

IN THE MATTER OF AN ARBITRATION
UNDER THE UNCITRAL RULES

B E T W E E N:

EUROPEAN MEDIA VENTURES S.A.

Claimant

- and -

THE CZECH REPUBLIC

Respondent

AWARD ON JURISDICTION

Arbitral Tribunal

The Right Honorable Lord Mustill, Chairman

Dr Julian Lew Q.C.

Professor Christopher Greenwood Q.C.

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Co-arbitrators

Lord Mustill, Chairman
Dr Julian Lew Q.C.
Professor Christopher Greenwood Q.C.
Ms Jessica Mance

Secretary to the Tribunal

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Respondent

THE TRIBUNAL

Composed as above, having considered the written and oral submissions of the Parties (see below), and

After deliberation

Makes the following Award on jurisdiction:

A. INTRODUCTION

1. In this arbitration, the Claimant claims for loss and damage allegedly arising from discriminatory treatment, unfair and inequitable treatment and expropriation, relating to its investment in a Czech television station 'TV3'. The arbitration is under the *Agreement concerning the Reciprocal Promotion and Protection of Investments* concluded between the Czechoslovak Socialist Republic and the Belgian-Luxembourg Economic Union on 24 April 1989 (the 'Treaty'). The Claimant is a Luxembourg company. The Respondent is the Czech Republic. The Respondent became a contracting party to the Treaty by virtue of succession to the rights and obligations of the Czechoslovak Socialist Republic on 1 January 1993.
2. In accordance with the established practice for the purpose of jurisdictional issues, the Tribunal has taken the facts of the disputes to be as summarised below. Accordingly, the following summary is without prejudice to the parties' submissions or the Tribunal's findings as to such facts in any subsequent stage of this arbitration.

B. CHRONOLOGY

Procedural history

3. The Claimant filed a Notice of Dispute in this matter under Article 7(1) of the Treaty addressed to the Respondent dated 17 February 2003. During the course of 2003 and 2004, the parties engaged in efforts towards an amicable resolution. Settlement was not achieved.

4. The Claimant formally referred the dispute to arbitration under the UNCITRAL Arbitration Rules by Notice of Arbitration dated and served on 22 August 2005, by which it nominated Dr Julian D M Lew Q.C. as its party-appointed arbitrator.
5. Subsequently, the Respondent appointed Professor Christopher Greenwood CMG, Q.C. as co-arbitrator. On 12 December 2005, the two arbitrators invited Lord Mustill to act as the Chairman of the Tribunal. Lord Mustill acknowledged the appointment by letter of 1 February 2006, and invited the parties in the first instance to confer between them as to the dates for exchange of statements of case. Lord Mustill confirmed his acceptance subject to specified terms by correspondence to the parties dated 31 July 2006.
6. The Claimant circulated its Statement of Claim on 29 May 2006. By correspondence dated 5 June 2006, the Respondent notified the Claimant that it maintained preliminary objections to the jurisdiction and admissibility of the Claimant's claims; and proposed a timetable for the proceedings including potential bifurcation of those objections from the parties' submissions on the merits.
7. By order dated 30 June 2006, the Tribunal instructed the Respondent to address the issues comprehensively in its Statement of Defence. In default of consent between the parties, the Chairman ruled on 3 July 2006 that the Respondent was to deliver its Statement of Defence and Counterclaim on or before Friday 1 September 2006. In the event, the Respondent enclosed its Statement of Defence in correspondence dated 15 September 2006. In the covering letter thereto, the Respondent again advocated bifurcation of jurisdiction and the merits by reference *inter alia* to Article 21(4) of the UNCITRAL Arbitration Rules, which the Claimant rejected by letter of 6 October 2006. At this time, the Claimant contended that there should be discrete hearings of liability and *quantum*, citing efficiency and Articles 15 and 32(1) of the UNCITRAL Arbitration Rules.
8. The Tribunal and parties convened for the first procedural conference on Wednesday 18 October 2006 at Essex Court Chambers, London. At this meeting, the Tribunal issued directions which included that two of the jurisdictional issues should be heard as preliminary issues, *viz.*:

