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Federal Tribunal [Logo]

4P.114/2006/bie

Judgment of 7 September 2006

I. Civil division

Composition

Federal Judge Corboz, President,
Federal judges Klett, Rottenberg Liatowitsch, Kiss, Mathys,
Court secretary Widmer.

Parties

Czech Republic, acting through the Ministry of Finance, Letenska 15, CZ-118 10 Prague 1, Appellant, represented by Prof. Dr. Franz Kellerhals and Dr. Bernhard Berger, advocate, P.O. Box 6916, 3001 Bern,

against

Saluka Investments BV,
Locatellikade 1, NL-1076 AZ Amsterdam, Appellee, represented by attorney Matthias Scherer, Rue de la Mairie 35, Postfach 6569, 1211 Geneva 6, **Arbitral Tribunal, UNCITRAL, Geneva.**

Subject-matter

Article 85(c) of the Federal Tribunal Act; Article 190(2)(b) PILA (International arbitral tribunal; Jurisdiction),

Public law appeal against the partial award of the Geneva Arbitral Tribunal of 17 March 2006.

Factual background:

A.

[1] **A.a** After the communist era, at the beginning of the 1990s, the government of the Czech and Slovak Federal Republic (Czechoslovakia) began to privatise the country's centralised banking sector. These efforts were continued by the government of the Czech Republic (Appellant) after the separation of Czechoslovakia into two independent states on 31 December 1992.

[2] By about 1994, the distinct segments of the formerly centralised banking system which revolved around the State Bank of Czechoslovakia had separated into four large State-owned commercial banks which dominated the banking sector in the Czech Republic These so-called "Big Four banks" (hereinafter also referred to as the "Big Banks") included Investicni a Postovni banka a.s. (IPB), Ceska sporitelna, a.s. (CS), Komercni banka, a.s. (KB) and Ceskoslovenska obchodni banka, a.s. (CSOB). The Czech banking sector was administered and regulated by the Czech National Bank (CNB).

[3] Because of the strategic importance of the Big Four banks, the Czech government retained significant minority stakes in these institutions as part of the first wave of privatisation in the economy (the mass privatisation process), which was completed in 1995. Their final privatisation took place between 1998 and 2001 through the sale of the State's shares to private investors.

[4] In an agreement dated 8 March 1998, the Czech State, acting through the Czech National Property Fund (NPF), sold the block of shares it held in IPB (around 36% of the share capital) to Nomura Europe plc, a company incorporated in Great Britain and belonging to the Japanese financial group Nomura, which already held a 10% stake in IPB. This transaction completed the first full privatisation of one of the "Big Four" banks.

[5] Nomura Europe plc sold its stake in IPB on 2 October 1998 and 24 February 2000 in two tranches to its wholly controlled subsidiary Saluka Investments BV incorporated under Dutch law (hereinafter "Appellee, Saluka").

[6] **A.b** The Big Four banks were of comparable strategic importance to the Czech economy as a whole. However, they all suffered from a high proportion of outstanding debt and non-performing loans. The main reason for this lay in an overly liberal credit policy in the post-communist era and inadequate protection of creditors' rights in the Czech legal system. Without state aid, this problem, which got worse in 1998, threatened to lead to the collapse of the four banks. However, they were too large to be allowed to fail.

[7] In 1998 the Czech government therefore changed the policy that it had developed since 1997, which had been not to provide direct financial aid to the banking sector and instead to tackle the problem of non-performing loans at the borrowing company level. In 1999 the three big banks, KB, CS and CSOB, which were in competition with IPB, were granted public support in order to enable their privatisation. In 1999, this aid amounted to 19% of the Czech Republic's GDP. Various statements by the banks, as well as the government and the NPF in April/May 1998, show that state support to KB, CS and CSOB was given on the basis that they were banks in which a majority stake was held by the state, while no such assistance was given to IPB as, following the Nomura investment in March 1998, it was considered a private entity whose fate was a matter of its private shareholders.

[8] Following growing concern at the CNB about IPB's banking practices in the course of 1998, and following information-seeking visits by the CNB to IPB from mid-April 1999 to the end of June 1999, the CNB began regulatory inspections on 30 August 1999, which continued until 5 November 1999. Serious financial deficits and irregularities came to light. Various efforts to reorganize IPB, including securing state aid and involving a foreign strategic partner, have been unsuccessful.

[9] On 16 June 2000, the CNB placed IPB in administration on the basis of a government decision made the day before. All the powers of IPB board of directors (management) were assumed by an administrator. On 19 June 2000, the operational business (going concern) of IPB was sold to CSOB. In this context, the Ministry of Finance granted CSOB a state guarantee while the CNB issued CSOB with a declaration of indemnity. These state aids were later approved by the government and the Czech Competition Authority (OPC). On 16 June 2002, the forced

administration of IPB ended and Nomura resumed control over IPB. On 4 December 2002 the Czech Republic and the NPF initiated arbitral proceedings against Saluka and Nomura, in which the arbitral tribunal ordered Nomura to transfer IPB shares to CSOB, which was registered as the new owner of the shares on 16 February 2004.

[10] After the end of the administration, Nomura made various claims against the Appellant.

[11] **A.c** On 29 April 1991, Czechoslovakia and the Kingdom of the Netherlands signed an Investment Protection Agreement (Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (hereinafter: Investment Protection Agreement (IPA); the Agreement). After Czechoslovakia separated into two independent states on 31 December 1992, the Appellant confirmed to the Kingdom of the Netherlands that the Investment Protection Agreement between itself and the Kingdom of the Netherlands, which entered into force on 1 October 1992, would remain in force.

[12] This Agreement contains the following provisions, among others:

Article 3:

[12.1] "1. Each contracting Party shall ensure fair and equitable treatment to the investments of investors of the other contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.

[12.2] 2. More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned.

[12.3] 3. (...)."

Article 5:

[12.4] "Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:

[12.4.a)] a) the measures are taken in the public interest and under due process of law;

[12.4.b)] b) the measures are not discriminatory;

[12.4.c)] c) The measures are accompanied by provision for the payment of just compensation. (...)."

[12.5] Article 8 of the Investment Protection Agreement then contains the following arbitration clause for disputes between one of the contracting states and an investor of the other contracting state:

[12.5.1] "1. All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if possible, be settled amicably.

[12.5.2] 2. Each Contracting Party hereby consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement.

[12.5.3] 3. (...) [on the constitution of the arbitral tribunal].

[12.5.4] 4. (...) [on the constitution of the arbitral tribunal].

[12.5.5] 5. The arbitration tribunal shall determine its own procedure applying the arbitration rules of the United Nations Commission for International Trade Law (UNCITRAL).

[12.5.6] 6. (...) [on the legal basis for the decision].

[12.5.7] 7. The tribunal takes its decision by majority of votes; such decision shall be final and binding upon the parties to the dispute."

B.

[13] On 18 July 2001, the Appellee initiated arbitral proceedings against the Appellant based on this arbitration clause. The Arbitral Tribunal was comprised of Sir Arthur Watts KCMG QC (Chairman), Peter Behrens and Maître L. Yves Fortier CC QC. At a procedural session held in London on 2 November 2, 2001, among other things, Geneva was selected as the place of arbitration.

[14] In its action in connection with its investment in IPB, the Appellee took the view that the Appellant's measures and conduct towards IPB on the one hand (and towards the other three big banks on the other hand) had violated the Investment Protection Agreement. In particular, the Appellant allegedly disregarded its duty to treat the Appellee and/or its investment into IPB in a fair, equitable, and, in particular, non-discriminatory manner (Article 3 of the Agreement).

