

UNDER THE ARBITRATION RULES OF THE UNITED NATIONS
COMMISSION ON INTERNATIONAL TRADE LAW

SALUKA INVESTMENTS B.V.

Claimant

v.

THE CZECH REPUBLIC

Respondent

**Decision on Jurisdiction over the
Czech Republic's Counterclaim**

Commencement of the Arbitration

1. This arbitration arises out of events consequent upon the reorganisation and privatisation of the Czech banking sector as it had formerly existed under the centralised banking system of the Communist period, which ended in 1990. The Nomura group is a major Japanese merchant banking and financial services group of companies, which typically operates also through subsidiaries set up in various countries. One such subsidiary is Saluka Investments B.V. ("Saluka"), a legal person constituted under the law of The Netherlands. Saluka is the Claimant in this arbitration.
2. By a Notice of Arbitration dated 18 July 2001, Saluka initiated arbitration proceedings against the Czech Republic as the Respondent, under Article 8 of the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of The Netherlands and the Czech and Slovak Federal Republic, signed on 29 April 1991 ("the Treaty"). The Czech and Slovak Federal Republic was dissolved on 31 December 1992, and its two constituent parts became independent States, as the Czech Republic and the Slovak Republic. The Czech Republic confirmed to the Kingdom of The Netherlands that, upon the separation of the Czech and Slovak Federal Republic into two separate republics, the Treaty remained in force between the Czech Republic and the Kingdom of The Netherlands.
3. In accordance with Article 8(5) of the Treaty, the arbitral tribunal ("the Tribunal"), in determining its own procedure, has to apply the arbitration rules of the United Nations Commission for International Trade ("the UNCITRAL Rules"). Although, inevitably, at the time when the Notice of Arbitration was served the Tribunal had not been constituted, the Claimant's Notice of Arbitration was, as is usual in these circumstances, given to the Respondent pursuant to Article 3.1 of those Rules.

Constitution of the Tribunal

4. Article 8 of the Treaty provides that the Tribunal will consist of three persons, each party appointing one member and those two members appointing a third person as Chairman of the Tribunal. Within the time-limits set out in that Article, the three appointments were made, Mr. Daniel Price being appointed by the Claimant, Professor Dr. Peter Behrens being appointed by the Respondent, and Professor Sir Elihu Lauterpacht CBE QC, being appointed as Chairman by agreement between the two previously appointed members.
5. On 5 June 2002, Mr. Price tendered his resignation. On 20 June 2002, the Claimant appointed in his place Me. L. Yves Fortier CC QC as a member of the Tribunal.
6. On 24 February 2003, Professor Sir Elihu Lauterpacht tendered his resignation. The two party-appointed members of the Tribunal agreed upon the appointment of Sir Arthur Watts KCMG QC in his place as Chairman of the Tribunal, and the parties were notified of this on 25 March 2003.

Procedural Timetable

7. At an organisational meeting held in London on 2 November 2001 –
 - (i) it was agreed that the UNCITRAL Rules were the applicable rules of procedure in this arbitration;
 - (ii) the parties accepted the Tribunal's proposal that registry services for the arbitration should be provided by the Permanent Court of Arbitration ("PCA"), and the PCA agreed to provide such services;
 - (iii) Geneva, Switzerland, was selected as the place of arbitration, although this did not preclude the Tribunal holding meetings at any other place, including The Hague, for the sake of convenience;
 - (iv) English was agreed as the language of the arbitration;
 - (v) arrangements were made for the discovery of certain documents;
 - (vi) the following timetable for the submission of written pleadings by the parties was laid down (it being agreed that it would be more appropriate to use the international nomenclature for the parties' written submissions rather than the terms used in the UNCITRAL Rules):
 - Claimant's Memorial – 15 March 2002
 - Respondent's Counter-Memorial – 17 May 2002;
 - (vii) the possibility of there being a second round of written submissions was reserved for future decision by the Tribunal, but tentative deadlines were set as follows:
 - Claimant's Reply – 19 July 2002
 - Respondent's Rejoinder – 13 September 2002;
 - (viii) arrangements were made regarding questions of confidentiality.
8. The timetable laid down for the first round of written pleadings was subsequently amended from time to time, by agreement of the parties.

The Written Pleadings

9. In accordance with the amended timetable, the Claimant filed its Memorial on 15 August 2002. In its Memorial the Claimant explained that the claims being submitted to arbitration arose out of events consequent upon the reorganisation of the Czech banking sector after the centralised banking system of the Communist period had come to an end. After the separation of the Czech and Slovak Republics at the end of 1992, there were four large State-owned commercial banks in the Czech Republic, one of which was Investiční a poštovní banka a.s. (now known as IP banka a.s., “IPB”). IPB, along with the other three banks, had considerable problems with bad debts. Amongst the shareholders in IPB was the Czech National Property Fund (“NPF”). As part of the steps taken to assist IPB, one element of the Nomura Group, Nomura Europe plc (later renamed Nomura Principal Investment plc) (“Nomura Europe” or generally, “Nomura”) – a legal person constituted under the law of England – bought NPF’s shares in IPB under a Share Purchase Agreement of 8 March 1998. That shareholding in IPB was subsequently transferred to Saluka, which was established under Dutch law for the express purpose of holding the IPB shares.
10. Subsequent events resulted, so the Claimant asserts, in the forced administration of IPB and the subsequent sale of its assets to another of the four major Czech commercial banks, Československá obchodní banka, a.s. (“CSOB”). These and other associated circumstances led the Claimant to the view that the conduct of the Czech Republic and its organs had been discriminatory, unfair, inequitable and expropriatory and in breach of its obligations under Articles 3 and 5 of the Treaty. The Claimant accordingly initiated this arbitration seeking declarations as to such breaches, and appropriate orders for the payment of compensation (with interest) and costs.
11. On 13 August 2002 the Respondent filed a Notice to Dismiss, by which it requested the Tribunal to dismiss the Claimant’s claims on the ground that, because of its connection to Nomura Europe, Saluka was not a *bona fide* investor as defined in the Treaty and thus unable to have recourse to arbitration under it. At a procedural meeting in London on 10 September 2002 to consider this request, the Tribunal ruled that because the facts alleged in the Respondent’s Notice to Dismiss were so closely related to the facts involved in the principal claim, the dismissal issue should be joined to the merits and ruled on in the Tribunal’s final award.
12. Before the amended deadline set for the filing of its Counter-Memorial the Respondent submitted, on 4 December 2002, a Notice of Counterclaim, setting forth a counterclaim against the Claimant on which it stated that it would elaborate in its Counter-Memorial.
13. By a letter dated 16 December 2002, the Claimant informed the Respondent of its view that the Tribunal lacked jurisdiction under the Treaty to hear a counterclaim by the Czech Republic. In a subsequent exchange of correspondence, the Claimant proposed that the Tribunal hear its objections to jurisdiction prior to the filing of Respondent’s Counter-Memorial, while the Respondent suggested that any objections to the jurisdiction of the Tribunal to consider the counterclaim be raised, and resolved by the Tribunal, after the filing of the Counter-Memorial.

