

**Arbitration Institute of the Stockholm Chamber of Commerce**  
Box 16050, S-103 21 STOCKHOLM, Sweden

**Final Award**

rendered in Stockholm on 9 September 2003

in arbitration No. 049/2002 between the following parties:

**Claimant:** Mr William Nagel, 10 Ely Place, LONDON EC1N 6RY. United Kingdom

**Counsel:**

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2. Mr Christopher Vigrass and Mr Marc Jones, Ashurst Morris Crisp. Broadwalk House, 5 Appold Street, LONDON EC2A 2HA, United Kingdom

**Respondent:** The Czech Republic, Ministry of Transportation and Telecommunications, Nabr. L. Svobody 12, 110 15 PRAGUE 1. Czech Republic

**Counsel:**

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2. JUDr Luboš Tichý and Ms Claudia T. Salomon, Squire, Sanders & Dempsey v.o.s., Vaclavske nam. 57, 110 00 PRAGUE 1, Czech Republic

**Arbitral Tribunal:** former Justice Hans Danelius, Professor J. Martin Hunter and Professor Dr. Herbert Kronke



## TABLE OF CONTENTS

Chapter	Title	Page
I	General Background	3
II	The Investment Treaty	10
III	The Proceedings	13
IV	The Claims and Arguments of the Parties	17
	1 <i>Claims</i>	17
	2 <i>Grounds and Arguments</i>	17
	(a) Grounds	17
	(b) Arguments	18
	Mr. Nagel	18
	The Czech Republic	44
V	Reasons for the Award	76
	1 <i>Introduction</i>	76
	2 <i>Preliminary Issues</i>	77
	(a) Jurisdiction	77
	(b) Article 8 of the Investment Treaty	78
	(c) Effect of the Settlement Agreement	79
	3 <i>The Merits of Mr Nagel's Claim</i>	83
	(a) Factual Background	83
	(b) Interpretation of the Investment Treaty	86
	(c) The Terms "investment" and "asset"	87
	(d) The Character of the Cooperation Agreement	89
	(e) The Czech Republic's Involvement	94
	(f) The Contents of the Cooperation Agreement	96
	(g) The Significance of Resolution No. 428	98
	4 <i>Remaining Question</i>	98
	5 <i>Conclusion</i>	99
	6 <i>Costs</i>	99
VI	The Arbitral Tribunal's Award	102

## I. General background

1. On 11 and 17 May 1993, a Cooperation Agreement was concluded by Millicom International Cellular S.A. (hereinafter called "*Millicom*"), Mr William Nagel and Sprava Radiokomunikaci Praha (hereinafter called "*SRa*"). The Agreement provided as follows:

"The following sets forth the understandings and agreements relative to the cooperative effort being undertaken by Millicom International Cellular S.A., a Luxembourg corporation ("*MIC*"), Mr W. Nagel ("*Nagel*") and Sprava radiokomunikaci Praha ("*SR*"), with respect to a cellular telephone business (the "*Business*") in the Czech Republic (and possibly the Slovak Republic):

1. Objectives *MIC*, Nagel and *SR* ("the parties") will jointly seek to obtain through the Consortium (referred to in Paragraph 4 below) the necessary frequencies, licences, rights to interconnect with the local public switched telephone network and other permits to establish, own and operate a GSM<sup>1</sup> cellular telephone network in the Czech Republic (the "*Operating Rights*") through negotiations, or through tender solicitation with the relevant entities in the Czech Republic. In addition, the parties will explore opportunities for securing similar *Operating Rights* for the Slovak Republic.

2. Best Efforts Each party shall devote its best efforts to assist the Consortium in the development and implementation of the objectives outlined above (it being understood that at this stage no party is committing to devote any specific amount of funding to the *Business*).

3. Expenses Unless otherwise agreed upon in writing, each of the parties will pay its own costs and expenses incurred in carrying out the cooperative activities hereunder until the formation and funding of the Consortium. Upon formation of the Consortium, project expenses incurred by a party shall be treated as a contribution to capital.

#### 4. Incorporation and Shareholders

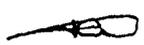
(a) The *Operating Rights* will be sought on behalf of a limited liability consortium (the "*Consortium*") which will be formed by the parties.

(b) The three parties will participate in the shares, capital contributions and loan support (if any) required by the Consortium, on the following basis:

Czech investors ( <i>SR</i> and others)	51% (to be allocated between them by separate agreement)
Foreign Investors ( <i>MIC</i> and <i>NAGEL</i> )	49% (to be allocated between them by separate agreement)

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<sup>1</sup> GSM = Global Systems Mobile.



A capital budget will be developed and agreed to by the parties as promptly as possible, with the understanding that, to the extent possible, the Consortium will be capitalized with a preliminary debt : equity ratio of 70 : 30.

(c) Major decisions regarding the Consortium will require unanimous support.

(d) Pursuant to a management and technical assistance agreement, MIC will nominate the Managing Director of the Consortium and assist the Consortium in its technical and financial operations, on normal commercial terms.

5. Confidentiality Each party confirms to the other that it will maintain and safeguard as secret and confidential all information relating to the Business supplied by the Consortium or the other parties.

6. Exclusivity Each party agrees that during the term of this Agreement and for a period of six months thereafter such party will not support, nor allow its affiliates, employees, agents or other representatives to support, any application for the Operating Rights or any similar licences outside the Consortium. In connection with privatizations SR may reveal the nature of this Agreement, on a confidential basis.

7. Termination

(a) This Agreement shall terminate on the date of the final awards of the Operating Rights. The terms of this Agreement, insofar as is necessary to carry out the provisions hereof, shall survive and have force and effect after its termination or expiration (including, without implied limitation, the provisions of paragraphs 5 and 6 hereof).

(b) If any party declines to continue its participation, it will, if requested by the other parties, continue its participation on a fully-reimbursed basis for as long as necessary to permit continued pursuit of the Operating Rights by the other parties.

8. Miscellaneous This Agreement may be amended only by written instrument, signed by the parties hereto. This constitutes the entire Agreement between the parties as to the subject matter hereof and entirely supersedes and replaces all prior agreements, written and oral, regarding the subject matter hereof.

9. Affiliates This Agreement shall be binding upon the parties hereto, their respective successors and assigns, as well as all of such party's affiliates (i.e., persons controlling, controlled by or under common control with a party)."

2. As from 1 January 1994, as part of the Czech Government's privatisation policy, České Radiokomunikace a.s. (hereinafter called "ČRa") became the legal successor of SRa.

3. In a letter of 13 January 1994 to the Minister of Economy Karel Dyba, the Executive Vice President of Millicom Håkan Ledin strongly advised the Czech authorities to seriously consider awarding a GSM licence by negotiation, and not on the basis of a process of competitive tender.

4. In the reply of 8 February 1994, the Deputy Minister Ladislav Chrudina stated as follows:

“We believe that an open competitive tender will give us the opportunity to evaluate proposals from all of bidders that have already expressed and will have yet expressed their interest in providing competitive GSM service in our country. We will then be in a position to negotiate the terms and conditions of the licence on the basis of the best proposal, using evaluation criteria that reflect the Government’s objective for GSM development. These criteria are to be in harmony with prepared terms and conditions for a selection of strategic partners for SPT TELECOM, a.s. and České radiokomunikaci, a.s. to ensure their transparency, objectivity and nondiscrimination character.”

5. In a letter of 23 March 1994 to Minister Karel Dyba, Mr Ledin and Mr Nagel referred to the Cooperation Agreement and stated, *inter alia*, as follows:

“2. Due to the said contract [Millicom], W. Nagel and [SRa] are partners for obtaining the Operating Rights for the operation of the cellular telephone network. This relationship is not only formal, but has been realised technically by the actual cooperation of [SRa] and [Millicom] technicians for a considerable time.

3. In the case that the Ministry is intending to announce a tender for the position of [SRa] partner, it is obvious that without changing the above specified contract between [SRa], W. Nagel and [Millicom], [SRa], W. Nagel nor [Millicom] will be allowed to enter any tender or project regarding the license for the operation of a cellular telephone network without their partners. This obligation is binding even after the termination of the contract. In the case that [SRa] gets a license to operate, [Millicom] and W. Nagel will automatically have the right to participate, as per the agreement between [SRa], W. Nagel and [Millicom].”

6. In a letter of 17 June 1994 to Mr Nagel, the General Director of ČRa Alex Bém stated that the assumptions on which the Cooperation Agreement had been based were no longer present, since the Government was preparing quite new

conditions and there were no realistic prerequisites for the Agreement to take effect. ČRa therefore proposed that the Cooperation Agreement be cancelled on 15 July 1994. This proposal was rejected by Mr Nagel and Millicom in a letter of 1 July 1994.

7. Mr Bém reverted to the same matter in a letter of 20 July 1994. In this letter he stated, *inter alia*, as follows:

“[The Cooperation Agreement] – owing to the nature of it and according to the law of the Czech Republic – is considered for the ‘Contract about conclusion of the future Contract’ for validity of whose, however, is necessary to state an exact time for its conclusion. The fixing of this time is missing in the Contract and a Consortium was not established. With regard to the circumstances that the objective of the Contract was not consequently completed, we had withdrawn from this Contract as at July 15th, 1994 and we advised you about it with our letter of June 17th, 1994.

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We are forced, therefore, to repeat that we have to insist on the withdrawal of the Contract with our letter of June 17th, 1994, because the assumptions we had been taking into consideration by the conclusion of the Agreement were not completed. Neither there are real assumptions for completion of this Agreement under the new conditions, too.”

8. On 10 August 1994, the Government of the Czech Republic promulgated Resolution No. 428 on Fundamental Principles of the State Telecommunications Policy. According to this Resolution and connected documents, two licences for the operation of GSM mobile telecommunications networks were to be issued. One licence was to be awarded to Eurotel, which was a joint enterprise of SPT Telecom and Atlantic West B.V. and which a few years earlier had been awarded a licence to operate a mobile telephone system in Czechoslovakia. The second licence was to be awarded to ČRa and a partner to be chosen by tender.

9. On 12 August 1994, Mr Nagel and Millicom replied to Mr Bém’s letter of 20 July 1994. They rejected Mr Bém’s legal argument and emphasised that the Cooperation Agreement was a legally binding document and that they adhered to this Agreement.



10. After further discussions during the autumn 1994, Mr Nagel and Millicom, on 5 December 1994, sent a letter to Mr Bém in which they stated that they could not agree to the cancellation of their valid contract and that "no instructions whatsoever from any source, including Government [could] unilaterally change a perfect legally binding documents [sic], in a country governed by law."

11. In a letter of 20 December 1994, Mr Bém expressed himself as follows:

"[The Cooperation Agreement] was signed on the basis of our common good will and on the basis of informations we had at our disposal at the time of its signature. We proceeded from the presumption that the only GSM licence will be issued for the whole Czech Republic and that this licence will be granted by the end of the year 1993 at the latest.

However, recently it has been found that in the meantime there has been important change as compared the situation that we proceeded from on May 1993. According to the latest resolution of the Government of the Czech Republic, the Ministry of Economics [sic] of the Czech Republic is exclusively authorized for choice of a foreign partner. Therefore it is not possible such a choice to be made by the inland participant himself.

Owing to this fact an essential change of circumstances under which this Agreement has occurred as compared with the situation under which this Agreement was signed in May 1993. According to this fact also the principal objectives expressly mentioned in Paragraph 1. of the Agreement were thus foiled. In connection with this neither party to the Agreement has any possibility to realize this Agreement.

Considering your refusal (see your letter of 5.12.1994) of our proposal No. 10.753/94 of 17.6.1994 for termination of this Agreement to be agreed by both parties, České radiokomunikace a.s. hereby declares that according to the § 356, Section 1., of the Czech Commercial Code it withdraws from the Agreement mentioned above and according to the § 582 of the Civil Code of the Czech Republic is hereby giving notice of this Agreement."

12. On 16 October 1995, the Ministry of Economy published an invitation to participate in a process to establish a GSM operator in the Czech Republic. The licence that was the subject of the tender process would be issued to a joint venture between ČRa and the selected operational partner. Among the various applicants a consortium in which Deutsche Telekom held a major interest was selected.

13. On 25 March 1996, an Agreement was concluded between the Ministry of Economy, TMobil B.V. and ČRa. According to this Agreement TMobil was to make a non-refundable payment of USD 15 million to the Ministry, after which the Ministry would issue an authorisation to provide certain telecommunications services and to establish and operate certain telecommunications equipment to a joint venture between TMobil and ČRa. A licence was then issued to the joint venture concerned, operating as a corporation under the name of RadioMobil a.s.

14. On 19 February 1998, Mr Nagel filed with the Regional Commercial Court in Prague a suit against ČRa for compensation of damages resulting from ČRa's withdrawal from the Cooperation Agreement. The amount claimed was GBP 411,900 plus interest.

15. On 17 May 1999, Mr Nagel and ČRa concluded an agreement called "Settlement Agreement and Release". The relevant clauses of the Settlement Agreement were the following:

“ – – – Nagel and ČRa desire to enter into this Settlement Agreement in order to provide for a certain payment in full settlement and complete discharge of all of the claims, complaints, losses, expenses and damages, past, present and future, including without limitation those stipulated in the Complaint, which did or may result from the Cooperation Agreement and any other understanding or agreement, whether written or oral, between Nagel and ČRa, and/or the termination thereof, upon the terms and conditions set forth below.

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#### **1.0 Release and Discharge**

1.1 In consideration of the payment set forth in Section 3.0 of this Settlement Agreement, Nagel hereby completely releases and forever discharges ČRa from any and of all of the claims, complaints, losses, expenses and damages, past, present and future, including without limitation those stipulated in the Complaint, whether based on a tort, contract, deceptive trade practices or other theory of recovery, which did or may result from the Cooperation Agreement and any other understanding or agreement in connection with the Cooperation Agreement, whether written or oral, between Nagel, Millicom and ČRa and/or termination thereof (hereinafter, the 'Claims').

1.2 Nagel hereby agrees to immediately withdraw the Complaint and submit to ČRa a confirmation of such withdrawal satisfactory to ČRa. Nagel hereby acknowledges that the Complaint represents the only formal action

taken by Nagel against ČRa and submitted or intended to be submitted to any court, tribunal or other authority.

1.3 This release and discharge shall also apply to ČRa's past, present and future officers, directors, stockholders, attorneys, representatives, employees, insurers, subsidiaries, parent corporation, affiliates, predecessors and successors in interest, and any and all other persons, or corporations with whom any of the former have been, are now, or may hereafter be affiliated, for any actions or transactions made on behalf of ČRa in connection with the Cooperation Agreement and/or its termination, including but not limited to all actions by ČRa's shareholders in exercising their respective rights as shareholders made in connection with the Cooperation Agreement and/or its termination.

1.4 This release, on the part of Nagel, shall be a fully binding and complete settlement among Nagel, ČRa, and their heirs, assigns and successors.

1.5 Nagel acknowledges and agrees that the release and discharge set forth above is a general release which includes all Claims which Nagel now have, or which may hereinafter accrue or otherwise be acquired or which may hereinafter arise from the alleged acts or omissions of ČRa. Nagel expressly waives and assumes the risk of any and all Claims which exist as of this date, but of which Nagel does not know or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise, and which, if known, would affect Nagel's decision to enter into this Settlement Agreement. Nagel further agrees that Nagel has accepted payment of the sum specified herein as a complete compromise of matters involving disputed issues of law and fact. Nagel assumes the risk that the facts or law may be other than Nagel believe.

1.6 It is understood and agreed to by the parties that this settlement is a compromise of disputed matters, and the payment is not to be construed as an admission of liability on the part of ČRa, by whom liability is expressly denied.

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### **3.0 Payment**

In consideration of the release set forth above, ČRa agrees to pay Nagel the sum of USD 550,000.

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### **10.0 Dispute Resolution**

All disputes arising from the Settlement Agreement and in connection with it that failed to be settled by negotiations of the parties will be finally decided with the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic by one or more arbitrators in accordance with the official Rules of that Arbitration Court. The language of the arbitration will be Czech."

16. On 12 November 1999, Mr Nagel brought court proceedings against the Ministry of Transport and Communications of the Czech Republic, seeking

damages in the amount of USD 27,000,000. On 7 February 2002, the District Court for Prague 1 decided to discontinue the proceedings against the Ministry in view of the fact that Mr Nagel had not paid the court fee.

## II. The Investment Treaty

17. An Agreement between the United Kingdom Government and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments (hereinafter called "*the Investment Treaty*") was concluded on 10 July 1990 and entered into force on 26 October 1992. The Agreement provides, in so far as relevant to the present case, as follows:

### "Article 1 *Definitions*

For the purposes of this Agreement:

(a) the term "investment" means every kind of asset belonging to an investor of one Contracting Party in the territory of the other Contracting Party under the law in force of the latter Contracting Party in any sector of economic activity and in particular, though not exclusively, includes:

- (i) movable and immovable property and any other related property rights including mortgages, liens or pledges;
- (ii) shares in and stock and debentures of a company and any other form of participation in a company;
- (iii) claims to money or to any performance under contract having a financial value;
- (iv) intellectual property rights, goodwill, know-how and technical processes;
- (v) business concessions conferred by law or, where appropriate under the law of the Contracting Party concerned, under contract, including concessions to search for, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments within the meaning of this Agreement. The term "investment" includes all investments, whether made before or after the date of entry into force of this Agreement;

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(c) the term "investors" means:

- (ii) in respect of the United Kingdom:
  - (aa) physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom;

(bb) corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory  
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## Article 2

### *Promotion and Protection of Investment*

(1) Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.

(2) Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.

(3) Investors of one Contracting Party may conclude with the other Contracting Party specific agreements, the provisions and effect of which, unless more beneficial to the investor, shall not be at variance with this Agreement. Each Contracting Party shall, with regard to investments of investors of the other Contracting Party, observe the provisions of these specific agreements, as well as the provisions of this Agreement.

## Article 3

### *National Treatment and Most-favoured-nation Provisions*

(1) Each Contracting Party shall ensure that under its law investments or returns of investors of the other Contracting Party are granted treatment not less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State.

(2) Each Contracting Party shall ensure that under its law investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, are granted treatment not less favourable than that which it accords to its own investors or to investors of any third State.  
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## Article 5

### *Expropriation*

(1) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the



impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realisable and be freely transferable. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

(2) The provisions of paragraph (1) shall also apply where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares.

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#### Article 8

##### *Settlement of Disputes between an Investor and a Host State*

(1) Disputes between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under Articles 2(3), 4, 5 and 6 of this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four months from written notification of a claim, be submitted to arbitration under paragraph (2) below if either party to the dispute so wishes.

(2) Where the dispute is referred to arbitration, the investor concerned in the dispute shall have the right to refer the dispute either to:

- (a) an arbitrator or *ad hoc* tribunal to be appointed by a special agreement or established and conducted under the Arbitration Rules of the United Nations Commission on International Trade Law; the parties to the dispute may agree in writing to modify these Rules, or
- (b) the Institute of Arbitration of the Chamber of Commerce of Stockholm, or
- (c) the Court of Arbitration of the Federal Chamber of Commerce and Industry in Vienna.

(3) The arbitrator or arbitral tribunal to which the dispute is referred under paragraph (2) shall, in particular, base its decision on the provisions of this Agreement.

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#### Article 11

##### *Application of Other Rules*

If the provision of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement."

### III. The Proceedings

18. Mr Nagel's request for arbitration, dated 27 May 2002 and directed against the Czech Republic, was submitted to the Arbitration Institute of the Stockholm Chamber of Commerce ("*the SCC Institute*") on 30 May 2002. The Czech Republic's reply to the request for arbitration, dated 25 July 2002, was submitted to the SCC Institute on 29 July 2002.

19. On 20 August 2002, the SCC Institute decided that the case should be decided by three arbitrators.

20. Mr Nagel having failed to appoint an arbitrator within the applicable time-limit, the SCC Institute decided, on 1 October 2002, to appoint Professor J. Martin Hunter, London, arbitrator on his behalf.

21. On 15 October 2002, the Czech Republic appointed Professor Dr. Herbert Kronke, Rome, as arbitrator in the case.

22. On 17 October 2002, the SCC Institute appointed Mr Hans Danelius, former Justice of the Supreme Court of Sweden, Stockholm, to be chairman of the Arbitral Tribunal.