Furthermore, the Appellant was said to have unlawfully and without adequate compensation deprived the Appellee of the true value of its investment (Article 5 of the Agreement). The Appellee requested the Arbitral Tribunal to establish the relevant Treaty breaches and to order the Appellant to pay damages and interest.

[15] Shortly before the deadline for the filing of the Claimant's Memorial, the Appellant objected to the Arbitral Tribunal's jurisdiction by submitting a "Notice to Dismiss". In support of this, the Appellant essentially asserted that the Appellee was not entitled to invoke the arbitration clause of the Investment Protection Agreement, since it was not a real (bona fide) investor within the meaning of the Agreement.

[16] By award of 17 March 2006, the Arbitral Tribunal declared that it had jurisdiction to consider the dispute submitted to it. On the merits, the Arbitral Tribunal found that the Appellant had violated Article 3.1 of the Investment Protection Agreement in various respects. By contrast, the Arbitral Tribunal denied a violation of Article 3.2 and Article 5 of the Agreement.

[17] The Arbitral Tribunal deferred to a further, second phase of the arbitration proceedings the issue of appropriate redress for the established breach of Article 3 of the Agreement, including the question of the scope of the claim. It further reserved the question of costs until final consideration could be given to the costs of the arbitration as a whole.

C.

[18] The Czech Republic brings a public law appeal against this decision of the Arbitral Tribunal with the following request for relief:

[18.1] "A declaration that the Arbitral Tribunal lacks jurisdiction to examine the alleged violations of an investment protection agreement that had taken place before a foreign investor decided to make an investment, and, in particular, lacks jurisdiction to consider whether the April Decision made by the Appellant in April and May 1998 and published on 27 May 1998 to offer public support to the three Czech banks (Ceska sporitelna as, Komercni banka as and Ceskoslovenska obchodni banka as), constituted a violation vis-à-vis the Appellee of the obligation contained in Article 3(1) of the Agreement on encouragement and reciprocal protection of investments between the

Kingdom of the Netherlands and the Czech and Slovak Federal Republic of 29 April 1991 to afford fair and equitable treatment to the investments of investors."

[19] The Appellee requests that the public law appeal be declared inadmissible or rejected, and the award of the Arbitral Tribunal be confirmed. The Arbitral Tribunal waived the opportunity to comment on the appeal.

D.

[20] By order of 26 May 2006, the President of the First Civil Division of the Federal Court rejected a request by which the Appellant had requested that the appeal be granted suspensive effect in the form of an order for the Arbitral Tribunal to stay the arbitral proceedings pending the decision on the appeal.

The Federal Tribunal takes into account the following:

1.

[21] The contested award is drafted in English. In the Federal Tribunal proceedings, the Appellant uses German, and the Appellee uses French. In accordance with practice, the judgment is issued in the language of the Appeal (see Article 37(3) of the Judicial Organisation Act).

2.

[22] The Appellant's request to join the record of the arbitration proceedings can be dispensed with, since the arguments put forward by the parties can also be assessed without such record.

3.

[23.1] **3.1** In its appeal, the Appellant requests that it be invited to comment on the answer to the appeal and any comments by the Arbitral Tribunal once received. By letter dated 4 August 2006,

it renewed and clarified its request for a second exchange of submissions, requesting the opportunity to comment on the Appellee's allegation that the parties to the arbitration agreement have waived any remedies against the arbitral award within the meaning of Article 192 of the Federal Act of 18 December 1987 on Private International Law (PILA; SR 291). In its answer to the appeal, and by letter dated 9 August 2006, the Appellee argues for the rejection of the request for a second round of submissions, or, in the alternative, that it be permitted a rejoinder.

3.2

[23.2.1] **3.2.1** In public law appeal proceedings under Article 93(3) of the Judicial Organisation Act, it is only exceptionally that a second exchange of submissions takes place. A second exchange of submissions must be based on a valid reason, because an orderly procedure – if it is to be terminated in a timely manner – must be kept within the framework of legal formalities and deadlines and does not tolerate an endless exchange of further submissions. Applications and objections that could have been raised or submitted as part of the appeal subject to a time limit are inadmissible after the expiry of the time limit for the appeal (BGE 132 I 42 para 3.3.4; 125 I 71 para 1d/aa, including references therein). One reason for ordering a further round of submissions can be the fact that essential arguments are only put forward in the other party's comments (Judgment 4P.207/2002 of 10 December 2002 para 1.1, ASA-Bull. 2003 p 585 *et seq*, 588 referring to BGE 94 I 659 para 1b p 662 *et seq*; Judgment 4P.236/2004 of 4 February 2005 para 3).

[23.2.1.1] It is generally up to the parties to judge whether a submission contains new arguments and whether a reply is required. However, if a reply is already requested in the statement of appeal, the Appellant is not yet in position to form a view as to whether it would be necessary for it to take a position on the submissions of the Appellee or of the Arbitral Tribunal. Such a request is premature, which is why comments are only sent to the Appellant for information, unless they contain new, legally relevant submissions. If the Appellant considers that it is necessary for it to take position, this must be submitted to the Federal Tribunal without delay upon receipt of the submissions (BGE 132 I 42 para 3.3.23.3.4; Judgment 1P.827/2005 of 11 April 2006 para 2).

[23.2.2] **3.2.2** In the present case, the Appellee's comments were sent to the Appellant on 5 July 2006, which made it immediately apparent to the Appellant that its request for a second exchange of submissions would not be accepted. The Appellant only responded to this despatch by letter dated 4 August 2006. It seems questionable whether it has thereby complied with the requirement to react without delay and whether – particularly given the requirement of speedy resolution – there is good reason to afford it the possibility of a reply (see in this regard Judgment 4P.207/2002, *op cit*, para 1.1). The question can, however, remain open:

[23.2.3] **3.2.3** In its appeal, the Appellant did not comment on the question raised in the Appellee's submission whether the public law appeal could be inadmissible because the arbitration clause contained in the Investment Protection Agreement excludes the submission of the arbitral award to the Federal Tribunal pursuant to Article 192(1) of the PILA. Nonetheless, there was no reason for the Federal Tribunal to depart from the general rule of a single exchange of submissions laid down in Article 93(3) of the Judicial Organisation Act and to provide the Appellant with the answer to the appeal otherwise than purely for information purposes, because the Appellee only called into question the existence of a merits decision required for the public law appeal, which is a question of which the Federal Tribunal may take full cognizance *ex officio* (BGE 130 II 388 para 1 p 389; 129 I 173 para 1 p 174; 129 II 225 para 1 p 227 with references), and which it can decide in the present case without the need for further enquiry (paragraph 5 below). With a view to the right to be heard, it does not appear necessary to give the Appellant the opportunity to comment. According to the Federal Tribunal's practice, if threshold issues arise, then, given that such issues are examined *ex officio*, the Appellant must not address such issues only after the requirements for a merits examination have been disputed in the answer to the appeal; rather, in view of Article 93(3) of the Judicial Organisation Act, it must, in good faith address the issues that it wishes to address in the appeal statement.

[23.2.3.1] Insofar as there are doubts as to whether the arbitration clause contained in Article 8 of the Investment Protection Agreement excludes any challenge of the arbitral award by way of appeal to the Federal Tribunal, the Appellant would have had all the reasons to take the initiative to make any arguments that it wished to make on that issue already in its statement of appeal. After all, this

issue could not have been lost on the Appellant, particularly given that it had been involved as a party in the appeal proceedings that had led to the Federal Tribunal judgment published in BGE 131 III 173 and had, at the time, successfully defended the view that the parties had excluded the appeal to the Federal Tribunal in the arbitration clause in that case. In addition, in paragraph 3 of the aforementioned (unpublished) judgment, the Federal Tribunal also addressed the question of ordering a second exchange of submissions with the same reasoning as here.

