INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER ARTICLE 8(2)(A) OF THE AGREEMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE CZECH AND SLOVAK FEDERAL REPUBLIC FOR THE PROMOTION AND PROTECTION OF INVESTMENTS AND THE UNCITRAL ARBITRATION RULES (1976)

A11Y LTD.

v.

CZECH REPUBLIC

(ICSID Case No. UNCT/15/1)

AWARD

Tribunal
The Hon. L. Yves Fortier, QC, Presiding Arbitrator
Prof. Stanimir A. Alexandrov, Arbitrator
Ms. Anna Joubin-Bret, Arbitrator

Secretary to the Tribunal
Ms. Jara Mínguez Almeida

Assistant to the Tribunal
Ms. Annie Lespérance

Place of Arbitration: Paris, France
Date of dispatch to the Parties: 29 June 2018

REPRESENTATION OF THE PARTIES

Representing the Claimant:

Mr. Hussein Haeri
Mr. David Walker
Ms. Uliana Cooke
Ms. Ruzin Dagli
Withers LLP
16 Old Bailey
London EC4M 7EG
United Kingdom

and

Mr. Lucas Bastin
Essex Court Chambers
24 Lincoln's Inn Fields
London WC2A 3EG
United Kingdom

Representing the Respondent:

Mgr. Marie Talašová LL.M.
Ms. Anna Bilanová
Mr. Martin Nováček
International Legal Services Department
The Ministry of Finance of the Czech Republic
Letenska 15
118 10 Prague 1
Czech Republic

and

Dr. Gerold Zeiler
Dr. Alfred Siwy
zeiler.partners Rechtsanwälte GmbH
Stubenbastei 2
1010 Vienna
Austria

TABLE OF CONTENTS

FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Act on Allowances	Act on Providing Allowances to Persons with Health Impairment of January 2012
Amended Memorial	Claimant's Amended Memorial, filed on 11 January 2016
C-	Claimant's Exhibit
CL-	Claimant's Legal Exhibit
Claimant	A11Y LTD.
Claimant's Post-Hearing Brief	Claimant's Post-Hearing Brief, dated 23 January 2018
Claimant's Rejoinder	Claimant's Rejoinder on the Jurisdictional Objection on Investment, dated 13 October 2017
Claimant's Reply	Claimant's Reply on the Merits and Jurisdictional Objection on Investment, dated 3 July 2017
Claimant's Reply Post-Hearing Brief	Claimant's Reply Post-Hearing Brief, dated 31 January 2018
Claimant's Skeleton	Claimant's Skeleton Argument, dated 3 November 2017
Claimant's Statement of Costs (Jurisdiction)	Claimant's Statement of Costs, dated 21 October 2016
Claimant's Statement of Costs	Claimant's Statement of Costs Merits, dated 31 January 2018
Counter-Memorial on Jurisdiction	Claimant's Counter-Memorial on Jurisdiction and Request for Endorsement of the Claimant's Right to Amend the Memorial, filed on 11 January 2016
Decision on Jurisdiction	Decision on Jurisdiction, issued on 9 February 2017
Hearing	Hearing held on 13–17 November 2017 in Paris, France

ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
MPSV	Ministry of Labour and Social Affairs of the Czech Republic
Notice of Arbitration	Claimant's Notice of Arbitration, filed on 14 October 2014
Parties	Claimant and Respondent
PO 1	Procedural Order No. 1, issued by the Tribunal on 23 March 2015
PO 2	Procedural Order No. 2 – Decision on Bifurcation, issued by the Tribunal on 5 October 2015
PO 3	Procedural Order No. 3 – Amendment to the Procedural Timetable, issued by the Tribunal on 11 December 2015
PO 4	Procedural Order No. 4 – Decision on Claimant's Request for Endorsement of its Right to Amend its Memorial, issued by the Tribunal on 1 February 2016
PO 5	Procedural Order No. 5 – Decision on Respondent's Document Production Requests, issued by the Tribunal on 18 February 2016
PO 6	Procedural Order No. 6 – Organization of the Hearing on Jurisdiction, issued by the Tribunal on 8 September 2016
PO 7	Procedural Order No. 7 – Procedural Calendar for the Remainder of the Proceedings, issued by the Tribunal on 21 February 2017
PO 8	Procedural Order No. 8 – Decision on the Parties' Document Production Requests, issued by the Tribunal on 11 April 2017

R-	Respondent's Exhibit
RL-	Respondent's Legal Exhibit
Respondent's Reply	Respondent's Reply on Jurisdiction, filed on 25 April 2015
Respondent	Czech Republic
Respondent's Post-Hearing Brief	Respondent's Post-Hearing Brief, filed on 23 January 2018
Respondent's Rejoinder	Respondent's Rejoinder on Merits and Jurisdiction, filed on 15 September 2017
Respondent's Reply to Post-Hearing Brief	Respondent's Reply to Claimant's Post-Hearing Brief, filed 31 January 2018
Respondent's Skeleton	Respondent's Skeleton Argument, filed on 20 September 2016
Respondent's Statement of Costs (Jurisdiction)	Respondent's Statement of Costs, filed 21 October 2016
Respondent's Statement of Costs	Respondent's Statement of Costs, filed 31 January 2018
Statement of Defence	Respondent's Counter-Memorial (Statement of Defence), filed on 31 August 2015
TI	Transparency International
Treaty or BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments with Protocol, 10 July 1990
Tribunal	Arbitral tribunal constituted on 19 December 2014
UNCITRAL Rules	The United Nations Commission on International Trade Law's Arbitration Rules as adopted by the General Assembly Resolution 31/98 on 15 December 1976

VCLT or Vienna Convention	Vienna Convention on the Law of Treaties as entered into force on 27 January 1980

I. INTRODUCTION

1. Having issued a Decision on Jurisdiction on 9 February 2017, the Tribunal now turns to the Parties' submissions in respect of the Respondent's remaining jurisdictional objection, liability and quantum.

2. The Tribunal recalls that these proceedings were launched pursuant to the 1976 UNCITRAL Rules and are administered by ICSID further to the Parties' agreement of 12 January 2015.

3. The present Award should be read together with the Tribunal's Decision on Jurisdiction.[1] Therefore, the Tribunal sees no need to traverse again the procedural history of these proceedings, which it reviewed at length in its Decision on Jurisdiction. Initially, the Tribunal will recall its findings on jurisdiction, and then set out the procedural history of the proceedings after the issuance of its Decision on Jurisdiction.

4. In order to set the stage for the present Award, the Tribunal will then review the background of the Claimant's investment in the Czech Republic and the Respondent's alleged measures which, the Claimant says, breached Article 5, the expropriation provision of the Treaty. The Parties' requests for relief are set out in Section II.

5. In its analysis, the Tribunal has considered not only the submissions of the Parties summarized in the present Award, but also the numerous detailed arguments presented by the Parties in their written and oral pleadings. To the extent that these arguments are not referred to expressly, they should be deemed to be subsumed into the Tribunal's analysis.

A. DECISION ON JURISDICTION

6. On 9 February 2017, the Tribunal issued its Decision on Jurisdiction.

7. The operative part of the Decision provides as follows:

> *187. For the foregoing reasons, the Tribunal decides:*

[1] Reproduced as Annex 1 to the present Award.

(1) To uphold the Respondent's jurisdictional objection based on the scope of application of Article 8(1) of the Treaty. Accordingly,

(a) the Tribunal has no jurisdiction over the Claimant's claims pursuant to Articles 2(2) and 3 of the Treaty;

(b) the Tribunal has jurisdiction over the Claimant's claims made under Articles 2(3) and 5 of the Treaty;

(2) To deny the Claimant's request for relief for a "declaration that the Czech Republic has breached Article 2(3) of the Treaty by failing to observe the provisions of the Treaty set out in sub-clauses (a) to (d) above" for the reasons set out in paragraph 91 above;

(3) To reject the Respondent's jurisdictional objection that the Claimant is not a foreign investor;

(4) To reject the Respondent's jurisdictional objection that the Claimant failed to adhere to the cooling-off period;

(5) To reject the Respondent's jurisdictional objection that the Treaty is superseded by EU law;

(6) To defer its decision on costs related to this phase of the arbitration until the Tribunal's Final Award.

188. After consultation with both Parties a procedural order will be issued regarding the further procedure.

B. HISTORY OF THE PROCEEDINGS FOLLOWING THE ISSUANCE OF THE DECISION ON JURISDICTION

8. On 9 February 2017, the Tribunal invited the Parties to seek to agree the remainder of the procedural calendar. By the Claimant's letters of 14 February 2017 and 20 February 2017 sent on behalf of the Parties, the Parties proposed a procedural calendar. On 21 February 2017, the Tribunal issued **Procedural Order No. 7** establishing the procedural calendar for the remainder of the proceedings.

9. In accordance with the procedural calendar set out in Procedural Order No. 7, the Claimant and the Respondent submitted document production requests for the Tribunal's decision on 3 April 2017. On 11 April 2017, the Tribunal issued **Procedural Order No. 8** setting out its decision on the Parties' document production requests.

10. On 25 May 2017, the Tribunal issued directions regarding the Claimant's request that "the Tribunal draw an adverse inference that the Respondent is withholding documents which are damaging to its position in these proceedings."[2] It did so after receiving the Respondent's letters of 15 May 2017 and 24 May 2017 and the Claimant's letter of 18 May 2017. The Tribunal decided that the Claimant's request was premature but that the Claimant could renew its request specifying which adverse inference it seeks against the Respondent in due course and with the benefit of the hearing on the merits.

11. On 3 July 2017, the Claimant filed its Reply on the Merits and Jurisdictional Objection on Investment. The Reply on the Merits and Jurisdictional Objection on Investment was accompanied by:

- Second Witness Statement of Jan Buchal dated 2 July 2017;
- Second Witness Statement of Hynek Hanke dated 2 July 2017;
- Expert Report of Morten Tollefsen dated 30 June 2017;
- Second Expert Report on the Assessment of Damage of CRS Economics dated 2 July 2017 with Exhibits CRS-0001 through CRS-0035;
- Factual Exhibits C-0076 through C-0140; and
- Legal Exhibits CL-0142 through CL-0161.

12. On 15 September 2017, the Respondent filed its Rejoinder on Merits and on Jurisdiction. The Rejoinder on Merits and on Jurisdiction was accompanied by:

- Exhibits R-0042 through R-0080, including:
- Second Expert Report of Abdul Sirshar Qureshi (PWC) dated 15 September 2017 (R-0042) with Exhibits SQ-0058 through SQ-0094;
- Joint Expert Report of Gerhard Weber and Zdeněk Míkovec dated 15 September 2017 (R-0043) with Annexes 1 through 17;

[2] Claimant's letter dated 18 May 2017, p. 2.

- Second Witness Statement of Milena Průžková dated 13 September 2017 (R-0051);
- Witness Statement of Kateřina Jirková dated 14 September 2017 (R-0052);
- Second Witness Statement of […] dated 15 September 2017 (R-0069);
- Witness Statement of […] dated 13 September 2017 (R-0073);
- Witness Statement of Jiří Rameš dated 13 September 2017 (R-0074);
- Witness Statement of […] dated 13 September 2017 (R-0075);
- Witness Statement of Ivona Sikorová dated 13 September 2017 (R-0076);
- Witness Statement of Romana Mičulková dated 13 September 2017 (R-0077);
- Witness Statement of […] dated 13 September 2017 (R-0078); and
- Legal Exhibits RL-0125 through RL-0152.

13. On 13 October 2017, the Claimant filed its Rejoinder on the Jurisdictional Objection on Investment accompanied by:

- Exhibits C-0141 through C-0149;
- Second Expert Report of Mr. Morten Tollefsen dated 13 October 2017; and
- Legal Exhibits CL-0162 through CL-0171.

14. By letter dated 24 October 2017, the Claimant requested Ms. Joubin-Bret to disclose information regarding her interactions with the Ministry of Finance of the Czech Republic in connection with Ms. Joubin-Bret's participation as a speaker at the Prague Conference on International Investment Treaties organized by said Ministry. The Respondent commented on this letter on the same day. Ms. Joubin-Bret responded to the Claimant's request on 25 October 2017. On 27 October 2017, the Claimant requested further information, which Ms. Joubin-Bret provided on 28 October 2017. On 30 October

2017, the Claimant requested that its requests for disclosure and Ms. Joubin-Bret's responses be noted for the record.

15. On 1 November 2017, on behalf of the Tribunal, the President held a pre-hearing organizational meeting with the Parties by telephone conference. On 2 November 2017, the Tribunal issued **Procedural Order No. 9** regarding the organization of the hearing.

16. On 3 November 2017, pursuant to paragraph 32 of Procedural Order No. 9, the Parties filed skeleton arguments.

17. On 7 November 2017, pursuant to paragraph 12 of Procedural Order No. 9, the Parties submitted an agreed daily schedule for the hearing.

18. On 8 November 2017, the Claimant requested leave from the Tribunal to file new documents. In accordance with paragraph 15.3 of Procedural Order No. 1, the Respondent filed observations on 9 November 2017 and agreed to the Claimant's request. In the same letter, the Respondent requested leave to submit a new document. That same day, in view of the Respondent's agreement, the Tribunal admitted the Claimant's documents into the record and invited the Claimant's comments on the Respondent's request for leave. The Claimant responded by return without objecting to the Respondent's request, and the Tribunal subsequently accepted the Respondent's new document into the record. The Tribunal invited both Parties to file the recently admitted evidence as soon as possible.

19. On 9 November 2017, the Claimant filed Exhibits CRS-0036 through CRS-0040. On 10 November 2017, the Respondent filed Exhibit R-0081.

20. A hearing on the merits and the remaining jurisdictional objection was held in Paris from 13 to 17 November 2017 (the "Hearing"). The following persons were present at the Hearing:

TRIBUNAL	
The Hon. L. Yves Fortier, QC	President
Prof. Stanimir A. Alexandrov	Co-Arbitrator

Ms. Anna Joubin-Bret	Co-Arbitrator

ICSID SECRETARIAT	
Ms. Jara Minguez Almeida	Secretary of the Tribunal

ASSISTANT TO TRIBUNAL	
Ms. Annie Lespérance	Assistant to the Tribunal

THE CLAIMANT	
Mr./Ms. First Name/ Last Name	**Affiliation**
Counsel	
Mr. Hussein Haeri	Withers LLP
Mr. Lucas Bastin	Essex Court Chambers
Mr. David Walker	Withers LLP
Ms. Ruzin Dagli	Withers LLP
Ms. Uliana Cooke	Withers LLP
Parties	
Mr. Jan Buchal	A11Y LTD.
[…]	A11Y LTD (carer)
Mr. Boris Dusek	A11Y LTD.
Mr. Hynek Hanke	A11Y LTD.
Ms. Dorothy McMahon	Augusta Ventures
Witnesses	
Mr. Jan Buchal	A11Y LTD.
Mr. Hynek Hanke	A11Y LTD.
[…]	N/A
[…]	N/A
[…]	(carer for […])
[…]	N/A
[…]	N/A
[…]	(carer for […])
[…]	N/A
[…]	(carer for […])
[…] **(via video conference)**	N/A
Experts	
Prof. Robert C. Lind	CRS Economics
Dr. Pavel Vacek	CRS Economics
Mr. Pavel Urban	CRS Economics
Mr. Morten Tollefsen	Media LT (technology expert)

Mr. Magnar Kvalvik	(Assistant to Mr. Morten Tollefsen)

THE RESPONDENT	
Mr./Ms. First Name/ Last Name	**Affiliation**
Counsel	
Mr. Alfred Siwy	zeiler.partners
Mr. Nicolas Zenz	zeiler.partners
Parties	
Ms. Anna Bilanová	Ministry of Finance of the Czech Republic
Mr. Martin Nováček	Ministry of Finance of the Czech Republic
Mr. Jaroslav Kudrna	Ministry of Finance of the Czech Republic
Witnesses	
[…]	General Directorate of the Labour Office of the Czech Republic
Ms. Milena Průžková	General Directorate of the Labour Office of the Czech Republic
[…] **(via video conference)**	General Directorate of the Labour Office of the Czech Republic
Ms. Kateřina Jirková **(via video conference)**	Ministry of Labour and Social Affairs of the Czech Republic
Mr. Jiří Rameš	Consultancy for Citizenship/Civil and Human Rights
Ms. Ivona Sikorová	Labour Office of the Czech Republic
Ms. Romana Mičulková	Labour Office of the Czech Republic
Experts	
Mr. Abdul Sirshar Qureshi	PWC
Ms. Kateřina Skryjová	PWC
Prof. Gerhard Weber	TU Dresden
Mr. Zdeněk Míkovec	Czech Technical University

21. During the Hearing, the Respondent filed Exhibits R-0082 and R-0082a.

22. On 28 November 2017, by letter dated 27 November 2017, Ms. Anna Joubin-Bret informed the Parties and the members of the Tribunal of her decision to step down from

the arbitral tribunal in this proceeding on account of her appointment as Director of the International Trade Law Division of the Office of Legal Affairs of the United Nations and *ex officio* Secretary of the United Nations Commission of International Trade Law. Over the following weeks, the Parties, Ms. Joubin-Bret and the members of the Tribunal exchanged correspondence regarding the possibility of Ms. Joubin-Bret staying on as arbitrator in the case until the issuance of the award. On 20 December 2017, Ms. Joubin-Bret informed the Parties that "*the Secretary General of the United Nations ha[d] authorized [her] to continue [her] employment as Arbitrator in the case in reference until the rendering of a final award.*"

23. On 21 December 2017, the Respondent reappointed Ms. Anna Joubin-Bret as arbitrator pursuant to Articles 13(1) and 7 of the UNCITRAL Arbitration Rules. Ms. Joubin-Bret accepted her appointment the same day.

24. On 27 December 2017, the Tribunal issued **Procedural Order No. 10** concerning the Post-Hearing Submissions.

25. On 2 January 2018, the Parties informed the Tribunal of their agreed deadlines for the filing of the post-hearing submissions, which the Tribunal endorsed the same day.

26. On 23 January 2018, both Parties filed their Post-Hearing Submissions. The Claimant filed Legal Exhibits CL-0172 through CL-0178, and the Respondent filed Legal Exhibits RL-0153 through RL-0158.

27. On 31 January 2018, both Parties filed their Reply Post-Hearing Submissions.

28. On the same day, the Parties filed their Statements of Costs. The Claimant filed Legal Exhibits CL-0179 through CL-0185, together with this submission.

C. DRAMATIS PERSONAE

29. The following witnesses and experts testified at the hearing on behalf of each Party in the following order:

THE CLAIMANT	
[…]	Mother of […], a 7-year old boy who was "practically blind" at the time of the statement who ordered A11Y aids for her son
Mr. Jan Buchal	Founder of BRAILCOM/A11Y and managing director
[…]	A self-employed masseur who uses A11Y aids
[…]	Was represented by BRAILCOM to obtain allowances from the Labour Office.
[…]	Ordered from A11Y visual aids to help study and enter the Police academy in Prague
[…]	Choir-master of singing choir Ave who uses A11Y aids
[…]	Director of the Primary School of Prof. V. Vejdovsky (a school for the visually impaired)
Mr. Hynek Hanke	Technician, analyst and trainer at A11Y
Mr. Morten Tollefsen	Technical Expert; Co-founder and Research Director at MediaLT
Prof. Robert C. Lind.	Quantum Expert, Partner at CRS Economics s.r.o.; Professor Emeritus of Economics, Management and Public Policy at the Johnson Graduate School of Management, Cornell University
Mr. Pavel Urban	Quantum Expert, Partner at CRS Economics s.r.o.
Dr. Pavel Vacek	Quantum Expert, Partner at CRS Economics s.r.o., Assistant Professor at the Charles University in Prague and a Czech court appointed expert

THE RESPONDENT	
[…]	Director for Social Affairs Department in the General Directorate of the Labour Office of the Czech Republic who issued the December Decision
Ms. Kateřina Jirková	Head of the Department of Non-Insurance Social and Family Allowance of the Ministry of Labour and Social Affairs who issued the July Statement
[…]	Spokesperson of the Labour Office who made a statement during the TV Report
Mr. Jiří Rameš	Former social worker at the Department of Non-Insurance Social Benefits for People with Disabilities of the Labour Office; Social worker at Consultancy for Citizenship/Civil and Human Rights, Public Society
Ms. Ivona Sikorová	Officer at the Department of Non-Insurance Social Benefits for People with Disabilities of the Labour Office and social worker
Ms. Romana Mičulková	Former Head of the Department of Non-Insurance Social Benefits for People with Disabilities of the Labour Office; Social worker
Ms. Milena Průžková	Head of Department of Non-Insurance Social Benefits for

	People with Disabilities of the Labour Office who informed […]
Prof. Gerhard Weber	Technical Expert; Professor at TU Dresden in Human-Computer Interaction; Expert for the European Union, for ISO and for DIN on digital accessibility
Prof. Zdeněk Míkovec	Technical Expert; Associate Professor at the Czech Technical University in Prague; Member of Human-Computer Interaction research group, the oldest and largest HCI group in Czech Republic
Mr. Abdul Sirshar Qureshi	Quantum Expert; Partner at PWC, Forensic Services

II. THE PARTIES' REQUESTS FOR RELIEF

A. THE CLAIMANT'S REQUEST FOR RELIEF

30. The Claimant seeks the following relief from the Tribunal:

> *(1) a declaration that the Tribunal has jurisdiction to hear and determine the Claimant's expropriation claim;*[3]
>
> *(2) a declaration that the Czech Republic has breached Article 5(1) of the BIT by imposing measures having effect equivalent to expropriation on (sic) the Claimant;*
>
> *(3) an order that the Czech Republic pay the Claimant compensation for the damage and lost profits it has suffered as a result of the breaches of UK-Czech Republic BIT, in the amount of CZK 564,719,000;*
>
> *(4) interest of 6-Month LIBOR plus 2%, compounded semi-annually on the compensation awarded to the Claimant;*
>
> *(5) an order that the Czech Republic pay the cost of these arbitration proceedings, including the costs of the Tribunal and the legal and other costs incurred by the Claimant on a full indemnity basis; and*
>
> *(6) such further or other relief as the Tribunal may deem appropriate.*[4]

[3] Claimant's Rejoinder, para. 34.
[4] Claimant's Reply, para. 237.

B. THE RESPONDENT'S REQUEST FOR RELIEF

31. The Respondent requests the Tribunal to:

> *(1) declare that it lacks jurisdiction to hear Claimant's claims and hence to dismiss its claims;*
>
> *(2)* in eventu *dismiss all Claimant's claims on the merits;*
>
> *(3) in either case to order Claimant to reimburse Respondent for all costs, fees and expenses incurred in relation to these proceedings.*[5]

III. FACTUAL BACKGROUND

A. A11Y'S TAKEOVER OF BRAILCOM'S BUSINESS

32. The Claimant, A11Y, is a private limited company incorporated in the United Kingdom of Great Britain and Northern Ireland on 2 August 2012.[6]

33. A11Y's Czech branch office was registered in the Czech Commercial Register on 17 October 2012.[7]

34. Following the registration of its Czech branch office, A11Y began to take over the assistive technology solutions activities of BRAILCOM, o.p.s. ("**BRAILCOM**").

35. BRAILCOM developed its know-how and goodwill for more than 20 years through various activities both in the Czech Republic and in connection with various international projects. Before 2010, BRAILCOM was known in the Czech Republic mainly for its projects "Internet for a Buck" (providing access to the Internet both for the blind and seeing people in 1997), "Speech Dispatcher" (speech infrastructure on Linux), "Biblio" (providing an electronic catalogue for the largest Czech library and printing facility for the blind), the project "Trafika" (the only country-wide news service for visually-impaired in the Czech Republic) and the international project "Eurochance" (a system of

[5] Respondent's Rejoinder, para. 437.
[6] *See* Certificate of Incorporation of A11Y, dated 2 August 2012, **Exhibit C-000l**.
[7] *See* Extract of the Czech Commercial Registry, dated 17 October 2012, **Exhibit C-0002**.

freely available electronic language textbooks for education of visually-impaired).[8] BRAILCOM has also been known for developing a range of special tools for visually disabled people.[9]

36. In 2012, BRAILCOM began offering to individual customers unique and complex aids/solutions in the field of assistive technologies for blind and visually impaired persons (most importantly, equipment based on computers enabling them to read, write, communicate, study and work).[10]

37. BRAILCOM was the first company in the Czech Republic to offer aids built on Apple's technologies. It became the first and exclusive supplier in the Czech Republic and Slovak Republic of the unique foldable and mobile magnifier VisioBook and high-quality Braille displays from BAUM Retec AG ("**Baum**").[11]

38. BRAILCOM was the first company in the Czech market that started to offer such complex services ("**Solutions**").[12]

39. BRAILCOM was also the sole company in the Czech Republic to offer its customers assistance while applying on their behalf for a state allowance.[13]

40. From late 2012, A11Y took over BRAILCOM's assistive technology solutions business, which included taking on new contracts with customers. A11Y hired former employees of BRAILCOM.

41. In connection with this take-over of BRAILCOM's assistive technology solutions business by A11Y, the Claimant writes as follows:[14]

> *(1) From late 2012, the Claimant started to carry out sales of assistive technology aids in the Czech Republic and began issuing pro-forma invoices and invoices to customers for assistive technology solutions. The Claimant's Czech branch financial accounts thus show income from sales*

[8] See First Witness Statement of Jan Buchal **(**"**First Buchal**"), paras. 35, 55 and 56.
[9] Claimant's Amended Memorial, para. 14.
[10] See First Buchal paras. 61, 62, 64, and First Witness Statement of Hynek Hanke **(**"**First Hanke**"**)**, para. l6.
[11] See First Buchal, para. 60.
[12] See First Hanke, para. 17.
[13] See First Buchal para. 83.
[14] Claimant's Post-Hearing Brief, paras. 3(1) -3(3) and para. 4 (footnotes omitted).

> *flowing to the Claimant from 2012. By March 2013, the Claimant entered into all new orders for assistive technology solutions and Brailcom no longer entered into new orders to produce assistive technology aids. After March 2013, Brailcom only fulfilled assistive technology aids orders made before that time. The Claimant's contracts with its customers in the Czech Republic are assets and investments.*
>
> *(2) The Claimant entered into important contracts with suppliers.*
>
> *(3) The Claimant assumed the contractual employment relationship with employees for the production of assistive technology solutions.*
>
> *(4) Brailcom continued its activities to support the blind after A11Y's takeover of Brailcom's assistive technology solutions business. In the context of assistive technology solutions supplied by A11Y, Brailcom would typically represent A11Y's customers in their interactions with the Labour Office under a power of attorney, as had been recommended by the Labour Office. In some cases, an applicant who applied for an allowance under the Act would only be granted an allowance of 90% of the price approved by the Labour Office. The applicant would have to pay the remaining 10% of the approved price themselves unless they and their family went through a social investigation to determine whether they could afford this. However, in such cases, Brailcom would typically offer to pay that 10% to the Claimant's customers as a charitable contribution.*

42. The Respondent submits that the "*exact circumstances of this alleged take-over remain nebulous and unclear*".[15]

43. The Respondent writes the following in respect of the Claimant's take-over of BRAILCOM:[16]

> *What Claimant essentially is alleging was not an arm's-length transaction in which Brailcom's business was taken over, but merely that Claimant as a matter of fact continued the business that Brailcom had been operating in the Czech Republic. Claimant therefore also paid no purchase price for the business of Brailcom. It just took over its business as a matter of fact. Given that both Brailcom and Claimant are companies owned and run by Mr. Buchal, he obviously saw no need for a clearly structured transaction. This, however, has severe jurisdictional implications.*

44. The jurisdictional implications of the take-over by A11Y of BRAILCOM's assistive technology solutions business are discussed and analysed by the Tribunal later in Section V.

[15] Respondent's Rejoinder, para. 11.
[16] Respondent's Rejoinder, para. 13.

B. A11Y'S BUSINESS

45. The Parties disagree on the nature of the Claimant's business.

46. The Claimant asserts that it is "*an assistive technology developer and solutions provider*".[17] The Claimant develops "*holistic solutions built around the specific needs of the individual user*"; draws "*on its deep expertise and know-how in technical development and accessibility to produce effective solutions that worked and were genuinely useful to the blind or visually impaired customer*"; and provides "*invaluable configuration, set-up, and training to make sure individuals could use their assistive technology properly as well as fine-tuning to make sure the aids were well adapted for the various needs of the user*".[18]

47. As Mr. Buchal stated in his Second Witness Statement "*Please notice the word 'solution' here, which was key for A11Y's services for the visually impaired. This is what distinguished A11Y from other companies in the same business.*"[19]

48. On this basis, the Claimant alleges that it conducts a different business compared to its direct competitors in the Czech market for providing aids to the blind and visually impaired.[20]

49. The Respondent, on the other hand, argues that the Claimant is "*a retailer for 'out-of-the-box' devices from third party manufacturers*".[21] In this connection, the Respondent writes as follows:[22]

> *43. Essentially, Claimant buys two categories of electronic products as a wholesaler and then resells them as aids for the blind. First, Claimant retails so-called "ICT with closed functionality", like for example Apple iPhones or MacBook computers. These are standard consumer products that have built in accessibility features, e.g. a screenreader functionality or a magnified presentation of captures images. Second, Claimant retails so-called Assistive Technology ("AT"), which are additional devices that*

[17] Claimant's Reply, para. 34.
[18] Claimant's Reply, para. 39.
[19] Second Witness Statement of Jan Buchal (**"Second Buchal"**), para. 3.
[20] Claimant's Reply, para. 316.
[21] Respondent's Rejoinder, para. 83.
[22] Respondent's Skeleton, paras. 43-44.

