

## AWARD ON JURISDICTION

rendered on 06 June 2007 on issues of jurisdiction in an arbitration between the following Parties:

**Claimant:** Mr. Binder,

**Counsel:**

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**Respondent:** The Czech Republic

**Counsel:**

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**Arbitral Tribunal:** Justice Hans Danelius, Chairman, Professor Jürgen Creutzig and Professor Emmanuel Gaillard

**Place of Arbitration:** Prague

### **I. The Treaty**

1. The present arbitration is based on the bilateral Treaty of 2 October 1990 between the Federal Republic of Germany and the Czech and Slovak Federative Republic regarding the Promotion and Mutual Protection of Investments ("*the Czech-German BIT*") which, in translation into English, provides, *inter alia*, as follows:

"Article 1

For the purpose of this Treaty

(1) the term 'investments' comprises every kind of assets that are acquired in conformity with the domestic laws, in particular:

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b) shares of companies and other kinds of interest in companies;

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(3) the term 'investor' means a physical person whose permanent residence is, or a juridical person whose seat is, within the respective areas to which this Treaty applies and which is authorized to perform an investment.

Article 2

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(2) Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use or enjoyment of investments in its territory of investors of the other Contracting Party.

(3) Investments and revenues arising hereof and in the event of their re-investment such revenue shall enjoy full protection under this Treaty.

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#### Article 4

(1) Investments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party.

(2) Investments by investors of either Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except for the public benefit and against compensation. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or comparable measure has become publicly known. The compensation shall be paid without delay and shall carry the usual bank interest until time of payment; it shall be effectively realizable and freely transferable. Provision shall have been made in an appropriate manner at or prior to the time of expropriation, nationalization or comparable measure for the determination and payment of such compensation. The legality of any such expropriation, nationalization or comparable measure and the amount of compensation shall be subject to review by due process of law.

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#### Article 9

(1) Disputes between the Contracting Parties concerning the interpretation or application of this Treaty should as far as possible be settled by the governments of the two Contracting Parties.

(2) If a dispute cannot thus be settled, it shall upon the request of either Contracting Party be submitted to an arbitration tribunal.

(3) Such arbitration tribunal shall be constituted *ad hoc* as follows: each Contracting Party shall appoint one member, and these two members shall agree upon a national of a third State as their chairman to be appointed by the governments of the two Contracting Parties. Such members shall be appointed within two months, and such chairman within three months from the date on which either Contracting Party has informed in writing the other Contracting Party that it intends to submit the dispute to an arbitration tribunal.

(4) If the periods specified in paragraph 3 above have not been observed, either Contracting Party may, in the absence of any other arrangement, invite the President of the International Court of Justice to make the necessary appointments.

(5) The arbitration tribunal shall reach its decisions by a majority of votes. Such decisions shall be binding. Each Contracting Party shall bear the cost of its own member and of its representatives in the arbitration proceedings; the cost of the chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The arbitration tribunal may decide on other allocation of costs. The arbitration tribunal shall determine its own procedure.

#### Article 10

(1) Disputes relating to investments between one of the Contracting Parties and an investor of the other Contracting Party should as far as possible be amicably settled between the parties in dispute.

(2) If a dispute cannot be settled within a time period of six months from the point in time when it was raised, it will be submitted to arbitration at the request of the investor of the other Contracting Party. Unless the parties in dispute have agreed otherwise, the provisions of Article 9(3) to (5) shall be applied *mutatis mutandis* on condition that the appointment of the members of the arbitration tribunal in accordance with Article 9(3) is effected by the parties in dispute and that, in so far as the periods specified in Article 9(3) are not observed, either party in dispute may, in the absence of other arrangements, invite the Chairman of the Arbitration Institute of the Stockholm Chamber of Commerce, if not otherwise agreed, to make the required appointments. The Arbitral Award shall be recognized and enforced according to the rules of the Agreement of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

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#### Article 13

(1) This Treaty shall be ratified; the instruments of ratification shall be exchanged as soon as possible in Bonn.

(2) This Treaty shall enter into force 30 days after the date of exchange of the instruments of ratification. It shall remain in force for a period of ten years and shall be extended thereafter for an unlimited period unless denounced in writing by either Contracting Party twelve months before its expiration. After the expiry of the period of ten years this Treaty may be denounced at any time giving twelve months' notice.

(3) In respect of investments made prior to the date of termination of this Treaty, the provisions of Articles 1 to 12 shall continue to be effective for a further period of fifteen years from the date of termination of this Treaty."

## II. The Proceedings

2. On 29 March 2005, Mr. [redacted] Binder ("*the Claimant*"), with reference to Article 10 the Czech-German BIT, informed the Czech Republic that he requested the opening of proceedings against the Czech Republic ("*the Respondent*"), provided that no conciliation was reached within a six-month period in respect of his claim for compensation for damage he had suffered in respect of his investment in the Czech Republic. As no settlement of the dispute was reached, the Claimant subsequently instituted arbitration proceedings against the Respondent. In these proceedings he alleged that the Respondent had breached his rights as an investor under Articles 2(2), 2(3), 4(1) and 4(2) of the BIT.

