

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the matter of the arbitration between

**PHOENIX ACTION, LTD.**

Claimant

v.

**THE CZECH REPUBLIC**

Respondent

(ICSID Case No. ARB/06/5)

**AWARD**

**Tribunal**

**Professor Brigitte Stern, President**

**Professor Andreas Bucher, Arbitrator**

**Professor Juan Fernández-Armesto, Arbitrator**

*Secretary of the Tribunal:* Ms. Martina Polasek

***Representing the Claimant:***

Phoenix Action Ltd  
c/o Ms. Kamilla Loz  
and Mr. Vladimír Beňo  
Tel Aviv, Israel

c/o Mr. O. Thomas Johnson, Jr.  
Covington & Burling LLP  
Washington D.C., U.S.A

c/o Mr. Luboš Kutiš  
General Director of BENet Praha spol. s r.o.  
Prague, Czech Republic

***Representing the Respondent:***

Czech Republic  
c/o Mr. George von Mehren  
and Mr. Stephen Anway  
Squire Sanders & Dempsey LLP  
Cleveland, OH, U.S.A.

c/o Mr. Rostislav Pekař  
Squire Sanders & Dempsey LLP  
Prague, Czech Republic

*Date of dispatch to the parties: April 15, 2009*

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## I. PROCEDURAL HISTORY

### *A. REGISTRATION OF THE REQUEST FOR ARBITRATION*

1. The International Centre for Settlement of Investment Disputes (hereafter “ICSID” or “the Centre”) received a Request for Arbitration from the Claimant against the Respondent dated February 15, 2004. The Request invoked the ICSID arbitration provisions in the Agreement between the Government of the Czech Republic and the Government of the State of Israel for the Reciprocal Promotion and Protection of Investments, which was signed on September 23, 1997, and entered into force on March 16, 1999 (hereafter “BIT” or “the Treaty”), as a basis for the Tribunal’s jurisdiction.
2. Phoenix Action Ltd. (hereafter “Phoenix” or “Phoenix Action”), the Claimant, complained about the treatment of its investment by the Czech Republic, its investment being two Czech companies, Benet Praha, spol. s.r.o. (hereafter “Benet Praha” or “BP”) and Benet Group, a.s. (hereafter “Benet Group” or “BG”). The Claimant acquired all interests in these companies on December 26, 2002. The Claimant informed the Respondent of the existence of an investment dispute a little more than two months after the acquisition of its investment, on March 2, 2003.
3. When it received the Request for Arbitration, the Centre requested, by letter dated May 4, 2004, further information from the Claimant, especially with regard to “the corporate activities of Benet Praha and of Benet Group”. In a letter dated May 12, 2004, the then counsel for the Claimant, Mr. Meir Arad, gave some details relating to the corporate activities of BP and BG, and stated that BG was established by BP as a wholly owned subsidiary. In another letter dated June 29, 2004, the Centre asked for more precisions on the acts complained about by Phoenix in the following terms:

“We note that the facts that are complained of in the request ... concerned exclusively Benet Group and Benet Praha before their acquisition. Under these circumstances, and to assist us further in our review of the request, please explain how and when a dispute for the purpose of Article 7 of the 1997 Israel-Czech Treaty has arisen between the requesting party and the Czech Republic.”

4. In an answer dated July 8, 2004 to this letter, Phoenix explained that its right to ICSID arbitration was transferred to it by Benet Praha and Benet Group. The initial claim was thus based on the notion that the Benet Companies had assigned an ICSID claim to Phoenix as part of the acquisition of the shares. Phoenix was therefore complaining both for acts committed against Benet Group and Benet Praha before Phoenix acquired the companies, and for acts committed after this acquisition:

“Certain grounds of the claim are related to the seizure of all of Benet Praha assets on April 25, 2001 and the continuance of the seizure up to this date, almost 2 years after the investment was made ... due to the fact that *the right of action was assigned to the Claimant when the acquisition was made, it is our view that the Claimant is entitled to claim also in respect of actions, inactions and omissions prior to the date of the investment.* Thus, a dispute exists between the parties for the purpose of Article 7 of the BIT in connection with the actions, inactions and omissions, which took place prior to the investment as well as subsequent to the investment ... As mentioned hereinabove the claimed violation is an ongoing process that might have started before the investment was made, yet it is still an ongoing violation after the investment was made.”<sup>1</sup>

5. This prompted another letter from the ICSID Secretariat dated July 28, 2004, in which further clarifications were requested:

“I refer to your letter of July 8, 2004, explaining that a right of action was assigned to Phoenix Action Ltd at the time of its acquisition of Benet Group and Benet Praha. It would appear that this would have had to have been a right to ICSID arbitration ... I would appreciate receiving your clarification of this point.”

6. In its answer dated September 15, 2004, Phoenix insisted that a claim of an Israeli company under the Israeli/Czech BIT cannot be considered by the Secretariat to be manifestly outside the jurisdiction of the Centre, and asked that the request be registered without delay.
7. Further clarifications were requested by the ICSID Secretariat in a letter dated January 21, 2005, in which three questions were raised, *i.e.* what can be called the Investment Question, the Assignment Question and the Timing Question:

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<sup>1</sup> Emphasis added by the Tribunal.

“We ask that you specify the investments made by Phoenix Action to acquire Benet Praha and Benet Group.

More importantly, we continue to require clarification of the basis for such request for arbitration. We are unable to understand how Phoenix could bring their request as assignee, since Benet Praha and Benet Group could not themselves have brought such an action, or how the matter could involve continuing violations of rights since the events underlying the dispute seem to have predated the involvement of Phoenix action which alone could invoke the Czech Republic – State of Israel bilateral investment treaty.”

8. In its 13 pages answer dated December 14, 2005, the Claimant assisted by Matthew Adler, the new counsel from the law firm of Pepper Hamilton, stated, in response to the Investment Question, that its investment was the purchase of the shares of BP and BG. It did not discuss directly the Assignment Question. The assignment theory was thus implicitly abandoned, as confirmed by a clear statement in the Claimant’s Counter-Memorial on Jurisdiction, where it is stated that “no BIT claim has been transferred because none existed prior to the time of the investment”<sup>2</sup>. Having abandoned the assignment theory, the Claimant merely insisted on the fact that Phoenix “owned the claim *at the time it filed the action*”<sup>3</sup>. As far as the Timing Question was concerned, the Claimant asserted that “(i)t is not the case that all the events underlying this dispute predate the involvement of Phoenix”, insisting that the continuous freezing of Benet Praha’s bank accounts and the continuous seizure of documents as well as the Czech courts’ delays in the different actions brought by Benet Praha and Benet Group in 2001 were part of a dispute which falls within the ambit of the ICSID Convention.
9. Finally, the Request for Arbitration, as supplemented by the Claimant’s above mentioned letters, was registered by the Centre on March 23, 2006, pursuant to Article 36(3) of the ICSID Convention. On the same day, the Secretary-General, in accordance with Institution Rule 6(1)(a), notified the parties of the registration, and invited them to proceed to constitute an Arbitral Tribunal as soon as possible, pursuant to Institution Rule 7.

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<sup>2</sup> Claimant’s Counter-Memorial on Jurisdiction, § 48.

<sup>3</sup> Emphasis in the letter.

*B. CONSTITUTION OF THE ARBITRAL TRIBUNAL AND ORGANIZATION OF THE PROCEEDINGS*

10. On August 29, 2006, Claimant requested that the Arbitral Tribunal in this case be constituted in accordance with Article 37(2)(b) of the ICSID Convention. Accordingly, the Tribunal was to consist of three arbitrators, one arbitrator appointed by each party and the third, the President of the Tribunal, by agreement of the parties. However, on November 27, 2006, without having proceeded under Arbitration Rule 3, the Claimant requested that the appointments of the President of the Tribunal and the arbitrator to be appointed by the Claimant be made by the Chairman of the ICSID Administrative Council under Article 38 of the ICSID Convention. On November 28, 2006, the Respondent appointed Professor Juan Fernández-Armesto as arbitrator. Following consultations with the parties, the Chairman of the Administrative Council appointed Professor Andreas Bucher to serve as co-arbitrator and Professor Brigitte Stern to serve as the President of the Tribunal. On January 8, 2007, the Secretary-General of ICSID, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (hereafter “Arbitration Rules”), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to be constituted and the proceedings to have begun on that date. The same letter informed the parties that Ms. Martina Polasek, Counsel, ICSID, would serve as Secretary of the Tribunal.
11. Shortly after the constitution of the Tribunal and before its planned first session, on January 25, 2007, the Claimant sent to the Centre a letter to which it attached an order requesting a transfer of the frozen funds in a bank account of Benet Praha, while invoking Arbitration Rule 39 concerning provisional measures. By a letter of February 7, 2007, the Secretary of the Tribunal informed the parties that the President of the Tribunal invited the Respondent, in accordance with Arbitration Rule 39(4), to submit its observations on the request for provisional measures by February 14, 2007. The Respondent submitted its observations within the prescribed time limit and asked the Tribunal to deny the Claimant’s request. The parties were subsequently informed that the question of provisional measures would be dealt with at the first session of the Tribunal with the parties.

12. The first session of the Tribunal was held on February 23, 2007, at the European Headquarters of the World Bank in Paris. In addition to the members of the Tribunal and the Secretary, the following persons attended that meeting:

Attending on behalf of the Claimant

Mr. O. Thomas Johnson Covington & Burling LLP  
 Mr. Luboš Kutiš General Director of BENet Praha spol. s r.o.  
 Mr. Pavel Klimeš Demut, Klimes, Mader Law Office  
 Mr. Zdeněk Hrdlička Translator, Assistant

Attending on behalf of the Respondent

Mr. George von Mehren Squire Sanders & Dempsey LLP  
 Mr. Stephen P. Anway Squire Sanders & Dempsey LLP  
 Mr. Ondřej Sekanina Squire Sanders & Dempsey LLP

13. At the outset of the preliminary hearing, the parties expressed their agreement that the Tribunal had been properly constituted (Arbitration Rule 6) and stated that they had no objections in this respect. At that meeting, in accordance with Arbitration Rule 41(3), after having heard the parties' positions and following deliberations, the Tribunal proposed the following timetable for the written and oral proceedings, to which the parties agreed:

- The Claimant shall file its Memorial by May 25, 2007;
- The Respondent shall file its Memorial on Jurisdiction by July 25, 2007;
- The Claimant shall file its Counter-Memorial on Jurisdiction by September 25, 2007;
- The Tribunal shall decide on the issue of bifurcation of the proceeding by October 12, 2007.

A(i) If the Tribunal decides to bifurcate the proceedings, then:

- The Respondent shall file a Reply on Jurisdiction by November 12, 2007;
- The Claimant shall file a Rejoinder on Jurisdiction by December 12, 2007;
- A pre-hearing conference by telephone will be held on December 20, 2007 at 5 p.m., Paris time; and
- A hearing on jurisdiction will be held on January 17 and, if necessary, January 18, 2008.

A(ii) If the Tribunal decides to bifurcate the proceedings and the Tribunal does not require further submissions on jurisdiction, then:

- It was decided after the first session and an exchange of communication between the arbitrators and with the parties that a pre-hearing conference by telephone will be held on November 13, 2007 at 9 a.m. Washington, D.C. time; and
- A hearing on jurisdiction will be held on November 30 and, if necessary, on December 1, 2007.

B. If the Tribunal decides to join the jurisdictional objections to the merits of the case, then:

- The Respondent shall file a Counter-Memorial by January 12, 2008;
- The Claimant shall file a Reply by March 12, 2008;
- The Respondent shall file a Rejoinder by May 12, 2008;
- A pre-hearing conference by telephone will be held on May 26, 2008 at 5 p.m., Paris time; and
- A hearing on jurisdiction and the merits will be held in the period June 16 to 19, 2008.

Other procedural issues identified in a provisional agenda circulated by the Tribunal's Secretary in advance of the hearing were also discussed and agreed. Among other things, it was agreed that the applicable Arbitration Rules would be those in force as of April 10, 2006 and that the place of proceedings would be the seat of the Centre in Washington, D.C. without prejudice to the possibility of holding sessions at a different venue, after consultations with the parties.

14. The question of the requested provisional measures was also raised and pleaded. The parties made presentations of 20 minutes each regarding the Claimant's request for provisional measures, as well as rebuttal arguments of 5 minutes each. It was decided that the parties would submit, within 10 days of the first session, by March 5, 2007, brief summaries setting out the parties' respective oral arguments, which both parties did. The Tribunal, after having reviewed the Claimant's and Respondent's arguments, both as presented in writing and orally, as well as the applicable law, rendered a Decision on Provisional Measures, dated April 6, 2007, in which it denied the requested measures.
15. In accordance with the agreed schedule, the parties duly filed the following submissions:

- Claimant's Memorial by May 25, 2007;
  - Respondent's Memorial on Jurisdiction by July 25, 2007;
  - Claimant's Counter-Memorial on Jurisdiction by September 25, 2007.
16. On October 11, 2007, after due consideration of the parties' submissions, the Arbitral Tribunal issued Procedural Order No. 1, in which the Tribunal decided to bifurcate the proceedings. That Procedural Order suspended the proceedings on the merits to deal with the jurisdictional objections raised by the Czech Republic as a preliminary matter pursuant to Article 41(2) of the ICSID Convention and Arbitration Rule 41(3) and (4). In that regard, the Tribunal considered that a second round of written pleadings was necessary.
  17. The proceeding continued according to the timetable set out in Procedural Order No. 1. The Respondent filed as scheduled its Reply on Jurisdiction by November 12, 2007. However, a week later, by letter dated November 12, 2007, ICSID was informed that the Claimant's third counsel, Mr. Thomas Johnson from Covington & Burling LLP, who had been appointed by the Claimant after the termination of Pepper Hamilton's mandate on July 20, 2006, had resigned from his functions, and that the Claimant consequently requested a suspension of the proceeding. As the Claimant had not paid its part of the required advance to the Centre and following a notice of default, the proceeding was suspended on December 18, 2007, in accordance with ICSID Administrative and Financial Regulation 14(3)(d).
  18. Later, on May 22, 2008, the Tribunal learned from ICSID that the payment of US\$ 100,000.00 due by the Claimant had been paid. The Tribunal was also informed that the law firm of Covington & Burling had resumed its representation of the Claimant. Thus, the procedure was resumed on May 22, 2008, but the initial timetable was no longer workable.
  19. A new timetable was agreed between the parties and accepted by the Tribunal. The Claimant's Rejoinder on Jurisdiction was filed on June 27, 2008, and the Hearing on jurisdiction was planned for September 1, 2008.