> *can be added to an ICT to enhance their accessible functionality. An example of an AT would be a Braille display.*
>
> *44. Claimant re-sells these products either as separate components or in certain "aid-packages. […]*

50. As will be seen later, the Parties have submitted technical expert reports and expert testimony in respect of the nature of the Claimant's business.

C. CZECH REGULATORY FRAMEWORK AND TRANSPARENCY INTERNATIONAL'S LETTER

51. In January 2012, the Act on Providing Allowances to Persons with Health Impairment[23] ("**Act on Allowances**" or the "**Act**") came into effect in the Czech Republic.

52. The Act on Allowances provides for the granting of subsidies to persons with health impairments, including the blind. These allowances are limited in absolute amounts (to CZK 800,000 per applicant for five years)[24] and in the amount for a single aid (to CZK 350,000 per aid).[25] The person with a health impairment is required to pay 10% of the aid for which an allowance is sought.[26]

53. Importantly, Section 9(10) of the Act specifies that an allowance will be granted for an aid:

- in its basic version;
- which satisfies the individual needs of the applicant; and
- which is the cheapest ("least economically demanding") option for doing so.

54. When the Act was introduced in 2012, the Labour Office, the body responsible for administering the Act, was confronted with a large number of applications. As the Labour Office had not been provided with any guidance from the Labour Ministry as to the

[23] Act on Allowances, Legal Exhibit CL-0002.
[24] The actual limit is CZK 800.000. A further CZK 50.000 is available only if the applicant also applies for an allowance for a stair lift for wheelchairs.
[25] Act on Allowances, section 10 (3) and (6), dated 13 October 2011, **Legal Exhibit CL-0002.**
[26] Act on Allowances, section 10 (3), dated 13 October 2011, **Legal Exhibit CL-0002**.

application of the Act, most requests for subsidies were granted without any in-depth scrutiny.[27]

55. On 21 May 2013, the Labour Office received a letter from Transparency International ("**TI**"). The letter reads in relevant part as follows:[28]

> *Madam Director-General,*
>
> *Transparency International – Česká republika ("TI") is a non-governmental organisation with a mission to chart corruption in the Czech Republic and to actively assist in stifling corruption through its activities. TI focuses on championing paradigms shifts in legislation, public administration and the private sector.*
>
> *In the past few months, the TI Legal Advice Centre has seen a re-influx of clients with severe visual disabilities resulting in the long-term impairment of their health, who are complaining about the conduct of BRAILCOM, o.p.s. in relation to special-aid allowances under Act No 329/2011 on the provision of benefits to disabled persons, as amended (the "Act").*
>
> *According to Section 9(1) of the Act, a person with a severe visual disability resulting in the long term impairment of their health is entitled to a special-aid allowance. Section 10(2) of the Act provides that the amount of a special-aid allowance is set in such a manner that the beneficiary contributes 10% of the estimated or already paid price of a special aid, up to a maximum of CZK 1,000. Those persons eligible for the special-aid allowance under the Act have been contacted, on a more intensive scale since 1 January 2012, i.e. since the Act took effect, by BRAILCOM, o.p.s., with an offer that, if those persons enter into an agreement on a power of attorney with it, this company will organise the procedure for applying for a special-aid allowance with the competent Labour Office (a regional branch) on the basis of a power of attorney, without the applicant having to take care of anything at all. Part of the arrangement between the applicant and BRAILCOM, o.p.s. is the provision of a gift by the company, as the gifting party, to the applicant, as the gifted party, at the value of the applicant's statutory contribution, i.e. at a value of 10% of the estimated or already paid price of a special aid. From the point of view of a person with a severe visual disability resulting in the long-term impairment of their health, this is an advantageous offer because they receive a special aid free of charge and there is no need for them to get in contact with the competent Labour Office themselves. On the other hand, this entirely eliminates any incentive on the part of the applicant to seek out rival offers for their selected aid, as supplied by other suppliers at much lower prices.*

[27] Respondent's Skeleton, para. 25.
[28] Letter from TI of 21 May 2013, **Exhibit R-0009**.

According to the information shared by clients, in the application for a special-aid allowance BRAILCOM, o.p.s. marks up the value of the special aid considerably. One of the clients who contacted TI witnessed a decision to grant a special-aid allowance, according to which the Labour Office (regional branch) granted an applicant an allowance worth more than CZK 30,000, even though the price of the corresponding special aid (a voice-activated Apple iPhone) had a market price of approximately CZK 17,000 at the time. Statements from other clients indicate that the value of special aids in benefit proceedings in which they are represented, on the basis of a power of attorney, by BRAILCOM, o.p.s., is marked up by between 50% and 100%. According to the information provided to TI by these persons, the main focus is on computer equipment – reading devices for the blind with a normal market value ranging from CZK 100,000 to CZK 150,000. BRAILCOM, o.p.s. purportedly supplies these aids for between CZK 200,000 and CZK 300,000.

According to Section 9(10) of the Act, an allowance is granted for a special aid delivered in a basic design which fully meets the requirements of the beneficiary, bearing in mind their disability, and meets the condition of best value for money. In the benefit proceedings in which BRAILCOM, o.p.s. has been active on the basis of a power of attorney, and the subject of which has been a substantially overpriced special aid in the basic design, if Labour Offices (regional branches) have issued decisions granting these allowances at the requested amount, they have failed and fallen short of their statutory obligation. Labour Offices (regional branches) as the authorities competent, by law, to take decisions on the granting of special-aid allowances, are required to grant such an allowance only in an amount which is consistent with the special aid's price customary at the place and time. The information disclosed by clients makes it quite plain that Labour Offices (regional branches) throughout the Czech Republic have failed to comply with this obligation, either out of negligence or by design. Apart from the fact that the state has made a loss, the victims are the individual applicants who have entered into an agreement on a power of attorney with BRAILCOM, o.p.s. and who have been represented by that company in benefit proceedings because, as a result of the repeated granting of allowances at a disproportionate amount, the amount of CZK 800,000, or CZK 850,000 according to Section 10(6) of the Act, could be exhausted early, i.e. the amount which may be granted to persons with severe visual disabilities on aggregate over a five-year period, in the form of an allowance to purchase special aids, could be used up well before such a period ends.

Clients with severe visual disabilities who have contacted TI in this matter are concerned by the practices pursued by BRAILCOM, o.p.s. and believe that the way it is acting could imperil the credibility of the entire system of public solidarity, entailing the payment of assistive aids which would otherwise be unaffordable for them and which are essential for their ability to be part of the workforce and for their general integration into the life of society. They are worried that the abuse of state allowances could result in the political relativisation of the need for such an established system of public solidarity and in moves to recover

amounts by which the special aids purchased for them have been overpriced. Accordingly, TI's clients wish to remain anonymous.

According to Act No 73/2011 on the Labour Office of the Czech Republic, as amended, the Labour Office of the Czech Republic is a national administrative authority whose duties, among other things, include benefits for the disabled. Section 25(2)(d) and (e) of Act No 320/2001 on financial control in public administration, as amended, provides that the head of a body of public administration must take all necessary action to protect public funds and to ensure the economic, effective and efficient use of public funds in accordance with the principles of sound management set out in the Financial Control Act.

In the light of the foregoing, TI requests that, starting with 1 January 2012, you review individual benefit proceedings held by the competent Labour Offices (regional branches) in accordance with Act No 329/2011 on the provision of benefits to disabled persons, as amended, in which applicants have been represented, on the basis of a power of attorney, by BRAILCOM, o.p.s., and the subject of which has been the granting of a special-aid allowance to a person with a severe visual disability to determine whether the granting and payment of the allowance has been at a disproportionate level for a markedly overpriced special aid and whether this constitutes widespread abuse of state allowances for persons with severe visual disabilities.

TI also requests information from you on how this case has been investigated and whether you have taken, in response to any errors identified, action to protect public funds.

Yours sincerely,

<signature>

Transparency International - Česká republika, o. p. s.

David Ondráčka

Director

D. JULY 2013 STATEMENT

56. Following TI's letter and an internal investigation, the Labour Office approached the Ministry of Labour and requested general guidance on the application of the Act to overcome the difficulties encountered with the implementation of the Act, to ensure a uniform application of the Act and to avoid an abuse of the Act.

57. As a result, on 12 July 2013, the Ministry issued a statement that further defined the criteria set out by the Act to ensure that the requirements of the Act could effectively be assessed in each application and to allow the Labour Offices to take a uniform approach towards all applications submitted under the Act ("**July Statement**").[29]

58. The July Statement, *inter alia*, made clear that when the aids applied for consist of several individual functionally independent components, the applicant is under the obligation to submit a list of the particular components and their respective prices. This was necessary, says the Respondent, because if such a list of components is not submitted, it is not possible for the Labour Office to assess whether the criteria of the Act are met.[30]

59. The July Statement also made clear that additional services, like training, or accessory products, like protective covers or laptop bags, could not be considered to be part of the basic version of an aid and were therefore not covered under the Act. The Respondent explains that the reason why the Ministry did not consider it necessary to pay private commercial companies for training was that there were various public benefit associations that provide training for blind persons for free or at very low cost throughout the Czech Republic.[31]

60. The Respondent submits that the July Statement's purpose was not, contrary to the Claimant's allegation, to "*stop the Claimant's business*" or "*to stop Claimant*" but to stop the Claimant's detrimental practice of submitting applications which did not allow an assessment in accordance with the Act on Allowances, submits the Respondent.[32]

61. The Claimant, on the other hand, submits that the July Statement "*targeted specifically at the Claimant's business*" and "*was the first step on the way to destroying the Claimant's business*".[33]

---

[29] Statement of the Ministry of Labour and Social Affairs ("**MPSV**"), dated 12 July 2013, **Exhibit C-0010**. The Claimant refers to the Statement in its pleadings as the "July Instruction".
[30] Respondent's Skeleton, para. 30.
[31] Respondent's Skeleton, para. 31; *see* Second Witness Statement of Milena Průžková, **Exhibit R-0051**, para. 11.
[32] Respondent's Skeleton, para. 29.
[33] Claimant's Reply, para. 94.

62. In this respect, the Claimant writes as follows:[34]

> *95. The key requirement in the July Instruction was the onus on the Labour Office regional branches to request suppliers of aids to provide a list of individual components and prices. The July Instruction also stated that in order to compare prices for the purposes of identification of the "least economically demanding" condition under section 9(10) aid the Labour Office was:*
>
> *"to compare the prices of the same or similar aids from different producers or suppliers, means for example in the case of hardware to have information about the name of the producer or trade name (such as Apple iPhone 4). In case of software it is necessary to know the producer and trade name (such as Microsoft Office 2010, Home & Business)".*
>
> *96. The July Instruction contains multiple references to the necessity for an aid to be functional and serve a particular user's needs and purpose in line with the objective of the Act on Allowances. However, it also contained a draconian edict:*
>
> *"…in case of not delivering the list of particular components, the application for the allowance for special aid will be rejected. If the list or the invoice includes training, protective covers, or other additions, which are not necessary, we do not include them in the price of the aid."*
>
> *97. This is arbitrary and contradictory in a number of respects. First, it goes against the functionality objective which the July Instruction recognised as valid. As explained above, an aid without proper configuration and training is of no use to a blind or visually impaired person. If a blind or visually impaired person receives a machine in a box, he or she is very unlikely to be able to do anything with it. As Mr. Tollefsen pointed out:*
>
> *"An assistive technology solution configured for the specific needs of a visually impaired person with training is completely distinct from a product ordered from a list and simply out of the box, which is likely to be largely inappropriate and unfit for purpose".*
>
> *Effective solutions require set-up, installation, ongoing configuration, adjustments and guidance from those who understand how the aid is designed in light of that particular person's needs.*
>
> *98. Second, it is striking that the July Instruction expressly referred to these two examples – "training and protective covers" - for exclusion from the price of an aid. Both were integral parts and distinguishing features of a solution developed by the Claimant, especially when compared with its competitors. Configuration, training, and support were a necessary feature of the Claimant's assistive technology solutions. As mentioned above, the Claimant's business was not to resell hardware*

[34] Claimant's Reply, paras. 95-100 (footnotes omitted).

> *components. It developed an integrated holistic solution often comprised of several aids that would function and work well together to serve particular needs of a visually impaired person.*
>
> *99. Furthermore, the exclusion of protective covers is notable. Protective covers serve the purpose of increasing the durability of an aid. An aid may not last very long without a protective cover - especially in the hands of a person without sight. This is significant particularly in the light of the very clear five-year financial limits as set out in the Act on Allowances (as above).*
>
> *100. It is also notable that the July Instruction contains an express reference to an Apple iPhone. Apple iPhones were an underlying product that Brailcom and later the Claimant incorporated into electronic communication aids. The iPhone was "a device that was supplied by A11Y but usually not by other competitors at the time."*

63. The Claimant also submits that the July Statement was issued "*without transparency and the Claimant was not informed about it at this time. It was not until later that the Claimant discovered that the July Instruction had even been issued.*"[35]

64. According to the Claimant, the following four measures of the Respondent destroyed its investment in the Czech Republic and lead to its insolvency.

IV. THE RESPONDENT'S ALLEGED MEASURES AGAINST THE CLAIMANT

A. THE RESPONDENT ALLEGEDLY PRESSURED THE CLAIMANT'S VISUALLY IMPAIRED CUSTOMERS TO LEAVE THE CLAIMANT AND TURN TO THE CLAIMANT'S COMPETITORS

(1) The Claimant's Position

65. According to the Claimant, following the issuance of the July Statement, the Respondent's representatives repeatedly told many customers of the Claimant that they should seek their assistive technology aids from the Claimant's competitors (which the Respondent sometimes named, including Spektra and Galop).[36]

66. The record is replete with evidence of this wrongdoing says the Claimant, including the following:

[35] Claimant's Reply, para. 92. See First Buchal, para. 125 (at Item No. 6).
[36] Claimant's Skeleton, para. 8.

(i) […] recounted in her witness statement the specifics of a "*very unpleasant social investigation*"[37] at her home in early 2014. […]explained that: "*The participants were the officers […] and […]. They tried to discourage me from aid purchase from A11Y company and they told me repeatedly that 'the office knows A11Y LTD. company very well and is not satisfied with it' and 'the aids from A11Y LTD. company are overpriced' and even 'there was a reportage on TV about frauds of the company.*"[38] […] further recalls that: "*The officers recommended me during the social investigation to turn to Tyfloservis or Galop companies. The officers threatened me in that context that they will not pay out many components of the aid delivered by A11Y LTD.*"[39] […] confirmed the contents of her statement as a witness at the hearing.[40]

[…]'s testimony stands essentially unrebutted submits the Claimant. The Respondent did not submit a witness statement from […] and the Respondent informed the Tribunal and the Claimant at the hearing that […] would no longer be available to testify. In her witness statement, […] cannot recall the meeting well, saying that "*my memories are a little bit foggy*"[41] and she "*cannot remember that this visit was somehow unpleasant*."[42]

(ii) […] explained in his witness statement that "*[i]n September 2013, when I visited the office to bring the necessary information about my income, Mr. [sic.] Sikorová tried to convince me that aids from A11Y LTD. company are overpriced and that other suppliers offer cheap aids in exactly the same version. Mrs Sikorová also tried to convince me to cancel my order for aids at A11Y LTD. And she tried to convince me to turn to another company.*"[43] […] confirmed this at the hearing.[44]

[37] Witness Statement of […], para. 8.
[38] Witness Statement of […], para. 8.
[39] Witness Statement of […], para. 9.
[40] Transcript of Final Hearing, Testimony of […], Day 2, p. 336 (lines 7-19).
[41] Witness Statement of […], **Exhibit R-0075**, para. 10.
[42] Witness Statement of […], **Exhibit R-0075**, para. 11.
[43] Witness Statement of […], paras. 8-9.
[44] Transcript of Final Hearing, Day 2, Testimony of […], Day 2, p. 349 (lines 16-18).

Ms. Sikorová in her own witness statement wrote that she "*cannot recall having spoken about A11Y Ltd.*" when she visited […].[45] At the Hearing, as a witness she denied ever mentioning the Claimant in her meeting with […].[46] The Claimant asserts that Ms. Sikorová's depiction "*strains credulity*" in view of the fact that the meeting in question was to discuss an assistive technology aid for […] which was to be supplied by the Claimant and which had just been approved by the Labour Office.[47]

(iii) Even in those cases where the Respondent's representatives did not directly name the Claimant's competitors, the Claimant submits that the Labour Office representatives pressured the Claimant's customers to go to another company.[48] For instance, at the Hearing Mr. Haeri asked […] *"[...]when Mr. Rames told you that he was not going to tell you which company you should go to, how did you understand that? What did you understand him to be saying?*"[49] […] answered that: "*I understood from him that I could go to any other company but A11Y, because in that instance they will not reimburse.*"[50] […], in response to a question from the President of the Tribunal about this conversation with Mr. Rameš, replied that she was told that "*the aid was three times overpriced and that Mr. Rames himself is not going to give me advice on what sort of company I should choose. Therefore, I was convinced that I shouldn't be selecting A11Y.*"[51]

(iv) […] (who did not testify as he had passed away prior to the Hearing) recalled in his witness statement that he was informed by a Labour Office representative during a meeting that the Labour Office has a "*bad experience*" with the Claimant.[52]

---

[45] Witness Statement of Ivona Sikorová, **Exhibit R-0076**, para. 9.
[46] Transcript of Final Hearing, Testimony of Ivona Sikorová, Day 3, p. 612 (line 14) - p. 613 (line 9).
[47] Claimant's Post-Hearing Brief, para. 43.
[48] Claimant's Post-Hearing Brief, para. 44.
[49] Transcript of Final Hearing, Testimony of […], Day 2, p. 368 (lines 9-12).
[50] Transcript of Final Hearing, Testimony of […], Day 2, p. 368 (lines 13-15).
[51] Transcript of Final Hearing, Testimony of […], Day 2, p. 377 (line 4) - p. 377 (line 8). The President of the Tribunal asked: "That was your deduction?'; to which […]replied: "Yes, that was my deduction, my conclusion." (Transcript of Final Hearing, Testimony of […], Day 2, p. 377 (line 9) - p. 377 (line 11)).
[52] Witness Statement of […], para. 8.

[…] does not recall having any meeting with […] in 2014, but "cannot exclude that one of my colleagues [from the Labour Office] held this meeting with […]."[53]

(v) […], a client of the Claimant, wrote to the Claimant on 22 November 2013 saying that two Labour Office representatives, Ms. Kořínková and Ms. Nožičková, had carried out a social investigation at her home concerning her application for an assistive technology solution aid with the Claimant. They had asked her whether "*I would be willing to go to another 'company' and try other aids (cheaper).*"[54]

(2) The Respondent's Position

67. The Respondent filed witness statements from all officers of the Labour Office who allegedly "*attack[ed] the Claimant's business*" says the Respondent. These officers all affirm that applicants were never asked to turn to a competitor of the Claimant and denied that applicants were told that the Claimant's aids were overpriced or that their allowance would not be granted if they ordered aids from the Claimant.[55]

68. At most, what the representatives of the Labour Office did, says the Respondent, is to inform the applicants that if an application included unnecessary components or was made for an aid that had a premium price compared to other aids with the same function, the application would be granted, but not in the full amount. This was the wording of the Act and thus something the applicants should have been aware of in any event.[56] The Respondent argues that there was never a "*systematic approach*" of the Labour Office to pressure visually impaired persons to purchase products from the Claimant's competitors.[57]

B. THE RESPONDENT ALLEGEDLY DENOUNCED THE CLAIMANT ON NATIONAL TELEVISION

[53] Witness Statement of […], **Exhibit R-0078**, para. 9.
[54] Message from […] (client) to A11Y LTD., dated 22 November 2013, **Exhibit C-0105**.
[55] Witness Statement of Jiří Rameš, **Exhibit R-0074,** para. 11; Witness Statement of […], **Exhibit R-0075**, para. 12; Witness Statement of Ivona Sikorová, Exhibit R-0076, para. 9; Witness Statement of Romana Mičulková, **Exhibit R-0077**, para. 9; Witness Statement of […], **Exhibit R-0078**.
[56] Respondent's Skeleton, para. 72. Witness Statement of […] **Exhibit R-0075**, para. 13; Witness Statement of […], **Exhibit R-0078**, para. 11.
[57] Respondent's Skeleton, para. 75.

(1) The Claimant's Position

69. According to the Claimant, the Respondent publicly denounced the Claimant on prime-time national television on 12 January 2014, further destroying its investment.

70. The television program of 12 January 2014 in the "Udalosti" news broadcast (the "**TV Report**") was aired at 7 p.m. in the evening (prime time viewing) on public broadcast television to over 1 million viewers.[58] It remains available for anyone to view on the Internet says the Claimant, thereby reaching a far larger audience.[59]

71. The English translation of the program's transcript reads as follows:[60]

> *Newsperson: The company BRAILCOM fell into suspicion of abusing the state allowance for the blind. A group of visually handicapped people have complained about it to Transparency International. The company, according to them, offers free processing of subsidies for compensation aids, such as special phones or computers. Then, however, it sells them for significantly higher price than is common and the state loses out.*
>
> *Commentary: The aids talk to them and the braille display shows what others usually see on the screen. Adjusted computer or phone is a necessity for the blind. This is also respected by the state and therefore it is contributing to the purchase of such aids by 90% of their price. But the blind must pay the 10% themselves. This should encourage them to look for an advantageous offer. But the BRAILCOM company offers to arrange everything for them and to reimburse the 10% participation. Its aids, however, are significantly more expensive.*
>
> *Blind woman (anonymized face and voice): Computer sets which we can get from other companies for some 100 to 150 thousand, the price from BRAILCOM is often up to twice as high.*
>
> *Citing Jan Buchal, director, BRAILCOM: ... we are supplying aids that are different, with different utility value which is several times higher that (sic) the aids on the market.*
>
> *Commantary (sic): Critics of BRAILCOM want to remain anonymous amid fears. But they are trying to draw attention to the problem.*

[58] Claimant's Amended Memorial, para. 133 and fn. 163; Television Audience Viewing Figures for CT1 and CT24, dated January 2014, **Exhibit C-0110**, p. 2 (row 31) and p. 3 (row 24) (938,000 viewers aged over 15 on CT1 on 12 January 2014, and 214,000 viewers aged over 15 on CT24).
[59] Claimant's Post-Hearing Brief, para. 26; *see* Události, 12 January 2014, available at: http://www.ceskatelevize.cz/ivysilani/1097181328-udalosti/214411000100112/obsah/301888-predrazene-pomucky (last accessed on 20 June 2016).
[60] Transcript of News Report on Czech Television, **Exhibit C-0032**.

Jiří Kračmar, expert assistant of law advisory centre of Transparency International: Those people with severe visual impairment who contacted us concerning BRAILCOM were several.

Newsperson: The non-standard procedures of BRAILCOM company are already being addresses by the management of Labour Offices. It's because they are those who pay for the aids for the blind. Even their own investigation pointed to significant overpricing. But also to cases where the company reportedly charged for completely ordinary equipment.

[…], the spokesperson, General directorate of Labour Office: For example, the iPads, which have, say, voice dialling already included in their price, then even for such services [BRAILCOM] billed special surcharges.

Citing Jan Buchal, director, BRAILCOM: The Ministry of Labour unfortunately doesn't have the necessary expertise in the area of our business.

Newsperson: According to the collected data, officials already reimbursed tens of unusually expensive aids.

[…], the spokesperson, General directorate of Labour Office: At the moment, we do not know the exact amount the state lost as a result of this overpricing.

Newsperson: The BRAILCOM company is not threaten with any penalty, because apparently it did not violate the law. Neither the bureaucrats themselves made a mistake according to their bosses. They even pointed on some suspicious prices and their suspicion was confirmed by further investigation. For the future, according to the management of the Labour Offices, similar problems should be prevented by stricter rules for reimbursement of special aids.

72. According to the Claimant, the following allegations made by […], the State spokesperson, and cited during the TV program were unsubstantiated:[61]

(1) That the Claimant was guilty of "overpricing";

(2) That the Claimant was illicitly charging for things for which it should not have been charging (such as billing "special surcharges" for "voice dialling" for iPads, even though this is false and iPads don't even have voice dialling') thus acting in a dishonest or underhanded way;

(3) That the State lost money as a result of the Claimant's wrongful practices, the only issue being the quantification of those losses of the State;

[61] Claimant's Post-Hearing Brief, para. 27.

> *(4) That the Claimant was culpable of "suspicious prices," which were "confirmed by further investigation"; and*
>
> *(5) "For the future, according to the management of the Labour Offices, similar problems [with reference to the Claimant's alleged "problems' should be prevented by stricter rules for reimbursement of special aids," thus starkly warning viewers away from the Claimant.*

73. The television broadcast, submits the Claimant, was made, *inter alia*, because of TI's letter of 21 May 2013 to the Labour Office and an undated "Compilation of Applications."[62] In the opinion of the Respondent, the Compilation of Applications showed "*that the allegations raised by Transparency International were correct*"[63] in that "*[v]irtually all solutions offered by Claimant were far more expensive than those offered by Claimant's competitors serving the same purposes*".[64]

74. The Claimant emphasizes that the Respondent admitted that "*Transparency International did not provide any evidence with its letter*"[65] and submits that "*the Respondent did not communicate with the Claimant in any way to let the Claimant know about the […] TI [letter] or to provide the Claimant with an opportunity to respond to the allegations. That is not only non-transparent, but it is also an evident violation of basic fairness and due process.*"[66]

75. At the Hearing, Ms. Průžková, who was identified by […] as the person who instructed her in preparation for the TV Report,[67] admitted when she testified that: "*The letter of Transparency International, in my opinion, doesn't prove anything.*"[68]

76. When asked by the President of the Tribunal if the Labour Office should have contacted the Claimant's representatives in order to get their version of the Transparency International allegations before publicly endorsing them in the TV Report, […] answered that: "*It is not my task to act on behalf of other parties. My task is to act and present the*

[62] Compilation of Applications, **Exhibit R-0010**.
[63] Respondent's Rejoinder, para. 182.
[64] Respondent's Statement of Defence, para. 186.
[65] Claimant's Skeleton, para. 14. Respondent's Rejoinder, para. 182.
[66] Claimant's Skeleton, para. 12.
[67] Transcript of Final Hearing, Testimony of […], Day 3, p. 558 (lines 5-22); Witness Statement of […], **Exhibit R-0073**, para. 9.
[68] Transcript of Final Hearing, Testimony of Milena Průžková, Day 4, p. 695 (lines 4-6).

standpoints or the opinion of the Czech Labour Office, and that's what I did in a few sentences that I said."[69] The Claimant writes that this is unacceptable.[70]

77. The Claimant also submits that the "Compilation of Applications" does not corroborate the TI letter. Mr. Tollefsen, in his expert report, opines as follows:[71]

> *I understand that the Respondent alleges that this [Compilation of Applications] shows that almost all of A11Y's (or Brailcom's) solutions were 'far more expensive' than competitor's solutions. I do not see how this document could show that since it has no reference to equivalent solutions or their prices.*

78. On this point, the Claimant notes that during the television broadcast, it was reported that the Labour Office's own investigation "pointed to significant overpricing".[72]

79. According to the Claimant, this television broadcast was seen by over one million people. It had a devastating effect on the Claimant's business and its reputation in the closed-knit blind and visually impaired community. As […], one of the Claimant's witnesses and a Director of a school for the visually impaired, wrote in his witness statement:[73]

> *[A]fter this report was broadcasted [sic.], I witnessed that the reputation of public benefit organization BRAILCOM and the company A11Y LTD significantly suffered not only within the community of the blind but also within the professional public. For example, Mrs. doctor Pavlína Baslerová from the Association of Consulting Workers personally asked me what that should mean and whether this company is trustworthy or not.*
>
> *From what the reporter proclaimed at the end of the report, I understood that the state plans to prevent reimbursement of such aids supplied by the company A11Y in the future.*

(2) The Respondent's Position

80. The Respondent submits that the Claimant conflates in its submissions the contents of the TV Report and the statements actually made by different persons which could be attributed to the Respondent.

---

[69] Transcript of Final Hearing, Testimony of […], Day 3, p. 588 (lines 18-22).
[70] Claimant's Post-Hearing Brief, para. 29.
[71] First Expert Report of Morten Tollefsen, para. 89.
[72] Claimant's Skeleton, para. 19. *See* Transcript of News Report on Czech Television, **Exhibit C-0032**, p. 2.
[73] Witness Statement of […], paras. 16 and 15.