3. In accordance with the Czech-German BIT, an Arbitral Tribunal was set up which is at present composed of Justice Hans Danelius, Chairman, Professor Jürgen Creutzig and Professor Emmanuel Gaillard. The Arbitral Tribunal has decided that the place of arbitration shall be Prague.

4. The Respondent having announced that it intended to make jurisdictional objections, the Arbitral Tribunal informed the Parties, on 29 October 2006, that it would deal with these objections separately in a first phase of the proceedings. The Claimant submitted certain views on this matter on 6 November 2006 to which the Respondent replied on 13 November 2006.

5. On 15 December 2006, the Respondent raised objections against the applicability of the Czech-German BIT and the jurisdiction of the Arbitral Tribunal. In his response of 18 January 2007, the Claimant contested the Respondent's objections and maintained that the Czech-German BIT was applicable and that the Arbitral Tribunal had jurisdiction. In response to requests by the Arbitral Tribunal of 23 January and 18 March 2007, specific jurisdictional issues were further dealt with by the Claimant in submissions of 3 and 23 February 2007, by the Respondent in submissions of 12 February and 7 March 2007 and by both Parties in submissions of 10 and 30 April 2007.

6. In this Award on Jurisdiction, the Arbitral Tribunal will examine the Respondent's jurisdictional objections in the light of the Parties' arguments and the documents submitted by them.

## III. The Parties' Positions on Jurisdiction

7. The Respondent requests that the Arbitral Tribunal should

(a) declare that it lacks jurisdiction to hear the claims raised by the Claimant,

(b) – on a subsidiary basis – either stay the present proceedings until issuance of a position as regards the status of intra-EU bilateral investment treaties ("*BITs*") by the competent

institutions, or lodge a request for a preliminary ruling before the European Court of Justice ("ECJ") pursuant to Article 234 of the European Community ("EC") Treaty and stay the present proceedings until the ECJ has answered by judgment the following question: "Is the BIT concluded on 2 October 1990 between Germany and the Czech Republic still in force and applicable after the accession of the Czech Republic into the European Union on 1 May 2004?",

(c) in all cases order the Claimant to pay all the costs and expenses of this arbitration, including the fees and expenses of the Arbitral Tribunal and expenses of the Respondent's legal representation, on a full indemnity basis,

(d) award such other relief as the Arbitral Tribunal considers appropriate.

8. The Claimant contests the Respondent's jurisdictional objections in their entirety.

9. The Respondent argues, in essence, (a) that the Czech-German BIT can no longer be applied between Germany and the Czech Republic after the latter State became a Member of the European Union ("EU"), and (b) that the Claimant cannot be regarded as a German investor under the BIT, since he has his permanent residence in the Czech Republic and not in Germany.

10. The Parties' arguments in regard to these issues are in brief as follows:

***The Respondent:***

***A. The Czech-German BIT and the EU***

11. The Claimant gave his consent to arbitration by communicating his request for arbitration to the Czech Republic. This was done on 24 November 2005, but the Czech-German BIT was no longer applicable after the Czech Republic had become a Member of the EU on 1 May 2004. Even if pre-arbitral efforts had been undertaken earlier, this would have been at a time when the BIT was no longer in force.

12. The inapplicability of the Czech-German BIT as of the date of the Czech Republic's accession to the EU is the consequence of the following three elements:

(a) Intra-EU investment matters are governed by EC law.

(b) The BIT is superseded by EC law.

(c) Intra-EU investor-State arbitration is inconsistent with the EC legal order.

13. The intra-EU investment regime derives from the provisions of the EC Treaty and from secondary EC legislation. The EC Treaty provides for a complete mobility of capital or investment within the EU by prohibiting restrictions to either the admission or the transfer of the investment. Accordingly, BITs and the EU investment regime address the same subject-matter, namely the faculty for a national of a contracting party to invest assets in the territory of another contracting party and to freely dispose of revenues deriving from the operation of such assets or investments. In any event, the intra-EU investment regime grants both

liberalization and adequate protection to investors. The Claimant's investment is therefore governed by EC law.

14. Moreover, the control of the application by Member States of the intra-EU investment regime is exercised by the EU institutions, in the last resort by the ECJ.

15. The intra-EU investment regime offers a high level of treatment. In fact, the rights afforded by the EC Treaty to EU investors are deemed more favourable than those afforded under a BIT, which means that intra-EU investment matters are governed by EC law. This includes the Claimant's investment in the Czech Republic.