20. The Hearing on jurisdiction (hereafter “Hearing”) was indeed held on September 1, 2008, at the European Headquarters of the World Bank in Paris. In addition to the members of the Tribunal and the Secretary, the following persons were present at the Hearing:

Attending on behalf of the Claimant

Mr. O. Thomas Johnson	Covington & Burling LLP
Mr. David Shuford	Covington & Burling LLP
Mr. Luboš Kutiš	General Director of BENet Praha spol. s r.o.
Mr. Pavel Klimeš	Demut, Klimes, Mader Law Office
Mr. Miloš Gerstner	Translator

Attending on behalf of the Respondent

Mr. Radek Šnábl	Ministry of Finance of the Czech Republic
Mr. George von Mehren	Squire Sanders & Dempsey LLP
Mr. Stephen P. Anway	Squire Sanders & Dempsey LLP
Mr. Ondřej Sekanina	Squire Sanders & Dempsey LLP
Mr. Rostislav Pekař	Squire Sanders & Dempsey LLP

## II. RELEVANT FACTS REGARDING JURISDICTION

21. The factual background of this arbitration is summarized hereunder to the extent necessary to rule on the jurisdictional issues arising out of the Respondent’s objections to jurisdiction.

### *A. THE PARTIES*

22. The Claimant is an Israeli company registered under the laws of the State of Israel on October 14, 2001, with Israeli corporation number 51-3153502. It has its permanent seat at 50 Dizeongoff Street, Tel Aviv, Israel. Phoenix is entirely owned by Mr. Vladimír Beňo. On December 26, 2002, two contracts were entered into by the Claimant, in order to purchase the holdings of BG and BP. On the one hand, an “Agreement for the Transfer of a Business Share” between Claimant, as purchaser, and Benreal s.r.o., as seller, effectuated the sale of BP to Claimant. On the other hand, a “Share Purchase Agreement” was agreed by the Claimant, as purchaser, and BP and Yugo Alloys s.r.o., as sellers, by which the Claimant became owner of BG. Thus, Phoenix became the sole owner of interest in two Czech companies, Benet Praha and Benet Group on December 26, 2002.

The Claimant's ownership of BP was registered in the Czech Commercial Register on March 10, 2003 and its ownership of BG was registered on April 7, 2003.

23. The Respondent is the Czech Republic. The Czech Republic is a sovereign State and a Contracting Party to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereafter "Washington Convention" or "ICSID Convention"), which it ratified on March 23, 1993, and to the BIT with Israel, which entered into force on March 16, 1999.

*B. THE FACTS*

24. Some of the factual background has already been presented in the Decision on Provisional Measures rendered by this Tribunal on April 6, 2007, but will be recounted for the sake of completeness in this Award.
25. BP and its subsidiary BG were involved in trading of ferroalloys, and their businesses were complementary: BP was established to be active in the import and export of these substances, by purchasing ferroalloys on the international market and providing them to manufactures or other brokers in the Czech Republic; BG for its part purchased large quantities of ferroalloy component materials on the international market and also sold them on the international market, these goods rarely entering the Czech Republic. BG asserts that it is the owner of two Czech companies, Cash & Capital a.s. (hereafter "C&C") and Druha Slevarna Blansko a.s. (hereafter "DSB"), which it acquired from a Czech national.
26. Certain new information concerning the present ownership of the Czech companies was given by the Claimant in passing in footnote 2 to its Rejoinder on Jurisdiction, where the Claimant indicated that it had sold its interest in BP on January 8, 2008. This information was discussed during the Hearing. Counsel for the Respondent elaborated on the sale of BP in the following manner:

"We learnt this reading footnote 2 of Phoenix's rejoinder on jurisdiction, when it said that claimant had sold back Benet Praha. But I invite you to look at footnote 2. It doesn't tell us to whom the claimant sold Benet Praha, it doesn't tell us why

it sold Benet Praha and it doesn't tell us for how much. Indeed, it doesn't even mention this fairly momentous event at all in the rest of its brief. So we did some investigating.

We ... looked at the Czech Commercial Registry in connection with the sale and we discovered three very interesting facts ...

First, the ultimate owner of the seller, ie the claimant, is in fact Mr. Beno ...

Second, we found out to whom claimant sold Benet Praha: back to the same entity from which claimant bought it in 2002, Mr. Beno's wife's company ...

Third, ... we learnt how much claimant sold Benet Praha for. You guessed it: the exact same price that it purchased it for in December 2002, \$4,000.”<sup>4</sup>

27. The Claimant did not deny the existence of that transaction, the consequence of which being that Benet Praha was at the time of its purchase by Phoenix and is now again indirectly owned by Mr. Beňo's wife through the Czech company called Benreal, of which she is the sole owner.
28. In December 2002, at the time when Phoenix purchased the two Czech companies, both BP and BG were involved in ongoing legal disputes, BG with a private party, BP with the Czech fiscal authorities.

*1. The background of Claimant's alleged investment in BG: the civil proceedings relating to the ownership actions*

29. Benet Group was involved in two lawsuits against Mr. Miroslav Raška, the subject matter of which was the ownership of C&C and DSB. These two entities were described in the following way by the Claimant in its Memorial: “C&C was a shell company that existed for the sole purpose of bidding on a manufacturing facility called CKD Blansko (hereafter “CKD Blansko”) that was owned by a bankrupt joint-stock company called CKD Blansko a.s. ... DSB was a metal foundry.”<sup>5</sup>

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<sup>4</sup> Transcript of the Hearing p. 35, lines 1-25 and p. 36, lines 1-14.

<sup>5</sup> Claimant's Memorial, p. 4.

30. To summarize these legal proceedings, it can be said that BG had executed on November 26, 2000 a series of contracts<sup>6</sup>, the objectives of which were the purchase of the two mentioned companies, C&C and DSB, from Mr. Miroslav Raška, and the subsequent bidding by C&C on the bankrupt company CKD Blansko<sup>7</sup>, which owned large parcels of land as well as a manufacturing facility. The contract for the acquisition of CKD Blansko was jointly signed by Mr. Beňo and Mr. Raška on behalf of C&C. Following disagreement between the two contractors<sup>8</sup>, the ownership of C&C, DSB and CKD Blansko – and the assets possessed by the latter company – is in dispute between a Czech company and a Czech citizen, *i.e.* between the Benet Group and Mr. Raška in the Czech courts.
31. C&C and DSB were both declared bankrupt, as stated in the Request for Arbitration: “... both C&C and DSB become bankrupt and all of their assets, estimated by an appraisal in the sum of US\$ 36,000,000 become the subject of sale in bankruptcy.”<sup>9</sup> It has to be noted that BG itself initiated the bankruptcy proceedings in order “to prevent further alienation of the companies’ property”<sup>10</sup> by Mr. Raška. BG submitted its bankruptcy petition against C&C to the Municipal Court of Prague on November 2, 2001 and joined a bankruptcy petition against DSB which was filed in the Regional Court of Hradec Kralove on April 19, 2002. The Claimant complains that it has been deprived of its

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<sup>6</sup> This was a complex operation described as such in the Claimant’s Memorial: “As part of the overall purchase of C&C and DSB, Mr. Vladimír Beňo, chairman of BG at the time, executed five contracts on BG’s behalf. The agreements were a contract for the sale of the shares of C&C by Mr. Raška to BG, a contract for the sale of the shares of DSB by Mr. Raška to BG, an agreement for the loan of CZK 80 million by BG to C&C, a security contract between BG and DSB securing the loan with DSB’s real estate, and an oral contract between BG and Mr. Raška by which Mr. Raška personally agreed to provide CZK 14 million security for the CZK 80 million loan. The share-sale contracts provided Mr. Raška with the option to repurchase the C&C and DSB shares if the CZK 80 million loan was repaid by January 30, 2001 ... The loan was not repaid, and so BG retained ownership of the companies ...”, pp. 4-5.

<sup>7</sup> Whose bankruptcy had been declared by a Czech court on August 13, 1997.

<sup>8</sup> According to the Claimant’s Memorial, “(i)t was understood by the parties to the various agreements that the CZK 80 million loan was to be the down payment paid at the time of C&C’s final and binding bid for CKD Blansko. C&C submitted its final bid for CZK 191 million on November 27, 2000, and the CZK 80 million down payment was paid. This bid was selected by the CKD Blansko bankruptcy trustee as the winning bid. Following negotiations between representatives of C&C and the bankruptcy trustee, a contract for the purchase of CKD Blansko by C&C was concluded on December 29, 2000. The contract, which was signed by Mr. Beňo and Mr. Raška on behalf of C&C, called for full payment of the additional CZK 111 million by C&C by April 30, 2001, at the latest. If C&C failed to make full payment by that date, the contract would be considered null and void and C&C would lose the CZK 80 million down payment.” p. 5.

<sup>9</sup> Request for Arbitration, § 35.

<sup>10</sup> Claimant’s Memorial, p. 13.

properties, because the Czech courts – for which the Czech Republic is internationally responsible – did not promptly resolve the private commercial dispute between BG and Mr. Raška, both alleging that they were the true owner of C&C and DSB and their respective assets.

*2. The background of Claimant's alleged investment in BP: the freeze of Benet Praha's bank accounts and the seizure of various documents*

32. BP, for its part, was engaged in an ongoing dispute with the police and the prosecutorial authorities regarding the freeze of funds in a number of bank accounts belonging to the company and the seizure of a substantial quantity of the company's accounting and business documents. It all started when a criminal investigation was commenced in April 2001 against Mr. Vladimír Beňo, who was at that time Benet Praha's Executive Officer. The investigation was related to the alleged committing of a series of tax and custom duty evasions, when importing metals into the Czech Republic. Further investigations revealed a suspicion that Mr. Beňo also engaged in income tax fraud. On the basis of an arrest warrant issued against Mr. Beňo, the Czech police took him into custody and attempted to escort him to the Office of corruption and financial crimes, but Mr. Beňo escaped police and fled to Israel, where he thereafter, on October 14, 2001, registered a new company, Phoenix Action Ltd., which is the Claimant in this case.
33. On April 24, 2001, the Czech police conducted a premises search of the head office of BG's corporate parent BP, as part of the mentioned criminal investigation. During the course of this search, the police seized a large quantity of BP's accounting and business records. As it was determined that the funds of Benet Praha were proceeds of a criminal activity, namely customs evasion, on April 25, 2001 and April 27, 2001, Czech police, with the approval of the High Prosecuting Attorney's Office in Prague and pursuant to Czech legislation, seized all of Benet Praha's assets held in CSOB Bank in the Czech Republic, as well as a substantial quantity of the company's accounting and business documents. It has to be noted that the freezing of Benet Praha's funds and the seizure of accounting and business documents were related to the criminal proceedings against Mr. Beňo. These events of 2001 are the basis for some of the claims of Phoenix before the Tribunal.

### III. THE PARTIES' POSITIONS ON JURISDICTION

#### A. *THE RESPONDENT'S POSITION*

34. According to the Czech Republic, Phoenix's allegations as to a violation of its rights as a foreign investor fall outside the jurisdiction of the Tribunal mainly because "Phoenix is nothing more than an *ex post facto* creation of a sham Israeli entity created by a Czech fugitive from justice, Vladimír Beňo, to create diversity of nationality."<sup>11</sup> The Respondent considers that "(t)his case represents one of the most egregious cases of 'treaty-shopping' that the investment arbitration community has seen in recent history. The purported investor, Phoenix, acquired the Benet Companies for the precise purpose of bringing their pre-existing and purely domestic disputes before an international judicial body", adding that "such abusive treaty-shopping is directly at odds with the fundamental object and purpose of the ICSID Convention and the BIT, which are meant to encourage *international* investment."<sup>12</sup> Because of the specificities of the case, according to the Czech Republic, "the Tribunal should exercise its equitable discretion to look beyond the shell of the corporate claimant. Such an equitable result is justified in this case because Phoenix has engaged in abusive treaty-shopping and has violated the principle of good faith, which applies to all bilateral investment treaties and the rights derived therefrom."<sup>13</sup> Its conclusion is that "this Tribunal should not elevate form over substance and simply accept Phoenix as the 'paper' claimant."<sup>14</sup>
35. From a legal point of view, the Czech Republic submits that the Tribunal should dismiss Phoenix's claim on the following jurisdiction-related grounds:

“(a) The Tribunal has no jurisdiction *ratione temporis* over Phoenix's claims arising prior to 26 December 2002;

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<sup>11</sup> Respondent's Memorial on Jurisdiction, § 3.

<sup>12</sup> Respondent's Memorial on Jurisdiction. Emphasis in the original.

<sup>13</sup> Respondent's Memorial on Jurisdiction, § 13. See also, § 112: "The sole reason for Phoenix's purported investment – indeed, perhaps its incorporation – was to subject the domestic litigation in which the Czech companies were involved to review by an international judicial body by manufacturing artificial involvement of an Israeli investor that would raise claims under the BIT. Such conduct is widely condemned in the international law community."

<sup>14</sup> Respondent's Memorial on Jurisdiction, § 118.

(b) The local remedies rule bars Phoenix's claims arising after 26 December 2002;

(c) Phoenix's alleged purchase of the Benet Companies is not an "investment" within the meaning of Article 25 of the Convention and Articles [sic] 7 of the BIT; and

(d) The Benet Companies, rather than Phoenix, are the real parties in interest, and the diversity of nationality requirement and the exclusive remedies principle are therefore not satisfied."<sup>15</sup>

36. The Respondent argues that the Tribunal has no jurisdiction *ratione temporis* over the acts committed against the Czech companies before they were acquired by Phoenix. Moreover, it maintains that the same conclusion should prevail for any alleged acts performed after this acquisition, as these acts can only be analyzed as a logical extension of the prior acts and should therefore be subjected to the same treatment.
37. As for the claims of denial of justice for acts committed after the investment was effected, the Respondent objects to the Tribunal's jurisdiction because of the non exhaustion of the local remedies. According to the Czech Republic, there has yet to be a final decision of the Czech courts and "when a claim of injury is based upon judicial action in a particular case, State responsibility only arises when there is final action by the State's judicial system as a whole"<sup>16</sup>.
38. Assuming these two objections do not prevent the Tribunal from determining that it has jurisdiction to hear the claims, whether arising before or after December 26, 2002, the Respondent presents an additional major objection to the Tribunal's jurisdiction, in that Phoenix's acquisition of BP and BG is not an "investment" within the meaning of Article 25 of the Convention and Articles 1 and 7 of the BIT. One of the arguments for denying the character of an investment to the transaction made by Phoenix is the following:

"Nor is there any allegation or evidence that Phoenix has been involved in the business activities relating to its investment. It has been, at most, a passive investor in two inactive companies. Surely that cannot suffice to satisfy the definition of "investment" under Article 25(1) of the ICSID Convention. As Dr.