14. In a “Direction by the Tribunal” issued on 15 January 2003, the Tribunal permitted the Respondent to proceed in the manner set out in its Notice of Counterclaim, by elaborating such claims within its Counter-Memorial (then due to be filed by 21 February 2003), and ordered the Claimant to respond by 31 March 2003 to the parts of the Counter-Memorial dealing with the counterclaim by Objections limited to the question of the Tribunal’s jurisdiction in that respect.
15. The Tribunal added that it expected the Respondent’s elaboration of its counterclaim to cover comprehensively the questions of the Tribunal’s jurisdiction over the counterclaim, and whether any connection was required between the counterclaim and the Claimant’s claim as submitted in its Memorial of 15 August 2002 and, if so, the nature and extent of such connection. The Direction reserved the question whether oral proceedings would be necessary on this issue, and suspended the proceedings in respect of the rest of the case until the question of the Tribunal’s jurisdiction over the counterclaim had been decided.
16. The Tribunal set, and at the request of the parties varied from time to time, a timetable for the submission by the parties of their pleadings on the issue of jurisdiction, and the parties duly complied with that timetable as amended.
17. In its Counter-Memorial, submitted on 7 March 2003, the Respondent both set out its response to the Claimant’s claims and dealt with the question of counterclaims. As regards the former, the Respondent contended that Saluka’s claims should be dismissed because Nomura had not acted in good faith and was not a *bona fide* investor, and because Saluka did not have any *bona fide* factual links to The Netherlands: the Respondent used the terms ‘Nomura’ and ‘Saluka’ interchangeably, considering Saluka to be nothing more than a shell used by Nomura for its own purposes. Respondent rejected the Claimant’s version of relevant facts and the context in which they were to be viewed. In particular, the Respondent asserted that Nomura knew of IPB’s financial weakness when it acquired its shareholding in IPB and could not therefore complain of losses arising because matters turned out worse than Nomura expected. The forced administration of IPB and consequent sale to CSOB was the result of Nomura’s failure to comply with its obligations to ensure IPB’s financial viability. In any event, Nomura’s acquisition of control over IPB could not be considered in isolation but as a step towards acquiring – at great profit to Nomura – control of the Czech Republic’s largest brewery, Pilsner Urquell, through acquiring IPB’s stake in the brewery. Overall, it was the Czech Republic, not Nomura, which was the injured party. The Respondent accordingly asserted that it had at all times acted reasonably, and denied that it was in breach of its obligations under Articles 3 and 5 of the Treaty.
18. As regards its counterclaim, the Respondent set out the various heads of its counterclaim in the Counter-Memorial, and addressed separately the question of the Tribunal’s jurisdiction over the counterclaim. On 15 May 2003 the Claimant filed its “Objections to Jurisdiction over the Czech Republic’s Counterclaims” (“the Objections”). This was followed, on 29 September 2003, by the Respondent’s “Response to the Claimant’s Objections to Jurisdiction over the Czech Republic’s Counterclaims” (“the Response”), and on 10 November 2003 by the Claimant’s “Reply to the Czech Republic’s Response to the Claimant’s Objections to Jurisdiction over the Czech Republic’s Counterclaims” (“the Reply”). The parties’ various arguments on the question of counterclaims are summarised

below.

Hearing on Jurisdiction Over the Respondent's Counterclaim

19. On 11 November 2003, the Respondent requested a hearing on the issue of the Tribunal's jurisdiction over its counterclaim. The Tribunal fixed 6 March 2004 for the hearing, and the Tribunal and the parties met in London on that date for the purpose of hearing oral argument on this issue.

The Relevant Treaty Provisions

20. Paragraph 6 of Article 8 of the Treaty provides:

“The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:

- the law in force of the Contracting Party concerned;
- the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;
- the provisions of special agreements relating to the investment;
- the general principles of international law.”

21. The Tribunal's jurisdiction is governed primarily by Article 8 of the Treaty. Paragraphs 1 and 2 of that Article provide:

- “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.
2. Each Contracting Party 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 stated] period.”

22. It is also relevant that paragraph 5 of Article 8 provides:

“The arbitration tribunal shall determine its own procedure applying the arbitration rules of the United Nations Commission for International Trade Law (UNCITRAL).”

23. Articles 19.3, 19.4 and 21.3 of the UNCITRAL Rules provide:

“Article 19

....

3. In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.
4. The provisions of article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off. [*Note by the Tribunal:* That paragraph sets out certain particulars which are to be included in a statement of claim.]

Article 21

....

3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.”