- (1) The issue of interpretation arising under Article 8(1) of the Treaty; and
 - (2) Whether an Article 8(1) claim can extend to the minimum standard of treatment obligation?
9. In addition, the Tribunal established a timetable for the parties' written and oral submissions on the preliminary issues; the format and delivery of statements of case; and confirmed that the seat and language of the arbitration were to be London and English respectively.
10. The preliminary issues were heard on Thursday 18 January 2007 at Essex Court Chambers, London. On Thursday 22 February 2007 the Tribunal communicated to the parties in these terms:
1. *The Tribunal has deliberated on the jurisdictional objections raised by the Czech Republic which were the subject of the oral hearing held on 18 January 2007.*
 2. *The Tribunal has concluded, not without some hesitation:-*
 - (a) *that its jurisdiction is circumscribed by the provisions of Article 8(1) of the Agreement between the Belgian-Luxembourg Economic Union and the Czechoslovak Socialist Republic concerning the Reciprocal Promotion and Protection of Investments, 1992 ("the Treaty");*
 - (b) *that, contrary to the Claimant's submissions, jurisdiction does not extend to making findings in respect of Article 2(3) and (4) of the Treaty;*
 - (c) *that, contrary to the Respondent's submissions, jurisdiction extends to determining whether there has been an expropriation and, if so, whether there arises, under Article 3(1) of the Treaty, a duty on the part of the Respondent to pay compensation; and*
 - (d) *that the burden of establishing that there has been an expropriation and that there is a consequent duty under Article 3(1) of the Treaty to pay compensation rests on the Claimant.*
 3. *In light of the above decision, the Tribunal intends to go ahead with the short procedural hearing scheduled for the morning of 1 March 2007, with a view to prescribing a timetable and fixing the date and duration of the substantive hearing. The parties are requested to consult regarding the agenda for that hearing and a proposed timetable for the next phase of written and oral pleadings and the appropriate date and approximate duration of the substantive hearing; and to notify the Secretary of their proposals not later than 5.00 pm, London time, on 27 February 2007.*
 4. *The Tribunal will set out its detailed reasons for its conclusions regarding jurisdiction in its award on the merits.*

11. At the second procedural conference on Thursday 1 March 2007, the Tribunal determined the forthcoming timetable for the reference. In addition, the Respondent requested the Tribunal to furnish the parties with a reasoned award on the preliminary issues prior to the third procedural conference scheduled for Tuesday 15 May 2007.

The bilateral investment treaty

12. The terms of Articles 2(3) and (4) of the Treaty read:

- (1) ...
- (2) ...
- (3) *Each Contracting Party shall assure to investments made on its territory by investors of the other Contracting Party a treatment excluding all illegitimate or discriminatory measures, which could impair their management, their maintenance, their use, their exploitation or their liquidation.*
- (4) *Except for measures necessary to maintain the public order, these investments shall enjoy a constant protection and security, which shall be equal to that enjoyed by investments belonging to investors of the most favored nation.*

13. Article 3(1) of the Treaty continues:

- (1) *Investments made by investors of one of the Contracting Parties in the territory of the other Contracting Party may not be expropriated or subjected to other measures of direct or indirect dispossession, total or partial, having a similar effect, unless such measures are:*
 - (a) *taken in accordance with a lawful procedure and are not discriminatory;*
 - (b) *accompanied by provisions for the payment of compensation, which shall be paid to the investors in convertible currency and without delay, The amount shall correspond to the real value of the investments on the day before the measures were taken or made public.*
- (2) ...
- (3) *The provisions of paragraph 1 and 2 are applicable to investors of each Contracting Party, holding any form of participation in any company whatsoever in the territory of the other Contracting Party,*

14. Article 7 provides in pertinent part:

- (1) *Any dispute relating to the interpretation of the application of the present Agreement shall be settled, as much as possible, between the Contracting Parties by means of diplomatic channels.*
- (2) *Failing settlement by such means, the dispute shall be submitted to a mixed Commission, composed of representatives from the Contracting Parties. This commission shall meet without delay, at the request of one or the other of the Contracting Parties.*
- (3) *If the dispute cannot be settled in this manner within a period of six months from the date of the start of the negotiations, it shall be submitted to an arbitral tribunal, at the request of one of the Contracting Parties.*
- (4) ...
- (5) ...
- (6) *The arbitral tribunal shall decide on the basis of the provisions of the present Agreement and the generally-accepted rules and principles of international law.*
- (7) *The arbitral tribunal shall determine its own rules of procedure.*

15. Article 8 of the Treaty is as follows:

- (1) *Disputes between one of the Contracting Parties and an investor of the other Contracting Party concerning compensation due by virtue of Article 3 Paragraphs (1). and (3), shall be the subject of a written notification, accompanied by a detailed memorandum, addressed by the investor to the concerned Contracting Party. To the extent possible, such disputes shall be settled amicably.*
- (2) *If the dispute is not resolved within six months from the day of the written notification specified in Paragraph (1), and in the absence of any other form of settlement agreed between the parties to the dispute, it shall be submitted to arbitration before an ad hoc tribunal.*
- (3) *This ad hoc tribunal shall be constituted in each case in the following manner: each party to the dispute designates one arbitrator, the two arbitrators jointly designate the third arbitrator, a citizen of a third State, who shall be the President of the tribunal. The arbitrators shall be designated within a period of two months, the President within a period of three months, from the date when the investor, party to the dispute, notified the concerned Contracting Party of its intention to refer to arbitration.*

If the above-mentioned periods are not respected, each party to the dispute may request the President of the Arbitration Institute of the Stockholm Chamber of Commerce to proceed to the necessary nominations.