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<sup>15</sup> Respondent's Memorial on Jurisdiction, § 60.

<sup>16</sup> Respondent's Memorial on Jurisdiction, § 72.

Ben Hamida has astutely observed, ‘ICSID jurisprudence is well established on the fact that capital or passive money is not enough to be protected’.<sup>17</sup>

39. The fact that it was only a passive investor is confirmed by the analysis of the Claimant’s investment: Phoenix’s investment cannot pass any of the four criteria of the so-called “*Salini test*”<sup>18</sup>, which the Respondent considers should be utilized to give some content to the notion of investment as used in the Washington Convention: according to the Respondent, there is no contribution in money, no sufficient duration, no risk and no contribution to the host State development. The Tribunal additionally has no jurisdiction because Phoenix’s alleged investment was not an investment “in connection with economic activities,” as required by Article 1(1) of the BIT.
40. Last but not least, the Respondent argues that, even if the Tribunal were not convinced by all these jurisdictional objections, Phoenix’s claims should still be dismissed because the presentation of an ICSID claim under the circumstances is abusive, as the Benet companies, not Phoenix, are the real parties in interest. When there is – as the Respondent contends is the case here – an abuse of a corporate structure, the Tribunal should look beyond the apparent facts and lift the corporate veil.
41. According to the Reply of the Czech Republic, the Claimant’s Counter-Memorial on Jurisdiction leaves the following facts entirely uncontroverted:

“Phoenix’s purported “investment” in the Czech Republic was made after a former-Czech national, Vladimír Beňo, fled from the Czech police to Israel;

After fleeing to Israel, Mr. Beňo incorporated Phoenix and purchased the shares of the two Czech companies that he controlled (and continues to control), Benet Praha and Benet Group;

Mr. Beňo’s wife and daughter were the previous legal owners of Benet Praha and Benet Group and “sold” them to Phoenix to create the purported investment at issue in this case; and

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<sup>17</sup> Respondent’s Memorial on Jurisdiction, § 89. The citation is from Dr. Walid Ben Hamida, *Observations by Dr. Walid Ben Hamida*, STOCKHOLM INT’L ARB. REV. vol. 2005:2, p. 84.

<sup>18</sup> This routinely designates in ICSID case law certain criteria set forth in the now seminal case *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, (Italy/Morocco BIT), Decision on Jurisdiction, July 23, 2001.

The *raison d'être* of Phoenix is to create diversity of nationality in this case – *ie.*, to serve as a vehicle by which to bring pre-existing *domestic* disputes in which the Benet Companies were involved before an *international* investment tribunal.”<sup>19</sup>

42. The relief requested from the Tribunal has been reaffirmed in the Reply on Jurisdiction in the following terms:

“(a) a declaration that the Tribunal does not have jurisdiction over Phoenix’s claims;

(b) an order that Phoenix pay the costs of these arbitral proceedings, including the cost of the Arbitral Tribunal and the legal and other costs incurred by the Czech Republic, on a full indemnity basis; and

(c) interest on any costs awarded to the Czech Republic, in an amount to be determined by the Tribunal.”<sup>20</sup>

43. The Respondent heavily insisted during the Hearing on the importance of the present case and the duty of the Tribunal to deny its jurisdiction, “... you will be the first Tribunal to decide whether a foreign entity can be created for the sole purpose of creating diversity of nationality and hence to achieve ICSID jurisdiction.”<sup>21</sup> And it added:

“We submit that if the Tribunal holds that it does have jurisdiction over Phoenix’s claims, it would send a message to the world that there is virtually no limit to ICSID jurisdiction. A domestic dispute or its continuation would always be reviewable by an ICSID Tribunal if the ultimate owner of a domestic company can simply incorporate a foreign entity who then buys the shares of the domestic company embroiled in the dispute.”<sup>22</sup>

#### ***B. THE CLAIMANT’S POSITION***

44. Before analyzing the position of the Claimant on the jurisdictional issues, it seems apposite to summarize the acts complained of. As far as BG is concerned, Phoenix contends that it has suffered a denial of justice, because of the lengthy civil litigation procedure still pending in the Czech courts. As far as BP is concerned, four types of alleged illegal acts are invoked by Phoenix: the failure to terminate the freeze, the failure

<sup>19</sup> Respondent’s Reply on Jurisdiction, § 6. Emphasis by the Respondent.

<sup>20</sup> Respondent’s Reply on Jurisdiction, § 144.

<sup>21</sup> Transcript of the Hearing, p. 11, lines 17-20.

<sup>22</sup> Transcript of the Hearing, p. 19, lines 6-13.

to terminate the document seizure, the violation of the obligation to accord fair and equitable treatment (hereafter “FET”), because BP had to respond to customs assessments without the benefit of access to its business records, the violation of FET, because BP had to respond to two tax assessments without the benefit of access to its business records. The Benet Group investment is the sole basis for the first claim, which is the denial of justice claim. The Benet Praha investment is the sole basis for the claims based on the problems with the funds freeze, the document seizure and the tax and customs assessments.

45. Concerning the freeze of the assets of BP, it has to be added here that, in footnote 2 already mentioned to its Rejoinder to Jurisdiction, the Claimant indicated that the funds were released on March 6, 2008, but that it still seeks compensation for Respondent’s wrongful freezing of those funds until January 8, 2008 – the date on which Phoenix sold its interest in BP, because it was deprived of the use of its funds until that time. Also in its Rejoinder, the Claimant presented a new analysis of the acts complained of, in that it did add, to the existing list of violations already asserted, a claim for expropriation, because the assets of the bankrupt companies whose ownership is disputed in the Czech courts have been sold: “Given that the disposition of property in the bankruptcy proceeding cannot be undone pursuant to Czech law, it is additionally possible now to characterize Phoenix Action’s claims related to the Ownership Actions as sounding in an expropriation or a measure having an equivalent effect to an expropriation, without payment of prompt, adequate, and effective compensation in violation of Article 5 of the BIT.”<sup>23</sup>
46. These different claims can only be entertained by the Tribunal if the latter has jurisdiction over them, which the Claimant contends is the case.
47. Although the Claimant had defended for a certain period of time the theory of an assignment of the claims of BP and BG to Phoenix, this analysis has been later abandoned. This was clearly emphasized, for example, in the Claimant’s Rejoinder on Jurisdiction, where it was submitted that “ ... there has been no such transfer of a

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<sup>23</sup> Claimant’s Rejoinder on Jurisdiction, § 29.

claim.”<sup>24</sup> Phoenix thus contends that it has brought before the Tribunal its own claims that have arisen since it has made its investment in the Czech Republic.

48. What are then the claims brought to the Tribunal by Phoenix? In its Counter-Memorial on Jurisdiction, the Claimant lays great emphasis on acts or omissions of the Czech Republic performed after the purchase of BP and BG by Phoenix. In answering to the objection to jurisdiction based on *ratione temporis* reasons, the Claimant said that “Respondent makes the unremarkable observation that ‘[t]he Tribunal is limited *ratione temporis* to judging only those acts and omissions occurring after the date of the investor’s purported investment.’ Claimant agrees; indeed, it asks the Tribunal to judge nothing else”<sup>25</sup>. In fact, the Claimant concentrates, at that stage, on the post investment events and considers that Phoenix’s BIT claims did arise after its investment on December 26, 2002, characterizing its claims in the following manner:

“Claimant does not allege that the Ownership Actions *themselves* violate the BIT, but rather alleges that the conduct of the Ownership Actions by the Czech courts since the time of the investment has violated the BIT because of unjustified and prejudicial delay in their adjudication.

Claimant does not allege that the funds freeze and document seizure *alone* violate the BIT, but rather that Respondent has violated the BIT by failing to terminate the funds freeze and document seizure over the almost five years that have passed since the investment, during which time all legitimate reasons for the continuation of the freeze and seizure have expired.

Claimant does not allege that the customs assessments and actions *alone* violate the BIT, but rather that the Respondent violated the BIT by requiring BP to respond to those assessments, after December 2002, without the benefit of its business records.

Finally, Claimant does not allege that the tax assessments *alone* violate the BIT, but rather that the Respondent violated the BIT by requiring BP to respond to the assessments, after December 2002, without the benefit of its business records.”<sup>26</sup>

Acts prior to the investment were subsequently referred to in a different way, as the Claimant states, for example, in its Rejoinder that “each and every claim raised by

<sup>24</sup> Claimant’s Rejoinder on Jurisdiction, § 29.

<sup>25</sup> Claimant’s Counter-Memorial on Jurisdiction, § 74. Footnote omitted, emphasis in the original.

<sup>26</sup> Claimant’s Counter-Memorial on Jurisdiction, § 5. Emphasis added by the Tribunal.

Phoenix Action in this case arose after its investment in the Czech Republic”<sup>27</sup>, the former acts and omissions being just referred to as a means to understand the *status quo ante* the time at which the investment was made.

49. As far as the objection to the Tribunal’s jurisdiction over a claim of denial of justice<sup>28</sup> based on the local remedies rule is concerned, the Claimant asserts that it is not jurisdictional in nature, but instead is a defence on the merits. Moreover, in the Claimant’s view, it is indeed the total failure of the Czech courts to resolve those actions that is the subject of part of Phoenix’s claims and for the other part, it stresses that the obligation to exhaust local remedies does not exist where the complaint relates to judicial inaction or a refusal to judge, as is the case here.
50. Turning then to the jurisdictional requirements of the ICSID Convention and the BIT, the Claimant briefly answers the Respondent’s objections in asserting that they are frivolous, adding that “(t)he Tribunal can and must exercise jurisdiction over this investment dispute lest it commit a manifest excess of powers.”<sup>29</sup> For the Claimant, there is not one single arbitration case in which an international tribunal has declared that “the purchase of a local company by a foreign national does not constitute an investment for purposes of Article 25 of the ICSID Convention or, for that matter, for purposes of any BIT”<sup>30</sup>. For the Claimant, nothing should be added to the text of the Washington Convention and it rejects the pertinence of the criteria of the *Salini* test, but adds that – should they be taken into account – they are nevertheless satisfied, stating, for example, in its Rejoinder, that “even accepting as legitimate the non-textual jurisdictional limitations proposed by Respondent, the Tribunal must still find that the exercise of jurisdiction over this dispute is proper.”<sup>31</sup> In other words, according to the Claimant, all criteria of the *Salini* test are present: Phoenix Action paid \$334,500 for the two companies, the purchase was for an

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<sup>27</sup> Claimant’s Rejoinder on Jurisdiction, § 72.

<sup>28</sup> In Claimant’s Memorial, it is stated that Respondent’s handling, through its courts, of the ownership disputes demonstrates at least two of three types of judicial denial of justice: “unreasonable delay” and either “pretense of form” or “gross incompetence”, p. 24.

<sup>29</sup> Claimant’s Counter-Memorial on Jurisdiction, § 9.

<sup>30</sup> Claimant’s Counter-Memorial on Jurisdiction, § 22.

<sup>31</sup> Claimant’s Rejoinder on Jurisdiction, § 33. See also, § 41: “Even if the *Salini* factors should be used in evaluating the full ownership of two host-state companies, application of those factors establishes that Phoenix Action’s ownership of BP and BG constituted an investment for purposes of the ICSID Convention.”

indefinite period, there was an anticipation of profits and a real risk involved as the companies were in a distressed situation when purchased. As far as the criteria of the contribution to the host State economy is concerned, Claimant asserts that it is not applicable outside of a State contract situation, which is not the situation in this case, and moreover that if it has not contributed to the development of the State's economy it is due to the illegal acts of the State. Moreover, the requirement of the BIT are satisfied, as the Claimant alleged to have made its investment in order to develop economic activities, *i.e.* to restart the profitability of the two Czech companies. According to the Claimant, one cannot contend, as does the Respondent, that if there is no economic activity at the time of the investment, it cannot be considered as a protected investment: "the purchase of land for future development would not qualify as an "investment" under Respondent's reasoning, because no commerce actively takes place on a piece of land that is undeveloped at the moment of the investment. But many tribunals have held that the purchase of land in fact is an investment."<sup>32</sup> The Claimant cites a number of cases in support of its contention.<sup>33</sup>

51. On this basis, the Claimant, considering that the Tribunal has jurisdiction to deal with the merits, requests the following relief: an award of compensation for losses suffered by Claimant related to C&C, which should in no event be less than CZK 951,048,000 (approximately EUR 37,500,000 at present) – this being the appraised value of CKD Blansko as of May 3, 2001; an award of compensation for losses suffered by Claimant related to the loss of BP as a working ferroalloys trading company; an order requiring Respondent immediately to unfreeze BP's funds and bank accounts; an order requiring Respondent immediately to release BP's business and accounting documents; an award of compensation for all other breaches of the BIT by Respondent, including but not limited to its imposition of tax and customs assessments on Claimant without allowing it the means necessary to defend itself against those assessments; compensation for corporate expenses, including but not limited to the more than CZK 2 million (approximately EUR 79,000,000 at present) in legal fees BP paid throughout the course

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<sup>32</sup> Claimant's Counter-Memorial on Jurisdiction, § 64.

<sup>33</sup> *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004; *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, February 17, 2000.

of the 171 customs assessments; and an order requiring Respondent to bear the costs of the present arbitration. When asked, during the Hearing, by a member of the Tribunal whether all the requests for relief sought were still valid after the submissions, pleadings and the evolution of some aspects of the situation<sup>34</sup>, counsel for Claimant answered in the following manner:

“The short answer to that question is: all of the requests for relief remain operative except for the request for an order requiring respondent immediately to unfreeze BP’s funds and bank accounts. That has happened.”<sup>35</sup>

#### IV. PRELIMINARY MATTERS

52. Article 41 of the ICSID Convention makes plain that the Tribunal is the judge of the Centre’s jurisdiction and its own competence. In order to determine the existence of its jurisdiction in any given case, an ICSID tribunal has to analyze the fulfillment of the requirements of the Washington Convention, and the requirements of the contract, the national law, the BIT or the multilateral treaty providing for the submission of investment disputes to ICSID arbitration.