Summary of the Parties’ Arguments Concerning Jurisdiction Over Counterclaims

24. The Respondent argues that Article 8 of the Treaty gives the Tribunal jurisdiction over “[a]ll disputes,” and that the Respondent’s claim to relief on its counterclaim, being challenged by the Claimant, constitutes a dispute. The dispute is between a Contracting Party to the Treaty and by Saluka’s own admission (although the Respondent disputes this) an investor of the other Contracting Party. The dispute concerns the purported investment of Saluka in the Czech Republic. Disputes are covered by Article 8 whether they arise by way of claim or counterclaim: nothing in the Treaty limits Article 8 to claims by investors to the exclusion of claims by the host State. Although precedent is limited, such practice as there is supports the possibility of a host State being entitled to bring a counterclaim. Moreover, the exercise of jurisdiction by the Tribunal over the Respondent’s counterclaim would advance the goals of economy and efficiency in international dispute resolution, since otherwise the Respondent would have to pursue its claim elsewhere.
25. The Claimant, in its Objections to Jurisdiction over the Czech Republic’s Counterclaims, placed primary reliance on the fact that while the Tribunal had jurisdiction over Saluka, which was constituted under the law of The Netherlands, it had no jurisdiction *rationae personae* over Nomura, which (not Saluka) was the entity against which every head of counterclaim was in terms and in substance directed. Nomura was a legal entity incorporated in the United Kingdom and had not consented to be a party to the arbitration. The Tribunal, being established under a Czech-Netherlands treaty, could not have jurisdiction over entities of a third nationality without the express consent of all concerned.
26. The Claimant also noted that in relation to certain heads of the Respondent’s counterclaim the Respondent had failed to show that they arose after Saluka acquired its investment in IPB, and that they were therefore beyond the Tribunal’s jurisdiction *rationae temporis*. The Claimant also denied the Tribunal’s jurisdiction over the counterclaim *rationae materiae*. In its view the UNCITRAL Rules did not allow counterclaims in the present context, since Article 19.3 only allowed counterclaims arising out of the same legal instrument containing the reference to arbitration, whereas the Respondent’s counterclaim was not based on the Treaty provisions which form the basis of the Claimant’s claims; nor can the Treaty be assimilated to the “contract” referred to in Article 19.3. There must be symmetry between the category of the primary claim and the counterclaim, which must be grounded in the same legal instrument. The Respondent’s offer of arbitration, contained in Article 8 of the Treaty, was only accepted by the Claimant in respect of claims based on the Treaty, and the parties’ mutual consent to arbitration was limited accordingly.

27. In any event, so the Claimant asserted, the Respondent had failed to establish (or even to address) the necessary close connection between its counterclaim and the primary investment dispute before the Tribunal. Policy considerations concerning the alleged advantages of economy and efficiency being best served by allowing the Respondent's counterclaim are insufficient to override the principle that the scope of the Tribunal's jurisdiction is determined by the scope of the parties' consent. Finally, those heads of counterclaim which were based on the Share Purchase Agreement between Nomura and the NPF were not within the Tribunal's jurisdiction *rationae personae* since neither party was a party to the present arbitration; furthermore, that Agreement contained its own mandatory arbitration provision which must be respected and enforced by the Tribunal.
28. The Respondent addressed these points in its Response to the Claimant's Objections. The Respondent asserted that the Tribunal had jurisdiction *rationae materiae* over its counterclaim, since both the Treaty and the UNCITRAL Rules allowed for counterclaims in the present situation, policy considerations supported the possibility of asserting a counterclaim, and the Respondent's counterclaim was sufficiently related to Saluka's claims in its Memorial. Moreover, the arbitration clause in the Share Purchase Agreement did not prevent the Respondent from asserting its counterclaim in the present arbitration. As regards the Tribunal's jurisdiction *rationae temporis* the Respondent rejected the Claimant's arguments, since the Treaty by its terms applied to all investments made after 1 January 1950, and the facts giving rise to the dispute to which the counterclaim related had arisen after 1991, which was the date when the Treaty became effective.
29. The Respondent further argued that if Saluka is permitted to be a representative of Nomura for purposes of claims in which Nomura was the real party in interest, the Respondent should, given the close relationship between Saluka and Nomura, be entitled to pursue its counterclaim. In practice Saluka was asserting claims on behalf of Nomura. The Tribunal may pierce the corporate veil between Nomura and Saluka, and treat them as parts of the same single group of companies, so as to assert jurisdiction *rationae personae* over Nomura and redress Nomura's abuse of the corporate form.
30. The Claimant, in its Reply, reiterated its original submission that under Article 8 of the Treaty the Tribunal could not exercise jurisdiction over Nomura, an English legal entity. Arguments based on theories of piercing the corporate veil, and on 'group of companies' analysis, were inapplicable: they were private law doctrines with no bearing on the interpretation of a treaty provision governing the Tribunal's jurisdiction, and the various precedents cited by the Respondent were beside the point. The Claimant repeated its position that a claim brought on the basis of one legal instrument cannot be met by a counterclaim based on another kind of legal instrument, and that Article 19.3 of the UNCITRAL Rules did not serve to admit the Respondent's counterclaim.
31. Moreover, the Claimant asserted, the Respondent had not discharged its burden of proof that its counterclaims were sufficiently connected to Saluka's claims. As to the heads of counterclaim based on the Nomura-NPF Share Purchase Agreement, they were beyond the Tribunal's jurisdiction *rationae personae*, and in any event had to respect the binding arbitration clause in that Agreement. Finally, as regards the Tribunal's jurisdiction *rationae temporis*, the Claimant argued that a counterclaim against Saluka had to be based on a cause

of action which arose after Saluka became an investor as defined in the Treaty, since the Tribunal's jurisdiction to consider investment disputes was premised on the existence of a qualified investment.

32. The Tribunal notes that in their written and oral submissions and in separate correspondence both parties referred to the existence of other litigation pending before various tribunals and between various parties, but arising substantially out of the same circumstances, and raising many of the same issues, as those involved in the present arbitration. Exchanges between the parties had not, however, led to agreement to consolidate the various pending legal proceedings in a single arbitration.