81. The Respondent explains that the Labour Office was asked to participate on a TV program which commented on TI's letter regarding the Claimant's business practices. The spokesperson of the Labour Office of the Czech Republic, […], only made "*a very brief statement*" during the program.[74]

82. According to the Respondent, […] (i) explained that the Claimant in some cases had included certain features in the price list attached to the applications which were unnecessary, and (ii) confirmed that she was not aware of the amount that had been paid in contravention of the Act.[75]

83. The Respondent thus denies that the Labour Office publicly "denounced" the Claimant. The Respondent writes:[76]

> *All […] did was to state what the Labour Office had been able to determine at that time. She neither spoke of any systematic wrongdoing nor did she publicly "denounce" Claimant.*

84. The Respondent submits that, if any damage was caused to the Claimant due to the TV Report, the damage was caused by the contents of the letter of TI and dissatisfied customers of the Claimant that cannot be attributed to the Respondent.[77]

85. The Respondent also submits that Mr. Buchal confirmed that, in the course of the preparation by the Labour Office of the TV report, he was contacted by the TV reporter and asked to participate in the program and to give his perspective on camera. Mr. Buchal refused and chose only to provide a written statement.[78] In other words, the reporter made an effort to present not only the viewpoint of the Labour Office but also the viewpoint of A11Y. The conduct of the TV station in any case is not attributable to the Respondent, argues the Respondent.[79]

C. THE RESPONDENT ALLEGEDLY TURNED OVER THE CLAIMANT'S CONFIDENTIAL AND PRICING INFORMATION TO ITS COMPETITORS

[74] Respondent's Skeleton, para. 77.
[75] Respondent's Skeleton, para. 77.
[76] Respondent's Skeleton, para. 79.
[77] Respondent's Post-Hearing Brief, para. 82.
[78] First Buchal, para. 117.
[79] Respondent's Post-Hearing Brief, para. 79.

(1) The Claimant's Position

86. The Claimant notes that, in its implementation of the July Statement, the Labour Office required the Claimant to provide some of its confidential information including the breakdown of components of its assistive technology solutions and their prices.[80]

87. The Claimant, initially, answered that the July Statement was inconsistent with previous assurances given by the Labour Office that broken-down components and prices were not required. Specifically, Mr. Buchal wrote to the Ministry of Labour in May 2013 to say that:[81]

> *The fact that presenting a detailed itemised calculation has no support in the law has been confirmed even by the General Directorate of the Labour Office, specifically by Mgr. Markéta Hrubišková, who assured us that in this sense an instruction has been issued to methodologists at Labour Offices to not require breakdown of components and their prices.*

88. Nevertheless, the Claimant says that it complied with the requests of the Labour Office and submitted detailed and highly confidential information relating to its solutions.[82] In doing so, the Claimant said very clearly that its confidential information must not be shared with its competitors. It stated in unequivocal terms in the documentation it provided to the Respondent:

- "*designated solely for the purposes of the administrative proceedings and may be disclosed to third parties only subject to the consent of A11Y LTD. – branch CZ*";[83] and

- "*Price calculation is intended only for the use of the administrative proceedings. It is not allowed to pass the price calculation or its parts to third parties*".[84]

[80] Claimant's Skeleton, para. 27.
[81] Letter from Jan Buchal to Kateřina Jirková, undated, **Exhibit C-0085**.
[82] Claimant's Skeleton, para. 28.
[83] Features and Functionality Specifications – Digital Magnifier 2013 […], dated 30 August 2013, **Exhibit C-0094**, p. 1.
[84] Preliminary Price Calculation and Specification for A11Y's special aid for […], dated 2014, **Exhibit C-0006**, p. 1; Preliminary Price Calculation and Specification for A11Y's special aid for […], dated 2013, **Exhibit C-0007**, p. 1.

89. Notwithstanding these clear instructions, the Labour Office shared the Claimant's confidential information and its prices with the Claimant's competitors[85] such as Tyflocentrum/ Ergones, Spektra and ACE Design.[86]

90. The Claimant submits that this was improper and highly prejudicial to the Claimant as it resulted in a skewed playing field and an unfair competitive environment.[87] By contrast, the Claimant says that it was never asked by the Labour Office to provide a competing offer or price with reference to any of its competitors.

91. According to the Claimant, the Respondent does not deny that the July Statement was in fact applied inconsistently. The Claimant says:

> *(i) At the hearing, the Respondent did not even attempt to refute the assertion of the Claimant that: "Never once did the Respondent ask the Claimant for an alternative application...Never once did the Respondent share the confidential and pricing information of Spektra and Galop and the other competitors with the Claimant. Not once."*[88]
>
> *(ii) [T]he Respondent has not been able to point out a single piece of evidence in the record showing that it asked the Claimant for a comparative price regarding an assistive technology aid offered by another provider.*[89]

[85] *See* Claimant's Reply, paras. 149-166; First Expert Report of Morten Tollefsen, paras. 92-102. *See also, e.g.* Email of Ms. Smidova to Ms. Vonesova of the TyfloCentrum, dated 12 September 2013, **Exhibit R-0013**; Emails between Labour Office (Jana Šinová) and Tylfocentrum Olomouc/Ergones, last dated 11 December 2013, **Exhibit C-0108**; Price Calculation for Electronic Communication Aid, Digital Magnifier and Camera Magnifier for […], dated 1 October 2013, **Exhibit C-0102**; Offer by ACE Design, dated 19 May 2014, **Exhibit C-0017**; Letters between Labour Office (Renata Matyášova) and Ergones (Pavel Kolčava), dated 8 October 2014, **Exhibit C-0134**.

[86] First Expert Report of Morten Tollefsen, paras. 95, and 92-102.

[87] *See:* Preliminary Price Calculation for […], dated 2014, **Exhibit C-0125**; Offer by ACE Design, dated 19 May 2014, **Exhibit C-0017**; Offer by Spektra, v.d.n., dated 19 May 2014, **Exhibit C-0018**; Request for alternative offers by the Labour Office, dated 19 May 2014, **Exhibit C-0019**; Application of 27 May 2013 and Invoice of 20 May 2013 re […], submitted on 29 May 2013, **Exhibit R-0007**; Functional description of Digital Magnifier for […], dated 2013, **Exhibit C-0086**; Letter of the Labour Office to Adaptech re […], dated 26 June 2013, **Exhibit R-0011**; Letter of the Labour Office to Spektra s.r.o., dated 26 June 2013, **Exhibit R-0012**. Emails between Labour Office (Jana Šinová) and Tylfocentrum Olomouc/Ergones, last dated 11 December 2013, **Exhibit C-0108**; Price Calculation for Electronic Communication Aid, Digital Magnifier and Camera Magnifier for […], dated 1 October 2013, **Exhibit C-0102**. *See also* Claimant's Reply, paras. 143-166.

[88] Claimant's Post-Hearing Brief, para. 20; Transcript of Final Mearing, Claimant's Opening Submissions, Day 1, p. 24 (lines 3-5 and lines 12-15).

[89] Claimant's Post-Hearing Brief, para. 21.

92. Accordingly, the Claimant concludes that there cannot therefore be any serious dispute that the July Statement was not applied consistently *vis-à-vis* the Claimant as compared with other assistive aid providers.

93. The Claimant also alleges that the Labour Office continued to share with the Claimant's competitors the Claimant's confidential and pricing information despite the Decision of the Deputy for Social Matters No. 14/2013 of 4 December 2013 ("**December Decision**") which prohibited the Respondent from doing so.[90]

94. The December Decision will be set out in full:[91]

> ***Article I***
> ***Initial provisions***
>
> *General Directorate of Labour Office of Czech Republic was notified by Ministry of Labour and Social Affairs, in relation to complaints of subjects supplying aids for handicapped persons, that offices of Labour Office of Czech Republic did not proceed in some administrative proceedings on admission of allowance for special aid in compliance with corresponding regulations. On basis of the mentioned, General Directorate of Labour Office of Czech Republic decided on adoption of measures of adjusting methods of administrative proceedings on admission of allowance for special aid.*
>
> ***Article II***
>
> *Policy to evaluation of the condition of being least economically demanding for the purposes of allowance for special aid*
>
> *1. Competent places of work of non-insurance social allowances as administrative bodies are obliged to handle documents that create files in such a way so that the rights and interests imposed by law of third-party persons are not violated and no detriment is caused.*
>
> *2. During the proceedings on allowance admission for special aid, when a regional branch of Labour Office of Czech Republic examines whether the aid, for which the allowance is requested, is in basic version that fully satisfies the person and satisfies the condition of being least economically demanding, it may not pass the details of parameters of the requested aid (price, particular components, project documentation), that the applicant provided, to any other subjects. Those subjects may be in competitive positions against the supplier of the requested aid and thus information*

[90] Claimant's Skeleton, para. 31. Decision of […], dated 4 December 2013, ("**December Decision**"), **Exhibit C-0040**, Article II (2).
[91] December Decision, **Exhibit C-0040** (Tribunal's emphasis).

passed by a regional branch of Labour Office of Czech Republic could intervene in their mutual positions as entrepreneurs on the business market.

3. To fulfil Section 9(10) of the Act 329/2011 Coll. on providing allowances to handicapped persons, as amended, regional branches of Labour Office of Czech Republic must compare prices of similar special aids from different manufacturers or suppliers. A regional branch of Labour Office of Czech Republic for that reason asks for price offerings of aids, similar from the point of view of their functionality, from other subjects. But it is not possible so that those subjects would qualify against particular competitive offer they would get detailed information about just from the regional branch of Labour Office of Czech Republic.

4. It is always needed to apply the policy stated in the previous points of this article in practice according to the following example providing that in practice it is always necessary to start from individual conditions of the particular case:

a) a regional branch of Labour Office of Czech Republic asks a supplier of aids for visually impaired persons for making an offer for special aid, for instance digital notetaker for the visually impaired with speech output, with the following properties:

- software: screen reader, software for optical character recognition (OCR), office suite, speech synthesis Zuzana,

- hardware: notebook (including operating system, with built-in speakers of good sound quality, weight below 2 kg), portable scanner.

b) the regional branch of Labour Office of Czech Republic consults the given parameters with the applicant (e.g. during social investigation) to find out what properties of the special aid are fundamental for him in relation to the possibility and ability to utilize that particular aid, that is for his personal activities in the sense of Section 9(5) b) and c) of the Act No. 329/2011 Coll., as amended.

5. Further it is inadmissible in practice so that an employee of a regional branch of Labour Office of Czech Republic (its contact office) would call in writing to the applicant for special aid so that he would contact a particular company of competition (specialized on the same kind of special aids) and add invoices of tenders from the selected company till the deadline given in the call (or determination of particular term of visit), that is under the threat of rejecting the allowance. An applicant is only obliged, in cases defined by the law (administrative proceedings in a matter of application for allowance for special aid — staircase platform, staircase chair, and ceiling lifting system), already at the time of application to add at least two offers of the barrier removal. In other cases, a regional branch of Labour Office of Czech Republic finds out the

prices of similar aids from various manufacturers for the purpose of determining the amount of allowance by its own exploration.

Article III
Final provision

This decision is obligatory for all employees of departments of non-insurance social allowances.

95. The Claimant submits that the breach of the December Decision was confirmed at the Hearing by representatives of the Labour Office. Both […][92] and Ms. Průžková[93] agreed that, on the application of the July Statement by the Labour Office, there were instances of cases which were contrary to the December Decision.[94]

(2) The Respondent's Position

96. The Respondent submits that the "*Claimant failed to evidence any disclosure of its know-how*"[95] because "*no special know-how is needed to combine different products into a standard aid for the blind and, hence, the disclosure of the specific components used by an aid supplier in general cannot reveal any special know-how*".[96]

[92] *See* Transcript of Final Hearing, Day 2, p. 467 (line 25) - p. 468 (line 18):

MR. HAERI: So you agree that this document [C-0134] includes pricing information and particular components of A11Y Ltd?
[…]: Yes, from what I see.
MR. HAERI: If you turn over the page, you'll see the e-mail from Ms. Renata Matyásová of the Czech Labour Office to Ergones on 8 October 2014 attaching this what she calls more precise specification of the special aid which is stated in the attachment. Do you see that?
[…]: Yes, I can see that.
MR. HAERI: This October 2014 date was after the December 2013 decision, wasn't it?
[…]: Yes.
MR. HAERI: So have you now seen a document that would evidence a breach of the December decision?
[…]: From what I see this is a document that is not in accordance with my [December 2013] decision...

[93] Transcript of Final Hearing, Day 3, Ms. Průžková, p. 663 (lines 16-19):
"MR. HAERI: So it shouldn't have happened and it breached your December 2013 decision. Is that right?
MS. PRŮŽKOVÁ: Yes. […]"

[94] Claimant's Post-Hearing Brief, para. 23.

[95] Respondent's Skeleton, para. 86.

[96] Respondent's Skeleton, para. 81.

97. In any event, the Respondent says that the July Statement was applied consistently: just as applications regarding products of the Claimant were compared with its competitors' offers, so were the applications of all other companies too.[97]

98. In this connection, the Respondent writes as follows:[98]

> *61. The Respondent has filed thirteen decisions taken after the issuance of the July Statement as **Exhibits R-0053 to R-0066** which in their reasoning show that alternative offers were obtained and that the allowance granted was always for the least economically demanding option which was determined based on the alternative offers obtained.*
>
> *62. In Exhibit R-0053, as an example, the applicant required an allowance for a camera magnifier and submitted two offers, one by Spektra and one by SmartOne. The Labour Office in its reasoning held that*
>
> > *Due to objectivity the labour office gathered other price offer for special aid – camera magnifying glass – made by company Galop Praha in order to compare prices and basic equipment. This company offers comparable camera magnifying glass for 24 900,- CZK which fulfils the same purpose as the ones above mentioned.*
> >
> > *Pursuant to the provision of Section 9 para. 10 of the quoted Act the labour office during assessment of amount of contribution was taking into consideration the price offer made by Galop Praha which offers cameras with same characters but it is less economically demanding and fulfils the same purpose.*
> >
> > *The amount of the contribution is set by the lowest economic cost, which is 24900,- CZK. That is basic equipped aid which you are able to use and meet your needs.*[99]
>
> *63. Also the other decisions make clear that the Labour Offices obtained alternative offers regardless of the company making the initial offer which was attached to the application. […]*

99. In view of the evidence, the Respondent concludes that the Claimant was not treated any differently than its competitors.

D. THE RESPONDENT ALLEGEDLY RIGGED THE INDEPENDENT ASSESSMENTS OF THE CLAIMANT'S ASSISTIVE TECHNOLOGY SOLUTIONS

[97] Respondent's Post-Hearing Brief, paras. 60.
[98] Respondent's Post-Hearing Brief, paras. 61-63.
[99] Decision in the case of […], dated 27 October 2014, **Exhibit R-0053**, p. 1.

(1) The Claimant's Position

100. The Claimant submits that the Labour Office gamed its "*independent evaluations*" of the Claimant's assistive technology solutions applications following the issuance of the July Statement. It gives the following as an example:[100]

> *[I]n the case of the Claimant's client […], the Labour Office insisted that the "independent evaluator" of the Claimant's assistive technology solution should be Tyflocentrum. This was despite the fact that Tyflocentrum was a competitor of the Claimant. Furthermore, Tyflocentrum had previously supplied […] with an aid that did not work and was not fit for purpose. Undeterred by these facts, which were pointed out to the Labour Office, the Labour Office insisted on Tyflocentrum as an appropriate evaluator of the Claimant's assistive technology solution for […].*

101. Accordingly, submits the Claimant, the Labour Office failed to "*consider the needs of the applicant or the effectiveness of the competing quotes*".[101]

(2) The Respondent's Position

102. The Respondent denies that it rigged the independent assessments of the Claimant's assistive technology solutions.

103. In the case of […], the Respondent writes as follows:[102]

> *312. In summary, […], represented by Brailcom, submitted an application for an electronic magnifying glass at a price of CZK 181.648,-. The application, as was Claimant's business practice at the time, did not contain a list of components but a lump sum for an unspecified product referred to as a "digital magnifier". The labour office contacted […] school to determine whether he needed such a product for his education and then requested two competitors of Claimant to submit offers for solutions which would meet […] needs. These companies submitted offers of CZK 88,800.- for a Windows-based solution and CZK 58,660.- for an Apple based solution.*
>
> *313. […]had in the meantime been asked to send a list of components. The Labour Office then submitted all three lists of components (without identifying which companies had submitted the offers and without indicating the prices offered) to Tyflocentrum for it to give its opinion on*

[100] Claimant's Skeleton, para. 30 (footnotes omitted).
[101] Claimant's Reply, heading of Section II.D.4(b).
[102] Respondent's Rejoinder, paras. 312-314 (Tribunal's emphasis).

> *whether they meet the needs of […], who was not only visually impaired but suffered also from a severe impairment of motor functions. The Labour Office also asked with regard to the iMac computer offered by Claimant at CZK 100,000.- why this computer was so expensive. This document did not identify that the price had been offered by Claimant. The Tyflocentrum, however, could not explain this pricing.*
>
> *314. The Labour Office then came to the conclusion that the offer by Adaptech was the economically least demanding offer and granted an allowance accordingly.*

104. In light of the foregoing, the Respondent submits that the Labour Office's approach was suitable.

V. JURISDICTION

105. In accordance with the Tribunal's Decision on Bifurcation of 5 October 2015,[103] the Respondent's jurisdictional objection as to whether the Claimant made an investment in the Czech Republic was joined to the merits. The Respondent's jurisdictional objection and the Claimant's comments thereon are summarized below.

A. WHETHER THE CLAIMANT MADE AN INVESTMENT IN THE CZECH REPUBLIC

106. The Claimant describes the investment it made in the Czech Republic as follows:[104]

> *18. First, the Claimant had a multitude of claims to money and/or performance under contract having a financial value in the Czech Republic:*
>
> *(1) The Claimant's contracts with its customers in the Czech Republic are assets and investments of the Claimant. More generally, the fact that the Claimant had such contracts with its customers is characteristic of the Claimant's broader assistive technology business operations and investment in the Czech Republic.*
>
> *(2) […] Further evidence of the Claimant having assets of this kind exists in the important distribution contracts it signed with BAUM Retec and iStyle.*
>
> *19. Second, as one would expect with an operating and ongoing business, the Claimant held property rights as well as movable property for the purpose of its business in the Czech Republic. As the evidence reflects, the Claimant's property included a lease of business premises, an automobile,*

[103] *See* PO 2.
[104] Claimant's Reply, paras. 18-22 (footnotes omitted).

and business assets that the Claimant acquired in the Czech Republic (such as printers, iPads, computers and telephones).

20. Third, the Claimant had developed extensive know-how and technical processes:

(1) The Claimant's staff comprise an impressive gathering of assistive technology experts who have in their work and experience developed extensive know-how and technical processes for the Claimant to assist the blind and the visually impaired with technology solutions to meet their needs. […]

(2) The Claimant had particular know-how in producing integrated and holistic assistive technology solutions that were designed and developed specially for individual customers in view of their particular disability and needs. This set the Claimant apart from standard suppliers and retailers of assistive technology products. […]

(3) In his expert report, Mr. Tollefsen, who has extensive practical experience in the field of assistive technologies, has said that the Claimant's documents "clearly show know-how." […]

21. Fourth, the Claimant had significant goodwill and a stellar reputation, which in turn promoted a strong "word of mouth" recommendations of the Claimant's business.105 This is attested to repeatedly by the Claimant's customers, who enthuse over the value of its support in clearly appreciative terms.

[…]

22. Finally, in addition to the Claimant's know-how and other contributions in the Czech Republic, the Claimant made considerable financial contributions in the Czech Republic through the payment of liabilities incurred in the course of its business, including for the supply of components for its solutions, employee salaries, and otherwise. For example, by 31 December 2012, the Claimant's Czech Branch had spent CZK 105,000 on the cost of goods in the Czech Republic. This had increased to CZK 7,950,000 by 31 December 2013.

107. The Parties agree that in order to determine whether or not an investment has been made, the Tribunal should assess the Claimant's business in the Czech Republic as a whole (as opposed to the individual elements of that business), and decide whether the combined effect of all features of that business render it an investment.[106]

[105] Jan Buchal explains in his Second Witness Statement, with reference to multiple examples, that "*A11Y's marketing was word of mouth from happy, satisfied customers*." Second Buchal, para. 11.
[106] Claimant's Rejoinder, para. 27. Respondent's Rejoinder, para. 15.

(1) The Parties' Positions

a. The Respondent's Position

108. The Respondent submits that the Treaty lists certain assets as a descriptive indication of what form an investment may take.

109. Article 1(a) of the Treaty provides as follows:[107]

> *(a) The term 'investment' means every kind of asset belonging to an investor of one Contracting Party in the territory of the other Contracting Party under the law in force of the latter Contracting Party in any sector of economic activity and in particular, though not exclusively, includes:*
>
> *(i) moveable and immoveable property and any other related property rights including mortgages, liens or pledges;*
>
> *(ii) shares in and stock and debentures of a company and any other form of participation in a company;*
>
> *(iii) claims to money or to any performance under contract having a financial value;*
>
> *(iv) intellectual property rights, goodwill, know-how and technical processes;*
>
> *(v) business concessions conferred by law or, where appropriate under the law of the Contracting Party concerned, under contract, including concessions to search for, cultivate, extract or exploit natural resources.*

110. The Respondent argues that, for an investment to exist, three criteria, (i) contribution, (ii) risk and (iii) duration must be met.[108] The word "investment", according to many decisions, has an inherent meaning and the objective definition of this term in a BIT comprises the elements of a contribution or allocation of resources, duration, and risk.[109]

---

[107] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments with Protocol, **Legal Exhibit CL-0001**.
[108] Respondent's Rejoinder, paras. 19 and ff.
[109] *Romak S.A. (Switzerland) v. Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009, paras. 180 and 207, **Legal Exhibit RL-0128**; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, paras. 165 *et seq*. and 173, **Legal Exhibit RL-0134**.

111. The finding of a contribution by the Claimant is the first step in the determination of whether an investment has been made, argues the Respondent.[110] Without a contribution, there is automatically no risk involved and no duration, as several tribunals have affirmed.[111]

112. The existence of a contribution made by the investor is a precondition for the qualification of an investment, and for this reason, it is also a precondition for the Tribunal's jurisdiction *ratione materiae* says the Respondent.[112]

113. For example, the tribunal in *KT Asia v. Kazakhstan* held that:[113]

> *The assets listed in Article (…) of the BIT are the result of the act of investing. They presuppose an investment in the sense of a commitment of resources. Without such a commitment of resources, the asset belonging to the claimant cannot constitute an investment […].*

114. The tribunal in that case concluded that the claimant had not made any contribution with respect to its alleged investment, and, as a consequence, the "*Claimant has not demonstrated the existence of an investment*".[114] On these grounds, the tribunal concluded that it did not have jurisdiction.

115. In this respect, the Respondent quotes Professor Zachary Douglas:[115]

> *Given that the stated objective of investment treaties is to stimulate flows of private capital into the economies of the contracting states, the*

---

[110] Respondent's Rejoinder, para. 24.

[111] *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, para. 219, **Legal Exhibit RL-0134**; *see also Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Award, 22 June 2017, para. 425, **Legal Exhibit RL-0135**.

[112] *See e.g.*, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, paras. 110-111, **Legal Exhibit RL-0131**; *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 220, **Legal Exhibit RL-0132**; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 5.43, **Legal Exhibit RL-0136**; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, 31 October 2012, para. 295, **Legal Exhibit RL-0133**; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, paras. 170-173, **Legal Exhibit RL-0134**; *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Excerpts of Award, 30 April 2014, para. 84, **Legal Exhibit RL-0137**.

[113] *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, **Legal Exhibit RL-0134,** para. 166.

[114] *Id.*, para. 206.

[115] Zachary Douglas, *The International Law of Investment Claims* (4th ed. Cambridge University Press 2012), **Legal Exhibit RL-0138**, para. 336.

> *claimant must have contributed to this objective in order to attain the rights created by the investment treaty.*
>
> *This contribution must be clearly ascertained by the tribunal if its existence is challenged by the host state; for otherwise the procedural privilege conferred by the investment treaty might be utilised by a claimant who has not fulfilled its side of the bargain.*

116. Accordingly, submits the Respondent, the existence of an investment depends on the making of a contribution for the acquisition of the investment at issue. Where there is no such contribution, tribunals have declined jurisdiction *ratione materiae* as it does not correspond with the objective of investment treaties.

117. In the present case, says the Respondent, the Claimant had no significant funds to make an investment. It spent GBP 28 to incorporate its letterbox company in the United Kingdom. Before taking over BRAILCOM, it had no business in the United Kingdom. In fact, it had no premises or employees in the United Kingdom until mid-2016. Mr. Jan Buchal, who owns and/or controls both BRAILCOM and the Claimant, shifted assets and business from one entity to the other, in pursuance of his own benefits. It is clear from the Claimant's own submission that it never committed any resources to acquire BRAILCOM's business. The Claimant, submits the Respondent, received BRAILCOM's business completely for free.[116]

118. Accordingly, concludes the Respondent, the Claimant made no contribution and therefore, cannot establish that it made an investment in the Czech Republic. As the Claimant did not make any personal contribution, it could not have assumed any personal risk with its alleged investment.[117] Therefore that the Tribunal lacks jurisdiction *ratione materiae* over the Claimant's investment.

[116] Respondent's Skeleton, para. 12.
[117] *See KT Asia Investment Group B.V. v. Republic of Kazakhstan,* ICSID Case No. ARB/09/8, Award, 17 October 2013, **Legal Exhibit RL-0134**, para. 219; *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Award, 22 June 2017, **Legal Exhibit RL-0135**, para. 425.

119. Should the Tribunal find that the Claimant did make a contribution, the Respondent submits that, in addition to the fact that an investment must involve a contribution, it must also involve a transfer of value from one country to another.[118]

120. In *Alapli Elektrik v. Turkey*, the tribunal held that:[119]

> *ECT Article 26(1) provides for resolution of disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former. […]*
>
> *In each instance, the investor is assumed to be an entity which has engaged in the activity of investing, in the form of having made a contribution. An alleged investor must have made some contribution to the host state permitting characterization of that contribution as an investment "of" the investor.*
>
> *Consequently, [...] (the Second Project Company) cannot be considered an investment "of" Claimant. Although not a very long word, the term "of" constitutes the operative language for determining investor status in both relevant treaties. Pursuant to the interpretative principles of the Vienna Convention on the Law of Treaties, which instruct that treaty terms are to be read in their ordinary meaning in context, reference to the investment "of" an investor must connote active contribution of some sort.*
>
> *Put differently, the treaty language implicates not just the abstract existence of some piece of property, whether stock or otherwise, but also the activity of investing. The Tribunal must find an action transferring some- thing of value (money, know-how, contacts, or expertise) from one treaty- country to another.*

121. In the present case, both Articles 5 and 8 of the Treaty refer to investments <u>of</u> the investor.[120]

122. The Respondent avers that the Claimant, however, never transferred anything of value from the United Kingdom to the Czech Republic. All assets of BRAILCOM that the Claimant alleges were transferred to it were and remained in the Czech Republic. Respondent argues that the Claimant specifically confirmed that, before 2016, it never had any business in the United Kingdom. BRAILCOM's business was merely transferred

[118] Respondent's Skeleton, para. 15.
[119] *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award, 12 July 2012, **Legal Exhibit RL-0139**, paras. 357-360.
[120] Respondent's Rejoinder, para. 60 (Respondent's emphasis).

from one Czech entity to the Czech branch of a UK entity. Nothing of value ever left the Czech Republic. Even less did anything of value enter the Czech Republic from the United Kingdom.[121]

123. As the Claimant never made an investment in the Czech Republic, the Tribunal therefore lacks jurisdiction *ratione materiae* over the Claimant's claim, concludes the Respondent.

b. The Claimant's Position

124. The Claimant submits that it has made a qualified investment under the Treaty.

125. The Claimant asserts that the Tribunal should only apply the broad definition of investment found in Article 1(a) of the Treaty which does not define or limit "every kind of assets".

126. In view of the specific definition of "investment" in Article 1(a) of the Treaty, the *Salini* test which pertained to the term "investment" in Article 25(1) of the ICSID Convention finds no application in the present case, argues the Claimant. This is an UNICTRAL Tribunal governed by the 1976 UNCITRAL Arbitration Rules.

127. In this respect, the Claimant relies on the following decisions:[122]

(i) In *White Industries v. India*, the tribunal held:[123]

> *The present case, however, is not subject to the ICSID Convention. Consequently, the so-called Salini Test, and Douglas's interpretation of it, are simply not applicable here. Moreover, it is widely accepted that the 'double-check' (namely, of proving that there is an 'investment' for the purposes of the relevant BIT and that there is an 'investment' in accordance with the ICSID Convention), imposes a higher standard than simply resolving whether there is an 'investment' for the purposes of a particular BIT.*

(ii) In *Guaracachi v Bolivia*, the tribunal held:[124]

[121] Respondent's Rejoinder, para. 61.
[122] Claimant's Rejoinder, paras. 8-11.
[123] *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award, 30 November 2011, **Legal Exhibit CL-0165**, para. 7.4.9.