The members of the ad hoc tribunal must be citizens of States with which the two Contracting Parties maintain diplomatic relations.

- (4) *The ad hoc tribunal shall fix its own procedural rules in accordance with those of the United Nations Commission for International Trade Law, adopted at the Conference of December 15, 1976.*
- (5) *The ad hoc tribunal shall rule on the basis of:*
 - *the national law of the Contracting Party, party to the dispute, on the territory of which the investment is located, including its conflict-of-law rules;*
 - *the provisions of the present Agreement;*
 - *the provision of the particular commitment which may have been entered into relating to the investment;*
 - *the general recognized rules and principles of international law.*
- (6) *The arbitral award shall be final and binding upon the parties to the dispute. Each Contracting Party commits to execute the awards in accordance with its legislation.*

Brief summary of salient facts

16. The Claimant's complaint addresses the conduct of the *Council of the Czech Republic for Radio and Television Broadcasting*, which was renamed the *Council for Radio and Television Broadcasting* (the '**Media Council**' or '**MC**').
17. On 10 September 1996, the MC issued a five-year licence to Mr (the '**Licence**') for terrestrial broadcasting in the city of Hradec Králové, Eastern Bohemia. With effect from 2 September 1999, after a public tender process, the MC extended the Licence so that it also embraced the Channel 11 frequency in Prague.
18. Mr operated as a regional television broadcaster under the successive names *TV Gemma* and *TV Galaxie* ('**Galaxie**'). In late 1999, Galaxie was re-branded as *TV3*. Mr and Mr became shareholders of TV3 on 30 July 1993.
19. In approximately late 1999, Mr solicited investment from a private equity firm *Argus Capital Group* ('**Argus**'). By a decision dated 8 February 2000, the MC stipulated that the Licence was: "*a license for distribution, in real time, in full and unmodified version, of the TV3 CZ channel operated by registered operator [i.e. TV3]*" (the '**Licence condition**').
20. Thereafter, on 31 March 2000:

- (1) Mr [redacted] agreed with TV3 that he was bound to broadcast the latter's programming, viz. TV3 CZ, and conversely TV3 was obliged to supply such programming to Mr [redacted]; and
 - (2) Mr [redacted] committed to transfer the License to TV3, when (as the parties anticipated) this became permissible in accordance with Czech law; and
 - (3) The founders of TV3 and Argus (amongst others) subscribed as shareholders of the company European Media Ventures S.A. ('EMV'); and
 - (4) Simultaneously, EMV became the sole parent of the Czech holding company, CMS, which owned TV3.
21. On 13 and 31 August 1999, Mr [redacted] applied to unify the programme composition for Hradec Králové and Prague; the MC ruled against the application on 14 September 1999. Thereafter, Mr [redacted] sought to acquire further unallocated provincial analogue frequencies on behalf of TV3 by application to the MC. The MC declined the applications by decisions of 27 June and 24 October 2000 and 28 August 2001. By contrast, on 11 October 2000 the MC granted Mr [redacted] applications to augment the power of the Channel 11 transmitter; and on 13 March and 28 August 2001, his applications for Channels 9 and 55.
22. By the end of December 2000, TV3 was in some competition with the national commercial broadcasters *TV Nova* and *TV Prima*, and the state-owned channels *CT1* and *CT2*.
23. Invoking Czech legislation dated 17 May 2001, there were two agreements dated 22 June 2001 by which:
- (1) TV3 contracted to assign to EMV its prospective rights and duties pursuant to the transfer of the License from Mr [redacted] under the *Agreement on a Future TV Broadcasting License Transfer Agreement*; and