The Tribunal's Task

33. The Tribunal's task at the present stage in these proceedings is to decide whether it has jurisdiction to hear and determine the counterclaim presented by the Respondent. That counterclaim was put forward first in the Respondent's Notice of Counterclaim of 4 December 2002, and was elaborated further in the Respondent's Counter-Memorial of 7 March 2003.
34. As the party asserting that the Tribunal has jurisdiction to hear and determine the counterclaim which it seeks to bring before the Tribunal, the Respondent carries the burden of establishing that that jurisdiction exists.
35. For purposes of determining its jurisdiction, the Tribunal must look at the claims which are brought before it as they are pleaded and formulated by the relevant party. In the words of the first ICSID tribunal's decision on jurisdiction in *Amco v. Indonesia*,

“The Tribunal is of the view that in order for it to make a judgement at this time as to the substantial nature of the dispute before it, it must look first and only at the claim itself as presented to ICSID and the Tribunal in the Claimants' Request for Arbitration. If on its face (that is, if there is no manifest or obvious misdescription or error in the characterization of the dispute by the Claimants) the claim is one “arising directly out of an investment,” then this Tribunal would have jurisdiction to hear such claims. In other words, the Tribunal must not attempt at this stage to examine the claim itself in any detail, but the Tribunal must only be satisfied that *prima facie* the claim, as stated by the Claimant when initiating this arbitration, is within the jurisdictional mandate of ICSID arbitration, and consequently of this Tribunal.”¹

36. In the context of the present arbitration the Tribunal is thus required to have regard to the counterclaim as formally presented in the relevant paragraphs of the Respondent's Counter-Memorial, and to be satisfied *prima facie* that the counterclaim as so presented is within the Tribunal's jurisdiction under the Treaty. Where particular matters are disputed, the Tribunal must for purposes of determining its jurisdiction look at them objectively, in their terms as pleaded, and consider whether there is at least a reasonable possibility that they could be determined, after subsequent proceedings on the merits, in the Respondent's favour.

¹ Decision of 25 September 1983: 89 ILR 368, 397, para 38.

Jurisdiction in Principle Over Counterclaims

37. The first issue which the Tribunal has to determine is whether, in principle (and irrespective of the particular counterclaim advanced in these proceedings by the Respondent), it has jurisdiction under Article 8 of the Treaty to hear and determine counterclaims. The parties were agreed that, as it was put by the Respondent, “there is not a wealth of precedent concerning the specific question whether a State may bring a counterclaim against an investor pursuant to a BIT.”² Moreover, such precedent as exists is often either based on treaty language different from that in Article 8 of the Czech-Netherlands Treaty, or does not arise in an arbitration applying the UNCITRAL Rules, or both. To a considerable extent, therefore, this issue has to be dealt with by the Tribunal on a ‘first impressions’ basis.
38. Both parties have, however, accepted that counterclaims might fall within the scope of the Tribunal’s jurisdiction under Article 8: the Respondent has done so by virtue of having presented such a counterclaim, and the Claimant has done so by acknowledging that circumstances could be envisaged in which a counterclaim could properly be made, as where a primary claim was presented on the basis of an investment contract and a counterclaim was presented on the basis of that same contract.³
39. The Tribunal agrees that, in principle, the jurisdiction conferred upon it by Article 8, particularly when read with Article 19.3, 19.4 and 21.3 of the UNCITRAL Rules, is in principle wide enough to encompass counterclaims. The language of Article 8, in referring to “All disputes,” is wide enough to include disputes giving rise to counterclaims, so long, of course, as other relevant requirements are also met. The need for a dispute, if it is to fall within the Tribunal’s jurisdiction, to be “between one Contracting Party and an investor of the other Contracting Party” carries with it no implication that Article 8 applies only to disputes in which it is an investor which initiates claims.

Jurisdiction Over the Respondent’s Counterclaim

40. The next issue is whether the particular counterclaim put forward by the Respondent in this arbitration falls within the scope of Article 8 of the Treaty. On that question the parties took opposing positions.

(a) the Relationship Between Saluka and Nomura

41. In the Notice of Counterclaim which the Respondent volunteered on 4 December 2002, the Respondent set out its proposed “counterclaim against Saluka” and stated that it would elaborate on such claims when it filed its Counter-Memorial. The Respondent stated in paragraph 380 of its Counter-Memorial that by its counterclaim the Czech Republic seeks relief on account of the manner in which Saluka (*sic*) handled its “purported investment.” So it may appear that the Counterclaim was intended to be directed against the Claimant. Under each of the more specific heads of its counterclaim, however, the defendant was identified in the Respondent’s Counter-Memorial as Nomura (essentially Nomura Europe,

² Respondent’s Counter-Memorial, para 383; Claimant’s Objections, para 18.

³ Objections, paras 31, 36; Reply, paras 3, 15; transcript (6 March 2004), p. 57, lines 21-26.

which is a legal person constituted under the law of England), whereas the Claimant in this arbitration is Saluka (which is a legal person constituted under the law of The Netherlands). The Tribunal's jurisdiction is limited by Article 8 to disputes between a Contracting Party (in these proceedings the Czech Republic) and an investor of the other Contracting Party (in these proceedings The Netherlands, under whose laws a corporate investor, by virtue of Article 1(b), has to be constituted if it is to be an "investor" for purposes of the Treaty).