##### *A. THE TEXTUAL BASES OF JURISDICTION*

53. The relevant jurisdictional requirements of the ICSID Convention are contained in its Article 25, which reads, in pertinent part, as follows:

“(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) “National of another Contracting State” means:

any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as

<sup>34</sup> Question of Professor Juan Fernández-Armesto, Transcript of the Hearing, p. 171, lines 20-22.

<sup>35</sup> Transcript of the Hearing, p. 176, lines 16-20.

on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.”

54. In other words, in order for the Centre to have jurisdiction over a dispute, three – well-known – conditions must be met, according to Article 25, to which one must add a condition resulting from a general principle of law, which is the principle of non retroactivity:

- first, a condition *ratione personae*: the dispute must oppose a Contracting State and a national of another Contracting State;
- second, a condition *ratione materiae*: the dispute must be a legal dispute arising directly out of an investment;
- third, a condition *ratione voluntatis*, *i.e.* the Contracting State and the investor must consent in writing that the dispute be settled through ICSID arbitration;
- fourth, a condition *ratione temporis*: the ICSID Convention must have been applicable at the relevant time.

55. The jurisdictional requirements of the BIT are contained in its Article 7, with further precisions in Articles 1 and 3. Article 7 reads in pertinent parts:

“1. Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment made in the territory of the latter shall be subject to 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, the investor shall be entitled to submit the dispute to:

a) a court of competent jurisdiction of the Contracting Party in whose territory the investment was made; or

b) the International Centre for the 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 March 18, 1965; or

c) an arbitrator or international ad hoc arbitral Tribunal as agreed by the parties to the dispute. The arbitral Tribunal shall be established according to the principles contained in Article 8.”

56. In addition, Article 1(1) and 1(3) of the BIT in turn defines the terms “investment” and “investor” as regards Israeli investors’ investments in the Czech Republic. Article 1(1) of the BIT defines the term “investment” as follows:

“1. The term “investment” shall comprise any kind of assets invested in connection with economic activities by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter and shall include, in particular, though not exclusively:

a) movable and immovable property, as well as any other rights in rem, in respect of every kind of asset such as mortgages, liens, pledges and similar rights;

b) rights derived from shares, bonds and other kinds of interests in companies;

c) claims to money or to any performance having an economic value associated with an investment;

d) intellectual property rights, including copyrights, trademarks, patents, industrial designs, technical processes, know-how, trade secrets, trade names and goodwill associated with an investment;

e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.”

Article 1(3) of the BIT defines the term “Israeli investor” as follows:

“a) natural persons who are nationals of the State of Israel in accordance with its laws who are not also nationals of the Czech Republic in accordance with its laws; or

b) legal entities incorporated or constituted in accordance with Israeli law and having their permanent seat in the territory of the State of Israel.”

57. In other words, the essential jurisdictional requirements under the Israel/Czech Republic BIT, to which one must also add a condition resulting from the general principle of law of non retroactivity, are:

- first, a condition *ratione personae*: the dispute must oppose a Contracting State and a national of another Contracting State;
- second, a condition *ratione materiae*: there must exist a dispute in connection with an investment, *i.e.* with “any kind of assets invested in connection with economic activities”;
- third, a condition *ratione temporis*: the BIT must have been applicable at the relevant time.

***B. THE BURDEN OF PROOF AT THE JURISDICTIONAL LEVEL***

58. The Claimant considers that the Tribunal has to accept for jurisdictional purposes the facts as alleged by the Claimant, stating that “Respondent, throughout this objection, seeks to require the Claimant to present evidence of certain facts supporting the Tribunal’s jurisdiction. There is quite simply no place for such evidentiary determinations at the jurisdictional phase of a proceeding.”<sup>36</sup> Again, in its Rejoinder on Jurisdiction, the Claimant asserts, when presenting the factual background of the case as it sees it, that “Claimant here merely summarizes the factual allegations supporting the Tribunal’s jurisdiction and Phoenix Action’s claims, which the Tribunal is required to accept for the

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<sup>36</sup> Claimant’s Counter-Memorial on Jurisdiction, § 28.

purposes of its jurisdictional determination.”<sup>37</sup> It strongly opposes the position of the Respondent when stating that “the weight of authority in prior investment dispute cases indicates that all facts must be accepted as alleged by a claimant for purposes of the tribunal’s jurisdictional determination. Contrary to Respondent’s contention, there is no jurisdictional-fact versus merits-fact dichotomy in the jurisdictional phase.”<sup>38</sup>

59. The Respondent indeed considers, on the contrary, that “(u)nder well-settled international investment law, the burden of proof applicable at the jurisdictional stage of a proceeding is twofold: (i) the claimant must prove the facts necessary for the establishment of jurisdiction; and (ii) the claimant must establish a *prima facie* claim on the merits.”<sup>39</sup>
60. In the Tribunal’s view, it cannot take all the facts as alleged by the Claimant as granted facts, as it should do according to the Claimant, but must look into the role these facts play either at the jurisdictional level or at the merits level, as asserted by the Respondent.
61. If the alleged facts are facts that, if proven, would constitute a violation of the relevant BIT, they have indeed to be accepted as such at the jurisdictional stage, until their existence is ascertained or not at the merits level. On the contrary, if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage. For example, in the present case, all findings of the Tribunal to the effect that there exists a protected investment must be proven, unless the question could not be ascertained at that stage, in which case it should be joined to the merits.
62. This double approach is routinely followed by arbitral tribunals. The alleged facts complained of have to be accepted *pro tem* at the jurisdictional phase. Recently, the tribunal in *Saipem v. Bangladesh*<sup>40</sup> stated:

“The Tribunal’s task is to determine the meaning and scope of the provisions upon which [the claimant] relies to assert jurisdiction and to assess whether the

<sup>37</sup> Claimant’s Rejoinder on Jurisdiction, § 8.

<sup>38</sup> Claimant’s Rejoinder on Jurisdiction, § 16.

<sup>39</sup> Respondent’s Reply on Jurisdiction, § 23.

<sup>40</sup> *Saipem v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007, § 91. See also for the same approach, *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, September 5, 2007, §§ 118-119.

facts alleged by [the claimant] fall within those provisions or would be capable, if proven, of constituting breaches of the treaty obligations involved. In performing this task, the Tribunal will apply a *prima facie* standard, both to the determination of the meaning and scope of the relevant BIT provisions and to the assessment whether the facts alleged may constitute breaches of these provisions. In doing so, the Tribunal will assess whether [the claimant's] case is reasonably arguable on its face. If the result is affirmative, jurisdiction will be established but the existence of breaches will remain to be litigated on the merits.”<sup>41</sup>

It is quite clear that the tribunal refers here to facts capable of being analyzed as a breach of the BIT, and not to facts whose existence is necessary to support jurisdiction.

63. If, on the contrary, the alleged facts are facts on which the jurisdiction of the tribunal rests, it seems evident that the tribunal has to decide on those facts, if contested between the parties, and cannot accept the facts as alleged by the claimant. The tribunal must take into account the facts and their interpretation as alleged by the claimant, as well as the facts and their interpretation as alleged by the respondent, and take a decision on their existence and proper interpretation. To take a simple example, if under a BIT entered into by Italy, a tribunal only has jurisdiction if the claimant is an Italian investor and if, at the jurisdictional level, a claimant asserts that he is Italian, and the respondent alleges that he is not, the tribunal cannot simply accept the facts as asserted by the claimant and confirm its jurisdiction, but it has to make a decision in order to verify whether or not it has jurisdiction *ratione personae* over the investor, based on his Italian nationality. This unavoidable analysis has been followed by several international tribunals, like for example the ICSID tribunal in *Inceysa Vallisoletana S.L. v. Republic of El Salvador*:

“If, in order to rule on its own competence, the Arbitral Tribunal is obligated to analyze facts and substantive normative provisions that constitute premises for the definition of the scope of the Tribunal's competence, then it has no alternative, but to deal with them.”<sup>42</sup>

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<sup>41</sup> See also, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, where the tribunal articulated the relevant *prima facie* standard at the jurisdictional stage of the proceeding: “The Tribunal should be satisfied that, if the facts or the contentions alleged by [the claimant] are ultimately proven true, they would be capable of constituting a violation of the BIT.”, Decision on Jurisdiction, November 14, 2005, § 194.

<sup>42</sup> *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, August 2, 2006, § 155. See also what Sir Franklin Berman QC stated in his dissenting opinion in the case *Industria Nacional de Alimentos*, called the “*Lucchetti*” case: “Factual matters can or should be provisionally accepted at the preliminary phase, because there will be a full opportunity to put them to the test definitively later on. But if particular facts are a

64. In sum, the Tribunal considers that as a general approach, it is correct that factual matters should provisionally be accepted at face value, since the proper time to prove or disprove such facts is during the merits phase. But when a particular circumstance constitutes a critical element for the establishment of the jurisdiction itself, such fact must be proven, and the Tribunal must take a decision thereon when ruling on its jurisdiction. In our case, this means that the Tribunal must ascertain that the prerequisites for its jurisdiction are fulfilled, and that the facts on which its jurisdiction can be based are proven.

*C. THE JURISDICTION RATIONE PERSONAE, VOLUNTATIS AND TEMPORIS*

65. At the outset, the Tribunal notes that in this case, for the jurisdiction *ratione personae*, there is no discussion about the Israeli nationality of Phoenix, which has been registered in Israel on October 14, 2001, and has its permanent seat in Tel Aviv, Israel.
66. In the same manner, for the jurisdiction *ratione voluntatis*, there is neither any discussion of the fact that the Czech Republic gave its consent to ICSID arbitration in the Israeli-Czech BIT, while the Claimant has manifested its consent in bringing a request for arbitration to the Centre.
67. A further jurisdictional matter can be easily disposed of. Although it is not entirely clear whether or not the Claimant still asserts some claims arising before its purchase of its participation in the Czech companies, the Tribunal cannot assert any jurisdiction over such claims. It does not need extended explanation to assert that the Tribunal has no jurisdiction *ratione temporis* to consider Phoenix's claims arising prior to December 26, 2002, the date of Phoenix's alleged investment, because the BIT did not become applicable to Phoenix for acts committed by the Czech Republic until Phoenix "invested" in the Czech Republic.

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critical element in the establishment of jurisdiction itself, so that the decision to accept or to deny jurisdiction disposes of them once and for all for this purpose, how can it be seriously claimed that those facts should be assumed rather than proved?", *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, Dissenting Opinion of Franklin Berman QC, September 5, 2007, § 17.

68. The Tribunal is limited *ratione temporis* to judging only those acts and omissions occurring after the date of the investor's purported investment. The proposition that bilateral investment treaty claims cannot be based on acts and omissions occurring prior to the claimant's investment results from the nature of the host State's obligations under a bilateral investment treaty. All such obligations relate to the host State's conduct regarding the investments of nationals of the other contracting party. Therefore, such obligations cannot be breached by the host State until there is such an investment of a national of the other State. As a result, the Tribunal lacks jurisdiction for acts or omissions that occurred before December 26, 2002.
69. The Tribunal notes that a similar approach is also to be found in the decision by a NAFTA tribunal in *Gami Inv., Inc. v. The Government of the United Mexican States*, stating unambiguously that "NAFTA arbitrators have no mandate to evaluate laws and regulations that predate the decisions of a foreigner to invest."<sup>43</sup>
70. The same analysis necessarily implies that the Tribunal lacks jurisdiction for acts directed against BP and its subsidiary BG, after the sale of BP – and consequently of its interests in BG – to Benreal, on January 8, 2008, as it is not contested that there was no longer any investment of the Claimant after that date.
71. In conclusion, this Tribunal has no jurisdiction *ratione temporis* over any alleged claims that predate the decision of Phoenix to invest in the Czech companies on December 26, 2002, or postdate the sale of the investment back to a Czech company on January 8, 2008<sup>44</sup>.

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<sup>43</sup> *Gami Inv., Inc. v. The Government of the United Mexican States*, UNCITRAL-NAFTA, Final Award, November 15, 2004, § 93, available at [www.investmentclaims.com](http://www.investmentclaims.com).

<sup>44</sup> Interestingly, a similar question was raised in a recent UNCITRAL case, *Société Générale v. Dominican Republic*, (hereafter *Société Générale*), UNCITRAL, LCIA Case No. UN7927 (France-Dominican Republic BIT), Preliminary Objections to Jurisdiction, September 19, 2008. This case arose after the parties had made their submissions, and for this reason, the Tribunal does not rely on it for its decision, but it considers interesting to point to the convergence of the reasoning in that case with the one adopted in this Award by the Tribunal. In this case, the French bank Société Générale bought some shares, later claimed as being a protected investment under the Agreement between the Government of the French Republic and the Government of the Dominican Republic on the Reciprocal Promotion and Protection of Investments (hereafter "the treaty"), which entered into force on January 23, 2003. Société Générale acquired its investment on November 12, 2004. The French bank's argument was that its rights were protected as from when the acts and events took place, even if it was before the treaty entered into force or it had

72. The Tribunal will therefore concentrate on the claims presented to the Tribunal for acts or omissions committed while the alleged investment belonged to the Claimant and analyze whether they enter into its jurisdiction *ratione materiae*.
73. In this arbitration, the main question to answer at this stage is whether the Tribunal has jurisdiction *ratione materiae*, *i.e.* whether there is a legal dispute arising directly out of an investment, and this is the question on which the Tribunal will concentrate. In Section V, the Tribunal will carry out an abstract analysis and interpretation of the definition of investment, as set forth in the ICSID Convention and in the BIT between Israel and the Czech Republic. In Section VI, the Tribunal will then apply its findings to the specific set of facts of this arbitration, in order to come to a conclusion whether it has or it lacks jurisdiction *ratione materiae*.