- (2) Mr [redacted] and EMV accordingly amended the *Agreement on a Future TV Broadcasting License Transfer Agreement*, so that TV3 would transfer the License to his Luxembourg company, *KTV*, which would relay the Licence to EMV; by means of share call options.
24. In conferences with the MC and Czech political figures during the summer of 2001, representatives of EMV sought to verify the legality of the proposed transactions.
25. On 28 August 2001, Mr [redacted] submitted the formal application to the MC for transfer of the Licence to KTV and for transfer of his shares in KTV to EMV. On the same day, Mr [redacted] offered to the MC the alternative intermediate transferee/transferor entity of RTVG. The Claimant alleges that the stakeholders of EMV had not sanctioned this course.
26. The MC refused Mr [redacted] application for transfer to KTV by way of press release on 11 September 2001 and by published decision on 22 October 2001.
27. On 17 September 2001, Mr [redacted] formally applied to the MC to effect the transfer to RTVG. EMV exhorted the MC to reject this latter application on the basis that it would jeopardise EMV's right to reserve the Licence to TV3. In addition, EMV approached the Minister of Foreign Affairs of the Czech Republic, the Prime Minister and the Minister of Finance by letters of 19, 20 and 21 September 2001. On 8 October 2001, KTV instituted a legal challenge to the rejection of its application; this was eventually dismissed by the Municipal Court on 20 June 2002.
28. On 22 October 2001, the MC respectively endorsed the latter application for transfer to RTVG.
29. By petitions dated 6 November and 16 December 2001, 31 January, 15 March and 7 May 2002, Mr [redacted] / RTVG petitioned the MC to rescind the Licence condition dated 8 February 2000. The MC did not respond. On 20 November 2001, the MC ordered TV3 to cease broadcasting on penalty of a fine at the same time as it initiated administrative proceedings against RTVG. TV3 complied with effect from 5 December 2001.

30. On 18 December 2001, the MC stated that it was revoking the Licence for breach of conditions. RTVG lodged an appeal which suspended the revocation so that RTVG pursued its territorial broadcasting except at the times allocated to TV3 under the Licence condition, during which there was no program distribution notwithstanding MC's lack of response to RTVG's petition. By a judgment of 3 May 2002, the Municipal Court restored the License to RTVG; and returned the matter to the MC for further exploration whereupon the MC imposed a fine on RTVG on 27 August 2002.
31. In the interim, on 22 January 2002 the MC furnished CMS with a short term licence to broadcast. On 25 June 2002, RTVG publicised its cession of TV3 broadcasting. In the meanwhile, RTVG and TV Prima entered into business co-operation which culminated in the MC's approval on 21 January 2003 of the takeover of RTVG by the parent company of TV Prima, *GES*.
32. On 21 June 2002, TV3 entered voluntary liquidation, as initiated by EMV. The Municipal Court declared TV3 to be bankrupt on 26 June 2002.
33. On 10 November 2004, the Constitutional Court of the Czech Republic adjudged the MC's decision of 22 October 2001 against transfer to KTV to be in breach of KTV's constitutional rights, and ordered that the lower courts annul the MC's determination against KTV. The lower court did so on 28 January 2005, after it had cancelled the MC's award of the Licence to RTVG on 16 December 2004. The License therefore reverted to Mr [redacted] who purported to abandon his application for transfer to RTV over RTV's protest. In any event, the MC denied the application on 27 April 2005.
34. On 9 August 2005, Mr [redacted] voluntarily surrendered his Licence to the MC which deemed it to have expired on 10 August 2005.

Summary of disputes

35. The Claimant now seeks declaratory relief and compensation from the Respondent, on the basis that the Respondent is responsible for the conduct of the MC which is in alleged breach of Articles 2(3), 2(4) and 3(1) of the Treaty.

36. Without prejudice to any possible defence on the merits of the claim, the Respondent objects that the claim falls outside the jurisdiction *ratione materiae* of the Tribunal as defined in Article 8(1) of the Treaty.
37. Pursuant to the Procedural Order of the Tribunal dated 18 October 2006, the preliminary issues for determination in this Award are as follows:
- (1) Whether under Article 8(1) of the Treaty the Tribunal has jurisdiction to determine issues of liability and quantum with regard to the Article 3 claim; and
 - (2) Whether the Tribunal has jurisdiction under Article 8(1) with regard to a claim for a breach of the minimum standard of treatment obligation in Article 2?
38. For the purpose of this Award on Jurisdiction the Parties filed and the Tribunal has considered
- (1) The Respondent's Statement of Defence, and in particular paragraphs 11-27 (Defence);
 - (2) The Claimant's Memorial on Jurisdiction dated 15 November 2006;
 - (3) The Respondent's Reply to the Claimant's Memorial on Jurisdiction (29 November 2006); and
 - (4) The Claimant's Rejoinder on Jurisdiction (13 December 2006).
39. The Tribunal also heard oral argument from the Parties at a hearing at Essex Court Chambers on 18 January 2007 at the end of which the Respondent gave the Tribunal its "skeleton" argument on jurisdiction".

C. FIRST JURISDICTIONAL ISSUE

What is the extent of Tribunal's Jurisdiction under Article 8(1) of the Treaty

40. The issue under this heading is, simply, whether the Tribunal has jurisdiction to determine if there was an expropriation of an asset belonging to the Claimant.