[23.2.4] **3.2.4** Based on the above, the request for a further exchange of submissions must be rejected.

4.

[24.1] **4.1** According to Article 85(c) of the Judicial Organisation Act, the Federal Tribunal shall determine appeals against decisions of arbitral tribunals under Articles 190 *et seq* of the PILA. The provisions of Articles 190 *et seq* of the PILA apply when the seat of the arbitral tribunal is located in Switzerland and at least one of the parties was domiciled or habitually resident outside Switzerland at the time when the arbitration agreement was concluded (Article 176(1) of the PILA).

[24.1.1] The disputed award was made by an arbitral tribunal seated in Switzerland, that is, by a panel that was constituted by the parties in place of the state courts that are normally competent for binding resolution of disputes and that has its seat in Geneva (see BGE 125 I 389 para 4a; L ALIVE/P OUDRET / R EYMOND, Le droit de I'arbitrage interne et internationale en Suisse, Lausanne 1989, p 26; P OUDRET/B ESSON, Droit comparé de I'arbitrage internationale, Zurich 2002, p 3, para 3;C ORBOZ, Le recours au Tribunal Fédéral en matière d'arbitrage international, SJ 2002 II 1 ff., p 3; E HRAT, Basel Commentary, para 9 on Article 176 PILA).

[24.1.2] As far as the arbitration agreement is concerned, the special feature of the present case is that the arbitration is based on Article 8 of the Investment Protection Agreement in force between the Netherlands and the Czech Republic. Since the Appellee is not a party to that Agreement, Article 8 of the Agreement can hardly be viewed as an arbitration agreement between the parties within the meaning of Chapter 12 of the PILA. The question then arises what actions, and at what point in time, can be treated as giving rise to an arbitration agreement with the corresponding content

between the parties. One could, for instance, qualify the arbitration clause contained in the international treaty between the Netherlands and the Czech Republic as an agreement in favour of a third party and containing an offer made to the investor – in this case, to the Appellee – to conclude an arbitration agreement, which the investor has accepted by initiating the arbitration proceedings (see WENGER, Basel Commentary, para 61 on Article 178 PILA;RÜEDE/HADENFELDT, Swiss Arbitration Law, 2nd Ed., Zurich 1993, p 42 para 5; Judgment 1P.113/2000 of 20 September 2000 para 1b).

[24.1.3] Ultimately, however, the question of the parties' acts that might qualify as the conclusion of an arbitration agreement need not be resolved in this case. The requirement under Article 176(1) of the PILA that, at the time the arbitration agreement is concluded, there be no legal seat or habitual residence in Switzerland appears, without more, to have been met regardless of when this is assumed to have taken place, in any event with respect to the Appellant – who is a foreign State – and likely also with respect to the Appellee.

[24.2] **4.2** In the so-called "partial award" of 17 March 2006, the Arbitral Tribunal decided on its jurisdiction to consider the dispute submitted to it. It also decided on the question whether the Appellant had violated the Investment Protection Agreement between the Netherlands and the Czech Republic in connection with the Appellee's investment in IPB, and found that the Appellant had violated the Agreement by various measures or behaviours. It reserved the determination of the consequences of such violations for a later decision.

[24.2.1] It has thus made a preliminary or interim ruling that does not end the proceedings either in relation to all claims or in relation to any individual claim. Rather, it has clarified preliminary questions of a procedural and substantive nature without such clarification terminating the proceedings in whole or in part in quantitative terms (see *i.a.* BGE 130 II 76 para 3.1 with references), given that, insofar as the Appellee had made separate requests for a declaration regarding the alleged violations of the Investment Protection Agreement before the Arbitral Tribunal in addition to its request for an award of damages, such requests have no independent significance in view of the Appellee's litigation objective of obtaining compensation.

[24.2.2] According to Article 190(3) PILA, preliminary and interim decisions of an international arbitral tribunal can only be challenged on the grounds stated in paragraphs (2)(a) and (b) of the same provision. The 17 March 2006 decision of the Arbitral Tribunal can, without more, be challenged as an interim decision based on the Appellant's complaint within the meaning of Article 190(2)(b) of the Judicial Organisation Act to the effect that the Arbitral Tribunal has, in part, wrongly assumed *ratione temporis* jurisdiction to establish the alleged violations of Article 3 of the Investment Protection Agreement. On the other hand, the appeal is inadmissible insofar as it is directed against the finding made in the contested decision that the complainant had violated Article 3.1 of the Agreement (Article 190(3) PILA; BGE 130 III 755 para 1.2.2 p 761 *et seq*; 130 III 76 para 4; see also paragraph 6.5.4 below).

[24.3] **4.3** In its appeal, the Appellant only requests a declaration that the Arbitral Tribunal lacked jurisdiction to examine whether the resolution of the Czech government published on 27 May 1998 to offer public support to three of the "Big Four" Czech banks, but not to IPB, violated the obligation to afford fair and equitable treatment to foreign investors contained in the Investment Protection Agreement.

[24.3.1] This request for declaratory relief by the Appellant is admissible. Although, as a form of public law appeal, the arbitration appeal is generally in the nature of a cassation remedy, where the appeal goes to jurisdiction, the Federal Tribunal can resolve the jurisdictional issue in the dispositif of its decision on the appeal (BGE 127 III 279 para 1b; 117 II 94 para 4 p 95 *et seq* with references).

[24.4] **4.4** If an arbitral award is based on several independent grounds, then, in accordance with established practice, the Federal Tribunal will only consider a public law appeal against it if all such grounds are disputed (with sufficient support) (Article 90(1)(b) of the Judicial Organisation ActBGE 115 II 288 para 4; 113 la 94 para 1a/bb, each with references; see also judgments 4P.168/2004 of 20 October 2004 para 2.1.1 and 4P.62/2004 of 1 December 2004 para 2.1). To the extent the disputed judgment finds independent support in the grounds that are not disputed, there

is no legal interest in a judgment with respect to those objections that are supported (BGE 111 II 398 para 2b p. 399 *et seq*).

[24.4.1] The Appellee claims that this appeal does not meet this requirement. The Appellant disputes the Arbitral Tribunal's jurisdiction in relation to the violation of Article 3 of the Investment Protection Agreement as determined in the dispositif of the arbitral award (para 511c). The Appellant's arguments against the assumed jurisdiction, however, are said to address only one out of a total of three confirmed violations of Article 3 of the Agreement – each based on different facts – that led to the determination in para 511c of the Arbitral Award. According to the Appellee, such arguments therefore disregard that the determination in para 511c of the Arbitral Award is based on a finding of separate violations. The Appellant is thus said to lack legal interest in an assessment whether jurisdiction was wrongly assumed with respect only to one of the established violations of Article 3 of the Agreement, since that would not defeat the finding laid down in the dispositif that Article 3.1 had been breached.