#### V. THE TRIBUNAL'S GENERAL ANALYSIS OF JURISDICTION *RATIONE MATERIAE*

74. It is common ground between the parties that the jurisdiction of the Tribunal is contingent upon the fulfillment of the jurisdictional requirements of both the ICSID Convention and the relevant BIT. As stated in a recent ICSID case, “(u)nder the double-barrelled test, a finding that the Contract satisfied the definition of “investment” under the BIT would not be sufficient for this Tribunal to assume jurisdiction, if the Contract failed to satisfy the criterion of an “investment” within the meaning of Article 25.”<sup>45</sup> This double test entails that the jurisdiction *ratione materiae* of the Tribunal rests on the intersection of the two definitions.
75. It is not disputed that the interpretation of the ICSID Convention and of the BIT is governed by international law, including the customary principles of interpretation

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acquired the investment as a French national. The Respondent, the Dominican Republic, on the contrary, contended that the treaty applied only in respect of French investors and that the Claimant could not claim for acts which took place before the date it became an investor, as there was then no bond of nationality. The decision of the tribunal was unambiguous:

“... the treaty violation falling under the Tribunal’s jurisdiction must have occurred after the entry into force of the Treaty and the investor became its beneficiary as an eligible national of the relevant Contracting Party ... Accordingly, the Tribunal lacks jurisdiction over acts and events that took place before the Claimant acquired the investment, that is on November 12, 2004, at which time the investment became protected under the Treaty to the benefit of French nationals and companies only.”

<sup>45</sup> *Malaysian Historical Salvors Sdn, Bhd v. Malaysia*, ICSID Case No. ARB/05/10, Award, May 28, 2007, § 55.

embodied in the Vienna Convention on the Law of Treaties and the general principles of international law.

76. According to Article 31 of the Vienna Convention on the Law of Treaties, which the International Court of Justice has repeatedly described as the expression of customary international law, “(a) treaty shall be interpreted *in good faith* in accordance with *the ordinary meaning* to be given to its terms *in their context* and *in the light of its object and purpose*” (Article 31. 1)<sup>46</sup>.
77. Also, international agreements like the ICSID Convention and the BIT have to be analyzed with due regard to the requirements of the *general principles of law*, such as the principle of non-retroactivity or the principle of *good faith*, also referred to by the Vienna Convention. This has been stated for the WTO law stemming from the Marrakech Agreements of 1994:

“States in their treaty relations, can contract out of one, more or in theory, all rules of general international law (other than those of *jus cogens*), but they cannot contract out of the system of international law. As soon as States contract with one another, they do so automatically and necessarily within the system of international law.”<sup>47</sup>

This has been stated also with force by the Appellate Body of the WTO Dispute Settlement Mechanism in its first rendered decision, where it stated:

“The General Agreement is not to be read in clinical isolation from public international law”<sup>48</sup>.

78. It is evident to the Tribunal that the same holds true in international investment law and that the ICSID Convention’s jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law, and its general principles. To take an extreme example, nobody would suggest that ICSID protection

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<sup>46</sup> Emphasis added.

<sup>47</sup> Jost Pauwelyn, “Role of Public International Law in the WTO Law”, 95, AJIL, 2001, 539.

<sup>48</sup> Appellate Body Report: *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, p. 18. See also, Jost Pauwelyn, “Role of Public International Law in the WTO Law”, 95, AJIL, 2001, 539: “States in their treaty relations, can contract out of one, more or in theory, all rules of general international law (other than those of *jus cogens*), but they cannot contract out of the system of international law. As soon as States contract with one another, they do so automatically and necessarily within the system of international law.”

should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.

79. In general, it is very easy to ascertain the existence of an investment: for example, nobody would contest that the construction and operation of a power plant is an investment. In this hypothesis, a reference to the ordinary meaning of what constitutes an investment is sufficient and no sophisticated analysis based on several criteria is needed. Sometimes, the nature of the economic operation is less evident or has different components and the existence of an investment is more difficult to ascertain. For that purpose, ICSID case law has developed various criteria to identify the pertinent elements of the notion of investment. Sometimes, however, in a minority of cases, this *factual analysis of the existence of an investment*, relying on the ordinary meaning of the term “investment”, is insufficient to detect an economic operation which is objectively an investment, but which is not a protected investment because, for one reason or another, it is not the purpose of the multilateral or bilateral treaty of protection of investments to extend protection through international arbitration to such an investment. If doubts are raised with regard to the existence of a protected investment, the Tribunal has to conduct a *contextual analysis of the existence of a protected investment*, in order to decide whether or not the investment satisfies certain criteria additional to those analyzed above, that grant it international protection through the ICSID mechanism and the BIT. In other words, in order to conclude that an economic operation, which by its nature is or looks like an investment, is indeed an investment deserving international protection, the Tribunal must also take into consideration *the purpose of the international protection of the investment*, whether it is the specific purpose of the ICSID system or the general purpose of the protection granted by international law.
80. The parties differ as to the interpretation of the facts and of the applicable law, the Claimant insisting that there is indeed an investment, the Respondent denying that such an investment has been made. In order to perform this interpretation, the Tribunal will first analyse the ordinary meaning of the notion of investment under the ICSID Convention, and will then ascertain which investments are protected in view of their

object and purpose, before looking at the BIT definition. Finally, in order to complete the determination of protected investments under the international arbitration mechanism, the Tribunal will interpret these two international agreements in the light of the general principles of international law.

*A. THE DEFINITION OF INVESTMENT UNDER THE ICSID CONVENTION*

81. It is well known that the ICSID Convention contains no definition of the term “investment” used in its Article 25. According to the Claimant, as a consequence, “the Convention leaves to each Contracting State the determination of what types of economic activities are to be considered investments which it consents to submit to ICSID jurisdiction in the event of a dispute”<sup>49</sup>; the Claimant rejects the relevance of the *Salini* test<sup>50</sup>, because it introduces “non-textual jurisdictional limitations” to the ICSID definition of an investment, but at the same time insists on the fact that in any event the different criteria of the test are fulfilled. On the contrary, the Respondent contends that the definition of an “investment” in the ICSID Convention is independent from the BIT<sup>51</sup>, that in order to ascertain the existence of an investment, the *Salini* test is the reference, and that the different criteria of this test are not fulfilled.<sup>52</sup>

*1. The ordinary meaning of the notion of investment under the ICSID Convention*

82. The Tribunal cannot agree with the general statement of the Claimant proffered during the Hearing to the effect that “it was the intent of the convention's drafters to leave to the parties the discretion to define for themselves what disputes they were willing to submit to ICSID.”<sup>53</sup> There is nothing like a total discretion, even if the definition developed by ICSID case law is quite broad and encompassing. There are indeed some basic criteria and parties are not free to decide in BITs that anything – like a sale of goods or a dowry for example – is an investment. The Tribunal cannot fully agree with the Respondent

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<sup>49</sup> Claimant’s Counter-Memorial on Jurisdiction, § 23.

<sup>50</sup> See this Award, § 50.

<sup>51</sup> Respondent’s Reply on Jurisdiction, § 52.

<sup>52</sup> See this Award, § 39.

<sup>53</sup> Transcript of the Hearing, p. 129, lines 1-4.

either, as it considers that the *Salini* test is not entirely relevant and has to be supplemented. This will be further explained in the following paragraphs.

83. ICSID case law has developed various criteria in order to identify the pertinent elements of the notion of investment. The definition most frequently referred to relies on what has come to be known as the “*Salini* test”, according to which the notion of investment implies the presence of the following elements: (i) a contribution of money or other assets of economic value, (ii) a certain duration, (iii) an element of risk, and (iv) a contribution to the host State’s development.<sup>54</sup> Such approach has been used for example in the recent Decision on Jurisdiction in the *Jan de Nul* case, where the tribunal stated:

“The Tribunal concurs with ICSID precedents which, subject to minor variations, have relied on the so-called “*Salini* test”. Such test identifies the following elements as indicative of an “investment” for purposes of the ICSID Convention: (i) a contribution, (ii) a certain duration over which the project is implemented, (iii) a sharing of operational risks, and (iv) a contribution to the host State’s development, being understood that these elements may be closely interrelated, should be examined in their totality and will normally depend on the circumstances of each case.”<sup>55</sup>

84. There are some divergent approaches concerning the fourth criterion of the definition of an investment (*i.e.*, the contribution to the host State’s development). Some tribunals, adopting the “*Salini* test”, insist on its importance, even if analyzing it with flexibility.<sup>56</sup>

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<sup>54</sup> See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001 § 52. Notes omitted. See also *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction, July 23, 2001, § 53; *Jan de Nul N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006, § 91; *Helnan International Hotels A/S v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Objection to Jurisdiction, October 17, 2006, § 77; *Malaysian Historical Salvors SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, May 17, 2007, §§ 73-74.

<sup>55</sup> *Jan de Nul N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006, § 91. See also, as advocating an even more flexible approach, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (UK/Tanzania BIT), § 316: “The Arbitral Tribunal therefore considers that a more flexible and pragmatic approach to the meaning of “investment” is appropriate, which takes into account the features identified in *Salini*, but along with all the circumstances of the case, including the nature of the instrument containing the relevant consent to ICSID.” Emphasis in the original.

<sup>56</sup> The *ad hoc* Annulment Committee in *Mitchell*, for example, stated: “The *ad hoc* Committee wishes ... to specify that, in its view, the existence of a contribution to the economic development of the host State as an essential – although not sufficient – characteristic or unquestionable criterion of the investment, does not mean that this contribution must always be sizable or successful; and, of course, ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely

Some tribunals have shown scepticism toward this criterion. For example, in *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria*, the tribunal ignored this element as a separate condition, considering it inherent in the other criteria:

“ ... il paraît conforme à l’objectif auquel répond la Convention, qu’un contrat, pour constituer un investissement au sens de la disposition, remplisse les trois conditions suivantes ; il faut

- a) que le cocontractant ait effectué un apport dans le pays concerné,
- b) que cet apport porte sur une certaine durée, et
- c) qu’il comporte pour celui qui le fait un certain risque.

Il ne paraît en revanche pas nécessaire qu’il réponde en plus spécialement à la promotion économique du pays, une condition de toute façon difficile à établir et implicitement couverte par les trois éléments retenus.”<sup>57</sup>

85. It is the Tribunal’s view that the contribution of an international investment to the *development* of the host State is impossible to ascertain – the more so as there are highly diverging views on what constitutes “development”. A less ambitious approach should therefore be adopted, centered on the contribution of an international investment to the *economy* of the host State, which is indeed normally *inherent in the mere concept of investment as shaped by the elements of contribution/duration/risk*, and should therefore in principle be presumed. This analysis can also be found in the arbitral award in *Sedelmayer v. Russian Federation*, where the tribunal stated:

“It must be presupposed, however, that investments are made within the frame of a commercial activity and that investments are, in principle, aiming at creating a further economic value.”<sup>58</sup>

86. Nevertheless, depending on the circumstances, this presumption can be reversed, as is illustrated in this Award. If the investor carries out no economic activity, which is the goal of the encouragement of the flow of international investment, the operation,

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broad and also variable depending on the case.”, *Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for the Annulment of the Award, November 1, 2006, § 33.

<sup>57</sup> *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria*, ICSID Case No. ARB/05/3 (Italy/Algeria BIT), Decision, July 12, 2006 (French), § 73(iv).

<sup>58</sup> *Sedelmayer v. Russian Federation*, (Germany/Union of the Soviet Socialist Republics BIT), *ad hoc* arbitration under the Stockholm Chamber of Commerce arbitration rules, Award, July 7, 1998, § 224.

although possibly involving a contribution, a duration and some taking of risk will not qualify as a protected investment, as it does not satisfy the purpose of the ICSID Convention. This will be developed in the next paragraphs.

*2. The purpose of international protection is to protect foreign investments made in order to develop an economic activity*

87. The Tribunal wishes to recall that the object of the Washington Convention is to encourage and protect *international investment made for the purpose of contributing to the economy of the host State*. At the time of the adoption of the Washington Convention, this purpose was clearly in the forefront, and it still is today:

“... adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private *international investment* into its territories, which is *the primary purpose* of the Convention.”<sup>59</sup>

This has to be read in light of the first words of the Preamble of the ICSID Convention, referring to “... the need for *international cooperation for economic development*, and the role of private international investment therein.”<sup>60</sup>

*a. The protection of foreign investments*

88. It is common knowledge that the purpose of the ICSID system is not to protect nationals of a Contracting State against their own State: the system was clearly “designed to facilitate the settlement of disputes between States and foreign investors” with a view to “stimulating a larger flow of private international capital into those countries which wish to attract it.”<sup>61</sup>
89. It is settled jurisprudence that a national investment cannot give rise to ICSID arbitration, which is reserved to international investments and that an invalid ICSID clause signed by a national cannot be transformed into a valid ICSID clause by assignment to a foreign

<sup>59</sup> International Bank for Reconstruction and Development, *Report of the Executive Directors on the ICSID Convention*, March 18, 1965 (*Report of the Executive Directors*), § 12. Emphasis added by the Tribunal.

<sup>60</sup> Emphasis added by the Tribunal.

<sup>61</sup> *Report of the Executive Directors*, § 9.

investor. The cases of *Banro*<sup>62</sup> and *Mihaly*<sup>63</sup> concerning a foreign investor – who like a national is not entitled to protection – transferring its claims to a foreign investor so entitled are apposite here.

90. The *Banro* Tribunal made it very clear that an assignment from one company of the Banro group, the Canadian subsidiary Banro Resource, to another company of the group, the parent company Banro American, could not transform the inoperative ICSID arbitration clause contained in Article 35 of the contract concluded by the Canadian company into an operative one, of which an American parent company could avail itself:

“In order to consider the right of access to ICSID arbitration, available under Article 35, as ‘extended’ or ‘transferred’ to Banro American by applying other provisions of the Mining Convention, it would still be necessary that such right existed first for the benefit of the entity Banro Resource. Such is not the case, given that Banro Resource, a Canadian company, never had, at any time, *jus standi* before ICSID. Having never existed for the benefit of Banro Resource, the right of access to ICSID cannot be viewed as having been ‘extended’ or ‘transferred’ to its affiliate, Banro American.”<sup>64</sup>

91. The same rationale has been applied by another ICSID tribunal in the case of *Mihaly*, where the question raised was also whether a Canadian company could validly assign an ICSID claim to an American company benefiting from a BIT. The answer was clearly no:

“ ... no one could transfer a better title than what he really has. Thus, if *Mihaly* (Canada) had a claim which was procedurally defective against Sri Lanka before ICSID because of *Mihaly* (Canada)’s inability to invoke the ICSID Convention, Canada not being a Party thereto, this defect could not be perfected vis-à-vis ICSID by its assignment to *Mihaly* (USA). To allow such an assignment to operate in favour of *Mihaly* (Canada) would defeat the object and purpose of the *ICSID Convention* ...”<sup>65</sup>

92. In other words, according to ICSID case law, a corporation cannot modify the structure of its investment for the sole purpose of gaining access to ICSID jurisdiction, after damages have occurred. To change the structure of a company complaining of measures adopted

<sup>62</sup> *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema, SARL v. Democratic Republic of the Congo*, ICSID Case No. ARB/98/7, Award, September 1, 2000.