This involves the meaning of the words “[d]isputes between one of the Contracting Parties and an investor of the other Contracting Party concerning compensation due by virtue of Article 3 paragraph (1) and (3)” of the Treaty. (Emphasis added)

The Respondent’s Position

41. The Respondent contends that the Tribunal’s authority is limited to determining “the adequacy or otherwise of the compensation” paid by the State where there has been an expropriation, i.e. in circumstances where the fact of the expropriation is not in dispute. The phrase “disputes ... concerning compensation” limits the Tribunal’s jurisdiction to concerns about the amount of compensation. Accordingly, the Tribunal does not have jurisdiction to determine whether or not there was an expropriation as alleged by the Claimant.
42. In support of its position the Respondent relies on the following arguments:
 - (1) Article 8(1) is unambiguous and must be given its ordinary meaning: the scope of “disputes” is limited to “concerning compensation”. It does not extend to other areas of dispute including the international responsibility of the state for expropriation. If the states party to the Treaty had intended to broaden the scope of the Tribunal’s jurisdiction to liability, they would have used “general words to describe disputes arising under Article 3 of the Treaty rather than the specific words actually found in Article 8 (1)”.
 - (2) Under the Vienna Convention the Tribunal must look to the specific language used by the state parties. Here the Respondent contends that the words “compensation due by virtue of” are clear: if the Tribunal accepts jurisdiction over anything other than issues of compensation it would render those words superfluous.
 - (3) The Respondent argues that the words “due by virtue of” do not allow a wider meaning to Article 8(1). The authentic languages of the Treaty are French and Czech. Whilst the French text uses the expression “dues en vertu de” (which the Respondent describes as merely stylistic and not to

be given significant meaning); there is no equivalent in the Czech language version. Accordingly, the Respondent argues that the language "due by virtue of" should be treated as neutral and not as critical to the meaning of Article 8.1.

(4) A further basis for the interpretation relied on by the Respondent is the alleged policy of the Czechoslovak Socialist Republic when the Treaty was concluded. During that time all communist and socialist countries rejected arbitration as the forum for determining issues of expropriation and other types of alleged liability. These countries agreed only to submit to arbitration the question of quantum of compensation if this was not agreed after liability was determined. In support of this position the Respondent relies on:

- (a) a memorandum presented to the Belgian parliament in support of the Treaty which recorded that the Czechoslovak Socialist Republic would only submit to arbitration issues of quantum;
- (b) in response to the argument that Article 8 be interpreted in such a way as reflects the object and purpose of the Treaty, the Respondent states that consent to arbitration does not necessarily mean a more favourable investment climate in the host state; and
- (c) the reference in Article 3(1) to "other measures of direct or indirect dispossession, total or partial," does not mean these issues are to be determined by an arbitral tribunal as otherwise there will be no other forum in which to determine these issues. The Respondent contends this can be determined either by inter-state arbitration under Article 7 of the Treaty or in the domestic courts.

The Claimant's position

43. The Claimant contends that to limit the Tribunal's jurisdiction to "the amounts of compensation due for an expropriation" is contrary to both the plain language and the object and purpose of the Treaty. The only fair reading of the words in

Article 8(1) is that they cover questions concerning the right to compensation and the amount or other matters pertaining to compensation.

44. Article 8(1) does not refer to disputes about "amounts"; rather disputes are defined as disputes "concerning compensation due by virtue of" the expropriation provisions contained in Article 3 (1). This means looking at the word "due" and whether the events which rendered compensation due under Article 3 had in fact occurred, namely, was there expropriation or measures of dispossession, were those measures lawful and non-discriminatory and was appropriate compensation offered, i.e., equal to the real value of the investment on the day before the expropriation or measures were taken?
45. The Claimant argues that if the drafters of the Treaty had intended to limit arbitration to the amount of compensation only they would have said so explicitly. This type of language had been used in the BIT between the Czech and Slovak Federal Republic and Austria in 1990. There was a similar provision in the previous BIT between China and the Czech Republic.
46. To determine its object and purpose the Tribunal should look at the title and preamble of the Treaty. These show a clear intent to "create favourable conditions for investments and to stimulate private initiative". Furthermore, BITs are widely accepted as "intended to stimulate investment by the provision of an agreement on how investments will be treated, that treatment including the possibility of arbitration".
47. Accordingly, the Claimant states that an object of the Treaty includes the grant of arbitral jurisdiction for disputes "concerning compensation due by virtue of" Article 3(1) and (3) which deal with direct and indirect expropriation. Article 3(1) explicitly protects against indirect expropriation. Accordingly, it is reasonable to conclude, absent clear language to the contrary, that the grant of arbitral jurisdiction is to determine compensation "due by virtue of" any direct or indirect expropriation.

Tribunal's analysis and conclusion

48. Both parties agree that the starting point to determine the meaning and extent of Article 8(1) of the Treaty is the Vienna Convention. This provides in Article 31(1):

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.

