In the matter of an arbitration under the UNCITRAL Arbitration Rules

between

1. WCV WORLD CAPITAL VENTURES CYPRUS LTD
2. CHANNEL CROSSINGS LTD

Claimants

v.

THE CZECH REPUBLIC

Respondent

INTERIM AWARD ON JURISDICTION

ARBITRAL TRIBUNAL

Juan Fernández-Armesto (Chairman)
Stanimir Alexandrov
Mark Clodfelter

ASSISTANT TO THE TRIBUNAL

[redacted]

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LIST OF DEFINED TERMS

2004 Permit	Permit issued by the Ministry of Finance to Synot TIP on 26 July 2004 to operate a CLS network
2007 Permit	Permit issued by the Ministry of Finance to Synot TIP on 31 December 2007 to operate a CLS network
2011 Amendment	Amendment No 300/2011 Coll, to Act No. 202/1990 Coll. on Lotteries and Similar Games
2011 Decisions	The Chrastava, Františkovy Lázně and Kladno Decisions of the Czech Constitutional Court
2013 Decision	Decision of the Czech Constitutional Court on the constitutional complaint raised by the municipality of Klatovy
Application for Stay	Respondent's application for stay submitted on 22 June 2016
B	Billion
Bad Faith Objection	Respondent's jurisdictional objection that Claimants instituted this arbitration in bad faith
BIT	Agreement between the Czech Republic and the Republic of Cyprus for the Promotion and Reciprocal Protection of Investments, 15 June 2001
C I	Claimants' Statement of Claim of 27 May 2016
C II	Claimants' Answer on Bifurcated Objections of 28 October 2016
C III	Claimants' Rejoinder on Bifurcated Objections of 9 December 2016
CCL	Channel Crossings Ltd
CCV or Czech CV	Czech Capital Ventures, s.r.o.
Chrastava Decision	Decision of the Czech Constitutional Court on the application for annulment of the Chrastava Decree, of 14 June 2011
Chrastava Decree	Municipal Decree adopted by the municipality of Chrastava in October 2009, regulating the operation of CLS devices
CJEU	Court of Justice of the European Union
Claimants	WCV and CCL
CLS	Centralised lottery system

Companies Act	The Cypriot Companies Act, Cap. 113
Confidentiality Order	Confidentiality Order adopted by the Tribunal in PO 2 of 23 August 2016
CYP	Cypriot Pound
CZK	Czech Koruna
Department 34	Department on State Supervision of Gambling and Lotteries
EUR	Euro
Exotic Island	Exotic Islands N.V.
First Hearing	Hearing held on 16 and 17 January 2017, at the PCA, Carnegieplein 2, 2517 KJ, The Hague, The Netherlands
Fork-in-the-road Objection	Respondent's jurisdictional objection that Claimants' claims have already been litigated before the Czech Courts, and therefore Claimants have engaged the fork-in-the road provision of Art. 8(2) of the BIT
Františkovy Lázně Decision	Decision of the Czech Constitutional Court on the application for annulment of the Františkovy Lázně Decree, of 7 September 2011
Františkovy Lázně Decree	Municipal Decree adopted by the municipality of Františkovy Lázně in February 2010, regulating the operation of CLS devices
Greenfield	Greenfield Trading Ltd.
HT1, 2, 3, 4	Hearing Transcripts of the First and Second Hearings
IBA	International Bar Association
ICJ	International Court of Justice
[redacted]	Expert Opinion submitted by [redacted] with Respondent's Reply on Bifurcated Objections
Joint Table on Municipal Proceedings	Excel sheet submitted jointly by the Parties on 21 August 2017, regarding the municipal proceedings brought by Synot Tip before the Czech Courts
Kladno Decision	Decision of the Czech Constitutional Court on the application for annulment of the Kladno Decree, of 27 September 2011
Kladno Decree	Municipal Decree adopted by the municipality of Kladno in July 2010, regulating the operation of CLS devices
[redacted]	Legal Opinion submitted by [redacted] with Claimants' Statement of Claim
LLS	Local lottery system
Lotteries Act	Act No. 202/1990 Coll. on Lotteries and Similar Games

M	Million
MAI	OECD Multilateral Agreement on Investment
[redacted]	Witness Statement submitted by [redacted] with Claimants' Statement of Claim
MSA	The Cypriot Merchant Shipping Act L. 45/1963
Multi-party Arbitration Objection	Respondent's jurisdictional objection that the Czech Republic did not give its consent to WCV and CCL to submit jointly their claims under the BIT in one and the same arbitral proceedings
Municipal Decrees	Decrees issued by the municipalities of the Czech Republic regulating CLS and LLS devices
Municipal Proceedings	Administrative proceedings initiated by Synot TIP before the Czech municipal Courts challenging decisions by the Ministry of Finance terminating Synot TIP's permits to operate Terminals in specific locations
[redacted]	Witness Statements submitted by [redacted] with Claimants' Answer and Rejoinder on Bifurcated Objections
Notice of Dispute	Notice of Dispute filed by WCV and CCL to the Czech Republic on 15 July 2014
Oneworld	One World Financial Limited
Operating Companies	Synot W and Synot TIP
Parties	WCV and CCL, as Claimants and the Czech Republic as Respondent
PCA	Permanent Court of Arbitration
Permanent Seat Objection	Respondent's jurisdictional objection that Claimants do not have their "permanent seat" in Cyprus and, thus, do not qualify as protected investors under Art. 1(2)(b) of the BIT
PO	Procedural Order
R I	Respondent's Memorial on Jurisdiction and Request for Bifurcation of 24 June 2016
R II	Respondent's Reply on Bifurcated Objections of 18 November 2016
Respondent	The Czech Republic
Second Hearing	Hearing held on 16 and 17 June 2017, at the offices of counsel for Respondent, Rue de Monceau, 75008 Paris
Smeets	Smeets woon-en DHZ Groep B.V.
Synot Holding	Synot Holding s.r.o.

Synot TIP	Synot TIP, a.s.
Synot W	Synot W, a.s.
Terminals	Interactive video terminals through which CLS and LLS are operated by the end user
TFEU	Treaty on the Functioning of the European Union
[redacted]	Witness Statement submitted by [redacted] with Claimants' Statement of Claim
UNCITRAL Rules	1976 UNCITRAL Arbitration Rules
[redacted]	Witness Statement submitted by [redacted] with Claimants' Statement of Claim
VCLT	Vienna Convention on the Law of Treaties
WCV	World Capital Ventures Cyprus Ltd.
WCV B.V.	World Capital Ventures B.V.
[redacted]	Witness Statement submitted by [redacted] with Claimants' Statement of Claim

LIST OF AUTHORITIES

AAPL	*Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990
Abaclat	*Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011
ADC	*ADC Affiliate Limited and ADC & ADMC Management Limited v Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006
Aguas del Tunari	*Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, October 21, 2005.
Alemani	*Giovanni Alemanni and Others v. The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014
Alps Finance	*Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award, 5 March 2011
Ambiente	*Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9 (formerly Giordano Alpi and others v. Argentine Republic), Decision on Jurisdiction and Admissibility, 8 February 2012
Arrest Warrant	*Case Concerning the Arrest Warrant (Democratic Republic of the Congo v Belgium)* [2002] ICJ Reports 1, 11 April 2000
Azurix	*Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2013
Barcelona Traction	*Barcelona Traction, Light and Power Co. Ltd (Belgium v. Spain),* ICJ 1970, Judgment, 5 February 1970
Bogdanov	*Yuri Bogdanov and Yulia Bogdanov v. Republic of Moldova,* SCC Case No. V091/2012, Final Award, 16 April 2013
Burimi	*Burimi SRL and Eagle Games SH.A v Republic of Albania*, ICSID Case No. ARB/11/18, Award, 29 May 2013
Caratube	*Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012
CEAC	*Central European Aluminium Company (CEAC) v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016

Cementownia	*Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009
CMS	*CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Jurisdiction, 17 July 2003
ELSI	*Elettronica Sicula S.p.A. (ELSI) (USA v Italy) [1989] ICJ Reports 15*
Flughafen	*Flughafen Zürich A.G. y Gestión e Ingeniería IDC S.A. c. Venezuela,* Caso CIADI No. ARB/10/19, Laudo, 18 noviembre 2014
Guaracachi	*Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014
Khan Resources	*Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v Government of Mongolia*, UNCITRAL, PCA Case No 2011-09, Decision on Jurisdiction, 25 July 2012
KT Asia	*KT Asia Investment Group B.V. v Republic of Kazakhstan*, ICSID Case No ARB/09/8, Award, 17 October 2013
Lauder	*Ronald S Lauder v The Czech Republic*, UNCITRAL, Final Award, 3 September 2001
Mobil	*Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010
Nobel Energy	*Noble Energy, Inc. and Machalapower Cia. Ltda. v The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008
Occidental	*Occidental Exploration and Production Company v The Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3467, 1 July 2004
OMAS	*OMAS (Cyprus) Ltd v. Republic of Cyprus* (2008) 3 A.A.D 253.
Orascom	*Orascom TMT Investments S.à r.l. v People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017
Pan American Energy	*Pan American Energy LLC et al. v The Argentine Republic*, ICSID Case Nos. ARB/03/13 and ARB 04/8, Decision on Primary Objections, 27 July 2006
Pantechniki	*Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009
Pey Casado	*Víctor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008

Philip Morris	*Philip Morris Asia Limited v. Commonwealth of Australia,* UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015
Rumeli	*Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008
Saluka	*Saluka Investments B.V. v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006
Standard Chartered Bank	*Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012
Suez	*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 Liability, 30 July 2010
Supervisión	*Supervisión y Control S.A. v Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017
Tacna Arica Question	*Tacna-Arica Question (Chile v Peru) (2 March 1925) 2 RIAA 921*
Tenaris I	*Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal Lda. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016
Tenaris II	*Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal Lda. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Award, 12 November 2016
Tokios Tokeles	*Tokios Tokelės v Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004
Total	*Total S.A. v The Argentine Republic*, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010
TSA Spectrum	*TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, 19 December 2008
Natland	*Natland et al. v. The Czech Republic*, UNCITRAL, PCA Case, Partial Award, 20 December 2017
Yaung Chi	*Yaung Chi OO Trading PTE Ltd. v The Government of the Union of Myanmar*, ASEAN Case No ARB/01/1, 31 March 2003 (2003) 42 ILM 540
Yukos	*Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009

I. PERSONS INVOLVED IN THE ARBITRATION

1. THE PARTIES

1.1 CLAIMANTS

1. The claimants are WCV WORLD CAPITAL VENTURES CYPRUS LTD ["**WCV**"], with VAT No. CY10187417K, and CHANNEL CROSSINGS LTD ["**CCL**"], with VAT No. CY10119416G [collectively the "**Claimants**"]. WCV and CCL are limited liability companies registered in Cyprus, with their offices at:

   Arch. Makariou III, 2
   Atlantis Building, 3rd floor, Flat/Office 301
   Mesa Geitonia
   4000, Limassol
   Republic of Cyprus

2. The Claimants are represented by:

[redacted]
Three Crowns LLP
104 avenue des Champs-Elysées
75008 Paris
[redacted]

[redacted]
Šítkova 1
110 00 Prague 1
Czech Republic
[redacted]

[redacted]
One Essex Court
Temple, London EC4Y 9AR
United Kingdom
[redacted]

1.2 RESPONDENT

3. The **Respondent** is THE CZECH REPUBLIC, with VAT No. CZ00006947, and address for notifications:

   Ministry of Finance
   Letenská 15
   118 10 Prague 1
   Czech Republic

4. Respondent is represented by:

   Mr. Eduardo Silva Romero
   Dechert (Paris) LLP
   32 rue de Monceau
   75008 Paris
   France
   [redacted]

   Mrs. Erica Stein
   Dechert LLP
   480 Avenue Louise
   1050 Brussels
   Belgium
   [redacted]

   The email address that Dechert used for purposes of this matter is:

   [redacted]

   Mrs. Marie Talašová
   Mrs. Anna Bilanová
   Mr. Tomáš Munzar
   Ministry of Finance
   Letenská 15
   118 10 Prague 1
   Czech Republic
   [redacted]

5. The Claimants and Respondent will collectively be referred to as the "**Parties**".

2. THE ARBITRAL TRIBUNAL

6. On 24 September 2015 Claimants appointed as arbitrator:

Mr. Stanimir A. Alexandrov [redacted]
Stanimir A. Alexandrov PLLC
1501 K Street N.W.
Suite C-072
Washington D.C. 20005
[redacted]

7. On 26 October 2015 Respondent appointed as arbitrator:

Mr. Mark Clodfelter [redacted]
Foley Hoag LLP
1717 K Street, N.W.
Washington, D.C. 20006-5350 US
[redacted]

8. On 9 February 2016 Messrs. Clodfelter and Alexandrov designated as the Chairman of the Tribunal:

Mr. Juan Fernández-Armesto
[redacted]
ARMESTO & ASOCIADOS
General Pardiñas, 102, 8º izda.
28006 Madrid
Spain
[redacted]

9. On 10 February 2016 Juan Fernández-Armesto accepted his appointment as Chairman of the Tribunal.

10. The Parties confirmed they had no objection as to the constitution of the Arbitral Tribunal[1].

3. ADMINISTRATIVE SERVICES

3.1 PERMANENT COURT OF ARBITRATION

11. The Parties agreed that the Permanent Court of Arbitration ["**PCA**"] would serve as registrar, as the depositary of funds deposited by the Parties to cover the Arbitral Tribunal's fees and expenses, and, if required, as appointing authority.

12. The contact details of the PCA are as follows:

[1] Terms of Appointment, para. 12.

Permanent Court of Arbitration
[redacted]
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands
[redacted]

3.2 ASSISTANT TO THE TRIBUNAL

13. With the consent of the Parties, the Arbitral Tribunal designated [redacted] as Assistant to the Tribunal. The Parties received [redacted] *curriculum vitae* and the following contact details:

[redacted]
Armesto & Asociados
General Pardiñas, 102, 8º izda.
28006 Madrid
Spain
[redacted]

II. PROCEDURAL HISTORY

1. THE BIT

14. Claimants instituted this arbitration in accordance with Art. 8 of the Agreement between the Czech Republic and the Republic of Cyprus for the Promotion and Reciprocal Protection of Investments, 15 June 2001 [the "**BIT**"], which reads:

> "
> Article 8
> Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party
>
> 1. Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of that other Contracting Party shall be settled, if possible, by negotiations between the parties to the dispute.
>
> 2. If any dispute between an investor of one Contracting Party and the other Contracting Party cannot be thus settled within a period of six months from the written notification of a claim, the investor shall be entitled to submit the case, at his choice, for settlement to:
>
> (a) a court of competent jurisdiction or an administrative tribunal of the Contracting Party which is the party to the dispute,
>
> or
>
> (b) the International Centre for Settlement of Investment Disputes (ICSID) having regard to the applicable provisions of the Convention of the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington D.C. on 18 March 1965,
>
> or
>
> (c) an arbitrator or international ad hoc arbitral tribunal established under the Arbitration Rules of the United National Commission on International Trade Law (UNCITRAL). The parties to the dispute may agree in writing to modify these Rules,
>
> or
>
> (d) The Arbitration Institute of the Chamber of Commerce in Stockholm.

> 3. The arbitral awards shall be final and binding on both parties to the dispute and shall be enforceable in accordance with the domestic legislation".

2. APPLICABLE PROCEDURAL AND SUBSTANTIVE RULES, PLACE OF ARBITRATION, LANGUAGE AND APPLICABLE LAW

15. The Parties have agreed to apply the 1976 UNCITRAL Arbitration Rules ["**UNCITRAL Rules**"][2].

16. The Parties also agreed that the Arbitral Tribunal would take into consideration, as general guidelines, the International Bar Association ["**IBA**"] Rules on the Taking of Evidence in International Arbitration adopted by the IBA Council on 29 May 2010, and the IBA Rules on Party Representation in International Arbitration adopted by the IBA Council on 25 May 2013[3].

17. The Parties further agreed that the place of arbitration is The Hague, Netherlands[4]; and that the language to be used in the proceedings is English[5].

18. The Tribunal must decide this dispute in accordance with the BIT.

3. THE COMMENCEMENT OF THE ARBITRATION

19. On 24 September 2015 Claimants served on Respondent a Notice of Arbitration pursuant to Art. 3 of the UNCITRAL Rules.

20. On 21 February 2016 Respondent informed the Tribunal that it intended to request the Tribunal to exclude three legal opinions commissioned by the Ministry of Finance of the Czech Republic (Exhibits C-11[6], C-12[7] and C-13[8]) submitted with the Notice of Arbitration, on the grounds that they were obtained illegally ["**Inadmissibility Application**"][9].

21. On 23 February 2016 Claimants transmitted to the Tribunal the Notice of Arbitration with all the exhibits attached thereto.

22. On 20 April 2016 the Tribunal and the Parties held a preliminary conference call where they discussed the Terms of Appointment, the Procedural Order ["**PO**"] No. 1, the procedural timetable and the confidentiality regime for the documents submitted in the proceedings.

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[2] Respondent's communication R-1; Claimants' communication C-1.
[3] Terms of Appointment, para. 30.
[4] Respondent's communication R-1; Claimants' email of 26 February 2016.
[5] Respondent's communication R-1; Claimants' communication C-1.
[6] Legal Opinion of Dr. Alan Korbel.
[7] Legal Opinion of PWC.
[8] Legal Opinion of White&Case.
[9] Respondent's communication R-1.

23. As agreed between the Parties and the Tribunal on the preliminary conference call, Claimants submitted their Statement of Claim on 27 May 2016 ["**C I**"].

24. On 31 May 2016 the Tribunal and the Parties signed the Terms of Appointment, recording the arbitration agreement, the applicable procedural and substantive law, the place and language of the arbitration, the remuneration of the Arbitral Tribunal and other administrative and procedural issues.

25. On that same day, the Tribunal issued PO 1, based on the Parties' agreement on the procedural timetable and other matters concerning the conduct of the proceedings, such as the number, scope and sequence of submissions, document production, time extension and the Tribunal's powers to conduct the proceedings.

26. The procedural timetable agreed upon by the Parties foresaw[10]:

- A schedule for Respondent's Inadmissibility Application;
- A deadline for Respondent to confirm whether it intended to submit a request for bifurcation of the proceedings;
- Alternative schedules for the presentation of written submissions and celebration of an evidentiary hearing, depending on Respondent's choice to request bifurcation and the Tribunal's decision on that matter.

4. CONFIDENTIALITY REGIME

27. On 20 April 2016 Claimants forwarded the Tribunal and Respondent a draft order for protection of confidential documents and information that was discussed during the preliminary conference call. The Tribunal invited the Parties to reach an agreement regarding the confidentiality regime to apply in this arbitration[11].

28. On 1 June 2016 the Parties informed the Tribunal that no agreement had been reached regarding confidentiality[12]. The Parties presented their respective proposals on the confidentiality regime[13].

29. After hearing the Parties, on 23 August 2016 the Tribunal issued PO 2 with a **Confidentiality Order** to regulate the treatment of the documents and information presented in this arbitration.

5. RESPONDENT'S WITHDRAWAL OF ITS INADMISSIBILITY APPLICATION

30. On 6 June 2016 Respondent informed the Tribunal that it withdrew its Inadmissibility Application with regard to Exhibits C-11[14] and C-12[15], since

[10] Annex 1 to PO 1.
[11] A 5, para. 4.
[12] Comminication C 7.
[13] Communications C 7, C 10 and C 11; and communications R 5 and R 8.
[14] Legal Opinion of Dr. Alan Korbel.
[15] Legal Opinion of PWC.

Claimants had provided in its Statement of Claim the explanation on how they got hold of these legal opinions. However, no explanation was provided on how Claimants obtained Exhibit C-13; thus, Respondent requested the Tribunal to order Claimants to provide such information[16].

31. On 8 June 2016 Claimants informed the Tribunal that the three documents in question – including Exhibit C-13 – were shared by the Ministry of Finance of the Czech Republic with Synot TIP – Claimants' Czech subsidiary[17].

32. On 13 June 2016 Respondent decided to withdraw its Inadmissibility Application also with respect to Exhibit C-13[18].

6. RESPONDENT'S APPLICATION FOR STAY

33. On 22 June 2016 the Czech Republic submitted an application requesting the Tribunal to suspend the arbitration until the Court of Justice of the European Union ["**CJEU**"] ruled on a preliminary ruling referred by the German Federal Court of Justice pursuant to Art. 267 of the Treaty on the Functioning of the European Union ["**TFUE**"], relating to compatibility of arbitration agreements in Intra-EU BITs and EU Law ["**Application for Stay**"].

34. On 6 July 2016 Claimants presented a response asking the Tribunal to dismiss the Application for Stay. The Parties filed two further submissions on this issue on 26 July[19] and 4 August[20] 2016.

35. On 6 September 2016 the Tribunal issued its PO 3 dismissing the Application for Stay.

7. BIFURCATION OF THE PROCEEDINGS

36. On 24 June 2016 Respondent confirmed that it would submit a request for bifurcation and its memorial on jurisdictional objections. Accordingly, on 29 July 2016 the Czech Republic submitted its Memorial on Jurisdiction and Request for Bifurcation ["**R I**"], asking the Tribunal to bifurcate the proceedings, to first adjudicate the following jurisdictional and admissibility objections:

- Objection 1: whether Claimants had established a *prima facie* breach of the BIT or International Law;
- Objection 2: whether this Tribunal has jurisdiction in light of the fact that this case is brought under an Intra-EU BIT[21];

[16] Respondent's communication R-7.
[17] Claimants' communication C-9.
[18] Respondent's communication R-9.
[19] Respondent's Reply on the Application for Stay.
[20] Claimants' Rejoinder on the Application for Stay.
[21] Respondent also requested the Tribunal to invite the European Commission to participate as *amicus curiae* in this arbitration.

- Objection 3: whether the claims submitted in this arbitration have already been litigated before the Czech Courts;
- Objection 4: whether the Czech Republic consented to a multi-party arbitration;
- Objection 5: whether Claimants satisfy the nationality requirements of the BIT, in particular, whether they have their permanent seat in Cyprus; and
- Objection 6: whether Claimants initiated this arbitration in bad faith.

37. On 19 August 2016 Claimants submitted their Response to the Request for Bifurcation, requesting the Tribunal to dismiss Respondent's application to bifurcate the proceedings.

38. On 2 September 2016 the Tribunal and the Parties held a conference call to further discuss the Request for Bifurcation.

39. On 6 September 2016 the Tribunal issued its Decision on the Request for Bifurcation deciding to bifurcate the proceedings to address Objections 3 to 6 separately from Objections 1 and 2, which were joined to the merits phase[22].

40. Pursuant to the procedural timetable, on 28 October 2016 Claimants submitted their Answer on Bifurcated Objections ["**C II**"].

41. On 18 November 2016 Respondent presented its Reply on Bifurcated Objections ["**R II**"][23].

42. And on 9 December 2016 Claimants submitted their Rejoinder on Bifurcated Objections ["**C III**"].

8. HEARINGS ON JURISDICTION

43. On 16 and 17 January 2017 the Parties and the Tribunal held a first hearing on the bifurcated objections ["**First Hearing**"]. The First Hearing was held at the PCA, Carnegieplein 2, 2517 KJ, The Hague, The Netherlands[24]. The following witness and expert were examined:

[22] The Tribunal and the Parties agreed that Respondent's request that the Tribunal invite the European Commission to participate as *amicus curiae* in this arbitration is directly linked with Objection 2 (Recording of the conference all on the Request for Bifurcation, 1:49:00), which was joined to the merits phase.

[23] On its Reply on Bifurcated Objections Respondent made a request for document production. Claimants opposed to such request arguing that the procedural calendar agreed upon by the Parties did not envisaged a document production stage (C 24). The Tribunal decided to postpone its decision to the end of the First Hearing. At the end of the First Hearing, Respondent waived its request for document production (HT2, p. 263).

[24] The Tribunal will refer to the transcript of the First Hearing as **HT1** and **HT2**.

- [redacted] who had presented two written witness statements on behalf of the Claimants ["[redacted]"][25];

- [redacted] who had presented an expert opinion on Cypriot law on behalf of the Czech Republic ["[redacted]"].

44. At the end of the First Hearing the Parties proposed, and the Tribunal agreed, to hold an additional two-day hearing on closing arguments, in lieu of post-hearing briefs[26]. Pursuant to the Parties' agreement the hearing on closing arguments was held on 16 and 17 June 2017, at the offices of counsel for Respondent at 32 Rue de Monceau, 75008 Paris ["**Second Hearing**"][27].

9. JOINT TABLE

45. On 14 June 2017 the Tribunal acknowledged the Parties' agreement to prepare a summary table of the municipal proceedings that Claimants' subsidiary has brought before the Czech courts and their status[28].

46. On 21 August 2017 the Parties jointly submitted the summary table on the municipal proceedings ["**Joint Table on Municipal Proceedings**"].

10. REQUEST TO FILE AN ADDITIONAL LEGAL AUTHORITY

47. On 12 February 2018 Claimants submitted communication C 40, notifying the Tribunal of the existence of a confidential award rendered pursuant to the Czech-Cypriot BIT ["***Natland et al v. Czech Republic or Natland***"], which adjudicated similar jurisdictional objections as those raised in this arbitration by the Czech Republic. Claimants informed the Tribunal that the claimants in *Natland et al v. Czech Republic* had agreed to disclose the award in this arbitration, and requested the Tribunal to order Respondent to produce the award either in whole or an extract containing the relevant sections.

48. On 16 February 2018 Respondent stated it would be willing to produce the relevant extracts of the *Natland* award after confirming whether the claimants in that case would consent to such disclosure[29].

49. The Tribunal requested Respondent to consult with the claimants in *Natland* to seek their consent to the disclosure of relevant sections of the award[30].

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[25] [redacted] first witness statement of 26 October 2016 ["[redacted]"] and his second witness statement of 9 December 2016 ["[redacted]"].
[26] HT2, pp. 259-262. See also communication R-27.
[27] The Tribunal will refer to the transcript of the Second Hearing as **HT3** and **HT4**.
[28] A 24.
[29] R 32.
[30] A 28.

50. On 28 February 2018 Respondent filed an extract of the *Natland* award in this arbitration[31], making brief comments on the outcome of the decision and its impact on this arbitration[32].

51. On 1 March 2018 Claimants also submitted a brief communication addressing the impact of the *Natland* award on this arbitration[33].

11. DUE PROCESS

52. At the end of the Second Hearing the Tribunal asked the Parties if they considered that any of their due process rights had been breached in this arbitration. The Parties answered that they had no complaints in this regard[34].

[31] Respondent marked the excerpts of the *Natland* award as "Confidential", pursuant to the Confidentiality Order in this arbitration (PO 2).
[32] R 33.
[33] C-44.
[34] HT4, pp. 93, 25-94, 1:11.

III. SUMMARY OF THE FACTS OF THE CASE

53. The Claimants are two limited liability companies incorporated in the Republic of Cyprus, which form part of a group of six companies – the **Synot Group** – which holds investments in a wide range of sectors (such as hospitality, software, real estate and gaming) in about 20 countries[35].

54. Between 2006 and 2009 the Claimants acquired two Czech companies from other companies within the Synot Group:

- Synot W, a.s. ["**Synot W**"], created in December 1998 and based in Uhrské Hradiště, Czech Republic[36], a manufacturer and distributor of hardware and software for gaming devices; and
- Synot TIP, a.s. ["**Synot TIP**"], established in October 2002 and also based in Uhrské Hradiště[37], which operates sports betting, casino games and lotteries games in the Czech Republic[38].

55. Both companies will be jointly referred to as the "**Operating Companies**".

56. From 2011 and 2013 a series of regulatory changes were made in the Czech gaming sector. Claimants have brought this arbitration, arguing that these reforms constitute breaches of the obligations assumed by the Respondent in the BIT and have caused serious losses to the value of their direct and indirect shareholdings in the Operating Companies.

57. The Tribunal will proceed as follows: it will first describe the corporate history of the Synot Group, and particularly, how the Claimants structure their investment in the Czech Republic (**1.**). Then, the Tribunal will summarize the business of the Operating Companies in the Czech Republic and the measures adopted by the Republic which allegedly breached Claimants' rights under the BIT (**2.**).

1. CORPORATE HISTORY OF THE SYNOT GROUP

1.1 SYNOT W

58. Synot W is a Czech company incorporated in 1990 in the Czech Republic. In 1998 the company became a joint-stock company[39], with a registered capital of CZK 30,200,000. The shareholders at this point were [redacted]

[35] C II, para. 4.
[36] C-44.
[37] C-43.
[38] [redacted], para. 10.
[39] R-33.

(CZK 29,980,000) and [redacted] ([redacted] (CZK 220,000) – two Czech nationals[40].

59. The first involvement of a foreign company in Synot W occurred in 1999: a Dutch company, Smeets woon-en DHZ Groep B.V. ["**Smeets**"] [41], subscribed a capital increase in Synot W, by delivering certain trade receivables held by a Cypriot company, Greenfield Trading Ltd. ["**Greenfield**"] against Synot W[42]. Synot W owed to Greenfield certain trade receivables, and Greenfield assigned these receivables to Smeets, which then contributed those to Synot W.

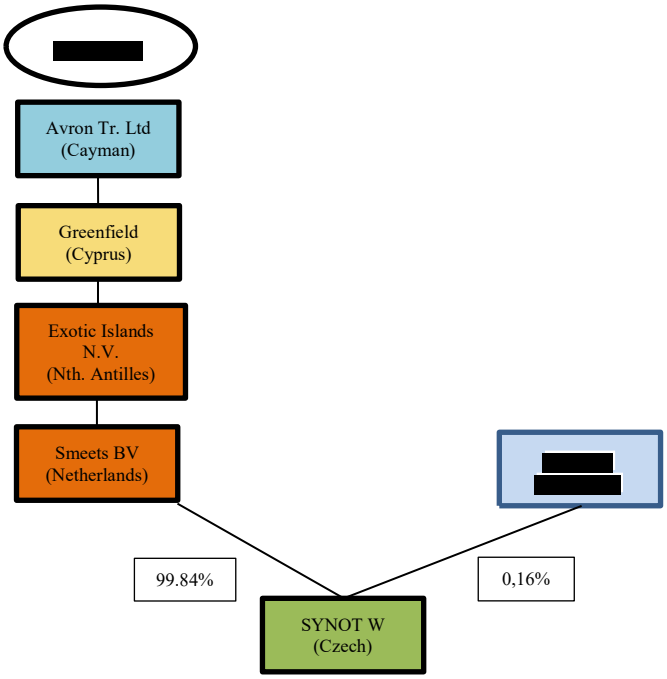
60. On 1 August 2000 [redacted] sold all of his shares in Synot W to Smeets[43].

61. After these transactions, the registered capital of Synot W amounted to CZK 135,200,000[44], distributed as follows:

- [redacted] Sr.: CZK 220,000;
- Smeets: CZK 134,980,000.

62. Although Smeets was a Dutch company, and Greenfield a Cypriot one, both were in fact controlled by [redacted] through a chain of trustees and holding companies[45]. By the end of 2000 the structure was thus, as follows:

[40] R-33.
[41] This company would later be called World Capital Ventures B.V. See C I, Annex 1.
[42] R-34.
[43] C-255.
[44] R-36.
[45] See, R-10, R-60, C-256, p. 3 and HT2, p. 20, 3:10.



1.2 SYNOT HOLDING

63. Synot Holding s.r.o ["**Synot Holding**"] was created in the Czech Republic in February 1997[46]. By July 1999 the registered capital was CZK 32,000,000, distributed as follows[47]:

- [redacted] CZK 31,000,000;
- [redacted] : CZK 1,000,000.

64. In June 2000 [redacted] transferred all of his shares to [redacted] who became the sole shareholder of Synot Holding with a registered capital of CZK 32,000,000[48].

65. A few months later, on 17 January[49] and 10 May 2001[50], [redacted] transferred 99,94% of his shares in Synot Holding to Czech Capital Ventures, s.r.o ["**CCV**" or "**Czech CV**"], a 100% subsidiary of Smeets, a company controlled by [redacted], for its nominal value of CZK 31,980,000[51]. At this point Synot

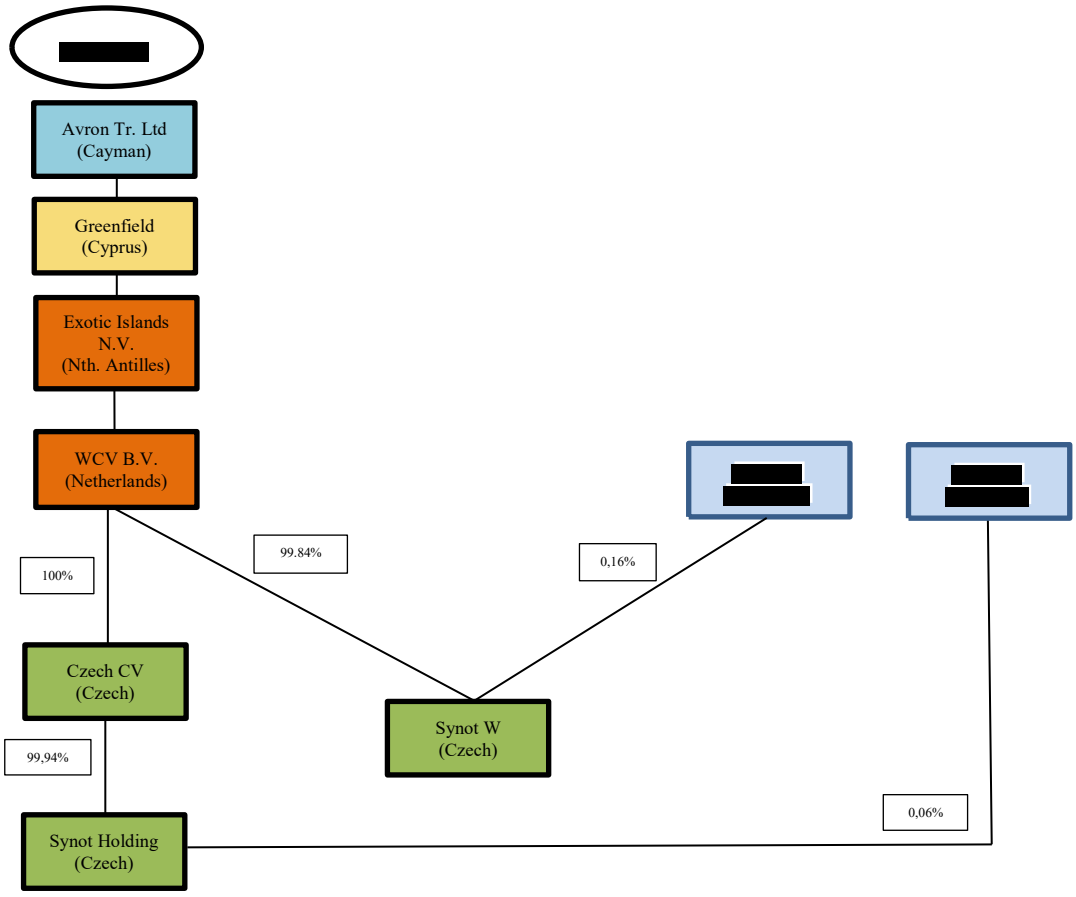
[46] C-41, p. 1.
[47] C-41, p. 3.
[48] C-41, p. 3.
[49] R-38.
[50] R-39.
[51] R-38 and R-39.

Holding had the same registered capital (CZK 32,000,000), but distributed as follows:

- [redacted] CZK 20,000;
- CCV: CZK 31,980,000.

66. In this period Smeets was renamed World Capital Ventures B.V. ["**WCV B.V.**"][52].

67. The group structure is reflected in this graphic:



1.3 SYNOT TIP

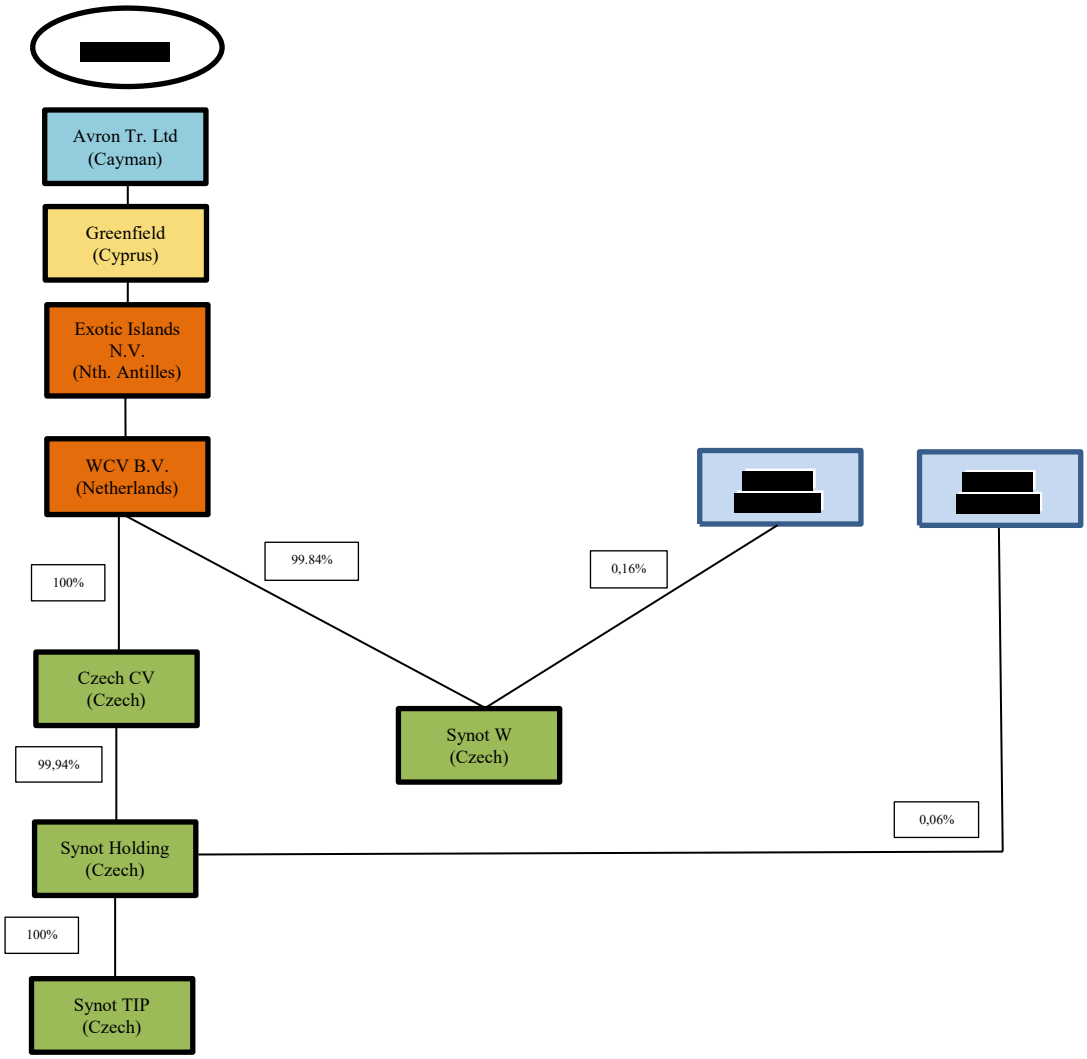
68. In September 2002 [redacted] and Synot Holding incorporated Synot TIP as a joint-stock company, with a registered capital of CZK 104,000,000[53], distributed as follows[54]:

[52] C I, Annex 1.

- [redacted] CZK 49,000,000;
- Synot Holding: CZK 55,000,000.

69. In November 2004 Synot Holding subscribed CZK 100,000,000 of new shares issued by Synot TIP[55]. At some later stage, [redacted] ceased to be a shareholder of Synot TIP, and Synot Holding became the sole shareholder of Synot TIP[56].

70. The structure by 2006 was as follows:



[53] R-37.
[54] R-37.
[55] C-43, pp. 11 and 12.
[56] C-43, p. 10.

1.4 THE 2006-2009 RESTRUCTURING

71. WCV, a Cypriot company which acts as Claimant in this arbitration, was incorporated on 22 November 2006 by One World Financial Limited (Cyprus), a company specialized in providing corporate services, with a share capital of CYP 1,000[57]. On that same day, the shares were transferred to Sheading Financial Limited[58], a Cayman Island company controlled by [redacted][59].

72. On that same day, WCV bought from Greenfield the totality of the share capital of Exotic Islands N.V., a company incorporated in the Netherland Antilles ["**Exotic Island**"][60]. The agreed price was USD 6,000[61], an amount equal to the nominal share capital of Exotic Island[62].

73. *Pro memoria*, Greenfield was another Cypriot company controlled by [redacted][3]. Exotic Island was the head of a line of holding companies, which eventually owned 100% of Synot TIP and 99.84% of Synot W, the two Operating Companies (the entities affected by the breaches of the BIT allegedly committed by the Czech Republic). The sale between Greenfield as seller and Claimant WCV as buyer of 100% of the capital of Exotic Island, thus indirectly implied the transfer of 100% of Synot TIP's and 99.84% of Synot W's share capital.

74. On 12 November 2007 the next step in the restructuring process was taken: Exotic Islands adopted a resolution distributing to its parent company, WCV, 100% of the share capital of WCV B.V.[64] Thus WCV B.V. (the parent company of both Operating Companies) became a direct affiliate of Claimant WCV, and Exotic Island disappeared from the structure.