<sup>63</sup> *Mihaly International Corporation v. Sri Lanka*, ICSID Case No. ARB/00/2 (United States/Sri Lanka BIT), Award, March 15, 2002.

<sup>64</sup> *Banro*, § 5 of Section II.

<sup>65</sup> *Mihaly International Corporation v. Sri Lanka*, ICSID Case No. ARB/00/2, Award, March 15, 2002, § 24. Emphasis added.

by a State for the sole purpose of acquiring an ICSID claim that did not exist before such change cannot give birth to a protected investment.

***b. The protection of investments whose purpose is the development of an economic activity***

93. The ICSID Convention/BIT system is not deemed to protect economic transactions undertaken and performed with *the sole purpose* of taking advantage of the rights contained in such instruments, without any significant economic activity, which is the fundamental prerequisite of any investor's protection. Such transactions must be considered as an abuse of the system. The Tribunal is of the view that if the sole purpose of an economic transaction is to pursue an ICSID claim, without any intent to perform any economic activity in the host country, such transaction cannot be considered as a protected investment.
94. International investors can of course structure *upstream* their investments, which meet the requirement of participating in the economy of the host State, in a manner that best fits their need for international protection, in choosing freely the vehicle through which they perform their investment. The decision in *Tokios Tokelés v. Ukraine*<sup>66</sup> comforts this analysis, as it precisely refused to disqualify the alleged investment because it did not find an abuse of procedure. The case involved a claim against Ukraine by a Lithuanian company owned by Ukrainian nationals and the issue was to determine whether such company could be considered as a foreign investor. In their decision, the two arbitrators forming the majority recognized that "none of the Claimant's conduct with respect to its status as an entity of Lithuania constitutes an abuse of legal personality ... The Claimant manifestly did not create Tokios Tokelés for the purpose of gaining access to ICSID arbitration under the BIT against Ukraine, as the enterprise was founded six years before the BIT ... entered into force. Indeed, there is no evidence in the record that the Claimant used its formal legal nationality for any improper purpose."

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<sup>66</sup> *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004, § 56.

95. But on the other side, an international investor cannot modify *downstream* the protection granted to its investment by the host State, once the acts which the investor considers are causing damages to its investment have already been committed.

***B. THE DEFINITION OF INVESTMENT UNDER THE BILATERAL INVESTMENT TREATY***

96. At the outset, it should be noted that BITs, which are bilateral arrangements between two States parties, cannot contradict the definition of the ICSID Convention. In other words, they can confirm the ICSID notion or restrict it, but they cannot expand it in order to have access to ICSID. A definition included in a BIT being based on a test agreed between two States cannot set aside the definition of the ICSID Convention, which is a multilateral agreement. As long as it fits within the ICSID notion, the BIT definition is acceptable, it is not if it falls outside of such definition.<sup>67</sup> For example, if a BIT would provide that ICSID arbitration is available for sales contracts which do not imply any investment, such a provision could not be enforced by an ICSID tribunal.
97. Like the ICSID Convention, BITs are signed to foster the flow of international investments. The fundamental reason why the Czech Republic and Israel agreed to be bound by their BIT – just like any other two countries entering into a BIT – is, to cite the terms of the Preamble, to “intensify economic cooperation to the mutual benefit of both countries”. It is not contested that the Czech Republic and Israel have only consented to submit their disputes to arbitration, if they concern investments protected under their BIT. The Czech Republic agreed to be sued in ICSID arbitration only with respect to foreign investments that are connected with economic activity in the host State. The BITs are not deemed to create a protection for rights involved in purely domestic claims, not involving any significant flow of capital, resources or activity into the host State’s economy.
98. As quoted in paragraph 56 of this Award, according to the BIT, “(t)he term ‘investment’ shall comprise any kind of assets invested in connection with economic activities by an investor of one Contracting Party in the territory of the other Contracting Party in

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<sup>67</sup> Of the same opinion, see the tribunal in *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (UK/Tanzania BIT), Award, 24 July 2008, § 308: “... Article 25 has an autonomous meaning which cannot be expanded.”

accordance with the laws and regulations of the latter ...”. The question is raised whether this definition is a restriction or not of the ICSID notion of investment as formerly outlined, or if it is only an explicit description of elements that must be present for any investment to benefit from ICSID arbitration.

99. Before answering that question, the Tribunal will turn to the issue of the proper interpretation of the notion of investment in the general framework of the ICSID mechanism and the specific framework of the BIT, in light of the general principles of international law.

*C. THE INTERPRETATION OF THESE CONVENTIONS IN LIGHT OF THE GENERAL PRINCIPLES OF INTERNATIONAL LAW*

100. The purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host State<sup>68</sup> or investments not made in good faith, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system. In other words, the purpose of international protection is to protect legal and *bona fide* investments.

*1. The protection of foreign investments made in accordance with the laws of the host State*

101. In the Tribunal’s view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws. If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system. These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process. And it is the Tribunal’s

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<sup>68</sup> According to *Salini*, “this provision refers to the validity of the investment and not to its definition”. This conclusion is not contradictory with the one reached in this Award, which distinguishes the existence of an investment and the existence of a protected investment. *Salini*, Decision on Jurisdiction, July 23, 2001 § 46. This is indeed what *Salini* says in the next sentence: “More specifically, it seeks to prevent the BIT from protecting investments that should not be protected, particularly because they would be illegal.” And then the tribunal did indeed verify that the investment was made “in conformity with the laws in force at that time.”

view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT. This position of the Tribunal has also been adopted in the case of *Plama*, where the Tribunal was faced with the silence of the relevant treaty on the necessary conformity of a protected investment with the laws of the host country. This did not prevent it to consider that this condition had to be implied:

”Unlike a number of Bilateral Investment Treaties, the ETC [Energy Charter Treaty] does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law ... The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law.”<sup>69</sup>

In any event, the Tribunal notes that such requirement is expressly stated in the Israel/Czech Republic BIT.

102. The core lesson is that the purpose of the international protection through ICSID arbitration cannot be granted to investments that are made contrary to law. The fact that an investment is in violation of the laws of the host State can be manifest and will therefore allow the tribunal to deny its jurisdiction. Or, the fact that the investment is in violation of the laws of the host State can only appear when dealing with the merits, whether it was not known before that stage<sup>70</sup> or whether the tribunal considered it best to be analyzed as the merits stage, like in the case of *Plama*<sup>71</sup>.
103. Of course, the analysis of the conformity of the investment with the host State’s laws has to be performed taking into account the laws in force at the moment of the establishment of the investment. The State is not at liberty to modify the scope of its obligations under the international treaties on the protection of foreign investments, by simply modifying

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<sup>69</sup> *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24 (Energy Charter Treaty), Award, August 27, 2008, §§ 138-139.

<sup>70</sup> As in the case *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, in which the tribunal stated, at the merits stage (no jurisdictional objection was raised) in § 188 that “(t)he Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings”.

<sup>71</sup> In fact the tribunal in *Plama* implicitly makes the same difference as this Tribunal between an investor and a protected investor, which cannot benefit from the substantive protection of the international treaty, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, §§ 126-130.

its legislation or the scope of what it qualifies as an investment that complies with its own laws.

104. There is no doubt that the requirement of the conformity with law is important in respect of the access to the substantive provisions on the protection of the investor under the BIT. This access can be denied through a decision on the merits. However, if it is manifest that the investment has been performed in violation of the law, it is in line with judicial economy not to assert jurisdiction.
105. The principle that an investment has to be in conformity with the host State's laws has been applied by ICSID tribunals in former cases. For example, in the case of *Fraport v. The Philippines*, an ICSID tribunal denied jurisdiction, stating that it had to ascertain for itself whether for the purpose of its jurisdiction what appeared on its face as an investment could be considered as a protected investment, which required the tribunal to verify if the investment had been acquired in conformity with Philippine laws:

“With respect to a bilateral investment treaty that defines "investment", it is possible that an economic transaction that might qualify *factually and financially* as an investment (*i.e.* be comprised of capital imported by a foreign entity into the economy of another state which is party to a BIT), falls, nonetheless, outside the jurisdiction of the tribunal established under the pertinent BIT, because *legally* it is not an "investment" within the meaning of the BIT. This will occur when the transaction that might otherwise qualify as an 'investment' fails *ratione temporis*, as occurred in *Empresa Lucchetti S.A. et al v. Republic of Peru*, or fails *ratione personae*, as occurred in *Soufraki v. The United Arab Emirates*. It will also occur when the transaction fails to qualify *ratione materiae*, as occurred in *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*.”<sup>72</sup>

In that case, what the tribunal called “factually and financially” an investment was not considered as a “legally” protected investment under the ICSID regime. To deny its jurisdiction, the tribunal based itself on the following statement: “Fraport was consciously, intentionally and covertly structuring its investment in a way which it knew to be a violation of the ADL [Anti-Dummy Law].”<sup>73</sup>

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<sup>72</sup> *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25 (Germany/Philippines BIT), Award, August 16, 2007, § 306. Footnotes omitted, emphasis in the original. The reference to the manner in which domestic law was violated is also clearly an implicit reference to bad faith.

<sup>73</sup> *Id.*, § 323.

## 2. *The protection of bona fide investments*

106. 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.
107. 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 ..."<sup>74</sup> 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. 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. This is stated for example by Hersch Lauterpacht:

"There is no right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused."<sup>75</sup>

108. The idea that the international conventions granting protection to foreign investors through arbitration have to be applied in good faith was also underscored by the tribunal in *Amco Asia Corporation et al v. Indonesia*:

"... like any other conventions, a convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly or liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties ... Moreover – and this is again a general principle of law – any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged."<sup>76</sup>

<sup>74</sup> A. D'Amato, Good Faith, Encyclopedia of Public International Law, vol. 7, p. 107 (R. Bernhardt, ed. 1984).

<sup>75</sup> Hersch Lauterpacht, *Development of International Law by the International Court*, London, 1958, p. 164.

<sup>76</sup> *Amco Asia Corporation et al v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, September 25, 1983, § 14. Italicised in the original, underlined by the Tribunal.

109. The Washington Convention as well as the BIT have to be construed with due regard to the international principle of good faith.<sup>77</sup> The principle of good faith is also recognized in most, if not all, domestic legal systems. It appears therefore as a kind of “Janus concept”, with one face looking at the national legal order and one at the international legal order. And in most cases, but not in all, a violation of the international principle of good faith and a violation of the national principle of good faith go hand in hand.
110. Therefore, ICSID tribunals which have relied on this principle in order to determine whether or not there existed a protected investment have often relied on both dimensions of the principle.
111. In the Award, dated August 2, 2006, in the case *Inceysa v. El Salvador*, the tribunal made it clear that an investment not performed in good faith could not benefit from the protection of the international rules provided for in the BIT. The tribunal referred to the general principles of law, among which the principle of good faith:

“Good faith is a supreme principle, which governs legal relations in all their aspects and content ...  
El Salvador gave its consent to the jurisdiction of the Centre, presupposing good faith behavior on the part of future investors ...”<sup>78</sup>

In fact, in the Tribunal’s analysis, the *Inceysa* case was explicitly<sup>79</sup> decided relying on the domestic principle of good faith, but also on more general considerations of international public policy. The tribunal concentrated first on the violation of the national legal order:

“By falsifying the facts, *Inceysa* violated the principle of good faith from the time it made its investment and, *therefore*, it did not make it in accordance with Salvadorian law. Faced with this situation, this Tribunal can only declare its

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<sup>77</sup> See § 77 of this Award.

<sup>78</sup> *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, (hereafter *Inceysa*), Award, August 2, 2006, § 230.

<sup>79</sup> In the decision in *Inceysa*, the tribunal concluded that because the claimant did not act in good faith, it could not be considered as having made its investment in accordance with the laws of El Salvador, as required by the BIT, because the principle of good faith is embedded in all national legal systems. In the decision in *Fraport*, the tribunal emphasized the fact that the violation of the national law was perpetrated through secret agreements concerning the structuring of the foreign investment, *i.e.* the tribunal focused primarily on the violation of the national law, but added that the structuring was perpetrated through bad faith behaviour. In other words, in these two instances, the economic activity was not considered as a protected investment, as it violated the principle of good faith as embodied in the domestic legal order.

incompetence to hear Inceysa's complaint, since its investment cannot benefit from the protection of the BIT."<sup>80</sup>

It then added that the violation of the national principle of good faith was also a violation of international public policy:

"It is not possible to recognize the existence of rights arising from illegal acts, because it would violate the respect for the law which ... is a principle of international public policy."<sup>81</sup>

112. The same dual approach, finding both a violation of the national and international legal order by a behaviour not complying with good faith can be found in *Plama*:

"... the Tribunal has decided that the investment was obtained by deceitful conduct that is in violation with Bulgarian law ... It would also be contrary to the basic notion of international public policy – that a contract obtained through wrongful means (fraudulent misrepresentation) should not (sic) be enforced by a tribunal ... The Tribunal finds that Claimant's conduct is contrary to *the principle of good faith which is part not only of Bulgarian law ... but also of international law ...*"<sup>82</sup>:

113. In the instant case, no question of violation of a national principle of good faith or of international public policy related with corruption or deceitful conduct is at stake. The Tribunal is concerned here with *the international principle of good faith as applied to the international arbitration mechanism of ICSID*. The Tribunal has to prevent an abuse of the system of international investment protection under the ICSID Convention, in ensuring that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected.

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<sup>80</sup> Emphasis added. See also a reference to the "general principles of law which, as indicated, are part of Salvadorian law", *id.*, § 243.

<sup>81</sup> *Inceysa*, § 249.

<sup>82</sup> *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, §§ 143-144. Emphasis added. In the case *World Duty Free*, also, it is noticeable that the tribunal has considered the bribe given to the President of the host State in order to obtain a contract to be a violation of both the national and international legal principle. In this case, the tribunal has insisted on the international aspect of the principle, dealt with in priority before examining English and Kenyan law. The tribunal concluded that corruption is contrary to "an international public policy common to the community of nations.", *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, § 148. See also § 157.