42. The Claimant attached overriding weight to the fact that Nomura Europe on the one hand and Saluka on the other were separate legal persons constituted under the laws of different States, that only Saluka was the Claimant in this arbitration and within the jurisdiction of the Tribunal, that Nomura Europe could not be brought within the scope of the Czech-Netherlands Treaty, and that a counterclaim against Nomura Europe could not therefore be brought in these arbitration proceedings instituted by Saluka. The Respondent, however, maintained that in the context of the circumstances which gave rise to this arbitration the relationship between Nomura and Saluka was so close that they were in effect interchangeable as parties in these proceedings; indeed, in the Respondent's submission, such was the closeness of the relationship that the real party in interest was Nomura, and that Saluka was not a *bona fide* "investor" under the Treaty, for which reason the Respondent requested that the proceedings initiated by Saluka should be dismissed.
43. At the Procedural Meeting held in London on 10 September 2002, the Tribunal ruled that the issue raised by the Respondent's request was joined to the merits (above, para. 11). Although the Respondent, by in terms asserting its counterclaim against Nomura and contending that Nomura and Saluka were interchangeable, even now raises aspects of the issue which the Tribunal has decided should be left for the merits, the Tribunal, for reasons which will become apparent, does not find it necessary to touch on those issues for the immediate purpose of reaching a decision on its jurisdiction to hear and determine the counterclaim advanced in this case by the Respondent.
44. For that purpose the Tribunal finds it appropriate to proceed in the first place on the basis that the question of the relationship between Saluka and Nomura is assumed to be determined on the basis most favourable to the Respondent. Accordingly the Tribunal will initially proceed on the assumption, but without deciding, that the relationship between Saluka and Nomura Europe is sufficiently close to enable the Tribunal's jurisdiction in proceedings instituted by Saluka to extend to claims against Nomura. The Tribunal will on that basis now address the several heads of counterclaim put forward by the Respondent.

(b) The Respondent's Counterclaim

45. For purposes of determining questions of jurisdiction in respect of claims put before the Tribunal, it is not appropriate for the Tribunal to examine their substance in any detail. Rather, the Tribunal will consider those claims (or in this instance, the various heads of counterclaim) at face value, on the basis of the terms in which they have been pleaded by the Respondent.
46. Those heads of counterclaim are set out in paragraphs 392-486 of the Respondent's Counter-Memorial, and are listed under eleven separate headings identified by the letters

A through K; the three subsequently lettered headings L through N, although apparently set out as further separate heads of counterclaim, are in fact consequential headings relating to Nomura's alleged liability for damage resulting from the heads of counterclaim previously asserted, and the Respondent's alleged losses in that context and its claimed entitlement to damages.

(c) Heads A, B and C of the Respondent's Counterclaim: the Share Purchase Agreement

47. Heads A, B and C of the counterclaim may be treated together. They all relate to alleged non-observance by Nomura of certain provisions of the Share Purchase Agreement concluded on 8 March 1998. It was, as explained in paragraph 9 above, by that Agreement that Nomura acquired NPF's shares in IPB, it being those shares which, some seven months later, were transferred by Nomura to Saluka and then (as asserted by Saluka) constituted Saluka's investment protected by the Treaty.
48. Those heads of counterclaim, as formulated in the Respondent's Counter-Memorial, allege that:
 - "A. Nomura breached the Share Purchase Agreement by failing to provide IPB with new equity capital;"
 - "B. Nomura breached the Share Purchase Agreement by acting as an agent for IPB's management;"
 - "C. Nomura breached the Share Purchase Agreement by failing to procure the underwriting of IPB's subordinated bonds that would provide IPB with new quasi-equity funds."
49. A further question arises over the parties to the Share Purchase Agreement of 8 March 1998 (see above, paras. 9 and 47). They were Nomura and the NPF, not Saluka and the Czech Republic. It is a cardinal principle relating to the bringing of counterclaims, however, that the necessary parties to the counterclaim must be the same as the parties to the primary claim. That sameness or identity cannot easily be established with respect to the three heads of counterclaim based on the implementation of the Share Purchase Agreement.
50. In order to extend the Tribunal's jurisdiction in these proceedings brought by Saluka to counterclaims based on the Share Purchase Agreement between Nomura and the NPF, a number of conditions would have to be met: Firstly, the counterclaims would either have to be interpreted as being directed against Saluka, even though, under the specific heads A, B and C of Respondent's counterclaim, they are pleaded as being directed against Nomura; and, furthermore, Saluka would have to be regarded as being allegedly bound by the Share Purchase Agreement in its capacity as transferee of the IPB shares initially held by Nomura. Alternatively, the Tribunal's jurisdiction must be shown to extend to claims against Nomura.
51. Even assuming that either of these conditions can be met, as the Tribunal is prepared to do for present purposes (but without so deciding), there is another problem with regard to the identity of the Respondent and the other party to the Share Purchase Agreement. The other Party to the Share Purchase Agreement, the NPF, is not a party to the present arbitration. Furthermore, both Claimant and Respondent were agreed in the oral hearings in London on 6 March 2004 that NPF was an entity separate from the Czech Republic although controlled

by the Czech Republic.⁴ Even if the Tribunal were to make an assumption to the contrary (but without so deciding), i.e., to the effect that identity between the NPF and the Czech Republic could be established so that the parties to the counterclaim based on the Share Purchase Agreement were the same as the parties to the primary claim, the Tribunal would be prevented from exercising jurisdiction on another ground which is of overriding importance.

52. Article 21 of the Share Purchase Agreement provides that “[a]ll or any disputes or differences arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with” the UNCITRAL Rules, the seat of that arbitration being in Zurich.
53. On the assumption (but not deciding) that a counterclaim formulated against Nomura may nevertheless be advanced against Saluka in these proceedings, these three heads A, B and C of the Respondent’s counterclaim in terms concern disputes or differences which fall within the scope of Article 21 of the Share Purchase Agreement. In particular they arise out of or in connection with the Agreement or the breach thereof.
54. Article 21 is in mandatory terms: the disputes and differences in question “shall be finally settled by arbitration” in accordance with the UNCITRAL Rules. Moreover, the Tribunal is aware from the parties’ written and oral pleadings that the Respondent and the NPF have already jointly initiated arbitration proceedings against Nomura under the Zurich arbitration provision contained in Article 21 of the Share Purchase Agreement, and that, as was confirmed during the oral hearings on 6 March 2004, the issues raised in that arbitration and in the arbitration before the Tribunal were largely the same.⁵
55. As it was put by the ICSID Ad hoc Committee in its decision on annulment in *Vivendi v. Argentina*,