[24.4.2] This objection is unfounded. In its statement of appeal, the Appellant is not seeking the annulment of the contested decision to the extent it has determined a violation of Article 3.1 of the Agreement. Rather, it requests, in essence – and, generally, in a manner that is admissible (see paras 4.2/4.3 above) – a determination that the Arbitral Tribunal was not competent to examine whether the Appellant's decision published on 27 May 1998 (and thus before the Appellee's investment in IPB) to provide public support to CS, KB and CSOB (but not IPB) was contrary to Article 3.1 of the Investment Protection Agreement, and the tribunal thus lacked jurisdiction to determine a violation of the Investment Protection Agreement based on that decision. It is true that this does not defeat the determination in para 511c of the Arbitral Award that the Appellant had violated Article 3 of the Agreement, since that determination is based on the finding that the Appellant violated the Agreement in three different respects (Award, paras 498, 499 and 503 *et seq*), while the Appellant's submissions only questions the Arbitral Tribunal's jurisdiction with regard to one of these findings. Nevertheless, it cannot be argued in the present case that the Appellant lacks legal interest in establishing that a determination of only one of three violations of the agreement was made without jurisdiction. The reason is that the purpose of the action brought by the Appellee was

never to establish a violation of the Investment Protection Agreement as such, as done in para 511c of the contested interim award, but, rather, to obtain damages. The determination that Article 3 of the Agreement has been breached – which cannot itself be defeated by the present Appeal – does not, without more, entail an award of damages. Rather, the Arbitral Tribunal will have to examine whether the further requirements for this are met, and, if so, to what extent, with regard to each of the established violations individually, whereby it is possible that some will lead to damages, whereas others will not. Consequently, the Appellant has an independent legitimate interest in establishing the absence of jurisdiction on the part of the Arbitral Tribunal with respect to each violation of Article 3 of the Agreement that it had affirmed, in order to avoid, in further proceedings, having to rebut the requirements for a damages award at least with respect to that violation.

5.

[25] The Appellee then argues that Article 8(7) of the Investment Protection Agreement containing the arbitration agreement excluded a challenge of the arbitral award by way of a public law appeal to the Federal Tribunal by providing that the Arbitral Tribunal's award was final and binding on the parties. In its view, when the arbitration agreement was concluded, the parties intended to exclude any right to contest the decision in a state court. It was clearly the intent of the contracting States parties to rule out any interference by a third country in the settlement of a dispute about compliance of a State party with the international treaty

[25.1] **5.1** If neither party is domiciled or habitually resident in Switzerland, then, according to Article 192(1) of the PILA, they may completely exclude the challenge of the arbitral award by an express declaration or in a later express written agreement. The exclusion of a challenge is also permissible for decisions on the Arbitral Tribunal's jurisdiction (BGE 131 III 173 para 4.1 with references).

[25.1.1] The requirement that the parties have no territorial ties with Switzerland is not disputed in the present case. The only issue to be verified is whether the parties have validly waived the submission of a public law complaint against the arbitral award.

[25.2] **5.2** According to Article 192(1) PILA, the declaration excluding challenge must be express. The Federal Tribunal initially demanded that the legal remedies that the parties wish to exclude be expressly named (BGE 116 II 639 para 2c). However, in a more recent judgment, this requirement was qualified as too restrictive; accordingly, it is sufficient that the declaration unambiguously shows the common intent of the parties to make use of the possibility within the meaning of Article 192(1) of the PILA and to waive the challenge of the international arbitral award before the Federal Tribunal. Whether or not this is the case must be determined by interpreting the specific arbitration clause (see BGE 131 III 173 Section 4.2, esp para 4.2.3.1; confirmed in Judgments 4P.198/2005 of 31 October 2005 para 1.1, ASA-Bull 2006 p 339 *et seq*, 346 and 4P.98/2005 of 10 November 2005 para 4.1). This jurisprudence has met with undivided approval among commentators insofar as it requires, for a valid exclusion of the challenge of an arbitral award by means of a pubic law appeal, that the will of the parties to waive any legal remedy, or the remedy of the public law appeal, must follow clearly from the arbitration clause, and does not require the wording of the clause to contain an express reference to the public law appeal or to the provisions of Article 190 *et seq* of the PILA (FELIX DASSER, Internationale Schiedsentscheide ohne Rechtsmittel: Ab jetzt gilt's ernst [International arbitral awards without appeal: it's now serious], Jusletter of 9 May 2005 p 3; FRANÇOIS KNOEPFLER/PHILIPPE SCHWEIZER, Renonciation à recourir jugée valable par le Tribunal fédéral, SZIER 2006 pp 148 *et seq*, 152; PHILIPPE SCHWEIZER, in SZZP 2005 p 202. Kritisch zur Methodik der Auslegung überhaupt und zur Auslegung der Klausel im konkreten Fall [Criticism of interpretation methodology in general and interpretation of the clause in the specific case]: SÉBASTIEN BESSON, Chronique de jurisprudence étrangère, Revue de I'arbitrage 2005 pp 1071 *et seq*, 1080 *et seq*; DASSER , *op cit*, p 4; FRANÇOIS PERRET, ASA Bull. 2005 p 520 *et seq*, p 521 *et seq*).

[25.2.1] Given the implications of a waiver of legal remedies, the intent to waive must be clearly expressed. After all, subject to the defendant's admissible objections in enforcement proceedings, the parties, by such waiver, deprive themselves of any possibility of having the arbitral award reviewed and revoked by a State court, even if it suffers from the most serious deficiencies and violates basic due process (BGE 116 II 639 para 2c; see particularly POUDRET/BESSON, *op cit*, para 839 p 828; BESSON, *op cit*, p 1083; BERGER, Internationale

Wirtschaftsschiedsgerichtsbarkeit [International Commercial Arbitration], Berlin/New York 1992, p 505 *et seq*).

[25.2.2] The ratio legis of Article 192 of the PILA invoked by the Appellee, which is to protect Swiss courts from dilatory appeals in disputes that have no real relationship with Switzerland (see judgment 4P.198/2005 of 31 October 2005 para 2.2, ASA Bull 2006 p 339 *et seq*, 346; Explanatory Note on the PILA, BBI 135/1983 I p 465; SIEHR, Zurich commentary, para 1 to Article 192 of the PILA; MICHELE PATOCCHI/CESARE JERMINI, Basel Commentary, para 1 to Article 192 of the PILA; POUDRET/BESSON, *op cit*, p 828 para 839; LALIVE/POUDRET/REYMOND, *op cit*, para 1 to Article 192 of the PILA), does not give rise to an interpretation rule according to which a waiver of a remedy is to be lightly accepted.

[25.3] 5.3 The presently disputed formulation that the arbitral award should be final and binding for the parties to the dispute does not meet the requirement of an express waiver within the meaning of Article 192 of the PILA (for an account of previous case law, see BGE 131 III 173 para 4.2.1 p 175 *et seq*):

[25.3.1] According to ordinary language use in civil procedure law, the designation of a decision as "final" does not exclude a further invocation of extraordinary legal remedies, but only the re-examination of the decision on the merits by way of ordinary legal remedies, such as appeal (see VOGEL/ SPÜHLER, Grundriss des Zivilprozessrechts [Outline of civil procedural law], 8th Ed, Bern 2006, p 362; HABSCHEID, Schweizerisches Zivilprozess- und Gerichtsorganisationsrecht [Swiss Civil Procedure and Judicial Organization Law], 2nd Ed, Basel 1990, para 473 *et seq*; WALDER - RICHLI, Zivilprozessrecht [Civil Procedure Law], 4th Ed, Zurich 1996, p 250; FRANK/STRÄULI/MESSMER, Kommentar zur zürcherischen Zivilprozessordnung [Commentary on the Zurich Civil Procedure Code], 3rd Ed, Zurich 1997, para 8 on Section 190 of the Civil Procedure Code). Thus, Article 190(1) of the PILA provides that a decision of the Arbitral Tribunal made under the procedure in Articles 176 *et seq* of the PILA is "final", yet also provides in the following two paragraphs 2 and 3 for a possibility of challenging such decision by way of an extraordinary remedy of public law appeal on the exhaustively listed grounds.