> *The Tribunal also considers that it is not appropriate to import 'objective' definitions of investment created by doctrine and case law in order to interpret Article 25 of the ICSID Convention when in the context of a non-ICSID arbitration such as the present case. On the contrary, the definition of protected investment, at least in non-ICSID arbitrations, is to be obtained only from the (very broad) definition contained in the BIT concluded by Bolivia and the United Kingdom.*

(iii) In *Flemingo v. Poland*, the tribunal held:[125]

> *Article 9 of the Treaty, and not Article 25 of the ICSID Convention, is the jurisdictional basis of the present arbitration. Consequently, jurisdictional restrictions deriving from the notion of 'investment' in Article 25 of the ICSID Convention, as emphasised by various ICSID tribunals such as the Salini panel, do not apply to the present arbitration. Moreover, the present Tribunal is convened under the UNCITRAL Arbitration Rules, which merely refer to any 'dispute' without any further qualification.*

(iv) In *Anglia Auto v. Czech Republic*, the tribunal held:[126]

> *As a preliminary matter, the Tribunal does not deem it necessary to inquire into the question whether the requirements of a contribution, certain duration and an element of risk are met in this instance, given that this arbitration was brought under the SCC Arbitration Rules, not the ICSID Arbitration Rules under which the so-called Salini test has been developed in arbitral case law in relation to Article 25 of the 1965 ICSID Convention.*

128. In addition, the Claimant submits that its investment, as described at paragraph 106 above, clearly falls within the Treaty's definition of an investment since the Claimant has (i) moveable property and property rights related to immoveable property in the Czech Republic, (ii) claims to money and/or performance contracts having financial value, and (iii) know-how, technical processes and goodwill.[127]

---

[124] *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No.2011-17, Award, 31 January 2014, **Legal Exhibit CL- 0167**, para. 364 (internal citations omitted).
[125] *Flemingo Duty Free Shop Private Limited v. Republic of Poland*, UNCITRAL, Award, 12 August 2016, **Legal Exhibit CL-0169**, para. 298.
[126] *Anglia Auto Accessories Ltd. v. Czech Republic*, SCC Case No. V2014/181, Final Award, 10 March 2017, **Legal Exhibit CL-0171**, para. 150.
[127] Claimant's Skeleton, para. 54.

129. Even the Respondent's technical experts acknowledged at the Hearing that the Claimant possessed know-how.[128]

130. Finally, in respect of the Respondent's argument that the Claimant's investment is not "international", the Claimant submits essentially that case law is clear that the origin of an investor's capital, whether international or not, is irrelevant as to whether an investment exists.[129]

131. For these reasons, the Claimant submits that the Tribunal has *ratione materiae* jurisdiction over the Claimant's investment.

(2) The Tribunal's Analysis

132. The Tribunal recalls that in its Decision on Jurisdiction, it upheld the Respondent's objection regarding the scope of the dispute resolution clause and found that the Claimant was a foreign investor under the Treaty.

133. The Tribunal then wrote at paragraph 132 of that Decision:

> *Whether the Claimant, at the time of its incorporation, had made an investment in the Czech Republic is a separate argument. The Tribunal recalls that, in its Procedural Order No. 2, it decided to join this*

[128] Transcript of Final Hearing, Testimony of Gerhard Weber and Zdeněk Míkovec, Day 4, p. 827 (lines 11-18). When asked again to confirm his answer, Gerhard Weber replied, "There is know-how, of course, […]." *See* Transcript of Final Hearing, Testimony of Gerhard Weber and Zdeněk Míkovec, Day 4, p. 828 (line 13). *See also* Transcript of Final Hearing, Testimony of Gerhard Weber and Zdeněk Míkovec, Day 4, p. 836 (line 12) - p. 838 (line 15).

[129] Claimant's Rejoinder, para. 20(3), *citing Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999, **Legal Exhibit CL-0163**, para. 109; *Yukos Universal Limited (Isle of Man) v. Russian Federation*, UNCITRAL Arbitration Rules, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, **Legal Exhibit CL-0036**, para. 432; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, **Legal Exhibit CL-0080**, para. 77; *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, **Legal Exhibit CL- 0168**, para. 288; *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, **Legal Exhibit CL-0166**, para. 383; *Venezuela Holdings B.V. and others (formerly Mobil Corporation and others) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, **Legal Exhibit RL-0101**, para. 198; *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 21 January 2010, **Legal Exhibit CL-0152**, para. 56; *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007, **Legal Exhibit CL-0164**, para. 210; *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, **Legal Exhibit RL-0127**, para. 106; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, **Legal Exhibit CL-0019**, para. 418.

> *jurisdictional objection to the merits as it is clearly intertwined with the merits. The Tribunal will thus decide this objection in the merits phase of this case.*

134. The Tribunal must now determine whether the Claimant made an investment in the Czech Republic which is protected by the Treaty.

135. The Tribunal deems it useful to cite again Article 1(a) of the Treaty which defines "investment" in this case:[130]

> *[T]he term 'investment' means every kind of asset belonging to an investor of one Contracting Party in the territory of the other Contracting Party under the law in force of the latter Contracting Party in any sector of economic activity and in particular, though not exclusively, includes:*
>
> *(i) moveable and immoveable property and any other related property rights including mortgages, liens or pledges;*
>
> *(ii) shares in and stock and debentures of a company and any other form of participation in a company;*
>
> *(iii) claims to money or to any performance under contract having a financial value;*
>
> *(iv) intellectual property rights, goodwill, know-how and technical processes;*
>
> *(v) business concessions conferred by law or, where appropriate under the law of the Contracting Party concerned, under contract, including concessions to search for, cultivate, extract or exploit natural resources.*

136. The Tribunal notes that there are no definitions or limitations in the Treaty of the terms "every kind of asset belonging".

137. On its face, the Treaty does not require, for instance, that the assets be transferred for consideration, that there be a flow of funds from the United Kingdom into the Czech Republic or that there be an underlying transaction. The Treaty only refers to "every kind of asset belonging" to the investor without any further qualification.

[130] Tribunal's emphasis.

138. The Contracting Parties to the Treaty could have qualified the definition of investment but they chose not to do so. It is not the task of this Tribunal to add words to the broad definition agreed by the Contracting Parties.

139. The Tribunal recalls that this case is proceeding pursuant to the UNCITRAL Arbitration Rules. These Rules have no equivalent to Article 25 of the ICSID Convention.

140. Accordingly, the Tribunal finds that the Treaty is clear: the investment is the asset and such asset must belong to the investor for the Tribunal to have jurisdiction.[131]

141. The Tribunal is comforted in its conclusion by the reasoning and the findings *mutatis mutandis* of the tribunals in *Tokios Tokelés* and in *Yukos*.

142. The tribunal in *Tokios Tokelés* wrote as follows:[132]

> *77. The Respondent requests the Tribunal to infer, without textual foundation, that the Ukraine-Lithuania BIT requires the Claimant to demonstrate further that the capital used to make an investment in Ukraine originated from non-Ukrainian sources. In our view, however, neither the text of the definition of "investment," nor the context in which the term is defined, nor the object and purpose of the Treaty allow such an origin-of-capital requirement to be implied. The requirement is plainly absent from the text. In addition, the context in which the term "investment" is defined, namely, "every kind of asset invested by an investor," does not support the restriction advocated by the Respondent. Finally, the origin-of-capital requirement is inconsistent with the object and purpose of the Treaty, which, as discussed above, is to provide broad protection to investors and their investments in the territory of either party. Accordingly, the Tribunal finds no basis on which to impose the*

[131] Arbitrator Joubin-Bret takes a different view from the other members of the Tribunal with respect to a central aspect in the analysis relating to the existence of an investment in light of the Treaty. Arbitrator Joubin-Bret considers that in the present case, there is no evidence of a transaction, a transfer, a contribution, a consideration or a counter-performance of any kind originating from the United Kingdom into the Czech Republic to establish or acquire property over the assets listed in the definition of investment under article 1. In Arbitrator Joubin-Bret's view, while, for purposes of definition, an investment can take different forms, it cannot dispense from being invested or otherwise acquired and to involve some form of transfer from one contracting State into the other contracting State of the BIT at any given stage. Arbitrator Joubin-Bret considers that it would defeat the object and purpose of investment promotion and protection treaties to cover situations where no foreign investment has taken place. However, Arbitrator Joubin-Bret is also mindful of the specific wording of the Treaty at hand that does not make reference to such transaction into the territory of the host State. Arbitrator Joubin-Bret is further reminded of the provisions of the Vienna Convention where the plain meaning of the text will take precedence over the object and purpose of the text and where Arbitrator Joubin-Bret's reading would result in adding a condition that the underlying treaty does not provide, which would in turn result in an incorrect interpretation.

[132] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, **Legal Exhibit CL-0080**, para. 77. Tribunal's emphasis.

> *restriction proposed by the Respondent on the scope of covered investments.*

143. The tribunal in *Yukos* wrote as follows:[133]

> *430. As an initial matter, the Tribunal finds that the ECT, by its terms, applies to an "Investment" owned nominally by a qualifying "Investor." Respondent's submission that simple legal ownership of shares does not qualify as an Investment under Article 1(6)(b) of the ECT finds no support in the text of the Treaty. The breadth of the definition of Investment in the ECT is emphasized by many eminent legal scholars. As defined in Article 1(6) of the ECT, an "Investment" includes "every kind of asset" owned or controlled, directly or indirectly, and extends not only to shares of a company but to its debt (Article 1(6)(b) of the ECT), to monetary claims and contractual performance as well as "any right conferred by law" (Article 1(6)(f) of the ECT, […]). The Tribunal recalls again that, according to Article 31 of the VCLT, a treaty is to be interpreted in good faith in accordance with the ordinary meaning of its terms. The Tribunal reads Article 1(6)(b) of the ECT as containing the widest possible definition of an interest in a company, including shares (as in the case at hand), with no indication whatsoever that the drafters of the Treaty intended to limit ownership to "beneficial" ownership.*

144. In the present case, the Claimant asserts that the assets that belong to it in the Czech Republic consist mainly of know-how and goodwill. The Tribunal agrees.

145. In respect of know-how, even the Respondent's technical experts agreed at the Hearing that A11Y possessed know-how.[134] Such know-how includes the expertise of A11Y's employees, such as Mr. Hanke, and its owner, Mr. Buchal, in providing cutting-edge assistive technologies and holistic solutions for the visually impaired. As Mr. Tollefsen, the Claimant's expert testified, the Claimant's training handbooks are "*among the best learning materials*" he has seen and would have required "*a lot of work and technical knowledge to prepare.*"[135]

---

[133] *Yukos Universal Limited (Isle of Man) v. Russian Federation*, UNCITRAL Arbitration Rules, PCA Case No. AA227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, **Legal Exhibit CL-0036**, para. 430 (Tribunal's emphasis).

[134] Transcript of Final Hearing, Testimony of Gerhard Weber and Zdeněk Míkovec, Day 4, p. 827 (lines 11-18). When asked again to confirm his answer, Gerhard Weber replied, "There is know-how, of course, […]." *See* Transcript of Final Hearing, Testimony of Gerhard Weber and Zdeněk Míkovec, Day 4, p. 828 (line 13). *See also* Transcript of Final Hearing, Testimony of Gerhard Weber and Zdeněk Míkovec, Day 4, p. 836 (line 12) - p. 838 (line 15).

[135] Expert Report of Morten Tollefsen, para. 59(a).

146. In respect of the Claimant's goodwill, the Tribunal need merely note that the record is replete with evidence concerning the loyalty of the Claimant's customers and Mr. Buchal's stellar reputation in this field. The evidence of goodwill is overwhelming.

147. The Tribunal heard the evidence of many A11Y's customers who expressed their unreserved satisfaction of the services A11Y provided to them. Those customers were […], […], […], […], and […]. Those witnesses impressed the Tribunal which found them all honest and totally credible. These witnesses, except for […] who testified by video-conference, travelled from the Czech Republic to Paris, accompanied by personal aides in order to provide evidence and assist the Tribunal. They did indeed impress and assist the Tribunal in its task to determine that the Claimant had made an investment in the Czech Republic.

148. With respect to Mr. Buchal's reputation, […], the Director of a primary school for the visually impaired wrote as follows in his witness statement:

> *[…] Mr. Jan Buchal, the companies BRAILCOM and A11Y and their team had an excellent professional name and an excellent reputation. Their clients first of all valued a high technical maturity of compensation aids and service of the workers of the company, which allowed the clients to make a perfect use of their aids.*[136]

149. […] confirmed this statement when he testified at the Hearing. The Tribunal found […] to be a credible witness.

150. The Tribunal concludes that these assets, namely the know-how and the goodwill, transferred from BRAILCOM to A11Y, belong to A11Y, and thus represent an investment by the Claimant in the Czech Republic under the Treaty.

151. Indeed, as noted earlier, the evidence reveals that over a period of several months A11Y took over the business from BRAILCOM, which included taking on new contracts with customers to provide them with assistive technology solutions, and hiring former employees of BRAILCOM.

[136] Witness Statement of […], para. 13.

152. In this connection, the Claimant writes in its Post-Hearing Brief:[137]

> *From late 2012, the Claimant started to carry out sales of assistive technology aids in the Czech Republic and began issuing pro-forma invoices and invoices to customers for assistive technology solutions. The Claimant's Czech branch financial accounts thus show income from sales flowing to the Claimant from 2012. By March 2013, the Claimant entered into all new orders for assistive technology solutions and Brailcom no longer entered into new orders to produce assistive technology aids. After March 2013, Brailcom only fulfilled assistive technology aids orders made before that time.*
>
> *[…]*
>
> *The Claimant assumed the contractual employment relationship with employees for the production of assistive technology solutions.*

153. Accordingly, the Tribunal finds that the Claimant's investment, namely its know-how and its goodwill, is a protected investment under the Treaty.

154. The Tribunal will now proceed to address the merits of this case. It will commence with the issue of liability of the Respondent.

VI. MERITS

155. As a result of the Tribunal's Decision on Jurisdiction, the Claimant's claim for indirect and creeping expropriation by the Respondent under Article 5 of the Treaty is the only claim which the Tribunal must adjudicate. The Parties' positions in respect of this claim are summarized below.

A. WHETHER THE RESPONDENT BREACHED ARTICLE 5 OF THE TREATY

156. Article 5 (1) of the Treaty provides, in relevant part, as follows:

> *Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. […]*

[137] Claimant's Post-Hearing Brief, para. 3 (footnotes omitted).

157. The Parties appear to agree on two important points regarding the Claimant's claim:

- while they cite different authorities and use different formulations of wording, the Parties seem to agree that an indirect expropriation arises when an investment's value has been substantially deprived of value or destroyed, even if title to it remains with the investor; and

- there is no value left in the Claimant's investment in the Czech Republic and the Claimant is insolvent today.

158. The Parties agree that the test for indirect expropriation is reflected in the case of *Metalclad v. Mexico* in which the Tribunal held that an expropriation exists if the measure in issue has the "*effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property*."[138] Nor is there any disagreement between the Parties that an indirect expropriation can take the form of a "creeping" expropriation.[139]

159. However, the Parties disagree as to whether the Respondent expropriated the Claimant's investment.

(1) The Parties' Positions

a. <u>The Claimant's Position</u>

160. The Claimant submits that the Respondent breached Article 5 of the Treaty.

[138] *Metalclad Corp v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, **Legal Exhibits CL-0017/RL-0142**, para. 103.
[139] *See inter alia*: *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, **Legal Exhibit RL-0002,** para. 20.22; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, **Legal Exhibit CL-0114**, para. 329; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **Legal Exhibit CL-0176**, para. 667; *Teinver S.A., Transportes de Cercanias S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017, **Legal Exhibit CL-0178**, para. 948.

161. Firstly, the Claimant submits that the Respondent subjected the Claimant's investment to measures having the effect of expropriation. The Tribunal recalls that these four measures were summarized in Section IV above. They are:[140]

- the Labour Office of the Respondent – deliberately and with the intention of persuading the Claimant's customers to abandon the Claimant's business – destroyed the Claimant's reputation and goodwill;

- the Labour Office of the Respondent participated in a prime-time television program and told the entire community of blind and visually impaired persons in the Czech Republic that the Claimant was "overpricing";

- the Labour Office of the Respondent consistently disclosed the Claimant's know-how and customer information to its competitors, eroding the Claimant's competitive edge; and

- the Labour Office of the Respondent rigged the "independent" assessments of the Claimant's assistive technology solutions by seeking biased assessments from competitors, failing to consider the needs of applicants and comparing the Claimant's assistive technology solutions against very different "out of the box" aids prepared by its competitors.

162. In its Post-Hearing Brief, the Claimant interestingly seemed to shift the focus of its initial position and argued that the predominant cause of the failure of the Claimant's business was the TV Report which aired on 12 January 2014.[141] According to the Claimant, it was that program which caused the collapse in the number of A11Y's customers and orders.[142]

163. The position of the Claimant and its evolution is apparent from the following passage of the Claimant's Post-Hearing Brief:[143]

[140] Claimant's Reply, para. 259.
[141] Claimant's Post-Hearing Brief, para. 68.
[142] CRS-4; Claimant Demonstrative 3.
[143] Claimant's Post-Hearing Brief, para. 88.

> *Although the Respondent's discriminatory application of the July Statement to the Claimant unquestionably had an adverse impact on the Claimant, it did not in itself result in the collapse of the Claimant's customers and orders (which caused the demise of the Claimant). The Respondent tried to inject uncertainty into the clear-cut position by asking at the hearing: "Why is the fact that 1 sold fewer aids in 2014 a result of the TV interview? Why isn't it a result of the fact that the applicants received less money?" However, in response to a question from Arbitrator Alexandrov, the Respondent's counsel answered his own question: "the applicant is given an amount of money and it can do with the money what it wants." Simply put, that is why the July Statement (notwithstanding that the Respondent applied it in a discriminatory fashion against the Claimant), did not in itself result in the collapse of the Claimant's customers and orders. The Claimant's customers could choose to stay with the Claimant and do with the money provided what they wanted, which was typically to continue with the Claimant. This did not change with the July Statement. What happened regarding the Respondents discriminatory approach to the Claimant under the July Statement was explained by Mr. Buchal: "we always tried to reduce the aids to our own costs in such a way that we could at least supply it to the client and we were hoping that soon we will start doing better and can provide support for the clients and satisfy their needs later. So we reduced stuff, or we just cancelled some necessary components. That was also a possibility."*

164. Mr. Buchal in his Second Witness Statement wrote:[144]

> *The Respondent told many of A11Y's customers directly that they should use other companies and that their applications would never be granted if they used A11Y. These allegations spread quickly within the blind community, and were very damaging because A11Y relied on word of mouth. We could not continue like this.*

165. And then, when referring to the television broadcast of 12 January 2014, Mr. Buchal says that:[145]

> *This was a terrible blow to A11Y, whose name was associated with Brailcom. A11Y's reputation, which was excellent through its work, was completely destroyed. I and my colleagues received many messages from clients who were extremely worried about their solutions applications and contacted A11Y enquiring about them. It shocked me that the Labour Office could make such allegations on national television without giving A11Y a chance to respond. The scale of the negative impact this would have on A11Y's business was devastating.*

[144] Second Buchal, para. 34.

[145] Second Buchal, para. 32. For other evidence in respect of the effect of the TV Report *see* Claimant's Post-Hearing Brief, paras. 72-79.

166. And then, in its Post-Hearing Brief, the Claimant writes as follows in respect of the effect of the TV Report on A11Y's business:[146]

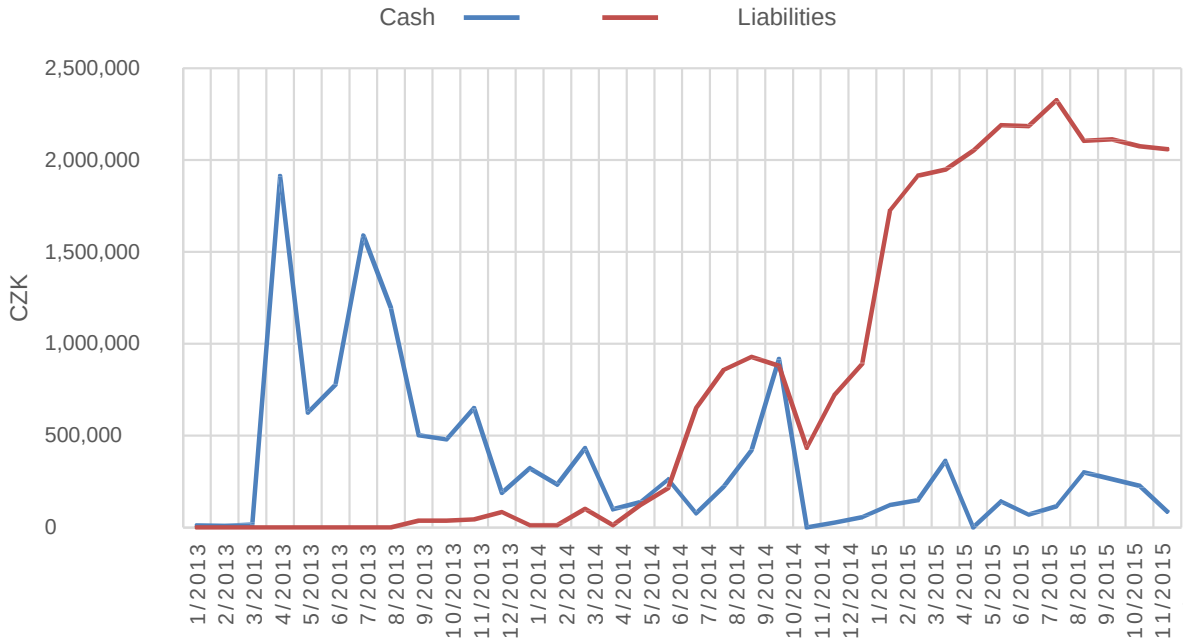
> *The collapse in the Claimant's number of customers and orders resulting from the TV Report is clearly shown in CRS-4 and Claimant Demonstrative-3. The number of new customers plummeted by more than two-thirds from 62 new customers in 2013 to only 20 new customers in 2014 after the TV Report. Similarly, new orders went from a peak of 166 new orders in 2013 to only 58 new orders in 2014 after the TV Report. There is nothing other than the TV Report that could possibly explain this collapse in the Claimant's customers and orders in 2014 and thereafter, nor could the Respondent credibly point to (still less prove) anything that could otherwise explain this.*

167. The Claimant further submits that its financial and employment data confirms that the Claimant's assistive technology solutions business was destroyed as a result of the TV Report.[147]

168. In respect of A11Y's financial situation, the chart below[148] produced by the Claimant evidences, says the Claimant, the increase of its liabilities and the decrease of its cash-flow following the TV Report.

[146] Claimant's Post-Hearing Brief, para. 63.
[147] Claimant's Reply, para. 265 (as modified by Claimant's Post-Hearing Brief).
[148] Second Expert Report of CRS Economics, para. 30, Chart 1.

Chart 1: Cash-flow test of A11Y insolvency



169. And then, in the autumn of 2014, the Claimant was forced to enter into compromise arrangements with its two major creditors, BAUM and iStyle, and has since been unable to pay those debts.[149]

170. In respect of the Claimant's employment data, the Claimant writes:[150]

> *In September 2014, Mr. Buchal announced to the Claimant's employees that the company was insolvent and that almost all employment contracts had to be terminated.*
>
> *[…]*
>
> *On 17 October 2014, Mr. Buchal had his employment terminated at the Czech Branch.*

171. In light of the foregoing says the Claimant, there can be little doubt that A11Y's assistive technology solutions business was irreparably destroyed as a result of the TV Report.

172. Secondly, the Claimant submits that the Respondent's actions were discriminatory.

---

[149] Claimant's Reply, para. 265. *See* Second Buchal, para. 37; Second Witness Statement of Hynek Hanke ("**Second Hanke**"), para. 55. *See also, e.g.* Email from BAUM (Michaela Gubernator) to A11Y LTD. (Marketa Buchalová and Boris Dušek), dated 31 May 2016, **Exhibit C-0137** (attaching an "*overview of open invoices*" and reflecting that EUR 41,560.88 was outstanding).

[150] Claimant's Reply, para. 265. See Second Buchal, para. 36; and Termination of Jan Buchal's employment, dated 17 October 2014, **Exhibit C-0135**.

173. The standard for discriminatory conduct in international investment law is well-known avers the Claimant.[151] While a claim for discrimination may be based on the nationality of the investor, this is not the only basis on which it can be proven that a measure is discriminatory. Rather, the core element of the test is that entities that are comparable are treated in a different manner in a way that is not justified.[152] As the *Saluka v. Czech Republic* tribunal held:

> *State conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification.*[153]

174. The Claimant submits that the Respondent's measures were targeted specifically and deliberately at the Claimant, and thus were discriminatory:[154]

(i) First, the motivation and design of the July Statement were clearly targeted at the Claimant, as the Labour Office acted only after it received the TI letter of 21 May 2013.[155]

(ii) Second, the Labour Office repeatedly asked the Claimant's competitors to offer competing prices for the Claimant's applications on the basis of the July Statement, but never asked the Claimant to provide a competing offeror price with reference to any of its competitors.[156]

(iii) Third, the inconsistent application of the July Statement by the Labour Office was contrary even to the Respondent's own legal requirements.[157] In fact, the Respondent contemporaneously admitted that "misconducts" had occurred,[158] and that in their attacks on the Claimant and its reputation "*the employees of the Labour Office breached the Code of Ethics of the Labour Office of the Czech*

[151] Claimant's Reply, para. 269.
[152] Claimant's Post-Hearing Brief, para. 51.
[153] *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, **Legal Exhibit CL-0024**, para. 313.
[154] Claimant's Reply, para. 272.
[155] Claimant's Post-Hearing Brief, para. 54(1).
[156] Claimant's Post-Hearing Brief, para. 54(2).
[157] Claimant's Post-Hearing Brief, para. 54(3).
[158] Claimant's Reply, paras. 191-200.

> *Republic and such conduct was totally unacceptable, beyond good administration.*"[159]

175. Thirdly, the Claimant submits that the Respondent's measures were not carried out for a public purpose.

176. In this respect, the Claimant writes as follows:[160]

> *42. The entirety of the Respondent's defence is thus focused on trying to blame the Claimant for its own demise, and cast the Respondent's conduct as innocent regulation. The Respondent does not try to reconcile this position with the reality that the Claimant's business was a success before the July Instruction and TV broadcast, but then foundered rapidly thereafter. Rather, it invites this Tribunal to conclude that it was mere coincidence that the Claimant's business failed immediately after its singling-out of the Claimant for adverse treatment compared to its competitors and its ominous denunciation of the Claimant on national television.*
>
> *43. That position strains belief, particularly when there is direct witness testimony on record saying that the impact of the Respondent's conduct severely damaged the Claimant's reputation in the market.*

177. Finally, the Claimant submits that the Respondent's actions were not accompanied by prompt, adequate, and effective compensation. This point is "uncontentious" says the Claimant.[161]

178. In conclusion, for the above-mentioned reasons, the Claimant submits that the Respondent breached Article 5 of the Treaty by unlawfully and indirectly expropriating its investment in the Czech Republic.

b. The Respondent's Position

179. The Respondent denies that it has breached Article 5 of the Treaty.

180. Firstly, the Respondent submits that, for an indirect expropriation to exist, the Claimant must establish that A11Y's insolvency is the result of the Respondent's measures.

---

[159] Meeting Notes of Meeting on 19 February 2014 prepared by Labour Office (Mgr. Lada Kunešová), dated 19 February 2014, **Exhibit C-0115**, p. 2.
[160] Claimant's Skeleton, paras. 42-43 (footnotes omitted).
[161] Claimant's Reply, para. 283.