75. On 17 July 2008 WCV made two share purchases, with its wholly-owned subsidiary WCV B.V. acting as seller:

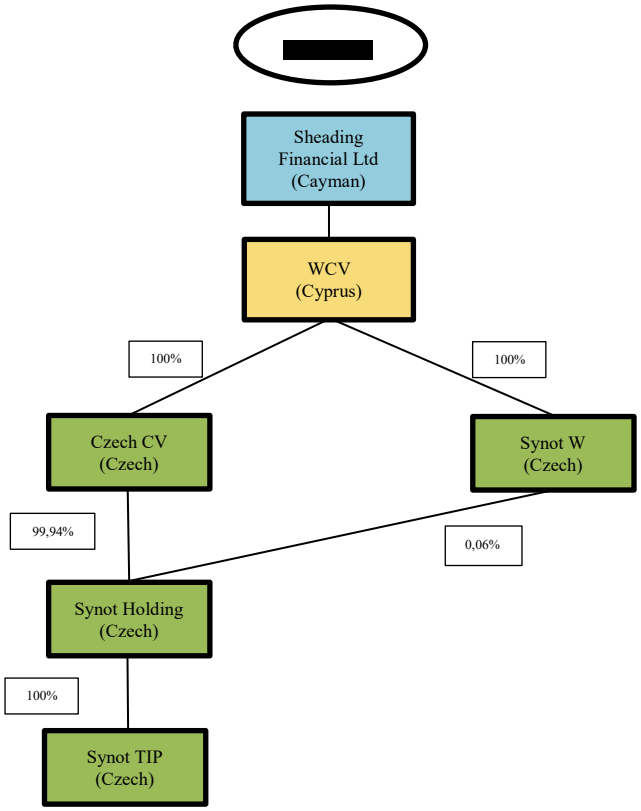
    - 99.84% of the share capital in Synot W, for a purchase price CZK 594,633,000 (EUR 25,6 M), which was converted into a loan from buyer to seller[65];
    - 100% of the share capital in CCV (which controlled Synot TIP through Synot Holdings), for a purchase price of CZK 41,750,000 (EUR 1,8 M), also converted into a loan[66].

[57] R-44, p. 3.
[58] R-44, p. 2.
[59] R-10; R-60.
[60] C-14.
[61] C-14
[62] HT2, p. 126, 1:25.
[63] R-40, C-14, R-10.
[64] C-16.
[65] C-19.
[66] C-20.

76. As a result of these sales WCV, became the direct owner of 99.84% of the share capital in Synot W, and indirect owner (through two Czech holding companies) of 100% of the share capital of Synot TIP.

77. In May 2009 [redacted] transferred his 0,06% interest in Synot Holdings (CZK 20,000 in shares) to Synot W[67]. And on October 2009 [redacted] sold his 0,16% participation in Synot W to WCV, for CZK 220,000[68].

78. The Group structure by the end of 2009 was as follows:



[67] C-22. The purchase price for this transaction is redacted in the share purchase agreement.
[68] C-23. The participation of 0,16% in Synot W was historically held by [redacted] (See para. 77 supra). By October 2009, however, such interest had passed to [redacted] who sold the shares to WCV (C-23).

1.5 CCL – CLAIMANT 2

79. The participation of CCL (Claimant 2) in the factual matrix of the case is much more limited: on 12 May 2009 it acquired from WCV 1,02% of the shares in CCV for CZK 3,300,000[69]. This was allegedly done because under Czech company law at that time, the Operating Companies were required to have two shareholders. However, this rule was abolished[70], and on 30 September 2014, WCV reacquired the shares in CCV from CCL for the same purchase price[71]. Consequently, the only participation of CCL in this case consists of holding 1,02% of CCV's share capital, from May 12, 2009 through September 30, 2014.

2. THE SYNOT GROUP'S OPERATIONS

80. The Synot Group can trace its operations back to 1990, when [redacted] and his father, [redacted]., created Synot W to operate slot machines in the Czech Republic .

81. In 2004 the Operating Companies began to manufacture, distribute, and operate two innovative gaming systems: a centralised lottery system [the "**CLS**"] and a local lottery system [the "**LLS**"].

CLS

82. The CLS system is operated via interactive video terminals ["**Terminals**"]. Players access and play games of chance through these Terminals[73]. The image below depicts two of these Terminals manufactured by Synot W[74]:

SYNOT W Blue Line VLT System

SYNOT W Trinity VLT System

83. The Terminals are remotely operated and centrally administered through an internet-based network[75]. Typically, there can be hundreds of Terminals connected to a single CLS network[76].

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[69] C-40, p. 3.
[70] HT2, p. 95, 8:17.
[71] C-40, p. 3; C-35. The Share Purchase Agreement is dated 30 September 2014 (C-35), but deleted in registry as owner of the shares on 11 March 2015 (C-40).
[72] C-197.
[73] [redacted], para. 14.
[74] C I, para. 89.

84. The novelty of the CLS lies in the connection to a central system. Unlike the typical winning slot machines, the Terminals are not stand-alone gaming devices. While an ordinary slot machine is not connected to other slot machines, the CLS operates through a network of connected Terminals; the software generating the games displayed on each Terminal is centralized.

LLS

85. The Operating Companies market and operate a second gaming device, the so-called local lottery system or LLS. Its features place it somewhere between a slot machine and a CLS: the LLS includes a set of inter-connected gaming Terminals (usually three), that are controlled by a control unit located on top[77]; players play for prizes that accumulate across the three connected Terminals[78].

86. The games displayed are installed directly in the Terminals, and are not administered through a centralized computer (although the LLS transmits financial and accounting information to a central server).

87. The image shows two LLSs operated by Synot Group:

SYNOT W Classic MP

SYNOT W MP Video – Diamond Line

2.1 THE REGULATION OF GAMING

88. Games of chance are regulated in the Czech Republic by the Act No. 202/1990 Coll. on Lotteries and Similar Games [the "**Lotteries Act**"][79].

89. The Lotteries Act regulates any "lottery and similar game" involving the placement of a bet in return for a chance to win[80]. The Lotteries Act contains a

[75] [redacted], para. 14; [redacted] para. 13.
[76] [redacted], para. 15; [redacted] para. 13.
[77] [redacted] para. 13.
[78] [redacted], para. 37.
[79] The text applicable at the time of Claimants acquired their interests in the Synot Group came into force on 29 September 2005 and has been submitted as exhibit C-8.
[80] C-8, s. 1(1).

non-exhaustive list of "lotteries and similar games" falling within its scope, such as monetary lotteries, prize lotteries, raffles or sport betting[81].

90. The Lotteries Act is divided into an introductory provision and six special parts: Parts One to Five cover each specific category of games and Part Six contains general, transitional and concluding provisions.

91. One of the main requirements, in order to operate any lottery or similar game, is the need to obtain a permit from a competent authority[82]. The Act confers powers to grant these permits on three public bodies – the central Government, the regional authorities and the municipalities – according to the following principles:

- For lotteries[83], the Ministry of Finance is the competent authority for lotteries over CZK 200,000 (EUR 8,000)[84]; municipalities are competent for lotteries of lesser value[85];
- For slot machines[86], the Ministry of Finance is only competent for machines operated in casinos or with a foreign currency[87]; municipalities are competent for all other machines operated in their territory[88]; the act also contains a specific authorization for municipalities to restrict the operation of slot machines to certain locations and times by issuing "general binding decrees" ["**Municipal Decrees**"][89];
- Any other lotteries and games not expressly regulated under the Lotteries Act (often called "innominate games") are licensed by the Ministry of Finance[90], pursuant to Section 50(3).

92. Each competent authority is not only responsible for granting, amending or terminating the permit, but also for supervising the operator's activities, including through physical inspections, the power to seize documents, impose fines and temporarily suspend the permit[91].

[81] C-8, s. 2.
[82] C-8, s. 2; [redacted] paras. 33-34.
[83] Part One of the Act.
[84] C-8, s. 6(1).
[85] C-8, s. 6(1).
[86] Part Two of the Act.
[87] C-8, s. 18(1).
[88] C-8, s. 18(1). Save for machines operated directly by the municipalities, which are licensed by the regional authority.
[89] C-8, s. 50(4); [redacted] para. 38.
[90] C-8, s. 50(3).
[91] C-8, s. 47(1).

2.2 PERMITS

The 2004 Permit

93. The CLS was first introduced in the Czech market in 2003[92]. As the Lotteries Act did not expressly mention this novel system, it was not clear in which category it should fall and which authority was competent to issue the relevant permits.

94. The first permit for a CLS was issued in 2003 by the Ministry of Finance to SAZKA, the former state-owned gaming entity[93]. The Ministry of Finance relied upon Section 50(3) of the Lotteries Act, which works as a catch-all clause, conferring on the Ministry powers to license innominate games and lotteries that do not fit within the categories set out by the other provisions[94]. According to the testimony of [redacted], Deputy Minister of International Relations and Financial Policy, CLSs fell within the scope of Section 50(3) of the Lotteries Act as innominate games and, therefore, under the games that the Ministry of Finance was able to regulate and license[95].

95. Sections 50(3) reads as follows:

> "The Ministry may also license lotteries and similar games which are not regulated according to this Act in Parts One to Four, provided that all terms and conditions for such operations are specified in detail in the permit. The provisions of Parts One to Four of the Act shall be applied accordingly".

96. The decision to issue permits for CLSs was made by the Department on State Supervision of Gambling and Lotteries, known as Department 34 ["**Department 34**"]. Department 34 carries out, at an operative level, the functions that the Lotteries Act entrusts to the Ministry of Finance.

97. According to [redacted] the practice of Department 34 was to issue a general "master" permit for the operation of a CLS network, and then "subsidiary" permits for each Terminal connected, under the conditions established in the master permit[96].

98. On 26 July 2004 Synot TIP[97] received from the Ministry of Finance its first permit to operate a CLS network with three Terminals in the town of Uhrské Hradiště [the "**2004 Permit**"][98]. According to the practice adopted by Department 34,

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[92] [redacted], para. 16.
[93] Privatized in 1993.
[94] [redacted] para. 27.
[95] [redacted] served as Deputy Minister for International Relations and Financial Policy within the Ministry of Finance. In this capacity, he oversaw the work of Department 34[redacted] has submitted a written witness statement in this arbitration ["[redacted]"]. See [redacted] para. 27.
[96] [redacted] para. 27.
[97] At that time Synot LOTTO. a.s.
[98] C-7.

Synot TIP later increased the number of Terminals that could operate under the 2004 Permit[99].

99. The 2004 Permit contained no expiration date; its language simply specified that the Ministry of Finance could "amend, change or cancel the permit under the terms and conditions stipulated in Section 43 of the [Lotteries Act]"[100]. Section 43 provides for general conditions that permit the suspension, amendment or cancellation of permits[101].

100. Over the following year Synot TIP expanded its CLS operations, obtaining additional permits in many other locations. Claimants aver that by the end of 2005 Synot TIP operated 180 terminals on the basis of the 2004 Permit[102].

The 2007 Permit

101. On 31 December 2007 the Ministry of Finance replaced the 2004 Permit with a ten-year renewable permit [the "**2007 Permit**"], which already included the new technical standards for Terminals approved by the Ministry of Finance in December 2006[103]. Under the 2007 Permit Synot TIP could continue applying for the incorporation of additional Terminals[104]. Synot TIP gradually developed its business and eventually held permits for 4,000 Terminals by 2011[105].

LLSs

102. LLSs entered the Czech market in 2008. Following the precedent of the CLS networks, the Ministry of Finance found that LLSs qualified as innominate games and that, accordingly, the Ministry had the power to issue the relevant permits under Section 50(3) of the Lotteries Act[106]. On 16 January 2009 Synot TIP received its first permit to operate five LLSs for a ten-year renewable period[107].

2.3 CHANGE OF THE REGULATORY FRAMEWORK

103. While Synot TIP and the gaming industry expanded, critical opinions against the gaming industry and its potential damages to society became vocal.

104. In October 2009 the Chrastava Municipality adopted a Municipal Decree [the "**Chrastava Decree**"] limiting the operation of CLS Terminals, arguing that the Terminals should be considered as slot machines for purposes of the

[99] C-7, para. 1.
[100] C-7 p. 4.
[101] See C-8, Section 43 (1) through (7).
[102] C I, para. 141.
[103] C-17, p. 26; [redacted] para. 47.
[104] C-17, para. 4.
[105] [redacted] paras. 47 and 48.
[106] [redacted] para. 34.
[107] C-118, paras. 3 and 25.

application of the Lotteries Act[108]. The municipalities of Františkovy Lázně and Kladno issued similar Decrees in February and July 2010 [the "**Františkovy Lázně Decree**"[109] and "**Kladno Decree**"[110], respectively].

105. The Ministry of Internal Affairs – acting within its authority[111] – suspended these Decrees and asked the Constitutional Court to declare them void.

106. Simultaneously, the municipalities also sought action in the Czech parliament. As a result, in early 2010 the Parliament adopted an amendment to Section 50(3) of the Lotteries Act, shifting the power to licence lotteries and similar games not regulated under the Lotteries Act from the Ministry of Finance to the municipalities. The project, however, never came into force as the President of the Republic vetoed it[112].

The 2011 Decisions of the Constitutional Court

107. On 14 June, 7 September, and 27 September 2011 the Constitutional Court handed down its three decisions on the annulment of the Municipal Decrees [the "**Chrastava**"[113], the "**Františkovy Lázně**"[114] and the "**Kladno Decisions**"[115], jointly the "**2011 Decisions**"]. The Court found for the municipalities and upheld the constitutionality of the three decrees that the Ministry of Finance had challenged. The Constitutional Court held the following[116]:

- Municipalities are entitled to restrict the operation of games in their territories by issuing Municipal Decrees, pursuant to the provisions of the Lotteries Act and their power under the Municipalities Act to regulate "local issues of public order" in their territories;
- The municipalities' right of self-governance prevailed over the rights acquired by the holders of existing permits to operate gaming devices, because operators are "on the edge of society" and so could be "deprived of their permits at any time";
- The Ministry of Finance must terminate permits to operate gaming devices that conflict with Municipal Decrees which limit or prohibit such games.

[108] C-26.
[109] C-27.
[110] C-147.
[111] C-52; C-63; [redacted] para. 10
[112] C-134.
[113] C-26.
[114] C-27.
[115] C-147.
[116] [redacted] para. 11.

The 2011 amendment to the Lotteries Act

108. In October 2011 the Czech Parliament passed a law that amended the Lotteries Act significantly [the "**2011 Amendment**"][117]. The law contained the following changes affecting CLSs and LLSs:

- It introduced a definition of CLSs and LLSs[118];
- The authorization to issue permits for CLSs and LLSs continued to be entrusted to the Ministry of Finance; however, it provided that municipalities were entitled to participate in the administrative proceedings relating to the issuance of permits, stating their position "from the point of view of protection of local public order issues"[119];
- Section 50(4) was amended to expressly allow municipalities to issue Municipal Decrees prohibiting the placement of CLS Terminals and of LLSs in their entire municipality or in parts thereof, or limiting their placement and times of operation[120];
- It included a transitional provision – Section 51(4) – benefitting permits issued prior to 1 January 2012; these permits would not be affected by newly enacted Municipal Decrees until 31 December 2014[121].

The 2013 Decision of the Constitutional Court

109. On 20 June 2012 the Constitutional Court received a constitutional complaint from the municipality of Klatovy, alleging that the Ministry of Finance had unlawfully interfered with its rights to self-governance by failing to cancel existing permits for operation of Terminals previously issued by the Ministry under Section 50(3) of the Lotteries Act. The constitutional complaint included a motion by Klatovy to annul the new Section 51(4) of the Lotteries Act, i.e. the transitional period inserted by the 2011 amendment.

110. The Court in a decision dated 2 April 2013 granted Klatovy's motion to annul this provision [the "**2013 Decision**"][122].

111. The Court examined whether the provision of Section 51(4) temporarily limited the right of municipalities to self-governance, by in turn limiting the power to regulate the operation of Terminals through Municipal Decrees[123]:

- Interpreting its 2011 Decisions, the Court said that:

[117] C-28.
[118] C-28, s. 2 (l) and (n).
[119] C-28, s. 45(3)
[120] C-138, Art. I (4).
[121] C-28, s. 51(4).
[122] C 30, paras. 1-4; [redacted]a para. 107.
[123] C-30, para. 26.

> "whether and where the lotteries and similar games (including [Terminals]) can be operated within the territory of the municipality, is a matter of local order and as such it falls within the self-government competence of municipalities"[124];

with the consequence that:

> "part of the right to self-government under Articles 8, 100(1) and 104(3) of the Constitution and within the meaning of the now established practice of the Constitutional Court is also the right of municipalities to regulate the operation of [Terminals] within its territory by issuing [Municipal Decrees]"[125];

- The Court found that the transitory provision of Section 51(4) contravened the municipalities' right to self-governance as defined in the Constitution, and, therefore, the Court annulled this provision[126];
- The Court added that the municipalities' right to self-governance cannot be affected by an ordinary legislative act, such as the 2011 Amendment, and thus the Court rejected the argument that the municipalities had acquired the right to regulate Terminals only after enactment of the 2011 Amendment[127].

2.4 TERMINATION OF PERMITS

112. Following the 2011 Amendment and the 2011 and 2013 Decisions of the Constitutional Court, many municipalities decided to issue Municipal Decrees regulating the operation of CLSs and LLSs in their territory. As of January 2016 nearly 750 Municipal Decrees had been enacted[128].

113. The Ministry of Finance has also adopted a more restrictive position as regards to permits:

- The Ministry of Finance has commenced proceedings under Section 43(1) to terminate all existing permits that are in conflict with Municipal Decrees[129];
- The Ministry of Finance has rejected approximately 100 of Synot TIP's applications for permits of CLSs and LLSs, on the basis of Municipal Decrees regulating slot machines[130];
- Since February 2014 new permits for Terminals issued by the Ministry of Finance are valid only for one year (instead of three years as was the previous practice)[131].

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[124] C-30, para. 32.
[125] C-30, para. 33.
[126] C-30, para. 44.
[127] C-30, para. 33.
[128] C-191.
[129] [redacted] para. 58.
[130] [redacted] para. 63.

114. By the end of 2015 Synot TIP had suffered the termination of 786 permits for Terminals and of 49 permits for LLSs, whilst termination proceedings were pending for another 200 Terminals and 15 LLSs. In the first three months of 2016, permits for another 100 Terminals and 10 LLSs were terminated[132].

115. As of May 2016 Synot TIP still operated more than 800 Terminals and 100 LLCs in areas where the municipality had banned the operation of slot machines; Claimants' expectation is that the Ministry of Finance will in due course terminate these permits too[133].

116. Since 2013 Synot TIP has initiated over 120 administrative proceedings before the Municipal Court in Prague and the Supreme Administrative Court, challenging decisions by the Ministry of Finance terminating permits to operate Terminals in specific locations ["**Municipal Proceedings**"][134]. As of July 2017:

- Synot TIP's claims have been dismissed in seven Municipal Proceedings;
- 78 Municipal Proceedings have been withdrawn;
- 22 Municipal Proceedings are still pending;

[131] C-160.
[132] [redacted] para. 58.
[133] C I, para. 275.
[134] Joint Table Municipal Proceedings.

IV. RELIEF SOUGHT

117. In its Statement of Claim Claimants submitted the following request for relief[135]:

> "On the basis of the foregoing, fully reserving their right to supplement or otherwise amend the present request for relief, the Claimants respectfully request that the Tribunal:
>
> (a) DECLARE that the Czech Republic has breached the Treaty;
>
> (b) ORDER the Czech Republic to compensate the Claimants for its breaches of the Treaty, in the principal amount of CZK3.6 billion, which amount is subject to revision closer to the time of the Tribunal's Award, in light of the continuing character of the Czech Republic's Treaty breaches, plus appropriate post-award interest until full payment of the award is made;
>
> (c) ORDER the Czech Republic to pay all of the costs and expenses of these arbitration proceedings, including the fees and expenses of the Tribunal, the PCA, the fees and expenses relating to the Claimants' legal representation, and the fees and expenses of any experts appointed by the Claimants or the Tribunal, plus interest; and
>
> (d) AWARD such alternative or additional relief as the Tribunal considers appropriate.
>
> The Claimants reserve their right to supplement and expand upon the factual and legal claims, arguments and evidence they have submitted through this Memorial in the course of the proceedings".

118. The Czech Republic presented its Memorial on Jurisdiction and Request for Bifurcation containing six jurisdictional objections and requesting the Tribunal to[136]:

> "DECLARE that it has no jurisdiction over Claimants' claims; or
>
> Alternatively, DECLARE that Claimants' claims are inadmissible; and
>
> ORDER Claimants to fully reimburse the Czech Republic for the costs it has incurred in defending its interests in this arbitration, plus interest on any costs at a rate to be determined by the Tribunal".

119. In their Answer on Bifurcated Objections Claimants asked the Tribunal to[137]:

[135] C I, para. 391.
[136] R I, para. 316.

> "DISMISS the Respondent's Bifurcated Objections;
>
> ORDER the Respondent to pay all of the costs and expenses associated with the Bifurcated Objections, including the fees and expenses of the Claimants' counsel, the fees and expenses of the Tribunal, PCA costs and any other costs incurred by the Claimants, on a full indemnity basis, together with interest on such costs, in an amount to be determined by the Tribunal; and
>
> AWARD such alternative or additional relief as the Tribunal considers appropriate".

120. The Czech Republic and Claimants submitted with their Reply and Rejoinder on Bifurcated Objections identical requests as formulated in their Memorial on Jurisdiction and Answer on Bifurcated Objections, respectively[138].

[137] C II, para. 128.
[138] R II, para. 254; C III, para. 212.

V. INTRODUCTION TO THE BIFURCATED OBJECTIONS

121. The Claimants have brought this arbitration seeking compensation for the loss in value of their directly and indirectly-owned shareholdings in the Operating Companies they allege was caused by changes in the regulation of the gaming sector made in breach of the BIT.

122. Claimants argue that its Operating Companies suffered substantial detriment when the Czech Constitutional Court issued its 2011 and 2013 Decisions, vesting municipalities with ample power to regulate gaming devices in general, and CLSs and LLSs in particular. Until then the Ministry of Finance had exercised these powers exclusively, and had issued the Operating Companies with numerous long-term permits for operating CLSs with multiple Terminals and various LLSs. Following the decisions of the Constitutional Court, through various statutory and administrative acts, the Ministry of Finance and the municipalities terminated the existing permits or imposed restrictions on the operation of the gaming devices. Claimants submit that the Czech Republic's conduct amounts to a violation of the fair and equitable treatment and full protection and security standards of the BIT; and request the Tribunal to order the Czech Republic to pay CZK 3.6 B (EUR 137 M) to compensate Claimants for the loss resulting from these violations.

123. In turn, the Czech Republic contends that this Tribunal lacks jurisdiction over the dispute, because Claimants have brought this arbitration in flagrant abuse of international law and the investment arbitration system. The Czech Republic says Claimants are mere holding companies, controlled by Czech Senator [redacted] who has already litigated these claims before the Czech Courts unsuccessfully. Respondent raises six jurisdictional objections against Claimants' case.

124. On 6 September 2016 the Tribunal decided, at the Respondent's request, to split four of the six jurisdictional objections, to be addressed on a jurisdictional phase that concludes with this Interim Award on Jurisdiction[139]:

- Whether Claimants have their "permanent seat" in Cyprus and thereby qualify as protected investors under Art. 1(2)(b) of the BIT [the "**Permanent Seat Objection**"];

- Whether Claimants instituted this arbitration in bad faith [the "**Bad Faith Objection**"];

[139] Decision on the Request for Bifurcation dated 6 September 2016.

- Whether Claimants' claims have already been litigated before the Czech Courts, and therefore Claimants have engaged the fork-in-the road provision of Art. 8(2) of the BIT [the "**Fork-in-the-road Objection**"];

- Whether the Czech Republic gave its consent to WCV and CCL to submit jointly their claims under the BIT in one and the same arbitral proceedings [the "**Multi-party Arbitration Objection**"].

125. In the following sections the Tribunal rules on each Objection.

VI. PERMANENT SEAT OBJECTION

126. With respect to legal persons, Art. 1(2)(b) of the BIT defines the term "investor" as follows:

> "The term 'legal person' shall mean, with respect to either Contracting Party, any entity incorporated or constituted in accordance with, and recognized as legal person by its laws, having the permanent seat in the territory of that Contracting Party".

127. Thus, the BIT establishes two requirements for a legal person of a Contracting Party to qualify as a protected investor:

- It must be incorporated or constituted in accordance with the law of a Contracting Party; and
- It must have its permanent seat in the territory of that Contracting Party.

128. The Czech Republic alleges that Claimants are not protected investors since they do not comply with the second requirement: Claimants have failed to prove that they have their "permanent seat" in Cyprus. Therefore, the Tribunal lacks *ratione personae* jurisdiction to hear this claim.

129. The Czech Republic submits that the indicia that Claimants have presented as evidence of their permanent seat do not meet the criteria of a seat; the Republic adds that these indicia were abusively put in place after the dispute had crystalized, which would also divest the Tribunal of jurisdiction to adjudicate this dispute – a separate allegation that will be adjudicated in the next Section.

130. Claimants reject Respondent's contention. In Claimants' view, Respondent has failed to properly apply the "permanent seat" test and seeks to introduce additional requirements which the Contracting Parties did not include in the BIT. In any event, Claimants aver that both have had their permanent seats in Cyprus under any applicable standard.

131. The Parties have devoted significant efforts to address the law and the facts relevant to this objection. Respondent addressed the issue in its Memorial on Jurisdiction ["**R I**"] and in its Reply on Bifurcated Objection ["**R II**"], and Claimants in their Answer on Bifurcated Objection ["**C II**"] and in their Rejoinder on Bifurcated Objections ["**C III**"]. Both parties then orally developed their arguments in the First and Second Hearing.

132. Apart from their written and oral submissions and supporting documentation, the Parties have presented the following evidence:

- Claimants have submitted two written witness statements of [redacted], [redacted] ["[redacted]"] . [redacted] also gave his oral testimony during the First Hearing;

- The Czech Republic has presented an expert legal opinion of [redacted] on the concept of "permanent seat" from the Cyprus law perspective [redacted"]. [redacted] also attended the First Hearing to confirm his expert opinion.

133. The Tribunal will summarize the arguments on which the Parties rely (**1.**) and will adopt a decision (**2.**).

1. POSITION OF THE PARTIES

134. Since the Parties' positions have evolved as the arbitration developed, the Tribunal will adopt a chronological structure to summarize the arguments.

1.1 RESPONDENT'S MEMORIAL ON JURISDICTION

135. In its Memorial on Jurisdiction Respondent says that in Art. 1(2)(b) of the Treaty the requirement that a legal person has a permanent seat in a Contracting Party comes in addition to the requirement that the legal person be formally incorporated there. The term permanent seat does not and cannot mean the same thing as formal incorporation – otherwise it would be rendered entirely superfluous[141].

136. Respondent adds that permanent seat is not merely a formal matter where a company has filed certain documents, but instead a substantive matter where decisions are made and where instructions originate from. The factors to consider are where a company has its effective administrative or management center, to the exclusion of pure formalities such as the place of legal incorporation[142]. Czech treaty practice confirms this conclusion[143], which was also defended in the *Alps Finance* decision[144].

137. Respondent says that Claimants have introduced no evidence to show that they have their permanent seats in Cyprus. This is no surprise because all publicly available evidence indicates that WCV and CCL are not genuinely managed and administered in Cyprus. There is only one genuine director, [redacted] and he

[140] [redacted] first witness statement of 26 October 2016 ["[redacted] and his second witness statement of 9 December 2016 ["[redacted]
[141] R I, para 212.
[142] R I, para. 215.
[143] R I, para 218.
[144] R I, para 213.

has no known connection to Cyprus. Claimants have no employees in Cyprus nor any physical location in Cyprus[145].

1.2 CLAIMANTS' ANSWER ON BIFURCATED OBJECTIONS

138. Claimants in their Answer say that Art. 1(2) of the BIT requires that a legal person have its permanent seat in a Contracting State, but offers no definition of that term. Nor does international law, which reflects the broad diversity of concepts of seat across domestic jurisdictions. In these circumstances, the appropriate course is to resort to municipal law. Claimants argue that permanent seat is not a term of art in public international law and cannot be construed as to impose requirements that the Contracting Parties had no intention to add, such as effective management or effective control[146].

139. Claimants explain that as a common-law jurisdiction, Cypriot law adheres to the incorporation theory of company law, and not to the civil law theory of *siège social*. The Cypriot Companies Act, Cap. 113 [the "**Companies Act**"], based on the English Companies Act 1948, adopts the incorporation theory: the company must be incorporated by adopting its Memorandum of Association and Articles of Association[147], upon which the company is deemed constituted under Cypriot law and is treated as a separate personality from its shareholders. The certificate of incorporation issued by the Registrar of Companies is:

> "conclusive evidence that all the requirements of the [Companies Act] in respect of registration … have been complied with, and that the association is a company authorised to be registered and duly registered under this Law"[148].

140. Claimants add that all companies incorporated in Cyprus must have a registered office in Cyprus, as per Section 102(1) of the Companies Act[149]:

> "Every company shall, as from the day of issuance of the certificate mentioned in section 15 [certificate of incorporation], have a registered office in [Cyprus] to which all communications and notices may be addressed".

141. Section 102 sets forth the essential elements of the registered office[150]:

- It must be registered with the Registrar;
- It must be an office (as opposed to a vacant plot); and

[145] R I, paras. 222-226.
[146] C II, para. 29.
[147] C II, para. 37, citing to CL-119, s. 15.
[148] C II, para. 39, citing to CL-119, s. 17.
[149] C III, para.
[150] C II, para. 42.

- It must be a functioning office capable of receiving "communications and notices".

142. Claimants conclude that the natural meaning of the term permanent seat under Cypriot law is registered office. Art. 1(2)(b) of the BIT takes the incorporation theory as its starting point, requiring that the company be incorporated or constituted in accordance with the laws of the Republic of Cyprus. The definition is then completed by reference to seat, which in the case of Cyprus must be taken to be the registered office, a concept which is central to Cypriot company law. There is no reason why Cyprus would intend to use the complex definition of seat suggested by Respondent, which would combine the incorporation theory and the real seat theory, especially when real seat is a concept alien to Cypriot company law[151].

143. Claimants explain that their interpretation of permanent seat complies with the *effet utile* principle of interpretation invoked by Respondent: it is clearly possible to have a company incorporated in Cyprus, without that company having its registered office in Cyprus (e.g. if the company has provided a non-existent address). In that case, the company would not be protected under the BIT – as actually happened in the *CEAC* case[152].

Application to the facts

144. In any event, the Claimants say that they comfortably meet the requirements for a permanent seat proposed by Respondent:

- They are registered at Arch. Makariou III, 2 Atlantis Building, 3rd floor, Office 301, Mesa Geitonia, Limassol, Cyprus, the address notified to the Registrar, a fully equipped office of approximately 160 m^2, where the Claimants' books and registers are kept, open during regular business hours and marked with signs at street level;
- They have two full-time employees, who live in Cyprus;
- [redacted] actively manages the affairs of the Claimants;
- Claimants engage local auditors and legal advisors, submit corporate and tax filings in Cyprus as tax residents of Cyprus, and pay local charges;
- The board of directors comprise three directors, [redacted] and two Cypriot directors.

1.3 RESPONDENT'S REPLY ON BIFURCATED OBJECTIONS

145. Respondent further developed its arguments in its Reply on Bifurcated Objections.

[151] C II, para. 47.
[152] C II, para. 53

146. Respondent says that the term permanent seat must be interpreted under international law, following the principles of primacy and autonomous interpretation of international law, uniformly recognized and applied by investment tribunals[153].

147. Under international law, permanent seat means effective place of management and administration of a company's business[154]. This is the proper interpretation of the concept, supported by the following arguments:

148. (i) The preparatory works for the BIT make it clear that the parties rejected the term registered office in favour of permanent seat[155]. The *travaux*, which may serve as a supplementary means of interpretation of the Treaty, pursuant to Art. 32 VCLT, show that during the negotiation of the BIT, the Czech Republic rejected the inclusion of the term registered office and suggested the term permanent seat, which was the one finally adopted. Logically, permanent seat cannot now mean registered office[156].

149. (ii) The *effet utile* principle of interpretation of Art. 31 of the VCLT implies that permanent seat must mean effective place of management and administration. Art. 1(2)(b) of the BIT establishes two requisites for legal entities to be protected under the Treaty:

- That the legal person be formally incorporated under the laws of the Contracting State; and
- That it has its permanent seat in its territory.

Permanent seat cannot refer to a formal incorporation requirement – such as registered office – because it would render this term superfluous. The term permanent seat must refer to the place of effective management and administration[157].

150. When Cypriot investment treaties wish to refer to registered office, they in fact adopt the terminology registered office. This is evident in the investment treaty between Cyprus and Belgium and Luxembourg[158].

Cypriot law

151. Respondent adds that even though the correct approach is to interpret permanent seat under international law, Claimants' argument that permanent seat equates to registered office under Cypriot law is wrong. Should the Tribunal adopt

[153] R II, para. 95.
[154] R II, para. 99.
[155] R II, para 85-87.
[156] R I, para. 217, citing to R-24; R II, para. 87, citing to R-78 through R-83.
[157] R II, para. 93, citing to *Tenaris I,* para. 150.
[158] R II, para 113; ER [redacted] para 25.

Claimants' position to apply Cypriot law, the Czech Republic argues that the term "permanent seat" does not equate to "registered office", but to the actual place of management and control[159].

152. In support of its position Respondent submits the expert legal opinion of [redacted] The expert explained that under Cypriot law the citizenship of a company is determined exclusively by incorporation, through the certificate of registration issued by the Registrar of Companies[160].

153. Each company incorporated in Cyprus is obligated, within 14 days of its incorporation, to create a registered office in Cyprus and to notify the Registrar accordingly[161]. It is not possible to have a lawfully incorporated company in Cyprus without a registered office[162], nor to move a Cypriot company's registered office outside of Cyprus[163].

154. [redacted] further says that Cypriot law does not have a concept of permanent seat. The Cypriot Merchant Shipping Act [the "**MSA**"] used to refer to companies incorporated under the laws of Cyprus and having its "seat" in Cyprus, but in a 2005 amendment "seat" was substituted by "permanent establishment"[164].

155. The Cypriot Value Added Tax Law does refer to companies having their "permanent seat of business in the Republic". The meaning of this concept was tested in the *OMAS* case, where the Supreme Court of Cyprus construed the term "permanent seat" to mean "the place of conducting business"[165].

156. Cypriot tax and exchange control law in general prefer the concept of "residence", a term developed in English law which equates with the actual place of central management of a company, and which may be different from the registered office[166].

157. Summing up, Respondent says that as a matter of Cypriot law, the term permanent seat cannot mean registered office, but rather the company's actual seat, where its central management and control actually abides[167].

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[159] R II, para. 108.
[160] [redacted], para. 11.4
[161] [redacted] para 10.12. Since 2015 a company is obligated to maintain a registered office upon incorporation
[162] R II, para. 115.
[163] R II, para. 114; [redacted] para. 10.8.
[164] [redacted], para. 10.10.
[165] [redacted], para. 13.5, citing to *OMAS (Cyprus) Ltd v. Republic of Cyprus* (2008) 3 A.A.D 253.
[166] [redacted], para. 12.8.
[167] [redacted], p. 23.

Application to the facts

158. Respondent says that Claimants have failed to prove that they have a permanent seat in Cyprus, where the administration and management of the company is carried out. Although Claimants have referred to some indicia, the timing is suspicious: the tenancy agreement, employment contracts, email addresses and board minutes were only put in place three months before the Notice of Dispute, and after the dispute had crystalized; these indicia disappeared after filing the Notice of Arbitration. Furthermore, the indicia are devoid of any substance[168].

159. Respondent adds that, in a holding company, effective management includes appointment and evaluation of directors in subsidiaries, monitoring of investments and strategic and financial consulting for subsidiaries. Claimants have not proven that they performed these tasks from Cyprus on a permanent basis[169].

1.4 CLAIMANTS' REJOINDER ON BIFURCATED OBJECTIONS

160. Claimants say that the starting point for interpreting Art. 1(2)(b) of the Treaty must be Arts. 31 and 32 of the VCLT. Applying these rules, a few points become clear[170]:

- The concept permanent seat is not a term of art in public international law, nor in any domestic law Claimants know of;
- Permanent seat does not mean real economic activity nor place of management and control;
- The *travaux* shows that the term permanent seat was a *porte-manteau* for the connection requirements under Cypriot and Czech company law;
- The term permanent seat is therefore either a *renvoi* to domestic law and consequently a term of art defined by reference to such law, or a generic term that must be interpreted; on either approach, the result is nearly identical: permanent seat denotes the requirement to maintain a registered office in Cyprus and the requirement to maintain a seat in the Czech Republic. Both are, by application of domestic law, permanent;
- The relevant seat requirement must be applied flexibly to holding companies, as opposed to operating companies; this confirms the appropriateness of a test based on registered office and seat;
- The test of object and purpose, as expressed in the preamble of the Treaty, fortifies the result of the textual interpretation.

161. The *travaux* shows that the term permanent seat was proposed by the Czech Republic (initially as permanent residence) and eventually approved by Cyprus. The term permanent seat appears in 21 other BITs entered into by the Czech

[168] R II, paras. 124-126.
[169] R II, para. 134.
[170] C III, paras. 81-85.

Republic[171]. Claimants add that there is no explanation in the *travaux* of what the Czech Republic understood this term to mean[172]. Claimants submit that the Czech Republic wanted to ensure that foreign companies incorporated in another country, which relocated their seat to the Republic and decided to have a permanent connection with the country, would benefit from the BIT[173].

162. Claimants add that under Czech law, permanent seat means the seat at which the company is registered. During the period relevant to the negotiation of the Treaty, the Czech Commercial Code adopted a formal seat concept that did not require any administrative or management activity at the seat. Therefore, like Cypriot law, Czech company law made no use of the legal concept of real seat to determine the domicile of a company[174].

163. Turning to Cypriot law, Claimants reiterate that the equivalent of permanent seat is registered office, which corresponds to the civil concept of statutory seat[175]. It is to this seat that Art. 1(2)(b) must be taken to refer, as the alternative (real seat) is a foreign concept to Cypriot company law. Otherwise Cyprus would have accepted a term which was undefined in its company law and has variable meanings[176].

164. Respondent's resort to Cypriot tax law is inapposite. Cypriot tax law is concerned with residence and presence, which are different concepts from nationality and the seat of a company[177].

165. The *OMAS* case referred to by Respondent concluded that the Greek term "έδρα" in the Cypriot VAT law did not have its company law meaning (seat or registered office) but that it had "a wider meaning, referring to the place of conducting business"[178]. But the *OMAS* ruling does not support Respondent's case, because Cypriot VAT law (which follows the UK VAT Act of 1983) does not refer to "seat", but to "business establishment" and "fixed establishment" – which Respondent wrongly renders in English as "permanent seat of its business"[179].

Permanent seat in international law

166. Claimants submit that "permanent seat" has no autonomous meaning in international law and reject Respondent's proposed construction of a "non-temporary and unchanging place of effective management and control"[180]. Respondent provides no basis for this assertion. In publicly-available materials, no

[171] C III, para 99.
[172] C III, para 95.
[173] C III, para 98.
[174] C III, para 106.
[175] C III, para. 118.
[176] C III, para. 118.
[177] C III, para. 141, citing to CL-127.
[178] [redacted], para. 13.5.
[179] C III, paras. 145 and 146.
[180] C III, paras. 152 and 153.

tribunal or commentator has expressly stated what permanent seat means, much less proclaimed that it has an autonomous meaning in international law. The only comment that Claimants have been able to identify is a 2016 text that the term is "highly unusual" and a feature of Czech treaty practice[181].

167. By way of example, in the Czech-Ireland BIT, the Czech Republic imposed on itself the "permanent seat" requirement, while Ireland applied the test of "any entity incorporated, registered or constituted in accordance with, and recognized as a legal person by its laws, and having its central management and control in the territory of Ireland"[182].

Application to the facts

168. Regardless of which test is applied, Claimants say that they have their permanent seat in Cyprus. They have their registered office in Cyprus, and the effective management is also there[183].

169. CCL was incorporated in 2001 and WCW in 2006, replacing Greenfield, another Cypriot Group company, to act as holding companies within the Synot Group. Both have had their registered offices in and have operated from Cyprus since they were incorporated. Both have also maintained physical offices in Cyprus, where their books and records are held, and where notices can be delivered. Both companies have always had at least two Cyprus-based directors, who have made board decisions in Cyprus, physical meetings of the board have taken place in Cyprus and the contractors or employees who have performed their administrative duties have also been based in Cyprus[184].

170. The Claimants had their permanent seat in Cyprus at the time they filed their Notice of Arbitration on 24 September 2015 and still do. They also had their permanent seat in Cyprus long before 2015, since their inception, so the Respondent's allegation of abuse is unsustainable[185]. Their activities did not cease after the filing of the Notice of Arbitration – in fact they expanded, by taking additional staff in 2015[186].

171. Claimants carried out various administrative changes in 2014 (moving the registered office of the companies to their present location and the employment of staff). These changes were made because Claimants anticipated changes to the Cypriot tax law, which would effectively require Cypriot companies to maintain their own premises and staff rather than using service company providers. Prior to 2014, the staff and premises necessary to perform the Claimants' administrative

[181] C III, para. 153, citing to CL-149.
[182] C III, para. 158, citing to C-254.
[183] C III, para 162.
[184] C III, para. 165.
[185] C III, para. 166.
[186] C III, para. 178.

and management functions had been provided by One World Financial Limited (Cyprus) ["**Oneworld**"], one such company specializing in providing corporate services. In 2014 these functions were transferred to the present registered office, and Claimants employed their own staff to perform them. New directors were also appointed[187].

172. Claimants are shareholders in their subsidiaries and this gives them the bundle of rights prescribed by the applicable domestic law – which are limited to corporate matters, and do not extend to management or executive functions, which must be performed by the board of directors of the subsidiaries[188]. It would be bizarre if a holding company were to be required to actively manage the group of companies in which it holds shares[189].

1.5 RESPONDENT'S ARGUMENTS IN THE FIRST HEARING

173. During the First Hearing, Respondent made six arguments defending its position:

174. First the award in *Tenaris I,* an authority relied upon by Claimants, declares that the term permanent establishment must be interpreted in accordance with international law to mean effective place of management and administration and cannot mean registered office[190].

175. Second Respondent adds that the *travaux* of the BIT confirms Respondent's position[191].

176. Third two internal memoranda from the Cypriot Planning Bureau to the Cypriot Ministry of Foreign Affairs, relied upon by Claimants, do not support Claimants' position: these are internal memoranda and there is no evidence that this proposal was ever exchanged with the Czech Republic[192].

177. Fourth Respondent reiterates that under Cypriot law permanent seat means actual place of management and control[193].

178. Fifth the definition of seat changed under Czech law during the key period of 2001, when the Cypriot BIT was signed. Until December 31, 2001 the Czech Commercial Code maintained a strictly formal approach to the term seat: it was understood as the address a company provided to the commercial register, regardless of whether the company was managed from the address or not. From January 1, 2002 Czech law changed from a formal to a material approach: the real seat is now the place from which the company is managed by its statutory body.