“In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.”⁶
56. Moreover, by Article 8(6) of the Treaty the Tribunal is required, in reaching its decisions, to take into account inter alia “the provisions of special agreements relating to the investment.” Given the facts of this arbitration, the Share Purchase Agreement, including its Article 21, constitutes a special agreement relating to Saluka’s investment. It follows that the Tribunal is required by the terms of the Treaty to take into account the mandatory arbitration provision in Article 21 of that Agreement.
57. The Tribunal thus cannot in this arbitration entertain a counterclaim based on a dispute arising out of or in connection with, or the alleged breach of, an agreement which both contains its own mandatory arbitration provision and is an agreement which the Tribunal

⁴ Transcript (6 March 2004), p. 81, lines 7-27.

⁵ Transcript (6 March 2004), p. 69, lines 6-9.

⁶ Decision of 3 July 2002 at para 98; 41 International Legal Materials (2002), 1135.

is expressly required to take into account.

58. For the foregoing reasons the Tribunal is without jurisdiction to hear and determine heads A, B and C of the Respondent's counterclaim.

(d) Heads D-K of the Respondent's Counterclaim

59. Different considerations apply to heads D through K of the Respondent's counterclaim. These were identified in the Respondent's Counter-Memorial in the following terms:

- "D. Nomura wilfully provided the CNB [Czech National Bank] with false and incomplete information in its petition for the CNB's prior approval of Nomura's acquisition of the IPB shares;"
- "E. Nomura violated Section 179(2) of the Commercial Code by obtaining the right to redeem IPB Shares;"
- "F. Nomura wilfully violated "proper morality" through its scheme;"
- "G. Nomura violated "proper morality" by benefiting from IPB's violation of Czech law;"
- "H. Nomura's representatives failed to fulfil their duties as members of IPB's Supervisory Board;"
- "I. Nomura's subsidiary, České Pivo, wilfully breached its obligation under Czech law to notify the Commercial Register that Pembridge was the sole shareholder of České Pivo;"
- "J. Nomura caused South African Breweries to supply OPC [Office for the Protection of Economic Competition] with false information in its Petition for Approval to purchase Pilsner Urquell Shares;"
- "K. Nomura wilfully provided OPC with incomplete and misleading information to circumvent OPC's negative opinion of the merger of Pilsner Urquell and Radegast."

60. The Tribunal first recalls that its jurisdiction, whether for primary claims or for counterclaims, is circumscribed by Article 8 of the Treaty. That Article refers to disputes "concerning an investment." Any counterclaim must, therefore, satisfy that requirement if it is to fall within the Tribunal's jurisdiction.

61. In relation specifically to counterclaims, it is necessary that they must also satisfy those conditions which customarily govern the relationship between a counterclaim and the primary claim to which it is a response. In particular, a legitimate counterclaim must have a close connexion with the primary claim to which it is a response. In this arbitration the primary claim involves Saluka's investment in the Czech Republic through its shareholding since October 1998 in IPB, and its treatment by the Respondent in circumstances which Saluka claims involve breaches of Articles 3 and 5 of the Treaty.

62. As regards the requirement of a close connection between a counterclaim and the primary claim, the Tribunal notes that the parties have nowhere suggested that such a connection is not required by any of the legal bases on which, under Article 8(6) of the Treaty, it is to take its decision, including Czech law. On the contrary, it follows from the submissions of the parties that there is agreement between them as far as the requirement of connection is concerned.⁷

⁷ See the Czech Republic's Response to the Claimant's Objections paras. 30-32; The Claimant's Reply to the Czech Republic's Response paras. 42-45.

63. The nature and extent of the necessary close connection may be variously expressed. No single attempt to define this requirement with universal effect is likely to be satisfactory, since so much will always turn on the particular circumstances of individual cases, including not only their facts but also the relevant treaty and other texts.
64. The Tribunal is unaware of any international arbitral decision which has been handed down by a tribunal which was both operating under the UNCITRAL Rules and applying a treaty provision in the same, or substantially the same, terms as those of Article 8 of the Czech-Netherlands Treaty in issue in this arbitration. Nor have the parties been able to draw the Tribunal's attention to any such decisions. Nevertheless the Tribunal has derived valuable guidance from the decisions of a number of other tribunals, whose decisions or reasoning (or both) have clear implications for the decisions which the Tribunal must make.
65. *Klöckner v. Cameroon*⁸ was a decision of an ICSID tribunal. Its decision emphasised the need for the subject-matter of the counterclaim to be intimately connected with the subject-matter of the primary claim: they were, as the tribunal put it, "indivisible" and "interdependent."
66. Articles 25(1) and 46 of the ICSID Convention governed the tribunal's decision. Article 25(1) provides that the "jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre." Article 46 provides that an ICSID tribunal has jurisdiction to "determine any incidental claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre."
67. The tribunal was seised of a dispute submitted by an investor in respect of its investment pursuant to a Supply Contract for a fertilizer factory, concluded in 1972. There had also been concluded, in the context of the Supply Contract, a Protocol of Agreement in 1971 and an Establishment Agreement in 1973. During the course of the proceedings the tribunal was called upon to consider whether its jurisdiction extended to a counterclaim by Cameroon based on alleged shortcomings in the management of that factory and involving those three instruments and not just the Supply Contract. The tribunal concluded that it

"has jurisdiction to rule both on the claim and the counterclaim, while taking into account the Establishment Agreement which, together with the Protocol of Agreement and the Supply Contract, constitutes an indivisible whole" (at p. 17).