49. For the purposes of such interpretation a treaty is considered to comprise, in addition to its preamble and annexes, "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty". (Article 31 (2)(b)) It may also be relevant to other means of interpretation, including the circumstances of the treaty's conclusion, to confirm the meaning which results from the application of Article 31. (Article 32)

50. In looking at the simple language of Article 8(1) there are four phrases relevant to arbitral jurisdiction:

- (1) there must be a "dispute;
- (2) it must be "concerning compensation";
- (3) the compensation must be "due by virtue of" something; and
- (4) an event under Article 3(1) and (2) must have occurred.

51. The term "dispute" causes no problem in this case. The parties concede there is a dispute; it concerns whether there was an unlawful expropriation of the assets of the Claimant or not, and if so whether and how much (if any) compensation is payable in respect of such expropriation. The issue here is where the disputes are to be determined: in this arbitration, as the Claimant contends, or partly in the Czech courts (unlawful expropriation or dispossession) and partly in this arbitration (concerning compensation, if any) as the Respondent contends. This is the issue to be determined in this Award.

52. The phrase "concerning compensation" is clearly intended to limit the jurisdiction of an Article 8 Tribunal. It would seem to exclude from that

jurisdiction any claim for relief other than compensation (e.g. a claim for restitution or a declaration that a contract was still in force). Where, however, the claim is solely for compensation it would appear to fall within the jurisdiction of an Article 8 Tribunal subject to the limiting effects of the words which follow. Those words limit the jurisdiction of the Tribunal to claims for compensation "due by virtue of Article 3, paragraph (1) and (3)", i.e. to claims for compensation arising out of the events specified in Article 3(1) and (3).

53. The phrase "due by virtue of" is the connecting element between the specified event and the entitlement to compensation. The Tribunal cannot possess jurisdiction even over a claim for compensation unless the asserted entitlement to compensation arises out of one of the specified events.
54. The events specified in Article 3(1) are expropriation and "other measures of direct or indirect dispossession, total or partial" having an effect similar to expropriation, unless they are taken "in accordance with a lawful procedure and are not discriminatory" (Article 3(1)(a)) and are "accompanied by provisions for the payment of compensation, which shall be paid to the investors in convertible currency and without delay" (Article 3(1)(b)). By corollary, despite its negative wording, Article 3(1) provides that expropriation or dispossession is permitted as long as it follows the relevant legal procedures in the country concerned, is not discriminatory and compensation is paid. The amount of compensation should be "the real value of the investments on the day before the measures were taken or made public".
55. According to the position of the Respondent, the only issue to which Article 8(1) applies is the last line of Article 3(1)(b), i.e., the amount of the real value of the investments expropriated or dispossessed. It is not for the Tribunal to decide any of the preconditions for compensation to be due.
56. The Tribunal was impressed by the force of the arguments put by the Respondent as to the first jurisdictional issue. The Treaty is not easy to interpret on this matter. On balance with varying degrees of conviction, the Tribunal has concluded that this interpretation is untenable for practical and realistic reasons as explained below.

57. The effect of the Respondent's contention is that before a matter "concerning compensation" can come to arbitration it will be necessary to have an agreement in fact or the decision of some other body that there has been an expropriation or a measure of dispossession, and that the expropriation or dispossession measures were lawfully taken and on a non-discriminatory basis. If these issues are not determined, and until they are determined, it would preclude the arbitrators determining the amount of compensation due. This would effectively limit the arbitration to nothing more than a valuation exercise.
58. To determine the amount of compensation, the Tribunal will need to know specifically what and how the expropriation or dispossession took place. For example, was it a full or partial expropriation, what assets have been left in the possession of the foreign investor, do they have a value, etc? If this is not to be determined by the same arbitral tribunal where are these issues to be determined? In the absence of a clear provision for these issues to be determined in some other forum these determinations must be made by the tribunal which is determining the amount of compensation payable, or the system of investment protection created by the Treaty will be rendered wholly ineffective.
59. This conclusion is reinforced by the structure of Articles 3(1) and 8(1). Article 3(1) prohibits both formal acts of expropriation and equivalent acts of dispossession unless they meet the requirements of Article 3(1)(a) and (b). Article 8(1) refers back to Article 3(1) without distinguishing between these two types of event. However, while it is conceivable that a State would admit that it had made a formal act of expropriation and leave to the Tribunal the issue of quantum of compensation, this is most unlikely to occur in other, informal, acts of dispossession. If, therefore, the question whether an act of dispossession had occurred at all was one over which the Tribunal had no jurisdiction, the effect would be that the reference in Article 8(1) back to this species of event on Article 3(1) (as opposed to the reference back to formal expropriation) would be wholly ineffective.
60. The above conclusion is supported by the fact that the Treaty is silent as to where and how the issues of expropriation and dispossession are to be determined. The Respondent has suggested that this could be in the local courts

or under inter-state arbitration under Article 7 of the Treaty. However, these solutions are neither practical nor expressly intended by the Treaty.