[25.3.2] The situation is similar where the arbitral award is designated as "binding" in an investment protection agreement. For example, sentence 1 of Article 53 of the multilateral Washington Convention of 18 March 1965 On the Settlement of Investment Disputes between States and Nationals of Other States (SR 0.975.2; hereinafter: the Washington Convention) provides that arbitral awards made under this Convention shall be binding, and immediately specifies that they shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Thus, even arbitral awards made under the Washington Convention are subject to the legal remedies provided for in the Convention despite being designated as binding.

[25.3.3] For the present disputed clause to be capable of interpretation as a waiver of any legal remedies against the arbitral award (*i.e.* including also the extraordinary legal remedy of the public law appeal), it would have had to contain an additional sentence making this clear by stating, for instance, that the parties waived the right of any recourse against the arbitral award.

[25.4] **5.4**. The above applies with equal force where the disputed arbitration clause is contained, as in the present case, in an international treaty that was not originally concluded by the parties to the dispute. It should be specified that, when interpreting the provision or the Agreement on the exclusion of legal remedies in such a case, one must apply the principles of international treaty interpretation – unless the parties to the dispute have made a special individual agreement with regard to the exclusion of legal remedies which would demonstrate their common – possibly deviating – intent. However, no such agreement was concluded here.

[25.4.1] **5.4.1** International treaties must be interpreted based on the provisions of the Vienna Convention on the Law of Treaties of 23 May 1969 (Vienna Convention on the Law of Treaties, VCLT; SR 0.111). This Convention entered into force for the Czech Republic on 1 January 1993, *i.e.* after the conclusion of the Investment Protection Agreement in question in 1991; it therefore does not directly apply to that agreement (Article 4 VCLT). However, this does not preclude interpretation of the treaty based on the general principles laid down in Article 31 *et seq* of the VCLT since these essentially codify customary international law and correspond to the practice of the Federal Tribunal (BGE 122 II 234 para 4c with references). In accordance with Article 31(1) VCLT, a

treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. According to the relevant federal jurisprudence, the interpretation of an international treaty must primarily start from the text of the treaty as understood by the contracting parties with the view to the purpose of the treaty based on the principle of good faith. If the meaning of the text, as it arises from common language usage as well as the object and purpose of the treaty, does not appear to be manifestly absurd, an interpretation that goes beyond the wording – whether expanding or restricting it – is only possible if, based on the context or the circumstances of the treaty's conclusion, it can be concluded with certainty that the contracting States had jointly intended to deviate from the wording (BGE 127 III 461 para 3; 125 V 503 para 4b; 124 III 382 para 6c p 394, all with references).

[25.4.2] With respect to the scope of the phrase "final and binding" contained in Article 8(7) of the Investment Agreement, an interpretation in accordance with these rules also does not lead, to a different result than that set out above (paragraph 5.3). The Appellee is unable to demonstrate that the clause has the opposite meaning:

[25.4.2.1] **5.4.2.1** First, the Appellee cannot be followed in the argument that it is obvious that the parties to the Treaty, as sovereign States, intended to rule out any interference by a third State through its courts. It may well be inferred from the clause that a free examination of the judgment (within the framework of an ordinary legal remedy) should be excluded and no State court should freely examine how the Investment Protection Agreement ought to be interpreted. However, it cannot be inferred from this that the State contracting parties wanted to forego the protection of legal remedies for themselves and also for their investors if an arbitral award suffered from gross deficiencies. In this respect it must be taken into account that, as far as apparent, only the laws of Switzerland, Belgium, Sweden, Malaysia and Tunisia provide for the possibility of waiver that also covers extraordinary legal remedies (BESSON, *op cit*, p 1082 para; BERGER, *op cit*, p 505). No other countries permit a valid agreement to effect such an exclusion. Had the parties intended to waive extraordinary legal remedies, then, in order to ensure the effectiveness of such waiver, they would have had to determine for the arbitral tribunal to have its seat in one of the countries listed. However, this is not the case. Rather, the parties to the dispute only agreed to Switzerland as the seat of the Arbitral Tribunal after the arbitration

proceedings had been initiated (see Article 16 of the UNCITRAL Arbitration Rules), without specifically referring to the possibility of excluding legal remedies under Swiss law (see para 5.4 above).

[25.4.2.2] **5.4.2.2** It is true that the purpose of an arbitration clause in an Investment Protection Agreement may include avoiding possible jurisdiction to resolve the dispute on the part of a State party's domestic courts, which may have the appearance of greater proximity to one party than to another. Instead, dispute resolution should be entrusted to a (more neutral) international arbitration tribunal, which offers a better guarantee for an independent decision based on the rule of law (see GÉTAZ -KUNZ, Rechtsmittelverzicht in der internationalen Schiedsgerichtsbarkeit der Schweiz [Waiver of Recourse in International Arbitration in Switzerland], Diss. Bern 1993, p. 30; see in particular for agreements with developing countries WANG JING -AN, Internationaler Investitionsschutz [International Investment Protection], Konstanz 1995, p 153 *et seq*). That this should also exclude any intervention by the State in which the arbitral tribunal has its seat does not appear to be imperative. In this regard, it must be considered that, when determining the place of arbitration in accordance with Article 16(1) of the UNCITRAL Arbitration Rules, the parties will rarely agree for the arbitral tribunal's seat to be in a treaty Contracting State, instead opting for an arbitral seat in a neutral third country. If the parties are unable to come to an agreement, the arbitral tribunal must also select a seat in a neutral country, taking into account the "circumstances of the arbitration" (see Article 16(1) of the UNCITRAL Arbitration Rules; KARLHEINZ RAUH, Die Schieds- und Schlichtungsordnungen der UNCITRAL [UNCITRAL Arbitration and Rules], Köln 1983, p 78 *et seq*; MENNO ADEN, Internationale Handelsschiedsgerichtsbarkeit [International Commercial Arbitration], 2nd Ed, Munich 2003, para 3 and 4 to Article 16 UNCITRAL p. 612 *et seq*).

[25.4.2.3] **5.4.2.3** The Appellee further submits that the Czech Republic had not yet acceded to the Washington Convention at the time the Investment Protection Agreement was concluded. The contracting parties therefore could not have provided for dispute resolution under that multilateral convention at the International Center for the Settlement of Investment Disputes (ICSID) that would have excluded the involvement of any State court as an authority of review. Nonetheless, the parties envisaged the dispute resolution in accordance with the Washington Convention as a

model that provided for dispute resolution on a purely international level, without any involvement of State courts.

[25.4.2.3.1] This argument of the Appellee is also to no avail. Even if it were true that the contracting parties had envisaged dispute resolution under the Washington Convention as a model, that would rather advocate against concluding that they wished to exclude the possibility of any recourse, given that the Washington Convention subjects arbitral awards rendered in accordance with the procedure laid down in that Convention to review proceedings in which an *ad hoc* committee appointed by the President of the International Bank for Reconstruction and Development may annul arbitral awards on grounds similar to those listed in Article 190(2) PILA (Article 52 and Article 53 first sentence in conjunction with Articles 2 and 5 of the Washington Convention [see also in this regard paragraph 5.3 above]). Thus, the Washington Convention too follows the principle that an extraordinary remedy must be available to correct the gravest defects of an arbitral award, and does not provide for a waiver thereof. The mere fact that the Washington Convention provides for a review authority in the form of an international *ad hoc* committee rather than a State court does not demonstrate that the parties to the Investment Protection Agreement in question – assuming that they had indeed had the provision in the Washington Convention in mind as a model – would necessarily have wished to waive any protection through extraordinary legal remedies merely in order to exclude any interference by a third country through its courts, which, in the context of a decision on an extraordinary legal remedy, is only possible to a very limited extent.