23. After the parties had paid the advance on costs, the SCC Institute, on 12 December 2002, referred the case to the Arbitral Tribunal and decided that the award should be rendered not later than 12 June 2003.

24. On 20 December 2002, the Arbitral Tribunal decided, at Mr Nagel's request and with the Czech Republic's consent, that the initial Statement of Claim and Statement of Defence should be limited to the issue of liability.

25. Mr Nagel submitted his Statement of Claim on 14 February 2003. The Czech Republic submitted its Statement of Defence on 21 March 2003.

26. On 22 April 2003, the SCC Institute extended the time for rendering the award until 30 September 2003.

27. On 25 April 2003, the Arbitral Tribunal, having heard the views of both parties, informed them that the hearing – which, in consultation with the parties, had been scheduled for 14–18 July 2003 – as well as the remaining briefs to be submitted before that hearing should only concern the liability issue and that questions of damages should be reserved for a possible further phase of the proceedings.

28. A reply to the Statement of Defence was submitted by Mr Nagel on 2 May 2003. A rejoinder by the Czech Republic was submitted on 13 June 2003.

29. On 30 June 2003, Mr Nagel submitted witness statements by himself as well as by Mr Håkan Ledin, JUDr Michael Macek, JUDr Martin Maisner and MM. Paul Sestak and Pavel Marc on behalf of the Wolf Theiss law firm as well as certain documentary evidence.

30. On the same day, the Czech Republic submitted witness statements by Ing. Karel Dyba, Mr Vladimír Sedláček, Professor Josef Bejček and Dr Cento Gavril Veljanovski as well as certain documentary evidence.

31. On 2 July 2003, the Chairman of the Arbitral Tribunal communicated to the parties a draft summary of the facts, the procedure and the parties' claims and arguments and informed them that they would have the opportunity to indicate possible errors or misunderstandings in this summary. Comments were subsequently received from both parties.

32. On 7 July 2003, Mr Nagel submitted in rebuttal statements by himself as well as by Mr Lennart Axhamn, Dr Pavel Randl and Mr Jan Tauber and also by MM. Jan Sestak and Pavel Marc on behalf of the Wolf Theiss law firm.

33. On the same day, the Czech Republic submitted in rebuttal statements by Ing. Karel Dyba, Professor Josef Bejček, Dr Cento Gavril Veljanovski and Professor Ing. Václav Klaus, President of the Czech Republic.

34. The main hearing on the liability issue was held in Stockholm on 14–16 July 2003. The parties were represented as follows:

- Mr Nagel by Mr Charles Lister, assisted by Ms Jennifer Green, Mr Harris Bor and Mr Pavel Marc, and
- the Czech Republic by Mr George von Mehren, JUDr Luboš Tichý and Ms Claudia T. Salomon, assisted by Dr Václav Rombald and Mr Petr Slach.

35. The Czech Republic waived its right to cross-examine the following witnesses relied on by Mr Nagel: Mr Håkan Ledin, JUDr Michael Macek, JUDr Martin Maisner and MM. Paul Sestak and Pavel Marc on behalf of the Wolf Theiss law firm. In agreement with the parties, it was therefore decided that these witnesses should not give oral evidence at the hearing.

36. Mr Nagel declared that he wished to cross-examine all the witnesses relied on by the Czech Republic who were therefore – with the exception of President Klaus (see below) – invited to give oral evidence before the Arbitral Tribunal.

37. Consequently, the following persons gave oral evidence at the hearing: Mr Nagel, Professor Bejček, Mr Dyba, Mr Sedláček and Mr Veljanovski.

38. Since President Václav Klaus, in his written statement, had declared that, because of his responsibilities as President of the Czech Republic, he was unable to attend the hearings in Stockholm, Mr Nagel requested that the Arbitral Tribunal should invite President Klaus to present himself for cross-examination

before the Arbitral Tribunal in Prague and that, if he should decline to permit cross-examination, his written statement should be considered inadmissible or, alternatively, be given no weight except as an admission of facts which he did not deny in his statement. The Arbitral Tribunal decided (a) not to invite President Klaus to give oral evidence, (b) not to declare his written statement as inadmissible evidence, but (c) to give considerable weight, in the evaluation of this statement, to the fact that it had not been possible for Mr Nagel to cross-examine President Klaus.

39. At the hearing it was further decided

(a) that the parties would be allowed to submit post-hearing briefs not later than 4 August 2003,

(b) that in connection with these briefs the parties should also present cost claims,

(c) that the parties would have the opportunity to comment on the reasonableness of each other's cost claims not later than 18 August 2003, and

(d) that, if no comment was received from a party under (c), the Arbitral Tribunal would be entitled to interpret this as meaning that that party had no objection to the reasonableness of the other party's cost claims.

40. On 4 August 2003, both parties submitted post-hearing briefs as well as cost claims.

41. On 18 August 2003, Mr Nagel submitted comments on the Czech Republic's cost claim.

42. On 21 August 2003, the Czech Republic responded to Mr Nagel's comments on its cost claim.

## IV. The Claims and Arguments of the Parties

### 1. Claims

43. Mr Nagel requested that the Arbitral Tribunal should declare him to be entitled to compensation from the Czech Republic in accordance with the principles set out in Article 5(1) of the Investment Treaty and order that the Czech Republic pay his costs of and occasioned by the arbitration.

44. The Czech Republic requested that Mr Nagel's claims be dismissed in full and that the Czech Republic be awarded its attorneys' fees and costs.

### 2. Grounds and Arguments

#### (a) Grounds

45. Mr Nagel argued

- that by the Czech Republic's actions he had been deprived of his claims to money or to any contractual performance under the Cooperation Agreement, being an investment as defined in Article 1(a)(iii) of the Investment Treaty, and
- that the Czech Republic's actions constituted breaches of Articles 2(2), 2(3), 3(1), 3(2) and 5(1) of the Investment Treaty.

46. The Czech Republic argued

- that the Arbitral Tribunal had no jurisdiction since Mr Nagel had not made an investment to which the Investment Treaty applied, or, alternatively,
  - that Mr Nagel was not entitled to recovery under Articles 2(2), 3(1) or 3(2) of the Investment Treaty,
  - that the Czech Republic had not breached the Investment Treaty,
  - that Mr Nagel had been compensated for any rights he had under the Cooperation Agreement,
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- that Mr Nagel had released and discharged all claims against the Czech Republic arising out of the Cooperation Agreement, and
- that Mr Nagel's claims were time-barred.

(b) Arguments

Mr Nagel:

(i) *General*

47. In late 1991 Mr Nagel identified the potential for a telecommunications venture in Czechoslovakia and approached Millicom with a view to pursuing this opportunity. Millicom was an experienced and expert operator of mobile telephone systems, holding licences in some 16 countries. Mr Nagel and Millicom recognised that it would be necessary to include a Czech party in their venture and to obtain the approval and involvement of the Czech Government.

48. In February 1992, Mr Nagel began to search for potential Czech commercial partners. He visited Prague on 18 and 19 March 1992 and met Mr Václav Klaus (then Deputy Prime Minister of the Czech Republic), Mr Lubomir Bokstefl (then Deputy Minister of the Federal Ministry for Transport and Communications of the Czech Republic), Mr Josef Pancir (then Deputy Minister for Foreign Trade of the Czech Republic) and Mr Karel Dyba (then Minister for Economic Policy of the Czech Republic) and informed them of his and Millicom's commercial intentions to form a consortium with a Czech party and obtain a mobile telephone licence. Mr Nagel had previously discussed this matter in detail with Mr Klaus.

49. On 17 and 18 December 1992, Mr Nagel wrote to Deputy Minister Bokstefl and Minister Dyba to confirm his and Millicom's intention to obtain a licence to operate a GSM system in the Czech Republic. He further stated that they had identified and entered into discussion with potential local joint venture partners in Prague and asked to be informed about the intentions of the respective Ministries in regard to the issuing of GSM licences. The Government answered

on 4 January 1993 that the invitation for the GSM licence tender would be issued not earlier than in the second half of 1994.

50. On 25 January 1993, Mr Nagel's representative met Minister Dyba and his collaborators and discussed possible joint venture partners for Mr Nagel and Millicom. Minister Dyba directed them to approach SRa for this purpose. They immediately did so, and at SRa's suggestion also met with Deloitte & Touche, SRa's privatisation advisor.

51. At that time SRa was an instrumentality of the Czech Government and had not yet been privatised. SRa twice informed Mr Nagel that it would require Government approval to enter into a joint venture, and this was confirmed by Deloitte & Touche. This also appeared to be a requirement imposed by the Large Privatisation Act. Mr Nagel was subsequently informed by Mr Bém, the General Director of SRa, and by then Prime Minister Klaus that Minister of Economy Dyba had indeed approved the joint venture. Contemporaneous documents show that Mr Bém later reminded Mr Dyba of this approval. Mr Nagel subsequently confirmed this fact in letters to Mr Klaus and Mr Dyba. The fact was not denied until in these proceedings, where only Mr Dyba has denied it.

52. Mr Nagel was also led by the Government to believe that SRa was the Czech entity that would participate in a new GSM system. This was confirmed by later events and by the witness statement of Mr Sedláček, who stated that the Ministry had concluded that SRa was – apart from SPT, which was already involved in Eurotel – the only Czech entity with the appropriate background, size and area of coverage.

53. After negotiations in February and March 1993, Mr Nagel, Millicom and SRa agreed in principle, at a meeting on 1 April 1993, to form a consortium in order to obtain the mobile telephone licence. Mr Nagel promptly informed Mr Dyba of the successful conclusion of the discussions and later informed Mr Klaus. The Agreement was drafted jointly by all of the parties. Before the Cooperation



Agreement was signed on 17 May 1993, the Czech Government was fully informed of the proposed Agreement and in fact authorised and approved SRA's execution of the Agreement. Also after 17 May 1993, the venture, including technical and financial plans, was repeatedly discussed with Prime Minister Klaus and Minister Dyba. On no occasion did Minister Dyba or any other member of the Government suggest that the Cooperation Agreement was not fully binding and valid. On the contrary, they always appeared to recognise and accept the validity of the Agreement.

54. During the remainder of 1993, and in reliance upon the Cooperation Agreement, the consortium (which also described itself as a "joint venture") began to take the necessary steps to put itself in a position to obtain and operate a mobile telephone licence. Substantial progress was made towards a new system, to be called Mobitel. This is shown by the undisputed evidence of Mr Ledin and Mr Axhamn from Millicom, and the contemporaneous documents provided by them, as well as by Mr Nagel's testimony. The Government waived cross-examination of Mr Ledin and Mr Axhamn, and their testimony on this and other points is therefore not contested. When ČRa became the legal successor of SRA, Mr Nagel and Millicom were assured that ČRa would be fully responsible for SRA's obligations under the Cooperation Agreement. In reliance on the assurances given to him by SRA, ČRa and the Government, Mr Nagel invested substantial time and money in the project. Among other things, Mr Nagel and Millicom arranged for technicians to educate SRA-ČRa about the operation of mobile telephone systems.

55. Mr Nagel considers that his expectations were realistic. They exactly reflected the assurances given to him by senior Government officials. They were also confirmed by the history, since the Government did in fact issue a GSM licence to a consortium based on ČRa.

56. By letter of 13 January 1994, Millicom, on behalf of the consortium, explained to the Czech Government the advantages of awarding a mobile



telephone licence by negotiation rather than by a tender process. By letter of 8 February 1994, the Czech Government responded that there would be a tender process to select strategic partners for both SPT Telecom a.s. (which was already a partner with American investors in the operation of an analogue system called Eurotel) and ČRa. The effect of the announced tender process would be to deprive Mr Nagel of his contractual rights under the Cooperation Agreement. It ignored the fact that, with the knowledge and approval of the Czech Government, Mr Nagel and Millicom had already entered into the Cooperation Agreement with respect to the mobile telephone licence. On 23 March 1994, Mr Nagel and Millicom wrote to Minister Dyba to object to the letter of 8 February 1994 and to protest and remind him that the Cooperation Agreement had been concluded with SRa upon the Ministry's advice and with its approval. At the time, Mr Dyba did not deny this. Mr Klaus also subsequently told Mr Nagel that Mr Dyba had approved the Agreement. Mr Nagel confirmed this in writing to Mr Klaus, who has never denied it.

57. On 17 June 1994, Mr Bém, on behalf of ČRa, wrote to Mr Nagel and Millicom, referring to the Czech Government's new approach and proposing cancellation of the Cooperation Agreement. ČRa did not wish to cancel the Agreement, but Mr Bém had been instructed by the Ministry of Economy that he must do so. By letter of 1 July 1994, Mr Nagel and Millicom rejected this proposal. The same proposal was again made in ČRa's letter of 20 July 1994 and was rejected by Mr Nagel and Millicom in their letter of 12 August 1994.

58. After 10 August 1994, when the Czech Government issued Resolution No. 428, there were discussions between Mr Nagel, Millicom and ČRa in order to find a solution to the problems caused by the Government's new policy. However, no agreement was reached. Also after 20 December 1994, when ČRa had unilaterally withdrawn from the Cooperation Agreement, Mr Nagel and Millicom refused to accept that ČRa was entitled to withdraw from the Agreement and protested to the Government. Over a lengthy period, Mr Nagel

made repeated but unsuccessful efforts to persuade the Government to make some compromise arrangement.

59. On 16 November 1995, the Czech Government published a public invitation to tender to participate in the process of establishing a GSM operator in the Czech Republic, stating that the licence would be granted to a joint venture between ČRa and a partner to be selected through the tender process. In contrast, a licence to SPT Telecom and Eurotel was awarded without bidding. The Government said that American investors in Eurotel had agreed in 1990 to pay a deposit towards a GSM licence if and when one was issued by the Government. This was said to give the American investors contract rights. Mr Nagel and Millicom had previously offered to pay a deposit to the Government for a licence, but this was said by the Government to be unnecessary.

60. On 15 February 1996, RadioMobil was formed as the joint venture vehicle for ČRa and whichever participant was chosen by the Czech Government. On 25 March 1996, RadioMobil was granted a GSM licence. In May 1996 bids were made by foreign consortia, and in about June 1996 a consortium led by Deutsche Telekom was chosen to be the joint venture partner of ČRa.

*(ii) The nature of the Cooperation Agreement*

61. The Cooperation Agreement obliged the parties to work jointly to obtain the GSM licence and to use their best efforts for this purpose. It provided specifically for allocations of shares in, and capital contributions to, the consortium that would operate the licence. It included a termination clause and confidentiality provisions. It expressly provided that its terms were binding on the parties' successors and assigns. Significantly, it included an exclusivity clause that prohibited the parties from providing "support" for a licence awarded to any other persons.

62. Nothing about these obligations was vague or conditional. No "condition precedent" was part of the Agreement. On the contrary, the Agreement's



obligations became binding immediately upon the Agreement's execution. While the Agreement contemplated the subsequent creation of a consortium, this was not a condition precedent to the Agreement's effectiveness. In any event, a formal joint venture vehicle was not created because the Government itself intervened to compel ČRa's "withdrawal" from the Agreement.

63. Mr Nagel considers that the fact that he did not know in 1993 when precisely a licence would be issued does not invalidate the Cooperation Agreement. The Government had assured him that a licence would be issued and that SRa-ČRa would be the Czech participant. The possibility that this might nonetheless not occur did not lessen Mr Nagel's rights. Moreover, the Agreement meant that none of the parties could accept a GSM licence without honouring the other parties' participatory rights. This was neither conditional nor speculative. The conduct of SRa, ČRa and the Government itself shows that they all understood that the Cooperation Agreement was a valid and binding contract.

64. Mr Nagel argues that the Government's present view is inconsistent with its prior conduct and with the conduct of SRa and ČRa. All governmental parties consistently behaved in a manner which confirmed that the Cooperation Agreement was valid and binding. Their behaviour induced Mr Nagel to act in reliance on his contract rights. They encouraged Mr Nagel to believe that it was fully binding. When the Government decided to take Mr Nagel's exclusive rights and sell them to a new consortium, it instructed ČRa to "cancel" the Agreement, which shows that it considered the Agreement to be binding. Under international rules, the Government is therefore now precluded from claiming that the Agreement was never valid.

65. When ČRa's General Director wrote to Mr Nagel on 17 June 1994, he did not claim that the Cooperation Agreement was not binding, but he argued that the assumptions on which the Agreement had been based had not been fulfilled. In his subsequent letter of 20 July 1994, he added a somewhat different argument by stating that the Agreement was a "Contract about conclusion of the future



Contract” and required a specific date for its conclusion. Mr Nagel and Millicom obtained legal advice and responded to Mr Bém that this was not correct. SRa did not subsequently rely on the claim. In a further letter of 20 December 1994, Mr Bém did not argue that the Agreement was invalid but claimed that ČRa was entitled to withdraw from it pursuant to Section 356 of the Czech Commercial Code.

66. Mr Nagel states that these letters foreclose the Government’s claims. First, they preclude them under international estoppel principles. The Government and its agencies consistently led Mr Nagel to rely to his detriment on his exclusive rights, and they are now precluded from denying the validity of those rights. Second, the Government’s claim is foreclosed because the events described here are subsequent conduct which under Section 266 of the Commercial Code confirms that the parties intended to create, and understood themselves to have created, a binding contract.

67. In Mr Nagel’s opinion, the settlement concluded by ČRa with Mr Nagel in May 1999 provides further evidence that the Cooperation Agreement was valid. Although the settlement agreement was prepared by counsel for ČRa (and current counsel for the Government), it did not suggest that the Agreement had not been valid and binding. On the contrary, it stated once more that circumstances had changed and that ČRa had therefore “terminated” the Agreement.

68. Under Czech law as properly construed, the Cooperation Agreement was valid and enforceable. This is confirmed by three expert opinions offered by Mr Nagel, as to which the Government waived all cross-examination. Pursuant to Section 266 of the Commercial Code, Czech courts regularly construe contracts in a manner intended to give effect to the parties’ real intentions. Any ambiguities in the Agreement could easily have been resolved by interpretation in the same manner.



69. Accordingly, the Cooperation Agreement was valid and binding, and imposed upon the parties an obligation to work jointly to obtain a GSM licence. More importantly, it obliged them to do so exclusively with one another. Mr Nagel concludes that the Agreement gave him a binding and enforceable right to participate in any licence awarded to SRa-ČRa.

70. Even if other portions of the Agreement were held to be too vague, which Mr Nagel denies, this is not true of the Agreement's exclusivity clause. Section 41 of the Civil Code provides that severable parts of an agreement may be enforced even if other parts cannot be. At a minimum, the exclusivity clause was valid and enforceable, and this is sufficient to establish Mr Nagel's rights.

71. Mr Nagel contends that all of these points are confirmed by the expert opinions offered by MM. Randl, Maisner and Macek. The Government waived cross-examination of all three experts.

*(iii) The Government and the Cooperation Agreement*

72. The Government instructed ČRa to terminate the Cooperation Agreement. ČRa first endeavoured to persuade Mr Nagel to relinquish his rights, but when this attempt failed, ČRa "withdrew" from the Agreement, claiming that it had been frustrated by changes in circumstances.

73. Mr Nagel considers the action of ČRa in withdrawing from the Cooperation Agreement to be wrongful and to constitute an unlawful termination of that Agreement. Such unlawful termination was directly procured and caused by the Czech Government.

74. Moreover, the Czech Government was fully aware of, and had authorised the creation of, Mr Nagel's legal rights arising from the Cooperation Agreement. The Government was further aware that to proceed with the policy implemented by Resolution No. 428 would have the effect of unjustifiably depriving Mr Nagel of those rights and that Resolution No. 428 would therefore be a measure the effect

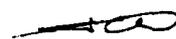
of which was equivalent to expropriation, for which prompt, adequate and effective compensation should have to be paid.

75. The Cooperation Agreement was a binding commitment that the parties would work jointly to obtain and operate a GSM licence. It provided for allocations of shares in, and capital contributions to, a consortium that would operate the licence. Its requirements were made expressly binding on the parties' successors and assigns. It included a confidentiality clause and termination provisions. Importantly, the parties were obliged to work exclusively with one another. If a GSM licence was issued to SRa, the Agreement entitled Mr Nagel and Millicom to be full participants. All these obligations were unconditional and immediately effective.