16. Consequently, there is no need for BITs between Member States of the EU. Even more important is the fact that EC law prevails over BITs concluded between Member States. This primacy principle implies that the EC Treaty takes precedence over provisions of BITs relating to admission, transfer and treatment of investments, with the ultimate consequence that the Czech-German BIT is no longer applicable since the Czech Republic's accession to the EU on 1 May 2004. This consequence is automatic, and there is no need to have the BIT terminated by the two Contracting States.

17. Intra-EU investor-State arbitration is inconsistent with the "mutual trust" principle which is an essential element in relations between EU Member States. It is also inconsistent with the exclusive jurisdiction of the ECJ. Consequently, the Arbitral Tribunal cannot declare that it has jurisdiction to rule on a claim arising out of an intra-EU BIT without infringing EC institutional public policy rules and principles.

18. Intra-EU arbitration in regard to BITs does not only violate EC institutional public order but also the most basic EC law fundamental principle, namely the non-discrimination principle, since such arbitration implies unequal treatment of investors among Member States. There would be distortions and differential treatment if certain economic operations could give rise to investor-State arbitration and others could not, and if certain Member States could be attracted before an arbitral tribunal and others could not.

19. The situation at hand also meets the requirements of Article 59 of the Vienna Convention on the Law of Treaties according to which a treaty shall be considered terminated if the parties to the treaty conclude a later treaty relating to the same subject-matter and certain further conditions are fulfilled. The Czech Republic and Germany have concluded two successive agreements relating to the same subject-matter, i.e. the BIT and the Accession Treaty providing for the Czech Republic's accession to the EU, and when concluding the latter treaty they intended to place investment matters under EC law. Moreover, the BIT and the EC Treaty are not capable of being concurrently applied.

20. Alternatively, it would be appropriate for the Arbitral Tribunal either to stay the proceedings pending a statement on the relations between BITs and EC law being issued by the competent authorities, or to request a preliminary ruling from the ECJ pursuant to Article 234 of the EC Treaty and to stay the proceedings until judgment is rendered by the ECJ.

*B. The Claimant's status as an investor*

21. The Claimant is a Czech citizen and has his permanent residence in the Czech Republic since at least 1992. Consequently, he is not an investor of the other Contracting Party within the meaning of Article 10 of the Czech-German BIT.

22. When applying for and obtaining the Czech citizenship, the Claimant admitted that he had his permanent residence in the Czech Republic. He made this statement before the Czech authorities and may not, in good faith, argue the contrary in a litigious context. Moreover, all the documents the Czech Republic has in its possession confirm that he has his permanent residence in the Czech Republic since, at least, 1992. His permanent residence is at [redacted]

23. It is not correct that the Claimant had to declare a permanent residence in the Czech Republic for the purpose of his business activities. Any entrepreneur in the Czech Republic may validly declare a permanent residence outside the Czech Republic. Alternatively, he could have obtained a permit to stay in the Czech Republic without obtaining Czech citizenship. However, it clearly appears that the Claimant's permanent residence was in the Czech Republic and that accordingly he must be qualified as a Czech investor under Article 1(3) of the Czech-German BIT. Therefore, he may not validly engage arbitration proceedings against the Czech Republic under Article 10 of the BIT.

24. Although the Respondent is aware that the investor's nationality is not the relevant criterion in order to enjoy the protection of the BIT, it should be noted that the Claimant is a Czech citizen. It would be absurd and contrary to the whole rationale of international investment rules and principles for the Claimant, a Czech national having his permanent residence in the Czech Republic, to attract his own national State before an arbitral tribunal constituted under a BIT. The granting of Czech citizenship to the Claimant appears as a strong connecting factor with the Czech Republic evidencing his intention to be considered a Czech national by the Czech authorities.

25. The Claimant was granted Czech citizenship on the basis of the old Citizenship Act No. 39/1969 and not the later Act No. 40/1993. According to Act No. 39/1969 such citizenship could be granted to persons who had resided in the territory of the Czech Republic for an uninterrupted period of five years and who had lost their current citizenship by being granted the Czech one. When the Claimant filed an application for Czech citizenship, he did not satisfy these conditions and he asked to be exempted from them. The Czech authorities considered that he could be granted Czech citizenship, provided that he obtained a permanent residence permit, which he did on 28 December 1992. He was then granted Czech citizenship on 19 January 1993.

26. The reason why the criterion of "permanent residence" was chosen in the Czech-German BIT instead of nationality was that the Czech Republic, like all Central and Eastern European countries where former German minorities were living, was concerned about the potentiality that some Czech nationals may, or may still, be considered German citizens and then invoke this nationality in order to be granted the regime of the BIT.

27. Thus, it was clear that it was intended to avoid protection of investors being nationals of both the Czech Republic and Germany. As such, the object and purpose of the Czech-German BIT, which have to be taken into account according to Article 31 of the Vienna Convention

on the Law of Treaties, fully support the Czech Republic's position that the Claimant, as a Czech national, is not an "investor of the other Contracting Party" under the BIT.