*D. A SUMMARY OF THE FULL TEST TO DETERMINE THE EXISTENCE OF A PROTECTED INVESTMENT*

114. To summarize all the requirements for an investment to benefit from the international protection of ICSID, the Tribunal considers that the following six elements have to be taken into account:

- 1 – a contribution in money or other assets;
- 2 – a certain duration;
- 3 – an element of risk;
- 4 – an operation made in order to develop an economic activity in the host State;
- 5 – assets invested in accordance with the laws of the host State;
- 6 – assets invested *bona fide*.

115. The Tribunal wants to emphasize that an extensive scrutiny of all these requirements is not always necessary, as they are most often fulfilled on their face, “overlapping” or implicitly contained in others, and that they have to be analyzed with due consideration of all circumstances.

116. At this stage, it is now possible to analyse the definition of an “investment” given in the BIT. It is the Tribunal’s view that in referring expressly to the necessity to invest “in connection with economic activities” and to make the investment “in accordance with the laws and regulations” of the host State, the BIT does not modify in any way the ICSID notion, but only explicitly expresses two necessary elements of the test – 4 and 5 – implicit in the rules of interpretation.

**VI. THE TRIBUNAL’S ANALYSIS OF THE EXISTENCE OF A PROTECTED INVESTMENT**

117. The Tribunal will now proceed to the analysis of the different criteria it considers relevant to determine the existence of a protected investment under the ICSID mechanism.

*A. A CONTRIBUTION IN MONEY OR OTHER ASSETS?*

118. According to the Claimant, “Phoenix Action paid \$334,500 for these companies ... Since the initial investment, Phoenix Action has invested an additional \$1.37 million in

its Czech subsidiaries over the last five years to cover various operating expenses.”<sup>83</sup> To support the figures concerning the payment of the shares, the Claimant annexes three exhibits containing, in the words of the Claimant, “three confirmations of international wire transfers of funds from Phoenix Action to the pre-investment owners of BP and BG.”<sup>84</sup>

119. The question of the low price paid by Claimant for the acquisition of the shares, whose payment the Tribunal considers acknowledged by the submitted bank accounts, has been extensively discussed between the parties. The Tribunal considers that the existence of a nominal price for the acquisition of an investment raises necessarily some doubts about the existence of an “investment” and requires an in depth inquiry into the circumstances of the transaction at stake. If there is indeed a real intent to develop economic activities on that basis, the existence of a nominal price is not a bar to a finding that there exists an investment.<sup>85</sup>
120. Although some aspects of the transactions are not crystal clear and will be re-discussed later in a broader context, it can be admitted for the time being that the Claimant has, at the time of the purported investment, contributed some money for the purchase of the shares of BP and BG.
121. Shares or other participation in the capital of a company are usually considered as an investment. The Tribunal cannot accept the Respondent’s contention that “mere ownership of shares does not automatically qualify as an “investment” under Article 25(1) of the ICSID Convention.”<sup>86</sup> The Tribunal agrees on this point with the Claimant, when it declares in its Counter-Memorial on Jurisdiction that ICSID tribunals have not endorsed a distinction between full owners and majority or even minority shareholders,

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<sup>83</sup> Claimant’s Counter-Memorial on Jurisdiction, § 11.

<sup>84</sup> Claimant’s Counter-Memorial on Jurisdiction, note 11.

<sup>85</sup> As stated by the LCIA tribunal in *Société Générale*, “(t)he purchase of property for a nominal price is a normal kind of transaction the world over when there are other interests and risks entailed in the business.” *Société Générale v. Dominican Republic*, UNCITRAL, LCIA Case No. UN7927, Preliminary Objections to Jurisdiction, September 19, 2008, § 36.

<sup>86</sup> Respondent’s Reply on Jurisdiction, § 18.

who necessarily play a less than decisive role in corporate governance. For example, the first *ad hoc* Annulment Committee in *Vivendi* stated:

“It cannot be argued that CGE did not have an ‘investment’ in CAA from the date of the conclusion of the Concession Contract, or that it was not an ‘investor’ in respect of its own shareholding, whether or not it had overall control of CAA. Whatever the extent of its investment may have been, it was entitled to invoke the BIT in respect of conduct alleged to constitute a breach ...”<sup>87</sup>

122. Some concern has indeed been voiced by international tribunals, and is shared by this Tribunal, that not any minor portion of indirectly owned shares should necessarily be considered as an investment. In *Enron v. Argentina*, the Claimants had a 35,263% indirect ownership of the shares of an Argentine company through a complex corporations’ structure. The tribunal considered this as an investment, while adding a *caveat*:

“The Tribunal notes that while investors can claim in their own rights under the provisions of the treaty, there is indeed a need to establish a cut-off point beyond which claims would not be permissible as they would only have a remote connection to the affected company.”<sup>88</sup>

This can however not be a bar to consider the ownership by Phoenix of *the full property* of BP and BG as an investment.

123. The Tribunal agrees therefore with the Claimant that there is “no case holding that the acquisition of a local corporation is not an investment”<sup>89</sup>, and does not consider that the property of two Czech companies by a foreign company can be summarily dismissed as an investment, without a more in-depth inquiry. In other words, the acquisition of the two

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<sup>87</sup> *Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, § 50. See also, *Asian Agricultural Products, Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990, § 3, as to the finding of an investment when claimant was merely “participating in the equity capital” of a host state enterprise; *Antoine Goetz v. République du Burundi*, ICSID Case No. ARB/95/3, Award, February 10, 1999, § 89, as to the upholding of the right to sue under a BIT not just by a wronged company but by its shareholders, the “true investors”; *Lanco International v. Argentine Republic*, ICSID Case No. ARB/97/6, Decision on Jurisdiction, December 8, 1998, § 10, as to the finding of an investment even though claimant owned just 18.3% of the capital stock of the host state company; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, July 17, 2003, § 55, noting that tribunals have not “been concerned ... with the question of majority or control” of a host country enterprise.

<sup>88</sup> *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (United States/Argentina BIT), Decision on Jurisdiction, January 14, 2004, § 54.

<sup>89</sup> Claimant’s Counter-Memorial on Jurisdiction, § 27.

companies of the host State by a foreign company, Phoenix, can be considered, *prima facie*, as looking like a foreign investment.

***B. A CERTAIN DURATION?***

124. The Respondent does not *per se* deny the duration of the alleged investment, but argues that since the investment itself is inexistent, it can have no duration. According to it, “(t)he duration criterion generally requires that the investment project be carried out over a period of at least two years. Phoenix, however, never intended to carry out a business project at all.”<sup>90</sup> It appears to the Tribunal that if the money paid in 2002 could be considered as having given rise to an investment, the mere fact that Phoenix had not sold its shares in BP and BG before January 2008 shows that the operation in which the Claimant engaged had a certain duration.
125. The Tribunal is therefore not convinced that this element of duration constitutes a bar to the qualification of the purchase of BP and BG as an apparent investment, if all other elements of the definition of an investment are satisfied.

***C. AN ELEMENT OF RISK?***

126. The Respondent’s analysis presented in order to deny the existence of a risk in the Claimant’s operation follows the same line of arguments used to prove that the operation did not entail a certain duration. According to the Respondent, “Phoenix had no business project ... Accordingly, there is no element of risk in Phoenix’s alleged investment.”<sup>91</sup>
127. It appears to the Tribunal that this element needs a little more thinking and elaboration than this plain statement. In general, in buying companies in bad shape, an investor certainly assumes a certain risk, the risk not to be able to revitalize the corporation, if such was the intent. It is common practice in international business for certain businessmen to buy bankrupt companies for a token price and to try to transform them into profitable going concerns. On its face, the purchase of a bankrupt company, for a small price, still carries a risk: namely that the investor loses the amount he has paid,

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<sup>90</sup> Respondent’s Memorial on Jurisdiction, § 91.

<sup>91</sup> Respondent’s Memorial on Jurisdiction, § 92.

because the company has to be liquidated and no cash is left to satisfy the shareholders. The Tribunal does not consider that it should deny the existence of what looks like an investment based on the alleged absence of a risk in the operation performed by Phoenix.

128. Overall, the Tribunal concludes so far that there are not sufficient objective elements to disqualify the existence of an apparent investment under the Washington Convention in this case, as there was clearly possession, during approximately six years, by an Israeli company of equity in two Czech companies, which according to the Claimant involved a risky operation. But this is not the end of the inquiry.

*D. AN OPERATION MADE IN ORDER TO DEVELOP AN ECONOMIC ACTIVITY IN THE HOST STATE?*

129. It appears from the file and Phoenix admits in its Memorial, that at the time of Phoenix's alleged investment, the Benet Companies had been engaged in no economic activity for more than a year. Indeed, the only activity in which the Benet Companies were involved at the time of the investment was the litigation that is a basis for this arbitration, which evidently is not an "economic activity."
130. The Respondent has heavily insisted on the absence of any economic activities performed by Phoenix, while it had invested in the two Czech companies, stating that the Claimant clearly did not buy a going concern in order to make a foreign investment that would contribute to economic activities, its only concern being to buy an ICSID claim. Proof of this situation of stand still during several years is, according to the Respondent, the fact that BP was sold back in 2008, six years after the purported investment, for exactly the same amount of money spent for its purchase in 2002.
131. The Claimant, on the contrary, insisted on the fact that, had not the Czech authorities illegally frozen the assets of BP, Phoenix would be entitled to \$6 million at current exchange rates in the bank accounts that were frozen by the Respondent.<sup>92</sup> The Claimant also argues that, had the Czech courts acted swiftly, it would have been recognized as the true owner of C&C and DSB and their valuable assets. According to the Claimant, the

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<sup>92</sup> See Transcript of the Hearing, p. 121, lines 5-6.

fact that it was not capable of engaging in economic activities was entirely due to the Czech authorities actions: “ ... it would be more than ironic, indeed it would be unjust, if Phoenix Action were to be deprived of the BIT's protection because of the Respondent's own breach of that treaty.”<sup>93</sup> This idea was also forcefully expanded in the Claimant's Rejoinder:

“Phoenix Action has owned two Czech businesses which, if Respondent had complied with its obligation under the BIT, would have resumed their normal operations in the metal-trading business.”<sup>94</sup>

132. Both parties thus agree on the state of affairs at the time of the purchase. Where they disagree is on the consequences of this state of affairs on Phoenix's claims. The Respondent considers that the purchase of the ownership in the companies can as a result of the surrounding facts not amount to an investment, while the Claimant on the contrary argues that the purchase qualifies as an investment as it was made in order to try to “revive” the two Czech companies:

“BG and BP had been profitable businesses before the events of April 2001, and Phoenix Action had every reason to believe that their profitability would return if the Respondent acted in a fashion consistent with its obligations under the BIT.”<sup>95</sup>

“Respondent would have the Tribunal believe that ownership of host-state companies is not “in connection with economic activities by an investor” because BG and BP have not resumed their prior level of business or profitability. This is incorrect. Under this reasoning the purchase of land or a company out of liquidation would not be investment, contrary to the ordinary meaning of that term ... A more reasonable application of the BIT's terms to Claimant's investment in BP and BG is that Phoenix Action's purchase of BP and BG was made in connection with economic activities because it was made in the reasonable belief that the Ownership Actions, Customs Actions, document seizure, and fund-freezing would be resolved in a manner consistent with Respondent's obligations under the BIT and that the companies' economic activities consequently would resume their prior extent and profitability.

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<sup>93</sup> Transcript of the Hearing, p. 122, lines 20-24.

<sup>94</sup> Claimant's Rejoinder on Jurisdiction, § 51.

<sup>95</sup> Claimant's Counter-Memorial on Jurisdiction, § 32. See also, § 33: “Phoenix Action paid substantial sums for two companies that were in a distressed condition in the hopes that those companies would regain their past profitability.”

Respondent's breach of the BIT is the cause of BP and BG's continued inability to resume their prior functioning."<sup>96</sup>

133. The Tribunal will accept here the Claimant's thesis, as a first step in its reasoning. The Tribunal considers that, if the facts asserted by the Claimant, concerning the Czech authorities' violations of the Claimant's rights are true, there is some merit in the Claimant's position. The fact that an investment is not profitable cannot disqualify an economic operation as an investment from the outset. The development of economic activities must have been foreseen or intended, but need not necessarily be successful, especially when the problems an investor faces in the development of its activities come from the host State's actions. It is true that an investment that has come to a standstill, because of the host State's actions<sup>97</sup>, would still qualify as an investment, otherwise the international protection of foreign investment provided by the BITs would be emptied of its purpose. The Tribunal is therefore inclined to accept that, although there were no significant activities performed by the Czech companies owned by Phoenix since it acquired them, this alone would not be sufficient to disqualify the operation as an investment, provided that, and this *caveat* is fundamental, the Claimant had really the intention to engage in economic activities, and made good faith efforts to do so and that its failure to do so was a consequence of the State's interference. Thus the Tribunal needs to analyze more thoroughly the different facets of the operations in which Phoenix has engaged.

*E. AN INVESTMENT MADE IN ACCORDANCE WITH THE CZECH LAWS?*

134. This question can be disposed of very quickly. In the present case, there is no violation of a rule of the Czech Republic legal order, and not even of the principle of good faith as embodied in the national legal order, as it has not been contended that the acquisition was against Czech laws, or was performed with dissimulation or otherwise contestable methods. Phoenix duly registered its ownership of the two Czech companies in the Czech

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<sup>96</sup> Claimant's Rejoinder on Jurisdiction, § 60.

<sup>97</sup> See for example, Transcript of the Hearing, p. 125, lines 8-11: "Finally, with respect to the phrase "in connection with economic activities", the respondent's breach of the BIT is the cause of BP's and BG's continued inability to resume their prior functioning."

Republic. The investment could certainly be considered as an investment under the Czech legal order.