[187] C III, para 180.
[188] C III, para. 169.
[189] C III, para 171.
[190] HT1, p. 53, l9:23.
[191] HT1, p. 53, 24:25 – p. 54, 1:5.
[192] HT1, p. 54, 18:25; p. 55, 1:10; p. 56, l:8.
[193] HT1, p. 57, 5:25 – p. 58, 1:7.

This is the definition that the Czech Republic had in mind when it signed the BIT on June 15, 2001[194].

Application to the facts

179. Respondent counters Claimants' argument that they had a permanent seat in Cyprus since their inception, by saying that there is not a shred of evidence to prove that prior to 2014 they had any capacity to manage their business from Cyprus: pre-March 2014, Oneworld, a corporate service provider, was shuffling their papers[195].

180. After March 2014, the indicia alleged by Claimants are not permanent and are devoid of substance[196]. Furthermore, it is not true that these changes were required by Cypriot tax law, as Claimants aver. In fact, they refer to a proposed amendment to a EU Directive, which had not been enacted at the time, and which does not require companies to maintain their own offices and staff[197]. In addition, the board minutes thoroughly disprove Claimants' assertion that they carry out their management and administration in Cyprus[198].

1.6 CLAIMANTS' ARGUMENTS IN THE FIRST HEARING

181. Claimants say that, as a matter of *effet utile*, both Parties accept that permanent seat must mean something separate from and additional to just the mere fact of incorporation[199].

182. The Parties part company thereafter. Respondent says that permanent seat is an autonomous concept of international law, which means non-temporary and unchanging place of effective management and administration[200]. Claimants say that international law has no self-standing notion of seat, permanent or otherwise, and consequently must rely on the corresponding requirements of Cypriot or Czech law – here Cypriot law. For Cypriot companies, permanent seat means a non-transient and functioning registered office that complies with legal requirements of Cypriot law – something which was absent in the *CEAC* case. This would prevent inactive, moribund or neglected companies from being protected as investors[201].

183. Does the term seat have a fixed meaning in international law? Claimants aver that it does not. Companies are creatures of and exist only at the level of municipal law. And domestic laws around the world have two conceptions of seat:

[194] HT1, p. 60, 3:22; p. 61, 23:25 – p. 63, 1:2.
[195] HT1, p. 66, 23:25 – p. 67, 1:6.
[196] HT1, p. 21, l:6 – p. 24 l:7; p. 68, l:20.
[197] HT1, p. 26, l:9.
[198] HT1, p. 30, l:2.
[199] HT1, p. 116, 22:25; p.116, 1:5.
[200] HT1, p. 117, 5:10.
[201] HT1, p. 118, l:25 - p. 120, l:2.

- Statutory seat, adopted in both Cyprus and the Czech Republic; and
- Real seat or *siège social*, adopted by French law.

Claimants say that seat is a generic concept, the content of which must be derived from an examination of the applicable domestic laws. Depending on the context where the term is used: seat can mean either statutory seat, which is the registered office or the place of central administration[202].

184. Claimants submit that the *travaux* of the BIT shows that Cyprus understood that "having their seat" and "having their registered office" were terms which could be used interchangeably. The Czech Republic insisted on using the term permanent seat to ensure that companies which had been incorporated abroad but decided to transfer their seat to the Republic, would still be protected by the BIT[203]. The Czech Republic's treaty practice shows that permanent seat does not mean central management and control: the Ireland-Czech Republic BIT, which was signed at the same time as the BIT with Cyprus, requires Irish companies to be incorporated in Ireland and to have the central management and control in its territory – whilst for the Czech Republic the equivalent requirement is permanent seat[204].

185. Claimants explain that permanent seat was included in no less than 21 treaties entered into by the Czech Republic, and that what the Czech Republic understood by that term is clear and can be induced from the contemporaneous statements made in the MAI negotiations. Section 26 of the Czech Commercial Code allowed companies constituted under foreign law to transfer their seat to the Republic and be treated as Czech companies. The use of permanent seat was intended to grant protection to such entities[205].

Czech law

186. Claimants say that seat (*sidlo*) is a term of art under Czech law. At the relevant time any company which was registered had an ongoing obligation to maintain a simple seat. In 2001 the Commercial Code added that the address that must be registered is the place where the board of directors meets and takes its decisions. This caused difficulties, and in 2002 it was changed to the place where the company was administered and could be approached by the public. Finally, in 2009, Czech law reverted to the requirement to provide a registered address without any further criteria[206].

[202] HT1, p. 127, 5:12.
[203] HT1, p. 142, 16:21.
[204] HT1, p. 144, 18:25 – p. 145, l:7, by reference to Doc. C 254.
[205] HT1, p. 139, 1:25 – p. 143, l:13.
[206] HT1, p. 146, 13:25 – p. 152, l:10.

Cypriot law

187. Claimants say that the term permanent seat is not found *verbatim* in Cypriot company law. Cyprus is a common law jurisdiction adhering to the incorporation theory of company law – not a real seat theory jurisdiction like France. This is common ground. Cyprus does not use the concept of seat, but rather of registered office[207].

188. Under Cypriot law a cumulative requirement that a company be incorporated and have its registered office in Cyprus is a perfectly normal test – which is even applied under the MSA[208]. And EU Regulation 1215/2012 (the Brussels recast Regulation) states in Art. 63.2 that for the purposes of Cyprus (and other common law countries) statutory seat means registered office, or alternatively, the place of incorporation. This proves that there can be a company incorporated in Cyprus, without a registered office – as was the case in *CEAC*. In a country like Cyprus, permanent seat would naturally be understood to be referring to the company's registered office, there being no concept of seat in its company law[209].

Application to the facts

189. Claimants contend that the available evidence shows that WCV and CCL had their permanent seats in Cyprus since their inception, even if this is understood to mean effective management and administration. There have been changes since 2014, which were incidental and unrelated to the treaty or this dispute. This consequently dismisses both the argument that there was no permanent seat and the argument that the Claimants abusively acquired or sought to acquire a permanent seat in Cyprus; they have always had one[210].

* * *

190. At the end of the First Hearing, the Tribunal submitted to both Parties a list of questions regarding the permanent seat issue:

- Article 1(2)(b) of the BIT refers to municipal law for the determination of the nationality of the investor. How does this impact on the proper interpretation of the concept of "permanent seat", which does not have a *renvoi*?[211]
- Assuming that the proper interpretation of "permanent seat" is "registered office", the Parties should argue why this construction would lead (or not) to a cumulative requirement[212].

[207] HT1, p. 153, 4:25 – p. 154. 1:14.
[208] HT1, p. 155, 5:25 – p. 160, l:19.
[209] HT1, p. 164, 7:25 – p. 166, l:12.
[210] HT1, p. 201, 11:20.
[211] HT 2, p. 255, 18:23.
[212] HT 2, p. 255, 24:25; p. 256, 1:3.

- When does the permanent seat requirement have to be complied with for *ratione temporis* jurisdiction?[213]
- Assuming the Tribunal concludes that the scheme of administration of the Cypriot Companies WCV and CCL is the Oneworld scheme – the administration by the corporate service provider: is there a permanent seat or not? And assuming the 2014 restructuring had not taken place: would there still be a permanent seat or not?[214]
- How does the taxation regime of the Claimants (which have Cyprus tax residency status) affect the assessment of the qualification as investors under the BIT?[215]

191. These questions were addressed by both Parties orally during the Second Hearing.

1.7 RESPONDENT'S ARGUMENTS IN THE SECOND HEARING

192. During the Second Hearing, Respondent reiterated its position that the concept of seat must be construed under international law[216]. Respondent acknowledges that the term permanent seat is found in the BIT, but it is not found in Cypriot law and is not found in Czech law – which proves that the parties wished to include the term in the treaty with an autonomous meaning under international law[217].

193. *Tenaris I* and *Tenaris II* expressly reject Claimants' position that the term seat must be interpreted in accordance with international law[218]. Further, the award in *Orascom*, which comes to a different conclusion, is a complete outlier and is not in line with the mass of international authorities on point[219]. But even if the term is interpreted under Cypriot law, Claimants' case fails, because they never had a permanent seat in Cyprus, even in accordance with Cypriot law[220].

194. To illustrate the concept of seat under international law, Respondent describes a scale setting forth the different links between a home state and a corporation. The weakest link is the incorporation. The next step is seat, where the link is intensified: the company must have its effective management and administration in the home state. Permanent seat adds a temporal element: the link must continue over a long period of time. The strongest link would be if a company is required to conduct substantial business activities in the relevant state[221].

[213] HT2, p. 256, 12:21.
[214] HT2, p. 258, 12:22.
[215] HT2, p. 258, 23:25-259, 1:4.
[216] HT3, p. 56, l:10.
[217] HT4, p. 26, l:6.
[218] HT3, p. 76, 16:22.
[219] HT3, p. 80, 2:14.
[220] HT3, p. 83, 16:22.
[221] HT3, p. 60, 16:25 – p. 62, l:7, by reference to slide 63.

195. Some treaties require an accumulation of these elements. For example, the Czechoslovak-Swiss treaty, which was the governing BIT in the *Alps Finance* dispute, required the investor to be established in the relevant State, and to have its seat and real economic activities there. In the present case, the BIT only requires incorporation and permanent seat[222].

196. Respondent acknowledges that the test for effective management and administration cannot be applied in the same way to holding companies as to operational companies. The test has to be adapted. But nevertheless, Claimants must prove that there is local administration in Cyprus, that Cypriot directors manage the investments, exercise voting rights in the subsidiaries and appoint officers[223].

197. As regards to the permanency requirement, Respondent says that the seat must have existed since the time of the investment[224]. This is Respondent's primary position. In the alternative, Respondent argues that the seat must at least exist at the time of the impugned act of the state (in our case, the 2013 Constitutional Court Decision, at the latest[225]). As a final alternative, Respondent submits that the seat has to be in place at the time of consent to arbitration, when Claimants submitted their notice of dispute on 15 July 2014[226].

Application to the facts

198. Respondent says that it is clear that Claimants have never had any effective management and administration in Cyprus, let alone permanent management and administration. Looking at the facts of the case, from the time of the investment in 2006 through March 2014, nearly a year after the Constitutional Court rendered its last decision, the corporate service provider Oneworld provided only administrative services to WCV and CCL, as [redacted] admitted on the stand. No evidence has been produced to attest to Oneworld's specific activities. Therefore, on no reasonable account can this equate to effective management and administration in Cyprus[227]. There is no evidence whatsoever of the administration of the companies during the Oneworld administration[228], or that they even had a registered office in Cyprus[229].

1.8 CLAIMANTS' ARGUMENTS IN THE SECOND HEARING

199. Claimants firstly addressed the question of the critical date for meeting the treaty requirements regarding jurisdiction, saying that it is trite law that these

[222] HT3, p. 62, 9:19.
[223] HT3, p. 65, l:17.
[224] HT3, p. 67, 16:25; HT4, p. 19, 4:11.
[225] HT3, p. 68, 12:18.
[226] HT3, p. 69, 4:13.
[227] HT3, p. 72, 4:25 – p. 73, l:6.
[228] HT4, p. 7, l. 4.
[229] HT4, p. 9, 23:25.

requirements are to be ascertained at the time when the tribunal is seized, as the International Court of Justice ["**ICJ**"] decided in the *Arrest Warrant* case[230]. In the investment treaty context, the result is the same, as stated in the *CEAC* award[231]. In the present case the Tribunal was seized with the Notice of Arbitration dated 24 September 2015. Thus, that is the date upon which the jurisdictional requirements must be assessed, in accordance with Art. 3(2) of the 1976 UNCITRAL Rules[232].

Permanent seat

200. Turning to the concept of permanent seat, Claimants state that there are two competing interpretations. The first interpretation is that permanent seat equates with a non-transient and actually functioning registered office that complies with the legal requirements of Cypriot company law. Respondent adds requirements that are not found in either Cypriot nor Czech company law, and which are unclear: central place of management and administration[233].

201. The term permanent seat is characteristic of the Czech treaty practice, used in some 21 BITs. It is therefore legitimate to look at the Czech treaty practice. The 2016 Czech model treaty requires incorporation, permanent seat, plus the conducting of substantial business activities within the territory of a contracting state. The *travaux* of the Cyprus BIT includes absolutely no reference to the meaning of permanent seat[234].

Cypriot law

202. Claimants say that their interpretation of permanent seat falls in line with the object and purpose of the BIT[235]. Under Cypriot law having a registered office is a test of substance, not of form – maintaining a physical office, keeping books and records and receiving communications. A Cypriot company may not have a registered office in Cyprus, without anyone realizing. If so it would be a mere paper company, breaching the law, but still existing as a legal person until it is taken off the commercial registry. It would not qualify as an investor under the BIT. This was precisely the case in *CEAC*[236]. This is also foreseen in the Cypriot MSA[237].

[230] HT3, p. 131, 3:11, by reference to exhibit CL-166.
[231] HT3, p. 131, 24:25 – p. 132, 1, by reference to exhibit RL-64.
[232] HT3, p. 132, 10:24.
[233] HT3, p. 136, l2:25 – p. 137, 1:2.
[234] HT3, p. 150, 2:25 – p. 151, l:4.
[235] HT3, p. 176, 24:25 – p. 177, 1:8.
[236] HT3, p. 179, 3:25 – p.181, l:23.
[237] HT3, p. 182, 8:13.

203. In regards to the qualifier "permanent", it implies that if the registered office ceases to exist and is later re-established, such conduct does not meet the requirement of the BIT[238].

Czech law

204. Claimants state that the term seat or *sidlo* in Czech is used in Czech law to mean an address registered with the commercial registry, and also as a test of nationality: Czech companies are companies with their seat in the territory of the Czech Republic. In Czech law seat does not mean a place of central management and administration of the business. This concept is alien to Czech law[239].

Application to the facts

205. Claimants say that before 2014 WCV and CCL were at all times compliant with Cypriot law requirements: Cypriot authorities never thought otherwise and the companies were audited by Ernst & Young. There were two Cypriot directors, [redacted] and [redacted] professionals who offered services as company directors, and signed on behalf of the companies, while Oneworld acted as company secretary and charged fees for their services, ranging between EUR 26,000 and EUR 31,000 per year[240]. The companies also had Cypriot tax residency[241]. Claimants explain that they have not put additional information into the record, because the Respondent only objected to the internal changes in 2014, but never doubted the pre-2014 period[242].

206. Lastly, Claimants say that corporate regularity is an element of effective management, as shown by the *Tenaris II* and *Yaung Chi* tribunals[243].

2. THE TRIBUNAL'S DECISION

207. In this objection Respondent argues that Claimants, two Cypriot companies, do not meet the test to be considered as protected investors under the BIT, and that consequently, the Tribunal lacks jurisdiction to adjudicate their claims. Claimants hold the opposite position.

208. The relevant provision is Art. 1 (2)(b) of the BIT:

> "The term "investor" shall mean any natural or legal person of one Contracting Party who invests in the territory of the other Contracting Party, and for the purpose of this definition:

[238] HT3, p. 183, 19:25 – p. 184,1:3.
[239] HT3, p. 193, 11:17.
[240] HT3, p. 218, 21:25 – p. 223, l:11.
[241] HT3, p. 224, 4:16.
[242] HT4, p. 57, 20:25 – p. 64, l:9.
[243] HT3, p. 204, 2:25 – p. 205, l:11.

> (a) The term "natural person" shall mean…
>
> (b) The term "legal person" shall mean, with respect to either Contracting Party, any entity incorporated or constituted in accordance with, and recognized as legal persons by its laws, having the permanent seat in the territory of that Contracting Party".

209. Under this provision, for a Cypriot company to be considered as a protected investor under the BIT, it must meet a double test:

- Be incorporated or constituted in accordance with Cypriot law, and recognized as a legal person by Cypriot law and
- Have its permanent seat in Cyprus.

210. It is undisputed that WCV and CCL were incorporated in accordance with Cypriot law, were duly registered at the Cypriot commercial registry and are recognized as legal persons by Cypriot law[244]. What is disputed is whether WCV and CCL meet the second requirement: having a "permanent seat" in Cyprus.

211. Claimants and Respondent disagree on the meaning of permanent seat, on the date when such requirement had to be complied with, and whether Claimants have passed the test:

- Respondent says that permanent seat equates to place of actual administration and management, and that the permanency requirement implies that since the investment is made, the administration and management must have been carried out at the seat – something which, in Respondent's submission, WCV and CCL failed to accomplish;
- Claimants see things differently: in their submission permanent seat equates to a non-transient and functioning registered office that meets the requirements of Cypriot company law, which was operational at the time when the Tribunal was seized; and in Claimants' submission WCV and CCL have actually met the requirement since their incorporation.

212. The Tribunal will explain its position in accordance with the following steps: it will first establish the proven facts (**2.1**), it will thereafter interpret Art. 1 (2)(b) of the BIT in accordance with Art. 31 VCLT (**2.2**) and Art. 32 VCLT (**2.3**), and reach its conclusion (**2.4**).

2.1 PROVEN FACTS

213. WCV (Claimant 1) was incorporated in Cyprus on 22 November 2006 by Oneworld, a company specialized in providing corporate services. On that same day, the shares of WCV were transferred to the beneficial ownership of [redacted]

[244] C-44; C-43.

[redacted][5]; thereafter, WCV bought from Greenfield – another Cypriot company controlled by [redacted] – a string of special purpose vehicles which indirectly provided the control of the entire share capital of Synot TIP and Synot W, the two Operating Companies[246].

214. Around the same time the administration of CCL (Claimant 2), a Cypriot company created in 2011 and also beneficially owned by [redacted] was moved to Oneworld[247].

> [CCL's participation in the factual matrix is limited: in 2009 it acquired from WCV 1,02% of the shares in CCV, a Czech holding company, so that this company had two shareholders as required by Czech law at the time; once Czech law was amended, and this requirement abolished[248], WCV reacquired the shares in 2014[249]].

215. In the period between 2006 and 2014, Oneworld, the Cypriot corporate service provider, carried out all administrative functions required by WCV and CCL[250] and provided office space to the companies: WCV's and CCL's registered offices in Nicosia were located at Oneworld's premises[251].

216. During this period WCV and CCL were managed by two Cypriot directors ([redacted]), professionals specialized in acting as directors for off-shore companies. Although there is scarce information in the record, it must be assumed that these professionals were related to Oneworld. The service company also kept the companies' books and accounts, received mail and communications, drafted minutes of the meetings of the corporate bodies, and performed other secretarial tasks[252]. WCV and CCL paid Oneworld a fee for their services (e.g. EUR 26,000 for the services rendered in 2013 to WCV)[253].

217. The companies' statutory accounts were audited by Ernst & Young[254].

218. The companies obtained tax certificates and were tax residents in Cyprus[255].

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[245] R-10; R-60.
[246] See, R-10, R-60, C-256, p. 3 and HT2, p. 20, 3:10.
[247] [redacted] para. 16.
[248] HT2, p. 95, 2:17.
[249] C-40, p. 3. C-35. The Share Purchase Agreement is dated 30 September 2014 (C-35), but deleted in registry as owner of the shares on 11 March 2015 (C-40).
[250] [redacted] II, para. 16; R-44; HT2, p. 62, 6:10.
[251] R-44; R-45.
[252] [redacted] para. 15
[253] [redacted] fn. 20.
[254] [redacted] para. 16
[255] [redacted] para. 17; C-37, C-38, C-283 and C-284.

The 2014 reorganization

219. In 2014 all Cypriot companies within the Synot Group, including WCV and CCL, decided to transfer their management and administration, that up until then was being performed by Oneworld, to its own staff and offices, and to designate a new board of directors.

220. As a first step, on 27 March 2014 [redacted] (a former partner of Ernst & Young) and [redacted] (owner of Euromanagement, a Cypriot corporate service provider) were appointed to the boards of WCV and CCL, in substitution of [redacted] and [redacted][256]. [redacted] was appointed Chairman of the board[257].

221. A week later, on 3 April 2014, WCV and CCL left the registered office provided by Oneworld and transferred to a new office. WCV and CCL signed two separate lease agreements for the use of the new premises with Redimus, a tax advisory company owned by [redacted] which in turn has the rights over the real estate[258]. The new office, shared by various companies belonging to the Synot Group, has approximately 160m^2, with a reception, a room for board meetings and space for the managing director and staff[259]. [redacted] has deposed (and Respondent has not marshalled evidence to the contrary) that the premises are open during business hours, marked with signs at street level and within the building, and are regularly used for sending and receiving mail and notices[260]. In fact, Respondent sent a letter to this address, and it was promptly acknowledged by Claimants[261].

222. Almost immediately, on 6 of April 2014, WCV and CCL hired two employees[262]:

- [redacted] ([redacted] a member of the board), as secretary and receptionist; and
- [redacted] as a part-time[263] accountant.

223. On 23 June 2014 WCV held a board meeting, which [redacted] and [redacted] attended in person. [redacted] was represented by [redacted][264]. In this meeting the board appointed [redacted] as a proxy to vote in the annual

[256] R-44; R-45.
[257] HT2, p. 75, 22:25.
[258] C-209, C-210 and C-225.
[259] [redacted] para. 28.
[260] [redacted] paras. 25, 27, 29 and 30.
[261] C-229 and C-230.
[262] C-204.
[263] HT2, p. 88, 2:5.
[264] C-211.

general meeting of CCV (the Czech holding which indirectly owned Synot TIP) and Synot W[265].

224. A couple of months thereafter, on 1 July 2014, WCV and CCL hired [redacted] as Managing Director[266] (also called CEO[267]). The appointment of [redacted] seems to have been approved informally[268]: [redacted] testified that the board designated him and gave him powers and responsibilities, but that the discussions and resolutions were adopted orally and never formalized[269]. He describes his functions as managing WCV and CCL on a daily basis, directing and supervising staff, making decisions at management (rather than board) level and reviewing the financial performance of the Group's subsidiaries. Finally, [redacted] who has submitted two witness statements and was deposed during the First Hearing, avers that he is involved in planning, implementing and monitoring the Group's investments[270].

225. On 15 July 2014, two weeks after [redacted] designation as CEO, Claimants submitted the Notice of Dispute[271].

226. On 14 November 2014 the board of WCV held another meeting which all board members attended in person. In this meeting the board[272]:

- Discussed the financials of the company and the accounts of the subsidiaries of WCV;
- Adopted the decision to make an investment of EUR 500,000 to purchase 15% of the shares in Ergona through a Slovakian subsidiary of WCV[273];
- Discussed a legal issue arising out of a claim by Oneworld pending in court, and decided to instruct counsel to file a petition relating to the release of WCV's accounting records by Oneworld;
- Discussed two issues relating to the accounting records: first, that Oneworld still kept WCV accounting records that were to be transferred to WCV and

[265] C-211, para. 2.
[266] C-212. Clause 1.2: "From the position of CEO the Employee shall undertake and perform such duties and exercise such powers in relation to the Companies and their business as the Board of Directors of the respective Companies shall from time assign to and/or vest in the Employee and/or otherwise instruct and/or direct the Employee in order to best meet the needs of the Companies' businesses and best promote the interest of the Companies from the Employee's position".
[267] HT2, p. 70, 4:14.
[268] HT2, p. 77, 16:25-81, 1:8.
[269] HT2, p. 77, 16:25-84, 1:25, 116, 20:25-117, 1:7; C-238, para. 111; C-234 – Articles of Association WCV and CCL: "The directors may entrust to and confer upon a managing director any of the powers exercisable by them upon such terms and conditions and with such restrictions as they may think fit, and either collaterally with or the exclusion of their own powers and may from time to time revoke, withdraw, alter or vary all or any of such powers".
[270] [redacted] para. 28.
[271] C-32.
[272] C-214.
[273] C-214.

the implementation of an accounting software in WCV and other Cypriot companies; and

- Discussed the due diligence undertaken by the Bank of Cyprus for the transfer of WCV's bank accounts to Limassol.

227. During this board meeting it was decided that WCV and CCL would undertake a more active participation in the management of the international operations of the Synot Group. To this effect, between December 2015 and March 2016, WCV hired three additional employees:

- [redacted], as international markets manager[274];
- [redacted] as financial analyst[275]; and
- [redacted] as head of hospitality, leisure and media projects[276].

228. On 8 March 2015 the board of WCV held another meeting (in which [redacted] acted as proxy for [redacted]). The board discussed the financial statements ending in 2014 and resolved to make an investment in a Czech company called Our Media, by acquiring 50% of its share capital for CZK 17.5 M (EUR 650,000)[277].

229. On 22 April 2015 the boards of WCV[278] and CCL[279] issued two resolutions respectively, resolving to initiate this arbitration. Further discussions relating to the regulatory problems arising in the Czech Republic in the gaming business and the decision to initiate the arbitration proceedings against the Czech Republic took place in another meeting in October 2015[280].

230. On 21 August 2015 the board approved the audited financial statements ending in 2013[281].

231. On 27 May 2016 Claimants initiated this arbitration by submitting their Request for Arbitration.

2.2 INTERPRETATION UNDER ART. 31 VCLT

232. The Tribunal's task requires that it establish the meaning of the term permanent seat, as used in Art. 1 (2) (b) BIT.

233. The starting point for an interpretation of an international treaty is Art. 31 VCLT:

[274] C-204.
[275] C-204.
[276] C-204.
[277] C-217.
[278] C-219.
[279] C-220.
[280] C-226.
[281] C-223.

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

234. Art. 31 VCLT directs the interpreter to first seek the ordinary meaning of any term employed in the treaty (**A.**), taking into consideration the principle of effectiveness (**B.**).

A. ORDINARY MEANING

235. Respondent and Claimants dispute the ordinary meaning of the term "permanent seat," as used in the BIT.

236. Respondent avers that the ordinary meaning of permanent seat must be taken to be the place where the management and administration of the company permanently takes place – the so-called "**effective seat**" or "***siège social effective***"[282].

237. Conversely, Claimants assert that the ordinary meaning of permanent seat is permanent "**statutory seat**" or "**registered office**", the place which is continuously recorded in the company's statute and registered in the commercial registry[283].

[282] *Tenaris II*, para. 153.
[283] *Tenaris II*, para. 153.

a. MUNICIPAL VS. INTERNATIONAL LAW

238. Before addressing this dispute, it is necessary to settle a preliminary question: whether the meaning of permanent seat must be sought by applying international or municipal law – an issue on which the Parties diverge, Respondent supporting the former position and Claimants the latter.

First argument

239. In the Tribunal's opinion, the BIT's drafting provides support for Respondent's position. Art. 1(2)(a) says that a protected "natural person" must enjoy the nationality of either Contracting Parties, "in accordance with its laws". And in Art. 1(2)(b), protected "legal persons" must meet two requirements, "nationality" and "permanent seat". The BIT expressly includes a *renvoi* to municipal law for the first requirement. There is no *renvoi* for the second.

240. *Inclusio unius exclusio alterius*: the existence of *renvoi* for nationality, and the absence of *renvoi* for permanent seat, supports the Tribunal's conclusion that the term should be interpreted in accordance with international law[284].

241. That said, international law lacks a separate and autonomous concept of permanent seat (and of registered office or seat); this implies that any investigation into the meaning of the term can only be performed by taking into consideration the municipal laws of the jurisdictions involved[285].

Second argument

242. There are two systems to determine the *lex societatis*[286]:

- The real seat theory, adopted *inter alia* by France and Luxembourg, which determines the *lex societatis* by reference to the effective seat (*siège social*) of the company;
- The incorporation theory, adopted by common law jurisdictions, which determines the *lex societatis* by reference to the place of incorporation – the registered office being a statutory requirement which companies have to fulfil.

243. When the BIT was negotiated, both Cypriot and Czech company law adhered to the incorporation theory; and neither Czech nor Cypriot law used the combined expression "permanent seat" as a term of art in municipal law.

[284] The same conclusion is reached in *Tenaris I*, para 165.
[285] See *Tenaris I*, para 169 and *Tenaris II*, para 181
[286] [redacted], 11.1; CL-124.

Czech company law

244. Under Czech law the term of art used is simply seat, *sidlo* in Czech. During the 1990s, the period when the treaty was being negotiated and the term permanent seat was agreed, Czech law had adopted a formal seat concept, and made no use of the effective seat (the place from where management and administration was actually performed) to determine the domicile and nationality of a company.

245. This conclusion is supported by Section 2(3) of the Commercial Code, which defined seat as a statutory seat, the address identified in the statute and in the commercial registry[287]:

> "The seat of a legal entity and place of business of an individual is an address, which is registered as the seat or place of business in the Commercial Register or Trade Register or other Register" [Emphasis added].

246. It is true that on 1 January 2001 – six months before the signing of the BIT – Czech law changed from a formal to a material approach. Companies were required to enter its real seat into the commercial registry. Section 2(3) of the Commercial Code changed as follows[288]:

> "The seat of a legal entity and place of business of an individual is an address, which is registered as the seat or place of business in the Commercial Register or in other register pursuant to other acts. An address is to be understood as a name of the municipality (part of the municipality), postal code number, building number, alternatively name of the street or square. The entrepreneur is obliged to enter its real seat or place of business into [the] Commercial Register. The seat of the organizational part of the enterprise (§ 7) is to be understood as an address of its placement. The seat of legal person can be in an apartment only in case it is allowed the characteristics of the subject of business activity. The real seat is the address of the place from which the legal person is managed by its statutory body". [Emphasis added]

But this change is irrelevant for the drafting of the BIT, because the text of Art. 1(2)(b), and the agreement to use the term permanent seat, had been reached three years earlier, in 1997 (see section **2.3.A.** below).

Cypriot Company Law

247. Cypriot law never uses the term "seat." As a common law jurisdiction, it uses the common law concept of registered office, which equates to statutory seat. Cypriot nationality is conferred to companies through incorporation and registration with the Cypriot Commercial Registry. Section 102(1) of the Companies Act (as

[287] C-249 – Czech Republic, Act No 513/1991 Coll., The Commercial Code (Extracts). This was the version which was in force between 1992 and 2000, when the Czech Republic and Cyprus discussed and agreed the drafting of Art. 1 (2)(b). See HT1, p. 58-62 and HT1, p.146–152.
[288] RL-124.

amended)[289] requires all companies incorporated under Cypriot law to have a registered office in Cyprus "to which all communications and notices may be addressed":

> "Every company shall, as from the day of issuance of the certificate mentioned in section 15 [certificate of incorporation], have a registered office in [Cyprus] to which all communications and notices may be addressed".

248. The fact that permanent seat was never a legal term of art in Czech or Cypriot law, reinforces the conclusion that the intention of the drafters of the BIT was to give the term an autonomous meaning under international law, without a *renvoi* to municipal law.

b. THE MEANING OF PERMANENT SEAT UNDER INTERNATIONAL LAW

249. Having reached this conclusion, the Tribunal is now faced with the difficult task of identifying the precise meaning of permanent seat under international law.

250. The difficulty is exacerbated by the fact that international law lacks any consistent concept of seat, whether permanent, statutory, effective or otherwise. The term seat has been and is being used in international law with a polysemic meaning: sometimes in a purely formal sense (akin to a registered office), sometimes with a more substantive connotation (requiring that the company perform a varying degree of additional activities at the relevant location)[290]. Every time a treaty refers to seat or permanent seat, the interpreter is required to investigate and ultimately decide upon which of the various definitions the rule is referring to.

251. Art. 31(1) VCLT orders interpreters to seek, as a first step, the "ordinary meaning to be given to the terms". That rule is of little help for the task at hand, as there is no "ordinary meaning" of permanent seat: depending on the treaty which is being applied, the term may be a reference to "permanent statutory seat" or to "permanent effective seat"; international law uses both meanings indistinctively and both must be considered as ordinary[291].

B. PRINCIPLE OF EFFECTIVENESS

252. In the absence of an ordinary meaning, Art. 31 VCLT instructs the interpreter to search for the context of the treaty (including in its preamble and annexes) and its object and purpose. These interpretative criteria established in the VCLT also permit application of the principle of effectiveness or *effet utile*[292]. The principle,

[289] The Companies Act of 1959 has been amended several times. There is no evidence, however, that Cypriot company law at any point abandoned the incorporation theory.
[290] See *Tenaris I*, para. 144, *Tenaris II*, para. 181.
[291] *Tenaris I* and *II* interpreted the term "*siége social*" and "*sede*" to mean effective seat, *Orascom* to mean registered office.
[292] *Tenaris I*, para. 151; *Tenaris II*, para. 188; *Orascom*, para. 288.

which is commonly applied to construe declarations of intent, implies that the terms of a treaty must, if possible, be interpreted so as to not become devoid of effect[293]. The principle has often been applied by tribunals in investment contexts, and was summarized in *AAPL*[294]:

> "Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning […]. This is simply an application of the more wider legal principle of "effectiveness" which requires favouring the interpretation that gives to each treaty provision 'effet utile'".

253. In the present arbitration, both Parties accept the relevance of the principle of effectiveness, and both agree that in order to derive a proper meaning and provoke an *effet utile* from the term "permanent seat", as used in Art. 1(2)(b), an additional requirement must be added to those already established in the provision.

254. Both Parties submit that their respective construction meets that test.

Respondent's *effet utile* test

255. Respondent recalls that the BIT establishes two requisites for Cypriot companies to be protected:

- incorporation under Cypriot laws, plus
- permanent seat in that territory.

Permanent seat cannot refer to a formal incorporation requirement, such as registered office, because it would render the term superfluous: every company incorporated in Cyprus must have its registered office in that country. Consequently, permanent seat must refer to the other possible interpretation: permanent effective seat, or place of actual administration and management[295].

Claimants' *effet utile* test

256. Claimants aver that the interpretation of permanent seat that they favour (as equivalent to permanent registered office) also meets the effectiveness test.

257. Under Cypriot law, all companies have an obligation to keep a registered office in the Republic; but what is required is a test of substance, not of form – a proper registered office requires having a physical office, keeping books and records for inspection and receiving communications. A Cypriot company may formally declare at the Registrar of Companies that it has a registered office, but it still may fail to comply with the requirements in substance. Should that occur, it would

[293] See *Tenaris* I para 151.
[294] *AAPL*, para 40; See also *Orascom*, para. 288.
[295] R II, para. 93

breach Cypriot company law, but as a company incorporated under Cypriot law it would still have Cypriot nationality.

258. As regards to protection under the BIT, Claimants say that a Cypriot company having a formal registered office in Cyprus, would comply with the first requirement of Art. 1(2)(b) – nationality. It would however, fail the "permanent seat" test, because it would lack a real registered office. The purpose of the second requirement – the need of a permanent seat – is to exclude such paper companies from protection under the BIT[296].

The Tribunal's decision

259. The position of both Parties seems defendable.

260. Respondent's *effet utile* interpretation has been accepted by the *Tenaris I* and *II* tribunals applying treaties with similar wording (*siège social* and *sede*)[297].

261. But Claimants' construction cannot be dismissed off-hand: the purpose of the permanent seat requirement in the Czech-Cypriot BIT could indeed be the exclusion of Cypriot "paper companies": companies which meet the incorporation requirement and have a formal registered office, but where that registered office lacks any substance and is in reality, a pure facade.

262. There is indeed a precedent, where Claimants' proposed construction of the term "permanent seat" has found application: in *CEAC,* a case referring to a Cypriot company seeking investment protection under a treaty which required incorporation and seat, the tribunal denied jurisdiction, finding that the claimant's formal registered office in Cyprus failed to meet the substantive requirements for registered offices established by Cypriot law[298].

263. Summing up: the Tribunal is inclined to agree with Claimants' proposed construction of the term "permanent seat" on the basis of Claimants' arguments regarding the application of the principle of effectiveness – especially, because this conclusion is confirmed when resorting to the supplementary means of treaty interpretation, as discussed below.

[296] HT1, p. 118, l:8.
[297] The Luxemburg-Venezuela BIT: "… the term 'investor' designates … b) companies, i.e. any legal person incorporated in accordance with the legislation of the Republic of Venezuela, the Kingdom of Belgium or the Grand Duchy of Luxembourg and having its 'siège social' in the territory of the Republic of Venezuela, the Kingdom of Belgium or the Grand Duchy of Luxembourg respectively …".
The Portugal-Venezuela BIT: "… the term 'investor' means … b) Legal persons, including commercial companies and other companies or associations, that have their seat [*sede*] in one of the Contracting Parties and are constituted pursuant to and function in accordance with the Laws of that Contracting Party.
[298] *CEAC*, paras.172-202.

2.3 INTERPRETATION UNDER ART. 32 VCLT

264. The supplementary means of interpretation, defined in Art. 32 VCLT, are as follows:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable".

265. The Parties have submitted extensive arguments regarding two of the supplementary means of interpretation: the "preparatory work" or *travaux préparatoires* of the BIT, and the "circumstances of its conclusion".

266. The Tribunal will first analyze the preparatory work for the Czech-Cypriot BIT (**A.**), and then devote a section (**B.**) to the circumstances surrounding its conclusion, and especially to the Czech BIT practice. At the end of this section, the Tribunal will explain its preferred interpretation of the term "permanent seat". In a final section (**C.**) the Tribunal will summarize and eventually dismiss a supportive argument submitted by Claimants.

A. *TRAVAUX PRÉPARATOIRES*

267. The Parties have discussed the preparatory works of the BIT and focused their attention on the evolution of the definition of investor during the treaty negotiation. The value of the discussion is however hampered by the fact that the Parties have only marshalled into the record a limited set of contemporary documents – additional documents are likely to have existed but seem to have been lost[299].

a. NEGOTIATION OF THE BIT

268. The earliest surviving draft of the BIT was submitted by Cyprus in December 1993; the proposed Art. 1(2)(b) reads as follows[300]:

> "The term "investor" means
>
> (a) Natural person […]

[299] HT1, p. 146, 1:23; HT4, pp. 20, 15:25-21, 1:11; HT4, pp. 39, 14:25-40, 1:5.
[300] R-78 (English translation without BIT) and R-78 (Czech version with BIT in English), p. 4 and R-79, p. 4.

> (b) Legal entities established under the law in force of one Contracting Party and having their registered office in the territory of that Contracting Party". [Emphasis added]

269. Thus, the requirements proposed by Cyprus were that any protected legal entity had to be:

- "established under the law" of one Contracting Party; and

- have its "registered office" in the territory of that Contracting Party.

The proposal was consistent with Cypriot law, which prefers the concept of "registered office".

270. Six months thereafter, on 29 July 1994, the Czech authorities submitted to Cyprus preliminary comments on the first draft, and presumably attached an alternative Czech draft. The Czech draft, however, is not in the record. Regarding Art. 1(2)(b) the Czech Republic suggested a different text, which it labels "more lucid"; the precise wording of this proposal has been lost[301]:

> "In Art. 1, par. 2, subpar b), we propose to use the text of the Czech draft, because we consider it more lucid".

271. The next document in the record is dated one year later: an internal communication of 1 June 1995 between the Czech National Bank and the Ministry of Finance of the Czech Republic attaching a draft of the BIT (which is available)[302]. In this Czech draft the term "registered office" has been substituted by "permanent residence"[303]:

> "The term 'investor' shall mean any natural or legal person who invests in the territory of the other Contracting Party.
>
> (a) The term "natural person" […]
>
> (b) The term "legal person" shall mean with respect to either Contracting Party, any entity incorporated or constituted in accordance with, and recognized as legal person by its laws, having permanent residence in the territory of one of the Contracting Parties". [Emphasis added].

[301] R-80 (English). Exhibit R-80 (English) is an internal communication of June 1995 between the Czech Ministry of Foreign Affairs and the Ministry of Finance, making reference to the comments sent by the Czech Republic to Cyprus on 29 July 1994, attached to the communication, which is in R-80 (Czech), p. 5-8.
[302] R-81, p. 7.
[303] R-81, p. 7.

272. An internal memorandum dated 10 May 1996 (again one year later), between the Cypriot Planning Bureau and the Cypriot Ministry of Foreign Affairs, discusses the Czech proposal[304]:

> "Article 1, par. 2(b) – Speaking of legal persons perhaps the term used by the Czech side "having permanent residence" does not render correctly the meaning we desire in these cases. It is not enough for a company to have been incorporated as a Cypriot company but also its certified office must be in Cyprus. Therefore, we believe that the phrase "having their registered office" which we propose in our draft must be maintained or to become "having their seats". [Emphasis added]

273. The Cypriot memorandum shows that Cyprus was insisting on "registered office" (the term of art in Cypriot law), but that as an alternative, Cyprus was prepared to accept "seat".

274. In line with these proposals, another internal memorandum dated 28 May 1996 from the Cypriot Planning Bureau to the Cypriot Ministry of Foreign Affairs shows that Cyprus prepared a new draft (prior to a meeting between the delegations, to be held in June/July 1996), changing the term "permanent residence" proposed by the Czech side to "seat or registered office"[305]:

> "The term "legal person" shall mean with respect to either Contracting Party, any entity incorporated or constituted in accordance with, and recognized as legal person by its laws, having their seat or registered office in the territory of that Contracting Party". [Emphasis added]

275. There is no information in the record regarding the outcome of the June/July 1996 meeting. However, a new and final meeting was held in October 1997 and the agreed minutes have survived. A draft of the BIT, accepted by both Contracting Parties (except for the Most Favoured Nation clause, which remained under discussion), was attached. This final draft of the BIT includes a new wording for Art. 1(2)(b), using the term "permanent seat" for the first time – and this wording survived into the signed version of the treaty[306]:

> "The term "legal person" shall mean, with respect to either Contracting Party, any entity incorporated or constituted in accordance with, and recognized as legal person by its laws, having the permanent seat in the territory of that Contracting Party". [Emphasis added]

276. Since "permanent seat" is a term very close to "permanent residence" (the Czech Republic's initial proposal) and since "permanent seat" is a term of art used in 22 Czech BITs, practically unknown outside Czech treaty practice, it can be safely

[304] C-250.
[305] C-251.
[306] R-82.

assumed that the use of "permanent seat" was proposed by the Czech Republic, and accepted by Cyprus.

> [Although the negotiations were closed towards the end of 1997, the Parties did not sign the Treaty until 15 June 2001].

b. EVIDENTIARY VALUE

277. The Tribunal's task is to establish the proper meaning of the term permanent seat, using the preparatory work leading to the signature of the BIT as a supplementary means of interpretation.