61. One can presume that a foreign investor will generally not seek redress for the actions of a government expropriating or dispossessing it of its property in the local courts unless that is expressly provided for in the BIT (as is the case in the BIT between Austria and the Czech and Slovak Federal Republic). In the absence of an express and specific jurisdiction provision in the Treaty the Claimant may seek redress in any court of competent jurisdiction. In the instant case because the alleged breach by the Respondent is expropriation or dispossession and the redress sought is compensation arbitration is the competent jurisdiction by virtue of Article 8(1).
62. The dispute settlement mechanism in Article 7 is completely different from the mechanism under Article 8. Article 7 disputes have several tiers before coming to arbitration, the arbitration will be conducted according to a procedure to be decided by the tribunal and the dispute will be determined on the basis of the Treaty terms and generally accepted principles of international law. Under Article 8 the arbitration is to be conducted in accordance with the UNCITRAL Arbitration Rules and the applicable law includes the national law of the host country and the provisions of the particular investment commitment.
63. In support of its interpretation of Article 8(1) the Respondent says that it was the policy of the Government of Czechoslovakia at the time the Treaty was concluded (as was the case with all communist and socialist states) to reject arbitration which relates to the liability of states. That may have been the case in many instances, but it is not supported by the wording in this Treaty. If it had been the intention and policy of the Czechoslovak Government at the time of negotiating the Treaty it could and should have expressly provided how all issues prior to the question of compensation were to be determined, i.e., local courts or international tribunal, and then to provide separately for how compensation was to be resolved if not agreed.
64. More fundamentally, it is only the shared intention of the parties with which this Tribunal is concerned, not the subjective intent of one of them.

65. The Respondent further relies on a recognition of the restricted jurisdiction of the arbitration provision in the memorandum presented to the Belgian Parliament in support of the Treaty. In particular the Respondent relies on the section in the memorandum where the Minister explains the derogations from the normal protections. This includes the statement that:

“Recourse to international arbitration is limited to disputes relating to compensation due in the event of expropriation.”

66. This language itself is not indicative of the very narrow limitation on the Tribunal’s jurisdiction suggested by the Respondent. It leaves open the issue of any alternative forum for other areas of dispute or non-performance by a party, and it uses similar, but even more ambiguous language, about compensation being due because of expropriation. Furthermore, while the explanation given by one party to its Parliament may be of interest, it is the common intention of the parties that is relevant to determining meaning.

67. Finally, the preamble and the objective of the Treaty support the contention that disputes relating to expropriation or dispossession of an investment can be determined by arbitration where the remedy sought is compensation. The preamble states a rationale behind the Treaty was “to create conditions favourable for the making of investments of one of the Contracting Parties in the territory of the other Contracting Party”. We have already seen that Article 3 provides that investments of a party from the other Contracting state would not be expropriated or subject to other measures of dispossession. As this was a major objective of the Treaty it is logical and natural to assume, in the absence of a provision to the contrary, that the dispute mechanism in Article 8(1) extends to determining whether there has been an expropriation or dispossession justifying compensation.

68. It is for these various reasons that the Tribunal has concluded that it has jurisdiction to determine whether or not the investments of the Claimant in the Czech Republic were lawfully expropriated or dispossessed, and in the affirmative whether the Claimant is entitled to compensation by virtue of that expropriation or dispossession.

D. SECOND JURISDICTIONAL ISSUE

Does Article 8(1) give the Tribunal Jurisdiction to determine issues concerning the minimum standard of treatment obligation under the Treaty?

69. Under this heading the Claimant, relying on the same facts as supports its claim under Article 3(1), seeks a declaration confirming that the Respondent is in breach of the minimum standard of treatment obligation in Article 2(3) of the Treaty .

The Claimant's Position

70. The Claimant is not seeking any monetary relief on the basis of Article 2, but rather declaratory relief in the context of the Claimant's claims and Article 3. This it contends is fully within the Tribunal's jurisdiction under both the express provisions of the Treaty and the general provisions of international law.
71. Article 8(5) of the Treaty requires the Tribunal to determine disputes under Article 8(1) applying national law of the contracting state, the contract provisions, the commitment entered into in respect of the investment and "generally recognized rules and principles of international law". This gives the Tribunal the power to rule on the basis of the provisions of the Treaty which bear on the Claimant's claim under Article 3.
72. The Claimant also relies on the Awards in the ADC and Metalclad arbitrations. In the former case, under the Hungary-Cyprus BIT, the Tribunal made determinations under the non-expropriation provisions relating to violations of the "fair and equitable treatment" of the Treaty even though the arbitration provision limited jurisdiction to expropriation. This was because the non-expropriation claims were subsidiary to the Tribunal's ultimate findings on expropriation.
73. In the Metalclad case the Tribunal looked outside of Article 1105 NAFTA, the basis for the claim against Mexico for violating the fair and equitable treatment obligation, to a provision which set out a statement of principles and rules which referred to transparency governing NAFTA. Although this Award has

been partially annulled (a decision the Claimant describes as based on “an extremely intrusive standard of review”), the Claimant maintains that its underlying reasoning remains sound and urges it on this Tribunal as an example of how an experienced tribunal felt it reasonable to consider and make decisions in respect of the application of otherwise non-actionable provisions of NAFTA.