*F. A BONA FIDE INVESTMENT?*

135. In order to determine whether or not the Claimant made an investment which deserves protection, the Tribunal will examine closely a whole series of factors surrounding the alleged investment of Phoenix.
136. *The timing of the investment* is a first factor to be taken into account to establish whether or not the Claimant's engaged in an abusive attempt to get access to ICSID. Phoenix bought an "investment" that was already burdened with the civil litigation as well as the problems with the tax and customs authorities. The civil litigation was ongoing since fourteen months, the criminal investigation was ongoing since twenty months, and the bank accounts had been frozen for eighteen months. The Claimant was therefore well aware of the situation of the two Czech companies in which it decided to "invest". In other words, all the damages claimed by Phoenix had already occurred and were inflicted on the two Czech companies, when the alleged investment was made.
137. *The initial request to ICSID* was based on a claim by the two Czech companies, which was supposedly assigned to Phoenix. This is also an important element in the overall analysis. Although it is not denied that the Claimant abandoned the assignment theory, it is, according to the Respondent, an element to be taken into account to understand Mr. Vladimír Beňo's true intent. Having fled from the Czech Republic and obtained Israeli nationality in 2002, Mr. Beňo created an Israeli company to buy the two Czech companies he owned as a Czech citizen living in the Czech Republic, after the actions taken by the Czech Republic against these companies. During the Hearing, the Respondent stressed that "despite the fact that their position has now changed, and it changed because ICSID refused to register the case, Phoenix admitted that its reason for attempting to bring this claim initially was to bring *the pre-existing disputes* involving Benet Group and Benet Praha before this Tribunal."<sup>98</sup> It should also be noted that there

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<sup>98</sup> Transcript of the Hearing, p. 34, lines 6-11. Emphasis added.

was a total confusion between Phoenix and the Czech companies at the beginning of this procedure, as was underscored by the Respondent in its written submissions and again during the Hearing:

“Additional evidence ... is a letter from Benet Praha – not the claimant – to the Czech Government. It asks the Czech Government to pay the money to "us", Benet Praha, not the claimant, and to allow "us", again, Benet Praha, to hold a process before the ICSID court in Washington DC ... This, members of the Tribunal, is a Czech entity writing to the Czech government asking to allow it to bring a claim against it before ICSID.”<sup>99</sup>

138. *The timing of the claim* too needs to be considered to ascertain the overall situation. The whole file shows that Phoenix’s “investment project” was made simply to assert a claim under the BIT. The Claimant presented Phoenix’s notification of an investment dispute to the Czech Republic on March 2, 2003, even *before the registration of its ownership* of the two Czech companies in the Czech Republic and a mere *two months* after its acquisition of the Benet Companies and filed the dispute with the Centre eleven months later. In its letter to the Czech Ministry of Finance, Phoenix argued that a series of facts violated the BIT. If one looks only at the post investment events, which is what has to be done with due regard of the application *ratione temporis* of the Israeli/Czech BIT, the unavoidable conclusion is that the Claimant, when it first raised its ICSID claim, pretended that a *two months delay* in solving its investment problem was a violation of the FET as well as the full protection and security (hereafter “FPS”) standards. The mere enunciation of such pretension clearly shows that what was really at stake were indeed the pre-investment violations and damages.
139. *The substance of the transaction* has also to be reviewed more closely. The initial purported investment in 2002 has been described in paragraph 22 and the resale in paragraphs 26 and 27 of this Award. As far as the so-called “pre-investment owners of BP and BG”, it appears to the Tribunal that all transfers were merely done inside the family of Mr. Beňo. The shares of BP were purchased from Mrs. Vladimira Beňo, M. Beňo’s wife, a Czech citizen; while the shares of BG belonging to Yougo Alloys were

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<sup>99</sup> Transcript of the Hearing, p. 42, line 25 and p. 43, lines 1-8.

bought from Mr. Beňo's daughter.<sup>100</sup> When Phoenix sold its shares in BP in January 2008, the Respondent expressed some concern about the total lack of transparency of the transaction, having noticed that the price paid for the sale of BP was handed over to BP itself. The Claimant recognized this fact, for which it gave the following explanation: "Respondent has expressed concern about the fact that Phoenix Action's payment for the full share interest in BP was paid to BP itself. That is true, but as shown by the attached bank transfer statements, the amount was immediately passed on to BP's then sole-shareholder, Benreal s.r.o."<sup>101</sup> This information however does not dissolve all concerns concerning this strange string of transactions. The alleged investment appears therefore as a mere redistribution of assets within the Beňo family.

140. *The true nature of the operation* raises also doubts. There are strong indicia that no economic activity in the market place was either performed or even intended by Phoenix. No business plan, no program of re-financing, no economic objectives were ever presented, no real valuation of the economic transactions were ever attempted. At the Hearing, a member of the Tribunal and its President inquired on the low price of the sale and resale of BP to Benreal, considering Phoenix's contention that it was the virtual owner of the bankrupt companies and of the frozen assets, and therefore that its investment had a great value to be compensated for by this Tribunal. The Claimant's counsel gave the following answers:

"Professor Bucher, you also asked about the relationship between the price paid for the shares of BP and the amount of money that was in the frozen account which came at today's exchange rates to a little over \$6 million when the funds were released ...

We have never pretended that these were arm's length transactions."<sup>102</sup>

"The next question I think was from Professor Stern concerning how the bankruptcy of DSB and C&C were reflected in the value that was assigned to Benet Group when acquired by Phoenix Action.

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<sup>100</sup> Respondent's Memorial on Jurisdiction, § 34: "The sole owner of Yugo Alloys is Zuzana Beňová, a Czech citizen; who is believed to have been no more than eighteen-years-old at the time. Upon information and belief, Miss Beňová is the daughter of Mr. Beňo."

<sup>101</sup> Claimant's Rejoinder on Jurisdiction, § 58.

<sup>102</sup> Transcript of the Hearing, p. 178, lines 1-5 and 8-9.

... we've never contended these were arm's length transactions, and there is no necessary relationship between the value assigned to the companies and the amounts paid.”<sup>103</sup>

This gives strong credit to the understanding of the Tribunal, according to which the whole operation was not an economic investment, based on the actual or future value of the companies, but indeed, simply a rearrangement of assets within a family, to gain access to ICSID jurisdiction to which the initial investor was not entitled. The Tribunal has accepted, in the first step of its reasoning, that the fact of buying a bankrupt or inactive company must not necessarily be disqualified as an investment, as the intent of the investor can precisely be to make the company profitable again. The Tribunal has initially given the benefit of doubt to the Claimant, but now that it has refined its analysis, it must come to a different conclusion. It is not contested by the Claimant that, *at the time of the alleged investment*, when Phoenix bought the two Czech companies, they had no activity. In the Request for Arbitration, the Claimant stated that “(t)he seizure of Benet Praha’s actually terminated all of the company’s commercial activity.”<sup>104</sup> Again, in its Memorial, the Claimant asserted that “(b)oth BP and BG are companies involved in the trading of ferroalloys, although (...) neither has been actively engaged in the business since April 2001.”<sup>105</sup> But a more important feature is that no activity was either launched or tried *after the alleged investment* was made. As stated by the Respondent during the Hearing:

“You did not hear anything about how it had a business plan, it had feasibility studies, it did it for any type of economic reason.”<sup>106</sup>

141. So, why did the Claimant invest in the Czech Republic, if not to develop economic activity, as in any investment? The Tribunal is convinced by the answer to this question given by the Respondent, and supported by the whole file before it:

“... the manifest purpose behind its purchase of the Benet Companies was an attempt to render their purely *domestic* disputes subject to the protections of the BIT rather than to conduct business.”<sup>107</sup>

<sup>103</sup> Transcript of the Hearing, p. 179, lines 7-10 and 15-18.

<sup>104</sup> Request for Arbitration, § 23.

<sup>105</sup> Claimant’s Memorial, p. 3.

<sup>106</sup> Transcript of the Hearing, p. 145, lines 16-19.

142. The evidence indeed shows that the Claimant made an “investment” not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic. This alleged investment was not made in order to engage in national economic activity, it was made solely for the purpose of getting involved with international legal activity. The unique goal of the “investment” was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty. This kind of transaction is not a *bona fide* transaction and cannot be a protected investment under the ICSID system.<sup>108</sup>
143. Although, at first sight, the operation realized by Phoenix looks like an investment, numerous factors converge to demonstrate that the apparent investment is not a protected investment. All the elements analyzed lead to the same conclusion of an abuse of rights. The abuse here could be called a “*détournement de procédure*”, consisting in the Claimant’s creation of a legal fiction in order to gain access to an international arbitration procedure to which it was not entitled. As stated in *Inceysa*, “(i)n the contractual field, good faith means absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the investment.”<sup>109</sup> It is the conclusion of the Tribunal that the whole “investment” was an artificial transaction to gain access to ICSID. Here the “*bona fide*” test is applied to the abusive distortion of the requirements for jurisdiction, but the Tribunal notes that it is not so limited and may also play its role when it comes to the analysis of the substantive protection for investments under international treaties, which is a matter for the merits.
144. The conclusion of the Tribunal is therefore that the Claimant’s initiation and pursuit of this arbitration is an abuse of the system of international ICSID investment arbitration. If it were accepted that the Tribunal has jurisdiction to decide Phoenix’s claim, then any

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<sup>107</sup> Respondent’s Memorial on Jurisdiction, § 87. Emphasis by the Respondent.

<sup>108</sup> Interestingly, this was also forcefully stated by the LCIA Tribunal in the case *Société Générale*, where it stated that a transaction to acquire an investment always has to be closely analyzed and that there are limits to the application of investment protection treaties: “One such limit is that the transaction in question must be a bona fide transaction and not devised to allow a national of a State not qualifying for protection to obtain an inappropriate jurisdictional advantage otherwise unavailable by transferring its rights after-the-fact to a qualifying national.” *Société Générale v. Dominican Republic*, UNCITRAL, LCIA Case No. UN7927, Preliminary Objections to Jurisdiction, September 19, 2008, § 110.

<sup>109</sup> *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, August 2, 2006, § 231.

pre-existing national dispute could be brought to an ICSID tribunal by a transfer of the national economic interests to a foreign company in an attempt to seek protections under a BIT. Such transfer from the domestic arena to the international scene would *ipso facto* constitute a “protected investment” – and the jurisdiction of BIT and ICSID tribunals would be virtually unlimited. It is the duty of the Tribunal not to protect such an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs. It is indeed the Tribunal’s view that to accept jurisdiction in this case would go against the basic objectives underlying the ICSID Convention as well as those of bilateral investment treaties. The Tribunal has to ensure that the ICSID mechanism does not protect investments that it was not designed for to protect, because they are in essence domestic investments disguised as international investments for the sole purpose of access to this mechanism.

#### *G. CONCLUSION*

145. It follows from these findings that the Tribunal lacks jurisdiction over the Claimant’s request, as the Tribunal concludes that the Claimant’s purported investment does not qualify as a protected investment under the Washington Convention and the Israeli/Czech BIT.
146. Having found that there is no protected investment under the Washington Convention and the Israeli/Czech BIT, interpreted in light of their object and purpose, the Tribunal need not address the other objections raised by the Respondent to the Tribunal’s jurisdiction. More precisely, the Tribunal does not need to address the scope of the rule concerning the exhaustion of local remedies when a denial of justice is concerned and consequently does not need to decide whether or not the local remedies rule invoked by the Respondent would bar Phoenix’s claims related to denial of justice arising after December 26, 2002.
147. The Tribunal also emphasises that it has not taken any position as to the manner in which the Czech companies were treated by the Czech Government, as this question does not come under its jurisdiction.

## VII. COSTS

148. The parties submitted their statements on costs simultaneously on October 1, 2008. Claimant informed the Tribunal that its total costs incurred in connection with this proceeding were USD 1,782,279.13, comprising its legal fees and expenses of USD 1,612,279.13 and the ICSID costs of USD 170,000.00 (advances and lodging fee). Respondent determined that its legal costs in connection with this arbitration were CZK 21,417,199.13 (approximately USD 1 million). Its ICSID costs were USD 210,000.00.
149. As is usual, both parties have asked that their legal and arbitration costs be borne by the other party. In its Memorial, the Claimant requested “(a)n Order requiring Respondent to bear the costs of the present arbitration including, but not limited to, Claimant’s legal fees and the costs of the Tribunal and the Centre.”<sup>110</sup> The Respondent requested the following relief with regard to costs:
- “(b) an order that Phoenix pay the costs of these arbitral proceedings, including the cost of the Arbitral Tribunal and the legal and other costs incurred by the Czech Republic, on a full indemnity basis; and
- (c) interest on any costs awarded to the Czech Republic, in an amount to be determined by the Tribunal.”<sup>111</sup>
150. Under Article 61(2) of the ICSID Convention, “the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid.” This provision establishes the Tribunal’s discretion in allocating arbitration costs (the advances paid by the parties to ICSID) and the fees for legal representation between the parties as it deems appropriate.
151. While many ICSID tribunals have ruled that each party should bear its own costs, many have applied the principle that “costs follow the event,” making the losing party bear all

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<sup>110</sup> Claimant’s Memorial, p. 40.

<sup>111</sup> Respondent’s Memorial on Jurisdiction, § 147.

or part of the costs of the proceeding and attorney fees.<sup>112</sup> In the circumstances of this case, the Tribunal intends to employ this principle. The Tribunal has concluded not only that the Claimant's claim fails for lack of jurisdiction, but also that the initiation and pursuit of this arbitration is an abuse of the international investment protection regime under the BIT and, consequently, of the ICSID Convention. It is also to be noted that the Claimant filed a request for provisional measures which was rejected in its entirety by the Tribunal and which added to the costs of the proceeding. The Respondent has been forced to go through the process and should not be penalized by having to pay for its defense.

152. Therefore, using its discretionary power, the Tribunal concludes that the Claimant is to bear all ICSID costs (the fees and expenses of the Members of the Tribunal and of the ICSID Secretariat, excluding the lodging fee) which are estimated to USD 356,000.00.<sup>113</sup> As a consequence, the Claimant is to pay to the Respondent USD 196,000.00. The Tribunal further finds that the Respondent's legal fees and expenses are not unreasonable having regard to the course of these proceedings and that, therefore, the Claimant is to bear such costs in the amount of CZK 21,417,199.13.

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<sup>112</sup> See in particular *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, §§ 307 ff.

<sup>113</sup> The ICSID Secretariat will in due course provide the parties with a financial statement of the case account.

**VIII. DECISION**

For the reasons stated above, the Tribunal unanimously decides:

1. The dispute brought by Claimant before the Centre is not within the jurisdiction of the Centre and the competence of the Tribunal.
2. Claimant shall pay to Respondent CZK 21,417,199.13 and USD 196,000.00, which represent the Respondent's legal fees and expenses and the Respondent's contribution to the costs of these proceedings.

  
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Andreas Bucher

Date: 6 April 2009

Brigitte Stern  
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Brigitte Stern

Date: 9 April 2009

  
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Juan Fernández-Armesto

Date: 8. April 2009