278. "Permanent seat" – the addition of adjective and substantive – is an unusual combination. While the concept of "seat" is frequently used in BITs between many countries, the combination "permanent seat" seems to be a development made by the Czech authorities, proposed by the Czech representatives during the course of BIT negotiations, and agreed upon in at least 22 BITs signed by the Czech Republic[307].

279. The Czech Republic submits in this arbitration that the proper interpretation of permanent seat, the term which it developed and applied in its treaty negotiations, is equivalent to permanent effective seat, i.e. the place where the actual management and administration of a company is continuously performed.

280. Since the term permanent seat was developed by the Czech authorities, and its use seems restricted to Czech treaty practice, it would seem reasonable to expect that surviving Czech *travaux* (or contemporaneous public statements made by Czech authorities) confirm *in tempore insuspecto* the construction of the term as presently defended by the Czech Republic.

281. However, this is not the case.

282. What the *travaux* show is that Cyprus went into the final negotiations in 1996/97 proposing that the Art. 1(2)(b) requirement be expressed as "having their seat or registered office" in a Contracting State, while the Czech Republic preferred the formulation "permanent residence". During the negotiations, the Parties finally agreed to use a third term, "permanent seat".

283. Both Parties have made significant efforts to describe and prove the negotiations between the Czech and the Cypriot Republic which led to the signing of the BIT. It is consequently striking that Respondent has failed to marshal any contemporaneous document or statement, showing that the Czech negotiators understood permanent seat to have the meaning which Respondent now supports: i.e. the place of actual management and administration. There is also no evidence

[307] L. Malintoppi/C. Tan: "Investment Protection in South East Asia" (2016) p. 124 (CL-149, p. 5).

that this meaning was conveyed to the Cypriot counterparty – whose initial position was to use seat and registered office as equivalent concepts.

284. The absence of evidence leads the Tribunal to the inference that the interpretation which the Czech Republic now defends was likely not voiced during the treaty negotiations, but rather is a later development.

B. CIRCUMSTANCES OF THE CONCLUSION OF THE BIT

285. Art. 32 VCLT permits interpreters faced with ambiguous or obscure terms to resort not only to the preparatory work of the BIT, but also to take into consideration "the circumstances of its conclusion".

Czech-Swiss BIT

286. In the BIT with Switzerland (signed in 1990[308]) the Czech authorities adopted a triple requirement for companies to enjoy protection:

- To be constituted (or otherwise organized) under the laws of a contracting state;
- Have its seat in that contracting state; and
- Have "real economic activities" in that state.

287. Consequently, the only companies incorporated in Switzerland (a well-known off-shore jurisdiction) which benefit from investment protection in the Republic, are those that meet the triple test.

Czech-Irish BIT

288. In 1997 the Czech Republic signed its BIT with Ireland, another well-known off-shore jurisdiction – at the time when the Czech-Cyprus BIT was being negotiated. The Irish BIT eschews the triple requirement approach adopted in the Czech-Swiss BIT. Instead it requires companies to be "incorporated or constituted and recognized as legal person" in a contracting party and then adds a second requirement, which differs for Irish and for Czech companies[309]:

[308] Signed when the Czech Republic was still united with the Slovak Republic; the definition of legal entities requires that they are "constituted or otherwise duly organized under the laws of that Contracting Party and have their seat, together with real economic activities, in the territory of that same contracting party"; see *Alps Finance*, para. 86.

[309] C 254: "The term 'investor' shall mean any natural or legal person who invests in the territory of the other Contracting Party … b) the term 'legal person' shall mean, (i) with respect to Ireland, any entity incorporated, registered, or constituted in accordance with, and recognised as a legal person by its laws and having its central management and control in the territory of Ireland, (ii) with respect to the Czech Republic, any entity incorporated or constituted in accordance with, and recognised as a legal person by, its laws and having its permanent seat in the territory of the Czech Republic".

- Irish companies must have their "central management and control" (not "real economic activities") in the territory of Ireland, while
- Czech companies must have their "permanent seat" in the territory of the Czech Republic.

* * *

289. Summing up: the Czech Republic has always required foreign nationality as the first requirement to grant treaty protection. But nationality alone is not enough. In each treaty the Republic specifies one or more additional requirements which foreign companies must meet.

290. The Czech-Swiss BIT imposes an especially close link: the company must be performing "real economic activities" in the home state. The Czech-Irish BIT defines an alternative, less demanding test for Irish companies investing in the Czech Republic: that its "central management and control" be in Ireland. The Czech-Cyprus BIT finally settles for an even less demanding test: the Cypriot company must simply have its "permanent seat" in Cyprus.

291. This Czech treaty practice at the time of the negotiation of the BIT permits the drawing of some tentative conclusions regarding the meaning of permanent seat as used in the Czech-Cypriot BIT:

292. The first is that "seat" must denote something different from "real economic activities", since the Czech Republic agreed to add this last requirement in the Swiss-Czech BIT.

293. The second is that "permanent seat" can also not equate with "central management and control"; if both terms had the same meaning, the Czech-Irish BIT would not create (within the same sub-section of an article) two different legal regimes, one for Irish companies (which require "central management and control") and a separate one for Czech companies (which only require a "permanent seat").

C. MAI

294. Claimants have drawn the Tribunal's attention to the position of the Czech Republic during the 1995-1998 negotiation of the OECD Multilateral Agreement on Investment ["**MAI**"] – a draft treaty which was eventually abandoned. Claimants say that the Czech negotiation position may shed some light on the meaning given to the term "permanent seat".

295. In fact, it does not.

296. The MAI included the following definition of "investor", in which protected companies were only required to have the nationality of a contracting party[310]:

> "Investor means:
>
> [...]
>
> (ii) a legal person or any other entity constituted or organised under the applicable law of a Contracting Party, […]". [Emphasis added]

297. A speciality of the Czech Commercial Code as it stood in the late 90s was that foreign companies could under certain circumstances transfer their seat to the Czech Republic – a measure incorporated by Czech law to foster foreign investment.

298. The Czech Republic was apparently concerned with whether these relocated companies would obtain protection under the MAI, and raised the question to the OECD drafting group. A draft of the MAI dated 13 May 1997 reveals the Czech Republic's concern, and includes the drafting committee's answer: in its opinion, relocated companies were already protected under the proposed definition of investor[311].

299. Claimants say that this document reveals the Czech Republic's concern that foreign companies which had transferred their seat to the Czech Republic should be protected by Czech investment treaties. Claimants add that the concern was reflected in the Republic's treaty practice of using the term "permanent seat"[312].

300. Claimants' argument is difficult to follow.

301. The draft MAI shows – as Claimants aver – that the Czech Republic wished to extend its treaty protection to foreign relocated companies. The MAI included within its coverage companies "constituted or organized" under Czech law. The Czech delegation posed a question, and the drafting group confirmed that companies relocated to the Republic were to be deemed "constituted or organized" under Czech law and that no treaty change was required to extend the coverage.

302. The Tribunal is ready to accept that the Czech authorities wished to guarantee the protection of the Czech-Cyprus BIT to companies relocated to the Czech Republic. The text of the BIT seems to accomplish this aim: relocated companies are probably included within the first requirement of Art. 1(2)(b) (companies "incorporated or constituted in accordance with and recognized as legal person

[310] C-253.
[311] C-253, p. 99.
[312] C III, para. 99.

by" Czech law) – as the OECD Drafting Group concluded when interpreting the similarly worded MAI.[313]

303. But there is a clear *non-sequitur* in Claimants' argument that by incorporating an additional, cumulative requirement ("having the permanent seat" in the Republic), the Czech negotiators were guaranteeing extension of the scope of the BIT to relocated companies:

- As a general rule, the introduction of an additional, cumulative requirement does not extend (but rather restricts) the scope of a rule; and
- The requirement of "permanency" seems especially inappropriate if the aim was to protect relocated companies.

304. Summing up, the negotiation history of the MAI does not shed any additional light on what the Czech Republic meant when it proposed to and eventually convinced Cyprus to accept the inclusion of the term "permanent seat" as an additional requirement in Art. 1(2)(b).

2.4 CONCLUSION

305. To secure protection under Art. 1(2)(b) BIT, Claimants must prove that they are incorporated and constituted under and recognized as legal persons by Cypriot law – a requirement that Claimants undisputedly meet. Additionally, the Treaty requires that Claimants have their "permanent seat" in Cyprus. The Tribunal has interpreted the meaning of this term as a self-standing concept of international law, applying the criteria for interpretation of treaties articulated in Art. 31 and 32 VCLT. In the Tribunal's opinion, these criteria lead to a rejection of Respondent's proposed construction (**A.**) and support an alternative interpretation (**B.**), which is close, but not identical to the interpretation defended by Claimants.

A. REJECTION OF RESPONDENT'S CONSTRUCTION

306. Not without difficulties, and relying both on the primary and the supplementary means of interpretation, the Tribunal concludes that it does not share the interpretation which is now being advanced by the Czech Republic: that permanent seat equates with non-changing effective place of management and administration of the company.

307. Permanent seat is a concept developed by the Czech Republic in the negotiation of its investment treaty network. Its origins and purpose remain obscure. The Respondent has not marshalled any evidence clarifying these aspects. Claimants' explanation that the concept was developed to extend investment protection to foreign companies which relocated to the Czech Republic is unsupported.

[313] C-253, p. 99.

308. The Republic now says that the term permanent seat is to be construed to mean "permanent effective seat", the place where management and control of the company is effectively performed. There are three difficulties with this interpretation:

- In the 1990s Czech law adopted a formal approach when defining a company's *sidlo*; thus, the position advanced by the Republic in the present case, is inconsistent with Czech municipal law as it stood when the Czech-Cypriot BIT was negotiated and agreed upon;
- The Respondent has failed to marshal any contemporary evidence proving that the Czech authorities *in tempore insuspecto* supported the position which the Republic is now defending; in fact, the Czech Republic has not referred to any contemporaneous public statement made by any of its officers or representatives, saying that prospective investors, hoping to obtain treaty protection under one of the 22 Czech BITs which use the permanent seat concept, had to operate the central management and administration of their business from a location in the home country;
- the Czech-Irish BIT, which the Republic negotiated at the same time as the Czech-Cypriot treaty, confirms these findings: it shows that in the mind of the Czech authorities "central management and control", the requirement imposed on Irish companies investing in the Czech Republic, was different from and more demanding than "permanent seat", the test applied to Czech companies investing in Ireland.

309. The Tribunal also attaches significant weight to the fact that the Czech Republic has failed to prove that during the negotiations of the BIT, it shared with the Cypriot authorities the interpretation of the term "permanent seat" which it now defends. Had that have happened it seems likely that Cyprus would have resisted, as it is a common law country and an off-shore jurisdiction basing its municipal law on the term of art "registered office". Its proposals during the negotiation show that in the mind of Cypriot authorities "seat" and "registered office" were equivalent terms, and that a company which met any of these two requirements should enjoy protection from the BIT.

B. THE TRIBUNAL'S APPROACH

310. Having dismissed Respondent's interpretation, the Tribunal offers its own meaning of the term "permanent seat" as used in Art. 1(2)(b) BIT. The starting point of the interpretation is the principle of effectiveness: if the BIT requires that a protected Cypriot company must have Cypriot nationality plus a permanent seat in Cyprus, the proper construction must ascribe meaning to each of the requirements.

311. Permanent seat cannot simply mean registered office. This interpretation eschews the principle of effectiveness: a company incorporated under Cypriot law must by law, from its incorporation until its dissolution, have a registered office in Cyprus. The *effet utile* implies that the term permanent seat be construed so as to require

that the company develop a relationship of greater significance with Cyprus, above and beyond that afforded by a mere registered office.

312. The difficulty is to define with precision the additional layer of relationship that is required to meet the permanent seat test, because the concept is vague and polysemic, and is affected by the size, purpose and shareholding structure of the company.

313. As a general rule, the Tribunal finds that the term permanent seat requires that the office established in the bylaws of a Cypriot company have substance and be more than a mere façade. The precise requirements necessary to meet this standard are case specific and must be reviewed by tribunals whenever the objection is raised.

314. To be more than a mere façade, the seat is typically required to be open for business, accessible to third parties, and regularly used to receive and send communications. In addition, accounts should be kept and audited at the location, the books should be available for inspection, and officers of the company should be able to work from the location. There is thus a close relationship between a Cypriot company properly and continuously satisfying all legal and compliance requirements imposed by Cypriot law at its office, and the company having its permanent seat in that location.

Application to the facts

315. The Tribunal has established the following facts as proven:

- WCV is a Cypriot holding company, which is 100% controlled by [redacted] and which indirectly owns the entire share capital of the Operating Companies since 2006 (except for a very small percentage, which between 2009 and 2014 was held by CCL, another Cypriot company 100% controlled by [redacted]);
- During the entire period, WCV and CCL had their registered office in Cyprus; between 2006 and 2014 in an office rented from Oneworld, after 2014 in an office rented from Redimus; there is no evidence that such offices were not accessible to the public during normal business hours, and there is evidence that the companies received and sent communications from such addresses;
- The corporate and accounting books were kept in the registered office; the companies' accounts were audited by Ernst & Young, Cyprus;
- Between 2006 and 2014 the companies' only two directors were Cypriot nationals; after 2014 the two Cypriot directors were substituted by two other Cypriot nationals, and [redacted] was incorporated into the board as chairman;
- The companies obtained tax certificates and were tax residents in Cyprus;
- The companies had no employees until 6 April 2014, when a secretary and an accountant were hired; in July 2014 the companies also employed a

Managing Director; and during the year 2015 three additional employees were added.

316. All proven facts seem to indicate that the permanent seat of WCV and CCL was indeed Cyprus. Respondent has not marshalled any evidence, showing that the permanent seat of these companies was located in another country. The Republic's only argument is that [redacted] the 100% shareholder of the companies, is a resident of Monaco, and that Claimants must have been managed from there. The problem with this argument is that the term permanent seat, as used by the Czech Republic in its treaty practice, does not require that a company's central management and control be located there. When the Czech Republic wished to impose that the foreign company be managed and controlled in its home country, it inserted clear language to that effect in the BIT.

317. Respondent has also put significant emphasis on the fact that in 2014 the Synot Group reorganized the management of its Cypriot subsidiaries.

318. In fact, those changes did not affect the permanent seat of WCV and CCL, which continued to be located in Cyprus (albeit at another address, using premises leased from a different provider).

319. What changed was the composition of the board of directors. [redacted] the 100% owner of the companies, became chairman of the board and the two existing Cypriot directors were substituted by two new Cypriot nationals. Since [redacted] was now a member of the board, Claimants started a practice of formalizing certain board meetings. Furthermore, the companies started hiring employees to perform corporate activities, instead of contracting out work to professional service providers. But these changes in management style do not affect the conclusion that, both before and after the reorganization, the companies had their permanent seat in Cyprus – and nowhere else.

* * *

320. Summing up, the Tribunal finds that WCV's and CCL's permanent seats have been located in Cyprus since 2006, during the period when the alleged investment was performed, and consequently dismisses Respondent's Permanent Seat Objection.

321. Respondent argued during the Second Hearing that the relevant date for complying with the "permanent seat" requirement was that of the investment[314]; Claimants disagreed and defended the day when the Tribunal was seized[315]. The discussion is moot. The Tribunal's finding that Claimants' permanent seats were situated in Cyprus since 2006, the time when the investment was made, makes it unnecessary for the Tribunal to reach a conclusion to that effect.

[314] HT3, pp. 67-68.
[315] HT3, p. 131.

C. CASE LAW

322. The Parties have drawn the Tribunal's attention to a number of awards rendered by investment arbitration tribunals, which have analysed situations and treaties which show some similarity to those of the present procedure. However, there are no public awards where a tribunal has been confronted with the same factual circumstances before this Tribunal: a Czech treaty requiring the foreign company to have its permanent seat in the home state.

Natland v. The Czech Republic

323. The Parties agreed to produce excerpts of a confidential award rendered pursuant to the Czech-Cypriot BIT, which addresses the permanent seat objection raised by the Republic in that arbitration, with respect to two Cypriot companies that are owned by Czech nationals[316].

324. The applicable BIT provisions are the same as in the present case: a legal person qualifies as an investor of a Contracting State if it is "incorporated or constituted in accordance with, and recognized as legal person by its laws, having the permanent seat in the territory of that Contracting Party"[317].

325. The same issue discussed in this arbitration was raised in *Natland*: whether the clause "having the permanent seat in the territory of that Contracting Party" established a formal or substantive requirement; that being, whether it was sufficient that the two Cypriot claimants had their registered office in Cyprus, or whether they also had to establish that the place of actual or effective management was in Cyprus. Further, the parties disagreed on whether this determination was to be made pursuant to international law or Cypriot law[318].

326. The tribunal determined that while Cypriot law was relevant to determine whether the claimants were validly incorporated and recognized as legal persons within Cyprus, the determination of whether they had their permanent seat in Cyprus was a matter of international law[319]. The tribunal found that the ordinary meaning of Art. 1(2)(b) of the BIT did not support the Czech Republic's argument, that the provision required that the actual or effective place of management be located in the home State. In reaching its conclusion, the tribunal also noted that Cypriot legislation did not use the terms "real seat" or "*siège réel*", and therefore, the construction suggested by Respondent was untenable[320].

327. The tribunal also did not accept the claimants' position that permanent seat equates to registered office: legal entities incorporated in Cyprus must have their

[316] See paras. 47-51 *supra*. The Parties have also represented that the claimants in *Natland* consented to the disclosure of relevant extracts in this arbitration.
[317] *Natland*, para. 209.
[318] *Natland*, para. 277.
[319] *Natland*, para. 278.
[320] *Natland*, para. 279.

registered office in that territory; thus, if permanent seat would be construed as registered office, this would be contrary to the interpretative requirement of *effet utile*[321].

328. The tribunal then stated[322]:

> "While the two Claimants need not show that their place of actual or effective management is in Cyprus – this could be elsewhere – they must establish that they had, as a matter of fact, a "permanent seat" in Cyprus, which must be something more than the mere existence of a registered office". [Emphasis added]

329. The tribunal distinguished between the two Cypriot claimants based on the following evidence[323]:

> "As to Natland Group, the Claimants have produced documentary evidence which shows that at least some of its directors' meetings were held at the company's registered office in Cyprus, that the company had a Cypriot director, and that it was audited by Cypriot accountants. The Claimants also allege that the company held a bank account in Cyprus and paid taxes in Cyprus, however there is no evidence to support this assertion. Mr. […], the controlling beneficial shareholder of Natland Group further testified at the hearing that the company rented office space in Cyprus at the address of its registered office, and that it was "outsourcing" staff from a daughter company.
>
> As to GIHG, the certificate issued by the Registrar of Companies shows that the company had a registered address in Nicosia and a Cypriot director, but there is no further documentary evidence of the company's activities in Cyprus. Mr. […], one of the two beneficial owners of the company testified at the hearing that the company did not own any property in Cyprus and did not have any employees in Cyprus. He also stated that he visited Cyprus once, but did not visit the GIHG office.
>
> Based on the evidence before it, the Tribunal is satisfied that Natland Group has presented sufficient evidence to show that it had, as a matter of fact, a "permanent seat" in Cyprus".

330. Thus, the tribunal determined that Natland Group had presented sufficient evidence to establish that its permanent seat was in Cyprus, whilst GIHG had not, as certificates of registry issued by the Registrar of Companies, was insufficient to establish that latter had any kind of corporate activity in Cyprus[324].

[321] *Natland*, para. 280.
[322] *Natland*, para. 281.
[323] *Natland*, paras. 282 – 284.
[324] *Natland*, para. 286.

331. The Tribunal considers the findings of the *Natland* tribunal to be highly persuasive in the present case, due to its similarities in respect of:

- The relevant treaty provision containing the "permanent seat" requirement, a concept unique to Czech treaty practice; and
- The application to similar facts: claimants are companies incorporated in Cyprus, with the ultimate owners possessing Czech nationality.

Alps Finance

332. The *Alps Finance* decision was issued under the Swiss-Czechoslovak BIT, in a dispute between a Swiss company and the Slovak Republic. The respondent State raised an objection arguing that the claimant did not qualify as an investor under the treaty. The tribunal accepted the objection, because the Swiss claimant had failed to prove that it had its "seat" in Switzerland and that it had "real economic activities" in the home State, two requirements set forth in the Swiss-Czechoslovak BIT for jurisdiction *ratione personae*.

333. This Tribunal finds this case to be of little assistance: the *Alps Finance* tribunal concluded that the term "seat in the meaning of international business law" meant the effective center of administration, where the board and/or shareholders met, where employees worked and where the companies' offices were located. No explanation, however, is offered on how the tribunal reached its conclusion that the contracting parties to the Swiss-Czechoslovak BIT agreed to the concept of "business seat", which required evidence of effective management[325].

334. Additionally, and this may provide an explanation of why the tribunal construed the term "seat" to mean "business seat", the Swiss-Czechoslovak BIT requires the investor to have "real economic activity"[326] in the home state. This additional requirement renders superfluous any analogy between *Alps Finance* and the present case.

Tenaris I and II

335. *Tenaris I* and *II* are two cases which apply the Luxembourg-Venezuela and the Portugal-Venezuela BITs. The treaties require protected companies investing in Venezuela to be incorporated under Luxembourg or Portuguese law, and to have their "*siège social*" or "*sede*" in Luxembourg or Portugal.

336. In *Tenaris I* the tribunal concluded that international law lacked a consistent legal term of art for the concepts of "*siège social*" or "*sede*" under international law, and thus, the tribunal should have regard to the context in which the terms were negotiated, and the object and purpose of the treaties[327]. The tribunal construed

[325] *Alps Finance*, para. 216.
[326] *Alps Finance*, para. 219 *et seq*.
[327] *Tenaris I*, para. 144.

the terms under Art. 31VCLT[328], and also considered these terms in the context of the relevant municipal law, as a secondary means for interpretation[329], to conclude that the terms "*siège social*" and "*sede*" meant the place of effective management[330]. In reaching its conclusion regarding its jurisdiction over the claims of the Portuguese and Luxembourgish investors the tribunal observed that:

- Luxemburg law establishes a *iuris tantum* presumption that the real seat coincides with the statutory seat; in other words, the statutory seat may be impugned if it is proven that the real seat is in another place, in order to avoid the fraudulent misuse of Luxemburg law[331];
- Portuguese law adopts a more express adhesion to the real seat theory: the seat of a Portuguese company is where the main and effective management of their administration is located[332];

337. Thereafter, the tribunal assessed whether the claimants (Tenaris and Talta) had their "*siège social*" and "*sede*" in Luxemburg and Portugal, respectively. The tribunal examined if these companies had their effective place of management in the respective home States[333], and concluded they did[334].

338. The *Tenaris II* tribunal was confronted with the task of interpreting the same terms under the Luxembourg-Venezuela and the Portugal-Venezuela BITs. The *Tenaris II* tribunal also found that recourse to municipal law was useful to interpret the terms "*siège social*" and "*sede*" not defined in international law[335], and concluded that they referred to the place where management of the company occurs[336]. On the assessment of the facts, the *Tenaris II* tribunal reached the same conclusions and dismissed Venezuela's objection *ratione personae*[337].

339. They key difference between the *Tenaris* cases and the present one is not the wording of each treaty, but the context of their conclusion. When the ordinary meaning of a term still leaves doubt as to how it should be construed, recourse must be had to the municipal law of the Contracting States, which forms part of the context in which the Contracting Parties agreed on the use of the term. The *Tenaris* tribunals were confronted with the task of construing the terms "*siège social*" and "*sede*" in two countries where the real seat theory is prevalent, and this circumstance impacted the final construction of the terms. In the present case, both Cyprus and the Czech Republic adhered to the incorporation theory during

[328] *Tenaris I*, paras. 134 and 145.
[329] *Tenaris I*, paras. 149 and 169-195.
[330] *Tenaris I*, para. 154.
[331] *Tenaris I*, paras. 172-176.
[332] *Tenaris I*, paras. 180-185.
[333] *Tenaris I*, para. 198.
[334] *Tenaris I*, paras. 201-227.
[335] *Tenaris II*, paras. 181 and 191 *et seq*.
[336] *Tenaris II*, para. 190.
[337] *Tenaris II*, para. 130.

the period when the BIT was signed, and the context has assisted this Tribunal's construction of the term "permanent seat" in the Czech-Cyprus BIT.

Orascom

340. The Parties also discussed the recent *Orascom* decision. The *Orascom* case applied the Belgium/Luxembourg-Algeria BIT, which requires that protected investors must be incorporated under the law of a contracting party and have its "*siège social*" there.

341. The official languages of the treaty were French, Dutch and Arabic, followed by an unofficial English translation submitted by Belgium to the United Nations Treaty Series. In this English translation "*siège social*" was translated to "registered office". The *Orascom* tribunal shared the *Tenaris I and II* tribunals' conclusion that the term lacks a defined meaning, and as such, could refer to statutory or to real seat[338].

342. The *Orascom* tribunal, however, emphasized that "*siège social*" has an autonomous meaning for the purposes of the BIT, and no recourse to municipal law as a supplementary means of interpretation was necessary[339]. This is because during the preparatory works of the treaty, the parties expressed their intention to include a term that reflected customary international law[340]. Accordingly, in reaching its conclusion, the *Orascom* tribunal relied heavily on the "traditional rule" of nationality for the purposes of diplomatic protection – as referred to by the ICJ in the *Barcelona Traction* case – which establishes that place of incorporation and registered office are the two distinct elements to determine nationality under customary international law[341].

343. Therefore, the *Orascom* tribunal reached a different conclusion to the *Tenaris* cases and concluded that "*siège social*" meant registered office[342].

344. This Tribunal has reached a similar conclusion to the one in *Orascom*, despite the different factual matrixes of both cases. The *travaux* of the Czech-Cyprus BIT submitted by the Parties lack any reference to the intention of the Contracting Parties to derive the meaning of the term permanent seat from an autonomous standard under customary international law. The only thing that the *travaux* reveal is that Cyprus deemed the terms "seat" and "registered office" as interchangeable, and that the Czech Republic did not contradict this assumption, at a time when both Cyprus' and the Czech Republic's respective company laws adhered to the incorporation theory to determine the *lex societatis*.

[338] *Orascom*, para. 273.
[339] *Orascom*, paras, 278-279.
[340] *Orascom*, paras. 293, 298 and 308.
[341] *Orascom*, paras. 293 and 294.
[342] *Orascom*, para. 314.

CEAC

345. Finally, the Parties also referred to the *CEAC* case, which examined whether a Cypriot company had complied with the "seat" requirement under the Cyprus-Serbia/Montenegro BIT. As in the present case, the claimant argued that seat had to be construed by reference to Cypriot law, and the respondent alleged that it was an autonomous standard under the treaty, which referred to the place where the legal entity was effectively managed and controlled, and where it carried out its business activities[343].

346. The *CEAC* tribunal did not find it necessary to make such a determination, because the evidence showed that the claimant did not even have its registered office in Cyprus[344].

[343] *CEAC*, para. 147.
[344] *CEAC*, para. 148.

VII. BAD FAITH OBJECTION

347. Respondent alleges that Claimants initiated this arbitration in bad faith because the incorporation of WCV in 2006 in Cyprus was made only to gain standing to bring this dispute under the BIT; additionally, in early 2014, once the dispute had already crystalized, Claimants deliberately placed indicia to feign compliance with the permanent seat requirement. Respondent finally avers that Claimants are a mere vehicle used by [redacted], a Czech national, to circumvent the nationality requirements of the BIT.

348. Claimants deny any bad faith conduct and say that the Respondent has failed to establish clear and convincing evidence in this regard: the corporate restructuring of the Synot Group executed between 2006 and 2008 was carried out only for tax purposes, not to gain access to treaty protection; the changes of WCV and CCL in 2014 was also a legitimate rearrangement of its administration in Cyprus for reasons unrelated to this arbitration. Regarding the third limb of the bad faith objection, Claimants submit that it is based on Respondent's incorrect assessment of the law and the facts of this case.

349. The arguments of the Parties regarding the bad faith objection have evolved considerably through this arbitration, and thus, for convenience, the Tribunal will first summarize the position of the Parties chronologically as set forth in each of their respective submissions (**1.**); thereafter, the Tribunal will adopt a decision on Respondent's bad faith objection (**2.**).

350. The evidence referred to in Section **VI.2.1** above is also relevant to adjudicate this objection.

1. POSITION OF THE PARTIES

1.1 RESPONDENT'S MEMORIAL ON JURISDICTION

351. In its Memorial on Jurisdiction Respondent raises two objections on the grounds of bad faith conduct[345]:

- That Claimants' investments cannot benefit from Treaty protection because their incorporation in Cyprus in 2006 was made in anticipation of a foreseeable dispute and is an abuse of process (**A.**);
- That Claimants cannot benefit from the protection of the Treaty because in reality they are Czech nationals and this is a domestic dispute (**B.**).

[345] R I, para. 232.

A. <u>There was a bad faith restructuring in 2006</u>

352. Respondent submits that in 2006 WCV acquired the shares in the Operating Companies by committing an abuse of the corporate form. The standard of abusive restructuring is met in the present case because this transaction was made for the sole purpose of gaining access to the protection of the BIT (**b.**) in a moment when the dispute was already foreseeable (**a.**)[346].

a. Foreseeability of the dispute

353. Respondent avers that since 1993 the municipalities of the Czech Republic have been given more and more power to regulate and supervise the gaming sector in their territory. Respondent stresses that the amendments to the Lotteries Act of 1997, 1998 and 2000 considerably expanded the regulatory powers of municipalities over the gaming industry, at the expense of the powers traditionally held by the central administration[347].

354. Between March and October 2006, several gaming operators, including Synot Group, as well as the Ministry of Finance, commissioned numerous external legal opinions regarding the involvement of municipalities in the regulation of CLS/IVT deceives. According to Respondent, these opinions were not conclusive on the role of the municipalities in the regulatory framework of CLS and LLS devices[348], and therefore, it was foreseeable that a ruling of the Czech courts was necessary to resolve the conflict of competences between the central administration and the municipalities over these types of gaming devices[349].

355. Thus, when WCV acquired the Operating Companies in 2006, the Synot Group was well aware that the municipalities might eventually get involved in the regulation of CLS and LLS devices, and that this would affect their operations. The dispute was, thus, foreseeable and likely to materialize[350].

b. The restructuring was made to gain access to the BIT

356. Respondent says that [redacted] and his relatives created the Operating Companies in the Czech Republic in the 90s, and then, funnelled their investment through the Cypriot Claimants to gain access to the BIT:

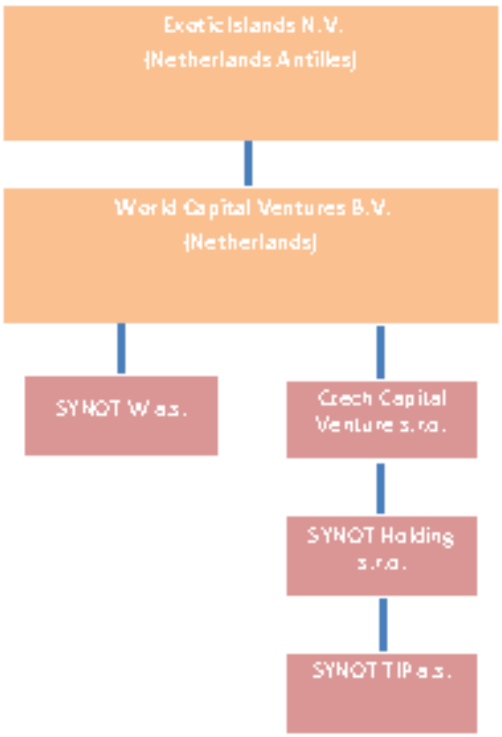
- Synot W was created in 1990 in the Czech Republic. In 1998 the company became a joint-stock company[351]. At this point, [redacted] held 99% of the shares, and his father, [redacted] – and later his brother,

[346] R I, para. 235, citing to *Philip Morris*, para. 554.
[347] R I, para. 242.
[348] R I, paras. 244-250.
[349] R I, para. 255.
[350] R I, paras. 242 *et seq*.
[351] R I, para. 259, citing to R-33.

[redacted] [redacted] 1%[352]. The first involvement of a foreign company was in 1999, when a Dutch company, called Smeets and controlled by [redacted] (later renamed WCV B.V.), acquired part of Synot W[353];

- Synot TIP was incorporated as a joint-stock company in 2002 by [redacted] with 53% of the shares, and Synot Holdings s.r.o. (another Czech holding company), which held the remaining 47%[354].

357. In 2005 WCV B.V. acquired directly Synot W and indirectly Synot TIP (through the intermediary of two Czech Companies). World Capital Ventures B.V. was in turn controlled by Exotic Islands N.V., a Dutch Antilles company. A year later the corporate structure stood as follows[355]:



358. Respondent asserts that under this structure Synot TIP was not protected by the investment treaty system: the Czech-Netherlands BIT only protects "every kind of asset invested either directly [i.e. by a national of a Contracting Party] or through an investor of a third State". Since Synot TIP was not directly owned by a Dutch national or, indirectly, through another company that was neither Dutch or Czech, it could not benefit from the treaty[356].

[352] R-33.
[353] R I, para. 259, citing to R-34.
[354] R I, para. 260, citing to R-37.
[355] R I, para. 262.
[356] R I, para. 265.

359. As the conflict regarding the permits for Synot TIP became apparent, [redacted] had to put another company above Exotic Islands N.V. to ensure treaty protection for Synot TIP. Since the Cyprus-Czech Republic BIT does not contain an express provision requiring indirect investments to pass through the intermediary of an entity from a third State, [redacted] chose Cyprus as the place for its new holding company.

360. Accordingly, on 22 November 2006 WCV (Claimant 1 in this arbitration) indirectly bought Synot TIP and Synot W, by acquiring Exotic Islands N.V[357]:

B. Claimants are in reality Czech nationals

361. Respondent's second objection is that WCV (and CCL) were empty shell companies, incorporated with the sole purpose of funneling the investment made in the Czech Republic by a Czech national through two foreign companies[358].

362. The Republic asks the Tribunal to decline jurisdiction because the nominal Claimants are mere vehicles through which a Czech national, [redacted] attempts to invoke international protection for his investment in the Czech Republic[359].

363. Respondent builds its argument in two stages[360]:

364. First Respondent says that under international law the Tribunal may decline jurisdiction asserted on the basis of corporate formalities and not economic realities[361].

365. A proper construction of the preamble of the BIT and its articles, leads to the conclusion that the Treaty was designed to promote investments between Cyprus and the Czech Republic, but not of Czech nationals in their own territory[362]: the preamble establishes that the Treaty's purpose is to "develop economic co-operation to the mutual benefit of both Contracting Parties" and to "stimulate the business initiatives"[363]. Furthermore, Arts. 1(2) and 8 of the Treaty establish that only an investor of one Contracting Party "who invests in the territory of that other Contracting Party" may benefit from the dispute resolution provision of the Treaty[364].

366. In light of this interpretation, the Tribunal should resort to the principle of "piercing of the corporate veil", which has been used by many investment

[357] R I, paras. 266 and 267.
[358] R I, para. 273.
[359] R I, para. 274.
[360] R I, para. 275.
[361] R I, para. 276.
[362] R I, para. 277.
[363] R I, para. 278.
[364] R I, paras. 279-280.

tribunals to prevent that the economic reality is overridden by corporate formalities[365]. The piercing of the corporate veil is essential to avoid misuse of the privileges of legal personality or to prevent the evasion of a legal requirement[366], which is precisely what [redacted] is attempting to do in the present case[367].

367. Second Respondent argues that the economic reality is determined by establishing who exerts control over the investment[368]. In this case it is [redacted] who controls the Operating Companies, through WCV (and during a brief period through CCL), and therefore, the true claimant is [redacted] and not the Cypriot holdings. Respondent's conclusion is drawn from the following facts:

- Czech nationals, the [redacted] family, established their investment of gaming devices in the Czech Republic (the Operating Companies), with economic resources drawn from the Czech Republic[369];
- [redacted] controls the Claimants, in terms of shareholder control[370]: WCV is owned by Sheading Financial Limited, a Cayman company in which [redacted] is the majority shareholder[371]; therefore, [redacted] owns and controls the Operating Companies through WCV[372].
- [redacted] also controls the Claimants in terms of management: [redacted] is one of the three directors of the boards in WCV and CCL, and the two other Cypriot directors are nothing more than service providers[373].

1.2 CLAIMANTS' ANSWER ON BIFURCATED OBJECTIONS

368. Claimants' starting point in their answer is that an allegation of bad faith conduct requires "clear and convincing evidence"[374]. In the present case, Respondent's allegations consist of mere assertions, which cannot constitute grounds to deny Claimants the protection they are entitled to under the BIT[375].

369. Claimants answer Respondent's two main objections as follows:

[365] R I, para. 283.
[366] R I, paras. 281-285, citing to *TSA Spectrum*, *Loewen*, *Barcelona Traction* and *Standard Chartered Bank*.
[367] R I, para. 293.
[368] R I, para. 292.
[369] R I, para. 290.
[370] R I, para. 293.
[371] R I, paras. 293-297.
[372] R I, para. 297.
[373] R I, para. 298.
[374] C II, paras. 78 and 89, citing to *Tacna Arica Question*, p. 930.
[375] C II, para. 79.

A. There was no bad faith restructuring in 2006

370. Claimants react to the Republic's first objection by averring that the 2006 restructuring was not made to gain access to the Cyprus-Czech BIT; and in any case, the dispute, as presented by Claimants, was not foreseeable by that time.

a. There was no restructuring to gain access to the BIT

371. Claimants say that Respondent's first objection is based on a false premise: Respondent avers that the Synot Group restructured its investment in Cyprus in order to gain access to Treaty protection. This is false because WCV purchased its interest in the Synot Group from another pre-existing Cypriot company, Greenfield Trading Limited, which had indirectly held the shares in the Operating Companies since 1999 and 2002. Therefore, the Cyprus-Czech Republic BIT already protected the investment before WCV's involvement in the corporate structure of the Synot Group[376].

372. In addition, as confirmed by [redacted] the restructuring of 2006 was driven by tax considerations. The Synot Group historically owned some Dutch and Dutch Antilles corporations as intermediary companies between its Cypriot companies and its Czech subsidiaries. Following the accession of the Czech Republic and Cyprus to the EU in 2004, the Dutch companies were no longer necessary[377].

b. The dispute was not foreseeable

373. Respondent's assertion that in 2006 there was a reasonable prospect that municipal authorities would take regulatory control over CLS and LLS devices is baseless. In the course of 2006 the Ministry of Finance made representations to Claimants that the Ministry was the sole regulator of CLS and LLS devices[378], and it did so on the basis of several legal opinions commissioned separately by the Ministry of Finance, by SYNOT Group and other gaming operators. These legal opinions unanimously confirmed that municipalities had no power to regulate CLS and LLS devices[379].

374. Claimants' case is that the Decisions of 2011 and 2013 of the Constitutional Court, and the subsequent actions of the Ministry of Finance and the municipalities, breached Claimants' legitimate expectations[380]. Therefore, the present dispute, as presented by Claimants, was not foreseeable in 2006[381].

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[376] C II, paras. 83-85.
[377] C II, para. 86; [redacted] para. 17.
[378] C II, para. 95; C I, paras. 306 and 307.
[379] C II, para. 95, referring to C-11, C-12 and C-13.
[380] C II, para. 96.
[381] C II, para. 96.

B. Claimants are Cypriot nationals

375. Claimants reject Respondent's objection that the Tribunal should decline jurisdiction on the grounds that Claimants are in reality Czech nationals.

376. Claimants say that WCV and, until recently, CCL – two Cypriot companies with their permanent seat in Cyprus – own the shares in the Operating Companies; Claimants meet the nationality requirements of the BIT, and thus, the Tribunal is bound to exercise jurisdiction over their claims[382].

377. The fact that [redacted] is the ultimate owner of the Synot Group was at all times well-known and transparent to the Czech Republic; and this circumstance should not preclude the Tribunal's jurisdiction over Claimants' claims, since the particular manner in which Claimants own the shares in the Synot Group, or who is the owner of the shares in the Claimants, is irrelevant[383].

378. Claimants also reject Respondent's proposition that the Tribunal should pierce the corporate veil to see who controls Claimants and determine the economic reality behind the investment. Claimants note that this type of objection has been consistently dismissed by investment tribunals, when the element of control bears no relevance in determining standing of a claimant, such as in the present case[384].

379. The Cyprus-Czech BIT does not require legal entities to exert control over its investment. Respondent's authorities in support of this allegation come from cases applying Art. 25(2)(b) of the ICSID Convention, and therefore, are irrelevant to this case. Art. 25(2)(b) extends the scope of jurisdiction of ICSID tribunals to legal persons that are nationals of the Contracting State that is party to the dispute, if controlled by a national of another Contracting State. Respondent tries to add the "control" requirement to the applicable BIT by reference to Art. 25(2)(b) – a rule that is not applicable in this case, and which materially handles a different issue[385]. In any case, the "control" test in the ICSID Convention is intended to extend, and not restrict, the scope of jurisdiction[386].

380. Claimants further argue that piercing the corporate veil is only justified in exceptional circumstances, to avoid cases of fraud or malfeasance, to protect third parties, or to prevent the evasion of legal requirements or obligations[387].

381. In the present case, Respondent has failed to show any exceptional circumstances that would merit lifting the corporate veil, nor has it proven that Claimants incurred in fraud or malfeasance, or that disregarding Claimants' corporate

[382] C II, paras. 99-101.
[383] C II, paras. 100-101.
[384] C II, paras. 102-107 citing to *Tokios Tokeles, Saluka, ADC,* and *Yukos*.
[385] C II, paras. 109 and 110.
[386] C II, para. 109.
[387] C II, paras. 111-112.

personality is necessary to protect rights of third parties, or to impede the evasion of a legal obligation or requirement[388].

382. Claimants make the following observations:

- the Czech Republic has always known Claimants' corporate structure[389]; there is nothing exceptional about this, since section 4(5) of the Lotteries Act allows foreign indirect ownership of Czech lotteries operators[390]; the Czech Republic has long known and accepted that foreign companies own Czech lotteries operators[391];
- Investment tribunals have consistently rejected to lift the corporate veil of the claimants when their beneficial owner holds a different nationality[392]: for instance, in *ADC,* the tribunal refused to pierce the corporate veil because the host State was fully aware of the claimant's foreign ownership and corporate formalities had not been used to disguise the true identity of the business[393]; similarly, in *Tokios Tokeles* and *Burimi*, the tribunals found the fact that the claimant and the claimant's beneficial owner had different nationality was no ground for piercing the corporate veil[394].
- Respondent has not proven that this case is exceptionally grave as to merit the piercing of the corporate veil[395]; as Claimants have explained, the 2006 restructuring was driven by tax purposes following the Czech Republic's and Cyprus's accession to the European Union[396]. The Claimants act as any holding and financing company would do, holding various subsidiaries across a wide range of industries, including gaming, software development and licencing and hospitality[397]. Both Claimants are fully operating companies that employ staff and have an active presence in Cyprus, with fully-functioning boards and fully equipped offices[398].