[25.4.2.3.2] If the parties to the Investment Protection Agreement had indeed had the Washington Convention in mind as a model insofar as they were primarily concerned with excluding any interference by a neutral third country through its courts, it would have made sense for them at least to provide that, in the event of a possible future accession of Czechoslovakia or the Czech Republic to the Washington Convention, the dispute would have to be resolved pursuant to that Convention (see in this regard the rule in Article 9(5) of the Agreement of 12 April 1991 between the Swiss Confederation and the Republic of Argentina on the Promotion and Mutual Protection of Investments [SR 0.975.215.4], which provides that disputes can be submitted to an ICSID arbitration tribunal once both contracting

parties accede to the Washington Convention). This is all the more so since the law of most states in which a referenced arbitral tribunal could have its seat according to the agreed rule does not provide for the possibility of waiving the filing of extraordinary legal remedies against arbitral awards at a state court (paragraph 5.4.2.1 above).

[25.4.2.4] **5.4.2.4** The result of the interpretation is furthermore not affected by the fact that the disputed Investment Protection Agreement contains a second arbitration clause in Article 10, which uses the same wording as Article 8(7) to specify that arbitral awards based thereon are final and binding for the parties to the dispute. Even if it were true, as the Appellee asserts, that the contracting State parties wanted to exclude any interference by the courts of a third country in disputes between them as sovereign states, the identically worded clause in Art 8(7) of the Agreement need not be accorded the same meaning as set out above.

[25.5] **5.5** In summary, it emerges that there is no valid waiver within the meaning of Article 192 of the right to bring a public law appeal in this case. The Appellee's objection to that effect is unfounded.

6.

[26.1] **6.1** The Appellant raises an objection to jurisdiction within the meaning of Article 190(2)(b) PILA. In support of this objection, the Appellant essentially asserts that the jurisdiction of an arbitral tribunal in proceedings for the protection of investments under a bilateral investment protection agreement results exclusively and directly from the agreement in question. For this reason, the relevant arbitral tribunal's jurisdiction is temporally (*ratione temporis*) limited to the assessment of treaty breaches that occurred after the claimant investor made its investment and thus triggered the applicability of the Investment Protection Agreement between the parties. The Arbitral Tribunal also recognised this principle in para 244 of its award. Accordingly, an arbitral tribunal with jurisdiction based on an investment protection agreement lacks jurisdiction to examine the host State's domestic law for compliance with that agreement if it had entered into

force before the relevant international treaty could have effect between the parties, *viz.* the investor and the host State.

[26.1.1] The objection then goes on to argue that the Appellee first made an investment in IPB on 2 October 1998, thus triggering the application of the Investment Protection Agreement between the Appellant and itself. Before that date, the shares in question were held by Nomura Europe plc, which has its registered office in the UK and not in the Netherlands. The Arbitral Tribunal found that the Investment Protection Agreement between the parties was violated because the Czech government unreasonably treated IPB differently from the other three big banks in granting state aid. However, in doing so, it failed to take into account that this allegedly unreasonable discrimination rested on a practice that was based on government resolution No 369 of 27 May 1998, which predated 2 October 1998 and was thus outside the arbitral jurisdiction *ratione temporis*. In other words, the Arbitral Tribunal found that the Investment Protection Agreement was violated because the Czech Government changed its previous "policy of non-assistance" by promising state support to three other large Czech banks – but not to IPB – by its decision of 27 May 1998, *i.e.* at a time when the Appellee had not yet invested. According to the Appellant, in examining this alleged violation of the IPA, the Arbitral Tribunal went beyond the limits of its temporal jurisdiction. Given that the IPA only started to produce effects between the parties as from 2 October 1998, the Appellant argues that the Arbitral Tribunal only had the power to consider whether the policy that was made public on 27 May 1998 was changed unforeseeably to the Appellee's detriment after it had invested. By contrast, it had no power to consider whether such policy itself, or its consistent implementation, constituted a breach of the IPA. According to the Appellant, the Appellee is not entitled to rely on the duty laid down in Article 3(1) to treat its investment fairly and equitably in relation to the Czech Government's change of policy that was already known or should have been known to it at the time of its investment on 2 October 1998. In the proceedings, neither party raised an objection that the government's 27 May 1998 resolution violated Czech law. It can and should not be the case that a Czech legal provision that was completely legal at the time of its adoption could become an illegal act under the Investment Protection Agreement through a subsequent unilateral decision of a foreign party to make an investment, given that the agreement only took effect between the

parties as a result of that investment.

[26.2] **6.2** The Federal Supreme Court may freely examine the objection to jurisdiction under Article 190(2)(b) PILA on the law, including preliminary questions of substantive law that are essential for a decision on jurisdiction (establishing the principle: BGE 117 II 94 para 5a; see also BGE 129 III 727 para 5.2.2; 128 III 50 para 2a p 54; 119 III 380 para 3c p 383, each with references).

[26.3] **6.3** According to the Federal Tribunal's established case law, questions concerning tribunal organisation must be resolved as early as possible, before the proceedings can continue (BGE 126 I 203 para 1b p. 205 *et seq*; 124 I 255 para 1b/bb p 259; 116 II 80 para 3a p 84, each with references). According to the requirement of good faith conduct and the prohibition of abuse of rights, which also apply in procedural law, it is incumbent on the parties to raise objections to the jurisdiction or the composition of the arbitral tribunal at the earliest possible point in time. Late submissions of a formal nature that violate these principles may be disregarded by virtue of waiver (BGE 130 III 66 para 4.3 p 75; 124 I 121 para 2 p 123; 121 I 30 para 5f p 38).

[26.3.1] According to its own submissions, the Appellant first asserted that the investor – *i.e.* the Appellee – could not complain about circumstances that already existed at the time of its investment in the rejoinder of the arbitral proceedings. In doing so, the Appellant did not expressly dispute the Arbitral Tribunal's *ratione temporis* jurisdiction to decide on the dispute submitted to it, but merely referred to an arbitral award of the NAFTA arbitral tribunal in GAMI Investments v The Government of the United Mexican States dated 15 November 2004, which addressed related issues. The Arbitral Tribunal therefore did not explicitly comment on the question of its *ratione temporis* jurisdiction in the disputed award, but merely rejected the objection raised by the Appellant that it lacked jurisdiction to consider the dispute submitted to it *ratione materiae* and *ratione personae* (see Section B above), which the complainant does not here contest.

[26.3.2] However, in the present case, the Appellant cannot, in good faith, be criticised for failing to expressly raise the objection that the Arbitral Tribunal lacked *ratione temporis* jurisdiction to consider the dispute submitted to it given that it is not apparent that the Appellee had factually

based its action concerning the discriminatory treatment of its investment on a circumstance predating 2 October 1998, *i.e.* the government's 27 May 1998 decision to support KB, CS and CSOB, but not IPB. Rather, according to the findings of the Arbitral Tribunal, it merely asserted that the Czech Republic had violated the principle of fair and equitable treatment under Article 3(1) of the IPA, by responding in a discriminatory manner to the systemic problem of bad loans in the Czech banking sector, which contributed to serious problems with such loans in the period 1998-2000 by unjustifiably treating IPB differently in the context of support to the banks in overcoming it. For example, it granted state aid to the other three big banks to the exclusion of IPB and thus created a situation in which IPB could not possibly have survived, which ultimately led to the loss of the investment. In view of these submissions of the Appellee, which did not make any reference to circumstances predating 2 October 1998, there was no reason for the Appellant to argue expressly that the Arbitral Tribunal was not temporally competent to consider the claim (see also in this regard BGE 128 III 50 para 2c/aa p 59 above), since it could not be required to anticipate that the Arbitral Tribunal would establish a breach of the IPA based on circumstances that had occurred before 2 October 1998.