76. Mr Nagel contends that Resolution No. 428 and its implementing rules entirely disregarded his exclusive rights. They also ignored the circumstances in which those rights were created: the Government had sent Mr Nagel to negotiate with SRa; the Government was fully informed of the ensuing discussions; and SRa had entered into the Agreement with the Government's approval. No justification was offered for the Government's decision to honour one set of contract rights while disregarding the other. If the Government decided upon this discriminatory treatment because the American investors had paid a deposit, it did not explain why a deposit was never taken from Mr Nagel and Millicom. It ignored the fact that Mr Nagel offered to make a deposit.

*(iv) The scope of the Investment Treaty*

77. The principal source of governing law in this case is the 1990 Investment Treaty. The protection given to Mr Nagel must be measured by the Treaty's provisions, interpreted in light of the purposes the Treaty was intended to achieve. The Treaty's terms show that it guarantees a high level of investment protection. International law, and not domestic law, is the residual source of governing law. According to Article 11 of the Treaty, domestic law may become applicable only if and to the extent that it offers more favourable treatment than

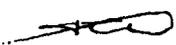


the Treaty. The reference to the host State law in Article 1(a) is irrelevant here because it permits only the exclusion of categories of investment which the host State regards as illegal. It does not permit Czech law to define "asset" or "investment". The issue in the present case is quite different from the question as to whether a private contract has been breached under domestic law. It follows that in this case Czech law may become applicable only if and to the extent that it is more favourable to Mr Nagel than the Treaty's provisions.

78. Contract rights are property. Their intangibility does not prevent them from being "assets" within the meaning of the Treaty. Mr Nagel's contract rights had a financial value. This is shown by the fact that ČRa paid Mr Nagel USD 550,000 to settle claims based on these rights. The settlement acknowledges that Mr Nagel had incurred costs in good faith reliance on his exclusive rights. In addition, Mr Nagel and Millicom contributed substantial know-how to the project.

79. The fact that Mr Nagel's rights had a value is also shown by the nature of those rights. Mr Nagel held binding rights to participate jointly in any GSM licence involving ČRa. Unless and until the Government decided not to grant a licence to a consortium that included ČRa, the exclusivity of those rights gave them substantial value. The high likelihood that ČRa would be a central part of a consortium to which a licence would be granted (which is confirmed both by subsequent events and by the witness statement of Mr Sedláček) meant that anyone interested in obtaining a licence would also be interested in purchasing Mr Nagel's rights. The very substantial value of GSM licences meant that a large market for Mr Nagel's rights would exist.

80. This is also proved by the Government's bidding process. Although the Government has kept secret the terms of the bids, it is clear that numerous bidders offered the Government substantial sums to acquire the same rights as had been taken from Mr Nagel. Indeed, the Government expropriated Mr Nagel's exclusive rights precisely to obtain those financial benefits.



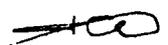
81. Contingency does not exclude value. Options and other commercial rights are routinely contingent on subsequent events, but they nevertheless have value. For example, the American investors in Eurotel agreed to pay USD 10 million in 1990 for a contingent right to obtain a GSM licence, if and when the Government decided to grant one. They obviously saw substantial value in that contingent right. The extent of the uncertainty surrounding that right is shown by the fact that the Government stated in February 1994 that it would award the licence, not on the basis of that contingent right, but instead by a bidding process.

82. Mr Nagel's exclusive rights are therefore an asset within the meaning of Article 1(a) of the Investment Treaty. "Assets" are defined by the Treaty and international law, and not by Czech law. Alternatively, and assuming that the Treaty's broad definition could be reduced to merely Article 1(a)(iii), the rights were "claims to — — — performance under contract having a financial value". Mr Nagel's rights were thus an investment protected by the Treaty, and the Arbitral Tribunal has jurisdiction to grant him relief.

*(v) Breaches of the Investment Treaty*

83. Mr Nagel contends that the Government breached Articles 2(2), 2(3), 3(1), 3(2) and 5(1) of the Investment Treaty. Certain of these articles establish multiple obligations, and Mr Nagel contends that each of those obligations has been separately breached. Mr Nagel is entitled to prompt, adequate and effective compensation if the Government has breached any of those obligations.

84. Mr Nagel denies the Government's claim that Articles 2(2) and 3 may be disregarded because they are not listed among the articles in Article 8(1) that may be a predicate to arbitration. Mr Nagel contends that, once an arbitral proceeding is properly initiated, as it has been here, all issues relating to the Government's obligations under the entire Treaty may be made the subject of claims, and may be considered by the arbitral tribunal in making its award.



85. According to Article 2(2) of the Investment Treaty, investors must at all times be accorded “fair and equitable treatment,” and investments must enjoy “full protection and security”. These are shown to be separate obligations by the use of separate verb phrases. Mr Nagel contends that both were violated.

86. In Mr Nagel’s opinion, the Government knowingly took his exclusive rights without compensation. This was a “wilful neglect” of its “duty” under the Investment Treaty and international law. At the same time and pursuant to the same Resolution, the Government honoured the rights of the American investors in Eurotel. It justified this discriminatory treatment by the fact that the American investors had, four years earlier, agreed to pay a deposit. Mr Nagel’s rights were not, however, conditional on any deposit. Nor was he ever asked for one. Indeed, his offers to provide a deposit were declined. Accordingly, the Government’s destruction of Mr Nagel’s investment was neither “fair” nor “equitable”. Those words require the Government to show “vigilance” and “care” in its protection of investments, as well as “due diligence”, and the Government failed to properly satisfy those obligations in this case.

87. The Government’s destruction of Mr Nagel’s rights also denied his investment the “full protection and security” to which it was entitled under the first sentence of Article 2(2). This is a separate requirement. Its violation is therefore a separate breach.

88. The Government took no steps to ensure the agreed and approved security and protection of Mr Nagel’s investment. On the contrary, the Government knowingly altered its laws and policies to destroy Mr Nagel’s exclusive rights. This “withdrew” and “devalued” the protection to which that investment was entitled. It also constituted a “wilful neglect of duty” and violated even the quite “minimal” standard for which the Government argues. Mr Nagel contends, however, that the Investment Treaty imposes a standard much higher than the minimal one urged by the Government. Accordingly, the Government has breached its obligation under the Treaty to provide “full protection and security”.



89. The Government's taking of Mr Nagel's rights was an "unreasonable" measure that impaired Mr Nagel's use and enjoyment of his investment. It cannot be "reasonable" for a government to destroy contract rights that are shown to be valid by both its laws and its conduct. The taking is not made "reasonable" because the Government expected to make substantial profits by selling the same rights to others.

90. Mr Nagel argues that the taking of his rights was a "discriminatory" measure that impaired the use and enjoyment of his investment. The Government's decision to honour the contingent contract rights of the American investors in Eurotel, while taking Mr Nagel's exclusive rights, was discriminatory.

91. As regards Article 2(3) of the Investment Treaty, Mr Nagel concluded a "specific" agreement with SRA which was then a wholly-owned part of the State. The Government itself directed Mr Nagel to negotiate with SRA, and the Agreement was entered into with the Government's authorisation and approval. In these circumstances, the Agreement is encompassed by Article 2(3). The Government's failure to "observe the provisions" of that "specific" Agreement therefore breached Article 2(3).

92. The Government's obligation in Article 3(1) of the Investment Treaty is unconditional and absolute. The Treaty's words permit no exceptions based on claims of public benefit or justification. Nor is it sufficient that the treatment of British investors is not less favourable than that given Czech investors. The treatment must also be not less favourable than that given investors from "any third State".

93. The Government honoured the contract rights of the American investors in Eurotel while simultaneously destroying Mr Nagel's exclusive rights. It seeks to distinguish the two situations only by the fact that the American investors paid a deposit. Mr Nagel's rights were not, however, conditional on a deposit. As



already stated, his offers to provide a deposit were declined. Accordingly, the treatment given his investment was “less favourable” than that given to the American investment. Mr Nagel finds any justifications now offered by the Government for the disparity to be irrelevant.

94. Article 3(2) of the Investment Treaty closely parallels Article 3(1), but differs because it applies specifically to the management, maintenance, use, enjoyment or disposal of investments. The Government’s taking of Mr Nagel’s rights clearly prevented the maintenance, use and enjoyment of his investment. The markedly less favourable treatment granted to Mr Nagel than to the American investors in Eurotel therefore breaches Article 3(2).

95. According to Article 5(1) of the Investment Treaty, an expropriation or its equivalent is forbidden even when done for a public purpose unless two conditions are satisfied: the expropriation must be non-discriminatory *and* compensation must be given. The conditions are cumulative, not alternative, so compensation must be paid even with respect to non-discriminatory measures for a public purpose.

96. Expropriation is not limited to physical seizures of tangible property. The taking of contract rights is clearly expropriation. Moreover, acts of expropriation or its equivalent need not be direct or declared. An expropriation occurs under international law when a State interferes with either the use of an asset or the enjoyment of its benefits. It also occurs when a State fails to honour expectations it has created, and on which an investor has reasonably relied. The key issue is not the form of the measures, but the reality of their impact. In this case, the Government knowingly took Mr Nagel’s exclusive rights so that it could obtain the financial benefits of selling those same rights to others.

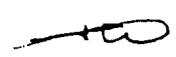
97. In sum, Mr Nagel contends that the Government’s taking of his exclusive rights constituted either expropriation or a measure having effect equivalent to expropriation within the meaning of Article 5(1). Mr Nagel has not received

prompt, adequate and effective compensation for the taking of his rights. Nothing further is required to show a breach of Article 5(1). Nonetheless, it is also clear that the expropriation of Mr Nagel's rights was not on a non-discriminatory basis. The disparate treatment granted to the American investors in Eurotel shows that the expropriation was also discriminatory.

98. The Government's arguments that it was merely adopting rules for competitive bidding and that it wanted an open and transparent process should be regarded with scepticism. In fact, the bids have been kept secret, and their financial terms are still unclear. It is certain that the auction of Mr Nagel's rights was quite profitable for the Government. It remains unclear what financial terms the winner offered, and by what standards that winner was ultimately selected.

99. But even if the Government's reasons for the taking of Mr Nagel's rights were entirely legitimate and reasonable, which Mr Nagel denies, those reasons could not excuse the Government under the Treaty and international law for failing to provide compensation. Even if the Government had been trying to overcome problems arising from a change in political systems, Mr Nagel's loss resulting therefrom would have to be compensated.

100. In fact, however, the Government has concealed the actual reason for its taking of Mr Nagel's rights. In Mr Nagel's view, the reason was the enormous financial advantage. The Cooperation Agreement did not require any payment to the Government for the GSM licence. In contrast, bidders could be, and were, compelled to pay the Government very substantially for the same rights. Despite its present claims of openness and transparency, the Government has never revealed the actual financial terms of the bids. Nor has it fully explained by what standards it actually selected the winner. Nonetheless, the magnitude of the Government's financial gains may be estimated from the Bidder Guidance and Joint Venture Principles issued to bidders.



101. Those documents show that the amount of each bid's "total value" to the Government was the key factor in the bid's appraisal. This "value" to the Government was measured by at least three separate monetary amounts: first, a "fee" payable to the Government of USD 15 million; second, a further monetary "premium" payable to the Government; and third, a further amount paid to the Government to purchase a "conversion opportunity".

102. These facts show, in Mr Nagel's opinion, that the Government took his exclusive rights for economic gain. The calculus was simple. Honouring his rights would merely have honoured a binding contract previously authorised and approved by the Government. Taking them produced handsome profits.

*(vi) The Settlement Agreement*

103. Mr Nagel points out that the Settlement Agreement and Release was written by counsel for ČRa. Mr Nagel's Czech counsel was able to obtain only isolated changes in the document. Accordingly, any ambiguities in the Settlement Agreement's language must be resolved favourably to Mr Nagel.

104. Further, the testimonies of Mr Nagel, Mr Macek and Mr Tauber all confirm that it was not the intention of either ČRa or Mr Nagel that the settlement would release the Government. Under the interpretative principles applied by Czech law, which interpret contracts in light of the parties' intentions, this forecloses the Government's claim. The Government did not venture to cross-examine Mr Macek and Mr Tauber and did not cross-examine Mr Nagel on this point. The parties' intentions are therefore undisputed.

105. But even apart from ambiguities, the simple fact that the Government's counsel, in preparing the instrument on which the Government now relies, failed to provide expressly for the release now claimed by the Government, is strong evidence that no release was ever intended.



106. In any case, Mr Nagel argues that the terms of the settlement foreclose the Government's present claim. If those terms are given their common and natural meanings, they do not discharge the Government from its Treaty obligations. Section 1.1 provides that Mr Nagel releases and discharges ČRa from claims arising under the Cooperation Agreement and its termination. Section 1.4 provides that the release and discharge shall be a fully binding and complete settlement among Mr Nagel, ČRa, and their heirs, assigns and successors. Section 1.5 provides that the release and discharge include all Mr Nagel's present and future claims arising from the alleged acts or omissions of ČRa. These provisions do not release the Government but only ČRa.

107. Section 1.3 provides that the release and discharge shall also apply to ČRa's officers, directors, stockholders, attorneys, representatives, employees, insurers, subsidiaries, parent corporation, affiliates, predecessors and successors in interest, and any and all other persons, or corporations with whom any of the former have been, are now, or may hereafter be affiliated, but the scope of the release and discharge given them is carefully restricted by the language that follows the listing. It provides that they are released for any actions or transactions made on behalf of ČRa in connection with the Cooperation Agreement and/or its termination, including but not limited to all actions by ČRa's shareholders in exercising their respective rights as shareholders made in connection with the Cooperation Agreement and/or its termination. When any ambiguities are resolved favourably to Mr Nagel, as they must be, this language does not release the Government from its obligations under the Investment Treaty.

108. First, Section 1.3 must be read in the context of the first sentence of Section 1.5, which specifically restricts the "general release" that is "set forth above" to matters that "arise from the alleged acts or omissions of ČRa". Mr Nagel's rights under the Investment Treaty arise entirely from the Government's actions, and not from ČRa's acts or omissions.



109. Second, Section 1.3 itself confines the release of its listed persons and corporations to claims arising from steps taken “on behalf of ČRa”. This does not include Resolution No. 428, which is the focus of this dispute. The Resolution was an exercise of the Government’s public and legislative powers. It was purportedly undertaken for the overall public benefit, and not as a private act in the name, or on behalf, of ČRa. It affected ČRa, just as it affected everyone else interested in providing or using GSM services within the Czech Republic, but it was a public act, and part of the Government’s *acta jure imperii*.

110. Third, Resolution No. 428 was not an action taken by the Government in exercising any rights as a shareholder. This phrase was the principal change obtained in ČRa’s document by Mr Nagel’s Czech counsel. It was his opinion that the phrase foreclosed any claim that the Government might be impliedly released for its *acta jure imperii* in violation of the Investment Treaty. He was correct. The Resolution did not purport to be an exercise of shareholder’s rights, and was not denominated as one. On the contrary, it was issued by the State in the name of the State, was authorised and signed by the Prime Minister, and stated the “fundamental principles of the State telecommunications policy”. Under the Resolution, the rules adopted to implement that policy were made the responsibility of the Deputy Prime Minister and Minister of Finance. None of this involved a purported exercise of any rights as a shareholder.

111. Fourth, the reference in Section 1.3 to ČRa’s “parent corporation” cannot be read to include the Government. As the Government’s extract from its Commercial Register shows, ČRa was placed under the National Property Fund. The Fund, and not the Government, was therefore ČRa’s shareholder. The Government was another level removed from ČRa. More fundamentally, the Government cannot be ČRa’s parent corporation because it is not a “corporation”. Corporations are artificial legal persons created by or under the authority of the laws of a State. Local or specialised government entities may be created in the form of corporations by States, but States are themselves the

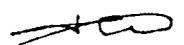


sources of power to create corporations, and cannot themselves be denominated as such.

112. Fifth, the reference in Section 1.3 to “affiliates” cannot be read to include the Government. Subsequent language in Section 1.3 refers to “other persons and corporations” with which the listed persons and entities have been “affiliated”. Accordingly, the Section’s initial reference to “affiliates” should also be read to encompass “persons” and “corporations”. While the Government might for some purposes be styled a legal person, the fact that Section 1.3 refers to both “persons” and “corporations” indicates that “persons” was intended to mean only natural persons.

113. Sixth, Section 1.3 must be read in light of the Settlement Agreement’s overall purpose. The Agreement was intended to resolve a domestic law contract dispute. It did not refer or relate to the *acta jure imperii* that are the basis of this dispute under the Investment Treaty and international law. In this context, the Government should not be permitted to rely on strained interpretations of commercial terms (“affiliate”, “parent corporation” and “shareholder”) to escape responsibility for actions taken in its sovereign and legislative capacity. When any ambiguities are resolved favourably to Mr Nagel, as they must be, the Government cannot be said to have been impliedly released.

114. In addition, Czech law does not permit creditors to release debtors unilaterally except as part of an agreement made with the debtor. The Government was the debtor in this case, and therefore cannot have been released under Czech law by an agreement between ČRa and Mr Nagel. Further, the Government cannot be a third party beneficiary of the settlement because Czech law requires such beneficiaries to be specifically identifiable, and the Government was not in this case. Finally, Mr Nagel denies that the settlement was an “offer” to the Government which the Government “accepted” in its defence to Mr Nagel’s later action in the Czech courts. All of these points are confirmed by the two expert opinions offered by the Wolf Theiss firm. The



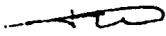
Government did not attempt to cross-examine Wolf Theiss, and its opinions are therefore not impeached.

115. Accordingly, Mr Nagel considers that the Government is not discharged from its obligations under the Investment Treaty by the ČRa settlement. This dispute does not arise from acts or omissions of ČRa. Nor does it involve any acts performed by any person, shareholder or corporation on behalf of ČRa or any exercise of rights as a shareholder.

116. The proceedings brought by Mr Nagel against the Czech Government before the District Court for Prague 1 did not result in any settlement or any finding or judgment for the Czech Government. Those proceedings were not pursued by Mr Nagel because he learned with certainty during them that his entitlement properly arises under the provisions of the Investment Treaty.

117. This dispute is quite separate from the domestic contract action brought against ČRa. It involves different claims, raises different questions, is based on different conduct, and arises under different laws. It arises under the Investment Treaty and international law. It relates solely to actions taken by the Government in its sovereign and legislative capacities. The Treaty claims that have arisen from the Government's *acta jure imperii* were not the subject of Mr Nagel's domestic contract action against ČRa. Nor were they encompassed by the agreement which settled that action.

118. Before entering into the settlement, Mr Nagel received legal advice that it would not bar his separate rights against the Government. Mr Nagel was assured, and entered into the settlement in the belief, that it merely resolved his domestic contract law claims against ČRa. His understanding and belief that he was not barred from challenging the Government's *acta jure imperii* are confirmed by his conduct. It is also confirmed by the undisputed testimony of Mr Tauber, who was then a member of the Board of Directors of ČRa.



119. First, the ČRa settlement provided compensation for ČRa's breach of contract, but that compensation did not purport to be, and was not, even remotely close to the full compensation to which Mr Nagel is entitled under the Investment Treaty for the taking of his investment. It covered only some of his expenses and made no provision for lost profits or lost alternative investment opportunities. This is confirmed by Mr Nagel and by Mr Tauber's undisputed testimony. Mr Nagel is an experienced international businessman, and he would never have accepted the relatively modest compensation given him under the ČRa agreement if he had supposed that it might foreclose his separate rights to full and adequate compensation for the Government's breaches of its Treaty obligations.

120. Second, the ČRa settlement was executed in May 1999. Less than six months later, Mr Nagel sued the Government for the *acta jure imperii* that destroyed his investment. He would never have done so if he had supposed that the ČRa settlement discharged the Government for its expropriation of that investment.

121. Finally, the Government argues that the Arbitral Tribunal should stay these proceedings to seek an interpretation of the ČRa Settlement Agreement by an arbitration court attached to the Government's Economic and Agricultural Chambers, since, in the Government's view, the Arbitral Tribunal "lacks jurisdiction" to interpret the Settlement Agreement. Mr Nagel argues that this is incorrect.

122. First, this is not a dispute arising from the Settlement Agreement. It arises under the Investment Treaty and international law. This Arbitral Tribunal is fully authorised by the Treaty, which was entered into with the Government's consent, to adjudicate Mr Nagel's rights. It is the Arbitral Tribunal's duty under the Treaty to do so.