1.3 RESPONDENT'S REPLY ON BIFURCATED OBJECTIONS

383. In its Reply on Bifurcated Objections, the Republic reiterates the two arguments presented in its Memorial on Jurisdiction:

- That Claimants committed an abuse of corporate form in 2006 when WCV acquired the Operating Companies to gain protection under the BIT in anticipation of the dispute (**A.**); and

[388] C II, para. 113.
[389] C II, para. 115.
[390] C II, para. 116, citing to C-8 and R-12.
[391] C II, para. 116.
[392] C II, paras. 117-119, citing to *ADC*, *Burimi* and *Tokios Tokeles*.
[393] C II, para. 117, citing to *ADC*, para. 358.
[394] C II, para. 120.
[395] C II, para. 122.
[396] C II, para. 123.
[397] [redacted] paras. 22 and 23.
[398] C II, paras. 124 and 125.

- That Claimants are in reality Czech nationals (**C.**).

384. Respondent also makes an additional abuse of corporate form argument: the Republic submits that Claimants, knowing that WCV and CCL did not comply with the permanent seat requirement, attempted to feign a permanent seat in Cyprus three months before filing the Notice of Dispute in July 2014, when the dispute had already crystalized (**B.**).

A. <u>There was a bad faith restructuring in 2006</u>

385. The Republic reiterates that, in November 2006, Claimants committed an abuse of corporate form in order to gain access to international arbitration, by funneling their investment in the Czech Republic through WCV, in anticipation of a foreseeable dispute[399].

386. Respondent answers to Claimants' defence submitting that Claimants have not successfully explained why the dispute concerning the regulatory powers of the municipalities was not foreseeable[400]. Furthermore, Claimants' explanation that the restructuring of 2006 was for tax purposes does not exclude the fact that it was also made to gain access to international arbitration[401].

387. Lastly Claimants have not provided evidence that another Cypriot company – Greenfield – held the investments in the Operating Companies before the involvement of WCV in 2006[402].

B. <u>The Claimants feigned the permanent seat requirement in 2014</u>

388. In its Reply the Republic raises a new argument: that in early 2014 Claimants purposely fabricated indicia to create an appearance that they had their permanent seat in Cyprus; this happened just three months before filing the Notice of Dispute, when the controversy had already crystalized[403].

a. Fabricating indicia of permanent seat

389. The Czech Republic asserts that Claimants undertook a massive restructuring of their Cypriot operations between March and July 2014 in an attempt to create the appearance that their permanent seat was located in Cyprus:

- On 27 March 2014 [redacted] and two other nominee directors – [redacted] and [redacted] – were appointed to the board of WCV and CCL[404]; the nominee directors have no real power, since WCV and CCL are

[399] C II, paras. 19-20 and 136-141.
[400] R II, para. 139.
[401] R II, para. 141.
[402] R II, para. 140.
[403] R II, paras. 21 and 22.
[404] R II, para. 22.

effectively managed and administered outside of Cyprus by [redacted][405]; prior to this date, the directors of Claimants were two other Cypriot nominees – [redacted] – which also lacked real management functions;

- On 3 April 2014 WCV and CCL changed their address from Oneworld, the service provider, to Atlantis Building, Office 301, 2 Arch. Makariou III, Mesa Geitonia, 4000, Limassol, Cyprus[406]; the new premises belong to Redimus, a tax advisory company of which [redacted] is also a director; in fact, the lease agreement was signed three days later between [redacted], on behalf of Redimus, and [redacted] on behalf of WCV and CCL[407];
- That same day [redacted] also prepared and signed two boilerplate employment contracts: one with [redacted], for a full-time position as secretary and receptionist at the new address of WCV and CCL, and the other with [redacted] to work as part-time accountant[408]; before this date WCV and CCL had had no employees;
- On 15 April [redacted] registered the domain name WCVCY.COM, which hosts no website; [redacted] registered the domain name to his personal address[409].
- On 23 June WCV held the first meeting of the board of directors on record (to which only the Cypriot nominees attended); no significant business was discussed at this meeting[410];
- On 1 July WCV and CCL appointed [redacted] as CEO using the same boilerplate employment contract to hire the secretary and the accountant[411].

390. All these events took place about three months before the submission of the Notice of Dispute (on 15 July 2014), and in Respondent's view, the timing proves that Claimants tried to create the appearance of a permanent seat in Cyprus only to be able to bring this arbitration under the BIT[412].

391. After December 2015 WCV allegedly hired three employees to manage its global business from Cyprus. However, none of these employees were genuinely carrying out their jobs from Cyprus; such tasks were performed from the Czech Republic and Slovakia, where these employees reside. In fact, two of these

[405] R II, paras. 32 and 34-38.
[406] R II, Appendix 2.
[407] R II, para. 23 citing to C-209 and C-210.
[408] R II, para. 26 citing to C-204.
[409] R II, para. 27, citing to C-68.
[410] R II, para. 28.
[411] R II, para. 29, citing to C-212.
[412] R II, para. 29, citing to C-32.

employees previously worked for the Synot Group in the Czech Republic, and continue to do so[413].

b. Crystallization of the dispute

392. Respondent submits that the 2014 changes were made once the dispute had already crystalized: the Czech Constitutional Court had already issued its four Decisions (three in 2011 and one in 2013), concerning the municipalities' regulatory powers over CLS and LLS devices. These are the measures which allegedly affected Synot TIP's permits to operate CLS and LLS devices and Synot W's business of licencing of such devices[414].

393. Thus, by the time Claimants made the 2014 restructuring (from March to July 2014) to feign their permanent seat, a legal controversy had already materialized[415].

C. <u>Claimants are in reality Czech nationals</u>

394. Respondent reiterates that the Tribunal should pierce the corporate veil to assess the economic reality behind the investment (i); and makes a new argument, submitting that the veil can also be pierced when the nominal investor is nothing more than the *alter ego* of the real investor who does not satisfy the nationality requirements of the BIT (ii).

395. (i) <u>First</u> Respondent says that the Tribunal may pierce the corporate veil when the nominal investor has no "economically active relationship" with the investment, since the BIT requires the investor to actually invest in the territory of the other Contracting Party[416]. WCV and CCL do not have an economically active relationship with their nominal investment in the Operating Companies, because they did not direct the making of, did not fund, and did not actively control the investment[417].

396. (ii) <u>Second</u> Respondent advances a new argument relating to the lifting of the corporate veil: that the veil may also be pierced in cases of bad faith evasion of the nationality requirement, and specially, when the nominal investor (in this case WCV and CCL) is nothing more than the *alter ego* of the beneficial investor ([redacted])[418]. [redacted] was seeking international investment treaty protection for his investment in the Czech Republic; however, he knew he was not entitled to it, and therefore, took deliberate bad faith steps to become a "foreign"

[413] R II, paras. 42-46.
[414] R II, para. 143.
[415] R II, para. 143.
[416] R II, paras. 211 and 214.
[417] R II, para. 220.
[418] R II, paras. 211 and 212.

investor to gain Treaty coverage, by funnelling his investment through WCV and CCL[419].

397. Respondent avers that Claimants are the corporate *alter ego* of [redacted] because:

- Every single decision of the WCV and CCL boards is in accordance with [redacted] instructions[420];
- For instance, the WCV and CCL board members did not decide whom to appoint to the board of directors of their subsidiaries; in 2015 five board members of Synot W began new terms office[421]; however, the Cypriot nominee directors of WCV – the sole shareholder of Synot W – did not discuss who should be appointed or whether existing board members should be reappointed[422];
- There was no discussion in the board meetings over the decision to submit the Notice of Dispute[423];
- The Cypriot members of the boards of WCV and CCL did not manage or administer potential or existing investments; in the board meetings to which Claimants refer there is no discussion whatsoever of Synot's new projects in Greece, a new subsidiary in Spain, accreditation in Macau or a partnership with Atlas in an Australian company[424].

398. Claimants submit that it is [redacted] who manages and administers the investments of WCV and CCL. However, this is not credible since [redacted] holds at least five other positions outside the Synot Group and his background is on tax advising in Cyprus, not the management of a multinational gambling company[425].

399. The reality is that WCV and CCL are administered and managed outside Cyprus by [redacted][426].

1.4 CLAIMANTS' REJOINDER ON BIFURCATED OBJECTIONS

A. <u>There was no bad faith restructuring in 2006</u>

400. Claimants reiterate that there was no incorporation in Cyprus in 2006 to obtain Treaty protection; and that the present dispute was not foreseeable at the time

[419] R II, para. 218.
[420] R II, para. 34.
[421] R II, para. 35, citing to C-44.
[422] R II, para. 35.
[423] R II, para. 36.
[424] R II, para. 38.
[425] R II, paras. 41 and 40.
[426] R II, para. 31.

WCV was incorporated[427]. Further, the Cyprus-Czech BIT already protected the investment in the Synot Group before WCV's involvement, as WCV purchased its interest from a Cypriot company, Greenfield Trading Limited[428].

401. In addition, as [redacted] states, the restructuring – planned in 2004 and executed from 2006 to 2008 – was driven by tax considerations[429]. The Synot Group historically owned some Dutch and Dutch Antilles corporations as intermediary companies between its Cypriot companies and its Czech subsidiaries. Following the accession of the Czech Republic and Cyprus to the EU in 2004, the Dutch companies were no longer necessary. In fact, dispensing with the Dutch intermediaries had an effective tax savings of 8.3% on dividends under the EU Parent/Subsidiary Directive, as well as tax savings on interest on direct loans from the Czech subsidiaries to WCV and CCL[430].

B. Claimants did not feign compliance with the permanent seat requirement in 2014

402. Claimants submit that Respondent's allegation that the 2014 organizational changes was an abuse of the corporate structure lacks merit[431]. Both WCV and CCL have operated in Cyprus since their incorporation, they maintained physical offices in Cyprus, where their books and records were held and could be inspected, and where notices could be delivered. The Claimants are tax residents in Cyprus and have been issued tax certificates. Both companies always had at least two Cyprus-based directors, who have made board decisions in Cyprus. They also have employees based in Cyprus who performed administrative functions and undertook their duties there[432].

403. As [redacted] testified, the 2014 administrative reorganization of WCV and CCL were made for two reasons:

- First, in anticipation of a potential change in EU and Cypriot tax law that would require companies to have their own offices and hire their own staff, rather than using service company providers such as Oneworld[433]; and
- Second, to implement the Synot Group's plans for international expansion, in which WCV was to play a relevant role as coordinator of the expansion[434].

[427] C III, para. 188.
[428] C III, para. 191.
[429] C III, para.189; [redacted] para. 7.
[430] C III, para. 189; [redacted] para. 7, citing to C-256 and CL-141.
[431] C III, paras. 163 and 164.
[432] C III, para. 165.
[433] [redacted] paras. 12 and 18.
[434] [redacted] paras. 12 and 19.

C. Claimants are Cypriot nationals

404. Claimants respond to the Czech Republic's objection that the Tribunal must pierce the corporate veil because Claimants allegedly do not have an economically active relationship with their investment (i); and because Claimants are the corporate *alter ego* of [redacted] (ii).

405. (i) Claimants say that Respondent's only authority to request the piercing of the corporate veil for an alleged lack of an economically active relationship is *Standard Chartered Bank*, which is inapposite to the present case: *Standard Chartered Bank* does not concern piercing of the corporate veil[435]. The tribunal in that case simply concluded that passive ownership of shares in a company not controlled by the claimant, when in turn that company owns the investment, is not sufficient to grant access to protection of the treaty[436].

406. WCV and CCL's claims relate to the diminution in value of their shares in the Operating Companies, as a result of the measures adopted by the Czech Republic. Claimants do not claim that their investment is the gambling business of their subsidiaries, which is the only situation which *Standard Chartered Bank* would relate to[437].

407. (ii) Regarding Respondent's argument that the veil must be pierced because Claimants are the corporate *alter ego* of [redacted], Claimants say that Respondent is attempting to introduce the "control test" for nationality in the BIT, where no such requirement exists[438].

408. Claimants reiterate that lifting the corporate veil is an exceptional measure[439]: the Czech Republic must show the misuse of corporate formalities for the purpose of perpetrating fraud or malfeasance, protecting the interests of third parties or preventing the evasion of legal requirements[440].

409. In the present case, given that Claimants qualify as investors under the terms of the BIT, and absent any exceptional circumstance that would warrant piercing the corporate veil, the question of who exerts control over Claimants is irrelevant[441].

1.5 RESPONDENT'S ARGUMENTS IN THE FIRST HEARING

410. During the First Hearing Respondent's counsel reiterated the three core arguments of its bad faith objection:

[435] *Standard Chartered Bank*, para. 230.
[436] C III, paras. 207-209.
[437] C III, para. 210.
[438] C III, para. 197.
[439] C III, para. 202.
[440] C III, paras. 198-200.
[441] C III, para. 203.

A. There was a bad faith restructuring in 2006

411. Respondent briefly reiterated that [redacted] funnelled its investment in the Czech Republic through WCV in 2006 to obtain investment treaty protection in view of a foreseeable dispute[442], using the alleged fact that WCV had acquired its interest in the Operating Companies for USD 6,000 as additional support for its position[443].

B. Claimants feigned the permanent seat requirement in 2014

412. Respondent also reiterated its argument that Claimants abusively feigned a permanent seat in early 2014 when the dispute had crystallized, in order to circumvent the nationality requirements of the BIT[444]. Respondent summarizes its position as follows:

413. First, the legal principle on abuse of process regarding corporate restructuring is clear: the foreseeability of the dispute and the restructuring in view of that dispute[445].

414. Second, the Claimants undertook a massive restructuring of their Cypriot operations between March and July 2014, in order to comply with the permanent seat requirement, once the dispute had already crystalized. Prior to that moment, WCV and CCL had no real effective existence in Cyprus[446]. The timing of these changes, just three months before filing the Notice of Dispute, could not be more telling: it evidences the attempt to create a permanent seat in Cyprus for the sole purpose of filing this arbitration[447].

415. Between March and July 2014 Claimants reconstituted the board of directors, including [redacted] and two Cypriot nominee directors, changed the registered office for a premise controlled by one of the Cypriot nominee directors and hired a part-time accountant and a receptionist to give the appearance of a permanent seat[448].

416. Third, Respondents say that Claimants' explanation that the 2014 changes were implemented because of an EU Directive on tax law is not credible. The EU Directive was not enacted at that time, and thus, was not even close to being enforceable through transposition into Cypriot Law[449]. And in any case, the EU Directive does not even require Cypriot companies to maintain their own premises

[442] HT1, p. 43, 2:9.
[443] HT1, pp. 16, 22:25, p.17, 1:4.
[444] HT1, p. 43, 2:24.
[445] HT1, p. 44 and 47.
[446] HT1, p. 45-49, p. 18.
[447] HT1. p. 24, 8:16.
[448] HT1, pp. 21, 13:25, p. 22, 1:11.
[449] HT1, p. 25, 9:17.

and staff, as Claimants aver[450]. Claimants' explanation that the changes were made to re-locate the management and administration of the Synot Group to expand its operations does not hold either, because there is no evidence that WCV and CCL are managing the business from Cyprus[451].

C. Claimants are in reality Czech nationals

417. Respondent reiterated its objection that [redacted] is the true claimant in this arbitration because he owns, controls and benefits from the investment; and WCV and CCL are mere vehicles through which [redacted] abusively attempts to benefit from investment treaty protection[452].

418. First, the preamble and the language of the Treaty shows that its purpose is to protect economic cooperation between the Contracting Parties by promoting investments of nationals of one Contracting Party in the territory of the other Contracting Party. The Treaty is not made to offer protection to a national doing business in his own country[453].

419. Second, it is not enough to look at the formalistic compliance with the nationality requirement; it is necessary to look beyond appearances and identify the economic reality to ensure that the nationality test is met[454].

420. Third, to identify the economic reality, the Tribunal must pierce the corporate veil, especially when the national of the host State has misused the corporate formalities to access the investment arbitration system[455], when the nominal investor is an *alter ego* of the real beneficiary of the investment[456], or when the nominal investor lacks an economically active relationship with its supposed investment[457].

421. Fourth, the facts of the present case show that [redacted] founded the Synot Group with resources drawn from the Czech Republic and Claimants did not make or fund the investment in the Operating Companies. Claimants have no independent existence from [redacted] because they are merely his *alter egos*. A clear evidence of this fact is that Claimants have not provided any evidence of activity by WCV or CCL prior to April 2014[458]. In conclusion, [redacted] founded, owns and controls the Synot Group through WCV (and for a brief period, through CCL).

[450] HT1, p. 26, 1:9.
[451] HT1, p. 28, 1:6.
[452] HT1, p. 83, 8:17.
[453] HT1, pp. 83-84.
[454] HT1, p. 85, 12:22.
[455] HT1, pp. 85-86.
[456] HT1, p. 86, 10:23.
[457] HT1, p. 87, 8:17.
[458] HT1, pp. 88-91.

1.6 CLAIMANTS' ARGUMENTS IN THE FIRST HEARING

422. In the First Hearing Claimants' counsel reacted to Respondent's three objections of bad faith.

A. 2006 bad faith restructuring

423. Claimants repeated their counter-argument to the 2006 bad faith restructuring objection averring that WCV succeeded another Cypriot company in the Synot Group structure. Therefore, Respondent's case that WCV acquired the Operating Companies to access treaty protection fails[459].

424. Moreover, by 2006 there was no prospect that Synot TIP's existing permits would be invalidated, an event which only occurred after the Decisions of the Constitutional Court of 2011 and 2013[460].

B. Claimants did not feign compliance with the permanent seat requirement in 2014

425. First, Claimants say that prior to the 2014 administrative changes Claimants already had their permanent seat in Cyprus: Oneworld had an office space, directors, administrative and secretarial support and had the books of the companies, which were available for inspection[461]; therefore, there was no necessity to make any change to comply with the jurisdictional requirements to gain access to the Treaty[462].

426. Second, Claimants submit that with the 2014 internal operating changes there was no restructuring to change nationality in anticipation of a dispute; the facts of this case are very different to the ones underlying the cases of treaty shopping, such as *Philip Morris,* and therefore, such standard is not applicable to the objection on the grounds of the 2014 changes[463].

427. Third, Claimants say that the changes were made for two reasons: (i) in anticipation of expected amendments to Cypriot tax law that would require companies to have their own offices and directly employ their own staff[464]; and (ii) to implement a corporate strategy having the management located up the corporate ladder, at the level of the Cypriot holdings, to perform managerial functions for the Synot Group's international operations[465]. Claimants do not submit that WCV manages the day to day operation of its subsidiaries. What WCV does, as a holding company, is to decide where to make the investments of

[459] HT1, pp. 207-209.
[460] HT1, p. 210, 18:25 – p. 211, 1:11.
[461] HT1, p. 194, 17:25.
[462] HT1, p. 201, 11:20.
[463] HT1, p. 197, 1:4.
[464] HT1, p. 197, 5:9.
[465] HT1, p. 197, 19:24.

the Group, for how long to hold such investments, and manages intra-group transactions such as the intercompany loans[466].

C. Nationality

428. First, the Synot Group's corporate structure and WCV's and CCL's direct and indirect ownership of Synot W and Synot TIP, respectively, was at all times known and accepted by the Czech Republic[467].

429. Second, Claimants submit that corporate personality has never been disregarded in an investment treaty case, even when the shareholder of the corporate claimant or the ultimate beneficial owner is a national of the respondent state[468]. This can only be done when there is an abuse of right, fraud or malfeasance, but not to determine the economic interest, participation or control of the shareholder of the claimant[469]. Further, the party who alleges abuse must provide convincing evidence to that effect[470]. In this case Respondent has not proven that Claimant's legal personality has been misused in order to perpetrate a wrong[471].

430. Third, the Tribunal is bound to apply the jurisdictional requirements of the Treaty and cannot go beyond the criteria set forth by the Contracting Parties to exclude Claimants from the protection they are entitled to. In this case the Czech-Cyprus BIT does not include the elements Respondent suggests the Tribunal to apply, such as an economically active relationship with the investment or control over the investment[472].

* * *

431. At the end of the First Hearing the Tribunal instructed the Parties to address the following issues at the Second Hearing:

- If the permanent seat requirement is complied with at the relevant moment, can it still be argued that in the present case there is an abuse precluding jurisdiction[473]?
- The Tribunal asked the Parties to discuss the case law on abuse of the investment arbitration system and how it relates to the argument of abuse in the present case[474]; and
- Whether there is a genuine foreign investment, taking into account that [redacted] is the ultimate beneficial owner of Claimants[475].

[466] HT1, p. 198, 17:24.
[467] HT1, pp. 105-106.
[468] HT1, p. 202, 13:20.
[469] HT1, pp. 215-216.
[470] HT1, p. 205, 8:13.
[471] HT1, p. 214, 12:20.
[472] HT1, pp. 214-215.
[473] HT2, p. 256, 22:25-257; 1:9.
[474] HT2, p. 257, 10:18.

1.7 RESPONDENT'S ARGUMENTS IN THE SECOND HEARING

432. In the Second Hearing Respondent focused on the 2014 rearrangements of the management in WCV and CCL (**A.**) and on the objection that Claimants are in reality Czech nationals (**B.**).

A. In 2014 Claimants feigned a permanent seat

433. Respondent's counsel reiterated that the purpose of Claimants' 2014 administrative changes was to feign a permanent seat (where there was none before), thus obtaining access to Treaty protection, after the dispute had already crystalized[476].

434. First, Respondent discussed the case law on abuse of rights in the context of corporate restructuring and, referring to *Orascom*, submitted that the principle "prohibits the exercise of a right for purposes other than those for which the right was established"[477]. Thus, the doctrine of abuse of right is wide enough to encompass a restructuring, or any other conduct, which has the purpose of abusively distorting the requirements for jurisdiction to access investment treaty protection[478]. The 2014 internal reorganization of Claimants to feign a permanent seat would, thus, be an abuse of right[479].

435. Second, Respondent submitted that, prior to March 2014, WCV or CCL had no corporate activity, and Claimants have offered no evidence to the contrary[480]. The lack of evidence regarding any activity prior to March 2014 shows that the organizational changes were made to feign compliance with the permanent seat requirement[481]. And this abuse is confirmed by the timing of the changes, just three months before filing the Notice of Dispute[482].

436. Third, the First Hearing confirmed that the explanation proffered by Claimants for the 2014 rearrangements is not credible: Claimants' witness, [redacted] confirmed that the EU Directive, that allegedly pushed Claimants to implement the 2014 administrative changes, came into effect on 27 January 2015 and was transposed into Cypriot law on 31 December 2015, i.e., almost two years after the internal reorganization of the Cypriot companies[483].

437. Fourth, Respondent, answering the Tribunal's question of whether an abuse would preclude jurisdiction even if the permanent seat was complied with at the relevant

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[475] HT2, p. 257, 19:23.
[476] HT3, pp. 42-45.
[477] HT3, p. 48, citing to *Orascom*.
[478] HT3, pp. 46-49.
[479] HT3, p. 49, 2:21.
[480] HT4, pp. 8, 3:25-9, 1:25.
[481] HT3, pp. 19-23.
[482] HT3, p. 24, 11:16.
[483] HT3, p. 26, 7:21.

moment, submitted that the Tribunal should not focus as much on whether the jurisdictional requirements were met, but analyze how they came to be met. And in this case, Claimants abusively tried to satisfy the permanent seat requirement[484].

B. Claimants are Czech nationals

438. Respondent's second argument is that the actual claimant is [redacted], who is using Claimants as a mere *alter ego*.

439. First, Respondent reiterated that the Czech-Cyprus BIT cannot protect a Czech national doing business in the Czech Republic[485]; and that, in the present case, the Tribunal may lift Claimants' corporate veil because Claimants have committed an abuse of their corporate form to bring this arbitration[486].

440. Second, Respondent, answering the Tribunal's question whether there is a genuine foreign investment, submitted that Claimants' abuse of corporate form reveals that there is no genuine foreign investment[487]. Citing to *Romak*, Respondent said that the objective characteristics of an investment are "contribution, duration and risk"[488]; the requirement of contribution being inherent in Art. 1(2) of the BIT, that defines an "investor" as a person "… who invests in the territory of the other Contracting Party"[489].

441. In the present case, the record shows that WCV and CCL made no contribution, *i.e.*, they did not invest in the Czech Republic, because the capital in question was already there, in the form of the [redacted] family's long-standing business[490]. This is evidenced by the fact that WCV purchased its interest in the Synot Group for USD 6,000[491].

442. The lack of contribution and economically active relationship with the investment is sufficient for the Tribunal to lift the corporate veil, to avoid that a Czech national's business in the Czech Republic benefits from the protection of the Treaty[492].

[484] HT3, p. 51, 3:9.
[485] HT3, p. 97, 5:8.
[486] HT3, p. 100, 16:25.
[487] HT3, pp. 96-97.
[488] HT3, pp. 101-102.
[489] HT3, p. 103, 10:14.
[490] HT3, p.103, 15:23.
[491] HT 3, p. 104, 1:3.
[492] HT 3, p. 105, 2:11.

1.8 CLAIMANTS' ARGUMENTS IN THE SECOND HEARING

A. Claimants did not feign compliance with the permanent seat requirement in 2014

443. First, Claimants said that they have proven that the motivations for the 2014 re-organization was to anticipate the amendments in EU and Cypriot tax law. These amendments would require Cypriot companies wishing to qualify under double-taxation treaties to have business reasons justifying their residence in Cyprus[493]. Claimants added that they had their permanent seat in Cyprus in 2014[494] and that Respondent has failed to prove that the purpose of the 2014 changes was to gain access to treaty protection[495].

444. Second, Claimants, answering the Tribunal's question whether a subsequent abuse would preclude jurisdiction if the permanent seat was complied with at the relevant time, said that, in theory, even if the requirement was met at the relevant time, an abuse could still preclude jurisdiction[496]. However, in the present case, there has been no abuse (neither in 2006 nor in 2014) and Claimants' have proven the legitimate reasons behind the restructurings[497].

445. Third, Claimants said that the *Philip Morris* standard is not applicable in cases of mere internal administrative re-organization of companies, such as the one WCV and CCL undertook in 2014[498].

B. Claimants are Cypriot nationals

446. First, Claimants reiterated that the Tribunal may not rely on the jurisdictional requirements Respondent suggests adding to the BIT, such as control. The fact that [redacted] is the ultimate beneficial owner of the Synot Group is irrelevant for jurisdictional purposes[499].

447. Second, Claimants focused on Respondent's allegation that WCV and CCL made no genuine foreign investment, because they acquired their interest in the operating companies for a nominal value of USD 6,000. Claimants rejected this proposition and said that Claimants had made three types of contributions to their investment in the Czech Republic:

[493] HT3, p. 210, 13:17.
[494] HT3, pp. 203-229.
[495] HT3, p. 205, 11:23.
[496] HT3, p. 230, 13:22.
[497] HT3, p. 230, 23:25 – p. 231, 1:13.
[498] HT3, p.231, p. 23:25 – p. 232, 1:25.
[499] HT3, p. 235, 11:25 – p. 236, 1:14.

- First, the transactions for the 2006-2008 restructuring reveal that WCV paid over EUR 25 M for its ownership in Synot W and Synot TIP[500], and CCL contributed EUR 125,000 for it 1% participation in CCV[501].
- WCV made further capital contributions raising the share capital in its subsidiaries by more than CZK 390 M[502];
- And Claimants also made contributions through earnings retained by their subsidiaries in the amount of EUR 37 M[503].

448. Claimants submission, however, is that the BIT does not impose a "genuine foreign investment" requirement, other than the nationality requirements of the Treaty. And since Claimants satisfy the requirements, a "genuine foreign investment" exists[504].

2. THE TRIBUNAL'S DECISION

449. In the Permanent Seat Objection, the Tribunal has come to the conclusion that WCV's and CCL's permanent seats have been located in Cyprus since 2006, with the consequence that when Claimants allegedly made their investment in the Czech Republic, their permanent seat was (and since their incorporation has been) in Cyprus.

450. In this Bad Faith Objection Respondent submits that Claimants acted with bad faith and abusively. The precise reasons which support Respondent's accusation have evolved in the course of the arbitration:

451. In the Memorial on Jurisdiction, Respondent referred to two "bad faith conducts":

- The first was Synot Group's 2006 corporate restructuring in Cyprus, made at the time when the dispute was foreseeable, in order to obtain treaty protection;
- And the second, the "circularity" of the investment: the real investor is [redacted], a Czech national, who misuses the investment treaty system to secure additional protection to which he is not entitled; such misuse permits the Tribunal to lift Claimants' corporate veil and identify the true investor.

452. In its Reply the Republic added a third limb to its bad faith argument: that in 2014 Claimants had fabricated certain *indicia*, to feign the existence of a permanent seat, to meet the jurisdictional requirements of the Treaty.

[500] HT4, pp. 74, 21:25-75, 1:4, citing to C-19, C-20 and C-23.
[501] HT4, p. 75, 5:7, citing to C-21.
[502] HT4, p. 75, 10:13, citing to C-44, pp. 15-18 and C-40. pp. 2-3.
[503] HT4, p. 75, 14:20, citing to Claimants' PWC Expert Report.
[504] HT3, p. 235, 15:25 – p. 236, 1.

453. In the oral statement during the First Hearing, Respondent's counsel reaffirmed these three separate accusations of bad faith conduct. In the Second Hearing the first leg of the argument – the 2006 restructuring – lost traction and Respondent's counsel primarily focused on the two other conducts.

454. The Tribunal will analyze each of the three bad faith conducts separately, starting with the 2006 restructuring (**2.1**.), followed by the 2014 changes in the organization of the Claimants (**2.2**.) and the circularity of the investment (**2.3**).

2.1 THE 2006 RESTRUCTURING

455. Respondent avers that [redacted] purpose, when he incorporated WCV in November 2006, was to use these vehicles to acquire the Operating Companies, and enjoy Treaty protection; and that he did so in anticipation of the present dispute which, according to Respondent, was already foreseeable back in 2006.

456. Claimants say that this objection is meritless, because the investments in the Operating Companies were already protected under the Czech-Cyprus BIT: WCV bought its interest from Greenfield Trading Limited, another Cypriot corporation within the Synot Group. In any event, Claimants says that the dispute was not foreseeable in 2006 – the case derives from decisions of the Constitutional Court adopted between 2011 and 2013.

457. The Tribunal sides with Claimants.

458. Since at least 2002, Greenfield, a holding company constituted under the laws of Cyprus and with its registered office in Cyprus, fully controlled by [redacted] indirectly owned the capital of Synot TIP and Synot W, the two Operating Companies.

459. In 2006 [redacted] decided to reorganize his shareholding structure, and in that process incorporated a new Cypriot company, WCV. This company then purchased the share capital of Exotic Islands from Greenfield, a special purpose vehicle which eventually (through a string of other special purpose vehicles) owned the entire share capital of Synot TIP and Synot W[505]. The 2006 restructuring did not cause any change as regards to potential availability of treaty protection: before the reorganization the (indirect) owner of the Operating Companies was Greenfield, a Cypriot company with its registered office in Cyprus, wholly owned (again indirectly) by [redacted] After the restructuring, ownership passed to WCV – equally a Cypriot company with its registered office in Cyprus.

460. The facts disavow Respondent's case that Claimants acted with bad faith, and that the motivation behind the 2006 restructuring was to access investment treaty protection: in 2006 Greenfield had *prima facie* standing to bring a claim against

[505] C-14; [redacted] para. 18.

the Czech Republic, a fact which undermines Respondent's case that the motivation behind the restructuring of 2006 was to access investment treaty protection.

461. Moreover, Claimants have provided solid evidence confirming that the rationale of the 2006-2008 reorganization was tax planning as a consequence of Cyprus' and the Czech Republic's accession to the EU in 2004[506].

462. Finally, the Republic has also failed to establish that by 2006 the dispute was already foreseeable. Claimants are challenging four Decisions of the Constitutional Court adopted between 2011 and 2013. The three 2011 Decisions relate to certain Municipal Decrees issued between October 2009 and July 2010. The fourth Decision, adopted in 2013, is related to the 2011 Amendment to the Lotteries Act. The Republic has failed to marshal any evidence proving that in 2006 any of the events underlying the present dispute were foreseeable.

463. Summing up, Respondent has failed to prove that when WCV reorganized its shareholding structure in 2006, it incurred in a bad faith conduct.

2.2 THE 2014 CHANGES IN MANAGEMENT

464. Respondent also alleges that Claimants acted in bad faith by feigning compliance with the permanent seat requirement of the Treaty: in the spring of 2014 the Claimants started fabricating *indicia* to create the appearance that WCV and CCL effectively managed and administered their investment in the Operating Companies from Cyprus. And they did so once the dispute had already crystalized.

465. According to Claimants, the 2014 reorganizational changes bear no relation to the present arbitration. These changes were made to comply with prospective amendments to EU and Cypriot tax law (requiring WCV and CCL to have their own offices and employ their own management); and to reorganize the holding companies in light of the Synot Group's expansion.

466. The Tribunal again sides with Claimants.

467. The Tribunal has already found that, since 2006 WCV and CCL were:

- entities "constituted in accordance with and recognized as legal persons" under Cypriot law,
- with their "permanent seat" in Cyprus,

and thus, complied with the subjective requirements of Art. 1(2)(b) of the BIT.

[506] C-256; [redacted] paras. 16-19.

468. Between March and June 2014 the Synot Group decided to reorganize the management structure of its Cypriot subsidiaries:

- The management agreements with Oneworld, a service providing company, were terminated;
- [redacted] were appointed to the boards of WCV and CCL, in substitution of the two historic incumbents, [redacted] and [redacted] [507]; [redacted] was appointed Chairman of the board[508];
- WCV and CCL left the premises provided by Oneworld and transferred their registered office from Oneworld's address to a new address – a separate office rented by the Synot Group for all its Cypriot holdings;
- WCV and CCL hired two employees and a Managing Director;
- WCV's new board held a number of board meetings.

469. Respondent says that Claimants adopted these measures in bad faith at a time when the dispute had already crystallized, with the purpose of feigning the existence of a permanent seat.

470. The Tribunal agrees with Respondent that by early 2014 the dispute had indeed crystallized – shortly thereafter, on 15 July 2014, Claimants submitted the Notice of Dispute.

471. But the Tribunal's finding that Claimants possessed a permanent seat in Cyprus since 2006 undermines Respondent's main argument: if Claimants had (and had always had) a permanent seat, why should they fabricate false *indicia* in order to prove its existence?

472. The Tribunal thus comes to the conclusion that the facts *prima facie* do not support Respondent's allegation that Claimants feigned a permanent seat.

A *caveat*

473. There is however a *caveat*: Claimants could not foresee in 2014 the findings of this Tribunal. Given this uncertainty, and knowing back then that a dispute was imminent, Claimants could have feigned the *indicia*, as an additional precaution, to cover the eventuality that the prospective arbitral tribunal came to the conclusion that the pre-2014 arrangements did not satisfy the requirements of the BIT.

474. For this reason, after the First Hearing, the Tribunal asked the Parties to address the following question in the Second Hearing: assuming that the permanent seat

[507] R-44; R-45.
[508] HT2, p. 75, 22:25.

requirement was complied with at the relevant moment, could it still be argued that there is an abuse precluding jurisdiction[509]?

475. The Republic answered that even if the permanent seat requirement was met at the relevant moment, the Tribunal should delve into how the jurisdictional requirements came to be met; and if they were abusively obtained, the Tribunal should decline jurisdiction[510].

476. Claimants agreed that in theory, even if the jurisdictional requirements are met, a case can be dismissed if there is evidence of abuse[511]. However, they say that in the present case, there is no evidence that Claimants committed an abuse[512].

Tribunal's position

477. The Tribunal shares the Parties' position that if a claimant in investment arbitration engages in bad faith conduct or an abuse of rights, such behaviour may result in the forfeiture of the investor's right to treaty protection. There is ample case law confirming this conclusion[513].

478. But on the facts of the present case, no evidence has been marshalled proving that Claimants engaged in bad faith conduct or an abuse of rights. Claimants simply reinforced its activities performed in Cyprus and changed the *modus operandi*: the agreements with the service provider were terminated, new, independent premises were leased, employees were hired and the board membership was restructured.

479. Claimants aver that the ultimate purpose of this reorganization was to forestall future developments in tax law.

480. [redacted] explained that in 2013 the European Commission had issued a draft EU Directive proposing amendments to the EU Parent/Subsidiary Directive[514]. Under the previous regime, an operating company in one Member State owned by a holding company in another Member State would pay the relevant profit tax in its country, and thereafter, could distribute its after-tax profit to the holding parent without withholding tax[515]. The 2013 draft EU Directive proposed to limit the application of this regime, by imposing a substantive requirement for companies that could benefit from this provision[516]. The 2013 draft EU Directive stated that[517]:

[509] HT2, p. 256, 22:25-257; 1:9.
[510] HT3, pp. 51-53.
[511] HT3, p. 230, 19:23.
[512] HT3, pp. 230, 23:25 – p. 231. 11:3.
[513] *Flughafen*, para. 122; *Phoenix Action*, para. 106.
[514] C-260.
[515] HT2, p. 53, 12:21.
[516] HT2, pp. 53, 22:25-54, 1:12.
[517] C-260, p. 5.

> "Member States shall withdraw the benefit of this directive in the case of an artificial arrangement or an artificial series of arrangements which has been put into place for the essential purpose of obtaining an improper tax advantage under this directive …
>
> A transaction, scheme, action, operation, agreement… is an artificial arrangement… where it does not reflect economic reality".

481. [redacted] testified that tax professionals across the EU understood that the prospective amendment would require companies that sought to benefit from the Directive to have business reasons in addition to tax reasons to be able to qualify as a beneficiary of the Directive. This is why he advised to have operational units in the Cypriot companies, so as to fulfil more than just the requirements of tax residency in Cyprus[518].

482. The amendment to the Parent/Subsidiary Directive finally came into force on 27 January 2015, and incorporated a similar wording to the one of the 2013 draft[519].

483. In the Tribunal's opinion, it is credible that in anticipation of the amendment of the Parent/Subsidiary Directive, WCV and CCL made arrangements to transfer offices to their own premises, hired staff to carry out the functions previously performed by Oneworld, and appointed a new board of directors[520].

484. Respondent rejects Claimants' explanation, because the amendment to the Parent/Subsidiary Directive did not come into force until January 2015, and was not transposed into Cypriot law until January 2016.

485. The Tribunal does not agree with Respondent's view. When regulatory changes are publicly anticipated, it is good business practice for companies to react in advance.

* * *

486. In conclusion, Respondent has failed to prove that any of the actions performed by Claimants in the 2014 reorganization were taken either in bad faith or constituted an abuse of rights.

Case law

487. The Parties have drawn the Tribunal's attention to a number of cases concerning abusive restructuring to gain access to treaty protection.

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[518] HT2, p. 55, 24:25-56, 1:6.
[519] Council Directive (EU) 2015/121 of 27 January 2015. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L0121&from=EN.
[520] [redacted] para. 18.

488. Restructuring a group of companies in order to gain treaty protection, or for tax considerations, is not unlawful on its own. It is a legitimate purpose, as long as it is not performed in anticipation of a foreseeable dispute, i.e. when there is a reasonable prospect that a controversy will materialize[521]. The *Aguas del Tunari* tribunal accepted the claimant's representation that its restructuring was made for reasons of taxation, and noted that[522]:

> "it is not uncommon practice, and – absent particular limitations – not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in term, for examples, of taxation or the substantive law of the jurisdiction, including the availability of a BIT".

489. The leading case concerning bad faith restructuring is *Phoenix Action*. In this case a Czech national who had a domestic tax and customs dispute with the Czech Republic, sold his investment to an Israeli company, Phoenix Action, which had been established for the sole purpose of bringing the pre-existing domestic tax and customs dispute to an international arbitration under the Israeli-Czech BIT. The tribunal found that such an abusive attempt to obtain access to the system of investment arbitration could not be permitted[523].

490. Similar cases endorsed the approach adopted by *Phoenix Action*. In the *Cementownia* case the tribunal found that the Polish company had acquired the shares in the Turkish subsidiaries, just 12 days before the termination of the concession agreements, and thus, such a transaction was a mere fabrication in order to obtain the benefits of the Energy Charter Treaty[524].

491. The *Mobil* tribunal confirmed that the timing of the restructuring is crucial when assessing abuse of the corporate form.

492. Exxon Mobil had made an investment in Venezuela through holding companies in Delaware and Bahamas. A dispute arose between the investor and Venezuela, over royalties and income tax. After these events, Exxon Mobil restructured its investment, interposing a Dutch holding company. Thereafter, Venezuela adopted nationalization measures affecting Exxon Mobil's investment, and the investor initiated an ICSID arbitration under the Dutch-Venezuela BIT.

493. The *Mobil* tribunal found that Exxon Mobil's restructuring into the Netherlands was not abusive conduct, and it relied heavily on the fact that the investor had informed Venezuela of the restructuring. The tribunal concluded that it had jurisdiction over the nationalization measures, but not over pre-existing disputes that had arisen prior to Mobil's acquisition of the status of a Dutch investor[525].

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[521] *Philip Morris*, para. 570.
[522] *Aguas del Tunari*, para. 330.
[523] *Phoenix Action*, paras. 142-144.
[524] *Cementownia*, paras. 156-157.
[525] *Mobil (Jurisdiction)*, paras. 204-205.

494. More recently, the *Philip Morris* case confirmed that a finding of abusive corporate restructuring requires that the claimant changes its corporate structure for the purpose of gaining access to treaty protection, when the relevant dispute becomes foreseeable, i.e., when there is a reasonable prospect that an illegal measure by the host State giving rise to a treaty claim will materialize[526].