181. The Respondent submits that the Claimant has failed to establish that the Respondent's alleged measures caused any deterioration to the Claimant's investment. The Respondent writes as follows in this respect:

- Concerning the Respondent's alleged destruction of the Claimant's goodwill:

> *[T]here was no practice of employees of the Labour Office making false statements about Claimant's business or pressuring or directing them to Claimant's competitors. To the contrary, all the employees in fact did was to inform the applicants about the process and application of the Act.*[162]
>
> *However, even under the hypothetical assumption that the individual state representatives in these three cases "pressured" Claimant's customers, Respondent could not be held liable under the BIT.*[163]
>
> *The Claimant did not even come close to showing that a wide-spread practice of such pressuring might have existed that went beyond these individual cases. It can be excluded that at that time Respondent would have ignored any such misbehaviour of its officials or that it would have even encouraged it. Quite to the contrary, Respondent's officials from the General Directorate of the Labour Office and from its regional branches clearly confirmed during the hearing that if such conduct would have occurred in the way described by Claimant's witnesses, it would have been absolutely inadmissible and not tolerable.*[164]
>
> *Moreover, […] the Labour Office in its December Decision explicitly stated that employees were not to suggest to customers to approach competitors of the Claimant. As of December 2013, therefore, the Labour Office ensured that such isolated instances would not occur in the future.*[165]
>
> *[In any event] Claimant at the time did not point the Labour Office to any specific case in which an alleged "pressuring" occurred. Therefore, Respondent was not in a position to verify Claimant's allegations and to take action against any such wrongdoing in case it really had happened.*[166]
>
> *What is even more relevant in this respect is that even if Claimant's accusations should have any merit, they had no effect whatsoever on the collapse of Claimant's business. Hence, even if the Tribunal should find*

[162] Respondent's Rejoinder, para. 382.
[163] Respondent's Post-Hearing Brief, para. 87.
[164] Respondent's Post-Hearing Brief, para. 88.
[165] Respondent's Rejoinder, para. 383.
[166] Respondent's Post-Hearing Brief, para. 88.

that there was misconduct attributable to the Respondent, this misconduct would not be of any relevance for Claimant's expropriation claim.[167]

Claimant failed to provide any evidence that the alleged misbehaviour of the Labour Office employees resulted in customers turning away from Claimant. [In fact, each of […], […]and […] remained with A11Y.][168]

Consequently, even if any pressuring of customers would have happened and if the Tribunal further is of the opinion that such conduct would be attributable to the Respondent, it would not be causal for Claimant's alleged expropriation.[169]

In respect of the TV report:[170]

116. [F]or Claimant's case of expropriation to work it must not only show that the TV interview had some impact on its business. It must show, first, that the statements made by […] were untrue and, second, that due to the statements made by […] in that interview, and her statements alone, its entire investment was economically destroyed.

117. Claimant had not been able to show any impact of the TV interview on the demise of its business at all. In particular, Claimant has been unable to show that the alleged impact was not due to the fact that Transparency International had publicly raised very serious allegations of Claimant's wrongdoing based on information received from disgruntled customers of Claimant in the TV interview, but only due to the fact that […] had spoken two sentences in that interview.

[…]

122. The available evidence shows, however, that Claimant itself has stated that sharp demise of its business started in July 2013. Obviously, therefore, the reason for the demise of Claimant's business occurred in July 2013 and not in January 2014. By January 2014, says the Claimant, the downward trend of its business was already "sharp" and significant. Claimant's experts even computed a slight and short reverse trend in the first half of 2014. The TV interview, therefore, cannot have caused the destruction of Claimant's investment. This, however, is what Claimant would have to show.

- In respect of the alleged admission of misconduct:[171]

Suffice it to say that where Respondent detected an imperfect implementation of the Act it immediately took measures to meet the Claimant's concern. Respondent never admitted anything more than that.

[167] Respondent's Post-Hearing Brief, para. 89.
[168] Respondent's Post-Hearing Brief, para. 90.
[169] Respondent's Post-Hearing Brief, para. 96.
[170] Respondent's Post-Hearing Brief, paras. 116-117 and 122 (footnotes omitted).
[171] Respondent's Rejoinder, para. 386.

182. Rather, says the Respondent, it was A11Y's flawed business model which destroyed the Claimant's investment.

183. In this connection, the Respondent writes:[172]

> *374. Claimant alleges that its business "irreparably ceased as a result of the Respondent's interventions and misconduct from July 2013 onwards". […] [a]s of July 2013, the Labour Offices took a different and more effective approach towards the implementation of the Act. As of July 2013, put in a nutshell, the Labour Office ensured that allowances would only be granted in an amount to satisfy the needs of the applicant at the lowest cost. This, however, simply was not Claimant's business model.*
>
> *375. First, Claimant's entire business was based on the use of Apple products. As Respondent's expert explained already in his first report, Apple's entire business strategy is to "focus on high end [and] give priority to profits over market share". Apple products are therefore more expensive than products based on other platforms. These findings are not disputed by Claimant. Claimant simply alleges that its products are superior and therefore the fact that they are more expensive is justified. In any event, so Claimant argues, the aids it offered fell within the maximum financial limits set out by the Act, which provides that applicants are entitled to allowances in an overall maximum of CZK 800.000,- for every five years and CZK 350.000,- per aid.*
>
> *376. This argumentation already shows Claimant's blatant disrespect of the provisions of the Act. […] the Act simply did not provide for the granting of allowances of high-end products. It further shows Claimant's mind-set when it argues that its aids were below the absolute maximum available to an applicant. This argument underlines that Claimant's business model simply was based on selling not the economically least demanding solution, but a more expensive one. This, however, is what is demanded by the Act. As Claimant itself concedes, blind and visually impaired persons rarely have sufficient income to pay for aids themselves. Hence, Claimant's business model was based on selling products to blind or visually impaired persons who could not afford them, while these products were also too expensive for the prospective buyers to get an allowance for them. Hence, the customers for this reason simply could not buy Claimant's products.*
>
> *377. Second, Claimant's business model was based on a profit margin which was way above that of its competitors. While Claimant's model was based on a gross profit margin of 47%, the average of its competitors was 35%. The EBITDA margin of Claimant was projected to be between 15 and 27% while that of its competitors was at 4% in average. Hence, Claimant's model was based on far higher profits to be generated from its*

[172] Respondent's Rejoinder, paras. 374-380.

business than that of its competitors. This is reflected in Claimant's pricing policy and the fact that it charged higher margins for its products.

378. In this context, it must also be emphasized that Claimant's practice included the alleged "gift" of the 10% mandatory participation of the applicant. As Claimant expected a higher profit margin from the products it was selling while also having to cover the 10% mandatory participation, the prices of its aids had to include this participation. If Claimant offered an aid at e.g., CZK 100.000,-, this amount included not only a profit margin of 47%, but also the 10% that the applicant was supposed to pay itself. Hence, the price offered by Claimant would be comparatively higher than that of a competitor.

379. Third, in depending on the individual needs, in some cases, Windows-based solutions are the better option. They are in most cases the economically less demanding option. It is therefore not surprising that companies offering these aids would benefit from the custom of the blind and visually impaired who cannot afford to pay significantly more for an aid than the amount of the allowance. As some competitors of Claimant offer both Windows and Apple-based solutions and so are more attractive to customers searching for a larger range of options than those offered by Claimant.

380. The reason why Claimant actually went out of business in the Czech Republic therefore was not one or all of the issues Claimant complains about in the present case. Claimant's business model, which was based on selling high-end products with a significantly higher profit margin than all of its competitors, simply was not competitive in the Czech market. Claimant's products were simply too expensive for the reasons set out here above to be sold on the Czech market. Claimant's model only worked until July 2013 when the Labour Offices actually started examining Claimant's offers for the compliance with the Act. After this, it was evident to the Labour Offices that Claimant's aids were not the economically least demanding and no blind or visually impaired person was willing or capable to pay the surcharge for Claimant's products.

184. Secondly, the Respondent submits that the July Statement was a legitimate regulation based on the law existing at the time the Claimant entered the Czech market.[173] It did not change the legal situation which existed as of January 2012 as it merely interpreted the Act in greater detail. This, however, does not amount to expropriation as the Act was adopted in a *bona fide* manner and is not discriminatory avers the Respondent.[174] The

[173] Respondent's Rejoinder, para. 370.

[174] *See Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, **Legal Exhibit RL-0070**, para. 255 ("It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.").

Claimant was never entitled to assume that the Act would never be implemented in a more detailed way by such an administrative regulation avers the Respondent.[175]

185. In addition, the Claimant has alleged numerous imperfections in the application of the Act. However, submits the Respondent, the correct legal standard to be applied is not whether the Act was applied incorrectly by the Respondent but whether there was a "blatant disregard" by the Respondent of the Act.[176] The Claimant has failed to show this, says the Respondent.[177]

186. Finally, the Respondent submits that the Claimant has failed to show that it was discriminated against in the application of the Act.

187. In this connection, the Respondent submits as follows: [178]

> *106. In the present case, however, there was no different treatment of Claimant at all and hence there is no basis for a claim based on discriminatory treatment. Ms. Jirková explained that she drafted the July Statement to unify the application process under the Act on Allowances. At that time she was not even aware of the fact that Claimant was a subject of interest of Transparency International. Hence, the July Statement clearly was not a direct reaction on Claimants behaviour and not directed at Claimant, but a means to solve problems encountered by officers of the Labour Office in handling applications for allowances. The July Statement was drafted to ensure the full implementation of the Act on Allowances with regard to all companies in all sectors of aids. Also during the hearing Ms. Jirková explained:*
>
> *"The instruction was drafted based on the request by the Labour Office to give them an interpretation on the law. The law was very new, different from previous legislation, and it was to be expected as new applications arrived, that there will be questions by the General Directorate about how to apply the law in practice. This is just a common procedure."*

---

[175] *See Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016 (translation from the Spanish original), **Legal Exhibit RL-0144**, para. 510 ("However, as stated in previous sections of this award, in the absence of a specific commitment toward stability, an investor cannot have a legitimate expectation that a regulatory framework such as that at issue in this arbitration is to not be modified at any time to adapt to the needs of the market and to the public interest.").

[176] *See Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, **Legal Exhibit RL-0061**, para. 43 ("As the First Decision stated, "not every violation of domestic law necessarily translates into an arbitrary or discriminatory measure under international law and a violation of the FET Standard". For this to happen, it is necessary that the State incurs in "a blatant disregard of applicable tender rules, distorting fair competition among tender participants". And this is what has occurred: the First Decision found that on four occasions (three tenders plus an administrative practice) Ukraine indeed acted in "blatant disregard of applicable tender rules".).

[177] Respondent's Rejoinder, para. 371.

[178] Respondent's Post-Hearing Brief, paras. 106-107 (footnotes omitted).

> *107. As explained above, the July Statement was applied equally to all companies in Czech market for assistive technology and not only to Claimant. Hence, it can be excluded that there was any discriminatory intent of the Ministry when drafting the July Statement and there was not different treatment of Claimant with regard to the scrutiny of the applications it filed.*

188. Even if the Respondent had treated the Claimant differently than its competitors, which is not the case, this would not have amounted to discriminatory treatment, says the Respondent.[179] Under general international law,[180]

> *[m]ere differences of treatment do not necessarily constitute discrimination […] [D]iscrimination may in general be said to arise where those who are in all material respects the same are treated differently, or where those who are in material respects different are treated in the same way.*

189. Accordingly, the Respondent submits that even if the Claimant had received different treatment at the hands of the Labour Office regarding the implementation of the Act, this was because A11Y's business model put it in a different position *vis-à-vis* A11Y's competitors. Hence, a different treatment of A11Y would not have been discriminatory according to the Respondent.[181]

190. In conclusion, for the foregoing reasons, the Respondent submits that it has not breached Article 5 of the Treaty.

(2) The Tribunal's Analysis

191. The Claimant submits that the Respondent breached Article 5 of the Treaty by indirectly expropriating its investment in the Czech Republic.

192. As the Tribunal traversed earlier, the Claimant contends that:[182]

[179] Respondent's Rejoinder, para. 395.
[180] R. Jennings, A. Watts (eds.), *Oppenheim's International Law* (9th ed. Longman, 1992), Vol. I, **Legal Exhibit RL-0149**, p. 378.
[181] Respondent's Rejoinder, para. 398.
[182] Claimant's Reply, para. 259.

- the Labour Office of the Respondent – deliberately and with the intention of persuading the Claimant's customers to abandon the Claimant's business – destroyed the Claimant's reputation and goodwill;

- the Labour Office of the Respondent participated in a prime-time television program and told the entire community of blind and visually impaired persons in the Czech Republic that the Claimant was "overpricing";

- the Labour Office of the Respondent consistently disclosed the Claimant's know-how and customer information to its competitors, eroding the Claimant's competitive edge; and

- the Labour Office of the Respondent rigged the "independent" assessments of the Claimant's assistive technology solutions by seeking biased assessments from competitors, failing to consider the needs of applicants and comparing the Claimant's assistive technology solutions against very different "out of the box" aids prepared by its competitors.

193. The Claimant contends that, as a result of those measures, its investment was completely destroyed.

194. The Respondent denies that it has indirectly expropriated the Claimant's investment. Its main defence rests on the argument that the Claimant's insolvency is not due to the State's alleged measures but rather to the Claimant's own business model.

195. The Tribunal notes that there is no disagreement between the Parties that the Claimant is insolvent. The value of the Claimant's investment in the Czech Republic has been completely destroyed.[183]

196. The Claimant bears the burden of proving whether the State's alleged measures had the "*effect of depriving the owner, in whole or in significant part, of the use or reasonably-*

[183] Claimant's Post-Hearing Brief, para. 34.

to-be-expected economic benefit of property."[184] Both Parties agree that there must be a sufficient causal link between any breach of the Treaty by the Respondent and the loss the Claimant sustained.

197. After reviewing carefully the totality of the evidence and the Parties' comprehensive submissions, the Tribunal has concluded that the Claimant's case must fail for the following reasons.

198. The Tribunal recalls that, in January 2012, the Act on Allowances came into effect in the Czech Republic. It provides for the granting of subsidies by the State to persons with health impairments, including the blind and visually impaired. Under the Act, the allowances are limited in absolute amounts (to CZK 800,000 per applicant for five years) and in the amount for an individual aid (to CZK 350,000 per aid).[185] The Act requires the applicant to pay 10% of the aid for which the allowance may be granted.[186] In other words, under the Act, the Czech Republic will pay 90% of the purchase price of the aid.

199. Section 9(10) of the Act is very crucial. It provides that an allowance will only be granted for an aid if:[187]

> *The allowance is provided for a special aid in basic version, which fully satisfies the person with regard to his or her health handicap and meets the condition of the aid being the least economically demanding. […]*

200. The Tribunal notes that a list of these aids is set out in Decree No. 388/2011 issued by the Czech Ministry of Labour and Social Affairs. In respect of the aids for the visually impaired, Annex 1 to the Decree provides that allowances will only be granted with respect to the following aids:[188]

> *Annex 1: List of kinds and types of special aids meant for persons with health impairment which the allowance for special aid is extended for*
>
> *[… I. …]*

[184] *Metalclad Corp v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, **Legal Exhibits CL-0017/RL-0142**, para. 103.
[185] Act on Allowances, Sections 10 (3) and (6), **Legal Exhibit CL-0002.**
[186] Act on Allowances, Sections 10 (3), **Legal Exhibit CL-0002**.
[187] Tribunal's emphasis.
[188] Decree No. 388/2011, dated 29 November 2011, **Legal Exhibit CL-0003**.

II. Special aids meant for severely visually-impaired persons

1. For persons with health impairment that is mentioned in the part I point 2 of the attachment to the law:

a) calculator with speech output

b) digital reading device for the blind with speech output

c) digital notetaker for visually impaired with speech output or braille display

d) special software equipment for visually impaired

2. For persons with health impairment that is mentioned in the part I point 2 letter a) and b) of the attachment to the law:

a) guide dog

b) typewriter for the blind

c) DYMO pliers

d) electronic orientation aid for the blind and deafblind

e) electronic communication aid for the blind and deafblind

f) indicator of colors for the blind

g) measuring devices for household with speech or tactile output

h) braille display for the blind

i) printer of relief letters for the blind

j) speech for the blind and deafblind

3. For persons with health impairment that is mentioned in the part I point 2 letters a) through c) of the attachment to the law:

voice recorder

4. For persons with health impairment that is mentioned in the part I point 2 letters b) through d) of the attachment to the law:

a) camera enlarging magnifier

b) digital enlarging magnifier

[… III. …]

[…Annex 2, 3, 4, 5]

201. The evidence reveals that BRAILCOM entered the market for assistive technology solutions for the visually-impaired in October 2011. A11Y was incorporated in the UK on 2 August 2012 and its Czech branch office was registered on 17 October 2012, a few months after the enactment of the Act on Allowances.[189] By March 2013, A11Y had taken over BRAILCOM's profitable business.

202. Obviously, the timing of A11Y's incorporation is not coincidental. As Mr. Buchal explained in his first witness statement:[190]

> *69. The reality was however completely different than I imagined. I thought that the revenue from sales of aids will be only a smaller part of our total income. But already in the middle of 2012 [a few months after the enactment of the Act on Allowances] it was clear that the income from sales of aids will be many times higher and that the originally intended secondary activity will become the main activity.*
>
> *70. That was also one of the reasons why I began to consider a change. It was clear that BRAILCOM,o.p.s., that is a non-profit organization by law, cannot be conducting such an extensive economic activity, and it was also clear that BRAILCOM,o.p.s. cannot expand with this activity outside the Czech Republic.*
>
> *71. I therefore decided to found a private, commercial company. […]*

203. The Act on Allowances clearly opened a new market in the Czech Republic, a market for assistive technology aids which incentivized Mr. Buchal to create A11Y which would take over BRAILCOM's profitable business.

204. When the Act was adopted in 2012, the Labour Office, the body responsible for administering the Act, received many applications. Since the Labour Office had not been provided with any guidance from the Labour Ministry with respect to how the Act, particularly Section 9(10), should be applied, most requests for subsidies were granted without any in-depth scrutiny.[191]

[189] Certificate of Incorporation of A11Y, dated 2 August 20l2, **Exhibit C-0001**.
[190] First Buchal, paras. 69-71.
[191] Respondent's Skeleton, para. 25.

205. A11Y's business thrived. According to the Claimant, clients and orders were increasing every month. Within the first 15 months of operations, A11Y submitted 161 applications to the Labour Office on behalf of 81 clients.[192]

206. On 21 May 2013, the Labour Office received the TI letter which has been cited in full earlier.

207. The TI letter singled out BRAILCOM. It includes the following paragraph:[193]

> *According to the information shared by clients, in the application for a special-aid allowance BRAILCOM, o.p.s. marks up the value of the special aid considerably. One of the clients who contacted TI witnessed a decision to grant a special-aid allowance, according to which the Labour Office (regional branch) granted an applicant an allowance worth more than CZK 30,000, even though the price of the corresponding special aid (a voice-activated Apple iPhone) had a market price of approximately CZK 17,000 at the time. Statements from other clients indicate that the value of special aids in benefit proceedings in which they are represented, on the basis of a power of attorney, by BRAILCOM, o.p.s., is marked up by between 50% and 100%. […]*

208. On 12 July 2013, the Ministry of Labour of the Czech Republic, in reaction to the TI letter, and after having been asked by the Labour Office for an opinion on how to proceed going forward[194] issued a statement that defined the criteria set out by the Act in order to ensure that the requirements of the Act could effectively be assessed in each application and to allow the Labour Offices to take a uniform approach *vis-à-vis* all applications submitted under the Act (the "**July Statement**").[195] The Tribunal recalls in particular that one of the conditions for the provision of an allowance by the State is that the aid must be "the least economically demanding".

209. The July Statement also decreed that when the aids applied for consist of several individual functionally independent components, the applicant must submit a list of the components and their prices. The July Statement also clarified that, henceforth, additional services, such as training, or accessory products, such as protective covers or laptop bags,

---

[192] First Expert Report of CRS Economics, paras. 4.4 and 4.5.
[193] Letter from TI of 21 May 2013, **Exhibit R-0009**.
[194] First Witness Statement of Milena Průžková, **Exhibit R-0028**, para. 14; First Witness Statement of […], **Exhibit R-0027**, para. 10.
[195] Statement of MPSV, dated 12 July 2013, **Exhibit C-0010**. The Claimant refers to the Statement in its pleadings as the "July Instruction".

could not be included as part of "the basic version" of an aid and were therefore no longer covered under the Act.

210. Although the July Statement was issued following receipt of the TI letter, in the view of the Tribunal, it did not target in any away or discriminate against A11Y.

211. The Tribunal finds that the July Statement was a *bona fide* regulatory measure. It applies to all people with a health impairment, not only those who are visually impaired. The language of the July Statement is neutral and, on its face, does not target A11Y and applies uniformly to all companies providing aids across different groups of people with health impairments.

212. Following receipt of the TI letter, and as Ms. Jirková writes in her witness statement,[196] it became clear to the State that it needed to provide guidance to the Labour Office on the application of the Act. Article 9(10) of the Act, principally, needed to be interpreted and this is precisely what the Ministry did.

213. After the July Statement was issued, as noted above, A11Y could no longer charge for training and accessory products. Furthermore, it had to provide to the Labour Office a list of all the components of the special aid with their prices in order that the Labour Office could determine whether the aid offered was "basic" and "the least economically demanding".

214. However, it is obvious to the Tribunal that A11Y was not in the business of providing the most "basic" solutions to its clients. As Mr. Hanke, a technician, analyst and trainer at A11Y, explains in his first witness statement in respect of A11Y's business:[197]

> *17. We have decided to work on these key aspects:*
>
> *a. quality – To seek and design solutions that are of a higher technical quality.*
>
> *b. individuality – Not to just sell generic solutions, but design the solutions on individual situation and needs of each visually handicapped individual.*

[196] Witness Statement of Kateřina Jirková, **Exhibit R-0052**, para. 8.
[197] First Hanke, para. 17 (Tribunal's emphasis).

> *c. complexity – To provide each visually handicapped person not with a single-use device, but with a thoughtful solution of his situation and needs.*
>
> *d. support – By means of close cooperation with manufacturers and developers of all the components of the solutions to continuously work on maintenance and improvement of the quality of the solutions, as well as to give support to the customer when he/she encounters problems.*
>
> *In retrospective I believe that in all these elements, we were quite different than the other companies selling special aids that existed in the Czech Republic before 2012.*

215. This is confirmed by Mr. Buchal in his second witness statement wherein he says that A11Y provided "*highly specialised technical services which were not available elsewhere in the market*".[198]

216. The Tribunal has no doubt that A11Y had its clients' best interest at heart and wanted to provide them "*with a thoughtful solution of [their] situation and needs.*" During the Hearing, as noted earlier, the Tribunal heard the testimony of several clients of A11Y who were unanimous in their praise of the excellent services A11Y provided to them.

217. However, the State, which funded the aids, had decided to pay for the least economically demanding aid which answered the needs of the visually-impaired citizens of the Czech Republic. The Tribunal has already concluded that the July Statement was a *bona fide* regulatory measure. Therefore, if the July Statement created an environment, in which the Claimant's business of providing high-end products to their clients at a premium became commercially unviable, that would not result in an expropriation.

218. The Tribunal notes that the Claimant's own experts on quantum affirm in their report that the gross profit margin of A11Y between 2012 and 2013, i.e. prior to the release of the July Statement, ranged between 35% and 47%, with the highest margin of 47% being reached in the first half of 2013.[199]

219. The Claimant's experts then proceed to opine that, as a result of the July Statement, "*the State […] declined to cover A11Y's full margin [and] A11Y was consequently forced to*

[198] Second Buchal, para. 12.
[199] First Expert Report of CRS Economics, para. 6.21, Table 9.

reduce its margins by up to 6 percentage points (i.e. from 47% down to approximately 40-41%)"[200] before concluding that the reduced profit margins were "*economically unsustainable from a long-term perspective*".[201] They then opine that "*[b]ased on [their] calculations and A11Y's cost projections, 47% gross profit margin represents the minimum gross profitability that makes the business sustainable in the long run while generating returns that a reasonable business investor would expect to receive from investment in a highly specialized IT company such as A11Y*".[202]

220. Even Mr. Buchal, in response to a question from the Tribunal at the Hearing as to whether A11Y's economic model was sustainable in the long term following the issuance of the July Statement, responded: "*It was not, definitely not.*"[203]

221. It follows from this statement and the opinion of the Claimant's experts that A11Y's business had become "*economically unsustainable from a long-term perspective*" in the regulatory environment created by the July Statement.

222. The Tribunal notes that the Claimant has advanced other claims of expropriatory conduct by the Respondent, in particular that the Respondent: (i) deliberately and with the intention of persuading the Claimant's customers to abandon the Claimant's business, destroyed the Claimant's reputation and goodwill; (ii) participated in a prime-time television program and told the entire community of blind and visually impaired persons in the Czech Republic that the Claimant was "overpricing"; (iii) consistently disclosed the Claimant's know-how and customer information to its competitors, eroding the Claimant's competitive edge; and (iv) rigged the "independent" assessments of the Claimant's assistive technology solutions.

223. There is sufficient evidence on the record that, in their implementation of the July Statement, some Labour Office employees acted improperly, notably by pressuring customers to abandon A11Y and purchase aids from its competitors and by sharing A11Y's business proprietary information with A11Y's competitors. This was recognized

[200] First Expert Report of CRS Economics, para. 6.22.
[201] First Expert Report of CRS Economics, para. 6.22. Tribunal's emphasis.
[202] First Expert Report of CRS Economics, para. 6.23. Tribunal's emphasis.
[203] Transcript of Final Hearing, Testimony of Jan Buchal, Day 2, p. 313 (lines 9-13).

by the Labour Office itself in its December Decision.[204] This behaviour of the Labour Office probably caused damage to the Claimant. A11Y lost customers and orders.[205] The Tribunal also accepts that the TV Report harmed the Claimant and caused it to lose more customers and orders.

224. Accordingly, the Tribunal has endeavoured to separate the effect of A11Y's loss of customers and orders as a result of those improper actions of the Labour Office employees from the effect of A11Y's significant price reductions and the non-coverage of extras such as training as a result of the implementation of the July Statement. The Tribunal has been unable to do so. Unhelpfully, the Claimant's own experts, after stating that "*there have been several components of the Breach and thus several causes of the damage*" concluded that "*[h]owever, it is practically impossible to distinguish to what extent individual components of the Breach contributed to the damage.*"[206]

225. In the circumstances, the Tribunal finds that the evidence before it is manifestly inadequate to reach a conclusion that the Respondent's conduct referred to in items (i) to (iv) of paragraph 222 above and the resulting loss of customers and orders would have caused the demise of A11Y's business independently of the effect of the July 2013 Statement. On the other hand, there is ample and convincing evidence that, after the July Statement was enacted and implemented, A11Y's business model was doomed to fail, as it did.

226. Accordingly, the Tribunal finds that the Claimant has not met its burden of proof that the Respondent, by it actions, unlawfully indirectly expropriated the Claimant's investment in the Czech Republic.

227. While the Tribunal has reached its conclusion strictly on the basis of the evidence of the Parties, it would like to acknowledge that Mr. Buchal is a very courageous entrepreneur. He was well intentioned. Being himself blind since a very young age, he founded

[204] December Decision, **Exhibit C-0040**. The December Decision provides that: "[…] offices of Labour Office of Czech Republic did not proceed in some administrative proceedings on admission of allowance for special aid in compliance with corresponding regulations."
[205] See Claimant's Demonstrative Exhibit 3.
[206] First Expert Report of CRS Economics, para. 4.1.

BRAILCOM and later A11Y to assist his visually impaired compatriots. Many of them came before the Tribunal to testify as to the help and assistance they had received from Mr. Buchal. The Tribunal also wishes to acknowledge their own courageous and brave attitude. For Mr. Buchal and his visually impaired customers, this must be a very sad ending.

VII. COSTS

228. The Tribunal recalls that, in its Decision on Jurisdiction, it decided that the costs relating to the bifurcated jurisdictional phase of these proceedings would be considered and allocated at the conclusion of the merits phase of this arbitration.

229. Accordingly, the Tribunal will now consider the Parties' Statements on Costs relating to both the jurisdictional and the merits phase of the proceedings.[207]

230. The Claimant details the costs it incurred in these proceedings as follows:[208]

Arbitration Costs	
Deposits towards fees and expenses incurred by the Tribunal	USD 475,000.00
Legal Costs	
Fees for Withers LLP	GBP 1,210,825.50
Fees for Mr. Lucas Bastin	GBP 140,520.00
Sekanina Legal	GBP 27,539.91
Expert fees and expenses of Mr. Morten Tollefsen	GBP 35,470.00
Expert fees and expenses of CRS Economics	GBP 83,662.44
Other disbursements including travel, travel and accommodation expenses for witnesses and their carers, photocopying, couriers, etc.	GBP 101,133.34
TOTAL	USD 475,000.00 (arbitration costs) GBP 1,599,151.19 (legal costs)

[207] Parties' Statements of Costs filed simultaneously on 21 October 2016 with respect to the Jurisdictional phase and 31 January 2018 with respect to the Merits phase.
[208] Claimant's Statement of Costs, paras. 8-10.

231. The Respondent details the costs it incurred in these proceedings as follows:[209]

Arbitration Costs	
Deposits towards fees and expenses incurred by the Tribunal	USD 475,000.00
Legal Costs	
Costs of Legal Representation and disbursements	CZK 5,129,261.84 (jurisdictional phase) CZK 4,861,445.77 (merits phase)
Expert Fees of PWC	CZK 1,222,517.00 (jurisdictional phase) CZK 2,984,041.00 (merits phase)
Expert Fees of Mr. Weber	EUR 9,685.00
Expert Fees of Mr. Míkovec	CZK 106,480.00
TOTAL	USD 475,000.00 (arbitration costs) CZK 14,303,745.61 (legal costs) EUR 9,685.00 (legal costs)

232. The Tribunal notes that the Claimant and the Respondent, to the extent that they each prevail, have requested that the opposing party be ordered to pay the full costs of the arbitration.