123. Second, the interpretation of the settlement involves no legal issues which are beyond the competence of the Arbitral Tribunal to decide. An incidental need



to interpret an instrument under domestic law cannot exclude the Arbitral Tribunal's jurisdiction. If it did, virtually every similar tribunal would also be denied jurisdiction. Few, if any, investment disputes do not require the interpretation of agreements entered into under domestic law.

124. Third, it is the Government itself which has interposed the settlement as an affirmative defence. It is therefore the Government's burden to prove that the settlement bars Mr Nagel's rights. It cannot escape this obligation by redirecting the issues to the comforts of a domestic forum.

*(vii) Statute of limitations*

125. Mr Nagel argues that his rights are not barred because of Czech law's extinctive limitation period. The rules that determine whether Mr Nagel's rights are time-barred must be derived from the Investment Treaty and international law.

126. The starting-point is the Investment Treaty. Significantly, with one irrelevant exception, the Treaty does not impose any limitation on the timing of claims for relief. Article 8(1) of the Treaty merely provides that claims may not be brought earlier than four months after they have been asserted. This is not a rule of extinctive prescription. It is intended to discourage a premature rush to arbitration, and to encourage a search for domestic solutions.

127. The issues here are therefore whether any extinctive time limitation may be read into the Investment Treaty and, if so, what and on what basis. This is not a commercial dispute between two private individuals or companies. The controlling instrument is a treaty, not a contract between private parties, and the Treaty permits an application of domestic law only in the narrow and specific circumstances set forth in Article 11. The Treaty's obligations must therefore be applied in accordance with public international law, and not by a domestic legal system selected through conflict of laws principles. While claims may be barred as stale or inequitable, municipal statutes of limitations cannot operate to bar a



public international claim. The doctrine of *renvoi* is widely limited and excluded and cannot be used to refer matters from public international law to a domestic law system.

128. Under international rules, there is no fixed time for extinctive prescription. The issue is instead one of fairness and equity. The controlling question is whether Mr Nagel has been so dilatory and negligent that it would be inequitable to consider his claim. The key factor is whether the Czech Republic can prove prejudice. When prejudice has not been proven, very lengthy delays have been held not to bar claims.

129. Mr Nagel has not been dilatory in the assertion of his rights. He has pursued those rights vigorously, using every procedural avenue. When the Government destroyed his exclusive rights, Mr Nagel immediately protested. When ČRa attempted to persuade him to relinquish his rights, he repeatedly refused. In protection of his rights, Mr Nagel sought access to information about the bidding process, and particularly to the information that allegedly was given by the Government to the bidders about Mr Nagel's rights. He was able to obtain access to some bidding documents by registering as a potential bidder, but the Government persistently refused to reveal what, if anything, it told the bidders about Mr Nagel's exclusive rights. After repeated efforts over a period of years, Mr Nagel received what purports to be that information only on the eve of the filing of the Government's Statement of Defence.

130. When reason and persuasion failed to provide a remedy, Mr Nagel was compelled in November 1999 to sue the Government for the *acta jure imperii* that expropriated his investment. When he was advised that the proper forum for his claims against the Government was an arbitration under the Treaty, Mr Nagel promptly initiated these proceedings. Mr Nagel was initially informed that he had Treaty rights, but was subsequently informed that this was incorrect, and he learned of the true situation only shortly before he initiated these arbitration proceedings.



131. The Government did not claim prejudice in its Statement of Defence, and belatedly claimed only in its Rejoinder that the death of Mr Kodr, a subordinate employee of SRA, had prejudiced it. This belated claim is without merit because the Government might have offered, but did not, the testimony of Mr Bém, the General Director of SRA-ČRa, who was far more deeply and personally involved in the relevant events than Mr Kodr. Further, the Government notably failed to offer any evidence at the hearing to show any prejudice because of Mr Kodr's death.

132. In these circumstances, Mr Nagel considers that there is no justification for imposing a time bar under international rules. Mr Nagel has persistently asserted his rights, and has done so without interruption or delays. This is not a situation in which a stale or dormant claim has been belatedly revived.

*(viii) Evidentiary matters*

133. Mr Nagel contends that the failure of the Government to produce Mr Bém's testimony, the narrow and guarded statement from Mr Klaus, and the Government's failure to provide any significant number of contemporaneous documents all require the Arbitral Tribunal to draw inferences that are adverse to the Government. Each of those sources was available to the Government, and its failure to provide evidence indicates that the evidence is favourable to Mr Nagel.

134. Mr Nagel further contends that, under international rules, his presentation of detailed documentary and testimonial evidence shifted the burden of proof to the Government, and that the Government entirely failed to satisfy that burden.

135. Mr Nagel contends that the testimony of Mr Dyba and Mr Sedláček was not credible, and that the most probative evidence consists of the extensive contemporaneous documents presented by Mr Nagel. When subsequent testimony conflicts with contemporaneous documents, the documents have higher probative value. In this case, those documents are confirmed by the

testimony of both Mr Nagel and Mr Ledin, who was the principal officer of Millicom involved in these events. The Government waived cross-examination of Mr Ledin, as well as all of the other witnesses offered by Mr Nagel except Mr Nagel himself, and Mr Nagel contends that this entitles the evidence provided by those witnesses to be given full and substantial weight..

*(ix) Summary*

136. The Cooperation Agreement was entered into with the Government's encouragement and consent. The Government itself directed Mr Nagel to negotiate with SRa. At the time, SRa was a wholly owned State entity. It was not even partly privatised. It had no powers other than those granted to it by the Government. Mr Nagel kept the Government fully informed both of the negotiations with SRa and of his implementation of the resulting Agreement. Mr Nagel understood, and was led by SRa-ČRa and the Government to believe, that the Agreement gave him binding participatory rights in any consortium that included SRa-ČRa to which the Government granted a GSM licence.

137. All these facts were known by the Government when it adopted Resolution No. 428. This is proved by discussions held by Mr Nagel with the Government before and after the execution of the Cooperation Agreement. It is also proved by the fact that the Government informed Mr Nagel and Millicom in February 1994 of the policies which it intended to adopt in the Resolution. There would otherwise have been no occasion to single out Mr Nagel and Millicom for advance notice. Mr Nagel immediately objected. Ignoring his objections, the Government went forward.

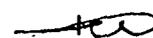
138. Under the Government's instructions, ČRa eventually "withdrew" from the Cooperation Agreement based on a purported change in circumstances.

139. In fact, the cause was the Government's policies, to which the Agreement had become an obstacle. The series of letters written to Mr Nagel by the General Director of ČRa in 1994, first in an effort to persuade Mr Nagel to relinquish his

rights, and ultimately to withdraw from the Agreement, are unequivocal admissions that the Government's new policies were the cause, and the only cause, of the taking of Mr Nagel's exclusive rights. There is therefore a clear "proximate causal link" between the Government's acts and the unlawful taking of Mr Nagel's rights.

140. The Government knowingly took contract rights belonging to Mr Nagel. In breach of the Investment Treaty, this denied Mr Nagel's investment the security and protection to which it was entitled. The treatment afforded that investment was unfair, inequitable and discriminatory. The Government's taking constituted expropriation, or a measure equivalent to expropriation. It failed to perform a "specific" agreement entered into with a State entity. The explanations offered by the Government provide no defence for its conduct under the Investment Treaty and international law. Mr Nagel's rights are barred neither by the ČRa settlement nor by time. Accordingly, the Government is now liable to Mr Nagel for multiple and independent breaches of its Treaty obligations.

141. Mr Nagel has stated various independent bases for the Government's liability. The first and simplest does not involve issues of Government approval or assurances about the licence, but rests simply on the fact that the Government knowingly took his contract rights. This alone is sufficient to establish liability. The second and independent ground is that the Government's approval and assurances created expectations on which Mr Nagel reasonably relied, and the Government's failure to honour those expectations results in its liability. The third and also independent ground is that the Government denied Mr Nagel's asset the protection and fair treatment to which it was entitled under the Treaty. The fourth and again independent ground is that the Government treated his asset in a discriminatory and less favourable manner than it treated the American investors in Eurotel. The fifth and again independent ground is that the Agreement with SRa-ČRa was an agreement within the meaning of Article 2(3) of the Treaty, and that the Government failed to comply with that Agreement.



The Czech Republic:

*(i) General*

142. By 1993, the Czech Republic had issued only one licence to establish and operate an analogous cellular telephone network in the Czech Republic. That licence was issued to Eurotel Praha s.r.o., a joint venture between SPT Telecom and Atlantic West B.V. At that time, it was presumed that the Czech Republic would issue additional mobile telecommunications licences, but it was unknown how many licences would be issued and on what basis the licence-holders would be selected.

143. On 17 May 1993, Mr Nagel, Millicom and SRa entered into the Cooperation Agreement. According to the Cooperation Agreement, a consortium would be constituted. Mr Nagel concedes in his Statement of Claim that the approval of the Czech Government was required to make the Cooperation Agreement binding on the Government. Although Mr Nagel asserts that various Government officials were aware of the Cooperation Agreement, the Agreement was never approved by a Government Resolution, which is the only means by which the Czech Government can formally make decisions.

144. On 1 January 1994, the assets and liabilities of SRa were transferred to the newly created corporation ČRa, owned by the State through the National Property Fund, the special entity created by an act of the Czech Parliament to administer State assets for the benefit of the Czech Republic until such assets are sold through privatisation. The Czech Republic had a majority interest in ČRa until 2001, when the State sold its interest in ČRa in privatisation.

145. On 10 August 1994, the Government of the Czech Republic adopted Government Resolution No. 428, which approved the "Fundamental Principles of the Czech Republic's Telecommunications Policy". The Government explained that its primary objective was to enhance the quality and accessibility of telecommunications services in the Czech Republic through a number of steps,

including *inter alia* (1) privatising SPT Telecom, the nationwide fixed line public telephone service provider, (2) changing the regulatory framework and tariff policy, (3) opening the telecommunications market to competition, and (4) issuing licenses to operate a GSM mobile telephone network. On this last point, the Government Resolution authorised the Ministry of Economy to issue a maximum of two licences and to set the terms for the issuance of those licenses. One licence should be awarded to Eurotel because in 1990, Atlantic West (one of the participants in the Eurotel joint venture) had paid USD 10 million to secure the rights to receive a GSM licence. The second licence should be awarded to a joint venture consisting of ČRa and a party selected through a public, competitive and transparent tender process.

146. Prior to the adoption of Resolution No. 428, it was thought that SRa and subsequently ČRa might be able to select its own partner, but since, in ČRa's view, the circumstances had changed fundamentally as a result of the Government's new policy reflected in the Resolution, ČRa withdrew from the Cooperation Agreement which it was entitled to do according to Section 356 of the Czech Commercial Code.

147. Besides SPT Telecom, the nationwide telecom service provider, ČRa was the only other domestic entity that conducted its business solely in telecommunications and throughout the entire territory of the Czech Republic. ČRa was therefore selected to participate in a joint venture together with a partner who was to be selected through a public tender, this being the only method that could ensure (1) transparency and credibility of the process; and (2) submission of sufficiently reliable information to determine which entity was capable of providing the GSM services.

148. By 15 November 1995, the Ministry of Economy had received thirty-five requests for further information regarding the GSM tender, and one of the parties that requested additional information was McKenna & Co, the law firm representing Mr Nagel. However, Mr Nagel never applied to participate in the

tender for the GSM licence. After a review of the submissions made in the tender, the Czech Republic selected C-Mobile, a consortium led by Deutsche Telekom and supported by Telecom Italia, among others, to create the joint venture with ČRa. C-Mobile then joined ČRa in a corporation operating under the business name RadioMobil a.s. Subsequently, the Ministry of Economy issued to RadioMobil a licence for the establishment and operation of a GSM mobile telecommunications network.

149. In February 1998, Mr Nagel filed a lawsuit against ČRa, alleging that the Cooperation Agreement was terminated improperly. The parties then reached a Settlement Agreement and Release in which Mr Nagel was paid USD 550,000. In exchange for this quite significant sum, Mr Nagel dismissed his claims against ČRa and released ČRa and its shareholders and affiliates (which, by definition, included the Czech Republic) from any claims. The Czech Republic, through the National Property Fund, was the majority shareholder of ČRa.

150. The subsequent court proceedings brought by Mr Nagel against the Ministry of Transport and Communications of the Czech Republic were dismissed because Mr Nagel had failed to pay the court filing fees.

*(ii) The nature of the Cooperation Agreement*

151. In the three-page Cooperation Agreement, Mr Nagel, Millicom and SRa stated their "Objectives" to be to form a consortium that would jointly seek to obtain certain rights relating to a GSM licence. The Cooperation Agreement did not grant Mr Nagel a right to receive a GSM licence. It was simply a statement of understanding that the parties would work together if the opportunity presented itself. Mr Nagel did not pay any money to SRa or anyone else to become a party to the Cooperation Agreement.

152. Under Czech law, the Cooperation Agreement does not in fact constitute a binding agreement. Although the Cooperation Agreement does not specify the controlling law, under general conflict of law principles, Czech law is the only

logical law to apply because the Cooperation Agreement was entered into and would have been performed primarily in the Czech Republic. Under Czech law, a contract is not binding unless it is "definitive and intelligible". In other words, the obligations must be clear not only to the parties but also to third parties who are not parties to the contract. Indeed, Section 269(2) of the Czech Commercial Code provides that (with certain exceptions not applicable here) a contract is binding only if the agreement has a sufficient description of the parties' obligations. If the agreement fails to adequately describe the parties' obligations, it is as if the agreement was never in existence. Here, key parts of the Cooperation Agreement set forth a commercial plan that is so general and vague that it is impossible to determine the parties' respective rights and obligations. As a result, under Czech law, the Cooperation Agreement does not constitute a binding agreement.

153. The Cooperation Agreement was merely a preparatory document, setting forth a future arrangement if a consortium were formed. Given that the Cooperation Agreement does not specify the parties' obligations, and that, indeed, the consortium was never formed, the Czech Republic considers that the Cooperation Agreement is invalid and unenforceable under Czech law.

154. Although the general arrangement was to seek GSM rights for the consortium, the Cooperation Agreement failed to establish the identity of all members of the consortium and the extent of their financial participation. Paragraph 4(b) provides that the consortium will be owned 51% by "Czech investors (SR[a] and others)". The 51% were "to be allocated between [those Czech investors] by separate agreement". For the consortium to operate, a Capital Budget was obviously crucial. However, the parties never had an agreement on what the Capital Budget would be. They simply said that they would try to agree. Paragraph 4(b) states that "[a] capital budget will be developed and agreed to by the parties as promptly as possible --". Further, paragraph 4(c) of the Cooperation Agreement provides that "[m]ajor decisions regarding the consortium will require unanimous approval". What constitutes a



“major decision,” however, is not specified in the Cooperation Agreement. Moreover, even if “major decisions” are capable of definition, it is impossible to know if “unanimous approval” could ever have been reached on those decisions. Again, as to “major decisions”, the parties simply said they would try to agree.

155. In addition to these vague provisions, the Cooperation Agreement is premised on an impossible action. Paragraph 4(a) provides that the parties will form “a limited liability consortium”, a legal entity that is unknown under Czech law, was unknown at the time of the execution of the Cooperation Agreement and could not be created. Hence, the consortium as envisioned under the Cooperation Agreement could not in fact be established.

156. Mr Nagel erroneously contends that actions of SRa and certain Government officials subsequent to execution of the Cooperation Agreement preclude the Czech Republic from arguing, or the Arbitral Tribunal from concluding, that the Cooperation Agreement is invalid. It is a well-established principle of Czech law that an invalid contract cannot be remedied by the subsequent actions of the parties. This is true even for contractual obligations between businesses under Section 266 of the Commercial Code. Thus, the fact that ČRa assumed that the Cooperation Agreement was valid when it withdrew does not in fact make it so.

157. Even if the Cooperation Agreement is valid, which the Czech Republic rejects, the parties’ obligations under the Cooperation Agreement to jointly seek to obtain a GSM licence never became effective because the consortium was never formed. The formation of the consortium was a condition precedent to the parties’ obligations.

158. Mr Nagel also relies on provisions in the Settlement Agreement to support his argument that the parties’ subsequent conduct precludes the Czech Republic’s argument that the Cooperation Agreement is invalid. Statements in the context of settlement cannot be considered to have relevance to this issue under the Cooperation Agreement.



159. Mr Nagel also argues that certain provisions of the Cooperation Agreement are clear and became binding immediately upon the execution of the Agreement. That the minor elements of the Cooperation Agreement, such as parts of the confidentiality provision, may be sufficiently clear and immediately enforceable does not rectify the overall vagueness of the Agreement and, importantly, the lack of definiteness in the parties' obligations when it comes to the fundamental undertaking that they would form the consortium.

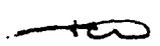
*(iii) The Government and the Cooperation Agreement*

160. Since the purpose of the Cooperation Agreement was to convince State agencies to grant operating rights to the consortium, the Czech Republic considers it illogical to suggest that the Agreement was binding on the Czech Republic. No resolution, law or decree of the Czech Government was ever adopted, and the Government had not yet identified which entities would issue the GSM rights or regulate their use.

161. There are no fewer than three independent and distinct reasons why the Czech Republic did not have any obligation to Mr Nagel or anyone else under the Cooperation Agreement. First, the plain words of the Cooperation Agreement directly contradict such an assertion. Second, SRa lacked legal authority to bind the Czech State. Third, the Government never adopted a resolution or regulation obligating itself in connection with the Cooperation Agreement and, in any event, Mr Nagel was not given any promises or assurances. Consequently, the Czech Republic had no obligations to Mr Nagel under the Cooperation Agreement.

162. Pursuant to Act No. 111/1990 on State Enterprise, SRa, like other State enterprises, was a distinct and independent "legal entity". Although entrusted to administer State property, State enterprises were entitled to act independently.

163. Like other State enterprises, SRa was entitled to engage in commercial activities without the approval of the Government or any of the ministries. It



entered into contracts and other legal relationships in its own name, and the State enterprise bore the liability arising from such legal relationships. Section 2(1) of the State Enterprise Act provides that a State enterprise “shall carry its entrepreneurial activities by conducting business on its own account, assuming a reasonable commercial risk related thereto”. Like other State enterprises, only SRa’s chief executive officer or others designated by SRa could act on behalf of SRa. In other words, the State enterprise alone assumed the rights, obligations and liabilities of its commercial activities. When engaged in commercial activities, the State enterprise could not and did not act as an agent or instrumentality of the Government, and the Government did not assume any of the obligations or liabilities of the State enterprise’s activities. Under the State Enterprise Act, a State enterprise could not bind the Government and the Government was not bound by a State enterprise’s contractual obligations.

164. Under the State Enterprise Act, the founder of a State enterprise (in the case of SRa, the Ministry of Economy) retained certain powers over a State enterprise regarding (1) decisions on winding up the enterprise; (2) decisions on merger with another State enterprise; and (3) appointment of the CEO and, if applicable, members of a State enterprise’s council. At the time of the execution of the Cooperation Agreement, however, the founder no longer had any power relating to the economic management of a State enterprise.

165. Section 5(2) of the State Enterprise Act provides that a State enterprise is not responsible for the liabilities of the State or other persons, and that the State is not responsible for liabilities of the State enterprise, unless the law provides otherwise. Pursuant to the provisions of Sections 2(1), 5(1) and 5(2) of the State Enterprise Act, only a State enterprise is responsible for its own actions; no other entity, including the Government (or the State itself), is directly or indirectly liable for the acts or omissions of the State enterprise.

166. Under the State Enterprise Act, SRa was indeed entitled to enter into the Cooperation Agreement without the prior approval of the Government or any of



the ministries. Under the State Enterprise Act, SRa remained solely liable for any obligations undertaken by SRa in the Cooperation Agreement; SRa could not enter into contracts that were binding on the Czech Republic itself. Thus, in this case, where the Czech Republic was not a party to the Cooperation Agreement, the Czech Republic is neither liable nor obligated under the Cooperation Agreement.

167. As just described, SRa was a State enterprise with a specific limited mandate, including the provision of telecommunications services and undertakings such as those entered into with Mr Nagel. SRa did not have the authority to grant telecommunications licences; such authority remained within the domain of the Czech Government.