28. Second, in order to avoid such undesired extension of the protection of the Czech-German BIT to Czech (previously Czechoslovak) citizens, the concept of "permanent residence" was agreed by the parties to the Czech-German BIT to be a decisive criterion. Therefore, the intention of the parties to the BIT was to define "investor of the other Contracting Party" in a narrower rather than more extensive way as compared to standard BITs.

29. Third, the notion of "permanent residence" encompasses a legal notion recognized under both German and Czech law, namely "*Wohnsitz*" in German and "*bydliště/pobyt*" in Czech. An additional requirement of a timely nature, namely that of permanency, is added through the adjective "permanent" ("*ständiger*", "*stálé/trvalé*") which necessarily implies that an investor may have only one "permanent residence" for the purposes of the Czech-German BIT and that such residence is objectively determined according to a criterion based on duration. The term "*trvalý pobyt*" is in Czech law interpreted as a synonym of "*bydliště*" or "*stálé bydliště*".

30. The fact that the term "residence" has different meanings in the existing legal systems makes it difficult to interpret the term, as it appears in the Czech-German BIT, in an autonomous manner. However, if this is done, it may first be noted that according to the BIT there should be only one "permanent residence". Moreover, in case of competing centres of life, the term must necessarily indicate the place where the investor stays most frequently. Thus, the Claimant's admission that

leads to designating the Czech Republic.

32. The Claimant actually lived in the apartment at . . . and did not only use it as an address for service. The building is owned by Köge a.s., a company fully owned by the Claimant and of which he is the Chairman of the Board of Directors. The building is one with permitted use for housing. Moreover, the Claimant was not under a duty to declare a permanent residence in the Czech Republic in order to be registered as managing director of a Czech company, but he was authorized to act as managing director in all his Czech companies once he had obtained his long-term temporary residence permit in 1992.

33. There are a number of reasons why the Arbitral Tribunal should apply Czech law to the determination of the Claimant's "permanent residence" in the Czech Republic. Although the Czech-German BIT is silent in this regard, all international public law elements converge to the conclusion that Czech law as the law of the host state should be applied. International private law leads to the same conclusion. According to the general principles of the conflicts of law rules, the host state's law is the proper law to a dispute between an investor and a state as being the law to which the investment relationship has the closest connection. There is no doubt that, according to Czech law, the Claimant has his permanent residence in the Czech Republic.

34. The doctrine of *estoppel* fully supports the Czech Republic's position as regards the Claimant's eligibility to the protection of the Czech-German BIT. In fact, the Claimant may not be a Czech citizen having his permanent residence in the Czech Republic at one moment in time and a German citizen having his permanent residence in Germany at another. In this regard, the doctrine of *estoppel* is nothing but a particular application of the general principle of good faith. The following elements should be noted in this regard:

(a) The Claimant was a Czech citizen, and the Czech citizenship, far from being offered by the Czech authorities, was granted after his deliberate and voluntary steps.

(b) The Claimant registered his permanent residence before the Czech administration. This step was also voluntary and deliberate and was not related to an imaginary obligation to declare an address in the Czech Republic in order to be registered as a manager.

35. The Claimant's behaviour before the Czech authorities thus induced the Czech Republic to believe that he was a Czech citizen having his permanent residence in the Czech Republic. It follows that, in the absence of any decisive explanation from his side, the Claimant is *estopped* from invoking his German citizenship or residence against the Czech Republic.

#### *The Claimant:*

##### *A. The Czech-German BIT and the EU*

36. The Respondent's argument to the effect that the Czech Republic's accession to the EU would eviscerate the Czech-German BIT of its effect is misconceived. The arbitration deals with an investor, resident in an EU State, who has been deprived of his investment in another EU State because of conduct constituting breach of international law. It represents an egregious proposition that depriving the investor of the right to seek redress for this international wrong would be consistent with the EC Treaty's aim of promoting the free movement of capital between EU Member States.

37. The mechanism of the jurisdiction of an arbitral tribunal based on the standing offer of a state, accepted by an investor, to submit an investment dispute to international arbitration is not compromised by any purportedly higher legal order such as the EC Treaty. The Respondent would certainly be at liberty, as far as the merits are concerned, to submit for the Arbitral Tribunal's review any argument or premise in support of its defence, based on EC law. But there cannot be any question of disqualifying the arbitration agreement, constituted by the State's offer and the investor's acceptance, as such.

38. The offer to investors in the Czech-German BIT remains in force for the duration of the BIT according to its terms. Investors have a right to rely on that offer until it has been duly terminated according to the terms of the BIT itself. In the Claimant's case, the breach of international law was committed in the years 1994-2003. It is not conceivable that a state, which has undertaken a valid treaty obligation to submit to international arbitration for determination of an international wrong, may be granted an amnesty for conduct pre-dating accession times by its mere entry into the community of European nations.