233. The Tribunal observes that the Treaty does not contain provisions on the allocation of the costs of arbitration in the case of a dispute between an investor and a Contracting Party.

234. However, Article 40 of the 1976 UNCITRAL Rules does provide the Tribunal with guidelines with respect to the allocation of costs in an arbitration.

Article 40

> *1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.*

[209] Respondent's Statement of Costs, para. 5, as updated by Respondent' Reply Statement on Costs, para. 19.

> *2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.*
>
> *[…]*

235. While the "loser pays" principle is the guiding principle under Article 40 of the 1976 UNCITRAL Rules, it is well established that an UNCITRAL Tribunal has total and unfettered discretion in the allocation of the costs of the arbitration and the parties' legal costs.

236. The Parties deposited with ICSID a total of USD 950,000.00 to cover the costs of the present proceedings; USD 475,500.00 by the Claimant and USD 475,000.00 by the Respondent.

237. The fees of Prof. Stanimir Alexandrov, the arbitrator appointed by the Claimant, amount to USD 118,200.00. His expenses amount to USD 20,259.90.

238. The fees of Ms. Anna Joubin-Bret, the arbitrator appointed by the Respondent, amount to USD 96,000.00. Her expenses amount to USD 5,829.66.

239. The fees of The Hon. L. Yves Fortier, QC, the Presiding Arbitrator, amount to USD 138,000.00. The Presiding Arbitrator's expenses amount to USD 17,615.12.

240. Pursuant to Procedural Order No. 1 and the agreement of the Parties of 16 January 2015, ICSID was designated to act as the Administering Authority in this arbitration. ICSID's fees for its services amount to USD 128,000.00.

241. The fees of Ms. Annie Lespérance, the Assistant to the Tribunal, amount to USD 104,000.00. Her expenses amount to USD 7,604.84.

242. Other Tribunal costs, including travel and all other expenses relating to the arbitration proceedings, amount to USD 112,354.52.

243. Accordingly, the combined Tribunal costs in this arbitration amount to USD 747,864.04.

244. The Parties' respective tranches of these tribunal costs, amounting to USD 475,000.00 for each side, shall be deducted from the deposit. Any unexpended balance will be returned to the Parties in proportion to their respective contributions.

245. The Parties' legal and other costs total GBP 1,599,151.19 for the Claimant and CZK 14,303,745.61 and EUR 9,685.00 for the Respondent.

246. Pursuant to Article 40 of the 1976 UNCITRAL Rules, as noted above, the costs are to be awarded to the successful party and against the unsuccessful party, unless the circumstances of the case justify a different approach. The Rules are clear on their face that costs follow the event as a matter of principle but that the tribunal has discretion to decide otherwise.

247. In the present proceedings, while the Claimant did, all things considered, prevail on jurisdiction, it is clear that the Respondent has prevailed on the merits. The Tribunal can see no reason why the Claimant, the unsuccessful party, should not bear the costs of the arbitration.

248. However, the Tribunal, in its discretion and having regard to the totality of the circumstances of this case, finds and orders that the Claimant will bear the combined Tribunal costs and that each Party will bear its respective legal costs.

VIII. DECISION

249. Having carefully considered the Parties' arguments in their written and oral pleadings, and having deliberated, for the reasons stated above, the Arbitral Tribunal unanimously **Decides**, **Declares** and **Awards**, as follows:

(1) The Tribunal has jurisdiction over the Claimant's indirect expropriation claims;

(2) The Claimant's case on the merits fails in its entirety as it has not discharged its burden of proving that the measures complained of are tantamount to an indirect expropriation under Article 5 of the Treaty;

(3) The Respondent has not indirectly expropriated the Claimant's investment;

(4) The Claimant is ordered to pay to the Respondent the amount of USD 373,932.02 representing the Respondent's share of the costs and expenses of the arbitration as detailed in paragraphs 236 to 244 above; and

(5) All other claims and requests for relief by both Parties are dismissed.

[*intentionally left blank*]

Place of arbitration: Paris, France

Date: 29 June 2018

[signed]

Prof. Stanimir Alexandrov
Arbitrator

[signed]

Ms. Anna Joubin-Bret
Arbitrator

[signed]

The Hon. L. Yves Fortier, QC
President

ANNEX 1

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER ARTICLE 8(2)(A) OF THE AGREEMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE CZECH AND SLOVAK FEDERAL REPUBLIC FOR THE PROMOTION AND PROTECTION OF INVESTMENTS AND THE UNCITRAL ARBITRATION RULES (1976)

A11Y LTD.

v.

CZECH REPUBLIC

(ICSID Case No. UNCT/15/1)

DECISION ON JURISDICTION

Tribunal
Yves Fortier, PC, CC, OQ, QC, Presiding Arbitrator
Stanimir A. Alexandrov, Arbitrator
Anna Joubin-Bret, Arbitrator

Secretary to the Tribunal
Jara Mínguez Almeida

Assistant to the Tribunal
Annie Lespérance

Place of Arbitration: Paris, France
Date of dispatch to the Parties: 9 February 2017

REPRESENTATION OF THE PARTIES

Representing Claimant:

Mr. Hussein Haeri
Mr. David Walker
Ms. Deliya Meylanova
Ms. Ruzin Dagli
Withers LLP
16 Old Bailey
London EC4M 7EG
United Kingdom

and

Mr. Lucas Bastin

Until 2 November 2016:
Quadrant Chambers
Quadrant House
10 Fleet Street
London EC4Y 1AU
United Kingdom

As of 2 November 2016:
Essex Court Chambers
24 Lincoln's Inn Fields
London WC2A 3EG
United Kingdom

Representing Respondent:

Mgr. Marie Talašová LL.M.
International Legal Services Department
The Ministry of Finance of the Czech Republic
Letenska 15
118 10 Prague 1
Czech Republic

and

Dr. Gerold Zeiler
Dr. Alfred Siwy
zeiler.partners Rechtsanwalte GmbH
Stubenbastei 2
1010 Vienna
Austria

TABLE OF CONTENTS

FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Amended Memorial	Claimant's Amended Memorial, filed on 11 January 2016
C-	Claimant's Exhibit
CL-	Claimant's Legal Authority
Claimant	A11Y LTD.
Claimant's Skeleton Argument	Claimant's Skeleton Argument, filed on 20 September 2016
Counter-Memorial on Jurisdiction	Claimant's Counter-Memorial on Jurisdiction and Request for Endorsement of the Claimant's Right to Amend the Memorial, filed on 11 January 2016
Hearing	Hearing on Jurisdiction held on 28 and 29 September 2016 at ICC hearing facilities in Paris, France
ICSID, or the Centre	International Centre for Settlement of Investment Disputes
Memorial on the Merits	Claimants' Memorial, filed on 30 May 2015
Notice of Arbitration	Claimant's Notice of Arbitration, filed on 14 October 2014
Parties	Claimant and Respondent
PO 1	Procedural Order No. 1, issued by the Tribunal on 23 March 2015
PO 2	Procedural Order No. 2 – Decision on Bifurcation, issued by the Tribunal on 5 October 2015
PO 3	Procedural Order No. 3 – Amendment to the Procedural Timetable, issued by the Tribunal on 11 December 2015
PO 4	Procedural Order No. 4 – Decision on Claimant's Request for Endorsement of its Right to Amend its Memorial, issued by the Tribunal on 1 February 2016

PO 5	Procedural Order No. 5 – Decision on Respondent's Document Production Requests, issued by the Tribunal on 18 February 2016
PO 6	Procedural Order No. 6 – Organization of the Hearing on Jurisdiction, issued by the Tribunal on 18 February 2016
R-	Respondent's Exhibit
Reply on Jurisdiction	Respondent's Reply on Jurisdiction, filed on 25 April 2015
Rejoinder on Jurisdiction	Claimant's Rejoinder on Jurisdiction, filed on 25 July 2016
Respondent	Czech Republic
Respondent's Skeleton Argument	Respondent's Skeleton Argument, filed on 20 September 2016
RL-	Respondent's Legal Authority
Statement of Defence	Respondent's Counter-Memorial (Statement of Defence), filed on 31 August 2015
Transcript	Transcript of the hearing in September 2016
Treaty or BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments with Protocol, 10 July 1990
UNCITRAL Rules	The United Nations Commission on International Trade Law's Arbitration Rules as adopted by the General Assembly Resolution 31/98 on 15 December 1976
VCLT or Vienna Convention	Vienna Convention on the Law of Treaties as entered into force on 27 January 1980

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted pursuant to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments dated 10 July 1990 (the "BIT" or "Treaty"), which entered into force on 26 October 1992, and the Arbitration Rules of the United Nations Commission on International Trade Law, 1976 (the "UNCITRAL Rules").

2. The claimant is A11Y LTD. and is hereinafter referred to as "A11Y" or the "Claimant."

3. The Claimant is a limited liability company incorporated under the laws of the United Kingdom with its registered address at 6 Bexley Square, Salford, Manchester, United Kingdom, M3 6BZ.

4. The respondent is the Czech Republic and is hereinafter referred to as "Czech Republic" or the "Respondent."

5. The Claimant and the Respondent are hereinafter collectively referred to as the "Parties." The Parties' respective representatives and their addresses are listed above on page (i).

6. The Parties' specific requests for relief are set forth in Section III below, and a fuller summary of their positions is contained in Section IV below. In its analysis, the Tribunal has considered not only the positions of the Parties as summarised in this Decision, but the numerous detailed arguments made in the Parties' written and oral pleadings as well. To the extent that these arguments are not referred to expressly, they should be deemed to be subsumed into the Tribunal's analysis.

II. PROCEDURAL HISTORY

7. The Claimant commenced this arbitration by filing a Notice of Arbitration on 10 October 2014 pursuant to Article 3 of the UNCITRAL Rules. In accordance with Article 3(4) of the UNCITRAL Rules, the Claimant proposed that the dispute be heard and decided by three arbitrators, and appointed Dr. Stanimir Alexandrov as arbitrator.

8. On 11 November 2014, the Respondent appointed Ms. Anna Joubin-Bret as arbitrator.

9. On 19 December 2014, the two party-appointed arbitrators appointed the Honourable L. Yves Fortier PC, CC, OQ, QC, as President of the Tribunal.

10. On 16 January 2015, the Parties informed the Secretary-General of the International Centre for Settlement of Investment Disputes ("ICSID") that they had reached an agreement on 12 January 2015 that ICSID would administer the case.

11. By letter of the same date, the Secretary-General accepted the Parties' invitation to provide full administrative services in relation to this proceeding. Ms. Martina Polasek, ICSID Senior Legal Counsel as she then was, was designated to serve as Secretary of the Tribunal. The Parties were later informed, on 28 July 2015, that Ms. Jara Mínguez Almeida, ICSID Legal Counsel, would replace Ms. Martina Polasek as Secretary of the Tribunal.

12. The Tribunal held a first session with the Parties on 9 March 2015 by telephone conference. At the session, the Parties confirmed that the Members of the Tribunal had been validly appointed and agreed, *inter alia*, that (i) the applicable Arbitration Rules would be the UNCITRAL Arbitration Rules 1976, except as modified by agreement of the Parties in accordance with Article 8(2)(a) of the Treaty, (ii) the procedural language would be English and (iii) the place of arbitration would be Paris, France. The Parties' agreement on procedural matters, and the Tribunal's determination of the schedule, were embodied in **Procedural Order No. 1** of 23 March 2015.

13. During the first session, the Parties and the Tribunal also discussed the Claimant's request of 8 March 2015 for an initial hearing to provide the Tribunal with an introduction to the accessibility technology behind the Claimant's alleged investment. The Parties filed additional observations on the Claimant's request by communications of 12 and 16 March 2015. In Procedural Order No. 1, the Tribunal denied the Claimant's request for an initial hearing as it was unable to determine whether it would be useful, relevant and appropriate at that stage of the proceeding and invited the Claimant to renew its request, if it so wished, following the Respondent's filing of its Statement of Defence.

14. On 30 May 2015, the Claimant filed its Memorial on the Merits pursuant to paragraph 14.2 of Procedural Order No. 1. The Memorial was accompanied by:

- Expert Report on the Assessment of Damage of Prof. Robert C. Lind, Mr. Pavel Urban and Dr. Pavel Vacek dated 30 May 2015;
- Witness Statement of Mr. Jan Buchal dated 30 May 2015;
- Witness Statement of Mr. Hynek Hanke dated 28 May 2015;
- Witness Statement of […] dated 22 May 2015;
- Witness Statement of […] dated 25 May 2015;
- Witness Statement of […] dated 20 May 2015;
- Witness Statement of […] dated 21 May 2015;
- Witness Statement of […] dated 28 May 2015;
- Witness Statement of […] dated 25 May 2015;
- Witness Statement of […] dated 25 May 2015;
- Factual Exhibits C-1 through C-41; and
- Legal Authorities CL-1 through CL-32.

15. In accordance with paragraph 14.3 of Procedural Order No. 1, the Respondent filed its Statement of Defence on 31 August 2015, which contained its Request for the Bifurcation of the proceeding between jurisdictional and merits phases. The Statement of Defence was accompanied by:

- Factual Exhibits R-1 through R-28; and
- Legal Authorities RL-1 through RL-93.

16. On 15 September 2015, in accordance with paragraph 14.4 of Procedural Order No. 1, the Claimant filed its Response to the Request for Bifurcation, which was accompanied by:

- Factual Exhibits C-42 through C-53; and

- Legal Authorities CL-33 through CL-40.

17. On 21 September 2015, Ms. Annie Lespérance was appointed as Assistant to the Tribunal with the agreement of the Parties.

18. On 5 October 2015, the Tribunal issued **Procedural Order No. 2** granting the Respondent's Request for Bifurcation in respect of three of its four objections to jurisdiction, namely the scope of application of Article 8(1) of the Treaty, whether the Claimant is a foreign investor and whether the Treaty is superseded by EU Law. The Respondent's objection pertaining to whether the Claimant had made an investment in the Czech Republic was joined to the merits.

19. On 4 December 2015, the Claimant instructed Withers LLP and Lucas Bastin of Quadrant Chambers as its new counsel. In view of this change of counsel, the Claimant requested the Tribunal to extend the deadline for the filing of its Counter-Memorial on Jurisdiction until 11 January 2016. On 9 December 2015, the Respondent filed observations on the Claimant's request for an extension and made its own requests in the event the extension was granted. On 11 December 2015, the Tribunal issued **Procedural Order No. 3**, in which it granted the Parties' requests and amended the procedural timetable.

20. On 11 January 2016, the Claimant filed its Counter-Memorial on Jurisdiction pursuant to paragraph 5 of Procedural Order No. 3, and a Request for Endorsement of the Claimant's Right to Amend the Memorial. The Counter-Memorial on Jurisdiction was accompanied by:

    - Factual Exhibits C-54 through C-62;
    - Legal Authorities CL-41 through CL-105.

    The Amended Memorial was accompanied by:

    - Legal Authorities CL-106 through CL-118.

21. The Respondent submitted its comments on the Claimant's Request for Endorsement of the Claimant's Right to Amend the Memorial on 20 January 2016. The Respondent objected to the admission of new claims. In the event the Tribunal should admit the Claimant's new

claims, the Respondent requested an opportunity to be heard in a further submission following the Claimant's comments on the Respondent's jurisdictional objections arising from the Claimant's new claims. On the same day, the Tribunal invited the Claimant to file any comments it may have on the Respondent's letter.

22. By its letter of 26 January 2016, the Claimant maintained its request and "*propose[d] that the Respondent articulate any new jurisdictional objections that the Respondent can conceive in the Respondent's Reply on Jurisdiction, which was scheduled for 25 April 2016. Thereafter, the Tribunal [could] decide whether additional round(s) of pleadings [were] necessary in the circumstances*."

23. On 1 February 2016, the Tribunal issued **Procedural Order No. 4**. The Tribunal decided that (i) the Claimant's Request for Endorsement of its Right to Amend its Memorial was granted; (ii) the Claimant's Amended Memorial was admitted into the record; (iii) the Respondent may include any additional jurisdictional objections arising from the Claimant's amended claims in its Reply on Jurisdiction to be filed on 25 April 2016; (iv) the Claimant may respond to the Respondent's Reply on Jurisdiction, including any additional jurisdictional objections arising from its amended claims in its Rejoinder on Jurisdiction to be filed on 25 July 2016; and (v) no later than one week following the filing of the Claimant's Rejoinder on Jurisdiction, the Respondent may seek leave from the Tribunal to file a brief reply submission limited to the Claimant's response to the Respondent's additional jurisdictional objections arising from the Claimant's amended claims. Should the Respondent file such a request and should the Tribunal accede to it, the Tribunal would afford the Claimant with an opportunity to comment on the Respondent's further reply submission.

24. As contemplated in paragraph 5 of Procedural Order No. 3, on 12 February 2016, the Respondent submitted its document production requests.

25. On 18 February 2016, the Tribunal issued its decisions with respect to document production requests in **Procedural Order No. 5**, including Annex A, listing the documents which the Claimant was ordered to produce.

26. On 25 April 2016, the Respondent filed its Reply on Jurisdiction pursuant to paragraph 5 of Procedural Order No. 3. The Reply on Jurisdiction was accompanied by:

- Factual Exhibits R-29 through R-39; and
- Legal Authorities RL-94 through RL-124.

27. On 25 July 2016, the Claimant filed its Rejoinder on Jurisdiction pursuant to paragraph 5 of Procedural Order No. 3. The Rejoinder on Jurisdiction was accompanied by:

- Factual Exhibits C-63 through C-74; and
- Legal Authorities CL-119 through CL-137.

28. On 7 September 2016, on behalf of the Tribunal, the President held a Pre-Hearing organizational meeting with the Parties by telephone conference. On 8 September 2016, the Tribunal issued **Procedural Order No. 6** regarding the organization of the Hearing on Jurisdiction.

29. On 20 September 2016, pursuant to paragraph 28 of Procedural Order No. 6, the Parties filed skeleton arguments.

30. A hearing on the Bifurcated Jurisdictional Objections took place in Paris on 28 and 29 September 2016. In addition to the Members of the Tribunal, the Secretary of the Tribunal, and the Assistant to the Tribunal, present at the hearing were:

CLAIMANT	
Mr./Ms. First Name/ Last Name	**Affiliation**
Counsel:	
Mr. Hussein Haeri	Withers LLP
Mr. David Walker	Withers LLP
Ms. Ruzin Dagli	Withers LLP
Mr. Lucas Bastin	Quadrant Chambers
Parties:	
Mr. Jan Buchal	A11Y LTD.
Mr. Boris Dušek	A11Y LTD.
Mr. Hynek Hanke	A11Y LTD.
[…]	A11Y LTD. (carer)

Witness:	
Mr. Jan Buchal	A11Y LTD.

RESPONDENT	
Mr./Ms. First Name/ Last Name	**Affiliation**
Counsel:	
Mr. Alfred Siwy	zeiler.partners Rechtsanwälte GmbH
Parties:	
Ms. Hana Křížová	Czech Ministry of Finance
Ms. Anna Bilanová	Czech Ministry of Finance

COURT REPORTER	
Ms. Claire Hill	The Court Reporter LLC

INTERPRETER	
Ms. Martina Parker	Independent Interpreter

31. The Parties filed their submissions on costs on 21 October 2016.

32. By letter dated 27 October 2016, the Respondent submitted that it considered that a decision on costs in an interim decision would be premature and prejudicial to its rights.

33. By letter dated 2 November 2016, the Claimant responded to the Respondent's letter.

III. PARTIES' REQUESTS FOR RELIEFS

A. Respondent's Request for Relief

34. The Respondent requests the Tribunal to:

(1) declare that it lacks jurisdiction to hear Claimant's claims and hence to dismiss its claims; and

(2) order Claimant to reimburse Respondent for all costs, fees and expenses incurred in relation to these proceedings.[1]

B. Claimant's Request for Relief

35. The Claimant seeks the following relief from the Tribunal:

(1) a declaration that the Tribunal has jurisdiction over the entirety of the Dispute;

(2) an order that the Respondent pay the costs of this bifurcated jurisdictional proceeding, including the costs of the Tribunal and ICSID, and the legal and other costs incurred by the Claimant; and

(3) such further declaration, order, or relief as the Tribunal may deem appropriate.[2]

IV. JURISDICTION

36. Three of the Respondent's jurisdictional objections have been bifurcated. In addition to those three objections, the Respondent, in its Reply on Jurisdiction, advanced a further objection that the Claimant, prior to initiating the arbitration, did not adhere to the cooling-off period of four months. The Respondent's four jurisdictional objections and the Claimant's comments thereon are summarized below in the order in which they were presented by the Respondent in its pleadings.

A. The Scope of Application of Article 8(1) of the Treaty

(1) The Parties' Positions

a. Respondent's Position

37. The Respondent submits that Article 8(1) of the Treaty constitutes an offer of the Respondent to arbitrate "*[d]isputes between an investor of one Contracting Party and the*

[1] Reply on Jurisdiction, p. 57.

[2] Claimant's Skeleton Argument, para. 194.

other Contracting Party concerning an obligation of the latter under Article 2(3), 4, 5 and 6 of the Agreement […]".[3]

38. The Respondent argues that the ordinary meaning of the language used in Article 8(1) is "*blatantly clear: Respondent offered to arbitrate disputes deriving from alleged violations of article 2(3) of the BIT (addressing obligations deriving from contracts concluded between investors and host states), article 4 of the BIT (compensation for losses from armed conflict, state of national emergency or civil disturbances), article 5 (expropriation) and article 6 (free transfer of investment and returns). Only such disputes shall be submitted to arbitration under paragraph (2) [of Article 8] […]*".[4]

39. According to the Respondent, the Claimant initially alleged violations by the Respondent of (i) Article 2(2) of the Treaty, including violations of the fair and equitable treatment ("FET") standard and the prohibition of unreasonable and discriminatory measures, and (ii) the national treatment standard included in Article 3(1) of the Treaty.

40. The Claimant, in its Amended Memorial, now also claims that its investment has been expropriated pursuant to Article 5(1) of the Treaty.

41. Therefore, according to the Respondent, "*article 8(1) of the BIT does not apply to any of the Claimant's claims but for its claim for expropriation*"[5] and consequently the Tribunal lacks jurisdiction over the Claimant's claims under Articles 2(2) and 3(1) of the Treaty.

42. In support of its argument, the Respondent relied on, *inter alia*, the decision in *Nagel v Czech Republic*[6] involving the very same Treaty under which the Claimant in the present proceeding is submitting its claims. In that decision the Tribunal concluded as follows:

> *271. […] Indeed, Article 8(1) only states that disputes under Articles 2(3), 4, 5, and 6 may be submitted to arbitration and there is nothing in the text*

[3] Statement of Defence, para. 26. See Treaty at CL-1.

[4] Statement of Defence, para. 27.

[5] Reply on Jurisdiction, para. 2.

[6] Statement of Defence, para. 29. *Mr. William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award, 9 September 2003, RL-10.

> *to indicate that the arbitration may also include other questions arising under the Treaty. The Arbitral Tribunal therefore concludes that Mr Nagel's claims under Articles 2(2), 3(1) and 3(2) are not admissible in the present arbitration and must be rejected.*

43. In response to the Claimant's arguments that (i) Article 2(3) of the Treaty should be interpreted as a "gate" to the other provisions of the Treaty and that (ii) in any event, the most-favored-nation ("MFN") clause attracts the more favourable dispute resolution provision found in the Netherlands-Czech BIT, the Respondent argues the following.

(i) Scope of Article 2(3) of the Treaty

44. The Respondent submits that the correct interpretation to be given to Article 2(3) of the Treaty is the following:

> *Article 2(3) refers to situations in which the investor and the host state conclude specific agreements. Its first sentence stipulates that such agreements can be more advantageous for the investor but may not be at variance with the BIT otherwise. Its second sentence then sets out that the host state shall observe the provisions of such specific agreements and the provisions of the BIT. This wording leaves little doubt that the second sentence refers to the first and must be read in connection with it. It obliges the host state to adhere to its contractual arrangements and, consonant with the first sentence, to the provisions of the BIT where these are more advantageous to the partner of its agreement. The provision, however, is limited to situations in which a specific agreement has been concluded.*[7]
>
> *[…]*
>
> *Claimant's interpretation of the BIT assumes that article 8(1) of the BIT was drafted for the purpose of limiting the jurisdiction of the Arbitral Tribunal to certain disputes, while article 2(3) was inserted for the*

[7] Respondent's Skeleton Argument, para. 6.

> *purpose of establishing the jurisdiction of the tribunal over all disputes deriving from the BIT. Claimant's interpretation therefore implies that the limitation included in article 8(1) are meaningless. […]*[8]

(ii) Scope of the MFN clause

45. The Respondent submits that the Claimant cannot invoke the MFN clause of the Treaty to rely on the dispute resolution provision of the Netherlands-Czech BIT for the following three reasons.

46. First, the Respondent argues that the MFN clause cannot be interpreted to allow the invocation of a right to arbitration in a third treaty as this would leave the limitations of Article 8(1) without any meaning:

> *Article 8(1) of the BIT grants the investor the right to arbitrate disputes deriving from alleged breaches of articles 2(3), 4, 5 and 6 of the BIT. It is therefore evident that the parties to the BIT agreed that the host state shall only consent to arbitration of those disputes. Claimant's interpretation of the MFN clause would render this clear and unambiguous restriction completely meaningless.*[9]

47. The Respondent relies, *inter alia*, on the tribunal's decision in *Austrian Airline v Slovakia* in support of its argument[10]. The tribunal, in that decision, wrote:

> *Faced with a manifest, specific intent to restrict arbitration to disputes over the amount of compensation for expropriation to the exclusion of disputes over the principle of expropriation, it would be paradoxical to invalidate that specific intent by virtue of the general, unspecific intent expressed in the MFN clause.*[11]

---

[8] Respondent's Skeleton Argument, para. 8.

[9] Respondent's Skeleton Argument, para. 14.

[10] Respondent's Skeleton Argument, para. 15.

[11] *Austrian Airlines v. The Slovak Republic*, UNCITRAL *Ad Hoc* Arbitration, Final Award, 9 October 2009, para. 135, Exhibit RL-5.

48. Second, the Respondent avers that MFN clauses do not permit investors to invoke arbitration clauses in order to import into the Treaty consent to arbitration where none exists in the basic Treaty. The Respondent asserts that "*[a]n investor can rely on an MFN clause to import dispute resolution provisions if they allow the claimant to exercise a right to arbitrate existing under the basic treaty in a more favourable way*".[12] As it is clear that Article 8(1) of the Treaty does not include the Respondent's consent to arbitrate disputes under Article 2(2), 3(1) and 3(2) of the Treaty, the Respondent argues that the MFN clause cannot be invoked to import consent from the Netherland-Czech BIT.[13]

49. In support of its argument, the Respondent relies, *inter alia*, on the tribunal's decision in *EURAM v Slovakia* where that tribunal wrote:

> *As regards those categories of disputes, there is no offer of arbitration at all. Acceptance of the Claimant's argument would therefore mean that the MFN clause completely transformed the scope of the arbitration provision […].*
>
> *The Tribunal therefore considers that the special character of the provision for investor-State arbitration and the radical nature of the transformation in that provision which acceptance of the Claimant's argument would entail, both militate against attributing to Article 3 of the BIT the effect suggested by the Claimant unless there are clear indications that such was the intention of the States Parties.*[14]

50. Third, the Respondent argues that the MFN clause in the present case only applies to treatment under domestic law and does not apply to arbitration. According to the Respondent, the MFN clause contains a "significant limitation":

---

[12] Respondent's Skeleton Argument, para. 28.

[13] Respondent's Skeleton Argument, para. 33.

[14] *European American Investment Bank AG (Austria) v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, paras. 448 et seq., **Exhibit CL-93**.

> *It expressly refers to treatment "under its law". Hence, all an investor can ask for is that its treatment by application of domestic law is no less favourable than that of other investors. […]*
>
> *If the limitation is to have any meaning at all, it must refer to treatment under domestic law as opposed to treatment under international treaties. If the latter were supposed to be included in the formulation, it would have no meaning of its own. As the right to arbitration Claimant is relying on is incorporated not in domestic law but in an international treaty, the MFN clause cannot serve as a basis for importing it.*[15]

b. Claimant's Position

51. The Claimant submits at the outset that the Respondent has conceded in its Reply on Jurisdiction that the Tribunal has jurisdiction over the Claimant's expropriation claim under Article 5 of the Treaty. As such, says the Claimant, "*there is no disagreement on the existence of the Arbitral Tribunal's jurisdiction, or that this arbitration will be proceeding to the next phase on liability and damages. What remains in dispute in the present jurisdictional phase is only the scope of the Arbitral Tribunal's jurisdiction.*"[16]

52. The Claimant accepts that, "*on its face, Article 8(1) contains reference only to Articles 2(3), 4, 5 and 6.*" However, submits the Claimant, "*the Respondent ignores the […] fact that Article 2(3) serves as a 'gate' towards all standards of protection contained in various articles of the BIT*"[17] and that accordingly, the Tribunal has jurisdiction over the entirety of the Claimant's claims.