[26.3.3] There is therefore nothing from the perspective of the principle of good faith to prevent the invocation of an objection to jurisdiction in these proceedings.

[26.4] **6.4** The principle that the Arbitral Tribunal's jurisdiction based on the arbitration clause of an investment protection agreement is temporally limited to the assessment of treaty breaches that had taken place after the claimant investor has made its investment and thereby triggered the applicability of the agreement between the parties, invoked by the Appellant, is undisputed and expressly recognised by the Appellee. There is thus no need to discuss this in detail. It may be pointed out in this context that this principle is based on the general principle of non-retroactivity of treaties that is applicable in international treaty law and is expressed as follows in Article 28 of the Vienna Convention on the Law of Treaties:

[26.4.a] "Article 28 Non-retroactivity of treaties

[26.4.b] Unless a different intention appears from the treaty or is otherwise established, its provisions do

not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

[26.4.1] Further reference is made in this regard to the recent ECtHR judgment in Blecic v Croatia of 8 March 2006 (RS 59532/00), paras 45-50, 77 *et seq*, 83 *et seq*, in which the court declined jurisdiction *ratione temporis* over an alleged violation by the Croatian State on the grounds that it had taken place before the ECHR entered into force for Croatia (see also ECtHR judgments in Prince Hans-Adam II of Liechtenstein v Germany of 12 July 2001 para 85, EuGRZ 2001 p 466 and Yagiz v Turkey of 8 August 1996 para 28, Recueil CourEDH 1996-III p 966).

[26.5] **6.5** First, it must be pointed out that the Arbitral Tribunal was well aware of the temporal limitation of its jurisdiction, as follows from the statement in para 244 of its award:

[26.5.a] "In reaching that conclusion [that the Tribunal is satisfied that it has jurisdiction to hear the claims brought before it by the Claimant under the arbitration procedure provided for in Article 8 of the Treaty], however the Tribunal wishes to emphasise that, in accordance with the Treaty, its jurisdiction is limited to claims brought by the Claimant, Saluka, in respect of damage suffered by itself in respect of the investment represented by its holding of IPB shares. It follows, therefore, that the Tribunal does not have jurisdiction in respect of any claims of Nomura, or any claims in respect of damage suffered by Nomura and not by Saluka, *or any claims in respect of damage suffered in respect of IPB shares before October 1998, when the bulk of those shares became vested in the Claimant.* Although Nomura is not a party to these proceedings, the Tribunal nevertheless has jurisdiction to consider and make factual findings about the conduct of Nomura in so far as such findings might be relevant to the Tribunal's consideration of arguments advanced by the Claimant or the Respondent." [Emphasis added by the Federal Tribunal].

[26.5.b] The Appellant is thus unable to demonstrate, and it is not evident, that the Arbitral Tribunal saw the alleged violation of Article 3(1) of the IPA in the issuing of the 27 May 1998 decision or assessed that decision for compatibility with Article 3(1) of the IPA, as the Appellant alleges.

[26.5.1] **6.5.1** In the arbitration proceedings, the Appellee asserted that the Appellant had breached Article 3(1) of the IPA by providing a discriminatory response to the systemic bad debt problem in the Czech banking sector which contributed to serious difficulties in that sector from 1998 to 2000. Thus, in assisting the banks to overcome the problem, it treated IPB differently in an unreasonable way by excluding IPB from the state assistance that was granted to its competitors,

which created a situation in which it was impossible for IPB to survive.

6.5.2

[26.5.2.1] **6.5.2.1** In the award under appeal, the Arbitral Tribunal stated that the principle of "fair and equitable treatment", as laid down in Article 3(1) of the IPA, was closely tied to the notion of legitimate expectations, which is the central element of that principle. By promising "fair and equitable treatment", the Czech Republic has thus assumed an obligation to treat foreign investors so as to avoid the frustration of their legitimate expectations which they had taken into account when making their investments. Such expectations include compliance with the fundamental principle of non-discrimination. A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies bona fide by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination.

[26.5.2.2] **6.5.2.2** In the present case, the Arbitral Tribunal further holds, the Appellant discriminated against the Appellee or its investment because it treated IPB differently from the other three big banks without sufficient justification, although all Big Four Banks were in a comparable situation with regard to the problem of bad loans and in terms of their macroeconomic significance. The Big Four banks all had large non-performing loan portfolios resulting in increased provisions and consequently in insufficient regulatory capital. None of the banks was able to absorb the losses by calling on equity. Their survival was sooner or later seriously threatened unless the Czech State was willing to provide financial assistance. On the other hand, due to the macroeconomic significance of the Big Four banks, the Czech State apparently could not afford to let any one of these banks fail, and did in fact sooner or later provide such assistance to all of them, including IPB after it had been acquired by CSOB. Given that all the Big Four banks were in a comparable situation, as far as the Appellee was concerned, Nomura (and subsequently Saluka) was justified in expecting that the Czech Republic, should it consider and provide financial assistance to the Big Four banks, would do so in an even-handed and

consistent manner so as to include rather than exclude IPB. However, it was frustrated in that expectation given that, after the bad loans problem became worse, the government provided CSOB, CS and KB with financial support in order to prepare them for privatisation, while IPB received no financial support after its privatisation without sufficient justification and it was only granted greater financial assistance again during the forced administration.

[26.5.2.3] **6.5.2.3** The Arbitral Tribunal did not accept the various reasons which the Appellant raised to justify the unequal treatment of IPB:

[26.5.2.3.1] According to the Arbitral Tribunal's account, the Appellant had, in particular, asserted that, before it invested into IPB, Nomura had been informed by its extensive due diligence of the government's plans to give aid to the other three big banks during their privatisation. According to the Appellant, Nomura therefore voluntarily assumed these risks and these were reflected in the share purchase price paid. In the Appellant's view, Nomura (and subsequently the Appellee) had no reason to expect that the Czech Government would be willing to alleviate IPB's future problems by providing State financial assistance.

[26.5.2.3.2] By contrast, on the basis of the available evidence, the Tribunal found that the Government changed its policy of non-assistance (to any of the banks) only after Nomura had acquired the shareholding in IPB on 8 March 1998. The earliest hint of such policy change was contained in a statement of the head of the NPF to the chairmen of the boards of directors of KB, CS and CSOB dated 21 April 1998 in which he promised the banks that the State, in its capacity as shareholder, would take such measures during the privatisation period as to ensure that they comply with the applicable regulatory requirements. Then on 27 May 1998 the government issued the following resolution (No 369):

[26.5.2.3.2.a] "The Government states that it is aware of its responsibility for the financial stability of the joint-stock companies CSOB, KB and CS and that it is ready to secure such financial stability until the completion of the privatisation of those joint-stock companies."

[26.5.2.3.3] The Arbitral Tribunal held that whatever the scope of Nomura's due diligence may have been, it was unlikely that it could lead to a reliable forecast as to which policies future governments would

adopt should an aggravation of the bad debt problem occur, which is what actually happened after Nomura had made its investment. Therefore, the Appellee could not be said to have assumed the risk of being treated differently when the Czech Government in fact decided to step in with financial assistance.