39. The Respondent, when arguing the inapplicability of the Czech-German BIT, relies on the following three propositions:

(a) Intra-EU investment matters are governed by EC law.

(b) The Czech-German BIT is superseded by EC law.

(c) Intra-EU investor-state arbitration is inconsistent with the EC legal order.

40. None of these propositions is true. Intra-EU investment matters are not governed by EC law but by the internal legislation of Member States. The Czech-German BIT is not superseded by EC law, as the BITs, despite the supremacy of EC law, do not come into conflict with EC law or are even addressed by EC law. Intra-EU investor-state arbitration is not inconsistent with the EC legal order. Investor-state arbitration is not addressed by EC law, and the EC legal order has not offered a substitute for investor-state arbitration.

41. The Claimant does not question the supremacy of EU law over the national law of Member States. If the legislation of a Member State includes provisions which are contrary to the EC Treaty – or any secondary legislation such as an EU Directive – EC law will prevail over the national legislation. The situation is different in respect of international treaties concluded by a state prior to its accession to the EU. Such treaty will not automatically become null and void by the mere operation of the accession. Instead it will be the obligation of the acceding state to actively take appropriate steps to remove any incompatibility between the terms of the international treaty and EU law. In respect of the Czech-German BIT, there has been no need to undertake such measures, and none have been undertaken. There exists no incompatibility.

42. Cross-border investment does not fall within the EU's common commercial policy but is still reserved for the Governments of Member States. As there is no conflict between the Czech-German BIT and EC law, the primacy of EU law is a moot point. Also, one must ask what policy considerations would urge the EU to disallow the effectiveness of intra-EU BITs, putting investors domiciled in Member States at a disadvantage in relation to investors from non-Member States.

43. The "mutual trust" principle is irrelevant for the enforceability of intra-EU BITs. Even if the EC legal order may be imbued with a certain sense of "mutual trust", such a soft-law principle is not susceptible of abrogating or amending validly undertaken treaty obligations.

44. The exclusive jurisdiction of the ECJ relates to the relationship between Member States only and does not impinge on the investor-state dispute resolution facility. The Claimant is not bound by the EC Treaty, not being a party to that Treaty, and the subject-matter of the present arbitration is not within the exclusive jurisdiction of the ECJ or even within the jurisdiction of the ECJ at all.

45. Also, Article 59 of the Vienna Convention on the Law of Treaties is not applicable to the present situation. Firstly, this provision requires for its application that all the parties conclude a later treaty which is not the case here. Further, it requires that a later treaty deals with the same subject-matter which is not the case either. Moreover, the provision requires that the two treaties are not capable of being applied at the same time, and that is not the case here either. Moreover, it does not appear from the later treaty that the parties intended the matter to be dealt with by that treaty.

46. The Respondent's alternative requests for a stay of the proceedings or for a request to the ECJ for a preliminary ruling are also contested. As regards the ECJ, it is noted that the subject-matter is nothing in respect of which the ECJ has jurisdiction. Moreover, the Arbitral Tribunal is not a court or tribunal of a Member State which is competent to ask for preliminary rulings.

#### *B. The Claimant's status as an investor*

47. The Czech-German BIT uses the term "permanent residence" as a qualifying criterion for investors who are physical persons. In this respect this BIT differs from other BITs which are based on the investor's nationality. The fact that "permanent residence" instead of the common criterion of nationality is used in certain German BITs is due to a wish to exclude their applicability to certain refugees or expelled persons of German origin but coming from former Eastern Bloc countries.

48. The matter of nationality is therefore not a consideration under the Czech-German BIT. Whether the Claimant is of Czech or German nationality or both is of no importance. In an indirect way, however, the matter of dual nationality provides a useful analogy in this context. When there is no express stipulation concerning the disqualification of persons with dual nationality, tribunals have approached the matter by determining the Claimant's "dominant" or "effective" nationality. This has, normally, been done on the basis of international law.

49. The fact that the Claimant accepted an offer extended to him at ministerial level and became a Czech citizen as of 25 January 1993 is therefore irrelevant under the Czech-German BIT. The Claimant kept his German nationality and therefore has dual citizenships. He did not satisfy the condition of five years' residence provided for in Czech law on acquisition of citizenship but was granted an exemption from this requirement as well as from the requirement that he should lose his previous citizenship. The reason was that his professional experience and expertise were considered particularly valuable to the Czech Republic.

50. In order to qualify as an investor under the Czech-German BIT the Claimant must satisfy the requirement of permanent residence in Germany. The permanent residence, "*Wohnsitz*",

of the investor must be determined according to German law according to which permanent residence encompasses two elements, actual residence of a certain duration and the intent to reside. It would be wrong to argue that Czech law should apply in a situation where a treaty claim is brought against the Czech Republic on the basis of an international treaty, since that would make it possible for the Czech Republic to adapt its legislation to suit its own interests.