53. Article 2(3) of the Treaty provides that:

> *Investors of one Contracting Party may conclude with the other Contracting Party specific agreements, the provisions and effect of which, unless more beneficial to the investor, shall not be at variance*

[15] Respondent's Skeleton Argument, paras. 23-24.

[16] Claimant's Skeleton Argument, para. 4.1

[17] Response to the Request for Bifurcation, para. 2.

> *with this Agreement. Each Contracting Party shall, with regard to investments investors the other Contracting Party, observe the provisions these specific agreements, as well as the provisions this Agreement. (Claimant's emphasis)*

54. According to the Claimant, "*the Respondent's obligation under Article 2(3) to observe 'the provisions of this Agreement'" applies to all the provisions of the Agreement. As such, this undoubtedly includes Articles 2(2), 3(1), 3(2) and 5 of the BIT*".[18] In addition, argues the Claimant, this obligation is mandatory in view of the use of the plain meaning of the word "shall" (observe … the provisions of this Agreement) in the provision.[19]

55. The Claimant's position that the Respondent's breaches of Articles 2(2), 3(1), 3(2) and 5 of the Treaty (i.e., "provisions of this Agreement") also breached the observance of undertakings clause in Article 2(3) of the Treaty is further supported in the jurisprudence argues the Claimant. The Claimant relies on the Tribunal's conclusion in *Eureko v Poland*:

> *... the Tribunal concludes that the actions and inactions of the Government of Poland are in breach of Poland's obligations under the Treaty —those that have been held to be unfair and inequitable and expropriatory in effect —also are in breach of its commitments under Article 3.5 of the Treaty to 'observe any obligations it may have entered into with regards to investments of investors' of the Netherlands.*[20]

56. The Claimant also submits that its argument is not impacted by the *Nagel* award since nothing in that award suggests that counsel for the claimant in that case made the same argument that the Claimant is now making before this Tribunal. Moreover, according to the Claimant, this issue was not a crucial one in that case as the *Nagel* tribunal proceeded to the merits and dismissed the claims on their merits.[21]

---

[18] Claimant's Skeleton Argument, para. 11.

[19] Claimant's Skeleton Argument, para. 13.

[20] *Eureko B.V. v. Republic of Poland*, *ad hoc* proceeding, Partial Award, 19 August 2005, ¶ 260, CL-48.

[21] Response to the Request for Bifurcation, para. 5.

57. Alternatively, the Claimant invokes the MFN clause in Article 3 of the Treaty to attract the more favorable dispute resolution provision found in the Netherlands-Czech BIT. Article 8 of that Treaty provides that "all disputes" between an investor and the host state can be resolved through investment arbitration.[22]

58. The Claimant submits that the case law supports the proposition that MFN treatment does extend to treatment under a dispute resolution provision.[23]

59. While the Claimant concedes that some tribunals have refused to use an MFN clause to expand a dispute resolution provision, the Claimant argues that "*these tribunals reached such a view not because a 'host state's consent to arbitrate' in a dispute resolution provision cannot be broadened by an MFN provision, but rather because an MFN provision cannot be used to summon into existence rights which did not previously exist.*"[24]

60. In the present case, the Claimant asserts that it "*is not seeking to use the MFN provision to arrogate to itself rights that it does not otherwise have. It only seeks more favourable treatment in relation to rights that already exist in, and from which it already benefits under, the BIT.*"[25]

61. In this respect, the Claimant argues that (i) it has a right to initiate international arbitration under Article 8 of the Treaty,[26] (ii) it has the substantive rights set out in Articles 2 to 6 of the Treaty,[27] and (iii) it merely seeks to create a direct connection between these two sets

---

[22] Response to the Request for Bifurcation, para. 6.

[23] Claimant's Skeleton Argument, para. 27. See Claimant's Counter-Memorial on Jurisdiction, paras. 73-80, citing *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, CL-65, paras. 53-94; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, CL-67, paras. 52 - 66,; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICISD Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006, CL-67, paras. 52 - 68, ; *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, CL-69, paras. 56 - 111; *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2006, CL-53, paras. 41 - 49; *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction For Lack Of Consent, 3 July 2013, CL-69, paras. 13 - 97.

[24] Claimant's Skeleton Argument, para. 30.

[25] Claimant's Skeleton Argument, para. 33.

[26] Claimant's Skeleton Argument, para. 34.

[27] Claimant's Skeleton Argument, para. 35.

of existing rights through the MFN clause.[28] In other words, submits the Claimant, "*[t]his connection of the Claimant's existing rights is (only) a treatment of the Claimant in relation to rights it already has under the BIT, and for which it may benefit from more favourable treatment given to investors of other nationalities in other BITs signed by the Respondent.*"[29]

62. The Claimant also submits that Article 7 of the Treaty explicitly lists exceptions to the application of MFN treatment. The list does not include dispute resolution.

63. For the foregoing reasons, the Claimant submits that the Tribunal has jurisdiction over all of the Claimant's claims.

(2) The Tribunal's Analysis

64. The provision of the Treaty in virtue of which the Tribunal derives its competence is Article 8 which gives an investor the right to submit a dispute under the Treaty to arbitration.

65. Article 8(1) of the Treaty provides as follows:

> *Disputes between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under Articles 2(3), 4, 5 and 6 of this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four months from written notification of a claim, be submitted to arbitration under paragraph (2) below if either party to the dispute so wishes.*

66. Both Parties agree that Article 8(1) does not refer to all disputes under the Treaty but provides that only disputes concerning an obligation of a Contracting Party under Articles 2(3), 4, 5 and 6 of the Treaty which have not been amicably settled shall be submitted to arbitration if either party to the dispute so wishes.

[28] Claimant's Skeleton Argument, para. 36.

[29] Claimant's Skeleton Argument, para. 36.

67. Both Parties agree that the Tribunal has jurisdiction over the Claimant's expropriation claim under Article 5 of the Treaty.

68. Both Parties also agree that the Tribunal has jurisdiction under Article 8(1) of the Treaty over the observance of specific undertakings obligation pursuant to Article 2(3) of the Treaty.

69. The Parties disagree, however, as to whether the Tribunal has jurisdiction over the Claimants' claims based on Article 2(2) (fair and equitable treatment and full protection and security) and Article 3 (national treatment) of the Treaty.

a. Scope of Article 2(3) of the Treaty

70. On the basis of the plain and ordinary meaning of Article 8(1), the Respondent argues that only disputes under Articles 2(3), 4, 5 and 6 of the Treaty can be the subject of arbitration and that therefore the Tribunal lacks jurisdiction over the Claimant's claims under Articles 2(2), and 3 of the Treaty.

71. The Claimant, on the other hand, interprets Article 2(3) of the Treaty, to which Article 8(1) refers specifically, as meaning that the Respondent has the obligation to observe all the provisions of the Treaty which include Articles 2(2), 3(1) and 3(2), not only Article 5.

72. Article 2(3) of the Treaty provides as follows:

> *Investors of one Contracting Party may conclude with the other Contracting Party specific agreements, the provisions and effect of which, unless more beneficial to the investor, shall not be at variance with this Agreement. Each Contracting Party shall, with regard to investments of investors of the other Contracting Party, observe the provisions of these specific agreements, as well as the provisions of this Agreement.*

73. The Tribunal must therefore determine the meaning and the scope of Article 2(3) of the Treaty. Which obligations are covered by the second sentence of Article 2(3) of the Treaty, having regard to the text of Article 8(1) which provides that *"Disputes between an investor*

of one Contracting Party and the other Contracting Party concerning an obligation of the latter under Articles 2(3) […] shall […] be submitted to arbitration"? (Tribunal's emphasis)

74. The Parties agree that Article 2(3) combines (i) a floor provision and (ii) an umbrella clause.

75. A floor provision often, as in this case, refers to specific agreements and provides that the terms of a specific agreement (or undertaking) entered into between the State and an investor cannot be less favourable than the Treaty. If the terms of a specific agreement (or undertaking) are less favorable than those of the Treaty, the more favorable provisions of the Treaty will apply.

76. An umbrella clause is typically found in an investment treaty as part of the general obligations of treatment of an investment and is not usually combined with a floor provision. A typical umbrella clause reads as follows: "*Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party*".[30]

77. The Claimant, when it analysed the second sentence of Article 2(3), argued that this sentence not only obliges the Respondent to observe the provision of any specific agreement which may have been entered into between the Respondent and UK investors, but also "*(…) serve[d] as a 'gate' towards all standards of protection contained in various articles of the BIT*."[31] This is so by virtue of the last 8 words in Article 2(3): "*as well as the provisions of this Agreement*".

78. While the Tribunal agrees with the Claimant that, with regard to investments of investors of the other Contracting Party, the standard umbrella clause applies to the obligations contained in specific agreements, it cannot agree with the Claimant that the last 8 words in Article 2(3), "*as well as the provisions of this Agreement*", import into the Treaty the

[30] See for example, Article 2(2) of the UK Model BIT, Exhibit R-29.

[31] Response to Request for Bifurcation, para. 2.

obligation of the Respondent to observe all standards of protection in the Treaty, including Articles 2(2), and 3.

79. The Tribunal is of the view that, in the present case, the obligation to observe the provisions of the Treaty in Article 2(3) is required by the combination of the floor provision and the umbrella clause for the following reasons.

80. Firstly, the scope of Article 2(3) is limited to investors that have specific agreements with the host state. The floor provision covers only investors with specific agreements and the umbrella clause refers to "these specific agreements." It is with respect to such investors that Article 2(3) requires the Contracting Parties to observe both the provisions of the specific agreements and the provisions of the Treaty.

81. As noted earlier, a typical umbrella clause such as the one found in the model UK BIT provides that: "*Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party*". [32]

82. "Any obligation" can refer not only to contractual obligations but also to treaty obligations. The Contracting States in the present Treaty merely spelled out what those obligations consist of, namely obligations under specific agreements as well as obligations under the Treaty in order to ensure that a tribunal seized of a contractual dispute brought under the Treaty by virtue of the umbrella clause will not be limited to the application of the contract itself but also to "the provisions of this Agreement".

83. Secondly, the Tribunal notes that the Claimant's interpretation would lead to an illogical result. In order to arbitrate a claim on the basis of the State's obligation to grant fair and equitable treatment to the investment of an investor such as the Claimant in this case, a claimant would merely have to invoke a breach of Article 2(3).

84. By so doing, the claimant would override the specific and limited consent to arbitration found in Article 8(1) of the Treaty.

[32] Tribunal's emphasis.

85. This is precisely the interpretation which the *Nagel* tribunal, analysing the very same Treaty as that invoked in the present case, concluded, in clear terms, had to be rejected. The tribunal said:

> *271. […] Indeed, Article 8(1) only states that disputes under Articles 2(3), 4, 5, and 6 may be submitted to arbitration and there is nothing in the text to indicate that the arbitration may also include other questions arising under the Treaty. The Arbitral Tribunal therefore concludes that Mr. Nagel's claims under Articles 2(2), 3(1) and 3(2) are not admissible in the present arbitration and must be rejected.*[33]

86. Thirdly, the Tribunal must give Article 8(1) an *effet utile*. The Claimant's interpretation would render the limited consent to arbitration in Article 8(1) without any effect.

87. Fourthly, if the Tribunal accepted the Claimant's interpretation, it would lead to another illogical outcome. It would mean that, as the Claimant has done in the present case, an investor claiming a breach of the fair and equitable treatment standard under Article 2(2) of the Treaty (or of any other substantive protection of the Treaty) could also argue that this breach constitutes a breach of Article 2(3) since the Contracting State has not observed the "provisions of this Agreement".

88. A breach of Article 2(3) can only be invoked by an investor who has a specific agreement with the Contracting State. The second sentence of Article 2(3) allows this investor to invoke not only a breach of the specific agreement but also a breach of the Treaty as a result of the breach of the specific agreement.

89. The Tribunal's interpretation does not provide investors who have specific agreements with a Contracting State preferred treatment compared to investors who don't have such agreements. The investor who has a specific agreement with the State will be able to submit its dispute to arbitration under the Treaty by alleging that the breach of the specific agreement by the State constitutes a breach of the Treaty by virtue of the umbrella clause.

---

[33] *Mr. William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award, 9 September 2003, RL-10, at para. 271. Emphasis added.

In other words, while the investor's contractual claims remain, the umbrella clause in Article 2(3) gives the investor a second legal basis on which he can argue a treaty or "umbrella clause" claim.

90. In summary, the Tribunal concludes that it has jurisdiction over alleged violations of Articles 2(3), 4, 5 and 6 of the Treaty but not over violations of other Articles of the Treaty.

91. The Claimant confirmed at the hearing that it is not advancing any claims under the Treaty pursuant to a specific agreement with the Czech Republic. In view of the Tribunal's finding that Article 2(3) of the Treaty is only applicable in a dispute where there is a specific agreement, the Claimant's request for relief for a "*declaration that the Czech Republic has breached Article 2(3) of the Treaty by failing to observe the provisions of the Treaty set out in sub-clauses (a) to (d) above*"[34] fails and the Tribunal so finds.

92. The Tribunal will now proceed with its analysis of the Claimant's alternative argument. In this section, the Tribunal will determine whether the MFN clause can broaden the scope of Article 8(1) of the Treaty which would enable the Tribunal to confirm that it has jurisdiction over the Claimant's claims under Articles 2(2) and 3 of the Treaty.

b. Scope of the MFN clause

93. Article 3 of the Treaty provides for most-favoured-nation treatment as follows:

> *3(1) Each Contracting Party shall ensure that under its law investments or returns of investors of the other Contracting Party are granted treatment no less favourable than that which it accords to investments or return of*

[34] Claimant's Amended Memorial, para. 150 (e). The Tribunal recalls that sub-clauses (a) to (d) of para. 150 of the Claimant's Amended Memorial read as follows:

"(a) a declaration that the Czech Republic has breached Article 2(2) of the Treaty by failing to accord Claimant's investment fair and equitable treatment;
(b) a declaration that the Czech Republic has breached Article 2(2) of the Treaty by impairing Claimant's management, maintenance, use, enjoyment or disposal of its investment by unreasonable and discriminatory measures;
(c) a declaration that the Czech Republic has breached Article 3 of the Treaty by failing to provide national treatment;
(d) a declaration that the Czech Republic has breached Article 5(1) of the Treaty by imposing measures having effect equivalent to expropriation of the Claimant's investment in the Czech Republic;"

its own investors or to investments or returns of investors of any third State.

3(2) Each Contracting Party shall ensure that under its law investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, are granted treatment not less favourable than that which it accords to its own investors or to investors of any third State.

94. The Claimant invokes this most-favored-nation clause to attract the more favorable dispute resolution provision found in the Netherlands-Czech BIT which provides that "all disputes" can be resolved through arbitration.

95. The Tribunal is of the view that an MFN clause can, *a priori*, apply to dispute settlement.

96. The Final Report of the ILC Study Group on the Most-Favoured-Nation clause is instructive in this respect:

> 95. *Key to the decision in Maffezini is the conclusion that dispute settlement provisions are, in principle, part of the protection for investors and investments provided under bilateral investment agreements. Hence dispute settlement provisions by definition <u>are almost always</u> capable of being incorporated into an investment agreement by virtue of an MFN provision. Under an investment agreement, to use the language of article 9 of the 1978 draft articles, dispute settlement falls "within the limits of the subject matter" of an MFN clause.*
>
> 96. *The conclusion that procedural matters, specifically dispute settlement provisions, are by their very nature of the same category as substantive protections for foreign investors has been an important part of the reasoning in some subsequent decisions of investment tribunals. In Siemens, the tribunal stated that dispute settlement "is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through an MFN clause." The tribunal in AWG said that it could find "no basis for*

> *distinguishing dispute settlement matters from any other matters covered by a bilateral investment treaty."*[35]

97. A review of arbitral decisions on the issue of the scope of the MFN clause reveals that, where tribunals have declined to apply the MFN clause to dispute settlement, the *ratio decidendi* was either that (i) the MFN clause was invoked to override public policy considerations such as a substitution of the consent to arbitrate where none exists in the basic Treaty, and/or (ii) its scope of application was limited by the wording used in the applicable Treaty. This is consistent with the ILC Study Group's conclusion that "*dispute settlement provisions by definition are almost always capable of being incorporated into an investment agreement by virtue of an MFN provision."*[36]

98. Arbitral rulings draw a distinction between the application of an MFN clause to a more favorable dispute resolution provision where the investor has the right to arbitrate under the basic treaty, albeit under less favorable conditions, and the substitution of non-existent consent to arbitration by virtue of an MFN clause. While case law confirms that the former is possible, it has almost consistently found that the latter is not.

99. In this respect, the Tribunal notes, in particular, the reasoning of the tribunals in *Hochtief v. Argentina*,[37] *EURAM v Slovakia*[38] and *Plama v Bulgaria*[39].

100. In *Hochtief*, the tribunal found that:

> *In the present case, it might be argued that the MFN clause requires that investors under the Argentina-Germany BIT be given MFN treatment during the conduct of an arbitration but that the MFN clause can-not create a right to go to arbitration where none otherwise exists*

---

[35] International Law Commission Final Report of the Study Group on the Most-Favoured-Nation Clause, CL-70. Emphasis added by the Tribunal.

[36] Id. Emphasis added by the Tribunal.

[37] *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, CL-68.

[38] *European American Investment Bank AG (Austria) v.The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, CL-93.

[39] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, CL-37.

under the BIT. The argument can be put more generally: the MFN clause stipulates how investors must be treated when they are exercising the rights given to them under the BIT but does not purport to give them any further rights in addition to those given to them under the BIT.

The question is, does the MFN clause in question here create new rights where none previously existed? and if not, is the right to have unilateral recourse to arbitration without the 18-month litigation period a distinct, new right or is it rather a matter of the manner in which those who already have a right to arbitrate are treated?

In the view of the Tribunal, it cannot be assumed that Argentina and Germany intended that the MFN clause should create wholly new rights where none otherwise existed under the Argentina-Germany BIT. The MFN clause stipulates a standard of treatment and defines it according to the treatment of third parties. The reference is to a standard of treatment accorded to third parties, not to the extent of the legal rights of third parties. Non-statutory concessions to third party investors could, in principle, form the basis of a complaint that the MFN obligation has not been secured. In contrast (to take an example comparable to the ILC example concerning commercial treaties and extradition), rights of visa-free entry for the purposes of study, given to nationals of a third State, could not form the basis of such a complaint under the BIT. The MFN clause is not a renvoi to a range of totally distinct sources and systems of rights and duties: it is a principle applicable to the exercise of rights and duties that are actually secured by the BIT in which the MFN clause is found.[40]

101. In *EURAM*, the tribunal found that:

While the present BIT does, of course, contain a provision for investor-State arbitration, the substantive scope of that provision is strictly

[40] *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, CL-68, paras. 79 et seq.

limited. It encompasses disputes regarding Article 5 of the BIT and certain aspects of Article 4 but, as the Tribunal has found in Chapter V(A) of the Award, it excludes disputes regarding other aspects of Article 4 and alleged violations of the other provisions of the BIT. As regards those categories of disputes, there is no offer of arbitration at all. Acceptance of the Claimant's argument would therefore mean that the MFN clause completely transformed the scope of the arbitration provision.

[…]

The Tribunal therefore considers that the special character of the provision for investor-State arbitration and the radical nature of the transformation in that provision which acceptance of the Claimant's argument would entail, both militate against attributing to Article 3 of the BIT the effect suggested by the Claimant unless there are clear indications that such was the intention of the States Parties.[41]

102. In *Plama*, the tribunal noted that:

[n]owadays, arbitration is the generally accepted avenue for resolving disputes between investors and states. Yet, that phenomenon does not take away the basic prerequisite for arbitration: an agreement of the parties to arbitrate. It is a well-established principle, both in domestic and international law, that such an agreement should be clear and unambiguous. In the framework of a BIT, the agreement to arbitrate is arrived at by the consent to arbitration that a state gives in advance in respect of investment disputes falling under the BIT, and the acceptance thereof by an investor if the latter so desires.[42]

[…]

[41] *European American Investment Bank AG (Austria) v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, CL-93, paras. 448 and 450.

[42] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, CL-37, para. 198.

> *When concluding a multilateral or bilateral investment treaty with specific dispute resolution provisions, states cannot be expected to leave those provisions to future (partial) replacement by different dispute resolution provisions through the operation of an MFN provision, unless the States have explicitly agreed thereto (as in the case of BITs based on the UK Model BIT). This matter can also be viewed as forming part of the nowadays generally accepted principle of the separability (autonomy) of the arbitration clause. Dispute resolution provisions constitute an agreement on their own, usually with interrelated provisions.*[43]

103. In the present case, it is clear that the Contracting Parties' consent to arbitrate expressed in Article 8 of the Treaty is limited. The Contracting Parties explicitly agreed in this provision that they would consent to arbitrate disputes arising out of a certain and limited number of articles of the Treaty. The Tribunal is therefore of the view that, under the Treaty, the Contracting Parties have not provided their consent to arbitrate disputes arising out of any provisions of the Treaty not explicitly mentioned in Article 8.

104. The arbitral jurisprudence cited above confirms that where there is no consent to arbitrate certain disputes under the basic Treaty, an MFN clause cannot be relied upon to create that consent unless the Contracting Parties clearly and explicitly agreed thereto.

105. The Tribunal notes that the 1991 UK model treaty and most treaties concluded by the UK include a third sub-paragraph in Article 3 which reads as follows:

> *3(3) For avoidance of doubt, it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.*

106. In the present Treaty, such a paragraph was not included. A review of treaties concluded by the UK shows that, where the scope of the dispute settlement provision is limited, there is

[43] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, CL-37, para. 212.

no such paragraph. Accordingly, the Tribunal finds that the absence of the "For avoidance of doubt" paragraph in the present Treaty demonstrates the clear intention of the contracting parties to give its full application to Article 8(1). In addition, in the view of the Tribunal, the wording of Article 8(1) is crystal clear and leaves no doubt as to the express limits of the dispute settlement clause. As the *Maffezini* tribunal found, to override the Contracting States consent by virtue of an MFN provision would "*upset the finality of arrangements that many countries deem important as a matter of public policy*".[44]

107. For the foregoing reasons, the Tribunal is of the view that the scope of Article 8(1) of the Treaty cannot be expanded by virtue of the MFN clause. Accordingly, the Tribunal lacks jurisdiction over the Claimant's claims under Articles 2(2) and 3 of the Treaty by virtue of the MFN clause and it so finds.

108. Arbitrator Alexandrov takes a different view with respect to some elements of the analysis relating to the application of the MFN clause. He agrees with the underlying premise that "an MFN clause can, *a priori*, apply to dispute settlement" (paragraph 95) and that "where tribunals have declined to apply the MFN clause to dispute settlement, the *ratio decidendi* was either that (i) the MFN clause was invoked to override public policy considerations such as a substitution of the consent to arbitrate where none exists in the basic Treaty, and/or (ii) its scope of application was limited by the wording used in the applicable Treaty" (paragraph 97). He differs from his colleagues on two points. First, he believes that the analysis of the MFN clause here should begin with a textual interpretation of its terms. The clause refers to "treatment" and the first question to be addressed should be whether that term includes dispute settlement. Another question of treaty interpretation that should be addressed relates to the fact that the exceptions to MFN treatment listed in Article 7 do not mention dispute settlement. Second, the presence of the limitations (i) and (ii) referred to in paragraph 97 of the Decision (and quoted above) has not been established in this case. Consent clearly exists in the Treaty; the objection raised by the Respondent relates to the scope of consent rather than to its existence. The Decision draws "a distinction between the application of an MFN clause to a more favourable dispute

[44] *Emilio Agustín Maffezini v Kingdom of Spain,* ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, CL-63, para. 63.

resolution provision where the investor has the right to arbitrate under the basic treaty, albeit under less favourable conditions, and the substitution of non-existent consent to arbitration by virtue of an MFN clause" (paragraph 98) yet does not consider the argument that the application of the MFN clause here may relate to expanding the scope of consent rather than to "the substitution of non-existing consent." Finally, arbitrator Alexandrov believes that a more detailed and in-depth study of the history and evolution of UK BITs is necessary before one can reach the conclusion that the introduction of the "for the avoidance of doubt" language was intended to signal a break with the past rather than continuity. Such a study may show that the intent was the opposite: to make express what was presumed, *i.e.*, that the MFN clause covered dispute settlement. He disagrees with the statement in para. 106 of the Decision that "where the scope of the dispute settlement provision [in the UK BITs] is limited, there is no such ['for the avoidance of doubt'] paragraph." This statement suggests that there is a pattern in the UK BITs: where the scope of dispute settlement is limited, there is no "for the avoidance of doubt" paragraph; where it is not, there is such a paragraph. In fact, no such pattern exists – there are multiple UK BITs where the scope of dispute settlement is not limited yet there is no "for the avoidance of doubt" paragraph – and, therefore, the Decision's conclusion in para. 106 remains unsubstantiated.

B. Whether the Claimant is a Foreign Investor

(1) The Parties' Positions

a. Respondent's Position

109. The Respondent submits that the Claimant is not a foreign investor.

110. Article 1(c)(ii)(bb) of the Treaty defines the term "investor" in respect of the United Kingdom as "*corporations, firms, and associations incorporated or constituted under the law in force in any part of the United Kingdom*."[45]

[45] Statement of Defence, para. 71. See Treaty at CL-1.

111. The Respondent accepts that the Claimant is an entity incorporated under the law in force in the United Kingdom. However, the Respondent requests the Tribunal to look beyond this formalistic approach to ascertain whether the Claimant is a foreign investor.[46]

112. According to the Respondent:

> *…under customary international law, in particular the law on diplomatic protection, there is a clear exception to the rule on determining the nationality of a company be reference to the place of its incorporation: If there are no substantial links between the place of incorporation and the incorporated company, such as property, an office, substantial business activities or residence of shareholders, policy and fairness dictate that the corporate veil can be pierced.*[47]

113. The Respondent requests the Tribunal to pierce the corporate veil, as was done by several other tribunals,[48] in order to ascertain who owns and controls the Claimant. According to the Respondent, such an exercise will reveal that the Claimant is controlled and owned in majority by Mr. Buchal, a Czech national.[49]

114. In addition, the Respondent submits that the Claimant does not serve any commercial purpose in the UK. According to the Respondent, the Claimant is a shell corporation with no business activities in the United Kingdom whatsoever: "*[b]y the Claimant's own account, it conducts all its business in the Czech Republic [through its Czech subsidiary, A11Y Czech]*."[50]

115. Accordingly, the Respondent argues that the present dispute is of a purely domestic nature: a Czech businessman is conducting business exclusively in the Czech Republic. As a consequence, avers the Respondent, the Claimant cannot be considered a foreign investor

---

[46] Statement of Defence, para. 72.

[47] Respondent's Skeleton Argument, para. 58.

[48] See, *inter alia, Mr. Franz Sedelmayer v. The Russian Federation*, SCC Case, Final Award, 7 July 1998, RL-38. Respondent's Skeleton Argument, para. 60.

[49] Statement of Defence, paras. 65; 98-113.

[50] Statement of Defence, para. 114.

under the Treaty as this would undermine the very purpose of the Treaty by granting a national of a State access to international arbitration against its own home State.[51]

116. For the foregoing reasons, the Respondent submits that the Claimant does not qualify as a foreign investor under the Treaty and therefore the Tribunal lacks jurisdiction to hear its claims.[52]

117. The Respondent also questions in its Skeleton Argument whether the alleged transfer of business by Mr. Buchal from his company Brailcom incorporated in the Czech Republic to the Claimant took place at a time at which the present dispute was foreseeable.[53] In other words, the Respondent questions the nationality planning of Mr. Buchal in the light of the present dispute.

b. Claimant's Position

118. The Claimant asserts that it meets the criteria of Article 1(c)(ii)(bb) of the Treaty and that those criteria are "*both necessary and sufficient*"[54]:

118.1 The Claimant is a private limited company, incorporated in the UK in August 2012 under the UK Companies Act 2006.[55]

118.2 The Respondent itself has certified that the Claimant is a UK company (in the context of registering the Claimant's Czech branch) long before the dispute arose between the Parties. In 17 October 2012, the Czech Commercial Register - maintained by the Municipal Court in Prague - issued a Statement that A11Y LTD is a "foreign legal entity" and that it is registered under the "Law of England and Wales" by the "Commercial Register in Cardiff in Great Britain under the entry number 8165690."[56]

[51] Statement of Defence, paras. 121-122.

[52] Statement of Defence, para. 123.

[53] Respondent's Skeleton Argument, para. 67.