495. Philip Morris (Hong Kong) initiated an arbitration against Australia because of the enactment of plain packaging legislation for tobacco. Australia raised an abuse of right objection, alleging that Philip Morris had restructured its investment to gain access to treaty protection, when the policy for plain packaging was already set in motion. The tribunal found for Australia, because Philip Morris had reorganized its corporate structure when the plain packaging legislation was already being discussed, and the claimant did not offer a convincing explanation to justify the restructuring[527].

496. All these cases are inapposite, because in the present matter the contested measures took place between 2011 and 2013, long after WCV and CCL had complied with the BIT's subjective requirements for jurisdiction.

2.3 CIRCULARITY OF THE INVESTMENT

497. In this Bad Faith Objection, Respondent says that Claimants engaged in improper conduct, not only in the 2006 restructuring and in the 2014 changes in management, but also for the circularity of the investment.

498. The Republic argues that the real investor is [redacted], a Czech citizen, WCV (and CCL) being simply his corporate *alter egos*, companies incorporated in Cyprus for the sole purpose of bringing this arbitration, and claiming the alleged damage suffered by [redacted] gaming business in the Czech Republic. Respondent asks the Tribunal to lift the corporate veil on two grounds:

- First, because Claimants lack an economically active relationship with the investment in the Czech Republic; the Tribunal must enquire into who exerts control to determine the economic reality behind the investment; in this case, [redacted] is the ultimate beneficial owner and controller of the gaming business in the Czech Republic;
- Second, Respondent also grounds its request for lifting the corporate veil on the misuse of corporate formalities: [redacted] improperly used WCV and CCL to file this arbitration and gain investment treaty protection.

499. Claimants reply that WCV and CCL fulfill the BIT criteria of nationality and permanent seat. The fact that [redacted] is the beneficial owner of WCV and CCL, and the manner in which Claimants own and manage the shares in the Operating Companies, is irrelevant for the purpose of determining the Tribunal's

[526] *Philip Morris*, para. 554.
[527] *Philip Morris*, paras. 586-588.

jurisdiction. Additionally, Respondent has failed to prove that an abuse or misuse of corporate formalities have been committed which justifies piercing of the corporate veil.

500. The Tribunal will first analyze the difficulties which circular investments pose in investment arbitration (**A**.), it will then establish the conduct expected from investors (**B**.), and finally summarize the relevant case law (**C**.).

A. Problems associated with circular investments

501. The basic facts of the case are undisputed: [redacted] a Czech citizen and a Senator in the Czech Senate, has at all relevant times been the ultimate (indirect) owner of Claimants' entire share capital. Being the sole indirect shareholder, it is also undisputed that [redacted] has always exercised control over Claimants. Claimants own the totality of the share capital of the Czech Operating Companies, and consequently these companies are controlled by Claimants. The result is that the Operating Companies are (indirectly) owned and controlled by a Czech citizen.

502. The Tribunal is thus faced with one of the most intricate problems in investment arbitration: can treaty protection be extended to companies incorporated in a home state and owning investments in a host state, if they are owned or controlled by nationals of the same host state? In this arbitration the Tribunal is confronted with this problem of circularity at its most radical: the Czech national is not an ordinary citizen, but a Senator, and he is the only (indirect) owner of the investment.

De lege ferenda

503. *De lege ferenda*, arguments can be raised in favour of excluding circular investments from treaty protection, in favour of allowing protection to certain types of circular investments, or of extending protection to all types – it all depends on the policy objectives which the contracting parties seek when executing a BIT.

504. These policy arguments in any case are irrelevant for the adjudication of this case. Policy decisions are in the hands of contracting states: it is their privilege to weigh alternative options, to discuss such alternatives in the course of the treaty negotiations, and then to agree on treaty language which reflects the alternative agreed upon. If the treaty fails to achieve the policy objectives, or if these objectives change while the treaty is in force, states have the possibility to amend the treaty language (or to terminate the treaty, if amendment turns out to be impossible).

505. The role of arbitral tribunals is much more modest: arbitrators are servants of the treaty and their function is limited to applying the treaty language agreed upon by the contracting states (if necessary interpreted in accordance with the VCLT), to the proven facts. BITs grant arbitrators limited jurisdiction to adjudicate certain disputes between certain protected investors and host states. Arbitrators should

not extend their powers beyond those limits, nor curtail their jurisdiction when the treaty language empowers them[528].

De lege lata

506. In Art. 1(2)(b) of the Treaty the Czech Republic undertook to grant treaty protection to Cypriot companies, provided that they meet two requirements:

- That such companies are incorporated or constituted in accordance with Cypriot law, and are recognized as legal persons by Cypriot law, and
- That they have their "permanent seat" in Cyprus.

507. The Tribunal has already come to the conclusion that Claimants meet these two requirements.

508. Switzerland, Ireland and Cyprus are well-known off-shore centers, which facilitate the creation of holding companies. And holding companies can be used by foreign investors (including Czech investors) to own shares in other companies, located in third countries, including in the investor's home country.

509. In the 1990's Czechoslovakia and then its successor the Czech Republic decided to execute BITs with Switzerland, Ireland and Cyprus.

510. In the Czechoslovak-Swiss BIT (signed before the Czech-Cyprus BIT) and in the Czech-Irish BIT (negotiated at the same time but signed before the Cyprus-Czech BIT) the Czech Republic reinforced the ties between the investment and home state, thwarting the possibilities of circular investments:

- The Czech-Swiss BIT additionally requires that Swiss companies have "real economic activities" in Switzerland;
- While the Czech-Irish BIT requires Irish companies to have their "central management and control" in Ireland.

511. The Tribunal notes that no such reinforced ties were agreed upon in the Czech-Cyprus BIT. Under Art. 1(2)(b) of the Czech-Cyprus BIT the only requirements which companies have to meet in order to achieve treaty protection are nationality and permanent seat. In the almost 20 years that the Czech-Cyprus BIT has been in force, the Czech Republic has made no attempt to start negotiations with the Republic of Cyprus, to amend the Treaty language and include additional subjective requirements.

512. Against this legal and factual situation, the Czech Republic now says that Cypriot companies can only access treaty protection if they meet an additional requirement: that an active relationship exists between the Cypriot company and the investment, the Cypriot company being the ultimate owner and controller of

[528] *Tokios Tokeles*, para. 36; *Saluka*, para. 241.

the investment. Respondent adds that this requirement is not fulfilled in the present case, because [redacted] is the ultimate owner and controller of the group, and thus, the Tribunal should decline jurisdiction.

513. The Tribunal is unable to follow the route proposed by Respondent.

514. The Czech Republic is requesting that the Tribunal create an additional Treaty requirement, alien to the text of the BIT. A requirement which would be akin to that established in the Czech-Irish BIT for Irish companies investing in the Czech Republic: that central management and control be carried out in the home state.

515. The difficulty with Respondent's request is that this requirement was agreed upon between the Irish and the Czech Republic, and not between the Republic of Cyprus and the Czech Republic. In fact, the available *travaux* indicate that the requirement of central management and control was never even discussed in the negotiations leading to the Czech-Cyprus BIT.

516. In this situation, the Tribunal cannot agree with the Czech Republic. Arbitration tribunals are not empowered to insert, at the request of one of the Contracting Parties, new jurisdictional requirements not contemplated in the text of the Treaty – in the same way that tribunals cannot assume jurisdiction dispensing with any of the requirements imposed by the BIT.

517. To do otherwise would undermine the confidence in the foreseeability and certainty of the investment arbitration system.

B. Conduct expected from investors

518. That said, states can expect that investors adhere to certain rules of conduct, including that they respect the laws and regulations of the host state, that they act in good faith, that they abstain from fraud and from abusing the rights granted by the Treaty. As the tribunal in *Phoenix Action* said[529]:

> "In the Tribunal's view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith. The protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance.
>
> The principle of good faith has long been recognized in public international law, as it is also in all national legal systems. This principle requires parties 'to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage…' This principle governs the relations between States, but also the legal rights and duties of those seeking to assert an international claim under a treaty.

[529] *Phoenix Action*, paras. 106-107.

> Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused".

519. Fraud, malfeasance and abuse also justify disregarding the legal personality of a corporation. As the ICJ said in *Barcelona Traction,* piercing of the corporate veil is possible "in exceptional circumstances", such as[530]:

> "to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as creditor or purchaser, or to prevent the evasion of legal requirements or of obligations."

520. Respondent avers that piercing the corporate veil is justified in the present case, because the Cypriot claimants are no more than [redacted] *alter egos*, companies incorporated to bring this arbitration, misusing their separate corporate personality and the investment arbitration system.

521. The Tribunal disagrees.

522. Respondent has not marshalled evidence proving that WCV or CCL were incorporated with the purpose of filing this procedure, or that Claimants misused their legal personality or committed abuse against the investment arbitration system.

523. WCV and CCL (and their predecessor – Greenfield) were incorporated and acquired ownership of the Czech Operating Companies, at a time when the present dispute was not foreseeable. Respondent's argument that the Synot Group took the decision to incorporate Claimants in order to have access to the protection of the Treaty is unsupported.

524. There is another element which militates against a finding of abuse: WCV's and CCL's ownership of the Operating Companies was transparent and well known to the Czech Republic. The Czech commercial registry shows that WCV was the sole shareholder of Synot W[531]; and that WCV (and CCL) were the shareholders of CCV, the Czech holding which indirectly owned Synot TIP[532]. There is no evidence in the record that the Czech Republic ever raised *in tempore insuspecto* the argument that [redacted] use of Cypriot holding companies was abusive, fraudulent or in bad faith.

Alleged sham purchase of the investment

525. Respondent has drawn the attention of the Tribunal to a fact, which, in the Republic's opinion, supports the argument that Claimants' conduct was abusive and in bad faith: in 2006, when WCV indirectly acquired the Operating Companies from Greenfield, the price paid was just USD 6,000. Respondent says

[530] *Barcelona Traction*, para. 56.
[531] C-44, pp. 12-13.
[532] C-40, pp. 1-3; C-41, pp. 2-5; C-43, p. 10.

that the token price reveals that the investment made by WCV was a sham, that the investor did not act in good faith and consequently, that Claimants have forfeited treaty protection.

526. The Tribunal accepts that a transaction where a buyer only pays a token price of a few thousand USD, when purchasing a group of companies with a net worth running into the tens of millions of USD, looks fictitious.

527. In the present case, however, the facts are much more complex than those alleged by the Respondent.

528. The transaction for USD 6,000, through which WCV purchased Exotic Islands from Greenfield (and thus gained indirect ownership of the Operating Companies)[533], was only one of a series of transactions within the 2006-2008 Synot Group restructuring.

529. Claimants' witness [redacted] explained that this first transaction was made at nominal prices (and not at arm's length), because the Dutch Antilles, where Exotic Islands resided, levied no taxation on sales of shares[534].

530. Thereafter, WCV carried out three additional operations:

- On 4 December 2007 WCV purchased from its subsidiary, Exotic Islands, the shares in WCV B.V. (an intermediate holding company); this operation was also done for a nominal value of EUR 18,151.2[535];
- Then, on 17 July 2008, WCV acquired from WCV B.V. the entire share capital of Synot W; the share purchase agreement proves that the price paid by WCV was EUR 25,608,656 (CZK 594,633,000)[536]; [redacted] averred that the price paid reflected Synot W's market value at the relevant time[537];
- On that same day WCV also acquired from WCV B.V. the entire share capital in CCV, the Czech holding which controlled Synot TIP, for a price of EUR 1,798,019 (CZK 41,750,000)[538]; [redacted] again confirmed that the purchase price was established at arm's length .

531. The record shows that WCV, after two initial purchases of intermediate holding companies at nominal values, eventually acquired shares in two Czech companies, for a total price of EUR 27,5 M – an amount which [redacted] averred

[533] C-14.
[534] HT2, p. 126, 11:24.
[535] C-16.
[536] C-19
[537] HT2, p. 127, 5:21.
[538] C-20.
[539] HT2, p. 127, 5:21.

reflected market price, and which in any case cannot be labelled as a token amount[540].

532. A complete evaluation of the proven facts thus leads to the conclusion that when WCV bought the Operating Companies, it paid a purchase price of almost EUR 30 M – dissipating any argument that the 2006-2008 restructuring was a mere sham.

533. Additionally, Claimants aver that they made two additional substantial capital contributions in the Operating Companies:

- First, in the form of retained earnings in the Operating Companies, in the amount of EUR 37 M;
- Second, with an increase of capital in the Operating Companies of CZK 390 M (approximately, EUR 15 M).

534. The documentary evidence supports Claimants statement and Respondent has not challenged this assertion[541].

* * *

535. Summing up, the Tribunal rejects Respondent's Bad Faith Objection. It is true that Claimants' investment is circular: [redacted] is a Czech national, and the investment consists of Operating Companies located in the Czech Republic. But Claimants do meet the two jurisdictional requirements established in the BIT (nationality and permanent seat), and Respondent has failed to marshal evidence proving that Claimants acted in bad faith or abused their rights under the Treaty, or that there are legitimate reasons which would justify lifting the corporate veil.

C. Case law

536. The Parties have drawn the Tribunal's attention to a number of decisions adopted by previous investment tribunals.

Circular investments

537. The leading case is *Tokios Tokeles*.

538. In this case certain Ukrainian nationals had a corporation in Lithuania – constituted six years before the entry into force of the BIT – which in turn owned a Ukrainian subsidiary operating a publishing business in Ukraine. The Lithuanian claimant sued Ukraine under the Lithuania-Ukraine BIT because the State had allegedly seized the assets of its Ukrainian subsidiary under the Ukrainian tax

[540] CCL paid EUR 125,000 (CZK 3,300,000) for its 1,02% participation in CCV – see C-40, p. 3.
[541] C-44, p. 15-18; Expert Report PWC, Financial Statements Synot TIP and Synot W, 2007-2015, Retained Earnings Cells. See HT4, p. 75.

regime, in a manner tantamount to a breach of the standards of the treaty. Ukraine opposed jurisdiction on the grounds that the Lithuanian company was not a genuine foreign investor because it was owned and controlled by Ukrainian nationals and the company did not maintain substantial business activity in Lithuania[542]. Ukraine requested the tribunal to pierce the corporate veil to determine that the real nationality of the investors was Ukrainian, and accordingly, dismiss the case for lack of jurisdiction[543].

539. *Tokios Tokeles* synthetizes the *status quaestionis* regarding investments made by companies controlled by nationals of the host State. The majority of the tribunal upheld jurisdiction; but the Chairman, Prof. Prosper Weil, issued a dissenting opinion. The *Tokios Tokeles* decision and the dissenting opinion, thus, offer the two alternative solutions to the subject matter.

540. The principles laid down by the *Tokios Tokeles* majority have been followed by other investment tribunals[544]. For instance, the *Yukos* tribunal rejected Russia's objection that, because claimant was owed and controlled by Russian nationals, the tribunal should decline jurisdiction on the grounds that the claimant did not qualify as an investor[545]. The *Yukos* tribunal emphasized that the tribunal was bound to interpret the ECT as agreed by the contracting states[546], and concluded that the claimant – a company organized under the laws of the Isle of Man (Dependency of the United Kingdom) – although admittedly controlled by Russian nationals, qualified as an investor under the ECT.

541. Respondent has also sought support in *TSA Spectrum* to aver that the Tribunal should look beyond Claimant's corporate structure to see who controls the investment. The question put before the *TSA Spectrum* tribunal was whether TSA Spectrum, an Argentinian company, could institute arbitration under the ICSID Convention against the Republic of Argentina, by application of Art. 25(2)(b), which explicitly permits:

> "juridical persons which had the nationality of the Contracting State party to the dispute … and which, <u>because of foreign control</u>, the parties have agreed should be treated as a national of another Contracting State…"[547]. [Emphasis added].

542. The applicable framework explicitly required the tribunal to establish who exerted control over the Argentinian subsidiary, in order to assess whether such company had standing to bring a claim. There is a debate on whether Art. 25(2)(b) requires

[542] *Tokios Tokeles*, para. 21.
[543] *Tokios Tokeles*, para. 22.
[544] *Rompetrol*, paras. 82-85; *KT Asia*, paras. 110-139; *RosInvest*, paras. 323-326; *Saluka*, paras. 226-244; *Burimi*, para. 131.
[545] *Yukos*, para. 47
[546] *Yukos*, para. 415.
[547] See *TSA Spectrum*, para. 140. See also *Burimi*, paras. 128-133.

the adjudicators to assess whether there is "actual control"[548] and who is the ultimate controller[549], or whether it is sufficient to analyze the first layer of foreign control[550]. This discussion, however, is not of assistance to the present case.

543. The Czech Republic also relies on the *Standard Chartered Bank* case to aver that the corporate veil must be pierced when the nominal investor lacks an "economically active relationship" with the investment.

544. Standard Chartered Bank (UK) initiated arbitration against Tanzania for alleged adverse measures adopted by the State affecting a loan granted by Standard Chartered Bank (Hong Kong) to a Tanzanian enterprise to fund an energy project in Tanzania. The tribunal held that Standard Chartered Bank (UK) had not made an investment in Tanzania, because its connection to the loan was that of a "passive ownership"[551], and this was not sufficient to conclude that there was an investment of a UK national in Tanzania.

545. The *Standard Chartered Bank* case does not relate to circular investments, but to the issue of whether the investor has actually made an investment in the host State. Thus, the *Standard Chartered Bank* decision offers little assistance, since it has been proven that WCV and CCL made a substantial contribution to their investment in the Czech Republic.

Piercing of the corporate veil

546. Another principle accepted by these decisions is that tribunals may pierce the corporate veil only in circumstances of abuse of corporate form and "to prevent the misuse of the privileges of legal personality"[552].

547. In *Barcelona Traction* the ICJ established principles regarding legal personality under international law and piercing of the corporate veil, particularly in relation to nationality in the context of diplomatic protection. Investment tribunals have consistently found that the doctrine of piercing of the corporate veil may be applied in the circumstances set forth by *Barcelona Traction*[553].

548. In *ADC*, for instance, a case brought under the Cyprus-Hungary BIT, the respondent state argued that the Cypriot claimants were mere shell companies established by Canadian investors, and thus, the veil should be lifted[554]. The tribunal found that the Cypriot claimants fulfilled the jurisdictional requirements

[548] *Caratube*, para. 407.
[549] *TSA Spectrum*, para. 153.
[550] *Aguas del Tunari*, para. 246.
[551] *Standard Chartered Bank*, para. 259.
[552] *Barcelona Traction*, para. 56; *Tokios Tokeles*, paras. 54-56; *KT Asia*, para. 135; *ADC*, para. 359; *Rumeli*, paras. 205-206.
[553] *Tokios Tokeles*, para. 119; *Saluka*, para. 230; *KT Asia*, para. 134.
[554] *ADC*, para. 334.

of the Cyprus-Hungary BIT, and that there was no evidence of misuse of corporate formalities that would warrant lifting the corporate veil; in fact, Hungary was "fully aware of the use of Cypriot entities and manifestly approved it"[555].

549. In the present case, WCV's and CCL's ownership of the Operating Companies was at all times transparent to the Czech Republic. Respondent cannot now impugn the Synot Group's corporate structure and WCV's and CCL's legal personality to deny the protection to which they are entitled to under the BIT.

[555] *ADC*, para. 358.

VIII. FORK-IN-THE-ROAD OBJECTION

550. Arts. 8(1) and (2) of the BIT contains a provision that permits an investor to choose among different *fora*:

> "(1) Any dispute which may arise between an investor of one Contracting Party and the Contracting Party in connection with an investment in the territory of that other Contracting Party shall be settled, if possible, by negotiations between the parties to the dispute.
>
> (2) If any dispute between an investor of one Contracting Party and the other Contracting Party cannot be thus settled within a period of six months from the written notification of a claim, the investor shall be entitled to submit the case, at his choice, for settlement to:
>
> (a) a court of competent jurisdiction or an administrative tribunal of the Contracting Party which is the party to the dispute,
>
> or
>
> (b) the International Centre for Settlement of Investment Disputes (ICSID) having regard to the applicable provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington D.C. on 18 March 1965,
>
> or
>
> (c) an arbitrator or international ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The parties to the dispute may agree in writing to modify these Rules,
>
> or
>
> (d) The Arbitration Institute of the Chamber of Commerce in Stockholm".

551. It is an undisputed fact that Synot TIP, a Czech company fully owned by Claimants, has filed over a hundred proceedings before the Czech administrative courts, contesting the decisions taken by the Ministry of Finance, and the Municipal Decrees adopted by certain municipalities, which terminated or imposed restrictions on its permits to operate gaming devices ["**Municipal Proceedings**"][556].

[556] See paras. 45 and 46 *supra*. See Joint Table on Municipal Proceedings.

552. Respondent avers that the BIT contains a fork-in-the-road provision that prevents an investor from re-litigating in an international forum, a dispute that it has already sought to resolve in a domestic forum[557]. Claimants have already litigated the present dispute via Municipal Proceedings; the fork-in-the-road provision bars Claimants' attempt to submit the same (or substantially the same) claims to adjudication in this arbitration, and thus the Tribunal should dismiss Claimants' claims.

553. Claimants reply that the facts do not support application of the fork-in-the-road provision and that Respondent's objection should be dismissed.

1. POSITION OF THE PARTIES

1.1 RESPONDENT'S MEMORIAL ON JURISDICTION

554. In its first Memorial, Respondent asks the Tribunal to apply the *Pantechniki* standard and to analyze whether the claims submitted in this arbitration have the "same fundamental basis" as those submitted before the Czech Courts[558].

555. In Respondent's opinion, Claimants have already pursued before the Czech courts, the same claims to be adjudicated by this Tribunal. As a result, Claimants are abusing the investment arbitration system by filing this procedure[559].

1.2 CLAIMANTS' ANSWER ON BIFURCATED OBJECTIONS

556. Claimants explain that the BIT allows the investor to submit its case to any of the *fora* listed in Art. 8(2). In determining whether an investor has impermissibly submitted its case to more than one of the available *fora*, the "tripe identity" test applies: there must be identity of the parties, of the object (i.e. relief sought) and of the cause of action (i.e. the legal grounds). This is the approach followed by the relevant investment treaty arbitration case law[560].

557. Claimants say that *Pantechniki* has not abandoned the triple identity test, contrary to Respondent's allegations[561].

558. The Municipal Proceedings referred to by Respondent do not meet the triple identity test because:

- The parties are different: Synot TIP brought the action before the Czech Courts, whilst this arbitration is brought by WCV and CCL; and
- The Czech cases are fundamentally different because they seek to overturn administrative decisions adopted by Czech municipalities and the Czech

[557] R I, para. 181.
[558] R I, para. 185; R II, para. 152; HT3, p. 87, 18:23.
[559] R I, para 187
[560] C II, para 10.
[561] C II, para 11.

Ministry of Finance, terminating or limiting Synot TIP's permits. In the Czech cases, Synot TIP alleges a breach of Czech administrative and constitutional law; and in this arbitration, Claimants allege a violation of the BIT and international law.

559. Claimants aver that investment tribunals have rejected fork-in-the-road objections without hesitation in similar cases[562].

560. Claimants also argue that, had they not have initiated the Municipal Proceedings, they would not have tested the legal situation of their permits in the Czech legal system, and therefore, Respondent would have argued that they had not exhausted local remedies[563].

1.3 RESPONDENT'S REPLY ON BIFURCATED OBJECTIONS

561. Respondent says that Claimants are committing an abuse: Claimants had already litigated this case all the way before the Czech courts, yet still resorted to this arbitration, in violation of the Treaty's fork-in-the-road provision. What is more, Claimants continued to litigate this case before the Czech courts even after this arbitration had begun[564].

562. The fork-in-the-road provision in the Treaty does not allow the investor to have "two bites at the same cherry". To determine what constitutes "two bites", the Czech Republic submits that the approach taken in *Pantechniki*, the so-called "fundamental basis" test, should be applied, to conclude that claims pursued before local courts cannot simply be relabelled to become Treaty claims[565]. The triple identity test, offered by Claimants to determine whether the same case has been submitted to the Czech courts and this Tribunal, is outdated and unavailing[566].

563. The *Pantechniki* test does not require that the identity of the parties be exactly the same in the local court proceedings as in the arbitration – although on the facts of the case the debate is ultimately irrelevant, because Synot TIP specifically sought to be equated with WCV before the Czech courts and because Synot TIP and Claimants are just proxies for one person, [redacted][567].

564. In the present case, Claimants have simply relabelled their Czech court claims before this Tribunal. Synot TIP's arguments before the Czech courts centered around "legitimate expectations", as can be seen in the decision of the Regional Court of Brno[568]. Claimants have presented their case to this Tribunal in nearly

[562] C II, para 15.
[563] C II, para. 14.
[564] R II, para 60.
[565] R II, para 152.
[566] R II, para. 155.
[567] R II, paras 171-174
[568] R II, para 187, citing to R-63 and R-77

identical terms, stating that Respondent's actions are inconsistent with Claimants' legitimate expectations[569]. This is blatant relabelling[570].

565. Finally, the Republic also rejects Claimants' argument that they had to test their case before the Czech courts as a substantive prerequisite to bringing this arbitration[571].

1.4 CLAIMANTS' REJOINDER ON BIFURCATED OBJECTIONS

566. Claimants say that Respondent wrongly seeks to diminish the applicable test for the Treaty's fork-in-the-road clause. It is false that the "triple identity test" has been supplanted since *Pantechniki* by a less exacting "fundamental basis test". The jurisprudence simply does not disclose such controversy or substantive change in the applicable test. In any event, despite how the test is framed, Art. 8(2) does not apply to preclude this arbitration[572].

567. Claimants' case has not been submitted to the Czech courts. The proceedings before the local courts concern challenges by Synot TIP against individual administrative decisions taken by the Ministry of Finance, terminating individual permits to operate gaming machines in specific locations, brought pursuant to section 65(1) of the Code of Administrative Justice. If the challenge is successful, the court revokes the contested decision, but it cannot award damages. There is therefore no risk of double recovery[573].

1.5 RESPONDENT'S ARGUMENTS IN THE FIRST HEARING

568. In the First Hearing Respondent's counsel said that before the issuance of the award in *Pantechniki* there was consensus that the "triple identity test" should be applied, which was incorrect in counsel's opinion. After 2009 when *Pantechniki* was issued, the test changed to "fundamental basis", with a prohibition that claims be relabelled to become investment claims[574]. The "triple identity test" is thus now outdated[575].

569. Respondent insisted that Claimants have simply relabelled their municipal claims, in order to submit them as treaty claims. Claimants asked the Czech courts to disregard the decision of the Czech Constitutional Court and to reinstate various gambling permits. Any decision in favour of Claimants in the Czech courts would

[569] R II, para 189.
[570] R II, para 192.
[571] R II, paras. 196-201.
[572] C III, paras. 16-17
[573] C III, paras. 36-37.
[574] HT1, p. 75, 12:20.
[575] HT1, p. 78, 14:20.

ultimately lead to the reversal of Claimants' damages claims in these proceedings[576].

1.6 CLAIMANTS' ARGUMENTS IN THE FIRST HEARING

570. Claimants' counsel defended the opposite view, explaining that the Ministry of Finance had issued approximately 1,000 administrative decisions terminating Synot TIP's gaming permits. To challenge these decisions, Synot TIP – not [redacted] – had commenced about 100 administrative proceedings, the majority of which were still pending[577]. The nature of these proceedings is the following:

- All proceedings have a very limited purpose – the cancellation of the administrative decision; the Czech courts can only choose between revoking the administrative decisions of the Ministry, or dismissing the complaint; the courts cannot award damages;
- The Czech courts review the decisions of the Ministry applying Czech administrative and constitutional law;
- Synot TIP has no standing to contest the decisions of the Constitutional Court directly; Synot TIP can only challenge the decisions of the Ministry which implement the Decisions of the Constitutional Court[578].

571. According to Claimants, from a legal point of view it is indifferent as to whether the Tribunal adopts the "triple identity test" or the "fundamental basis test" from *Pantechniki*. Neither of these tests will result in the Tribunal dismissing Claimants' claims on the basis that the fork-in-the-road provision of the Treaty has been triggered[579].

* * *

572. At the end of the First Hearing the Tribunal required the Parties to assess the following issues in the Second Hearing:

- Do Claimants have a cause of action before the Czech Courts for violations of the BIT? What would be the procedure before a Czech Court to ask for remedies based on a violation by the Czech Republic of the BIT? The Parties are required to discuss any precedents on point[580].
- How would the standard of *Pantechniki* for the fork-in-the-road clause apply in the present case considering the Municipal Proceedings[581].
- Are the criteria to apply the fork-in-the-road provision related to the criteria for exhaustion of local remedies under Customary International Law? i.e,

[576] HT1, p. 80, 1:8.
[577] HT1, p. 222, 15:20.
[578] HT1, p. 223, 8:20.
[579] HT1, p. 225, 11:16.
[580] HT2, p. 252.
[581] HT2, p. 252, 17:24.

can the criteria for exhaustion of local remedies be used by analogy when applying the fork-in-the-road provision[582].

- Assuming that Claimants are successful in some of the pending Municipal Proceedings, what would be the impact on this arbitration? Could this lead to a double recovery?[583]

573. After the First Hearing, new events occurred affecting the Municipal Proceedings.

Withdrawal of certain Municipal Proceedings

574. On 16 May 2017 Respondent wrote to the Tribunal, stating that it had recently come to the Republic's attention that Claimants had withdrawn some of the hundreds of Municipal Proceedings which had been submitted to the Czech courts[584].

575. Claimants reacted in a letter dated the next day[585], stating that the Czech courts had consistently dismissed the challenges, that the claims had become futile and that Synot TIP had decided to withdraw the majority of the 100 proceedings it had commenced. Claimants added[586]:

> "Only about 25 proceedings were left on foot. These remaining proceedings are before a variety of judges and relate to municipal decrees which invite challenge on various grounds, such as non-compliance with the principles of proportionality, non-discrimination, or the need for consistency and transparency".

576. Claimants averred that the withdrawal of these challenges had no bearing on the argument that Art. 8(2) of the BIT had not been engaged[587].

1.7 RESPONDENT'S ARGUMENTS IN THE SECOND HEARING

577. In the Second Hearing, Respondent reaffirmed that, to analyse whether the same claim has been submitted to the Czech courts and in this arbitration, the Tribunal should not apply the triple identity test, but rather evaluate whether or not the cases have the same fundamental basis[588]. This approach has recently been reconfirmed in the *Supervisión* award[589].

578. Applying the fundamental basis standard developed in *Pantechniki,* Respondent says that Claimants have violated the fork-in-the-road rule: the normative source

[582] HT2, p. 253, 20:25; p. 254, 1.
[583] HT2, p. 254, 6:9.
[584] Communication R-25
[585] Communication C-32.
[586] Communication C-32, p. 2.
[587] Communication C-32, p. 2.
[588] HT3, p. 87, 18:23.
[589] HT3, p. 88, 1:7, citing *Supervisión*.

in this arbitration is the same as the normative source as in the Municipal Proceedings, and that normative source is a purported violation of [redacted] legitimate expectations. As the *Supervisión* tribunal found, when claims are based on the same facts, this confirms that they share the same normative source[590].

579. Furthermore, in this arbitration Claimants pursue the same aim as Synot TIP in the Municipal Proceedings. In both sets of proceedings, [redacted] aim is to eradicate or at least reduce the effects of the Constitutional Court Decisions: before the Czech courts, through the reinstatement of licences; and before this Tribunal, where the reinstatement of licenses is not possible, with damages[591].

580. Respondent also covered the Tribunal's question regarding double recovery: if Claimants are successful in some of the Municipal Proceedings pending, what would be the impact on this arbitration? The Republic says that favourable decisions in the Municipal Proceedings would reduce the compensation due in these proceedings. This is the true reason why Claimants have withdrawn the bulk of their Municipal Proceedings[592]. But withdrawal cannot correct the violation of the fork-in-the-road clause which has already occurred[593].

581. Responding to the Tribunal's question whether the criteria to apply the fork-in-the-road provision is related to the criteria for exhaustion of local remedies under customary international law, Respondent answered in the affirmative: it is entirely consistent to evaluate sameness using the more flexible standards under customary international law[594], as applied by the ICJ in *ELSI* and confirmed in the ILC Draft Articles on Diplomatic Protection[595]. The ICJ in *ELSI* applied an even lower standard than the "fundamental basis" test and concluded that the municipal claim need not be exactly the same as the claim made before an international tribunal in order to exhaust local remedies[596]. This Tribunal could use *ELSI* by analogy to interpret the fork-in-the-road provision[597].

582. Regarding the Tribunal's question whether Claimants have a cause of action before the Czech Courts for violations of the BIT, Respondent's counsel submitted that – in theory – it is possible for an investor to submit to a Czech court an alleged breach of a BIT. Respondent referred to a decision in which the Supreme Administrative Court declined competence to adjudicate a claim under

[590] HT3, p. 92, 13:22.
[591] HT3, p. 94, 5:20.
[592] HT3, p. 95, 2:18.
[593] HT3, p. 95, 19:24.
[594] HT3, p. 89, 9:14.
[595] HT3, p. 90, 8:11, by reference to *ELSI*.
[596] HT3, pp. 89-90. See J1, p. 89.
[597] HT3, p. 90, 12:16.

the UK-Czech BIT[598] – a decision justified by the fact that the Treaty did not foresee the possibility of bringing the investment dispute before national courts[599].

1.8 CLAIMANTS' ARGUMENTS IN THE SECOND HEARING

583. In the Second Hearing Claimants' counsel explained that the decision to withdraw Synot TIP's Municipal Proceedings was due to an established line of jurisprudence which constantly rejected Synot TIP's claims; the courts repeatedly stated that the Constitutional Court decisions should be applied. At the beginning of 2017, Synot TIP's management decided to leave 25 cases where the termination decision of the Ministry was challenged on additional grounds, such as discrimination, arbitrariness and inconsistency of the regulation. All other procedures were terminated[600].

Appropriate test

584. Claimants' counsel reiterated that in their opinion the "triple identity test" is the appropriate means to decide the fork-in-the road objection[601], but it is nonetheless indifferent as to whether the "triple identity test" or the "fundamental basis test" are applied – both lead to the same result.

585. The "fundamental basis test" preferred by Respondent requires that the disputes share the same fundamental cause of claim and seek the same effects[602]. These requirements are not met:

586. The causes of the claims are different. Even if in both disputes Claimants make reference to legitimate expectations, there are fundamental differences: in the Municipal Proceedings, it is an expectation that Czech law will provide a general certainty of law; in these arbitral proceedings legitimate expectations refer to certain specific representations made in relation to the regulation of lotteries[603].

587. Further, as previously stated the effects of the proceedings differ. In this arbitration Claimants request compensation, whereas Synot TIP is limited to requesting the revocation of Ministry of Finance decisions[604].

588. Claimants also deny that there is any risk of double recovery:

- First, because Synot TIP is not asking for compensation before the Czech courts;

[598] HT3, pp. 91-92.
[599] RL-142.
[600] HT3, p. 40, 1:2.
[601] HT3, p. 240, referring to *Khan Resources*.
[602] HT3, p. 245, 7:12.
[603] HT3, pp. 245-246.
[604] HT3, pp. 246-247.

- Second, because Synot TIP has already suffered losses, which cannot be wiped out by decisions of the Czech courts;
- Third, because the Municipal Proceedings only relate to a small part of the thousands of permits affected;
- Fourth, Claimants undertake to waive any conflicting Municipal Proceedings following the hearing on the merits, in order to avoid a situation where compensation is paid for permits which are eventually reinstated by the Czech courts[605].

Criteria by analogy

589. Claimants aver that the criteria used for exhaustion of local remedies should not be applied by analogy, because they serve different purposes. On one hand the exhaustion of local remedies gives states the opportunity to address violations within its municipal courts, whilst the fork-in-the-road provision prevents investors from improving their legal position by bringing parallel actions and attempts to avoid contradictory judgements[606]. Instead, Claimants submit that a useful analogy could be drawn from the requirements for *lis pendens* – the purpose of which is to prevent parallel actions[607].

590. In addressing the question of whether it is possible to bring a case for breach of the BIT to the Czech courts directly, Claimants agreed with Respondent – the Treaty is part of the Czech legal order and it can be directly enforced. There is a case before the Czech courts where the claimant relied upon certain investment treaties, and where the court accepted jurisdiction and dismissed the case because the treaty did not contain a relevant and directly enforceable provision[608].

591. Claimants reiterated that they had not made any claims for breach of the BIT before the Czech courts. But the possibility exists – both in the Czech Republic and in Cyprus[609].

1.9 AGREED TABLE OF MUNICIPAL PROCEEDINGS

592. On 13 June 2017 – very shortly before the Second Hearing – Respondent submitted a letter to the Tribunal, seeking leave to add to the record a table identifying the Municipal Proceedings filed and withdrawn by Synot TIP, the dates of withdrawal and the legal principles invoked[610]. Claimants reacted on the same day, suggesting that the table prepared by Respondent be submitted to

[605] HT3, pp. 248-249.
[606] HT3, p. 241, 5:18, by reference to *Flughafen*.
[607] HT3, p. 242, 12:18.
[608] HT3, p. 243, 9:17.
[609] HT3, p. 243, 18:23, by reference to CL-170/RL-142
[610] Communication R-28.

Claimants first and thereafter in an agreed version to the Tribunal[611]. The joint table was eventually submitted on 21 August 2017[612].

2. THE TRIBUNAL'S DECISION

593. Respondent avers that the Tribunal, applying Arts. 8 (1) and (2)[613] of the BIT, should not admit Claimants' claims. Claimants hold the opposite view.

594. Under Art. 8(1) "any dispute which may arise" between a Cypriot investor and the Czech Republic "in connection with an investment" shall "be settled, if possible, by negotiations between the parties to the dispute". Art. 8 (2) then provides that if negotiations fail, after six months of negotiations, the "investor shall be entitled to submit the case, at his choice, for settlement" to four *fora*:

- A Czech "court of competent jurisdiction" or "administrative tribunal", "or"
- An ICSID arbitral tribunal; "or"
- An UNCITRAL arbitral tribunal; "or"
- A tribunal under the aegis of the Arbitration Institute to the Stockholm Chamber of Commerce.

595. The rule implies[614] that when an investment dispute arises between a Cypriot investor and the Czech Republic, and negotiations fail, the investor is entitled "to submit the case" to any of the four alternative *fora* defined in the provision. But once the investor has made its choice, the three other become unavailable. The alternative and mutually exclusive nature of the choice is confirmed by the triple use of the copulative "or" in the text.

596. The purpose of this so-called fork-in-the-road provision is to prevent an investor from improving its legal position (having "two bites of the same cherry", as Respondent graphically says) by bringing the same case simultaneously or successively before a municipal court and an international arbitral tribunal (or before two different international arbitral tribunals). The rule also seeks to avoid the possibility of contradictory judgements[615], and a situation of double recovery, where the investor receives compensation exceeding the actual damage suffered.

597. To establish whether Claimants have breached this rule, the Tribunal must first investigate the "dispute" which is being adjudicated in these proceedings (**2.1.**), it must then establish whether that dispute could have been filed before the Czech

[611] Communication C-37.
[612] Respondent's email of 21 August 2017.
[613] The full text of the provisions is to be found at the beginning of this Section.
[614] The Tribunal observes that other BITs explicitly state that once the dispute is submitted to domestic courts the investor is precluded from submitting the dispute to international arbitration. Such explicit prohibition is absent from the text of the present BIT. The Parties, however, have not raised the argument that the absence of such language should affect the Tribunal's decision.
[615] *Flughafen*, para. 357.

courts (**2.2.**); thereafter it must analyze the dispute actually filed by Claimants in the Czech Republic (**2.3.**), leading to a decision whether Art. 8(2) has been breached (**2.4.**), and a comparison between the result of this case and other decisions of investment tribunals (**2.5.**).

2.1 THE CASE FILED BY CLAIMANTS IN THESE PROCEEDINGS

598. The dispute submitted by Claimants for adjudication in this arbitration is defined in Claimants' Statement of Claim.

599. Claimants define their "case" as follows[616]:

> "This case involves the international responsibility of the Czech Republic for drastic and unexpected changes in the regulatory framework for lotteries and gaming. Not only were these changes unexpected, they were also changes that the Czech Government had vouched would not occur. And, what is more, they were changes which have taken away – and continue to take away – lawfully acquired rights that any system of law ought to preserve and protect from subsequent change in regulation".

600. The relevant facts can be summarized in the following way[617]:

> "[f]rom mid-2011, the Czech Republic abruptly and fundamentally altered the regulatory framework for CLS/IVT and LLS games, resulting in the decimation of the licensed CLS/IVT and LLS sector in the Czech Republic. Operators have been faced with a barrage of arbitrary and incoherent municipal decrees. Municipalities act without any practical limit on their discretion and certainly without publicised criteria. This has led to the premature and ongoing terminations of permits to operate hundreds of CLS/IVT and LLS devices. In short, operators now face the invidious reality of having their permits terminated prematurely as a result of subsequently-issued decrees, issued without notice or reason".

601. The normative source for Claimants' claims is "the provisions of the Treaty, supplemented by international law"[618]. According to Claimants, the Czech Republic has breached Art. 2(2) of the BIT by failing to accord fair and equitable treatment to Claimants' investments[619]:

> "Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party".

[616] C I, para. 1.
[617] C I para 285.
[618] C I para. 287.
[619] C I, para. 289.

602. Claimants say that the FET standard "protects the legitimate expectations of investors regarding key terms of their investment and the stability of the state's legal and business framework"[620]. Based on the foregoing, Claimants:

> "had a legitimate expectation that, absent the limited grounds provided in section 43(1) [of the Lotteries Act], the State would not be able to interfere with their existing permits and would bear the consequences of any errors in the permitting process or the interpretation of the Lotteries Act"[621].

603. These legitimate expectations, according to Claimant, were destroyed[622]:

> "The decisions of the Constitutional Court in 2011 and the amendment to the Lotteries Act on 14 October 2011 brought drastic changes in the regulatory framework for CLS/IVT and LLS games, which individually and collectively frustrated Claimants' legitimate expectations. This radical departure from established practice produced dramatic consequences for the Claimants' investment".

604. Claimants add that the FET standard also requires states to act transparently in their dealings with investors and investments. The Czech Republic has failed to do so[623]:

> "The Czech Republic failed to provide a transparent regulatory regime in respect of CLS/IVT and LLS games. Starting in 2011 and continuing to date, the Czech Republic dismantled a reasonably predictable and transparent regulatory framework and replaced it with an opaque and unpredictable one".