51. In the Claimant's view, conclusions as to the location of his permanent residence for the purposes of bringing a claim for treaty breaches based on the Czech-German BIT would be the same, irrespective of whether Czech or German law is applied to this concept or whether an autonomous interpretation is chosen, premised directly on a construction of the BIT or by application of general principles of international law. Nevertheless, the Claimant considers that German law should be applied to the matter of an investor's residence in a situation such as the present one, where the investor claims that he has his permanent residence in Germany. The concept of permanent residence, serving the purpose of providing a territorial justification for an investor to bring an investment claim against a host state, has to be based on the national laws of the state, within which the investor claims that he has his permanent residence.

52. In any event, the following facts are decisive to show that the Claimant's permanent residence is in Germany:

54. In German law there is a provision about several residences. However, that provision is not applicable to the Claimant's situation. The fact that he has frequently stayed in Prague has been due to the need of his presence to manage the operations of the CARGO company and develop his investment in that company, and it has not been based on an intention to take up permanent residence in the Czech Republic. The fact that he has sometimes stated his address in Prague in connection with commercial registration has been dictated by requirements of Czech administrative and company law.

55. There is a difference between "residence" in the meaning of having a right of abode or sojourn, and "residence" as the place where a person actually leads his life, identified by all relevant factors. The difference is clear in German, which distinguishes between "*Wohnsitz*" and "*Aufenthalt*", and also in Czech where the distinction is between "*bydliště*" and "*pobyt*". While the Claimant was granted the status of "permanent residence" in the Czech Republic, it is immediately apparent that this is an entirely different concept from the concept of "permanent residence" envisaged by the Czech-German BIT. The grant of "permanent residence" status effectively constitutes the granting of a visa by the Czech state which entitles the individual in question to remain in the country.

56. If the Arbitral Tribunal were to arrive at the conclusion that the application of German law would not be appropriate for purposes of determining the location of the Claimant's permanent residence, it follows that the determination of this concept must be made by way of an autonomous interpretation of the Czech-German BIT.

57. According to the BIT it would be necessary, in the event of conflicting residences, to resolve that conflict in favour of that residence which more fully satisfies the "centre of gravity" criterion. However, it should be emphasized that the present case is not even a situation of competing residences. The reason for this is that the Claimant's use of his overnight-flat in Prague is exclusively dictated by his need, at the time, to personally manage his investment in the Czech Republic. A residence which is established solely because of the necessity to perform management or business functions in a place other than the one where the person has the centre of his life interest is altogether irrelevant. The proposition that the Claimant should forfeit the protection of his investment under the Czech-German BIT because he has had to spend time in Prague in order to discharge vital management functions is untenable.

58. The doctrine of *estoppel* is not applicable to the present case. Even if *estoppel* could be said to be a principle of international law, it has been rarely applied in practice and only in very clear cases. The doctrine cannot be an issue in the present case for the following reasons:

- (a) The Claimant's permanent residence is situated in Germany.
- (b) The Claimant has never engaged in any act or declaration, conduct or the like which testified to an intent to establish permanent residence in the Czech Republic. Nor has he in fact established permanent residence there.
- (c) The permanent residence permit which the Claimant obtained in the Czech Republic was a necessary pre-condition for obtaining Czech citizenship which, in its turn, the Claimant acquired for purely commercial reasons.
- (d) Even if the Claimant had stated that he had established permanent residence in the Czech Republic, the Czech Republic had not acted in any particular way in reliance on such declaratory act or course of conduct by the Claimant to its detriment or to the advantage of the Claimant.

#### **IV. Reasons for the Award**

##### ***The Czech-German BIT and the EU***

59. The Arbitral Tribunal notes that the Czech-German BIT was concluded on 2 October 1990 and that it entered into force on 2 August 1992. On 1 May 2004, the Czech Republic became a Member State of the EU in accordance with the Accession Treaty. The status of the Czech-German BIT was not regulated in connection with that Treaty, and there is no indication that it was discussed during the negotiations on the Czech Republic's accession to the EU.

60. The Czech-German BIT has not been terminated pursuant to the provision in Article 13(2) of the BIT. Nor would it seem that the Czech Republic and Germany have agreed in any other way that the BIT should be terminated or cease to be operative.

61. While the Arbitral Tribunal is not aware of any official document showing the German Government's present view on the validity of the Czech-German BIT, a message dated 15 January 2007 from Mr. Tillmann Rudolf Braun, M.P.A., International Investment, Federal Ministry for Economics and Technology, submitted by the Claimant, contains the following passage (in translation from German):

"Moreover, the accession of both Contracting States to the EU does not, in our opinion, bring about an automatic termination of the BIT, since these agreements provide to the favoured parties other rights than those of the EC Treaty. It is also difficult to imagine how a Member State could invoke, against an investor, the basic rights of the EC. On the contrary, the guarantee of basic freedoms rather creates a legal duty for the Member States in relation to the nationals of the Common Market."