At a later point the tribunal said:

"This case involves one and the same bilateral relationship, because the three instruments are bound together by a close connecting factor: agreement was reached for the supply of a fertilizer factory, and its technical and commercial management, in return for payment of a price and for certain investment guarantees. The reciprocal obligations

⁸ Award of 21 October 1983: ICSID Reports, vol. 2, p. 9.

had a common origin, identical sources, and an operational unity. They were assumed for the accomplishment of a single goal, and are thus interdependent” (at p. 65).

68. To similar effect have been decisions of the Iran-US Claims Tribunal. Article II, paragraph 1, of the governing Claims Settlement Declaration for that tribunal gave it jurisdiction over “any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of [the] national’s claims.”
69. In *American Bell International, Inc. v. The Government of the Islamic Republic of Iran, et al.*,⁹ the primary claim was based on two contracts. The respondent presented counterclaims based on a different contract between the parties. The tribunal upheld its jurisdiction over the counterclaims: it found that all the contracts involved the same project, and the linkage between them was sufficiently strong so as to make them form one single transaction. A similar conclusion was reached in the *Westinghouse Electric Corp. v. The Islamic Republic of Iran et al.*¹⁰
70. The interdependence and essential unity of the instruments on which the original claim and counterclaim were based in those cases, resulting in the tribunals holding that they had jurisdiction over the counterclaims, may be contrasted with other cases in which tribunals have found that there was no sufficient connexion between the claims and the counterclaims to justify it having jurisdiction over the latter.
71. In *Owens-Corning Fiberglass Corp. v. The Government of Iran et al.*,¹¹ the primary claim was based on a licensing agreement between the parties. A counterclaim was submitted, based on a separate licensing agreement. The Iran-US Claims Tribunal declined jurisdiction over the counterclaim because each licensing agreement was stated to constitute the entire transaction to which it related, from which the tribunal concluded that they could not be treated as together constituting the “same transaction” over which the tribunal would have had jurisdiction.
72. In *Morrison-Knudsen Pacific Ltd. v. The Ministry of Roads and Transportation et al.*,¹² the Iran-US Claims Tribunal reached a similar conclusion in relation to three contracts between the parties because, although they related to a single motorway project, they could not be viewed as a single transaction since they were executed on different dates and involved different services to be performed on different dates, and where findings made with respect to claims and defences raised in connection with one contract would have no effect on claims and defences raised on the other contracts.
73. To similar effect was the decision of the Iran-US Claims Tribunal in *Harris International Telecommunications, Inc. v. Iran*.¹³ In that case, the Respondent raised a counterclaim in respect of non-payment of social security contributions and related fines. The tribunal said:

⁹ 11 June 1984; Iran-US CTR, vol. 6, pp. 74, 83-4.

¹⁰ 12 February 1987; Iran-US CTR, vol. 14, p. 104.

¹¹ 13 May 1983; Iran-US CTR, vol. 2, pp. 322, 324.

¹² 13 July 1984; Iran-US CTR, vol. 7, pp. 54, 82-4.

¹³ Partial Award of 2 November 1987; Iran-US CTR, vol. 17, p. 31.

“Previous decisions of the Tribunal interpreting Article II(1) of the Claims Settlement Declaration have clarified that the Tribunal has no jurisdiction over counterclaims for social security premiums that are based on municipal laws rather than on the contract which forms the basis of the claims. Article 2.26 of the Contract in this Case stipulates that the Claimant is responsible for ‘Payment of all taxes, charges, fees and Government charges relating to this Contract and contractor’s personnel and his Contractors *outside* of Iran’ (emphasis added). The Contract does not provide for any obligation of the Claimant to pay social security premiums in Iran. Any such obligation can therefore only stem from an application of Iranian law, which is also the legal basis on which the Respondent itself bases this Counterclaim. Thus, the Counterclaim for social security premiums and related penalties must be dismissed.” (at para. 176).

74. Other decisions of the Iran-US Claims Tribunal have been to similar effect. The position has been summarised in the following terms:

“When claims are based on contracts, the Tribunal has consistently held that it has no jurisdiction over counterclaims seeking Iranian taxes or social security premiums allegedly owed by the claimant and attributable to the performance of those contracts. The reason is that such counterclaims arise from provisions of Iranian law, not from the contracts. Even when the contracts contained clauses requiring the claimant to comply with Iranian tax and social security laws, it was the law, not the contract, that was the source of the alleged obligation.” (Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (1996), at p.116)

75. *Amco v. Indonesia*¹⁴ was decided by an ICSID tribunal, to whose decision Articles 25(1) and 46 of the ICSID Convention (above, para. 66) were relevant. Amco made an investment in Indonesia relating to its development of an hotel and office-block on a site in Indonesia. Problems arose, and Amco initiated an ICSID arbitration claiming damages arising from seizure of its investment and the cancellation by Indonesia of the associated investment licence. After the first award on the merits had been annulled, the case was resubmitted to a new ICSID tribunal. In those new proceedings Indonesia asserted a counterclaim based on alleged tax frauds by Amco. While both parties and the tribunal agreed that tax claims might be within its jurisdiction, the tribunal observed that the immediate issue was

“whether this particular claim falls within Article 25(1) of the ICSID Convention. In answering this question the Tribunal believes that it is correct to distinguish between rights and obligations that are applicable to legal or natural persons who are within the reach of a host State’s jurisdiction, as a matter of general law; and rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host state. Legal disputes relating to the latter will fall under Article 25(1) of the Convention. Legal disputes concerning the former in principle fall to be decided by the appropriate procedures in the relevant jurisdiction unless the general law generates an investment dispute under the Convention.

“The obligation not to engage in tax fraud is clearly a general obligation of law in Indonesia. It was not specially contracted for in the investment agreement and does not arise directly out of the investment.

¹⁴ Resubmitted Case, Decision on Jurisdiction, 10 May 1988; ICSID Reports, vol. 132, p. 543; 89 ILR 552.

“For these reasons the Tribunal finds the claim of tax fraud beyond its competence *rationae materiae*.” (at ICSID Reports, vol. 1, p. 565).