605. A further component of the FET standard is the prohibition of arbitrary conduct. The Czech Republic took arbitrary and unreasonable measures: the Constitutional Court Decisions have replaced a clear and coherent regulatory framework with a series of measures leaving the gaming sector in a state of regulatory chaos[624].

606. Additionally, Claimants argue that the actions of the Czech Republic also amount to a breach of the Full Protection and Security standard embedded in Art. 2(2) of BIT[625]:

> "Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party".

[620] C I, para. 293.
[621] C I, para. 305.
[622] C I, para. 318.
[623] C I, para. 329.
[624] C I, para. 340.
[625] C I, para 349.

607. Claimants finally say that because of the alleged breaches committed by the Czech Republic, they are entitled to full compensation of the damage suffered, which is valued at CZK 2,968 M, plus interest[626].

608. The Claimants prayer for relief is the following[627]:

> "On the basis of the foregoing, fully reserving their right to supplement or otherwise amend the present request for relief, the Claimants respectfully request that the Tribunal:
>
> (a) DECLARE that the Czech Republic has breached the Treaty;
>
> (b) ORDER the Czech Republic to compensate the Claimants for its breaches of the Treaty, in the principal amount of CZK3.6 billion, which amount is subject to revision closer to the time of the Tribunal's Award, in light of the continuing character of the Czech Republic's Treaty breaches, plus appropriate post-award interest until full payment of the award is made;
>
> (c) ORDER the Czech Republic to pay all of the costs and expenses of these arbitration proceedings, including the fees and expenses of the Tribunal, the PCA, the fees and expenses relating to the Claimants' legal representation, and the fees and expenses of any experts appointed by the Claimants or the Tribunal, plus interest; and
>
> (d) AWARD such alternative or additional relief as the Tribunal considers appropriate".

2.2 COULD CLAIMANTS' CASE HAVE BEEN FILED BEFORE THE CZECH COURTS?

609. Claimants' case before this Tribunal involves two limbs: a declaration that the Republic has breached vis-à-vis the investors, the international law obligations assumed by the Czech Republic in the Treaty, and more specifically the FET and FPS standards, plus an order seeking compensation for those breaches.

610. Could Claimants have chosen to submit that action to the Czech courts?

611. The Tribunal submitted this question to the Parties[628], and both confirmed that in theory it would be possible for a Cypriot investor, protected by the BIT, to submit to the Czech municipal courts its case that the Czech Republic has breached the obligations assumed in the Treaty and to request the appropriate compensation.

612. The Tribunal concurs. The text of the Treaty confirms this possibility.

[626] C I, para 390.
[627] C I, para 391.
[628] HT2, p. 252, 9:16.

613. Under Art. 8(2) an investor is "entitled to submit the case, at his choice, for settlement" by a Czech "court of competent jurisdiction or administrative tribunal". Art. 8(2) assumes that there are indeed Czech courts competent for settling disputes arising from breaches of the Treaty. The assumption is reinforced by Art. 5(2), which provides that an investor affected by an expropriation:

> "shall have a right to prompt review by a judicial or other competent authority of the Contracting Party, of his or its case […]"

614. Art. 5(2) shows that there are Czech courts competent to decide allegations of expropriation. No reason has been alleged as to why such courts would not be competent to adjudicate cases arising from other breaches of the Treaty.

* * *

615. To sum up, the Tribunal finds that Claimants, if they had so chosen, could have filed their present dispute before a competent Czech court.

616. The Tribunal notes that this conclusion is in line with the findings of a Czech regional court in a 2016 decision[629]. The claimant, a solar energy producer, had, in its action against a tax levied on the production of solar energy, invoked (*inter multa alia*) a breach by the Republic of an international investment treaty[630]. The court did not doubt that it had jurisdiction to decide the dispute, and dismissed the claim on the merits with the argument that[631]:

> "international treaties on the promotion of investments [do not] contain any directly enforceable provisions regarding the issue of purchase price for energy produced in solar power plants or returns on investment".

2.3 THE CASES FILED BY SYNOT TIP IN THE CZECH COURTS

617. Claimants acknowledge that Synot TIP, a wholly owned Czech subsidiary of Claimants, filed more than one hundred claims before the Czech administrative courts, challenging certain decisions taken by the Minister of Finance and certain Municipal Decrees adopted by the Municipalities. As a consequence of such decisions Synot TIP's gaming permits in certain municipalities had either been withdrawn or limited[632]. Claimants aver that in these actions Synot TIP simply asked for a revocation of the decisions or Municipal Decrees, but not for any damages – requests for compensation not being admissible in these types of administrative procedures[633]. Claimants add that after a string of defeats, in the beginning of 2017 Synot TIP decided to withdraw the bulk of the procedures,

[629] CL-170 – Czech Republic, Regional Court in Ústí nad Labem, Judgment, Ref 59 Af 11/2015 – 53 (English translation and Czech original).
[630] CL-170, para. 13.
[631] CL-170, para 28.
[632] C I, paras. 221-227.
[633] HT3, p. 247.

leaving only 25 procedures alive, which were based on additional arguments, such as discrimination or arbitrariness[634].

618. Respondent does not deny the basic facts as submitted by Claimants. It does not doubt Claimants' averment that in the Municipal Proceedings Synot TIP is not asking for compensation. Respondent's line of argumentation is that the case submitted in this arbitration is simply a relabelling of the Czech court claims, with the same fundamental basis[635], and that there is a risk of double recovery[636].

619. Although the number of claims submitted to the Czech domestic courts exceeds one hundred, Respondent has only submitted documentation with regard to three, which the Tribunal deems to be representative of the total population.

First case: annulment in the Court of Prague

620. The first case refers to a decision of the Minister of Finance dated 7 September 2013 regarding the revocation of gaming permits in the city of Brno. Synot TIP filed an action against the decision before the Court of Prague. The purpose of the action was the annulment of the Minister's decision. There is no reference at all to damages or to a request for compensation.

621. The claimant, Synot TIP, argued that the contested decision was unlawful, as it is contrary to Czech law, in conjunction with EU Regulations[637]. Synot TIP alleged a breach of Art. 43 of the Lotteries Act; formal defects like the absence of a signature by the Minister; an illegal application of retroactivity; and a failure to apply the principles of proportionality and to provide appropriate reasoning. When referring to the issue of retroactivity, Synot TIP's line of reasoning includes a reference to legitimate expectations[638]:

> "[Synot TIP] cannot be deprived ex post of its legitimate expectation that the conditions of the permit granted […] by the State would be observed and this legitimate expectation […] should be protected in the sense of the case law of the Constitutional Court concerning the issue of inadmissibility of retroactivity".

622. The Judgement was rendered by the Municipal Court in Prague in 2014. The court dismissed all claims submitted by Synot TIP. As regards to the merits, the court confirmed that the Minister was authorized to revoke permits, relying on Sections 4, 17, 43 and 50 of the Lotteries Act and on the Decisions of the Constitutional Court[639]. The court quoted the Constitutional Court's decision that gaming

[634] Communication C-32 and Joint Table on Municipal Proceedings.
[635] R II, para. 192.
[636] HT1, pp. 73-80.
[637] R-62 – Czech Republic, The Municipal Court in Prague judgment, Ref No 11 Af 38/2013 – 53, pp. 1, 2.
[638] R-62, p. 3.
[639] R-62, pp. 6-7.

operators could have no legitimate expectations that their activities would not be regulated through Municipal Decrees. Gaming operators should have been aware of the risk that the legal sphere might be affected by new legislation, including secondary legislation[640].

623. Synot TIP lodged a cassation appeal with the Supreme Administrative Court, alleging that the Prague Court first instance judgement "was unreviewable and unlawful"[641].

624. The Supreme Administrative Court ultimately upheld the decision of the Municipal Court of Prague[642].

625. The Supreme Court dealt extensively with the argument that Synot TIP's legitimate expectations had been breached. It defined these legitimate expectations as the expectation that Synot TIP would be able to use the permit for its entire term. The Supreme Court dismissed the plea, based on the Constitutional Court's finding that the expectations of gaming operators, even if based on law, were not legitimate, because Municipalities enjoyed a pre-existing right to self-governance, including the right to regulate the placement and operation of gaming machines[643]. The Supreme Court also confirmed that Synot TIP had no legitimate expectation that the law would not change, because it was operating in a sector subject to strict statutory restrictions due to the adverse impact on society[644].

Second case: annulment in the Court of Brno

626. The second case referred to by Respondent is a judgement dated 11 February 2016 issued by the Court of Brno[645].

627. The proceedings were filed by Synot TIP under the Czech Code of Administrative Justice, and the prayer for relief was an application for annulment of certain sections of a generally binding Municipal Decree issued by the city of Brno in 2014, and of a decision of the Minister of Finance dated 15 May 2015. Both applications were dismissed[646]. There is no reference in the judgement to any request for compensation.

628. In regard to the first application, Synot TIP argued that the Municipal Decree was unlawful due to its discriminatory nature, and its disproportionate interference with the legal certainty and legitimate expectations concerning the protection of property of lottery operators. The Decree was also said to be at variance with the

[640] R-62, p. 9.
[641] R-59-2 – Czech Republic, Supreme Administrative Court judgment, Ref No 6 As 285/2014 – 32.
[642] R 59-2.
[643] R 59-2, p. 8
[644] R 59-2, p. 9.
[645] R-63 – Czech Republic, Regional Court in Brno judgment, Ref No 30 Af 57/2015 – 137.
[646] R-63.

guarantee of legitimate expectations for the protection of property under Protocol 1, the case law of the European Court of Human Rights and EU law[647].

629. Synot TIP also sought the cancellation of the decision of the Minister of Finance dated 15 May 2015, which was based on Brno's Municipal Decree, with arguments that echo those used in the first application: municipal regulations must comply with the requirements of coherency and a lack of contradictions, which also include the prohibition of arbitrary, unforeseeable and frequent changes of legal regulations. The Court also dismissed this application[648].

Third case: Judgement of the Supreme Administrative Court

630. Finally, Respondent briefly mentions a third case[649]: a Judgement of the Municipal Court in Prague of 26 November 2015, which dismissed a claim for annulment filed by Synot TIP against certain decisions of the Minister of Finance affecting permits to operate lotteries in Ricany, Klatovy and Varnsdorf[650].

631. Respondent does not refer to that judgement directly, which does not seem to have been filed, but to a Judgement of the Supreme Administrative Court dated 26 May 2016, which reviewed and quashed the first instance judgement, and referred the case back to the Municipal Court (Respondent has not produced further information regarding the final outcome).

632. Synot TIP's reasons for filing the cassation complaint were the unreviewable and unlawful nature of the first instance judgement. The Supreme Court agreed that the judgement was unreviewable, because it had failed to deal with certain pleas submitted by Synot TIP in the first instance proceedings, and it lacked reasoning[651].

633. However, the Supreme Court rejected Synot TIP's plea that the Municipal Court had incorrectly assessed the principles of legitimate expectation, legal certainty, prohibition of retroactivity and non-discrimination – arguments which Synot TIP had used before the lower court[652].

634. Respondent has not provided details of other cases.

635. To sum up, the following can be deduced from the arguments submitted and the evidence marshalled by Respondent and Claimants:

- The claimant in all Municipal Proceedings was Synot TIP;

[647] R-63, p. 3.
[648] R-63, p. 2.
[649] R II para 188.
[650] R-77 – Czech Republic, Supreme Administrative Court judgment, Ref No 5 As 255/2015 – 57.
[651] R-77, pp. 6-7.
[652] R-77, p. 9.

- The request for relief in the Municipal Proceedings was limited to requesting the annulment of decisions taken by the Minister of Finance, and of certain provisions of Municipal Decrees adopted by certain Municipalities;
- The Municipal Proceedings did not include requests for compensation of the damage allegedly caused to Synot TIP;
- The pleas for annulment were based on Czech administrative law, including the Lotteries Acts, on EU Law and EU human rights regulations;
- There is no reference to the Czech Republic's breach of its international obligations, and specifically of those assumed in the BIT;
- Synot TIP argued that it had legitimate expectations that it would be permitted to use the permits granted for the entire period of their validity; Synot TIP also argued that it had legitimate expectations that the gaming regulation would not suffer unreasonable, disproportionate and retroactive amendments; both arguments were dismissed.

2.4 DECISION

636. The Tribunal must decide whether the Claimants have filed the same "dispute" in the Municipal Proceedings which the Tribunal is called to adjudicate in these proceedings. A dispute is defined by its Parties, is based on the alleged facts, and is reflected in the prayer for relief and the cause of action. These are the elements which the Tribunal must bear in mind when reaching its decision.

637. The first comparator are the parties. Here there is a difference. Respondent in both proceedings is the Czech Republic (in some cases acting together with certain Municipalities, for which the Republic bears international responsibility). Claimants however differ: being Synot TIP in the Municipal Proceedings, and two Cypriot companies (WCV and CCL) in this arbitration. This distinction, however, is not decisive: WCV is the sole shareholder of Synot TIP, and the decision to file the Municipal Proceedings, although adopted by the subsidiary, must have been approved by, and will ultimately benefit, the parent[653].

638. The second comparator are the facts. Here there is no distinction: the facts which underlie the Municipal Proceedings coincide with the circumstances giving rise to the present arbitration.

639. The third comparator are the prayers for relief. In this matter, the differences are significant.

640. In the Municipal Proceedings Synot TIP sought annulment of certain administrative acts taken by the Minister of Finance and of certain sections of Municipal Decrees approved by Municipalities – without compensation; whilst in these proceedings Claimants request a declaration that the Czech Republic has

[653] *Supervisión*, paras. 323-328.

breached its international obligations under the Treaty, plus compensation for the damage caused.

641. The two prayers are not only mutually incompatible, but complementary. Should Synot TIP succeed in its Municipal Proceedings, Claimants would still have a valid purpose for continuing with this arbitration: even if the acts causing the alleged damage are finally annulled by a municipal court, an investor is still entitled to seek a declaration that the state breached its international obligations, and to be compensated for the damages caused (albeit calculated on a different basis).

642. The fourth comparator is the cause of action invoked by Claimants to support the prayer for relief.

643. Again, a significant difference exists: in this arbitration Claimants rely on the BIT plus international law, whilst the Municipal Proceedings are based on Czech administrative law and EU law (which also forms part of the Czech legal order).

Relabeling

644. Respondent has put great emphasis on the argument that Claimants invoke their legitimate expectations in both the Municipal Proceedings and this arbitration. Based on this, Respondent argues that Synot TIP's claims, originally submitted in the Municipal Proceedings, have simply been "relabelled" in this arbitration.

645. The Tribunal disagrees.

646. It is undisputed that in the Municipal Proceedings Synot TIP invokes its legitimate expectations as one of the various arguments to support the annulment of the administrative acts – including the expectation that permits would not be revoked, that rules would not be applied retroactively and that authorities would act proportionally and reasonably.

647. It is also a fact that in this arbitration Claimants are arguing that they had a legitimate expectation that the State would not interfere with the gaming permits granted to its Czech affiliate.

648. Superficially, the arguments may seem similar. However in reality, the supporting cause of action differs entirely. The term is used in the Municipal Proceedings because the Constitutional Court reasons in its decisions, that whilst the gaming operators may have had expectations, these expectations were not legitimate in light of Czech constitutional law[654]. Conversely, in this arbitration Claimants refer to legitimate expectations as one of the elements of the FET and FPS standards enshrined in the Treaty[655]. In other words, in the Czech courts the claim relates to

[654] R-59-2, pp. 8-9; R-63, pp. 14-16; R-77, p. 9.
[655] C I, pp. 101-129.

a breach of legitimate expectations as an element of domestic law; whereas in the dispute before this Tribunal, the claim relates to a breach of the provision of the BIT.

649. Thus, legitimate expectations in the Municipal Proceedings do not equate with legitimate expectations in this arbitration. The fact that Synot TIP and Claimants both refer to legitimate expectations in their respective proceedings, albeit in widely differing contexts, does not mean that the claims in this arbitration can be considered as relabelled municipal claims. The fundamental difference – annulment of administrative acts, no compensation vs. declaration of international breach, plus compensation – remains unaffected.

Double recovery

650. Respondent submits a final argument: if Synot TIP is eventually successful in the Municipal Proceedings and also in this arbitration, there would be a risk of double recovery.

651. This is not so.

652. Synot TIP is only asking for compensation in this arbitration, not in the Municipal Proceedings; thus, the possibility that Claimants could collect twice will never arise.

653. Respondent seems to acknowledge that recovery from two sources is excluded, but submits that there is a risk that Claimants would receive compensation which exceeds their damage.

654. Excessive compensation could only occur if two things happened: Claimants achieve success both in this arbitration and in the Municipal Proceedings, and this Tribunal (mis)calculates compensation, wrongly assuming that Synot TIP was unsuccessful in the Municipal Proceedings.

655. The probability of Claimants' success in Municipal Proceedings is remote (as shown by Synot TIP's decision to withdraw the bulk of its cases); and in any case double recovery can easily be avoided by correctly calculating the damage suffered by Claimants depending on whether Synot TIP is successful in the domestic courts or not.

* * *

656. To sum up, the Tribunal dismisses Respondent's Fork-in-the-Road Objection. Art. 8(2) of the BIT requires that the same "dispute" be submitted to two *fora.* This has not happened in the present case.

657. Claimants' case is a typical investment claim: an allegation that the Czech Republic breached its FET and FPS obligations assumed under the BIT, and a request for declaratory relief plus damages. Claimants had the possibility of

submitting their case to a Czech court – but instead opted for adjudication by this Tribunal.

658. Synot TIP's case in the Municipal Proceedings is different: it is a request for annulment of certain administrative acts and Municipal Decree provisions, for breach of Czech law, without seeking any compensation.

659. The difference between both cases is shown by their complementary nature: even if Synot TIP were to be fully successful in all of its Municipal Proceedings, Claimants would still have a legitimate interest in pursuing this arbitration, seeking declaratory relief and recovery of the damages caused.

2.5 CASE LAW

660. The Parties have drawn the Tribunal's attention to several decisions taken in investment arbitrations, which address fork-in-the-road provisions.

661. There are a few cases where tribunals have been confronted with situations where local affiliates of the investor filed administrative procedures seeking annulment of administrative acts, which form part of the factual matrix invoked in the investment arbitration.

662. The Parties have discussed the *Flughafen* decision, which is quite similar to the present case: in *Flughafen,* a consortium formed by Chilean and Swiss companies filed an arbitration against Venezuela for the unlawful cancelation of a concession contract to administer the airport in Isla Margarita, in a manner tantamount to a violation of the treaty. The claims were filed under the Chile-Venezuela and Swiss-Venezuela BITs. The Chile-Venezuela BIT contained a fork-in-the-road provision, allowing the investor to submit the investment claim to the Venezuelan courts[656].

663. The claimants filed an administrative proceeding and a constitutional complaint requesting the annulment of two administrative decisions which cancelled the concession contract[657]. Venezuela raised an objection that the Chilean investor had lost standing to bring the investment arbitration, as a consequence of the fork-in-the-road provision. The tribunal rejected Venezuela's objection because:

- The cause of action and object of the municipal proceedings and the arbitration were different[658];
- The prayer for relief was also different: the municipal proceedings sought the nullity of administrative acts[659].

[656] *Flughafen*, para. 345.
[657] *Flughafen*, paras. 340-342
[658] *Flughafen*, para. 355.
[659] *Flughafen*, para. 355.

664. When assessing the fork-in-the-road objections, the *Flughafen* tribunal followed the test applied by many investment arbitration tribunals, by comparing the parties, cause of action and object to assess the similarity of the local proceedings and the investment arbitration[660].

665. More recently, the tribunal in *Khan Resources*, which deals with an investment claim related to the invalidation of rights or permits conferred to the investor under municipal law, also adopted this approach. In this case, the local subsidiary of the investor resorted to the municipal administrative courts to nullify an administrative decision that cancelled its mining and exploration licences. The respondent State raised the fork-in-the-road objection under Art. 26(3)(b)(i) of the ECT. The tribunal undertook the triple identity test and found that neither the parties, cause of action or relief sought in the municipal proceedings coincided with those of the arbitration, and accordingly, dismissed Mongolia's objection[661].

666. Respondent has put special emphasis on two decisions, where the tribunals applied the fork-in-the-road provision and dismissed the claims. Both cases are based on contracts, and both can be distinguished from the present arbitration:

667. In *Pantechniki* a Greek contractor initiated arbitration against the Republic of Albania for damages suffered as a consequence of riots occurring throughout the country in March 1997. The contracts contained a *force majeure* provision holding Albania liable for civil disturbances that might cause damage to the contractor. After the civil disorders of March 1997, an independent commission constituted pursuant to the contracts fixed an indemnity owed to the contractor. However, Albania refused to pay the compensation.

668. The Greek contractor sought to enforce the settlement fixed by the commission before the Albanian courts. In the first instance and the appeal, the contractor's claims were dismissed[662], leading to the claim being brought before the Supreme Court. The contractor also initiated the arbitration under the Greece-Albania BIT, and thereafter, abandoned the municipal proceeding before the Supreme Court[663].

669. The Greek contractor made five claims[664], one of which was "monetary recovery as a result of [the] failures of compliance with the Treaty"[665]. The sole arbitrator assessed whether this claim had the "same normative source" as the one before the Albanian courts, to determine whether the two claims had the same "fundamental basis"[666]. The sole arbitrator concluded that the arbitral claim was framed in the

[660] *Lauder*, paras. 163-166; *Occidental*, paras. 46, 51-52; *CMS*, para. 80; *Azurix*, para. 88-90; *Pan American Energy*, paras. 154-157; *Pey Casado*, para. 484; *Bogdanov*, paras. 170-175; *Total*, para. 443.
[661] *Khan Resources*, paras. 390-396.
[662] *Pantechniki*, paras. 23-25.
[663] *Pantechniki*, paras. 26-27.
[664] Pantechniki also claimed a violation of the full protection and security standard, the fair and equitable treatment, denial of justice and a breach of the *pacta sunt servanda* principle.
[665] *Pantechniki*, para. 28, (v).
[666] *Pantechniki*, paras. 61-62.

exact same terms as the contractual claim before the Albanian courts: the crux of claimant's case in both claims was that Albania's refusal to pay the settlement was unlawful because it had previously agreed to pay such compensation[667]. Thus, both cases arose out of "the same purported entitlement"[668]. Since the claimant first opted to pursue the claim before the Albanian courts, allowing a second chance to adjudicate the same claim in the ICSID arbitration was not permitted under the fork-in-the-road provision[669]. This however, did not bar the claimant from pursuing its FPS and denial of justice claims in the ICSID arbitration[670].

670. *Pantechniki* is of no assistance in the present case, since it arises out of entirely different facts: the *Pantechniki* ruling dismissed the investor's attempt to resubmit the exact same contractual claim previously submitted before the local courts. In the present case, the Claimants are not resubmitting a contractual dispute previously pleaded before the local courts.

671. Respondent also relied on *Supervisión*, a case concerning a concession contract issued by Costa Rica for the technical inspection of vehicles (VTI service) across the country. In this case, a local subsidiary filed an administrative claim before the local courts, requesting compensation when the administration fixed the tariffs that the investor would receive for the service provided, below what was agreed upon in the concession contract. The local courts dismissed the municipal claims. Thereafter in the arbitration, the investor raised a violation of the FET standard based upon Costa Rica's alleged unlawful fixation of the tariffs, and requested the same compensation for this act, as what was requested in the municipal proceedings[671].

672. The *Supervisión* tribunal followed the *Pantechniki* approach and found that the two claims shared the same "fundamental normative source and pursue ultimately the same purpose": in both claims compensation was requested, deriving from Costa Rica's failure to adjust the tariffs of the VTI service[672].

673. *Supervisión* is similarly distinguishable from the present case: the claims in the local proceedings and in the international arbitration arose from a contract and requested the same amount of damages as compensation.

[667] *Pantechniki*, paras. 66-67.
[668] *Pantechniki*, para. 67.
[669] *Pantechniki*, para. 67.
[670] *Pantechniki*, paras. 68 and 72.
[671] *Supervisión*, paras. 313-314.
[672] *Supervisión*, para. 315.

IX. MULTI-PARTY ARBITRATION OBJECTION

674. Respondent submits that the Tribunal lacks jurisdiction to adjudicate this dispute, because the Czech Republic did not give its consent for both Claimants to bring their respective BIT claims in one arbitration – consent which Claimants themselves admitted was necessary.

675. Claimants reply that Respondent's objection is without merit: WCV and CCL are related entities, their claims arise out of their investments in the same companies, are based on the same facts and involve the same BIT violations.

1. POSITION OF THE PARTIES

1.1 RESPONDENT'S MEMORIAL ON JURISDICTION

676. Respondent submits that the Claimants did not obtain the required consent of the Czech Republic to bring this arbitration as joint Claimants, which they admitted was necessary in the **Notice of Dispute**[673].

677. According to Respondent, Art. 8 of the BIT does not contain the Czech Republic's consent to resolve disputes with investors jointly[674], and neither the UNCITRAL Rules, nor the Dutch Arbitration Act[675] foresee the possibility of multi-party proceedings[676].

678. The ICSID cases *Abaclat*, *Ambiente*, and *Alemanni*, which examine the ability for multiple claimants to bring a dispute jointly against a respondent state, do not help the Claimants' position[677]. The *Abaclat* tribunal assumed that it had jurisdiction over several individual claimants and thus did not address the question of consent by the state to the multi-party proceedings[678]. In the *Ambiente* case, consent was provided by the respondent state and therefore the Tribunal's conclusion to allow a plurality of claimants to submit an arbitral claim was not linked to expressions of consent in the BIT, but rather whether multi-party arbitrations were permissible under the ICSID Convention[679].

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[673] R I, paras. 195 – 196.
[674] R I, para. 199.
[675] Respondent acknowledges that the arbitral tribunal may allow the intervention of a third party to arbitral proceedings upon application of a party, only after considering all parties' comments. The Czech Republic's comment to this effect is that the BIT does not allow multiparty arbitration.
[676] R I, para. 204 and 205.
[677] R I, para. 200.
[678] R I, para. 201.
[679] R I, para. 201.

679. Respondent requests the Tribunal to apply the standard expressed by the *Alemanni* tribunal: whether the dispute clause is "wide enough" in scope to provide consent to multi-party arbitration. Under this standard the Tribunal should conclude that the language of the BIT is insufficient for any general consent on the part of the Czech Republic to conduct an arbitration with multiple claimants[680].

680. Respondent avers that in the Notice of Dispute the Claimants expressly acknowledged that they could not bring this proceeding jointly without the State's consent[681]:

> "unless consolidation is approved by the Czech Republic, both Claimants will appoint one and the same arbitrator for both disputes".

681. However, Claimants filed the claims together, despite the fact that Respondent never provided its consent to multiparty arbitration[682]. After receiving the Notice of Arbitration, the Czech Republic asked Claimants twice to specify on what legal basis Claimants relied upon to consolidate their claims into a single arbitral proceeding. However, no response was received[683].

1.2 CLAIMANTS' ANSWER ON BIFURCATED OBJECTIONS

682. Claimants aver that Respondent's construction of the law on multi-party arbitration is legally flawed and that they did not admit in their Notice of Dispute that the Republic's consent was required to act as joint Claimants in this arbitration[684].

683. Claimants assert that it is uncontroversial that multiple and related claimants with related disputes may bring the claims in a single arbitration against the same respondent[685]. Further, investment tribunals have consistently allowed actions by multiple claimants even in circumstances where there is an absence of a corporate or investment relationship between them[686].

684. Claimants say that Art. 8 of the BIT, which contains Respondent's consent to arbitration and does not limit multiple claimants, entitles Claimants to submit their claims jointly[687].

685. Claimants are related entities that have a single dispute, arising out of their investments in the same companies, based on the same BIT breaches, which were

[680] R I, paras. 202 and 203.
[681] R I, para. 196, citing to C-32.
[682] R I, para. 197.
[683] R I, para. 198, citing to R-20 and R-21.
[684] C II, paras. 18 and 25
[685] C II, paras. 19 and 20, citing to *Guaracachi* and *Noble Energy*.
[686] C II, para. 21, citing to *Abaclat*, *Ambiente* and *Alemani*.
[687] C II, para. 23.

caused by the same governmental measures[688]. Making Claimants pursue two separate arbitrations would be duplicative and grossly inefficient. It is also contrary to the Czech Republic's own practice: the Republic accepted that claims by investors in the Czech solar energy sector, who were affiliates or had a common investment, should be filed jointly[689].

686. The argument that Claimants prospectively requested Respondent's consent to grouping any separate claims is unavailing, as Claimants filed their Notice of Arbitration jointly, which they were entitled to do[690].

1.3 RESPONDENT'S REPLY ON BIFURCATED OBJECTIONS

687. According to Respondent, the fact that Claimants initially sought their consent in the Notice of Dispute, highlights that Claimants were well aware that the Czech Republic's consent was indispensable to initiate a multi-party claim[691]. The filing of a joint Notice of Arbitration despite a lack of consent by the Respondent, does not mean that such consent suddenly exists[692].

688. Past examples of the Czech Republic accepting group claims by investors in the solar energy sector only proves that Respondent must give its specific consent for joint claims[693].

689. Respondent alleges that Art. 8 of the BIT makes it clear that any claim against the Czech Republic must be brought by a single investor. It manifestly excludes arbitration by multi-party claimants[694]:

> "1. Any dispute which may arise between an investor of one Contracting Party …
>
> 2. If any dispute between an investor of one Contracting Party …
>
> 3. The arbitral awards shall be final and binding on both parties …".

690. Therefore, the express consent by the Czech Republic is necessary for two or more claimants to bring their claims in a single arbitration.

691. The case law relied upon by Claimants is inapposite[695]: Respondent distinguishes *Abaclat*, *Ambiente* and *Alemanni* on the basis that the applicable investment treaty foresaw the possibility to submit: "dispute[s] between investors and a Contracting

[688] C II, para. 17.
[689] C II, para. 25.
[690] C II, para. 24.
[691] R II, paras. 224 and 226, citing to C-32.
[692] R II, para. 226.
[693] R II, para. 227.
[694] R II, paras. 231 and 232.
[695] R II, para. 229.

Party"[696], which differs from the singular language used in the Czech-Cypriot BIT. *Noble Energy* and *Suez* is distinguished on the ground that the States did not object to multi-party proceedings[697]. In addition, the Tribunal should depart from the incorrect reasoning established in the *Guaracachi* case, that the submission of a claim by multiple claimants is not subject to the qualified express consent of the State, as such a contention simply does not hold[698].

1.4 CLAIMANTS' REJOINDER ON BIFURCATED OBJECTIONS

692. According to Claimants, Respondent willfully misrepresents Claimants' request for consent to consolidate and the law on the scope of consent to multi-party arbitration under investment treaties[699].

693. Respondent incorrectly portrays Claimants' words in the Notice of Dispute. Claimants did not admit that Art. 8 BIT requires the Czech Republic's consent to bring both claims in one arbitration[700].

694. Respondent's objection is antithetical to procedural efficiency[701], and if granted would result in Claimants being forced to commence separate and duplicative arbitrations against Respondent[702]. Such a result would be grossly inefficient[703].

695. Further, multi-party arbitration is not prohibited by the UNCITRAL Arbitration Rules of 1976[704]. Claimants distinguish between disputes which require specific agreement for consolidation to occur under the UNCITRAL Rules, such as when the same parties have multiple disputes under separate contracts and arbitral clauses, and the present case, where one proceeding is commenced by multiple claimants under a single arbitration agreement to which all are party[705].

696. Contrary to Respondent's assertion, in *Noble Energy* the respondent did object to the multi-party proceedings on the basis that they did not consent to several different disputes being disposed of in one arbitration[706]. However, the tribunal concluded that even in the absence of express language in the dispute resolution clause, there is an implied consent to have pending disputes arising from the same overall economic transaction resolved in one arbitration[707].

[696] Italy-Argentina BIT.
[697] R II, para. 233.
[698] R II, para. 235 and 238.
[699] C III, p. 23.
[700] C III, para. 60.
[701] C III, para. 58.
[702] C III, para. 57.
[703] C III, para. 57.
[704] C III, para. 61.
[705] C III, fn. 98.
[706] C III, para. 64.
[707] C III, para. 65.

697. Respondent's formalistic argument which avers that the use of a singular "investor" in Art. 8 BIT limits the claims to only individual investors, is unavailing[708]. It is a widely-understood drafting convention that terms used in the singular include the plural, and nothing in the BIT suggests otherwise[709]. Further, the applicable investment treaties in the *Guaracachi* case and Art. 25(1) of the ICSID Convention, both use the singular terms 'investor' and 'national', however this has not been found to preclude multi-party ICSID arbitration[710]. This was confirmed in *Abaclat*, *Alemanni* and *Ambiente*[711]. For example, in *Ambiente*, the tribunal analysed Art. 25(1) of the ICSID Convention and ultimately concluded that while the provision speaks of "a national of [a] Contracting State" in the singular, this does not prevent a tribunal from finding that the wording encompasses a plurality of individuals[712].

* * *

698. The Tribunal will now summarize the Parties' arguments in the First and Second Hearings, including their answers to the questions addressed by the Tribunal at the end of the First Hearing:

- Whether in the BIT the term "the investor" can be construed as including plural investors[713].
- Does the drafting of the Notice of Dispute affect the Czech Republic's right to designate an arbitrator[714]?
- What are the implications if the Tribunal accepts the multi-party objection? Is it the dismissal of the whole case? Or the dismissal with regard to one of the Claimants only? What is the final result[715]?

1.5 RESPONDENT'S ARGUMENTS IN THE FIRST AND SECOND HEARINGS

699. Respondent avers that the *travaux* of the BIT confirm that the Contracting Parties only envisaged disputes between one Contracting Party and one investor[716].

700. Additionally, the *Flughafen* case relied upon by Claimants is inapposite because the tribunal did not deal with the state's consent to multiparty arbitration, but with the state's consent to the consolidation of the dispute[717].

[708] C III, paras. 70 and 71.
[709] C III, para. 71.
[710] C III, para. 71.
[711] C III, para. 71.
[712] C III, para. 71, citing to *Abaclat*, paras. 489-490.
[713] HT2, p. 254, 13:20.
[714] HT2, p. 254, 21:25.
[715] HT2, p. 255, 6:13.
[716] HT3, p. 108, 13:17.
[717] HT3, p. 107, 11:17.

701. Respondent therefore requests the Tribunal to dismiss the entire case on the ground that Claimants filed a multiparty arbitration against a State that has never, in law or in fact, consented to such a procedure[718].

702. To the question of whether the BIT term "the investor" can be construed as including plural investors, Respondent replied that it cannot, as the ordinary meaning of the singular term "investor", cannot include multiple investors[719]. Respondent drew the Tribunals attention to the Czech-Spain BIT, to outline that when the contracting parties intend to afford treaty protection to multiple investors, it uses the term "investors" in the plural[720].

703. In relation to the Tribunal's question about Respondent's right to designate an arbitrator, Respondent submits that the Notice of Dispute led them to believe that two separate arbitrations would be filed[721]. Instead, Claimants filed only one arbitration, depriving Respondent of its fundamental right to designate an arbitrator for each proceeding[722].

704. In regard to the last question, the implications of accepting the multi-party objection, Respondent states that Claimants have abusively filed this multi-party arbitration, and that the Tribunal should dismiss the case in its entirety[723].

1.6 CLAIMANTS' ARGUMENTS IN THE FIRST AND SECOND HEARINGS

705. According to Claimants, a Notice of Dispute serves to notify a respondent state that a dispute has arisen and provides an invitation to negotiate; however, it does not bind the evidence, or perfect the parties' consent to arbitration[724]. The Notice of Arbitration thus did not have the effect of binding the Claimants to launch two arbitrations and then seek consolidation, rather than jointly commencing the arbitration[725].

706. The relevant treaties in *Guaracachi* and *Flughafen* had the singular term "investor", and the tribunals in those cases both found that the states' consents in the treaties were broad enough to encompass joint claims by multiple claimants, without the need for an additional express consent[726]. Further in *Flughafen*, the tribunal found that where two claimants are protected by two different treaties, but have made joint investments and have been subject to the same measures from the

[718] HT3, p. 113, 12:17.
[719] HT3, p. 107, 21:24; p. 108, 10:12.
[720] HT3, p. 108, 18:22.
[721] HT3, p. 110, 20:23.
[722] HT3, p. 110, 10:12; p. 111, 10:12.
[723] HT3, p. 113, 12:17.
[724] HT3, p. 250, 24:25, p. 251, 1.
[725] HT3, p. 250, 20:23.
[726] HT1, p. 225, 23:25; p. 226, 1:8.

host state, the claimants are permitted to submit a claim jointly[727]. Thus, Respondent's multi-party jurisdictional objection must be dismissed.

707. To answer the Tribunal's question of whether the BIT term "the investor" can be construed as including plural investors, Claimants outline that the word "the" is a definite article, and "investor" is singular[728]. Nevertheless, the use of the singular form of "investor" does not preclude more than one investor from contemporaneously accepting the offer to arbitrate, which has the effect of forming a tripartite arbitration agreement[729].

708. According to Claimants, the Notice of Dispute did not in any way affect the Republic's right to designate an arbitrator. The Czech Republic designated an arbitrator for this dispute, just like the Claimants did[730].

709. In response to the question regarding the implications of granting the multi-party objection, Claimants answer that whether the Tribunal dismisses the whole case or dismisses only one of the Claimants, the practical result would be the same. Either one or both of the Claimants would have to commence anew and bring the arbitration jointly against the Respondent[731].

2. THE TRIBUNAL'S DECISION

710. In this Multi-party Arbitration Objection Respondent argues that the Claimants failed to obtain the required consent to initiate a multi-party arbitration against the Czech Republic. Respondent relies upon Claimants' Notice of Dispute, as evidence that Claimants knew that the Respondent's specific consent was necessary for Claimants to jointly bring this arbitration.

711. Claimants aver that the Notice of Dispute was not an admission that Respondent's consent was required for a multi-party arbitration. Claimants are related entities with a dispute arising from the same investment and BIT breaches and were thus entitled to file jointly. Further, Respondent's construction of the law on multi-party arbitration is legally flawed.

712. The crux of the multi-party dispute objection revolves around whether Art. 8 of the BIT permits Claimants to file disputes jointly against the Respondent.

713. Art. 8(2) of the BIT provides the following:

> "If any dispute between an investor of one Contracting Party and the other Contracting Party cannot be thus settled within a period of six months from

[727] HT3, p. 253, 15:21.
[728] HT3, p. 252, 16:17.
[729] HT3, p. 252, 19:25.
[730] HT3, p. 251, 4:9.
[731] HT3, p. 251, 22:25; p. 252, 1:2.

> the written notification of a claim, the investor shall be entitled to submit the case, at his choice, for settlement to:
>
> […]
>
> (e) an arbitrator or international ad hoc arbitral tribunal established under the Arbitration Rules of the United National Commission on International Trade Law…"[Emphasis added]

714. The relevant question is whether this dispute resolution clause is wide enough in scope to include Respondent's consent to a multi-party arbitration.

715. The question must be answered in the affirmative.

716. To support its conclusion, the Tribunal will first explore the ordinary meaning of "investor" as used in Art. 8(2) of the BIT (**2.1**), it will then conclude that the BIT contains no prohibition on multiple claimants (**2.2**), followed by an analysis of the effects of the Notice of Dispute (**2.3**) and a review of the case law cited by the Parties (**2.4**).

2.1 ORDINARY MEANING OF INVESTOR

717. The Tribunal will again rely on the general rules of treaty interpretation as codified in Art. 31 of the VCLT – as it did in Section 2.2 of the Permanent Seat Objection above.

718. The ordinary meaning of "investor" as used in Art. 8 of the BIT includes both an individual investor or multiple investors.

719. The Cambridge Online Dictionary defines investor[732] as:

> "a person or group of people that puts its money into a business or other organization in order to make a profit[733]".

The definition shows that the term investor can refer to a single person, but also to a group of people who invest together.

720. The Tribunal agrees with Claimants that the use of the singular form to encompass the plural is a commonly used drafting technique. Something similar happens with the pronoun "his". Although Art. 8(2) of the BIT uses "his" to refer to the investor, this does not mean that all investors must be male. Instead, it is commonly understood that "his" also covers the female gender and non-gendered corporate entities. The same technique applies to the use of a singular noun to include its plural counterpart.

[732] Under US English.
[733] https://dictionary.cambridge.org/dictionary/english/investor.

2.2 NO PROHIBITION ON MULTIPLE CLAIMANTS

721. Art. 8 of the BIT is silent as to the possibility for multi-party arbitration. It neither permits nor restricts the possibility of multiple claimants. It simply says that the "investor", a single person or a group of persons, is entitled to submit the case to arbitration.

722. The Tribunal cannot interpret silence as a prohibition. The Treaty definition of "investor" includes a group of persons who have put up money jointly; the Treaty then authorizes the "investor" to submit the case to arbitration; the logical consequence is that all group members who have co-invested must be deemed to be authorized to jointly submit a single request for arbitration. For the Tribunal to find otherwise there would have to be a provision in the BIT prohibiting multi-party arbitration. There is not.

723. The UNCITRAL Arbitration Rules of 1976 are similarly drafted in the singular form. Art. 3(1) provides:

> "The party initiating recourse to arbitration (hereinafter called the "claimant") shall give to the other party (hereinafter called the "respondent") a notice of arbitration".

724. Despite the fact that the UNCITRAL Rules refer to a singular claimant, there is nothing in the Rules which suggests that multiple parties cannot bring claims together, if they relate to the same dispute.

725. The same reasoning was applied by the *Ambiente* tribunal to find that Art. 25(1) of the ICSID Convention, which only refers to a 'national' in the singular form, does not prevent multiple claimants from bringing a joint action[734]. The tribunal failed to find a reason to interpret the "silence" in the ICSID Convention as preventing multi-party arbitrations[735]. This approach was similarly adopted in *Guaracachi*, where the tribunal reasoned that "one cannot use silence to limit the scope of the consent given"[736].

726. To accept Respondent's restrictive interpretation of the BIT and the 1976 UNCITRAL Rules, would be contrary to the ordinary meaning of investor and be inconsistent with the jurisprudence which overwhelmingly supports the ability for multiple claimants to bring a joint claim in one arbitration.