168. Given this legal setting, which is undisputed, it would be incorrect to assume that the actions of SRa could bind the Government in regard to the modalities, the conditions and the granting of licences; nor is it appropriate to assume that the Czech Government bound itself in regard to the granting of a GSM licence when individuals suggested that Mr Nagel meet representatives of SRa in the context of Mr Nagel's effort to seek a licence. Mr Nagel was not given any assurances or promises regarding the granting of a GSM licence.

169. Given the allocation of responsibilities and their delineation between SRa and the Czech Government, this is not a case involving a contract formed with an entity that had either direct or delegated authority to issue a licence. The legal setting in the Czech Republic left no doubt that the only entity with the power to grant a licence was the Government, and not SRa.

170. The Czech Republic notes that this situation was different from one in which an oil company manages the oil industry for the government or in which a company is charged exclusively to sell wheat. In settings of this kind, the relevant agency grants an oil licence or sells wheat in accordance with its mandate, and therefore, in principle, the relevant agency is empowered to render



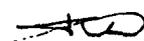
binding decisions within its area of competence. In our case, SRa had no mandate to grant a licence or to render any decision in respect to the granting of a licence. Indeed, at the time of the Cooperation Agreement it was not even involved in the GSM or cell phone business. Neither the Czech Government nor SRa acted in a manner that would have led Mr Nagel to believe that SRa controlled the licensing process. If they had, there would have been no reason for the parties to have stated in paragraph 1 of the Cooperation Agreement that they would seek to obtain GSM rights from as yet unidentified agencies of the Czech Republic.

171. Mr Nagel maintains that, if a GSM licence was issued to SRa, the Cooperation Agreement entitled Mr Nagel and Millicom to be full participants. However, this is an incorrect assertion, since paragraph 6 of the Cooperation Agreement only prohibits support for any application for operating rights. The Cooperation Agreement does not prohibit ČRa from holding a licence without Mr Nagel. It was Mr Nagel and Millicom that drafted the Cooperation Agreement. Had they wanted to prohibit SRa from holding a licence without them, they should have said so. They did not.

172. Should Mr Nagel somehow contend that “support” for an “application” can be interpreted to mean the same thing as holding a licence, the argument must fail under the rule of *contra proferentem*. SRa did not draft the Cooperation Agreement and was not even represented by legal counsel while the terms were negotiated and drafted.

173. Thus, if there is an ambiguity in paragraph 6 of the Cooperation Agreement, the Czech Republic considers that it must be resolved against Mr Nagel. ČRa never supported any application for operating rights outside the consortium. Thus, there was never a breach of paragraph 6 of the Cooperation Agreement.

174. ČRa (and others) attempted to convince the Czech Republic to grant the operating rights to a group including Mr Nagel. Those efforts failed. Instead, the



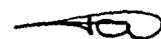
Czech Government itself determined (1) that ČRa would participate in the operating rights without an application from ČRa, and (2) that the prospective foreign partner would apply to participate through the tender process. ČRa did not support any party's tender. The Czech Republic concludes that there was no violation of paragraph 6 of the Cooperation Agreement.

175. It is widely recognised that rights to operate mobile telephone networks (like other telecom and broadcast enterprises) are regulated legitimately by the relevant government in accordance with that government's policy determinations and as required by its national law. The government typically receives a fee in connection with granting these rights. In this matter, the Czech Government did what many governments have done – it decided that the foreign investor who would be ČRa's partner for one of two GSM licences would be required to apply by public tender and pay a fee. Mr Nagel has no right arising from or related to the Cooperation Agreement requiring the Czech Republic to act otherwise. Mr Nagel paid nothing to the Czech Republic.

176. The Czech Republic points out that this contrasts sharply with the Eurotel transaction. Eurotel had a contractual agreement binding on the Czech Republic. It paid the Czech Republic USD 10 million for its rights. The Eurotel transaction shows that the Czech Republic honours its contracts with foreign investors when such contracts actually exist. It also demonstrates that Mr Nagel's position is both opportunistic and unjust. Having not entered into a contract with the Czech Republic and having paid nothing to the State, Mr Nagel now wants to be treated as if he had rights similar to Eurotel.

*(iv) The scope of the Investment Treaty*

177. In accordance with a fundamental principle of international law, Mr Nagel bears the burden of proving his claims. It is likewise established international law that a party, having the burden of proof, must not only bring evidence to support his allegations, but also convince the Arbitral Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.



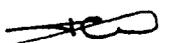
178. Thus, Mr Nagel bears the burden of establishing that he made an investment in the Czech Republic, as that term is defined in the Investment Treaty, and if so, what his investment rights actually were. In addition, Mr Nagel bears the burden of establishing that the Czech Republic breached the Treaty. The Czech Republic submits that Mr Nagel has not met and cannot meet his burden.

179. Fundamentally, Mr Nagel claims that he can recover under the Investment Treaty without negotiating and paying for rights similar to those acquired by Eurotel. That is wrong. The Treaty is no substitute for contractual privity when a party claims that a Contracting State owes it commercial obligations.

180. The statement in Article 8(3) of the Investment Treaty that the Arbitral Tribunal shall base its decision “on the provisions of this Agreement” does not require that the law of the host State should be ignored for purposes of determining whether an investor has made an investment. This is especially so because the Treaty expressly states that the law of the host State determines whether an investor has an investment. This is not a case in which Czech law grants broader rights than the Treaty.

181. The definition of “investment” varies among the numerous bilateral investment treaties, and thus, the language of the Investment Treaty itself must be closely examined to determine whether Mr Nagel’s claim qualifies as an “investment”, entitling him to assert a claim under the Treaty.

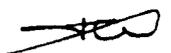
182. Article 1(a) of the Investment Treaty makes clear that Czech law determines and defines what rights, if any, Mr Nagel may claim as an “investment” for purposes of the Treaty’s protection. Article 1(a) also makes clear that to claim an “investment,” Mr Nagel must have an “asset”, and if the claimed investment is a contract, the contract must “hav[e] a financial value”. The concept that a contract must have financial value to qualify as an asset, i.e. an investment, falls within the general meaning of an asset as property, which itself connotes value.



183. The Czech Republic submits that the Cooperation Agreement does not qualify as an "investment" as that term is defined in the Investment Treaty because, under Czech law, the Cooperation Agreement is invalid. The Agreement is premised on a legal impossibility, i.e. the formation of a limited liability consortium which is an entity unknown in Czech law. Moreover, the clauses relating to the functioning of the consortium are vague and incomplete. They fail to adequately describe the obligations of the parties under Czech law, and the gaps could not be filled by way of interpretation. Since the basis of the invalidity of the Agreement related to the essential part of the parties' planned cooperation, i.e. the formation of the consortium, no portion of the Cooperation Agreement could be severed and the whole Agreement lacked legal validity and enforceability. And even if Mr Nagel could derive any rights from the Agreement, these rights never became enforceable, since they were subject to a condition precedent, which was the formation of a consortium, and the consortium was never formed.

184. Quite simply, if the Cooperation Agreement is not valid and enforceable, Mr Nagel has no contractual rights. The Cooperation Agreement then certainly cannot be said to amount to an "investment".

185. It is contested that the Cooperation Agreement is an "investment", as defined in Article 1(a)(iii) of the Investment Treaty. Mr Nagel has the burden to establish that he had a right under Czech law which constituted an investment, and he has not done so. The Cooperation Agreement did not grant Mr Nagel a right to be awarded a GSM licence but only provided that the parties would jointly seek to obtain through a consortium certain rights related to the GSM network through negotiations or a tender. Whether the consortium would be awarded the GSM licence, however, was entirely speculative. Thus, the "financial value" of the Cooperation Agreement was entirely speculative. Indeed, Mr Nagel never made any payment to participate in the Cooperation Agreement.



Unless the consortium was the successful participant in the tender, the Cooperation Agreement would have no financial value.

186. Thus, the Czech Republic finds that the Cooperation Agreement cannot be said to amount to an “investment” as that term is defined under the Investment Treaty because it is not a “contract having a financial value”. The Arbitral Tribunal is therefore without jurisdiction to consider Mr Nagel’s claims.

187. The fact that ČRa paid Mr Nagel USD 550,000 to settle his claims does not mean that the Cooperation Agreement involved rights with a “financial value”, as Mr Nagel contends. The payment made to him was in consideration of the settlement and release of his claims, not in any way as an acknowledgement that these claims under the Cooperation Agreement had a value. In Section 1.6 of the Settlement Agreement, Mr Nagel expressly agreed “that this settlement is a compromise of disputed matters, and the payment is not to be construed as an admission of liability on the part of ČRa, by whom liability is expressly denied”.

188. Mr Nagel also tries to attribute “financial value” to the Cooperation Agreement by arguing that bidders offered the Government substantial sums to acquire the same rights that had been taken from Mr Nagel. This is wrong. Bidders offered to pay for the right to acquire GSM licence participation. The Cooperation Agreement granted Mr Nagel no such right. At best (and assuming, *arguendo*, that the Cooperation Agreement was valid and provided Mr Nagel with any contractual rights), Mr Nagel only had the right to participate in an effort to seek to convince the Czech Republic to grant such a licence to the consortium and to prevent both ČRa and Millicom from supporting any application for a licence outside the consortium.

189. Those alleged rights had no commercial value whatsoever – particularly once the Czech Government decided that the foreign participant would need to apply for and obtain licence participation rights through a tender process.



*(v) Breaches of the Investment Treaty*

190. If the Arbitral Tribunal concludes that it has jurisdiction to consider Mr Nagel's claims, the Czech Republic respectfully submits that these claims should be dismissed for the following reasons.

191. The claims are nothing more than a mere listing of Articles 2(2), 2(3), 3(1), 3(2) and 5(1) of the Investment Treaty. Mr Nagel has the burden of proving his claim under all of the relevant circumstances (including the circumstances of his own conduct), and nothing less. Notably, however, Mr Nagel offers no support for his claims and no explanation of how the Czech Republic purportedly violated the particular provisions of the Treaty. Without doubt, Mr Nagel has not met his burden of proof.

192. Mr Nagel is not entitled to assert any claims under Articles 2(2), 3(1) and 3(2) of the Investment Treaty. Article 8(1) provides that Mr Nagel may only seek recovery "under Articles 2(3), 4, 5 and 6" of the Treaty. Among those provisions, Mr Nagel is only seeking to recover under Articles 2(3) and 5(1). However, in an abundance of caution, comments are made below also on the claims under Articles 2(2) and 3.

193. Article 2(2) of the Investment Treaty requires the signatory countries to treat foreign investments in a "fair and equitable" way. Under international law, this requirement is generally understood to impose an "international minimum standard" that is separate from domestic law, but that is indeed a minimum standard. In essence, a breach of this provision may be found only if, based on the totality of the circumstances of the case, the Czech Republic would have acted in such a manner that every reasonable and impartial man would recognise its insufficiency.

194. In seeking to have the language of Article 2(2) interpreted as broadly as possible to his benefit, Mr Nagel argues that the language guarantees against all losses suffered due to the destruction of the investment for whatever reason. The



reasonable (and correct) interpretation of the Article is not so draconian. The Investment Treaty does not render the Czech Republic a blanket guarantor of foreign investment.

195. Mr Nagel's argument is premised on the theory that the Czech Republic was bound by the Cooperation Agreement and thus failed to honour its contractual obligations. This is not the case.

196. In the present circumstances, ample grounds existed for the Government of the Czech Republic to conclude that it should issue the two GSM licences in the manner it selected, namely, to honour its contractual obligations to Eurotel, which had secured a right to a GSM licence, and to a joint venture consisting of ČRa and a party selected by a public tender.

197. Article 2(2) of the Investment Treaty also requires that the signatory countries not impair investments by acting in an unreasonable or discriminatory way. In this case, there is no indication that when the Government of the Czech Republic implemented its Telecommunications Policy and decided to issue the GSM licences as it did, it specifically targeted Mr Nagel in a discriminatory way, or treated him less favourably than any other parties seeking a GSM licence. Indeed, Mr Nagel could have participated in the public tender along with the other interested parties, but he chose not to do so. Moreover, he has failed to prove, as he must, that the decision to award the GSM licences was made with the intention to harm Mr Nagel or treat him in a discriminatory way.

198. The Arbitral Tribunal cannot draw the conclusion that the Czech Republic's actions were discriminatory simply because different investors were treated differently; reasons specific to the particular investors justify such a difference of treatment. Indeed, such was the case here. Eurotel had a contract with the Czech Republic. It paid the Czech Republic USD 10 million for actual rights to participate in a GSM licence. The legal and commercial differences are



substantial and clearly justify a difference in treatment. There was no violation of Article 2(2).

199. The portion of Article 2(3) of the Investment Treaty cited by Mr Nagel does not require any specific treatment of investors or create a specific cause of action. Instead, it is a general provision stating that the contracting countries shall observe the provisions of the Treaty. The Czech Republic contends that it has at all times acted properly with regard to Mr Nagel, and he has failed to demonstrate otherwise.

200. Under Article 2(3), Mr Nagel must show that he had a "specific" agreement with the Czech Republic. Because Mr Nagel had no agreement at all with the Czech Republic, he cannot establish a claim under Article 2(3).

201. Mr Nagel argues that he met the threshold condition of asserting a claim under Article 2(3) because he concluded an agreement with SRa. However, the Czech Republic was not a party to the Cooperation Agreement and is not bound by the Cooperation Agreement. Although SRa was a State enterprise, it was entitled to enter into commercial contracts, and such contracts are not binding on the State.

202. Mr Nagel's allegations that the Government directed him to negotiate with SRa and that the Agreement was entered into with the Government's authorisation and approval are false and do not transform the Cooperation Agreement into an agreement with the State. The Government did not in fact direct Mr Nagel to negotiate with SRa or approve the Cooperation Agreement. Mr Nagel spoke with some individuals about the matter, and some of them suggested that he might wish to speak with representatives of SRa. As Mr Nagel well knows, the Government never adopted any resolution concerning the Cooperation Agreement. However, even official approval of an agreement with a State enterprise, which is not the case here, does not transform such agreement to an agreement with the State. Mr Nagel thus has no claim under Article 2(3).



203. In so far as Article 3 of the Investment Treaty is concerned, it should be noted that the mere fact that investors in the Czech Republic or investors from a third State received certain benefits does not mean that that Article has been violated. Like all other parties interested in obtaining a GSM licence, foreign or domestic, Mr Nagel had the opportunity to participate in the public tender to obtain the right to participate in the joint venture with ČRa that would be awarded the GSM licence, but Mr Nagel failed to apply.

204. To the extent that Mr Nagel evokes Article 3 to suggest that he has been treated less favourably than Eurotel or ČRa, his argument easily fails. The Ministry of Economy determined that it would award Eurotel, a joint venture between SPT Telecom and Atlantic West, one of the GSM licences because Eurotel had a contractual right to one of the GSM licences. In 1990, Atlantic West had paid USD 10 million to secure the rights to receive the GSM licence when the Czech Republic decided to issue such licences. Eurotel, who had a contractual right to the GSM licence, thus stands in sharp contrast to Mr Nagel, who had no right to the GSM licence.

205. The decision of the Ministry of Economy to issue the second licence to a joint venture consisting of ČRa and a party selected through a public tender was based, among other reasons, on a determination that ČRa's participation would increase competition in the telecommunications sector and would enable the prompt rollout of the GSM services. It cannot be disputed that this rationale is consistent with legitimate and internationally recognised policy objectives.

206. To prove his claim of expropriation under Article 5(1) of the Investment Treaty, as a threshold matter, Mr Nagel must demonstrate that the Czech Republic deprived him of his "investment", as that term is defined in the Treaty. Thus, to the extent that the Cooperation Agreement was an "investment", he must demonstrate that the Czech Republic deprived him of whatever rights he

had under the Cooperation Agreement. Of course, if he had no rights under the Cooperation Agreement, he has no claim of expropriation.

207. Mr Nagel expressly concedes that he is not complaining of breach of contract. Those domestic law issues were resolved in the settlement with ČRa. Thus, the only issue before this Arbitral Tribunal is whether the Government's adoption of its telecommunications policy for issuance of the GSM licence deprived Mr Nagel of whatever rights he had under the Cooperation Agreement.

208. Mr Nagel had no right arising out of the Cooperation Agreement to participate in a GSM licence. His right, if any, was jointly with SRa and Millicom to try to convince the Government that a GSM licence should be awarded to the consortium. Mr Nagel, Millicom and SRa had an agreement that they would try to convince the "relevant entities" of the Czech Republic that their consortium should be awarded a GSM licence. The consortium as purportedly described in the Cooperation Agreement was not established and could not be established under Czech law. The fact that the Government decided not to issue a GSM licence to a consortium as referred to in the Cooperation Agreement cannot be considered a deprivation of Mr Nagel's rights under the Cooperation Agreement. The Government's decision simply means that the efforts to convince it ultimately were not successful.

209. Mr Nagel's argument that the Czech Republic deprived him of the right to participate in any GSM licence issued to ČRa is also erroneous. He had no such right under the Cooperation Agreement. The Cooperation Agreement only provided that no party to the Cooperation Agreement would support an application for the GSM licence outside the consortium, but as stated above the consortium described in the Agreement was not, and could not be, established under Czech law. The Czech Republic did not deprive Mr Nagel of his alleged right. It decided that ČRa would participate in the GSM licence without application from ČRa and that foreign investors could also apply to participate



through the tender process. The Government did not direct ČRa to support anyone's tender application. Nor did ČRa do so.

210. Since the Czech Republic did not deprive Mr Nagel of any rights he may have had under the Cooperation Agreement, the Arbitral Tribunal does not need to examine whether other conditions under Article 5(1) were fulfilled.

211. In any case, it is a well-settled principle of international law that a State's exercise of its regulatory power does not amount to expropriation, even if the governmental regulation adversely impacts the value of property or a business interest. When the Czech Government adopted its telecommunications policy, it was exercising its regulatory police power in a traditional arena of public regulation. Consequently, the present case cannot be considered to concern expropriation but the evolution of Czech telecommunications regulatory policy for the public good. Although Mr Nagel claims that his rights under the Cooperation Agreement were adversely affected by the Czech Government's adoption of its telecommunications policy, there was no expropriation in this case.

212. Moreover, the Cooperation Agreement contained no binding rights under Czech law which were capable of being expropriated, and mere expectations are not investments under the Investment Treaty. If expectations could be regarded as investments for the purposes of the Treaty, Mr Nagel would have to prove that his expectations were reasonable, which they were not.

213. If the Arbitral Tribunal should conclude that the Czech Republic's telecommunications policy and issuance of the GSM licences deprived Mr Nagel of his rights under the Cooperation Agreement, Mr Nagel nonetheless cannot meet his burden of proving his claim under Article 5(1) unless he demonstrates that the Czech Republic's decision to issue the GSM licences as it did was not for a public purpose, that it was discriminatory, or that Mr Nagel has not been compensated for any rights he had under the Cooperation Agreement.



214. When the Government adopted Government Resolution No. 428, which approved the "Fundamental Principles of the Czech Republic's Telecommunications Policy", the Government explained its primary objective as being to enhance the quality and accessibility of telecommunications services in the Czech Republic. The Government's reason for issuing two GSM licences, and not more or less, was two-fold: first, to be economically feasible, a licence holder needed a certain number of subscribers, which based upon estimates of future demand justified the issuance of two licences; and second, the limitations on the availability of the GSM spectrum justified the issuance of just two licences.

215. The decision to award one of the licences to a joint venture consisting of ČRa and a party selected through a public tender application was driven by a desire to identify in an open, competitive and transparent process the entity most capable of working with ČRa, to provide GSM services in the Czech Republic in the shortest amount of time and to create needed competition in the mobile telecommunications sector. The Czech Republic had a basic objective of ensuring quality service at accessible prices.

216. Indeed, the Ministry of Economy explained in its Principles of the GSM System Implementation in the Czech Republic that maximising profits from the assignment of a GSM licence was not among its basic objectives. At the same time, the Ministry of Finance recognised that "a frequency band is a scarce estate and it needs to be handled accordingly". Indeed, the Czech Republic's selected method and rationale for issuing the GSM licences were well within the norms of international practice.