[26.5.2.3.4] The Arbitral Tribunal therefore also did not follow the Appellant's arguments to the effect that different treatment of IPB was justified – in accordance with the policy pursued by the government – on the grounds that, unlike the others three big banks, IPD had already been privatised. Among other things, it stated that the government's policy of privatising KB, CS and CSOB after they had been relieved from the bad debt problem (through financial assistance) were perfectly legitimate, but did not, however, relieve the Appellant from complying with its obligation of non-discriminatory treatment of IPB. Furthermore, the policy of only granting public assistance to banks in which the state still held shares with a view to their privatisation was not consistently implemented. For instance, CSOB had already been privatised at the time the Appellant granted it financial assistance.

[26.5.3] **6.5.3** It is clear from the above that the Arbitral Tribunal saw the established violation of Article 3(1) of the IPA not in the 27 May 1998 government resolution, but rather – as asserted by the Appellee in support of its claim – in the factual exclusion of IPB from public assistance (which had been discriminatory given the granting of assistance to CSOB, CS and KB) at the time when the Appellee already held IPB shares.

[26.5.3.1] The Arbitral Tribunal did not regard the 27 May 1998 resolution as a binding legal act whereby the discriminatory treatment of IPB was already completed, such that the subsequent non-provision of assistance at the time when the Appellee already held its shares was only a consistent implementation of that act rather than a new, independent breach. Rather, it saw that decision as a mere political declaration of intent which, in the tribunal's opinion, could and should have been implemented in a non-discriminatory manner, on which Saluka was entitled to rely, at least in the sense that IPB could also expect appropriate state assistance in the event of serious structural economic problems jeopardising the continued existence of the Big Four banks the preservation of which was in general economic interest, if the other three big banks were also supported. Thus, the

basis for the Arbitral Tribunal's finding that Article 3(1) of the IPA was breached by the unequal treatment of IPB in the granting of state aid was not a circumstance that had occurred before the Appellee acquired the shares with the result that the IPA became effective between the parties (*i.e.* the 27 May 1998 Resolution), but, rather, circumstances that had occurred at a later stage. The question whether the 27 May 1998 Resolution was as such compatible with the IPA was not considered. The Arbitral Tribunal cannot therefore be accused of having exceeded the limits of its *ratione temporis* jurisdiction.

[26.5.3.2] The Appellant's argument is essentially that the Arbitral Tribunal was not entitled to treat the factual withholding of support from IPB at the time after the Appellee had invested into it as conduct contrary to the treaty, given that, after the 27 May 1998 resolution, the Appellee (which the Arbitral Tribunal, in this regard, unacceptably equates with Nomura) could no longer reasonably expect that IPB would receive state aid in future if its existence were threatened. However, the question whether, despite the publication of the 27 May 1998 government resolution the Appellee could legitimately expect that IPB would receive public support like the other three big banks if its non-performing loans problems got worse, and whether the Czech government's contrary conduct after the acquisition of the shares by the Appellee therefore amounts to a violation of Article 3(1) of the IPA, concerns the substantive assessment made by the Arbitral Tribunal on the merits, which cannot be challenged in the context of the public law appeal against the present interim award in the first place (see above para 4.2). The Appellant's arguments therefore appear to be an attempt, under the guise of a jurisdictional objection, to submit to the Federal Tribunal's full review the merits of the Arbitral Tribunal's decision, although this is only available in appeals against a final award (see references in para 4.2 above) and only for violations of substantive public order (Article 190(2)(e) PILA).

[26.5.4] **6.5.4** As explained in para 6.5.3 above, in its award, the Arbitral Tribunal implicitly rejected the argument that the discrimination against IPB was completed with the 27 May 1998 Government Resolution and the later factual withholding of state aid to the bank was nothing more than consistent implementation of that resolution which the Appellee had to reckon with and which therefore did not constitute an IPA breach. For the sake of completeness, it should be noted that this does not represent a substantive preliminary question that is decisive for the decision on the

Arbitral Tribunal's *ratione temporis* jurisdiction of the kind that the Federal Tribunal must fully review in the context of a jurisdictional objection (see para 6.2 above; on the other hand, see also judgment of the European Court of Human Rights of 8 March 2006 paras 83 *et seq*, where, as part of the *ratione temporis* jurisdictional inquiry, it had to be decided what State act – and therefore at what point in time – constituted the Convention breach [termination of a rental agreement] alleged as the basis for the complaint).

[26.5.4.1] The decisive element of the jurisdictional inquiry is the basis of the claim, *i.e.* the factual circumstances from which the claimant seeks to derive its claims (see, in this regard, judgment of the Federal Tribunal 4P.289/1998 of 23 March 1999, para 5a and b with reference to BGE 119 II 66 para 2 p. 68 *et seq*; see also BGE 131 III 153 para 5.1; 129 III 80 para 2.2 in fine; 122 III 249 para 3b/bb).

[26.5.4.2] In the present case, the Appellee did not in its action claim that the 27 May 1998 resolution was contrary to Article 3.1 IPA. Rather, it based its claim on the Appellant's practice with respect to support as such, and it is not disputed that the Arbitral Tribunal had the *ratione temporis* jurisdiction to review such practice for compliance with the IPA. In this respect, the Arbitral Tribunal's *ratione temporis* jurisdiction was never challenged. As mentioned above (para 6.4), the parties to the present proceedings also agree with the principle that the Arbitral Tribunal was temporally competent to consider claims arising from alleged breaches of the international treaty, insofar as these were justified by a factual circumstance that had occurred after the Respondent had made its investment and therefore after the Investment Protection Agreement took effect as between the parties.

[26.5.4.3] When the Arbitral Tribunal came to the conclusion that the disputed support practice as such – irrespective of the 27 May 1998 resolution – violated the right to fair and equitable treatment of the Appellee's investment in accordance with Article 3.1 of the IPA, it has made a pure merits determination on the asserted basis of the claim. It did not thereby decide on any preliminary substantive question decisive for its ratione *temporis jurisdiction*. Had it been in agreement with the Appellant that the Czech government's support practice did not, as such, constitute a violation of IPA in view of the 27 May 1998 resolution, it would not by that reason have been

required to make an award declining jurisdiction; rather, it would then have to render a decision rejecting the Appellee's request for a declaration to the contrary. This also appears to have been the Appellant's view during the arbitration, since it did not expressly complain therein that the Arbitral Tribunal lacked temporal jurisdiction to consider the matter submitted to it (see para 6.3 above).

[26.6] **6.6** The complaint that the Arbitral Tribunal exceeded its temporal jurisdiction in the contested award, insofar as admissible, thus emerges as unfounded.

7.

[27] The public law appeal is rejected insofar as admissible. The unsuccessful Appellant shall bear the costs and expenses of the proceedings (Articles 156(1) and 159(2) of the Judicial Organisation Act).

[28] Accordingly, the Federal Tribunal holds as follows:

1.

[28.1] The public law complaint shall be dismissed to the extent admissible.

2.

[28.2] The Appellant shall pay the court fee of CHF 100,000.

3.

[28.3] The Appellant shall compensate the Appellee for the Federal Proceedings in the amount of CHF 150,000.--.

4.

[28.4] This judgment shall be communicated in writing to the parties and to the UNCITRAL Arbitral Tribunal, Geneva.

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Lausanne, 7 September 2006

On behalf of the I. Civil Division
of the Swiss Federal Tribunal

President
[*signature*]
[Stamp:] Swiss Federal Tribunal

Court Secretary
[*signature*]