727. Thus, the Tribunal is of the opinion that Art. 8 of the BIT formalizes the Czech Republic's consent to multi-party arbitration, which is permissible under the UNCITRAL Arbitration Rules of 1976.

[734] *Ambiente*, para. 130.
[735] *Ambiente*, para. 146.
[736] *Guaracachi*, para. 341.

728. There is a further reason. In the present case, Claimants are related entities linked by a shared investment, and their dispute with Respondent is one and the same; the same government measures have affected both investments. It would be futile to make affiliated entities that have the same dispute arising from the same measures that were applied to the same investment, file two separate claims. To do so would only lead to procedural inefficiency, an increase in costs for all Parties, and would create a risk of inconsistent awards.

729. The Tribunal therefore sees no good reason to make Claimants file two separate arbitrations.

2.3 THE EFFECT OF THE NOTICE OF DISPUTE

730. Respondent has consistently argued that the Notice of Dispute contained Claimants' acknowledgement that the consent of the Respondent was necessary for Claimants to file the arbitration as a single dispute.

731. The relevant section of the Notice of Dispute reads as follows[737]:

> "It is a case of legal entities economically cooperating with each other, they also act jointly for the purposes of the dispute in question (these entities are hereinafter referred to as the "**Claimants**") and in the event that the dispute is commenced, both companies will propose consolidation of proceedings as the Agreement on Protection of Investment is identical as well as the right violation being objected to, and also for the reason of their joint ownership of some companies". [Emphasis added]

732. The situation envisioned in the Notice of Dispute is different from the actual procedural steps taken by Claimants.

733. In the Notice of Dispute Claimants explain that, in the event that WCV and CCL file two separate arbitrations against Respondent, both Claimants will propose a consolidation of the proceedings. However in the present dispute, Claimants elected to initiate the arbitration jointly, rather than following the hypothetical procedure envisioned above.

734. A Notice of Arbitration under the UNCITRAL Arbitration Rules serves to generally inform the respondent state about the nature of the dispute[738]. In the present case, Claimants informed the Republic that "in the event that the dispute is commenced" with two separate procedures, they would ask for consolidation and referred to the necessary consent from the Republic. This statement cannot have the effect of precluding both Claimants from jointly filing a single dispute in accordance with the applicable dispute resolution provision in the BIT, which does not restrict multi-party claims.

[737] C-32, para. 4.
[738] Art. 3(3) UNCITRAL Rules.

735. The Respondent is correct in arguing that in the event that Claimants were to seek a consolidation of two separate arbitral proceedings, Respondent's consent would be necessary to permit consolidation[739]. However, the question of consent to consolidation is irrelevant, as the claim was commenced jointly, as permitted by Art. 8 of the BIT.

2.4 CASE LAW

736. Arbitral tribunals have consistently allowed disputes to be brought by multiple investors against a single respondent state. This is specifically the case when the claimants are connected by a corporate relationship or a related investment.

737. In *Guaracachi*, the tribunal dismissed an objection which arose following the joint filing against Bolivia by Guaracachi America, a US company, and Rurelec Plc, its UK subsidiary, under the US-Bolivia and UK-Bolivia BITs, in relation to their shareholding in a Bolivian company[740]. The objection was based on the absence of an explicit consent by the respondent State, for investors from the United Kingdom and the United States to join claims arising under different BITs into a single arbitration proceeding, before one tribunal[741].

738. The tribunal decided that the offers of arbitration in the BITs were not subject to a condition or limitation on their scope which would prevent the claimants from submitting a single joint arbitration against the Respondent[742]. The tribunal outlined that the Treaties cannot be interpreted to contain a limitation preventing a claimant from submitting an arbitral claim with another claimant, if both claims are based on the same alleged facts and breaches, regardless of the differing BITs[743]. The tribunal further reasoned that silence in relation to the permissibility of multi-party arbitration in the BITs does not equate to a restriction on the possibility of joint arbitrations, as "one cannot use silence to limit the scope of the consent given"[744].

739. Similarly, in *Noble Energy*, a United States company Noble Energy and its Cayman Islands subsidiary MachalaPower, brought a joint dispute against Ecuador. The *Noble Energy* tribunal examined the interdependence between the different disputes based upon "the same facts, the same overall economic transaction, and the same measures", to find that there was "an implied consent to

[739] J. Paulsson and G. Petrochilos, Revision of the UNCITRAL Arbitration Rules, September 2006, para. 127 ("*Under the present [1976] Rules consolidation is possible only where the parties specifically agree*"), (RL-58).
[740] *Guaracachi*, paras. 3 and 4.
[741] *Guaracachi*, para. 164.
[742] *Guaracachi*, para. 336.
[743] *Guaracachi*, para. 337.
[744] *Guaracachi*, para. 341.

have the pending disputes arising from the same overall economic transaction resolved in one and the same arbitration"[745].

740. In *Flughafen,* a consortium formed by Chilean and Swiss companies filed an arbitration against Venezuela for the unlawful cancelation of a concession contract to administer the airport in Isla Margarita, in a manner tantamount to a violation of the treaty. The claims were filed under the Chile-Venezuela and Switzerland-Venezuela BITs. The tribunal was confronted with the question of whether two claimants protected by two different BITs, but which have made a joint investment and had been affected by the same state measures, can submit a claim jointly in an ICSID arbitration[746].

741. The tribunal answered the question in the affirmative, reasoning that one sole dispute had arisen which the investors wished to resolve in one arbitration. This form of action avoids the occurrence of parallel proceedings dealing with the same events, which would lead to an increase in costs and the potential for contradictory decisions[747]. Further, neither the applicable BITs nor the ICSID Convention prohibit multiple investors acting under different treaties, from bringing joint claims[748]. Thus, the tribunal saw no reason to force the two Claimants to plead separately[749].

742. The *Abaclat, Alemanni*, and *Ambiente* cases referred to by Respondent and Claimants are inapposite. All three cases are ICSID claims against the Argentine Republic, brought by a large amount of Italian sovereign bond holders[750]. In *Abaclat* the tribunal had to determine whether it could hear the dispute brought by 60,000 Italian bondholders[751]. In *Ambiente*, the same question was being asked in relation to 90 claimants[752], and in *Alemanni*, 74 claimants[753]. The cases examined whether, on the proper interpretation of the BIT and the ICSID Convention, the respondent state had consented to arbitration with such a large amount of claimants[754].

743. The cases are inapposite for two reasons:

- In *Abaclat, Alemanni*, and *Ambiente* claimants were unrelated parties, only linked by the state measures which caused the dispute;

[745] *Noble Energy*, paras. 192 and 194.
[746] *Flughafen*, para. 401.
[747] *Flughafen*, paras. 402 and 405.
[748] *Flughafen*, paras. 403 – 404.
[749] *Flughafen*, para. 405.
[750] *Abaclat*, para. 8.
[751] *Abaclat*, para. 216.
[752] *Ambiente*, para. 113.
[753] *Alemanni*, para. 1.
[754] R I, para. 200.

- The "mass" claims issue facing the tribunals differs to the two Claimants in the present case.

744. In light of all of the above, the Tribunal dismisses Respondent's Multi-party Arbitration Objection.

X. DECISION

745. For the foregoing reasons the Tribunal rules as follows:

1. Dismisses Respondent's Permanent Seat Objection, Bad Faith Objection, Fork-in-the-Road Objection and Multi-party Arbitration Objection;

2. Reserves the decision on costs for a future determination.

746. This Interim Award on Jurisdiction is made by the majority of the Tribunal. Arbitrator Clodfelter dissents and his Dissenting Opinion is attached.

747. The Tribunal will convene the Parties to discuss the continued progression of the arbitration.

Seat of Arbitration: The Hague

Date: April 25, 2018

Stanimir Alexandrov

Mark Clodfelter
Separate Dissenting Opinion

Juan Fernández-Armesto

DISSENTING OPINION

1. I join the majority in concluding that Respondent has failed to demonstrate that the commencement of the arbitration was an abuse of rights or an abuse of process by virtue of either the 2006 or 2014 reorganizations. I also agree that no bad faith or malfeasance may be attributed to Claimants from the fact that [redacted] is, and was at all relevant times, the sole ultimate (indirect) owner of the investment at issue, i.e., the Claimants' shares in the Czech Operating Companies, Synot W, a.s. and Synot TIP, a.s.

2. Regrettably, I cannot join my colleagues in holding that Claimants qualify as investors under the Treaty. I am not persuaded that that they had either the required connection to the Republic of Cyprus or the required detachment from the Czech Republic. That is, they have not demonstrated that, at the relevant time, they had permanent seats in the Republic of Cyprus or that, with respect to the shares, they, as opposed to their ultimate owner, have invested in the Czech Republic, within the meaning of the Treaty.

3. I concur with the Interim Award's conclusions on the fork-in-the-road and multiparty objections, with brief explanations.

PERMANENT SEAT

4. Article 1(2) of the Treaty provides:

> *The term 'investor' shall mean any natural or legal person who invests in the territory of the other Contracting Party, and for the purpose of this definition;*
>
> *[…]*
>
> *(b) The term "legal person" shall mean with respect to either Contracting Party, any entity incorporated or constituted in accordance with, and recognized as legal person by its laws, having the permanent seat in the territory of that Contracting Party.*

5. On the question of whether Claimants meet the condition of Article 1(2)(b) of the Treaty that they have their permanent seats in Cyprus, I reach the same conclusion that was reached by the tribunals in the *Tenaris I*[1] and *Tenaris II*[2] awards, with regard to similar terms, that, paraphrasing the words of the latter, "regardless of the terminology used … , the reference[] to ["permanent seat"] contained in the BIT[] must be taken to

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[1] *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal Lda. V Bolivarian Republic of Venezuela* (ICSID Case No ARB/11/26), Award, 29 January 2016, CL-108 ("*Tenaris I*").

[2] *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal Lda. v Bolivarian Republic of Venezuela* (ICSID Case No ARB/12/23), Ruling, 12 December 2016, CL-177 ("*Tenaris II*").

mean the Effective Seat[] of the investing companies, the places where *de facto* the company's business is managed."[3]

A. Relationship to the content of municipal law.

6. I agree that Article 1(2)(b) of the Treaty does not provide for a *renvoi* to municipal law for determining permanent seat. The concept must have a meaning for purposes of the treaty (though not necessarily in international law generally), autonomous of municipal law; there is no single meaning under international law. Finding such a meaning under international law principles of treaty interpretation is our task.

7. I also agree that, in doing so, consideration has to be given to the municipal law of treaty parties. But this does not mean that the term must be one that is actually used in municipal company law. The main function of considering municipal law is to exclude possible meanings that conflict with the law of one or both parties and therefore not likely to have been intended. Absent a more clear definition, those treaty terms would likely refer to legal or economic concepts understood in both countries.

8. Here, both sides' interpretations involve concepts that are familiar in both countries;[4] clearly, both countries have concepts of "registered offices," but they also have concepts of "seat" and of "central management and control." Therefore, the notions of both "seat," both formal and real, and "management and control" are part of the backdrop to the Contracting Parties' mutual agreement to use the term "permanent seat" in the treaty, and neither can be said to be in conflict with the law of either.

Czech Law

9. During the 1990s, before the amendments that took effect in 2001, Article 2(3) of the Czech Commercial Code defined "seat" as "an address, which is registered as the seat … in the Commercial Register." While this certainly could be understood, as the Interim Award does, to refer to the formal, statutory seat, this view was not universally shared and some commentaries considered this definition to imply that that registered address had to be that of the "real" seat of the company. One noted commentary refers to "*schizophrenic concept of Art. 2 para. 3* of the Commercial Code *prior to its amendment by Act No. 501/2001 Coll*., which stipulated the same principle [that anyone may invoke the seat where the management of the legal person is located], but also stated that only the address registered in the Commercial Register is considered the seat, which sometimes led to the conclusion that real seats that were not registered

[3] *Tenaris II*, CL-177 , para. 190 ("In summary, the Tribunal concludes that, regardless of the terminology used and the imperfections in the translation of the concepts, the references to 'seat' (or '*siege social*') contained in the BITs must be taken to mean the Effective Seats of the investing companies, the places where *de facto* the company's business is managed.") (English translation supplied by Claimants). *See also*, *Tenaris I*, CL-108, para. 154 ("In conclusion, in order to make sense of each provision, and ensure that each term is given meaning, the Tribunal determines that both '*siège social*' and '*sede*' in the Treaties in issue in this case mean the place of actual or effective management.").

[4] *Cf. Tenaris I*, CL-108, para. 171 ("In particular, the Tribunal notes that notions of 'effective seat', and the use of a substantive test for corporate nationality in certain circumstances, are entirely familiar to both Luxembourg and Portuguese law (being the municipal systems of most relevance to the issues of nationality in this case).").

could not be invoked, because according to the first sentence of former Art. 2 para. 3 of the Commercial Code it was not a seat in the legal sense."[5]

10. This view that "seat" meant "real seat" was criticized by other commentators. For example, one commentator notes that "we cannot approve *the attempts of some commentaries* to install in the Act something that is not there and derive that the seat of a company (or another legal entity) is the address, from which the activities of the legal entity are organized and administrated."[6]

11. But, regardless of whether a real seat requirement was already implied in Czech law before the 2001 amendments, it is clear that there was much debate about it and that the "central management and control" concept was well-understood in Czech Republic legal discussions. For example, an earlier version of the first commentary mentioned above describes what is meant by the "material seat" before noting that the tendency of Czech law toward the formal, statutory, seat approach had been heavily criticized prior to the 2001 amendments:

> First of all, the seat can be understood in material or formal sense of the word. If the essential criterion is the material aspect it is proceeded from the concept that *the seat of the legal person is the location of its centre, i.e. usually the location from which it is managed and controlled, where its statutory body is usually located and where it truly operates and where its other main bodies usually meet.* For economically active legal persons, the seat can be often understood as the location of their main enterprise. . . *Our legislation has inclined for a long time to a formal concept of the seat; the seat is then understood the location defined as the seat in relevant documents or registered as the seat of the legal person in relevant public legal registers.* Therefore before 2001, it was generally sufficient in the Czech Republic to provide an address as the seat of the legal person which could be the seat as a matter of fact (i.e. particularly the address of an existing building) irrespective of whether such specified location was in fact the seat. If the registered address is not the material seat of the legal person (i.e. if a contact with the legal person cannot be reached at such address) the seat is called fictive. Fictive seats were significantly used in practice in early 90's particularly in the context of establishing trading companies. *This practice* which was not prevented even by relevant state authorities *was repeatedly criticised in literature.* Because of that the legislation has been gradually made more accurate.[7]

12. Similarly, the second commentary mentioned above argued that the material approach was the preferable approach: "In my opinion, it is necessary to prefer the [material]

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[5] Švestka/Spácil//Škárová *et al*., *Civil Code Commentary*, RL-130 (2008), third page of Respondent's translation (emphasis added). *See also* Article 19c(3) of the Czech Civil Code of 26 February 1964, Act No. 40/1964 Coll., as amended by Act No. 215/2009 Coll, RL-127.

[6] K. Eliáš, "Seat of Business Corporations," *Legal practice and business*, C-288 (1993), first page of Claimant's expanded translation (emphasis added).

[7] O Jehlička, J Švestka, M Škárová, and others, *The Civil Code Commentary*, CL-148 (2002), second page of Claimant's translation (emphasis added).

approach and to understand the concept of seat as a place where the statutory body of the business company resides, as *a place from where the decisive directives for the company's business are coming*."[8]

13. The change or clarification provided by the 2001 amendments to the law was the fruit of such views by commentators. As amended, the Article 2(3) of the Commercial Code expressly stated that "seat" meant "real seat," defined as "the address of the place from which the legal person is managed by its statutory body."[9]

14. Thus, even though Commercial Code did not expressly adopt the "real seat" approach (at least for companies incorporated in the Czech Republic) until the amendments effective on 1 January 2001, after the actual negotiation of the treaty, it was openly contended to imply that approach by some and urged to be changed to do so by others. Either way, the "real seat" approach could well have informed the Czech Republic's position in negotiations, which could even have consciously anticipated the 2001 amendments. Thus, the intended meaning of "permanent seat" cannot be considered as limited by reference to Czech municipal law to the formal approach to seat, as the Interim Award suggests.

Cypriot Law

15. The concepts of "registered office," "seat" and place of "central management and control" were also known in Cypriot law. For example, the term "seat" was used in the Merchant Shipping Law until it was changed to "registered office," literally translated, only in 2005.[10]

16. And, with respect to "management and control," while the parties here mostly discussed "domicile," they also discussed the term "residence" under Cypriot law, which, reliant as it is on United Kingdom law, means "*where [a company's] central management and control is exercised*."[11] In addition, Article 24(2) of the Recast Brussels Regulation provides that, on questions involving the validity of various aspects of the company, the "the courts of the Member State in which the company, legal person or association *has its seat*" shall have exclusive jurisdiction, regardless of the domicile of the parties, as determined by that State's private international rules.[12]

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[8] Eliáš, *op. cit.*, fn. 6, C-288 (emphasis added).

[9] Czech Republic, Act No 370/2000 Coll., amendment to Commercial Code, RL-124 (emphasis added).

[10] Expert Report of [redacted] para. 10.10 ("I must note however that the Claimants have not addressed the fact that the requirement of having a registered office in Cyprus was only added to the Merchant Shipping Law by an amending law in 2005. Prior to that amendment, the obligation was for a legal person to have been incorporated under the laws of Cyprus and have its '*seat*' («*έδρα*») in Cyprus. The replacement in 2005 of the word '*seat*' («*έδρα*») with the words '*registered office*' («*εγγεγραμμένο γραφείο*») clearly shows that the two are distinct and separate concepts.")

[11] *Id.*, Exhibit 27, Dicey, Morris & Collins, *Conflict of Laws* (15th ed. 2012), Volume 2, para. 30R-001 (emphasis added). *See also*, Hearing transcript, Day 3, p. 154:11-12, Mr. Petrochilos ("a company's residence in Cypriot law, which may refer to the actual location of management and control … ").

[12] Council Regulation (EC) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1, CL-128, Article 24(2), p. L351/10.

As pointed out by Arbitrator Parks in his separate opinion in *CEAC Holding v. Montenegro*, "[i]n the English tradition of Cyprus, those rules look to either (i) place of incorporation and registered office or some other official address, or (ii) *central management and control*."[13]

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17. Therefore, it is clear that the notions of both "seat," both formal and real, and "management and control" are part of the backdrop to the Contracting Parties' mutual agreement to use the term "permanent seat" in the treaty. For this reason, Czech Republic and Cyprus company law cannot be seen as determinative, even if both were "incorporation theory," rather than "real seat theory," jurisdictions, as the Interim Award contends.[14] The Czech Republic's interpretation cannot be excluded as it is in the Interim Award on the basis that it is inconsistent with Czech municipal law at the time the treaty was negotiated.

B. Principle of Effectiveness.

18. I also cannot agree that Claimants' interpretation – "actual and functioning registered office" – does not render the requirement of "permanent seat" ineffective. The *maintenance* of an actual registered office, as both sides agree is required in Cypriot law, is necessarily implied in the requirement that the company of a Contracting Party be "incorporated or constituted *in accordance with … its laws*." In other words, merely stating an address at the time of incorporation is insufficient to *being* incorporated in accordance with Cypriot law, in light of the continuing legal obligation to have an "actual and functioning registered office," and whether or not the company has been stricken from the corporate registry as a result of non-compliance.

19. *Tenaris I* supports this reasoning, since it does to appear to have been contested there that the companies had functioning registered offices, which was sufficient for the tribunal to conclude that the "in accordance with" requirement (as opposed to the"*siège social*"/"*sede*" requirements) had thereby been met, and leading the tribunal to conclude that the rule of effectiveness required that the treaty terms at issue could only mean "the place of actual or effective management."[15] (It appears that the issue

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[13] *Central European Aluminium Company (CEAC) v. Montenegro*, ICSID Case No. ARB/14/8, RL-64, Separate Opinion (4 July 2016) para. 15, *citing* Dicey, Morris & Collins, *Conflict of Laws*, (15th ed. 2012), para. 11-079 (emphasis added).

[14] The fact that, in the Czech Republic, foreign-incorporated companies may become recognized as Czech companies by establishing their seats there while maintaining their foreign incorporation status suggests that the Czech Republic is no less a "real seat" jurisdiction than Luxembourg was considered to be by the *Tenaris I* tribunal, which derived the "real seat" requirement from provisions of Luxembourg law applicable to companies incorporated in other countries. *Cf. Tenaris I*, CL-108, paras. 176-177, and Czech Republic, Act No 513/1991 Coll., The Commercial Code, 1 January 1992, C-249, section 26.

[15] *Tenaris I*, CL-108, para. 148 ("Given this context, it is immediately apparent – as Venezuela has argued – that neither '*siège social*' nor '*sede*' can mean simply 'registered office' or 'statutory seat' in a purely narrow and formal sense, since neither term would then have any effective meaning. For a company to be 'constituted in accordance with the laws of … the Grand Duchy of Luxembourg', it must have its registered office or statutory seat in Luxembourg. And for a company to be 'constituted pursuant to and function in accordance with the Laws of' Portugal, it must have its registered office or statutory

was not specifically addressed by the parties in the *Tenaris II* case, which concluded nonetheless that the terms "*siège social*" and "*sede*" meant "Effective Seat," i.e., "where the company's business activity is centralized."[16])[17]

20. The award in *CEAC v. Montenegro* does not contradict this view since it never actually addressed respondent's *effet utile* argument and, instead, affirmatively stated that the tribunal did not have to determine the meaning of "seat" since the claimant could not satisfy the requirement under either party's test.[18]

21. Finally, on effectiveness, Claimants' interpretation does not give a plausible effect to the treaty language. While Claimants argued that the Parties' intent was to screen out "paper companies," they have not explained why the Parties would be any less concerned with "mailbox companies," i.e., companies which are maintained by service

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seat in Portugal."), para. 150 ("So if '*siège social*' and '*sede*' are to have any meaning, and not be entirely superfluous, each must connote something different to, or over and above, the purely formal matter of the address of a registered office or statutory seat. And this leads one to apply the other well-accepted meaning of both terms, namely 'effective management', or some sort of actual or genuine corporate activity."), and para. 154 ("In conclusion, in order to make sense of each provision, and ensure that each term is given meaning, the Tribunal determines that both '*siège social*' and '*sede*' in the Treaties in issue in this case mean the place of actual or effective management.") (emphasis omitted).

[16] *Tenaris II*, CL-177, para. 177 ("No Party has questioned whether or not Tenaris is incorporated in accordance with Luxembourg legislation, and Talta with Portuguese legislation. The requirement is therefore deemed fulfilled."), and para. 189 ("By applying the latter two hermeneutic principles, and in the light of the rules of international law concerning the concept of seat, stated earlier, the conclusion has to be that the concept of 'seat' used in the BITs cannot refer simply to Statutory Seat, in the formal sense, but must refer to Effective Seat, where the company's business activity is centralized. If this interpretation is not adopted, the requirement of the BITs, of a 'seat' in addition to the 'incorporation' requirement, would become superfluous: every company incorporated in Luxembourg or in Portugal is legally bound to declare in its Articles of Association that its Statutory Seat is situated in the jurisdiction concerned. The term 'seat' only acquires a meaning of its own if it is accepted that the BITs are referring to the Effective Seat of the investing company.").

[17] While the Interim Award states that the construction arrived at by both of the *Tenaris* tribunals was impacted by the fact that they were construing the terms "*siège social*" and "*sede*" as used in the two treaty Parties where the "real seat" theory is prevalent, as noted earlier, *op. cit.* fn. 14, this would seem to be no more true for Luxembourg than it is for the Czech Republic which, like Luxembourg as described by the *Tenaris I* tribunal, accords Czech nationality to companies incorporated abroad but whose "seats" are located in the Czech Republic. In any event, the *Tenaris I* tribunal consulted the law of the treaty Parties only to "confirm the interpretation" it had reached independently under an interpretation of the text, *see* paras. 169-170. Similarly, the *Tenaris II* tribunal turned to the treaty Parties' own law only after it had first "established the conclusion that the BITs, when referring to 'seat', are referring to Effective Seat," and then only as legal systems of "special relevance" in the consideration of "rules generally accepted by the different municipal legal systems." *See* paras. 191-192.

[18] *Central European Aluminium Company (CEAC) v. Montenegro*, *op. cit.* fn. 13, RL-64, Award (26 July 2016), paras. 113, 148. Indeed, in his separate opinion, Arbitrator Parks, *op. cit.* fn. 13, RL-64, Separate Opinion (4 July 2016), para. 19, identified the Claimants' interpretation here as one of three tests discussed in the case ("The second [test] imposes multiple criteria in determining registered office, and presupposes that an office ceases to be registered in the event of defective compliance with corporate formalities."). But, in his view, *id.* at para. 21, "[this] test finds no support in either domestic or international law. The test defines registered office according to six criteria, and posits that non-observance of these factors leads to disregard of the office. Adoption of that standard would require arbitrators to assume a policy-making mission in excess of their authority."

companies and share the same services/offices with many other, unrelated companies. The former are not in any real sense less substantial, or more fictive, than the latter. That would leave the purpose of the term to be merely to supplement enforcement of the Parties' own company law requirements, an unlikely motivation for the requirement. Indeed, it would have been far easier, if this is what the Parties intended, simply to indicate expressly some requirement for continued compliance with registered office regulations.

22. On the other hand, Respondent's interpretation, which equates "permanent seat" with place of effective management, establishes a required link that goes beyond what appears to have been sufficient to establish compliance with incorporation regulations in municipal law. Reading "permanent seat" to mean "real seat" gives effect to the term while reading it to mean merely "real registered office" does not.[19]

C. Evidence and Circumstances of the Negotiations.

23. Care must be taken with the materials relied upon by the parties purportedly as supplementary means of interpretation under Article 32 of the Vienna Convention on the Law of Treaties. The most reliable of such materials are the alternative proposed texts exchanged by the parties, but even these shed only limited light in the absence of explanations for counter-proposed terms also shared between the parties, of which we have none. But we do know from the exchanged texts, as recounted in the Interim Award, that formulations that rested upon "registered office," and even of "seat," unadorned, were rejected, twice in fact in the case of the term "registered office."

24. But the biggest difficulty arises from the same reasoning underlying the *effet utile* analysis. Since the proposals for "registered office" were made by Cyprus as a requirement cumulative to that of "incorporation," it would seem to apply to any conception based on "registered office," including one beyond the requirements already covered by the "incorporation in accordance with" language. Thus, even if having "an actual and functioning registered office," as required by Cypriot law, was not already covered by the "in accordance with … its laws" requirement, it appears to have been rejected in favor of the term "permanent seat."

[19] All of the indicia of a functioning registered office cited in the Interim Award are requirements of law necessary to remain validly incorporated in Cyprus, except for the fact that their books were audited in Cyprus, which is immaterial, and that they were tax residents of Cyprus, a requirement of tax law. *See* Expert Report of [redacted] para. 10.6 ("There are certain minimum requirements that an office should fulfil if it is to be considered to be a company's registered office within the meaning of the Companies Law, including: (a) It must consist of a physical premises – a vacant plot will not do; (b) The company must have some right (by way of ownership, lease or license) to use the property or part thereof – it cannot be a trespasser (although the premises may be shared with any number of other persons – whether legal or natural); (c) The premises must be accessible to the public (for at least two hours on each business day) for inspection of the various books and registers and for service of documents and notices upon the company; (d) The books and registers that a company must by law maintain in its registered office should actually be held there; and (e) The relevant company's name should be painted or affixed on the outside of the office, in a conspicuous position, in letters easily legible. If an 'address' does not comply with the above minimum requirements, I do not see how such address can qualify as the registered office of any company.") (footnotes omitted).

25. In light of this evidence, the other materials submitted, which probably do not qualify as Article 32 supplementary means, are of less use. We simply do not know the full content of the discussions between the Parties, or even within the two governments, on issues raised in their non-shared internal papers, and I think it is very dangerous to attempt to imagine or assume how they unfolded over the years.

26. At the same time, I cannot see any ground for allocating to the State party in treaty arbitration the burden of affirmatively proving what it meant by its own proposals for treaty language, on some assumption that they must have access to relevant documentation. First, here, the Czech Republic has stated that it made all of the *travaux* for this treaty available to Claimants pursuant to a request under Czech law. We have no basis to question this; partial and fragmented *travaux* seem more the rule than the exception. Secondly, there are many terms in BITs for which there is no record of stated intent, much less of an agreed intent. We cannot properly assume that such statements exist and draw conclusions from their absence in the record.

27. Finally, I do not think that that the Czech Republic-Ireland BIT, whether it constitutes supplementary means or not, shows that "permanent seat" cannot mean place of effective management and control. That treaty does define qualifying legal persons as Irish incorporated companies having their "central management and control" in Ireland and Czech incorporated companies having their "permanent seats" in the Czech Republic.[20] We are not privy to the reasons for this language differentiation. The inclusion of different terminology may just as likely reflect the Parties' agreement on a common meaning using the different terms with which each respectively is more familiar (as the Czech Republic was in its BITs). Indeed, it is highly unlikely that the Parties to that BIT intended that radically different criteria for BIT protection would apply to Irish as opposed to Czech companies, as would result from reading the "permanent seat" requirement applicable to Czech companies as something less than the place of central management and control requirement applicable to Irish companies. Indeed, given the express object stated in the preamble of that BIT of achieving *reciprocal* protection of investments (as in the title of the BIT),[21] the BIT is more properly read as supporting the interpretation of "permanent seat" as place of effective management.[22]

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[20] Agreement between the Czech Republic and Ireland for the Promotion and Reciprocal Protection of Investments (entered into force 1 August 1997, terminated 1 December 2011), C-254, Article 1(2)(b) ("The term 'investor' shall mean any natural or legal person who invests in the territory of the other Contracting Party … b) The term 'legal person' shall mean, (i) with respect to Ireland, any entity incorporated, registered, or constituted in accordance with, and recognised as a legal person by its laws *and having its central management and control* in the territory of Ireland, (ii) with respect to the Czech Republic, any entity incorporated or constituted in accordance with, and recognised as a legal person by, its laws *and having its permanent seat* in the territory of the Czech Republic.") (emphasis added).

[21] *Id*., C-254, Preamble ("Recognising that the encouragement and *reciprocal protection* under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both Contracting Parties.") (emphasis added).

[22] I do not find the recent Partial Award in *Natland Investment Group NV et al v. The Czech Republic* (20 December 2017) to be helpful on the meaning of "permanent seat," even though it considered the same term in the same treaty as is at issue here. That decision states in para. 279, "The provision merely requires that an investor be a legal person 'having the permanent seat in the territory' of the relevant Contracting Party; it does not require that the place of actual or effective management be located in that

D. Conclusion: Claimants Did Not Have Their Permanent Seats in Cyprus at the Relevant Time.

28. The Parties have advanced different views as to when the Claimants must have had their permanent seats in Cyprus in order to qualify as "investors" under the treaty. Claimants argue that the commencement of arbitration is the key time,[23] while Respondent argues that Claimants are required to have had permanent seats in Cyprus from the time the investments were made.[24] (The Interim Award did not need to dispose of this issue because it held that Claimants had registered offices "having substance" since 2006.) But it is self-evident that the treaty only applies to legal persons who are "investors" within the meaning of the treaty, and therefore not to legal persons incorporated in the territory of the relevant Contracting Party until they have "permanent seats" in that territory. The actual relevant time, thus, falls between two events cited by the parties, and is, at latest, the date of the alleged breach.

29. Here, the evidence shows that Cyprus was not the place of Claimants' central management and control until, at the earliest if ever, the 2014 organizational changes,[25] well after the breaches are alleged to have occurred. Therefore, I do not believe that Claimants have established that they were investors within the meaning of the treaty and that, on this ground, the claims should be dismissed for lack of jurisdiction.

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jurisdiction. In this connection, the Tribunal notes that, while Cypriot law, which has apparently been influenced by English law, requires that every company incorporated in Cyprus maintain a registered office in Cyprus, it does not use the term 'real seat' or *siège réel*."

On the first of these points, the *Natland* decision does not explain why, without a process of interpretation, the absence of an express reference to management and control excludes such a meaning. (This mirrors the Interim Award's criticism of the *Alps Finance* decision which held, under the Swiss-Czechoslovak BIT, that, independently of the additional requirement to have "real economic activities" in the host State, the term "seat" meant the "effective center of administration of the business operations," *See*, *Alps Finance and Trade AG v. Slovak Republic*, Award (5 March 2011), paras 216-217.) On the second point, as discussed above, Cypriot law is indeed familiar with the concept.

[23] Hearing transcript, Day 3, p. 131: 3-23.

[24] Hearing transcript, Day 3, pp. 67: 20-25.

[25] The question was posed at the hearing, If not in Cyprus, where was the place of the Claimants' effective management? This question need not be answered, but it is worth noting that the Regulation 2 of Claimant WCV's internal regulations provides that "(c) For as long as the company functions as a private company limited by shares with one sole member: … (ii) The one sole member exercises all the powers of the general meeting, by virtue of the Law, provided always that the decisions, which will be taken by this member in general meetings, will be recorded in minutes, or be drawn up in writing.... (v) The provisions of these Regulations must be read, interpreted and applied on the basis that the Company is private with a single Member and accordingly any provisions that are inconsistent with the nature of the Company as a private single-member company shall be adapted accordingly or shall be deemed as non-existent and shall be ignored." *See*, Memorandum and Articles of Association of WCV World Capital Ventures Ltd, 22 November 2006, C-238, Interpretation, Regulation 2(c).

30. I join the majority in concluding that Respondent has failed to demonstrate that the commencement of the arbitration was an abuse of rights or an abuse of process by virtue of either the 2006 or 2014 reorganizations. I also agree that no bad faith or malfeasance may be attributed to Claimants from the fact that [redacted] is, and was at all relevant times, the sole ultimate (indirect) owner of the investment at issue, i.e., the Claimants' shares in the Czech Operating Companies, Synot W, a.s. and Synot TIP, a.s.[26]

31. Finally, I share the majority's appreciation that this case presents the problem of circularity at its most radical – does a bilateral investment treaty apply when the sole ultimate investor is conceded to be, and to have always been, a national only of (and indeed an elected official of) the host State?

32. But I do not agree that this Treaty may be properly interpreted to apply in this circumstance.

33. This is in part because any such interpretation would be inconsistent with the obvious purpose of the Treaty, namely to offer protection to, and thus to entice, investment from nationals of the one Contracting State (i.e., foreign investors) into the territory of the other Contracting State. Extending Treaty application in the circumstances of this case clearly flies in the face of this purpose. But this conclusion is not based *de lege ferenda* solely upon the policy objectives of the Contracting States. Rather, it is based upon the meaning of terms of the Treaty in the context of the rest of the Treaty and in light of, and infused, by the Treaty's object and purpose.

34. The majority considers that, *de lege lata*, [redacted] ownership interest is irrelevant to the Tribunal's jurisdiction because the Claimants are legal persons incorporated in, and having their permanent seats in, Cyprus pursuant to Article 1(2)(b) of the Treaty. But, although Article 1(2)(b) of the Treaty sets forth a two-part test for what constitutes a legal person of one of the Contracting States, the leading clause of Article 2(1) provides that, in order to be considered as an "investor" of a Contracting State, that legal person must be a "legal person of one Contracting Party *who invests in* the territory of the other Contracting Party …"

35. There is an issue, then, of whether the Claimants may be said with respect to the investment at issue to have "*invest[ed] in the territory of the*" Czech Republic within the meaning of the treaty.[27]

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[26] There has been no objection raised based upon the fact that Claimants' ownership interests in Synot TIP were indirect.

[27] As part of what the Interim Award organizes under the rubric of the Bad Faith Objection, Respondent has approached the circularity issue from a number of angles, one of which is the argument that neither Claimant is "legal person of one Contracting Party who invests in the territory of the other Contracting Party." *See* Respondent's Memorial on Jurisdiction and Request for Bifurcation, 5 August 2016, paras. 279-280 ("[T]he dispute resolution provision in Article 8 provides for resolution of specifically international disputes … In addition, Article 1(2) of the Treaty extends international investment protection only to a person from one Contracting Party who invests in a different Contracting Party. It does not extend protection to a person from one Contracting Party who invests in his or her State: *'The*

36. It is undisputed that [redacted] was the original shareholder of virtually all of the shares in Synot W and that ownership of those shares moved from him, first, to a Netherlands company which he owned, successively through Caymans Islands, Cypriot and Netherlands Antilles companies all of which he owned,[28] and, eventually, to Claimant WVC of Cyprus, all before the claims arose. This structure was the result of tax minimization strategies and these transfers, as well as additional share subscriptions, were all conducted among [redacted] and these companies by means of [redacted] funds, inter-company transfers or via assignments of inter-company receivables.

37. It is also undisputed that Synot Holding s.r.o., a Czech Republic company virtually wholly-owned by [redacted] successively through Caymans Islands, Cypriot, Netherlands Antilles and Czech companies which he also owned, and eventually

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term "investor" shall mean any natural or legal person of one Contracting Party who invests in the territory of the other Contracting Party'[.]"), and para. 290 ("In other words, from the start, two Czechs established the supposed international investment in the Czech Republic with economic resources also drawn from the Czech Republic. These economic truths have not changed."); Respondent's Reply on Bifurcated Objections, 18 November 2016, para. 53. ("In all events, the evidence on the record demonstrates that Claimants … in this regard, did not actively make, fund, or control their nominal investments."), para. 56 ("WCV and CCL could not possibly have made or funded their nominal investment because SYNOT W and SYNOT TIP existed long before WCV or CCL came to own interests in those companies."), para. 214 ("As *Standard Chartered Bank* explained, an economically active relationship exists when 'the investment was made at the claimant's direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner'. Although Claimants argue that there is 'no reason to graft additional requirements on to the Treaty', the terms of the Treaty itself require that the investor actually invest. Just as *Standard Chartered Bank* found for its treaty, the Treaty in Article 1(2) defines an investor as one 'who invests in the territory of the other Contracting Party'."), and para. 220 ("These are, however, the exact circumstances of this case. As discussed in Section 2.2.1 above, Claimants are the corporate alter ego of [redacted] and WCV and CCL lacked an economically active relationship with their nominal investments in SYNOT W and SYNOT TIP per Standard Chartered Bank because they did not direct the making of the investment, did not fund the investment, and did not actively control the investment."); Hearing transcript, Day 1, p. 91:20-24 ("The fact of the matter is simple: WCV and CCL have not invested in the Czech Republic; [redacted] invested in the Czech Republic and controls those investments at his will through Claimants. In light of this, the Tribunal cannot hear this case."); Hearing transcript, Day 3, p. 103:6-14 ("[T]he transfer of capital is the very essence of foreign investment, which is meant to spur the economic development of the host state. In fact, our treaty puts particular emphasis on the element of contribution, as Article 1(2) clearly defines an 'investor' as: '... one ... who invests in the territory of the other Contracting Party ....'"), and p. 103:15-23 ("What contribution exactly did WCV and CCL make to the Czech Republic? … Such a contribution would normally be of capital. But as we've already seen, not a single penny was invested from Cyprus into the Czech Republic through WCV and CCL. This is because the capital in question was already there, in the form of the [redacted] amily's long-standing business. In this sense, WCV and CCL never actively invested in the Czech Republic; only [redacted] did."); Hearing transcript, Day 4, p. 31:2-14 ("WCV never invested anything, it is not an investor, and the assets it possesses are not investments. There was no capital flow from WCV and CCL to the Czech Republic. So, simply put, WCV and CCL are not protected investors. They hold no protected investment. The reality is that the value, if you will, originates with [redacted] with his father; they are Czech citizens, and the value was made in the Czech Republic when they built the SYNOT Group. But to state the obvious, the treaty doesn't protect Czech investors in the Czech Republic and there is no jurisdiction over those claims.").

[28] Including, for a period, Claimant CCL.

Claimant WCV, was the majority incorporator of Synot TIP, along with [redacted] brother, who soon transferred his shares to Synot Holding, all before the claims arose. Again, this structure was the result of tax minimization strategies, and Synot Holding's original shareholding and its acquisition of the remaining shares were conducted by means of funds of [redacted] or his companies.

38. The question is, may whom is considered to be an investor within the meaning of the Treaty change by virtue of ownership reshuffling done merely for tax reasons? In other words, with respect to the investment at issue, may Claimants be said to have invested in the territory of the Czech Republic when the shares were originally issued or transferred to a Czech investor, pre-claim, and have ever since always been ultimately owned by that same Czech investor, having merely been transferred at various times between various other companies that were created merely for tax minimization purposes and that he also ultimately owns and controls?

39. The Treaty does not define the term "invests in the territory of the other Contracting Party." However, in context, "invests in" the territory of the other Contracting Party necessarily implies "invests from without" that territory. The "otherness" of the territory from which the act of investing must emanate excludes acts of investing by persons within the dominion of the host State under circumstances such as those present here.

FORK-IN-THE-ROAD

40. I join the majority in concluding that the court actions commenced by Synot TIP in the Czech courts do not bar their claims in arbitration here, but for somewhat different reasons. I agree with Respondent that the appropriate test is one that looks at the fundamental basis of the municipal law claims to determine whether they share the same normative source and essence as the claims in arbitration. Thus, I agree with the Interim Award's departure from the so-called "triple identity test" in not finding as decisive the fact that the Claimants are not themselves parties to the municipal court actions. Indeed, I think that similar reasoning informs the issue of circularity discussed above; the factors cited – that WCV is indirectly the sole shareholder of Synot TIP and that filing of the court cases must have been approved by and will ultimately benefit the WCV – would seem to be equally applicable in assessing whether the Claimants themselves have actually "invested in" the Czech Republic.

41. We have very little information about the many specific cases presented in the Czech courts. As a result, I do not believe that Respondent has established that the cases were not, as argued by Claimants, brought merely "to test *the extent to which* the decisions of the Constitutional Court in 2011 and 2013, and the amendments to the Lotteries Act in 2011, *applied in certain circumstances*."[29] As such, it has not been proven that the cases share the same fundamental basis, normative source and essence as the claims here.

[29] C II, para. 14.

42. I also join the majority in concluding that, in the circumstances here where the Claimants have indirect interests in the shares of Synot TIP that were, for the period of CCL's involvement, identical in nature, and allege identical breaches of the same treaty with respect to those shares, the term "investor" in Article 8 of the Treaty can properly be read to include the plural form of the noun.

24 April 2018

Mark Clodfelter