76. The Tribunal acknowledges that the several decisions referred to were based on the terms of instruments which differ from those of Article 8 of the Treaty in issue in the present arbitration and of the UNCITRAL Rules, or (particularly in relation to the decisions of the Iran-US Claims Tribunal) turned on the particular relationship between a counterclaim and a contract-based original claim. Nevertheless, Article 19.3 of the UNCITRAL Rules, Articles 25(1) and 46 of the ICSID Convention and Article II(1) of the Iran-US Claims Settlement Declaration, all reflect essentially the same requirement: the counterclaim must arise out of the “same contract” (UNCITRAL Rules, Article 19.3), or must arise “directly out of an investment” and “directly out of the subject-matter of the dispute” (ICSID, Articles 25(1) and 46), or must arise “out of the same contract, transaction or occurrence that constitutes the subject matter of [the primary] claims” (Article II(1) of the Claims Settlement Declaration). The Tribunal is satisfied that those provisions, as interpreted and applied by the decisions which have been referred to, reflect a general legal principle as to the nature of the close connexion which a counterclaim must have with the primary claim if a tribunal with jurisdiction over the primary claim is to have jurisdiction also over the counterclaim. The Tribunal notes that the parties, in their written and oral submissions on the question of counterclaims, have said nothing to suggest that Czech law does not accord with that general legal principle.
77. The Tribunal considers that Article 8 of the Treaty has to be understood and applied in the light of that general legal principle.
78. In the particular circumstances of the present arbitration, and especially in the light of the terms in which the Respondent has pleaded heads D through K of its counterclaim in paragraphs 415-486 of its Counter-Memorial, it is apparent that those heads of counterclaim involve non-compliance with the general law of the Czech Republic. Thus head D alleges violations of Czech banking law and regulations, heads E, H and I allege violations of the Czech Commercial Code, heads F and G allege violations of the Czech Civil Code, and heads J and K allege violations of the Czech law on Protection of Economic Competition. This is borne out by the Respondent’s statement in what is set out as head L of the counterclaim, that “Nomura is liable for damages that it caused through its breaches of Czech Law and Proper Morality listed above” (the requirement of ‘Proper Morality’ being itself a requirement of the Civil Code).
79. Taken at face value, and on the basis of their own terms as pleaded by the Respondent, these heads D through K of the Respondent’s counterclaim cannot be regarded as constituting (to use the language adopted in *Klöckner v. Cameroon*, above, paragraph 65) “an indivisible whole” with the primary claim asserted by the Claimant, or as invoking obligations which share with the primary claim “a common origin, identical sources, and an operational unity” or which were assumed for “the accomplishment of a single goal, [so as to be] interdependent.” The legal basis on which the Respondent has itself relied for heads D through K of its counterclaim is to be found in the application of Czech law, and involves rights and obligations which are applicable, as a matter of the general law of the Czech Republic, to persons subject to the Czech Republic’s jurisdiction. Consequently, the

disputes underlying those heads of counterclaim in principle fall to be decided through the appropriate procedures of Czech law and not through the particular investment protection procedures of the Treaty.

80. The Tribunal therefore concludes that it is without jurisdiction in respect of any of the heads A through K of counterclaim put forward in the Respondent's Counter-Memorial, and thus also is without jurisdiction in respect of the consequential heads L through N of the counterclaim identified in the Respondent's Counter-Memorial.
81. The Tribunal has reached that conclusion on the basis that, as stated in paragraph 44 above, it assumes (but does not decide) that the relationship between Saluka and Nomura Europe is sufficiently close to enable the Tribunal's jurisdiction in proceedings instituted by Saluka to extend to claims against Nomura. Even on that basis, the disputes which have given rise to the Respondent's counterclaim are not sufficiently closely connected with the subject-matter of the original claim put forward by Saluka to fall within the Tribunal's jurisdiction under Article 8 of the Treaty.
82. It follows from that conclusion that the Tribunal does not find it necessary in these proceedings on its jurisdiction over counterclaims to reach any decision as to the nature of the relationship between Saluka and Nomura Europe and the consequences of that relationship, whatever it may be. Even if the relationship between Saluka and Nomura Europe were to be decided in favour of the Respondent, i.e. if the Tribunal were to decide that the assumption on which it has proceeded (above, paragraph 44) was indeed correct in fact and in law, it would not, for the reasons given, affect the Tribunal's conclusions as to its jurisdiction over the particular counterclaim presented by the Respondent; and if that issue were to be decided against the Respondent it would merely confirm, on other and additional grounds, the Tribunal's lack of jurisdiction. Accordingly, the Tribunal's decision that it is without jurisdiction to hear and determine any of the heads of counterclaim put forward by the Respondent is without prejudice to the eventual consideration of that issue, involving in particular Saluka's standing as an "investor" under the Treaty. That issue remains to be considered at the merits phase of these proceedings, as decided by the Tribunal in its ruling of 10 September 2002 (above, paragraph 11).

The Tribunal's Decision

83. For the foregoing reasons, the Tribunal –

DECIDES:

- (i) that it is without jurisdiction to hear and determine the counterclaim put forward by the Respondent in its Counter-Memorial;
- (ii) that that Decision is without prejudice to the issue raised by the Respondent's Notice to Dismiss of 15 August 2002, which was joined to the merits by the Tribunal's ruling of 10 September 2002;
- (iii) that questions of costs arising as a result of the presentation by the Respondent of

the counterclaim set out in its Counter-Memorial are reserved until final consideration can be given to questions of costs in this arbitration as a whole;

and

- (iv) that the Tribunal will separately set out a revised timetable for the remaining written pleadings of the parties.

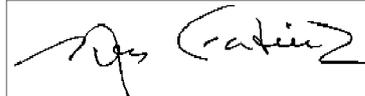
7 May 2004



Sir Arthur Watts, Chairman



Professor Peter Behrens



L. Yves Fortier