62. Even if it were assumed that the accession of the Czech Republic to the EU had an effect on the Czech-German BIT, it should be observed that the acts which are alleged to have violated the Claimant's rights under the BIT were undertaken before 1 May 2004, the date of the Czech Republic's accession to the EU, i.e. at a time when the Czech-German BIT was undoubtedly in force. In this respect, the Arbitral Tribunal also notes Article 13(3) of the BIT which provides for continued protection during a fifteen years period after the termination of the Treaty.

63. The Arbitral Tribunal further cannot find that the invoked substantive provisions of the Czech-German BIT, i.e. Article 2(2), which provides for protection against impairment of investments by arbitrary or discriminatory treatment, Article 2(3), which ensures full protection of investments and revenues, Article 4(1), which provides for full protection and security of investments, and Article 4(2), which stipulates that expropriation must be for public benefit and must be accompanied by full compensation, are in any way in conflict with EC law. Consequently, there is no substantive conflict with EC law, and the question of the primacy of EC law does not arise in respect of these provisions.

64. Moreover, the EU documents to which the Parties have referred in this case do not show that, in the opinion of the EU institutions, BITs have automatically ceased to be operative once both Contracting States have become Member States of the EU. The issue of whether measures should be envisaged to terminate intra-EU BITs as not being well adapted to internal co-operation within the EU has given rise to some debate within the EU but has not been finally settled even as a policy matter to this date.

65. The Arbitral Tribunal does not find either that Article 10(2) of the Czech-German BIT, which provides for a specific procedural protection in the form of arbitration between the investor and the host State, is in conflict with EC law. It is true that where a BIT is in force between two Member States of the EU a legal remedy which is being offered by one of these States to investors of the other State is not necessarily being offered also to investors of other EU Member States. The investor's right arising from the BIT's arbitration clause to address an international tribunal independent of the host State is in practice the best guarantee that his investment will be protected against undue infringements by this State. Moreover, when there is no BIT between two Member States, the remedy available to an investor from one of these States in respect of his investment in the other State is legal action before the national courts of the latter State. The fact that, when there is a BIT, such national remedy is replaced or supplemented by an international arbitration mechanism does not, in the Arbitral Tribunal's view, involve any discrimination and is not otherwise incompatible with EC rules and principles.

66. Consequently, the Arbitral Tribunal considers that the relevant provisions of the Czech-German BIT cannot be considered in themselves incompatible with EC law. Consequently, there is no basis for finding that they have become automatically inoperative in application of the principle of the priority of EC law.

67. Moreover, the Arbitral Tribunal cannot find the situation to be such as to justify a suspension of the arbitration proceedings or a request for a preliminary ruling to be made to the ECJ.

#### *The Claimant's status as an investor*

68. The further jurisdictional question which the Arbitral Tribunal is called upon to examine is whether or not the Claimant, in respect of his investment in the Czech Republic, enjoys protection according to the Czech-German BIT as an investor of the other Contracting Party, i.e. Germany. According to the terms of the BIT, in particular its Article 1(3), the relevant criterion for answering this question is whether the Claimant has his permanent residence in Germany.

69. Consequently, it is in no way decisive whether the Claimant holds German, Czech or any other citizenship. Nevertheless, the fact that he applied for, and was granted, Czech

citizenship is of some importance as an element in the consideration of the residence issue. He has explained that he did so because he considered it would promote his business activities in the Czech Republic, and he has also stated that he did not, when acquiring Czech citizenship, lose his German citizenship. It must therefore be assumed that he became a double – German and Czech – citizen.

70. The Claimant acquired Czech citizenship under the old Citizenship Act No. 39/1969 and not under the new Citizenship Act No. 40/1993. The 1969 Act required, for the granting of Czech citizenship, that a person should have resided for an uninterrupted period of five years in the Czech Republic and that he or she should renounce any prior citizenship. However, there was a general exception from these requirements for “cases deserving special consideration”.

71. It appears from the documents submitted to the Arbitral Tribunal that the Claimant asked to be exempted from the requirements of five years’ residence and the renunciation of previous citizenship. In a letter, the text of which has been submitted, the Czech Transport Authority supported his application. Although the decision of 25 January 1993 granting Czech citizenship does not specifically refer to exemptions, it may be assumed that the Claimant obtained the exemptions he had asked for. There is also in the decision granting him Czech citizenship a dispensation from the obligation to make a declaration of allegiance to the Czech Republic the reason for which may have been that the Claimant was not expected to give up his German citizenship.