217. Mr Nagel does not dispute that the Czech Republic's stated rationale for issuing the licences in the manner it chose would indeed constitute a public purpose. Instead, he erroneously argues that the decision to award one of the licences to a joint venture consisting of ČRa and a party selected through a public

tender was driven by financial reasons. The fact that the public tender for the right to participate in the GSM licence was financially beneficial to the Czech Republic does not diminish the legitimate, public purpose of the tender itself. In this case, financial considerations were not the driving factors for the Czech Republic in determining how to issue the GSM licence.

218. Mr Nagel's argument that the Government took Mr Nagel's exclusive rights so that it could obtain the financial benefits of selling those same rights to others is simply erroneous. Importantly, Mr Nagel did not have the right to a GSM licence; he simply had the right to jointly try to convince the Government that the consortium should be awarded the licence.

219. Mr Nagel's suggestion that the Czech Republic's rationale for the issuance of a GSM licence to a joint venture consisting of ČRa and an entity selected by a public tender should be "regarded with scepticism" because the bids have been kept secret is unconvincing. That the terms of the bids for a telecommunications licence were not made public is not unusual and is in fact standard. Such bids would contain the bidders' detailed business plans and strategies, pricing policies, technical parameters of their networks and other trade secrets. If made public, the other telecommunications service providers would gain access to crucial information that could provide them with an unfair and uncompetitive advantage, ultimately to the detriment of the end users, and indeed the general public.

220. The review process itself determines whether the process of selecting the bidders is transparent and fair, and in this case there can be no question about the independence of the process. The Czech Ministry of Economy set up an advisory body composed of representatives of various governmental agencies. In addition, the Ministry of Economy hired two independent experts for each of telecom matters and financial and tender process matters, namely, Salomon Brothers, an internationally recognised investment bank with prominent advisory capacities, and Analysys Limited, a British firm specialising in telecommunications.

221. The Czech Republic exercised its best efforts to organise a transparent selection process by engaging expert advisors and implementing strict rules and procedures maintaining the anonymity of the respective bidders during the entire valuation process until the selection of the winner. To open the GSM licence process to fair competition, the Ministry of Economy organised a public tender open to Mr Nagel, under the very same terms and conditions as to any other willing bidder.

222. Importantly, Mr Nagel never applied to participate in the tender for the GSM licence, so his complaints about the fairness of the process lack any merits.

223. Mr Nagel's argument that the issuance of the GSM licences was discriminatory because the American investors in Eurotel were granted a licence similarly lacks force. As discussed above, the licence was awarded to Eurotel because in 1990, Atlantic West (one of the participants in the Eurotel joint venture) paid USD 10 million to secure the rights to receive a GSM licence when the Czech Republic decided to issue GSM licences. Unlike Eurotel, Mr Nagel did not have a contract with the Czech Republic and paid nothing to the State. Mr Nagel was not similarly situated to Eurotel and thus cannot claim that he should have been treated in the same way as Eurotel.

224. The Czech Republic thus concludes that Article 5(1) of the Investment Treaty has not been breached.

*(vi) The Settlement Agreement*

225. In the Settlement Agreement and Release between Mr Nagel and ČRa, Mr Nagel agreed to release and discharge all claims against ČRa arising from the Cooperation Agreement. In addition, Mr Nagel released all claims relating to the Cooperation Agreement and its termination against ČRa's "stockholders", "parent corporation" or "affiliates". SRa and subsequently ČRa, its legal successor, were State-owned companies. When the Settlement Agreement was

executed in May 1999, the Czech Republic, through the National Property Fund, owned a majority interest in ČRa. In other words, the Czech Republic was the “parent corporation”, “stockholder” and/or “affiliate” of SRa and subsequently ČRa. Thus, Mr Nagel waived all claims against the Czech Republic in connection with the Cooperation Agreement when he entered into the Settlement Agreement.

226. The argument that the State could not be a “shareholder” or “parent corporation” of ČRa because the National Property Fund held the shares of ČRa is not convincing. The National Property Fund was founded by the Czech Government to administer certain governmental assets, including assets designated by the Czech Government for sale to private parties. For Mr Nagel to argue that the Czech Republic is somehow bound by the acts of ČRa but then argue that the Czech Republic is not a shareholder of ČRa because it owns the shares of ČRa through the National Property Fund is disingenuous.

227. The Czech Republic’s role as a “shareholder” or “parent” was evident, for example, when ČRa had a capital increase. In August 1997, the Government adopted Resolution No. 527, deciding that the National Property Fund would not participate in the capital increase, thus decreasing the State’s interest in ČRa. In other words, the Czech Republic exercised its shareholder rights (held through the National Property Fund).

228. If, *arguendo*, the Czech Republic were not a “stockholder” or “parent corporation” of SRa or ČRa, it still remains that the Settlement Agreement also refers to “affiliates”. The Settlement Agreement does not define the term “affiliate”. Czech law governs the definition of “affiliate” because the Settlement Agreement states expressly that the Settlement Agreement should be construed in accordance with Czech law.

229. Under Czech law, an “affiliation” arises when an entity can exercise a certain degree of influence over another. If the ability to influence the other

persons exceeds a certain level, the influencing entity is considered a "controlling" entity. At the time when the Settlement Agreement was executed, the Czech Republic, through the National Property Fund, held 51% of ČRa's shares. Under Czech law, the National Property Fund exercises its powers pursuant to Government Resolutions or under the direct direction of the Ministry of Finance. In addition, the Czech Parliament appoints and recalls, at its sole discretion, the Presidium of the National Property Fund, and the Minister of Finance is the chairman of the Presidium. Thus, the Government of the Czech Republic indeed exercised control over ČRa.

230. Mr Nagel's argument that the term "affiliate" is limited to persons or corporations but does not include the State likewise falls flat. Under Czech law, which governs the Settlement Agreement, it is well established that the State (*res publica*) is a type of "corporation". As the "supreme territorial corporation" the Czech Republic certainly falls under the definition of a "corporation".

231. Consequently, pursuant to the Settlement Agreement, Mr Nagel released and discharged all claims against ČRa and the Czech Republic, whether the Czech Republic is considered a past, present or future "stockholder", "parent corporation" or "affiliate" of ČRa. Thus, Mr Nagel's claims in this case should be dismissed.

232. If Mr Nagel believes, as he now asserts, that the Cooperation Agreement bound the State, and that the Government of the Czech Republic controlled SRa, he has to concede that the Settlement Agreement, which provides for a release of all claims relating to the Cooperation Agreement, released the State from all such claims. He cannot have it both ways.

233. Instead, Mr Nagel takes an untenable, formalistic position that the Settlement Agreement does not release the Czech Republic because the Settlement Agreement does not expressly provide for the release of the State. The response to his argument is obviously that the Settlement Agreement did not

expressly provide for the release of the Czech Republic because it would have been redundant. By releasing ČRa and ČRa's stockholders, parent corporation and affiliates, the Czech Republic was already included among the entities released by Mr Nagel.

234. Mr Nagel further argues that the release in the Settlement Agreement of ČRa's stockholders, parent corporation and affiliates does not release the Czech Republic from the claims asserted in this case because the release of such entities is limited to "acts or omissions of ČRa" and only for "actions or transactions made on behalf of ČRa in connection with the Cooperation Agreement". He asserts that his claims in this case arise under the Investment Treaty and not from ČRa's actions or omissions. His argument, however, ignores the fact that any rights that Mr Nagel may have under the Treaty derive from the Cooperation Agreement and, in a fundamental sense, must flow from what ČRa either did or did not do in connection with the Cooperation Agreement.

235. Mr Nagel also argues that the Settlement Agreement does not release the Czech Republic because the Government's adoption of Resolution No. 428 was not an action taken by the Government in exercising any rights as a shareholder. Again, he is trying to read into the Settlement Agreement limitations on the release of claims that simply are not there. Section 1.3 provides for the release of ČRa's "officers, directors, stockholders, --- parent corporation, affiliates --- for any actions or transactions made on behalf of ČRa in connection with the Cooperation Agreement and/or its termination, including but not limited to all actions by ČRa's shareholders in exercising their respective rights as shareholders made in connection with the Cooperation Agreement". Under the express language of Section 1.3, Mr Nagel releases ČRa's stockholders for actions, including but not limited to the exercise of their respective rights as shareholders. Thus, the release of the Czech Republic is not restricted to whether it was exercising its rights as a shareholder of ČRa.



236. When Mr Nagel released all claims against the Czech Republic relating to the Cooperation Agreement, he received in exchange for this release a payment of USD 550,000. His claims in the present case concern compensation for the same damage, and any further compensation would therefore amount to double recovery which is legally impermissible and unjustified.

237. Mr Nagel concedes that he has received compensation for any alleged breach of the Cooperation Agreement. Nonetheless, he claims that he is entitled to additional compensation from the Czech Republic as a consequence of his dealings with ČRa, notwithstanding that the Settlement Agreement wiped out the consequences of ČRa's actions. He apparently considers his position to be legitimate in view of the fact that the Settlement Agreement was reached with ČRa, while this claim is brought against the Czech State. Under this theory, every contracting party would be entitled to a double recovery.

238. Neither precedent nor international legal doctrine nor common sense, however, will support Mr Nagel's theory. It is true that the principle of avoidance of double recovery has not played a major role in international discussions and proceedings. This is to be explained not by any lack of clarity of the law but by the absence in international practice of persons who, like Mr Nagel, would indeed be prepared to ask twice for the same damage, be it before one tribunal or two different tribunals. In this exceptional case, Mr Nagel, for reasons of his own, has had no scruples to act contrary to the relevant long-standing international practice.

239. Avoidance of double recovery is a requirement consistent with basic notions of equity and is recognised not just in Czech law but also in other legal systems. In international law, the principle operates in legal doctrine in various ways. In the context of measuring lost profits and the awarding of interest, for instance, the principle requires that an award be made under only one of the two headings, but not both. None of the numerous arbitral awards addressing issues of contracts between States and aliens in the context of expropriation has awarded

compensation both for breach of contract and for a violation of the rules on expropriation.

240. Under Mr Nagel's theory, the deprivation of whatever rights he had under the Cooperation Agreement, whether a breach by ČRa, or some other act by the Czech Republic itself, allows for double recovery under the heading of breach of contract and under the rules on expropriation. The lack of legal logic in this approach is obvious and is confirmed by the absence of any discussion of such an approach in the literature or practice on the international level. Double recovery is not permitted, regardless of the parties involved and regardless of the procedural setting.

241. Mr Nagel further argues that ambiguities in the Settlement Agreement should be construed in Mr Nagel's favour because counsel for ČRa drafted the Settlement Agreement. Mr Nagel, however, is a sophisticated businessman who was represented by counsel during the negotiation of the Settlement Agreement. This is not a situation where one should assume that ČRa was in a better position in these negotiations than Mr Nagel's counsel. Indeed, just the opposite was true. ČRa's main motivation for settling with Mr Nagel was the fact that the latter repeatedly threatened ČRa that, unless his claims were satisfied, he would launch a wide-ranging campaign aimed at discrediting ČRa as an issuer of special securities trading on the London Stock Exchange. To avoid the potential damaging effects of such a campaign, ČRa paid Mr Nagel USD 550,000, although Mr Nagel agreed that ČRa was not admitting any liability.

242. Mr Nagel's argument that the Settlement Agreement does not release his claims against the Czech Republic under the Treaty because the claims are different from his claim against ČRa that he filed in a Czech court is without merit. The Settlement Agreement expressly provides that the settlement and release are not limited to the claims asserted against ČRa in the Czech court. His release applies to all claims, complaints, losses, expenses and damages, whether

based on tort, contract or other theories of recovery, relating to the Cooperation Agreement.

243. Mr Nagel's understanding or belief regarding the scope of the release in the Settlement Agreement is irrelevant to whether that Agreement in fact released and discharged Mr Nagel's claims against the Czech Republic. Indeed, in the Settlement Agreement, Mr Nagel expressly agreed that he "assumes the risk that the facts or law may be other than Nagel believe[s]". Accepting Mr Nagel's argument would turn on its head the maxim "ignorance of the law is no defence". The language of the Settlement Agreement, not Mr Nagel's understanding of the language, determines whether he released his claims against the Czech Republic.

244. If Mr Nagel asserts that his claims against the Czech Republic are not barred by the Settlement Agreement, and the Arbitral Tribunal does not dismiss Mr Nagel's claims on other grounds, the arbitration proceedings should be stayed pending resolution of this dispute regarding the scope of the Settlement Agreement by the Arbitration Court attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic. The Settlement Agreement provides that "[a]ll disputes arising from the Settlement Agreement" shall be decided by this Arbitration Court. Whether or not the present proceedings are stayed, it is submitted that the Arbitral Tribunal lacks jurisdiction to consider any disputes concerning the meaning of the Settlement Agreement.

*(vii) Statute of limitations*

245. Assuming, *arguendo*, that Mr Nagel has not released all of his claims against the Czech Republic, Mr Nagel's claims are nonetheless barred because the statute of limitations for his claims has expired.

246. Mr Nagel knew in February 1994, more than eight years before he filed his Treaty claim, that it was the Government's position that it would select a partner for ČRa through a public tender. Because the Treaty does not expressly provide



for a statute of limitations, it is only logical that the Arbitral Tribunal would consider Czech and English law as relevant for determining the limitations periods for claims brought under the Treaty.

247. Under Czech law, the statute of limitations for any claim for damages (including claims for expropriation) against the Czech Republic is three years. Thus, Mr Nagel's claims expired on 20 December 1997, three years after he was notified that ČRa was terminating the Cooperation Agreement.

248. Section 398 of the Commercial Code provides further guidance as to the claims for damages and stipulates that the statute of limitations starts running from the date as of which the party seeking damages learned about the occurrence of damage and about the identity of the damager.

249. Indeed, Mr Nagel's own counsel in the Czech Republic, JUDr Michael Macek, conceded that the limitation period for Millicom's claims, to which the same statute of limitations applies as to Mr Nagel's claims against the Czech Republic, has expired and that the claims are therefore barred. This appears from a letter written by Mr Macek on 29 March 1999. Then, on 7 April 1999, during the process of drafting the Settlement Agreement, Mr Nagel's legal counsel conceded that the statute of limitations for any claims had expired.

250. Thus, under Czech law, all of Mr Nagel's claims are barred by the statute of limitations.

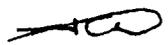
251. Because the Investment Treaty does not specify the statute of limitations, under Article 24(1) of the Stockholm Rules, the Arbitral Tribunal "shall apply the law or rules of law which it considers to be most appropriate". The Czech Republic respectfully suggests that the Arbitral Tribunal should apply the law of the Czech Republic with respect to the statute of limitations for the following principal reasons.

252. First, the Arbitral Tribunal should apply the relevant statute of limitations under Czech law to bar Mr Nagel's claims based on general conflict of law principles. Under these principles, the Arbitral Tribunal may consider several factors, including but not limited to the law with which the contract at issue has its most significant connection. Here, the Cooperation Agreement – which is the exclusive subject matter of this arbitration – was entered into and would have been performed primarily in the Czech Republic. Indeed, the "Objectives" of the Cooperation Agreement were to establish an entity that would "own and operate a GSM cellular telephone network in the Czech Republic". Therefore, under general conflict of law principles the statute of limitations under Czech law should apply because of the strong (if not exclusive) connection between the Cooperation Agreement and the Czech Republic.

253. Although the choice of law provision in the Settlement Agreement is not directly applicable, the parties have addressed what law applies to disputes regarding the Cooperation Agreement or its termination and have concluded that Czech law applies. It would not be proper for the Arbitral Tribunal to apply any other law when determining the statute of limitations of Mr Nagel's claims.

254. Other tribunals have applied the substantive law of a contracting party to a bilateral investment treaty in the absence of an express provision in the treaty. Similarly, in this case, the Arbitral Tribunal should look to international and Czech law with respect to the applicable statute of limitations.

255. Second, if the Arbitral Tribunal fails to apply the relevant statute of limitations under Czech law, the policy underlying the Investment Treaty will be thwarted when it comes to the observation of Czech laws and the granting of benefits under Czech laws. Czech law regarding the statute of limitations follows the same or similar principles as do other legal systems, and no issue arises concerning a minimum standard, which might be violated by the Czech legal system on the statute of limitations. The investor's rights are observed on this point when the principle of national treatment is adhered to.



256. Therefore, under general conflict of law principles and to preserve the underlying policy goals of the Investment Treaty, the Arbitral Tribunal should apply the statute of limitations under Czech law. Pursuant to the applicable statute of limitations under Czech law, Mr Nagel's claims are barred.

257. Mr Nagel does not dispute that his claims are indeed time-barred if the statute of limitations under Czech law is applicable. He instead argues that the statute of limitations under Czech law has no relevance to these proceedings. However, an international tribunal would not disregard a national law that stipulates a period of limitation consistent with general principles of law and applicable by virtue of the relevant rules of private international law. Where a claim under municipal law is barred by a municipal statute of limitations, it cannot form the grounds for a valid international claim on behalf of an individual like Mr Nagel, unless the validity of the municipal statute can be challenged in international law.

258. This same standard is equally applicable to Mr Nagel when he brings his own claim before an international tribunal. That the Investment Treaty does not expressly provide for a statute of limitations for claims brought under the Treaty does not mean that the Treaty claim has no prescription period. It is illogical to suggest that the Czech Republic and the United Kingdom would have entered into a treaty that permitted claims to be brought beyond their own statutes of limitations.

259. Mr Nagel's claims would be similarly time-barred under the applicable statute of limitations under English law. Under English law, both tort claims and breach of contract claims must be brought within six years from the time when the cause of action accrued. Thus, under English law, his claims would have expired almost two years before he filed his Treaty claim, no later than 20 December 2000.



260. ČRa notified Mr Nagel that it was terminating the Cooperation Agreement on 20 December 1994, but Mr Nagel did not file this claim until 25 June 2002, seven and a half years later. Seven and a half years is longer than prescription periods in legal systems generally.

261. Mr Nagel concedes that a claim under the Treaty may be barred if “fairness and equity” so demand. This is just such a case. Mr Nagel’s case is premised on alleged conversations dating back to 1992. He has made numerous assertions about what happened, but with the passage of time, memories fade, and it is more difficult to rebut his claims. This is particularly true in this case because one of the important witnesses, Mr Kodr, has recently died. He was a Technical Director of SRa and, subsequently, ČRa, and was personally involved in negotiating certain aspects of the Cooperation Agreement and in the decision making of SRa and ČRa, generally. Thus, Mr Nagel’s delay is indeed prejudicial to the Czech Republic.

262. Mr Nagel’s argument that he delayed filing because he could not get the documents he needed from the Czech Republic is not convincing. Indeed, he admits that he filed this case before he received the very documents that he said he needed to file the case. Because he had a sufficient basis to bring his case against the Czech Republic in a Czech court more than two years ago, alleging claims similar to those that he now asserts in this action, he could have filed this case more than two years ago, when memories were fresher and all the witnesses were available.



## V. Reasons for the Award

### 1. Introduction

263. Claimant in this case is Mr William Nagel, a businessman resident in the United Kingdom. In or around 1991, he started exploring the possibilities of contributing to the development and operation in Czechoslovakia of a cellular telephone network (GSM). He and his partner in this matter, which was Millicom, wished to engage in a joint venture with a Czechoslovak partner, and Mr Nagel made contact at high level in Czechoslovakia in order to find support for his plans and create favourable conditions for the granting of a licence which they would require for these activities. When in 1993 Czechoslovakia was divided into the Czech Republic and the Slovak Republic, his and Millicom's efforts concentrated on the Czech Republic.

264. On the basis of his enquiries, Mr Nagel reached the opinion that their most suitable partner in the Czech Republic would be SRa which was a State enterprise wholly owned by the Czech Republic. Negotiations with SRa resulted in the Cooperation Agreement signed on 11 and 17 May 1993 by Millicom, Mr Nagel and SRa. Under this Agreement the three parties would jointly seek to obtain through a consortium the necessary permits to establish, own and operate a GSM network in the Czech Republic. SRa was subsequently transformed into ČRa.

265. On 10 August 1994, the Government of the Czech Republic adopted Resolution No. 428 on Fundamental Principles of the State Telecommunications Policy. According to this Resolution and its annexes, two licences for GSM networks would be issued, one to Eurotel (a joint venture of SPT Telecom and the company Atlantic West) and the other one to ČRa and a foreign partner which was to be selected on the basis of a competitive tender. Mr Nagel argues that the Czech Government thereby deprived him of the rights he had obtained through the Cooperation Agreement with SRa and that he is therefore entitled to

receive financial compensation from the Czech Republic according to the provisions of the Investment Treaty. He relies, more particularly, on Articles 2(2), 2(3), 3(1), 3(2) and 5(1) of that Treaty.