[54] Claimant's Skeleton Argument, para. 39.

[55] Certificate of Incorporation of A11Y LTD,2 August 2012, C-1.

[56] Extract of the Czech Commercial Registry,17 October 2012, C-2.

118.3 There is a consistent body of jurisprudence supporting that a place of incorporation test in a treaty (such as exists in Article 1(c)(ii)(bb) of the Treaty) should be upheld in accordance with ordinary principles of treaty interpretation. In particular, the Claimant relies on the decision in *Yukos v. Russia* wherein the tribunal opined that: *"[t]he Tribunal knows of no general principles of international law that would require investigating how a company or another organization operates when the applicable treaty simply requires it to be organized in accordance with the laws of a Contracting Party. […]"*[57]

119. For the foregoing reasons, the Claimant submits that it is a foreign investor.

120. The Claimant also denies that its incorporation in the UK on 2 August 2012 was done in bad faith.[58]

(2) The Tribunal's Analysis

121. Article 1(c)(ii)(bb) of the Treaty defines the term "investor" in respect of the United Kingdom as "*corporations, firms, and associations incorporated or constituted under the law in force in any part of the United Kingdom.*"[59]

122. The Tribunal notes that the Respondent agrees that the Claimant fulfils the formal requirement stipulated in Article 1(c)(ii)(bb) of the Treaty for being an investor.[60]

123. The Tribunal recalls that the Claimant submitted at the hearing that under the Treaty, "*[t]he test is an incorporation test, the Claimant meets it. That is and should be the beginning and the end of the analysis*".[61] The Tribunal agrees.

124. The Tribunal is of the view that the ordinary meaning of Article 1(c)(ii)(bb) of the Treaty clearly sets an incorporation test in respect of which investors should be protected under the Treaty rather than a test relating to economic control or otherwise.

---

[57] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility,30 November 2009, CL-36, ¶ 415.

[58] Claimant's Skeleton Argument, paras 50-52.

[59] Treaty, CL-1.

[60] Statement of Defence, para. 75.

[61] Tr. Day 1/111/20-22.

125. Where a Treaty provides for an incorporation test, arbitral tribunals have consistently upheld such test. Even the Respondent, in its opening submissions during the hearing, recognized this: "*I can state from the outset that I am aware, fully aware, that there are cases that have been decided on very similar facts and that have been decided in claimant's favour.*"[62]

126. In this respect, the Tribunal refers to and adopts the tribunal's reasoning in *Saluka v Czech Republic*:

> *The parties had complete freedom of choice in this matter, and they chose to limit entitled 'investors' to those satisfying the definition set out in Article 1 of the Treaty. The Tribunal cannot in effect impose upon the parties a definition of 'investor' other than that which they themselves agreed. That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) The Netherlands, and it is not open to the tribunal to add other requirements which the parties could themselves have added but which they omitted to add.*[63]

127. In view of the above, the Tribunal finds that the Claimant meets the definition of investor under the Treaty and is therefore protected under the Treaty.

128. The Respondent also advanced an alternative "bad faith" argument. It submitted the following at the hearing:

> *[…] It is undisputed that Claimant was incorporated in August 2012, but at that point in time, and I believe that is also undisputed, it was simply an English company. It had no links whatsoever to the Czech Republic. It had also not made an investment at that point in time in the Czech Republic.*

[62] Tr Day 1/30/24-25 – Tr Day 1/31/1-2.

[63] *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, CL-24, para. 241.

> *There is a rule established in particular by the Tribunal of Phoenix v Czech Republic that if you transfer your investment to a foreign company at a point in time in which a dispute is either in full swing or is at least foreseeable, then that is an act of nationality planning and precludes a claimant investor from invoking claims against the host state.*[64]

129. The Tribunal notes that it is undisputed between the Parties that the Claimant was incorporated in August 2012[65] and that, on the Respondent's case, the dispute between the Parties became foreseeable by July 2013.[66]

130. The Tribunal is therefore of the view that the timing of the Claimant's incorporation could not have been done in bad faith since, on the Respondent's own case, there was no pre-existing or foreseeable dispute between the Parties in 2012.

131. Accordingly, the Tribunal rejects the Respondent's bad faith argument.

132. Whether the Claimant, at the time of its incorporation, had made an investment in the Czech Republic is a separate argument. The Tribunal recalls that, in its Procedural Order No. 2, it decided to join this jurisdictional objection to the merits as it is clearly intertwined with the merits. The Tribunal will thus decide this objection in the merits phase of this case.

C. The Cooling-Off Period

(1) The Parties' Positions

a. Respondent's Position

133. The Respondent submits that the Tribunal lacks jurisdiction over all of the Claimant's claims since the Claimant failed to adhere to the cooling-off period:

[64] Tr Day 1/37/9-21.

[65] Tr Day 1/37/9-10; Tr Day 1/123/16-18; C-1.

[66] Tr Day 1/38/16-17.

> *Article 8(1) stipulates that Claimant has to notify Respondent of a dispute under article 2(3), 4, 5 and 6 of the BIT and is only entitled to initiate arbitration of these disputes after a cooling-off period of four months.*
>
> *In the present case, such notification was never made. On 10 October 2014 a dispute was notified to Respondent. However, this notification alleged one single breach of the BIT, namely a breach of article 2(2). Hence, there never was a valid notification of any dispute under one of the provisions listed in article 8(1).*[67]

134. The Respondent argues that the compliance which such notification periods has been considered by a number of tribunals as a jurisdictional requirement.[68] It relies, *inter alia*, on the tribunal's decision in *Murphy Exploration v Ecuador*:

> *[…] the requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six-month period does not constitute, as Claimant and some arbitral tribunals have stated, "a procedural rule" or a "directory and procedural" rule which can or cannot be satisfied by the concerned party. To the contrary, it constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules.*[69]

135. For the foregoing reasons, the Respondent submits that the Tribunal lacks jurisdiction.

b. Claimant's Position

136. The Claimant denies that it failed to adhere to the cooling-off period of four months:

> *Article 8(1) of the BIT provides for the submission of disputes to arbitration four months after written notification of a claim. The Respondent neglects to mention that the Claimant notified the*

[67] Respondent's Skeleton Argument, paras. 71-72.

[68] Respondent's Reply on Jurisdiction, para. 198.

[69] *Murphy Exploration and Production Company International v. Republic of Ecuador*, Award on Jurisdiction, 15 December 2010, RL-109, para. 149 .

Respondent of a claim by serving a Notice of Dispute on the Respondent on 30 May 2014, which sets out the factual background of the dispute and sought the resolution of the dispute "in an amicable manner". The subject line of the Notice of Dispute letter was "Notification about existence of dispute on the basis of article 8 of Czech-British Agreement for the Promotion and Protection of Investments." There cannot therefore be any serious doubt that the Claimant notified the Respondent of a claim under Article 8 of the UK-Czech Republic BIT and sought to resolve the dispute amicably.

Nor is the Respondent correct to argue that "the parties have not entered into amicable settlement negotiations." For example, the Claimant met with the Ministry of Finance of the Czech Republic in July 2014 (after the Claimant's Notice of Dispute letter of 30 May 2014 and before the Claimant's Notice of Arbitration of 10 October 2014) to seek to resolve the dispute amicably. However, the Ministry of Finance communicated that "at this time" it would not accept the Claimants proposal for amicable settlement.

The Respondent appears to consider that the Claimant was obliged to notify the Respondent of all legal arguments relating to its claim. This is incorrect. […] As the Tribunal in Burlington v Ecuador (which the Respondent cites) noted, a notice of dispute letter "does not require the investor to spell out its legal case in detail during the negotiation process" and "does not even require the investor to invoke specific Treaty provisions at that stage."[70]

137. For the foregoing reasons, the Claimant submits that the Tribunal has jurisdiction.

(2) The Tribunal's Analysis

138. Article 8(1) of the Treaty provides as follows:

[70] Claimant's Skeleton Argument, paras 79-81. See *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case ARB/08/5, Decision on Jurisdiction, 2 June 2010, RL-110, ¶ 338.

> *Disputes between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under Articles 2(3), 4, 5 and 6 of this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four months from written notification of a claim, be submitted to arbitration under paragraph (2) below if either party to the dispute so wishes.* (Tribunal's emphasis.)

139. The Tribunal considers that the four-month cooling off requirement of Article 8(1) of the Treaty must be satisfied before an investor is entitled to initiate an arbitration.

140. In the present case, the record reveals the following.

141. On 30 May 2014, the Claimant wrote to the Respondent as follows:

> *Subject:* **Notification about existence of dispute on the basis of article 8 of Czech-British Agreement for the Promotion and Protection of Investments**
>
> *[…]*
> *13. Both of the above mentioned acts of the Ministry undoubtedly constitute a breach of the fair and equitable treatment standard contained in Article 2(2) of the Treaty.*
>
> *14. In accordance with Article 8(1) of the Treaty, I am hereby commencing negotiations about amicable resolution of the dispute between A11Y and Czech Republic. […]*
>
> *15. At the same time, I reserve the right to provide supplementary facts on which A11Y is basing its international legal claims, and to do so especially in the case of the Czech Republic's failure to provide for a swift remedy to the illegal state that is harming A11Y. Under the same conditions, I reserve the right to invoke breaches of other standards contained in the Treaty.*

16. Finally, please take into account that upon the delivery of thus notification the four-month period for amicable resolution of the dispute defined in Article 8(1) of the Treaty commences to run. If this period elapses to no avail, A11Y is prepared to commence an investment arbitration pursuant to the same article of the Treaty. However, I hope that the investment arbitration will not be necessary and that we will solve this dispute in an amicable manner.[71]

142. In his witness statement, Mr. Buchal states the following:

130. We did not make an agreement, so finally the notification of the dispute occurred on May 30, 2014. I still believed in an amicable settlement. I believed that what the "agreement on promotion and protection of investments" orders, that is the 4 month period for finding an amicable settlement, is possible. Therefore I visited with Mr. Sekanina in July 2014 Ministry of finance of the Czech Republic, specifically the director of Section 02- Legal, Mr. Mgr. et Mgr. Petr Horacek and the then-chief of the standalone division of international investments Ms. Mgr. Marie Talasova, LL.M. and again I hoped, I believed in amicable settlement. Mr. Horacek asked me if we could produce more evidence, that I surely understand that they cannot make a decision to pay any amount from the state budget without thorough documentation. I of course gladly admitted that and so within 14 days, we prepared a file of evidence about illegal passing of know-how damaging good name and illegitimate refusal of margin. We presented the file and I believed in honest and just dealing.

131. The answer was however not coming. So we urged it several times, several times it was promised to us and again postponed, that they will respond and will again meet with us. They did not meet by only answered: "After having studied all documents submitted by you I am respectfully informing you by this letter that the Ministry of Finance at

[71] Notice of Dispute of A11Y LTD, 30 May 2014, C-73.

this time will not accept the proposal of your client for settlement."[72]
(Tribunal's emphasis)

143. On 10 October 2014, more than four months after its notification, the Claimant filed its Notice of Arbitration. The relevant excerpts of the Notice of Arbitration are reproduced below:

> *[…]*
>
> *53. The Claimant submits that, as a result of the measures described in Section III above, the Czech Republic has failed to provide fair and equitable treatment to the Claimant's investment and has interfered, by unreasonable and discriminatory measures, with the operation thereof.*
>
> *[…]*
>
> *59. The Claimant bases its Notice of Arbitration on Article 8 of the Treaty. In relevant part, Article 8 provides: […]*
>
> *[…]*
>
> *61. The period of four months, earmarked by Article 8(1) of the Treaty for the parties to try to reach amicable settlement, expired without success on September 30, 2014.*[73]

144. At the hearing, Mr. Buchal testified that other meetings concerning the dispute had taken place with the Ministry of Finance of the Czech Republic in June 2015 when the present proceedings were pending but to no avail.[74]

145. According to the Respondent, Article 8(1) of the Treaty requires that disputes concerning an obligation under Articles 2(3), 4, 5 and 6 must be notified by the investor to the State. If

[72] Witness Statement of Mr Jan Buchal, paras. 130-131.
[73] Notice of Arbitration, 10 October 2014, R-39.
[74] Tr. Day 2/12/11-24.

no amicable settlement is reached after four months, then, and only then can an arbitration be initiated avers the Respondent.

146. In the present case, the Respondent argues that the Claimant never notified it of a dispute under any one of these articles. In fact, the Notice of Arbitration of 10 October only notified the Respondent of a dispute under Article 2(2). Accordingly, the Claimant never triggered the cooling-off period of Article 8(1).

147. The Claimant submits that it complied with the cooling-off period. Its Notice of Dispute dated 30 May 2014 states that it was made "*on the basis of article 8 of the [BIT]", that "upon the delivery of this notification, the four-month period for amicable resolution of dispute defined in Article 8(1) of the Treaty commences to run*", and that it "*reserve[s] the right to invoke breaches of other standards contained in the Treaty*".[75]

148. Without making any finding as to (i) the validity of the Claimant's notice of 30 May 2014 pursuant to Article 8(1) of the Treaty or (ii) the characterization of this issue as one of jurisdiction or admissibility or procedure, the Tribunal is of the view that, as of the date of the Notice of Dispute, the Respondent was clearly aware of the existence of a dispute, the facts from which it arose, the legal basis of the dispute (to wit the Treaty) and an estimate of the damages sought. On the basis of this notice, the Parties met in July 2014 and in June 2015 in an attempt to resolve the dispute amicably. The Parties were unable to reach a settlement.

149. In light of the above, the Tribunal considers that it would be futile to decline jurisdiction over the present arbitration in order to allow the Parties to engage in further attempts to reach an amicable settlement.

150. As Christoph Schreuer writes:

> *There would be little point in declining jurisdiction and sending the parties back to the negotiating table if these negotiations are obviously futile. Negotiations remain possible while the arbitration proceedings are pending. Even if the institution of arbitration was premature,*

[75] Notice of Dispute of A11Y LTD, 30 May 2014, C-73.

compelling the claimant to start the proceedings anew would be a highly uneconomical solution.[76]

151. Accordingly, the Tribunal denies the Respondent's objection to its jurisdiction on the basis that the Claimant failed to adhere to the cooling-off period.

D. Whether the Treaty is superseded by EU law

(1) The Parties' Positions

a. Respondent's Position

152. The Respondent submits that EU law has superseded the Treaty as of the date of accession of the Czech Republic to the European Union on 1 May 2004. In other words, submits the Respondent, the Treaty is no longer in force between the Contracting States since 1 May 2004. Hence, argues the Respondent, the Claimant is precluded from invoking the Treaty's standards and, in particular, its dispute resolution clause.

153. The Respondent quotes Article 59 of the VCLT in support of its argument: "*[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 latter 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*."

154. Alternatively, should the Tribunal find that the Treaty is not terminated by virtue of Article 59 of the VCLT, the Respondent relies on Article 30(3) of the VCLT in support of its following argument: "*[A]rticle 30 provides that certain individual provisions of a treaty can be derogated by a later treaty if they relate to the same subject-matter. In that case, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treat.*"

[76] Christoph Schreuer, Ch. 21 Consent to Arbitration, Peter Muchlinski (ed.) and others, The Oxford Handbook of International Investment Law, 1st ed, Oxford University Press 2008, CL-137, p. 846.

155. According to the Respondent, various provisions of EU law have the same subject-matter as those of the Treaty:

> *Article 2(1) of the Czech-UK BIT provides for the promotion and admission of investments from investors of the other contracting state. Corresponding to that article 49 TFEU et seq. states the right of establishment. Additionally article 16(2) Charter of Fundamental Rights recognizes the freedom to conduct a business in accordance with Community law and national laws and practices. Likewise to article 2(1) of the BIT, these provisions of the TFEU clearly create favourable conditions for investors of other EU member states.*
>
> *Article 2(2) of the Czech-UK BIT requires a fair and equitable treatment standard as well as the prohibition of unreasonable or discriminatory measures. Also article 3 of the BIT states that investments or returns of investors of the other contracting party shall not be treated less favourable than investments or returns of domestic investors. Very similarly, EU law in general prohibits any discrimination between EU member states in article 18TFEU.*
>
> *Article 5 of the BIT prohibits expropriations, except for very limited reasons and only against compensation. Likewise, article 17 Charter of Fundamental Rights clearly states that no one may be deprived of his or her possessions. This rule explicitly and as well general principles of EU Law prohibit expropriations without the payment of compensation.*
>
> *Article 6 of the Czech-UK BIT states the guarantee to investors of the other state to transfer their investments and returns, without restrictions. Equally, article 63 TFEU et seq. provides that all restrictions on the movement of capital between member states shall be prohibited.*[77]

[77] Respondent's Skeleton Argument, paras. 85-88.

156. Accordingly, argues the Respondent, the Treaty should be considered terminated under Article 59 of the VCLT, or the provisions of the Treaty listed above no longer apply pursuant to Article 30 of the VCLT, since the Treaty's provisions are incompatible with those of EU law.[78]

157. In particular, avers the Respondent, "*the dispute resolution clause in Art 8 of the BIT is incompatible with the later concluded EU treaties, since it infringes both Art 18 TFEU and Art 344 TFEU.*"[79]

158. The Respondent argues that Article 18 of the TFEU prohibits discrimination between nationals of member states based on their nationality. The Treaty in the present case provides the right to arbitration to certain investors, but not to investors from other member states.[80]

159. Article 344 TFEU provides that:

> *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.*

160. The Respondent avers that "*the General Court explicitly ruled that out-of-court methods for settling disputes provided for in agreements [such as arbitration as provided for in Article 8 of the Treaty] are no longer applicable as of the contracting state's accession to the Union if the subject matter is regulated by EU law.*"[81]

161. Consequently, argues the Respondent, the entire Treaty or, in the alternative, at least Article 8 of the Treaty, is incompatible with the EU Treaties. As a result, avers the Respondent, the Treaty and in particular its dispute resolution clause are superseded by EU

[78] Respondent's Skeleton Argument, para. 91.

[79] Respondent's Skeleton Argument, para. 92.

[80] Respondent's Skeleton Argument, para. 93.

[81] Respondent's Skeleton Argument, para. 96. See Judgment of the General Court (Third Chamber), 15.4.2011, T-465/08 (Czech Republic v. Commission), RL-118, para. 102 .

law and the Claimant is therefore precluded from invoking the substantial standards and the dispute resolution clause of the Treaty.[82]

162. Alternatively, the Respondent submits that the Treaty was impliedly terminated by the United Kingdom and the Czech Republic upon the latter's accession to the EU:

> *In view of the ECJ's repeated emphasis on the precedence of the EU Treaties over other agreements between member states,*[83] *and the member states' apparent agreement with such interpretation, it is difficult to argue that a BIT provision incompatible with EU law should nevertheless apply. Thus, as far as the Czech Republic is concerned, its termination of the UK-Czech BIT should be implied from its accession to the European Union also by virtue of EU Law.*[84]

163. In view of the above, the Respondent submits that the Tribunal lacks jurisdiction.

b. Claimant's Position

164. At the outset, the Claimant notes the following:

164.1 the Respondent "*does not contest that the UK and Czech Republic have confirmed that the BIT remains in force, or that it and the UK have taken no steps under Article 14 to terminate the BIT*"[85]; and

164.2 the objection regarding intra-EU BITs has failed in numerous past cases.[86]

---

[82] Respondent's Skeleton Argument, para. 98.

[83] ECJ, 27.9.1988, C-235/87 (*Matteucci v. Belgium*) para 22, RL-124; ECJ, 27.2.1962, C-10/61 (Commission v Italy), RL-123**.**

[84] Respondent's Skeleton Argument, para. 100.

[85] Claimant's Skeleton Argument, para. 55. See: List of Current Bilateral Treaties from the Ministry of Finance of the Czech Government Website, htto://www.mfcr.cz/en/themes/trade-defence [accessed on 11 January 2016], C-61; Email from Treaty Enquiry Service of the Foreign and Commonwealth Office of the UK Government to Mr. Boris Dusek of A11Y LTD, 25 November 2015, [with English translation] (C-62.

[86] Claimant's Skeleton Argument, para. 56. See *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.a.r.1. v. Kingdom of Spain*, ICSID Case No ARB/13/30, Decision on Jurisdiction, 6 June 2016, CL-130, ¶ 89: "*the Tribunal underlines that in all published or known investment treaty cases in which the intra-EU objection has been invoked by the Respondent, it has been rejected.*"

165. Nevertheless, the Claimant submits that, according to the VCLT, the termination of the Treaty pursuant to Article 59 can only be done by having recourse to the procedure set out in Article 65 of the VCLT which provides as follows:

> *Article 65*
> *Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty*
>
> *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....*

166. Since the Respondent did not comply with Article 65, the Claimant submits that the Tribunal should dismiss the Respondent's objection based on Article 59 of the VCLT.

167. In any event, argues the Claimant, Article 59 can only terminate a treaty if the subsequent treaty concerns the same subject matter. In the present case, avers the Claimant, the Treaty and the TFEU (or EU law or the Charter) do not cover the same subject matter.[87]

168. The Claimant submits that the Respondent's objection on the basis of Article 30(3) of the VCLT should also be dismissed since there is no substantive contradiction between Article 8 of the Treaty and Articles 18 and 344 of the TFEU.[88]

169. For the foregoing reasons, the Claimant submits that the Tribunal has jurisdiction.

(2) The Tribunal's Analysis

170. The Tribunal must decide whether the Czech Republic's accession to the EU means that EU law has superseded the Treaty which is thus no longer in force.

---

[87] Claimant's Skeleton Argument, para. 61.

[88] Claimant's Skeleton Argument, para. 77.

171. Investment treaty tribunals have consistently held that EU treaties do not supersede intra-EU BITs. Accordingly, for sake of procedural economy, the Tribunal will limit its analysis to the following.

172. Firstly, investment treaty tribunals have held that no common intention appears from the EU treaties or accession to the EU to terminate intra-EU BITs. In this respect, the Tribunal refers to and adopts *mutatis mutandis* the tribunals' reasoning in the following decisions: *Micula v Romania*, *Eastern Sugar v The Czech Republic*, *Eureko v The Slovak Republic*, *Oostergefel v The Slovak Republic* and *EURAM v The Slovak Republic*.[89]

173. The Tribunal in *EURAM v The Slovak Republic* stated, for instance:

> *The Tribunal is not convinced by the Respondent's argument that, by its very nature, the ECT demonstrated an implied intent to terminate the BITs between Members and non-Members of the EU that were transformed into intra-EU BITs by the accession of Slovakia to the EU. The Tribunal considers that nothing in the EU Treaties gives such an indication of intent, rather to the contrary. As rightly emphasised by the Claimant, "nowhere does the Accession Treaty say that … the] Accession Treaty and EU law 'govern the matter' of bilateral investment treaty protection with its protection standards and enforcement mechanisms. The Accession Treaty and the European Treaties do also not say anything about investment protection for investors of one EU Member State in another Member State."*

174. Secondly, the evidence reveals that the Czech Republic and the UK both consider that the Treaty is in force. Exhibit C-61 is a five-page document printed from the website of the Ministry of Finance of the Czech Republic on 11 January 2016 which lists the bilateral

[89] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmili S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, RL-68, para. 321; *Eastern Sugar BV v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, RL-44, para. 167; *A Achmea BV v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko BV v. The Slovak Republic*), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, RL-43, paras. 244-252; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, CL-94, paras. 80-85; *European American Investment Bank AG (Austria) v. The Slovak Republic*, UNCITRAL, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, CL-93, paras. 186-210.

treaties concluded by the Czech Republic. It is recorded that the one concluded with the UK is currently in force. Counsel for the Claimant represented to the Tribunal that this document remains unchanged as of the date of the hearing. Similarly, Exhibit C-62 is an e-mail from the Treaty Public Enquiries Department of the Foreign and Commonwealth Office to a representative of the Claimant dated 25 November 2015 which says "*[i]n accordance with our records, the [Treaty] has not been terminated.*"

175. In addition, neither Contracting State has taken the steps under Article 14 of the Treaty to terminate it.

176. Accordingly, the Tribunal finds that the Treaty is still in force.

177. Thirdly, in respect of the Respondent's argument in relation to Article 59 of the VCLT, that "*[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) [i]t appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) [t]he 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*", the Tribunal notes that investment treaty tribunals have consistently found that BITs and EU treaties do not relate to the same subject-matter and that there is no incompatibility between the provisions of the EU treaties and BITs. In this respect, the Tribunal refers to and adopts *mutatis mutandis* the tribunals' reasoning in the following decisions: *Binder v The Czech Republic*, *Eastern Sugar v The Czech Republic*, *Eureko v The Slovak Republic*, *Oostergetel v The Slovak Republic*, and *EURAM v The Slovak Republic*.[90]

178. Accordingly, the Tribunal rejects the Respondent's objection to the Tribunal's jurisdiction on the basis that EU law has superseded the Treaty and is no longer in force.

[90] *Mr. Binder v. The Czech Republic*, UNCITRAL, Award on Jurisdiction, 6 June 2007, CL-39, paras- 63 - 65; *Eastern Sugar BV (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, RL-44, paras. 158-166 and 168 -171; *A Achmea BV v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko BV v. The Slovak Republic*), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, RL-43, paras. 239-242, 245-263, 273-277 (in relation to Art. 30 VCLT); *Mr. Jan Oostergetel and Mrs. Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, CL-94, paras. 72-79, 86-87, 104 (in relation to Art 30 VCLT); *European American Investment Bank AG (Austria) v. The Slovak Republic*, UNCITRAL, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, CL-93, paras. 155-185, 213-234, 268-278 (in relation to Art 30 VCLT).

V. COSTS

179. The parties simultaneously filed submissions on costs on 21 October 2016.

180. The Claimant requests that the Tribunal rule on the costs of this bifurcated phase in its decision on jurisdiction and order the Respondent to pay the Claimant the costs of the arbitration in the amount of GBP 137,123.44 as well as the Claimant's costs for legal representation and assistance in the amount of GBP 665,981.16, for a total of GBP 803,104.60 in arbitration and legal costs.

181. The Respondent requests that the Tribunal order the Claimant to reimburse the Respondent the amount of USD 200,000 as reimbursement of advance payments in respect of the Tribunal's fees; and the amount of CZK 6, 351,778.84 for legal fees and other expenses by the Respondent in connection with these proceedings.

182. By letter dated 27 October 2016, the Respondent submitted that a decision on costs in an interim decision would be premature. It argued *inter alia* that:

> *[…] at the current stage of the proceedings, it is not possible to determine which of the parties will ultimately be successful in the present proceedings. Even if the Arbitral Tribunal should affirm its jurisdiction, there is no indication that Claimant will ultimately be successful in the proceedings; it has merely overcome one set of Respondent's arguments. If jurisdiction is assumed over Claimant's claim for expropriation, Claimant has not even been fully successful in the jurisdictional phase. Respondent, however, considers a decision on costs to be premature while only some of its arguments and objections have been decided on, but the outcome of the case remains open.*

183. Article 40 of the 1976 UNCITRAL Rules provides that:

> *Article 40*
>
> *1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.*
>
> *2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.*
>
> *[…]*

184. According to Article 40 of the 1976 UNCITRAL Rules, the applicable principle is that the unsuccessful party pays the costs of the successful party unless the tribunal considers that apportionment is reasonable, taking into account the circumstances of the case.

185. Without making a determination of whether apportionment would be reasonable in the present case, the Tribunal is of the view that, in the circumstances of this case, it would be premature at this stage to issue any decision with respect to costs.

186. Consequently, costs relating to the bifurcated jurisdictional phase of these proceedings will be considered and allocated at the conclusion of the merits phase of this arbitration.

VI. DECISION

187. For the foregoing reasons, the Tribunal decides:

(1) To uphold the Respondent's jurisdictional objection based on the scope of application of Article 8(1) of the Treaty. Accordingly,

(a) the Tribunal has no jurisdiction over the Claimant's claims pursuant to Articles 2(2) and 3 of the Treaty;

(b) the Tribunal has jurisdiction over the Claimant's claims made under Articles 2(3) and 5 of the Treaty;

(2) To deny the Claimant's request for relief for a "*declaration that the Czech Republic has breached Article 2(3) of the Treaty by failing to observe the provisions of the Treaty set out in sub-clauses (a) to (d) above*" for the reasons set out in paragraph 91 above;

(3) To reject the Respondent's jurisdictional objection that the Claimant is not a foreign investor;

(4) To reject the Respondent's jurisdictional objection that the Claimant failed to adhere to the cooling-off period;

(5) To reject the Respondent's jurisdictional objection that the Treaty is superseded by EU law;

(6) To defer its decision on costs related to this phase of the arbitration until the Tribunal's Final Award.

188. After consultation with both Parties a procedural order will be issued regarding the further procedure.

Place of Arbitration: Paris, France
Date: 9 February 2017

[signed]

Dr. Stanimir Alexandrov
Arbitrator

[signed]

Ms. Anne Joubin-Bret
Arbitrator

[signed]

The Hon. L. Yves Fortier, PC, CC, OQ, QC
President