72. Shortly before the Claimant became a Czech citizen on 25 January 1993, he was granted a permanent residence permit in the Czech Republic on 28 December 1992. This could at first sight be considered to indicate that he had moved his permanent residence to the Czech Republic, which would mean that he would not be entitled to protection under the Czech-German BIT in respect of his investment in the Czech Republic. However, it appears that, while his application for citizenship was pending, the District Authority of Prague 6, while giving its support to the application, insisted that the Claimant should first obtain a permanent residence permit. It may therefore be assumed that he asked for a permanent residence permit, at least primarily, in order to be able to become a Czech citizen. The granting of this permit cannot therefore be decisive for whether he should be considered to have his permanent residence in the Czech Republic or in Germany.

73. The Parties agree that the Czech-German BIT envisages a permanent residence in one State only. Although the possibility of two permanent residences may not be entirely excluded according to the wording of the BIT, the Arbitral Tribunal accepts the Parties’ common view that Mr. Binder’s permanent residence should be considered to be either in Germany or in the Czech Republic but not in both countries.

74. The Czech-German BIT being an international treaty, the Arbitral Tribunal does not find it appropriate to determine the question of permanent residence on the basis of the national law of one of the Contracting Parties. Instead, permanent residence should be considered to be a treaty concept and should as such be given an autonomous meaning and be interpreted according to the principles of the Vienna Convention on the Law of Treaties which provides in Article 31(1) that a treaty shall be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

75. The general purpose of the term "permanent residence" in the Czech-German BIT must be considered to be that protection in one State should only be given to investors with a strong attachment to the other State. The term "residence" also seems to envisage an attachment in regard to private and family life rather than the investor's professional or commercial activities. As regards investors with an attachment to both the Czech Republic and Germany, it would have to be determined to which of these States the investor has the strongest attachment.

76. In this case, there are a number of documents from Germany mentioning [redacted] as the Claimant's place of residence, whereas documents from the Czech Republic often indicate Prague as his place of residence. In some documents from the Czech Republic, the Claimant, in connection with his business activities, declared himself to be a resident of the Czech Republic. However, there are other documents in which he declared [redacted] to be his place of residence. The available documents therefore do not present a uniform picture.

78. This information would seem to show that the Claimant who lived in [redacted] in the past never intended to move his residence to Prague but rather wanted to establish a second home there which would also serve as a centre for his business activities. Since the Arbitral Tribunal understands the term "permanent residence" as referring primarily to private and family life and not to professional or commercial activities, there would seem to be strong reasons for considering that the Claimant's permanent residence has remained in [redacted].

79. However, the Arbitral Tribunal has considered whether the Claimant has acted in such manner in his relations with the Czech authorities that he would be prevented, according to the doctrine of *estoppel*, from relying in the Czech Republic on the protection of the Czech-German BIT. In this respect the Arbitral Tribunal notes that the Claimant took certain measures of integration into the Czech society, the most important one being the acquisition of Czech citizenship. It may also be assumed that he has benefited from his Czech citizenship in his dealings with the Czech authorities. He also asked for, and was granted, a permanent residence permit prior to the acquisition of citizenship, and he regularly indicated before Czech authorities that he was a resident of the Czech Republic.

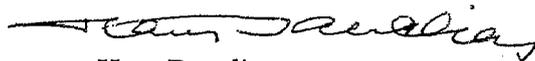
80. However, on balance the Arbitral Tribunal does not consider these measures taken by the Claimant to be sufficient to justify the conclusion that he has forfeited his right to protection under the Czech-German BIT in respect of his investment in the Czech Republic or that he has otherwise acted in a manner inconsistent with his current contention that he has remained at all relevant times a permanent resident of Germany within the meaning of the Czech-German BIT.

81. For all these reasons, the Arbitral Tribunal concludes that the Claimant has his permanent residence in Germany and that he is to be considered an investor of Germany in respect of his investment in the Czech Republic.

**AWARD ON JURISDICTION**

The Arbitral Tribunal rejects the Czech Republic's requests:

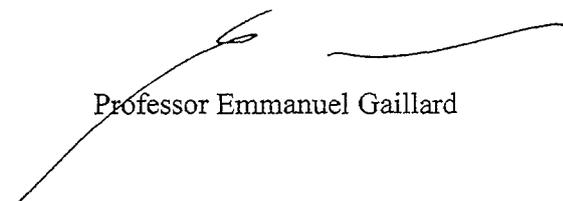
- (a) for a declaration that the Arbitral Tribunal lacks jurisdiction to hear the claims raised by the Claimant,
- (b) for a stay of the proceedings or for a request for a preliminary ruling being made to the European Court of Justice,
- (c) for an order on costs and expenses, and
- (d) for other relief.



Hans Danelius



Professor Jürgen Creutzig



Professor Emmanuel Gaillard