## *2. Preliminary Issues*

### *(a) Jurisdiction*

266. The Investment Treaty was concluded in 1990 as a bilateral agreement between the United Kingdom and Czechoslovakia. It is binding on the Czech Republic as one of the two successor States of Czechoslovakia.

267. The Czech Republic argues, however, that the Arbitral Tribunal does not have jurisdiction under the Investment Treaty because Mr Nagel did not have an investment under the Treaty.

268. The Arbitral Tribunal finds that the question as to whether or not Mr Nagel was an investor who made an investment within the meaning of Article 1 of the Investment Treaty is an important question in this case. Deciding this question in the present arbitration involves the determination of certain factual issues that are also in dispute in connection with the substantive issues between the parties in relation to the merits of Mr Nagel's claim. It is therefore not an issue which can be easily decided as a preliminary question of jurisdiction but one which requires a more detailed analysis both of the Treaty and of the facts of the case. The Arbitral Tribunal considers that it should be treated as an issue relating to the merits of the case. The Arbitral Tribunal finds support for its approach in the so-called theory of "double relevance" in principles of international civil procedure of a number of countries and, in particular, under the former Brussels Convention – now EC Regulation – on Jurisdiction and Enforcement of Foreign Judgments. According to this theory, facts which need to be established both for assuming jurisdiction and for the claim to succeed on the merits are to be taken as given for purposes of the former if the claimant alleges those facts in such a way as to



justify an examination on the merits. It follows that the Arbitral Tribunal will deal with this question in a later part of this award where the facts relevant to the merits of Mr Nagel's claim are analysed.

(b) Article 8 of the Investment Treaty

269. The provision of the Investment Treaty from which the Arbitral Tribunal derives its competence is Article 8 which gives an investor the right to refer a dispute under the Treaty to arbitration. However, Article 8(1) does not refer to all disputes under the Treaty but provides that disputes concerning an obligation of a Contracting Party under Articles 2(3), 4, 5 and 6 of the Treaty which have not been amicably settled shall be submitted to arbitration if either party to the dispute so wishes.

270. Basing itself on this provision, the Czech Republic argues that only disputes based on the said Articles can be the subject of arbitration and that Mr Nagel's claims are therefore inadmissible in so far as they are based on Articles 2(2), 3(1) and 3(2) of the Treaty. Mr Nagel, for his part, interprets Article 8(1) as meaning that as soon as there is a dispute relating to one of the provisions of Articles 2(3), 4, 5 and 6, the Arbitral Tribunal may proceed to a full examination which may include other provisions of the Treaty as well.

271. The Arbitral Tribunal finds no support in the text of Article 8(1) of the Treaty for Mr Nagel's interpretation. Indeed, Article 8(1) only states that disputes under Articles 2(3), 4, 5 and 6 may be submitted to arbitration and there is nothing in the text to indicate that the arbitration may also include other questions arising under the Treaty. The Arbitral Tribunal therefore concludes that Mr Nagel's claims under Articles 2(2), 3(1) and 3(2) are not admissible in the present arbitration and must be rejected.

(c) Effect of the Settlement Agreement

272. The Czech Republic further argues that an examination of Mr Nagel's case on its merits should be dismissed on the basis of another threshold issue, namely, because Mr Nagel, on 17 May 1999, concluded with ČRa the "Settlement Agreement and Release" which, in the opinion of the Czech Republic, released not only ČRa but also the Czech Republic from further claims by Mr Nagel in connection with the Cooperation Agreement. Mr Nagel contests this and argues that what was settled was his claim against ČRa based on the termination of the Cooperation Agreement but not his claim against the Czech Republic based on the Investment Treaty.

273. The Czech Republic relies, in support of its position, on a statement by Professor Josef Bejček who argues that the Czech Republic falls under the categories which were released from any liability according to the Settlement Agreement. He refers to the terms of Section 1.3 of the Agreement under which the release concerned, *inter alia*, "parent corporation, affiliates, — — — any and all other persons, or corporations with whom any of the former have been, are now, or may hereafter be affiliated". A different opinion is expressed in the statement made on behalf of the Wolf Theiss law firm according to which (1) the term "parent corporation" cannot be considered to apply to the Czech Republic, (2) the term "affiliates" concerns "controlled subjects", which excludes the Czech Republic, and (3) the Czech Republic never owned the shares of ČRa and cannot therefore be considered as its "stockholder".

274. The Arbitral Tribunal notes that the Settlement Agreement was concluded in connection with the proceedings brought by Mr Nagel against ČRa before the Prague Regional Commercial Court. In those proceedings Mr Nagel had demanded compensation for costs and damages because of the termination of the Cooperation Agreement.

275. The Settlement Agreement provides that the purpose of the Agreement is "to provide for a certain payment in full settlement and complete discharge of all of the claims, complaints, losses, expenses and damages, past, present and future, including without limitation those stipulated in the Complaint, which did or may result from the Cooperation Agreement and any other understanding or agreement, whether written or oral, between Nagel and ČRa and/or the termination thereof". In the operative part of the Settlement Agreement (Section 1.1), Mr Nagel released and discharged ČRa "from any and of all of the claims, complaints, losses, expenses and damages, past, present and future, including without limitation those stipulated in the Complaint, whether based on a tort, contract, deceptive trade practices or other theory of recovery, which did or may result from the Cooperation Agreement and any other understanding or agreement in connection with the Cooperation Agreement, whether written or oral, between Nagel, Millicom and ČRa and/or termination thereof".

276. From these clauses it cannot be concluded that the release covered Mr Nagel's claims against anybody else than ČRa. However, the Czech Republic relies on an additional clause in the Settlement Agreement (Section 1.3) which provides that the release and discharge "shall also apply to ČRa's past, present and future officers, directors, stockholders, attorneys, representatives, employees, insurers, subsidiaries, parent corporation, affiliates, predecessors and successors in interest, and any and all other persons, or corporations with whom any of the former have been, are now, or may hereafter be affiliated, for any actions or transactions made on behalf of ČRa in connection with the Cooperation Agreement and/or its termination, including but not limited to all actions by ČRa's shareholders in exercising their respective rights as shareholders made in connection with the Cooperation Agreement and/or its termination". It is specified that the release, on the part of Mr Nagel, "shall be a fully binding and complete settlement among Nagel, ČRa, and their heirs, assigns and successors" (Section 1.4). In a further clause, Nagel acknowledged and agreed that the release and discharge were a general release which included "all Claims which Nagel now have, or which may hereinafter accrue or otherwise be acquired or



which may hereinafter arise from the alleged acts or omissions of ČRa” (Section 1.5).

277. The Czech Republic’s argument on this point is that the State is covered by one or more of the terms “stockholders”, “parent corporation” and “affiliates” appearing in the Settlement Agreement. This is contested by Mr Nagel.

278. The Arbitral Tribunal first notes that, while the Czech Republic might have been considered a stockholder in the State-owned enterprise SRA, the same does not necessarily apply to ČRa which was apparently, when the Settlement Agreement was concluded, owned not by the Czech Republic as such but by a special State institution, called the National Property Fund. At no time did the Czech Republic own any stock, or shares, in ČRa directly.

279. A review of other provisions of the Settlement Agreement reinforces this approach to the interpretation. Section 1.3 refers to “actions or transactions made on behalf of ČRa”, and the Government’s promulgation of Resolution No. 428 can hardly be considered to have been made on behalf of ČRa. Other clauses – Section 1.4 (“settlement among Nagel, ČRa, and their heirs, assigns and successors”) and Section 1.5 (“Claims which – – – may – – – arise from the alleged acts or omissions of ČRa”) – as well as the direct link between the Settlement Agreement and the then pending court proceedings against ČRa speak against including in the release any claims which have an entirely different legal basis, such as claims based on the Investment Treaty.

280. Nor is the Arbitral Tribunal satisfied that the parties intended the Czech Republic to be covered by the term “parent corporation”. In fact, while under certain domestic laws regulating the phenomenon of groups of companies States are considered to be potential holding companies or parent companies, there would have to be clearer indications to authorise the Arbitral Tribunal to apply such analysis to this particular case. Without any such indication and authority,

in the Arbitral Tribunal's view, it would appear overly bold because it is unusual in normal language to refer to a State as "parent corporation".

281. As regards the term "affiliates", the Arbitral Tribunal notes that the same term is also used in paragraphs 6 and 9 of the Cooperation Agreement itself. According to paragraph 6, each party agrees not to allow its affiliates to support certain applications for licences. It is obvious that in this paragraph the term "affiliates" does not apply to the Czech Republic, since it is the State which grants the licences. Paragraph 9 provides that the Agreement shall be binding upon the parties, their successors and assigns, as well as a party's affiliates, i.e. persons controlling, controlled by or under common control with a party. It is most unlikely that the term "affiliates" in this paragraph was intended to include the Czech Republic, since ČRa had no authority to make an undertaking on behalf of the Czech Republic in regard to the contents of the Agreement.

282. The Arbitral Tribunal has found no other elements showing that the parties to the Settlement Agreement intended the release to include claims against the Czech Republic. On the contrary, the fact that in November 1999, i.e. approximately six months after the Settlement Agreement, Mr Nagel sued the Czech Republic before the District Court for Prague 1 in order to obtain compensation for breach of the Investment Treaty rather supports the view that he had not intended to release the Czech Republic through the Settlement Agreement.

283. It may be added that, if the parties, when drafting the Settlement Agreement, had wished to include the Czech Republic in the release, it would have been easy to do so in an unambiguous manner. They could indeed have been expected to express themselves clearly on such an important point.

284. Having regard to these various circumstances, the Arbitral Tribunal concludes that the Settlement Agreement did not affect any rights that Mr Nagel might have against the Czech Republic under the Investment Treaty. Nor does



the Arbitral Tribunal find that Mr Nagel was fully compensated through the Settlement Agreement for the claims he has requested the Arbitral Tribunal to determine in the present arbitration, since the claims against the Czech Republic concern deprivation of property rights and not breach of contract. The damage which may have resulted from expropriation or equivalent measures may not at all be the same as that resulting from a breach of contract.

285. The Czech Republic has requested that the Arbitral Tribunal, if it does not accept the Republic's interpretation of the Settlement Agreement, should stay the proceedings pending an arbitration procedure as referred to in Section 10.0 of the Settlement Agreement. The Arbitral Tribunal points out, however, that the present arbitration concerns alleged breaches of the Investment Treaty and that the impact of the Settlement Agreement is only a preliminary issue in this arbitration. The Arbitral Tribunal finds itself competent to take a position on this preliminary issue and deems it neither necessary nor appropriate to stay the proceedings pending an examination under the Rules of the Arbitration Court attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic.

### *3. The Merits of Mr Nagel's Claim*

#### *(a) Factual Background*

286. Having found that Mr Nagel's claim in this case cannot be rejected on the basis of any of the three threshold issues raised by the Czech Republic, the Arbitral Tribunal turns now to analyse the questions of fact and law that are relevant to the determination of the merits of Mr Nagel's claim for compensation. In doing so, the Arbitral Tribunal takes into account the rather special factual background to the dispute.

287. In giving evidence before the Arbitral Tribunal, Mr Nagel explained in a convincing manner that he saw his engagement in the Czech Republic not merely



as an ordinary business deal, but as a project close to his heart. He declared that, since he had spent some considerable time there as a young man, he had a special sentimental attachment to the country, and that he had a strong and emotional wish to help the Czech Republic establish an efficient GSM mobile telecommunications system. The existing landline network was in poor condition; the availability of new lines for new business enterprises was virtually non-existent; and the analogue mobile networks were inadequate, as many more developed European countries had discovered a few years earlier. Mr Nagel saw the creation of an effective telecommunications network as an essential prerequisite to the economic development of the Czech Republic.

288. Mr Nagel testified that, in his view, the establishment of an effective GSM mobile communications network was not only essential, but urgent. He was confident that, with a credible foreign partner to provide the necessary technology, his vision was achievable. He was equally confident that his personal friendship with several influential persons in what became the Czech Republic would guarantee success – not just for him personally, but for the benefit of the Czech nation.

289. This was the factual matrix against which the subsequent events were played out.

290. On the other side of the dispute, Mr Karel Dyba, the Minister of Economy at the relevant time, and Mr Vladimír Sedláček, who held a senior position in the Ministry of Economy, conveyed a clear and credible impression that in 1993 the Government had not yet decided the path it would take when choosing the means of establishing an effective and economically sound GSM mobile telecommunications system. The Arbitral Tribunal accepts that, at senior levels in Government, it was still an open question in 1993 whether Mr Nagel's project would have a place in the system that would eventually be adopted.

291. It may well be that Minister Dyba and Mr Sedláček had more contacts with Mr Nagel than they either remembered or admitted in their written and oral declarations before the Arbitral Tribunal. It must be borne in mind that, at the time the witnesses testified, some ten years had passed. Minister Dyba testified that he saw it as part of his mission, in the early years after the steps towards establishing a market economy had begun, to encourage potential investors in the Czech Republic, and to advise them on the steps that they could usefully take to move their projects forward. The Arbitral Tribunal accepts that senior Government figures made encouraging remarks to Mr Nagel about the prospects for his plans, and that they advised him to make contact with SRa with a view to seeking a cooperative arrangement with that state-owned company to seek a licence to own and operate a GSM network.

292. The Arbitral Tribunal does not doubt the enthusiasm and good intentions of Mr Nagel, and the correspondence and other documents from the relevant period that were submitted in evidence show considerable activity on his part, as well as on the part of his co-venturer Millicom. It is, however, striking that the documentary record from the Government side is almost non-existent. Indeed, the replies to the letters or fax messages from Mr Nagel and his colleagues or collaborators, when at all forthcoming, were scarce and, later, even evasive. No internal documents of any real significance were produced from the Government side. This is not surprising, as the Arbitral Tribunal formed the impression that Minister Dyba and his colleagues led busy lives, moving from meeting to meeting, appointment to appointment, rarely having minutes taken or following them up with memoranda containing instructions or approvals. But the fact remains that there is nothing in written confirmation to Mr Nagel, or to anyone else, that the Government acknowledged any commitment to him to the effect that he, or the joint venture of which he was part, was in any way guaranteed to obtain a GSM licence. Equally, there is no sign of any written approval from the Government to the Cooperation Agreement between SRa and the prospective consortium of which Mr Nagel was to be part.



293. The Arbitral Tribunal considers that Mr Nagel may, in good faith, have been over-optimistic in interpreting the informal signals he received from his influential personal friends and contacts within the Czech Government. He may also not have taken sufficient account that the country was still in a state of transition, in which the Government and public authorities were labouring to develop the newly born democratic system and to create a well-functioning market economy. This involved a lengthy process of planning the route the country was to follow in the privatisation process of various important sectors of the state-controlled economy, including telecommunications.

294. The paragraphs above provide a by no means exhaustive overview of the Arbitral Tribunal's assessment of the factual background to this dispute. The purpose is to provide some insight to the reader of the Arbitral Tribunal's perception of the events that gave rise to Mr Nagel's claim, and to provide the backdrop to the Arbitral Tribunal's interpretation and assessment of the effect in law of the Cooperation Agreement and the Investment Treaty.

(b) Interpretation of the Investment Treaty

295. As stated above, the legal basis for Mr Nagel's claim in this case is the Investment Treaty. As an international treaty between two sovereign States, the Investment Treaty should be interpreted according to the principles applicable under public international law to treaties between States. The Arbitral Tribunal refers in particular to Article 31(1) of the Vienna Convention on the Law of Treaties which provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

296. Legal terms in an international treaty do not necessarily have the same meaning as similar terms in the domestic laws of the Contracting Parties. In a treaty such terms should often be considered to have an autonomous meaning

appropriate to the contents of the specific treaty and to the issues it intends to regulate.

(c) The Terms “investment” and “asset”

297. As stated above, the Arbitral Tribunal must decide whether there have been breaches in respect of Articles 2(3) and 5(1) of the Investment Treaty. According to Article 2(3), investors of one Contracting Party may conclude with the other Contracting Party specific agreements, the provision and effect of which, unless more beneficial to the investor, shall not be at variance with the Investment Treaty. It is added that investors of one Contracting Party shall, with regard to investments of investors of the other Contracting Party, observe the provisions of these specific agreements, as well as the provisions of the Investment Treaty. Article 5(1) lays down the conditions for expropriation, nationalisation or similar measures by one Contracting Party with regard to investments of investors of the other Contracting Party. Such measures may only be taken for a public purpose and on a non-discriminatory basis, and they must be accompanied by prompt, adequate and effective compensation.

298. Since both Article 2(3) and Article 5(1) of the Investment Treaty concern “investments”, a first question is whether Mr Nagel should be considered to have made an investment in the Czech Republic. This question should in principle be answered on the basis of the Treaty itself and independently of the meaning of the term “investment” or equivalent concepts in the domestic laws of the Contracting Parties (cf. Dolzer-Stevens, *Bilateral Investment Treaties*, 1995, p. 25-31, and Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, Collected Courses of the Hague Academy of International Law 1997, p. 305-310). The Treaty gives guidance in Article 1(1) which contains the following definition of “investment”:



“For the purposes of this Agreement:

(a) the term “investment” means every kind of asset belonging to an investor of one Contracting Party in the territory of the other Contracting Party under the law in force of the latter Contracting Party in any sector of economic activity and in particular, though not exclusively, includes:

- (i) movable and immovable property and any other related property rights including mortgages, liens or pledges;
- (ii) shares in and stock and debentures of a company and any other form of participation in a company;
- (iii) claims to money or to any performance under contract having a financial value;
- (iv) intellectual property rights, goodwill, know-how and technical processes;
- (v) business concessions conferred by law or, where appropriate under the law of the Contracting Party concerned, under contract, including concessions to search for, cultivate, extract or exploit natural resources.”

299. In this provision an “investment” is defined as an “asset”. Moreover, the examples in sub-paragraphs (i) – (v) assist in shedding light on the meaning of “asset” and “investment”. The examples given all seem to relate to rights or claims which have a financial value. In sub-paragraph (iii) the words “having a financial value” are expressly mentioned, but financial value seems to be an underlying concept also in regard to movable and immovable property in sub-paragraph (i), shares and similar rights in sub-paragraph (ii), intellectual property rights in sub-paragraph (iv) and business concessions etc. in sub-paragraph (v). Article 5 of the Treaty, which requires compensation to be paid in the case of nationalisation or expropriation of an investment, also seems to be based on the assumption that an investment is something which has a financial value. There seems to be unanimity among writers that the financial value needs to be real, i.e. flow from the terms of a contract etc., rather than just potential (cf., besides the authorities cited *supra*, the examples given by F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, in: *Further Studies in International Law*, 1990, p. 234 *et seq.*, at p. 237).

300. It follows that, when read in their context, the terms “asset” and “investment” in Article 1 shall be considered to refer to rights and claims which have a financial value for the holder. This creates a link with domestic law, since it is to a large extent the rules of domestic law that determine whether or not there is a financial value. In other words, value is not a quality deriving from natural causes but the effect of legal rules which create rights and give protection to them.

301. Article 1(1)(c) makes it clear that a claim can be accepted as an “asset” if it has a financial value. However, a claim can normally have a financial value only if it appears to be well-founded or at the very least creates a legitimate expectation of performance in the future.

302. In order to determine whether Mr Nagel had an “asset” which constituted an “investment” under Article 1 of the Investment Treaty, the Arbitral Tribunal will therefore have to examine what right or claim, if any, he could derive from the Cooperation Agreement.

(d) The Character of the Cooperation Agreement

303. The Cooperation Agreement had strong links with the Government of the Czech Republic. One of the parties was a Czech State enterprise and the Agreement concerned cooperation in order to obtain rights to operate a GSM system in the Czech Republic. The Arbitral Tribunal therefore considers that Czech law should be regarded as the applicable law of the contract. Indeed, this view seems to be shared by both parties.

304. There is however a dispute between the parties in regard to the question of whether or not the Cooperation Agreement was a valid and binding contract under Czech law.

305. The Cooperation Agreement provided that the parties would jointly seek to obtain through a consortium the necessary frequencies, licences, rights to

interconnect with the local public switched telephone network and other permits to establish, own and operate a GSM cellular telephone network in the Czech Republic through negotiations, or through tender solicitation with the relevant entities in the Czech Republic (paragraph 1). Each party should devote its best efforts to assist the consortium in the development and implementation of these objectives (paragraph 2). There were further paragraphs dealing with expenses (paragraph 3), incorporation and operation of the consortium and the respective shares in the consortium (paragraph 4), confidentiality (paragraph 5) and an undertaking by the parties not to support any application for operating rights or licences outside the consortium (paragraph 6).

306. The Czech Republic argues that the Cooperation Agreement was not precise enough to constitute a legally binding contract under Czech law. It relies in this respect on the analysis of Professor Josef Bejček who was also heard orally as an expert witness before the Arbitral Tribunal.

307. Mr Nagel, for his part, contends that the Cooperation Agreement was indeed binding according to Czech law and relies, in support of his contention, on statements by the attorneys Michael Macek, Martin Maisner and Pavel Randl.

308. Professor Bejček states in his report that the validity and legal relevance of any agreement under Czech law depends on whether the agreement satisfies the requirements of definiteness and intelligibility reflected in Section 269(2) of the Commercial Code and Section 37 of the Civil Code. It is required that the obligations resulting from the agreement must be clear not only to the parties but also to third persons. In Professor Bejček's view, the Cooperation Agreement, except for parts of the confidentiality provision, did not meet the minimum standard of definiteness and intelligibility and was therefore not a binding agreement under Czech law.

309. Professor Bejček further points out that the parties were to operate within a consortium but that this consortium was never formed. Nor was there in the

Cooperation Agreement any legally binding obligation to establish the consortium. Unless the consortium was formed, the entire Cooperation Agreement, in Professor Bejček's view, was legally ineffective and meaningless. Moreover, the Cooperation Agreement failed to specify the identity of all members of the future consortium – according to paragraph 4(b) the Czech investors were to be SRA “and others”. Nor did the Agreement specify the financial participation of the consortium members – none of the parties undertook to provide any specific capital to the consortium.

310. Professor Bejček also refers to paragraph 4(c) of the Cooperation Agreement, according to which major decisions regarding the consortium would require unanimous approval. He points out that the Agreement does not define the notion of “major decisions” which makes the provision unclear. Paragraph 7(a) provides that the Agreement shall terminate on the date of the final awards of the Operating Rights but does not indicate whether this means the granting of operating rights only to the consortium or also to another entity. He adds that, in any event, the Agreement would have to expire when a licence was granted to another entity because, in such a situation, performance under the Agreement would be impossible and agreement on an impossible performance results in invalidity under Czech law. Professor Bejček also finds paragraph 7(b) unclear in so far as it refers to the case of a party declining to continue its participation without making it clear whether it concerns participation in the consortium or in the Cooperation Agreement.

311. Professor Bejček concludes that the Cooperation Agreement sets forth an obligation to exert efforts and not an obligation to achieve a result and is a declaration of mutual understanding regarding the parties' intention to exert efforts. It can therefore, in Professor Bejček's view, be seen as a document of precontractual rather than contractual nature. He adds that under Czech law an invalid contract cannot become valid as a result of the subsequent conduct of the parties.

312. Professor Bejček's views on the invalidity of the Cooperation Agreement are contested in the expert statements of Mr Macek, Mr Maisner and Mr Randl.

313. Mr Macek expresses in general terms the view that the Cooperation Agreement was, and remains, a valid and binding contract under Czech law at the time of its execution.

314. Mr Maisner points out that a contract can be deemed invalid because of lacking clarity only if the content of the expressed will cannot be established even by using interpretation rules and by taking into account the actions of the parties in a wider context. In this case, however, Mr Maisner considers that the parties have undertaken some clear liabilities and agreed to cooperate to reach certain objectives, to cover their expenses and even to mutually invest in an agreed calculated proportion. Although terms like "best efforts" do not have an exact meaning, it does not follow that the undertaking is vague or non-existent. Mr Maisner points out that the objectives have been clearly stated and the steps to be taken as well. He considers the Agreement sufficiently clear and finds it fully valid and binding. He further refers, in support of his view, to ČRa's subsequent attempt to negotiate the termination of the Agreement, and he attaches special weight to the exclusivity clause in paragraph 6 of the Agreement, which in his opinion contains a clear obligation for the parties.

315. Mr Randl refers to the severability of a contract according to Section 41 of the Czech Civil Code and argues that, even if for instance paragraph 1 of the Cooperation Agreement were found invalid due to a lack of definiteness and intelligibility, other provisions of the Agreement, such as the exclusivity clause in paragraph 6, are sufficiently definite and intelligible to be considered valid. In his view, there is no reason why this provision could not be severed from the rest of the Agreement and be accepted as valid and enforceable under Czech law.

316. The Arbitral Tribunal has already noted that the basis of Mr Nagel's claims in this case is the Investment Treaty and that that Treaty should be interpreted in



accordance with the rules of public international law. However, Czech domestic law will be of some relevance, since the terms “investment” and “asset” in Article 1 of the Investment Treaty cannot be understood independently of the rights that may exist under Czech law. It is therefore necessary to determine what is the legal significance of that Cooperation Agreement under Czech law.

317. The main elements of the Cooperation Agreement were, on the one hand, an obligation to cooperate for the purpose of obtaining operating rights for a GSM network and, on the other hand, an obligation not to support any application for operating rights outside the consortium which the parties intended to establish. While the setting up of the consortium would be the principal means of cooperation, the Arbitral Tribunal finds that the undertaking to cooperate was made already when the Agreement was concluded. It may be that this undertaking was of a general nature, but the aim was clearly indicated, and the Arbitral Tribunal finds no reason why it should not be possible for the parties to undertake in a legally binding way an obligation to cooperate for a specific purpose and to refrain from any action that would be incompatible with that purpose.

318. The Arbitral Tribunal has examined Professor Bejček’s arguments and his conclusion that the Cooperation Agreement was not a valid and binding contract under Czech law. It notes that contrary views on this matter were expressed in other expert witness statements. Moreover, although some parts of the Agreement could not become operative until the consortium had been set up, the Tribunal finds it difficult to accept that the main elements in the Agreement would be deprived of legal validity. Indeed, the parties’ conduct after the Agreement had been concluded shows that they all treated it as a valid contract. In particular, ČRa’s efforts to make Mr Nagel and Millicom accept the termination of the Agreement would have been without any useful purpose, if the Agreement had never become binding. And when ČRa finally withdrew from the Agreement, it did so not on the basis that the Agreement had been invalid from the start but with reference to Section 356 of the Commercial Code which entitles



a party to withdraw from a contract in case of a substantial change in the circumstances in which it was concluded.

319. The Arbitral Tribunal also attaches weight, in this connection, to Section 41 of the Czech Civil Code which provides that, if there is a ground for invalidity which relates only to part of an act in law, only this part shall be void, provided that it does not follow from the nature of the act in law, or its contents, or the circumstances under which it was undertaken, that such part may not be separated from the rest of the contents. Consequently, the fact that some elements of the Cooperation Agreement may not have been precise enough to obtain legal recognition does not mean that the main features of the Agreement, i.e. those which impose on the parties a general duty of loyalty and cooperation and a prohibition against acts incompatible with the objectives of the Agreement, also lack legal validity. The Arbitral Tribunal cannot find it established in this case that, even if some parts of the Agreement should be considered to lack legal validity, the invalidity was of such fundamental importance as to extend to the rest of the Agreement as well.

320. For these reasons, the Arbitral Tribunal must conclude that the Cooperation Agreement was, at least as regards its general contents, a contract which under Czech law created legal obligations for the parties to the Agreement.

(e) The Czech Republic's Involvement

321. While SRa – subsequently succeeded by ČRa – was a party to the Cooperation Agreement, the Czech Republic was not. Although SRa was a fully owned State enterprise, it was a separate legal person whose legal undertakings did not as such engage the responsibility of the Czech Republic.

322. The parties have expressed different views on the question as to whether SRa could, or did, conclude the Cooperation Agreement without first having obtained the approval of the Government or the competent Minister. Mr Nagel



has expressed the opinion that it was inconceivable that SRa could have entered into a relationship of this kind with him and Millicom without Government approval. He has also referred to various meetings with Ministers and high officials who had encouraged his contacts with ČRa and been informed of how these contacts developed. They had also been aware of, and had been satisfied with, the Agreement which was the result of these contacts.

323. Mr Karel Dyba, who was at the relevant time Minister of Economy and in that capacity responsible for telecommunications, and Mr Vladimír Sedláček, who was a senior official in the Ministry of Economy, both gave evidence before the Arbitral Tribunal. They denied that they had been well informed about the negotiations between SRa, Mr Nagel and Millicom. In particular, they denied that the Cooperation Agreement had been approved by them or by the Czech Government. They pointed out that SRa had been entitled to conduct negotiations with Mr Nagel and Millicom without any Government involvement and could therefore not be expected to keep Ministers or Government officials informed. Mr Dyba stated that he had met Mr Nagel on a few occasions but denied that during their conversations he had given any assurances or made any declarations of Government support to Mr Nagel or his cooperation with SRa. Mr Dyba and Mr Sedláček also emphasised that, in order for the Government to make a binding commitment, it would have been necessary to observe various formalities and that simple conversations with a Minister or a Government official were not sufficient to engage the Government's responsibility.

324. The Arbitral Tribunal notes that Mr Nagel's accounts of frequent and close contacts with persons on the Government side differ a great deal from Mr Dyba's and Mr Sedláček's statements that they were neither involved in nor informed about Mr Nagel's and Millicom's action and plans in the Czech Republic. However, the Arbitral Tribunal does not find it necessary, for the purposes of this case, to go into details in this regard but finds it sufficient to note that, in any event, there is no convincing evidence of such concrete Government involvement in connection with the conclusion of the Cooperation Agreement as would make



the Czech Republic responsible for the implementation of the Agreement. Moreover, as explained to the Arbitral Tribunal, Government approval or any other binding commitment by the Government would have had to be made in a form which was certainly not applied in this case, and Mr Nagel cannot have been justified in believing that, as a result of the Cooperation Agreement, the Government had made any commitment or undertaken any legal obligations towards him.

(f) The Contents of the Cooperation Agreement

325. However, the main question which the Arbitral Tribunal has to answer is not whether the Czech Republic had any responsibility under the Cooperation Agreement but whether Mr Nagel's contractual rights under the Cooperation Agreement were such as to constitute an "asset" and an "investment" and, if so, whether Mr Nagel was deprived of his asset and investment by the Government's Resolution No. 428 of 10 August 1994.

326. As stated above, the basic undertaking in the Cooperation Agreement was that the parties should work together for the purpose of obtaining a GSM licence. There was not, and could not be, a guarantee that a licence would in fact be obtained. That would depend on the Government, and the Government had made no undertaking in this regard. Mr Nagel could do no more than hope that his cooperation with the State-owned Czech company SRa would increase his chances to become involved in the operation of GSM in the Czech Republic, but he could not be certain of getting a licence. Although he may have been encouraged by various remarks from Ministers or Government officials or by the general interest they demonstrated in his plans, this was not sufficient, in the Arbitral Tribunal's view, to raise his prospects based on the Cooperation Agreement to the level of a "legitimate expectation" with a financial value.

327. The Arbitral Tribunal has considered the additional question as to whether the link with SRa, created by the Cooperation Agreement, included an



undertaking by SRa not to accept to be holder of a GSM licence except together with Mr Nagel and Millicom, and whether the Government, by issuing a licence to a joint venture of ČRa and another applicant, deprived Mr Nagel of a contractual right which might be considered to have a financial value. However, while the Agreement prohibited SRa from supporting an application for a licence outside the consortium, it did not provide that SRa could not accept a decision by the Government to award a licence to a joint venture which included SRa. It is indeed unlikely that SRa would have been authorised to make such an undertaking, as this would in reality have restricted the Government's freedom to grant licences according to its discretion.

328. The Arbitral Tribunal further notes that the Cooperation Agreement did not oblige the parties to make specific financial contributions to their project but only indicated the shares, capital contributions and loan support that would be required once the consortium had been formed. While the Agreement was an important basis for further work, the Arbitral Tribunal considers that it was only of a preparatory nature and cannot find that the rights derived from it had a financial value. In so far as Mr Nagel now states that the bidders in the tender process offered substantial sums to acquire the same rights as had been taken from Mr Nagel, the Arbitral Tribunal finds his assertion misleading, since the payments for the licence concerned something different from the general right to cooperation for a specific purpose which was the subject-matter of the Cooperation Agreement. Similarly, the comparison which Mr Nagel makes with the licence granted to Eurotel is also not relevant, since the payment of USD 10 million by one of the partners in Eurotel was a clear financial engagement which was considered to confer specific rights to a licence, not comparable with those rights which could be derived from the Cooperation Agreement.

329. The Arbitral Tribunal therefore concludes that Mr Nagel's rights under the Cooperation Agreement were not such as to constitute an "asset" and an "investment" within the meaning of Article 1 of the Investment Treaty.



(g) The Significance of Resolution No. 428

330. The Arbitral Tribunal has no doubt that Resolution No. 428 came as a shock to Mr Nagel. For him personally, the project in the Czech Republic was of considerable importance, and he had apparently evaluated his chances in a more optimistic way than the circumstances warranted. The Arbitral Tribunal can well understand his disappointment but, as stated above, cannot consider that he was thereby deprived of an asset or an investment.

331. It is another matter whether ČRa's withdrawal from the Cooperation Agreement or any other act by ČRa constituted a breach of contract. This matter was the subject of proceedings before the Regional Commercial Court in Prague which ended in a settlement. It falls outside the scope of the present proceedings, not only because the Czech Republic was not a party to the Cooperation Agreement, but also because the Arbitral Tribunal has no jurisdiction in respect of breaches of the Cooperation Agreement.

*4. Remaining Question*

332. The Czech Republic also contests Mr Nagel's claims on the ground that they were barred due to the statute of limitations. The Republic refers in this respect to the limitation period applicable in Czech law which would be three years in respect of claims for damages, including damages for expropriation.

333. Mr Nagel argues that the limitation periods in Czech law have no relevance to a claim based on the Investment Treaty. Instead, international rules should be applied, and under these rules the question is whether Mr Nagel has been so dilatory and negligent that it would be inequitable to consider his claim.

334. The Arbitral Tribunal finds that in respect of a claim arising from an international treaty the limitation rules of domestic law are not directly relevant and that international standards would have to be applied. However, having



regard to its above conclusion that Mr Nagel did not have an asset and an investment protected under the Investment Treaty, the Arbitral Tribunal does not find it necessary to analyse in further detail the contents of limitation rules in international law and their application to a claim under the Investment Treaty.

### *5. Conclusion*

335. For the reasons indicated above, the Arbitral Tribunal concludes that Mr Nagel's rights under the Cooperation Agreement – alone or in conjunction with surrounding factors, such as the conduct of persons acting on behalf of the Czech Government – did not constitute an asset and an investment protected under Article 1 of the Investment Treaty.

336. It follows that Mr Nagel's claims based on Article 2(3) and Article 5(1) of that Treaty must be dismissed.

### *6. Costs*

337. The Arbitral Tribunal has reached the conclusion that Mr Nagel's claims are to be dismissed in their entirety. This should normally have as a consequence that Mr Nagel should bear his own costs and also be ordered to pay the Czech Republic's costs and be ultimately responsible for the costs and expenses of the Arbitral Tribunal and the administrative fee of the SCC Institute.

338. However, the Arbitral Tribunal considers that some costs and expenses must be considered to relate to specific objections raised by the Czech Republic which were rejected by the Arbitral Tribunal. In particular, the Arbitral Tribunal rejected the arguments that the Cooperation Agreement was not a binding contract and that the Settlement Agreement released the Czech Republic from any liability in relation to the Cooperation Agreement. The Arbitral Tribunal considers it justified to take these circumstances into account when making an



order about costs and expenses. Thus, while Mr Nagel should be responsible for his own costs in their entirety, he should be obliged to reimburse only 80% of the Czech Republic's costs.

339. Mr Nagel has contested the reasonableness of the Czech Republic's cost claims. He has argued that the number of more than 3,267 hours indicated by the Czech Republic as having been devoted to the case by lawyers and other timekeepers is excessive since there have been (a) no preliminary hearings or appearances of any kind, (b) no disclosures of documents, (c) only three days of evidentiary hearings in which the Czech Republic cross-examined only one witness and produced the testimony of only four witnesses, and (d) only three written submissions from each side, none of unusual length. Mr Nagel also argued that the claim of USD 118,041 for experts was excessive and unreasonable and pointed out that the testimony of one of the experts (Dr. Veljanovski) had relevance, if at all, only to damages and that his costs should therefore be disallowed at this stage of the proceedings.

340. The Arbitral Tribunal first notes that there is a very considerable difference between the amounts claimed by the two parties as compensation for costs. The number of "Timekeeper Hours" for which compensation is claimed by the parties is about four times higher in the Czech Republic's claim than in the corresponding claim by Mr Nagel, and as a consequence the amount claimed in this regard by the Czech Republic is USD 706,908 and the amount claimed by Mr Nagel only USD 264,440. The compensation claimed for disbursements is also considerably higher as regards the Czech Republic (USD 168,010 to be compared with Mr Nagel's claim of USD 71,958).

341. The Arbitral Tribunal accepts that the Czech Republic may have had good reason to devote more time and effort to this case than Mr Nagel and that a direct comparison between the respective cost claims may therefore be unjustified. But even apart from any such comparison, the amount claimed by the Czech Republic in legal fees is remarkably high, and the Arbitral Tribunal cannot find



that this case necessitated or justified costs of this level. The same applies to the disbursements and, in particular to the amount of USD 118,041 which concerns the participation of experts.

342. The Arbitral Tribunal considers that a reasonable estimate of fees and disbursements would result in a total amount of USD 500,000, out of which USD 400,000 concerns fees and USD 100,000 disbursements.

343. Consequently, Mr Nagel should be ordered to pay compensation to the Czech Republic in the amount of USD (80% x 500,000 =) 400,000 out of which USD 320,000 concerns fees and USD 80,000 disbursements.

344. The SCC Institute has informed the Arbitral Tribunal that, pursuant to Section 39 of its Rules, it has finally determined the costs and expenses in the arbitration as follows:

*Fees*

Hans Danelius	EUR 72,043
J. Martin Hunter	EUR 43,226
Herbert Kronke	EUR 43,226

*Administrative Fee*

The SCC Institute	EUR 20,936
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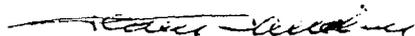
*Expenses*

Hans Danelius	SEK 17,917
J. Martin Hunter	SEK 11,510, GBP 648.10, EUR 600
Herbert Kronke	SEK 8,569.52, EUR 2,309

345. In view of the outcome of the arbitration, the Arbitral Tribunal finds that the parties should be ultimately responsible, Mr Nagel for 90% and the Czech Republic for 10% of these costs and expenses.

## VI. The Arbitral Tribunal's Award

- Mr William Nagel's claims against the Czech Republic are dismissed.
- Mr William Nagel shall bear his own costs incurred in connection with the arbitration.
- Mr William Nagel shall pay to the Czech Republic USD 400,000 (four hundred thousand US dollars) in respect of the costs incurred in connection with the arbitration.
- In accordance with the decision of the Arbitration Institute of the Stockholm Chamber of Commerce, the arbitrators shall be entitled to fees and compensation for expenses in the following amounts:
  - (a) Hans Danelius: a fee of € 72,043 and expenses of SEK 17,917,
  - (b) J. Martin Hunter: a fee of € 43,226 and expenses of SEK 11,510, GBP 648.10 and € 600,
  - (c) Herbert Kronke: a fee of € 43,226 and expenses of SEK 8,569.52 and € 2,309, and
  - (d) the Arbitration Institute: an administrative fee of € 20,936.
- In relation to the arbitrators and the Arbitration Institute, the parties shall be responsible, jointly and severally, for the payment of the amounts due to the arbitrators and the Arbitration Institute.
- As between the parties, Mr William Nagel shall be responsible for 90% and the Czech Republic for 10% of the amounts due in this arbitration to the arbitrators and the Arbitration Institute.



Hans Danelius



J. Martin Hunter



Herbert Kronke

Dated: 9 September 2003