74. Further, the Claimant’s suggests, the Tribunal’s findings concerning violations of Article 2 would assist the Tribunal’s conclusions in respect of Article 3. The protections under Article 2(3), exclude “all the illegitimate or discriminatory measures which could impair their management, their maintenance, their use, their exploitation or their liquidation” and (4), which provides for “constant protection and security ... equal to that enjoyed by investments belonging to investors of the most favoured nation”.

The Respondent’s Position

75. Respondent argues that the Tribunal has no jurisdiction to consider any issue relating to the minimum standard of treatment under Article 2(3) and (4) of the Treaty. This is because, simply, there is no mention of Article 2(3) and (4) in Article 8(1) of the Treaty and there is no conceivable basis to read Article 8(1) as encompassing disputes concerning Article 2(3) and (4). The Respondent states that the Claimant has “attempted to bypass Article 8(1) altogether by asserting a novel theory of jurisdiction whereby, ... a [sic] international tribunal has some form of inherent jurisdiction to provide declaratory relief in relation to Treaty obligations not covered by the concept to arbitration...”.
76. The fact that the Tribunal, under Article 8(1) of the Treaty, does not have jurisdiction to award damages for violations of Article 2 (3) and (4) does not mean that the Tribunal can make an award of declaratory relief. By corollary, the Tribunal only has jurisdiction to grant declaratory relief if “it also has jurisdiction to determine the lawfulness of the Czech Republic’s conduct with respect to Article 2(3) and (4)”.
77. The Respondent further argues that a declaratory judgment is not an inferior remedy to monetary compensation so that a tribunal can be less rigorous in establishing its jurisdiction for such remedy. Quite the contrary: declaratory

judgments are the most common type of award before the International Court of Justice.

78. The Respondent refutes the Claimant's contention that the choice of law provision in Article 8(5) of the Treaty can operate to expand the Tribunal's jurisdiction. Article 8(1) deals with jurisdiction; Article 8(5) deals with choice of law. These provisions cannot be fused as proposed by Claimant.
79. The Respondent challenges the Claimant's interpretation and application of the Metalclad and ADC awards and contends that these decisions assist the Tribunal to exercise jurisdiction over Article 2(3) and (4). The Metalclad decision was annulled by the Supreme Court of British Columbia for the specific reason that that Tribunal exceeded its authority by looking beyond Article 1105 to a non-actionable provision of NAFTA.
80. The ADC decision was distinguished on several bases. First, the Tribunal did not analyse its jurisdiction with respect to the reliefs sought; rather the issue concerned the requirement of written consent for ICSID jurisdiction. Secondly, the Tribunal made an error in considering the "minimum standard of treatment" in the context of a breach of due process as the treaty obligations of "fair and equitable treatment", "unreasonable or discriminatory measures" and "full security and protection" are distinct from the due process requirement. Thirdly, the Tribunal's analysis of the "fair and equitable treatment" had no significance for the Tribunal's assessment of damages.

Tribunal's Analysis and Conclusion

81. The Tribunal has concluded that it does not have jurisdiction either to determine issues under, or to grant declaratory relief in respect of, Article 2(3) or (4) of the Treaty as sought by Claimant.
82. First, and this point is itself dispositive of this second jurisdictional issue, the Tribunal does not have the power to issue declaratory relief of the sort claimed by the Claimant or at all. This is clear from the language in Article 8(1) which states that arbitral jurisdiction is limited to disputes "concerning compensation

due". To the extent that any other relief may be appropriate, even for breach of Article 3(1), it would seem no arbitral tribunal has jurisdiction to grant such relief. At least as far as this case is concerned the Tribunal has no authority to grant the declaratory relief concerning violations of Article 2(3) and (4) sought by the Claimant.

83. Secondly, and in any event, as discussed and determined above, the Tribunal's jurisdiction is limited under Article 8(1) to determining disputes concerning Article 3(1). This means the Tribunal can decide whether there was an expropriation or dispossession of investments, whether the expropriation or dispossession was taken without lawful procedure and in a discriminatory fashion, and in respect of which compensation to the real value of the investment on the day prior to the expropriation or dispossession was made.
84. Article 8 makes no reference to any provision of the Treaty other than Article 3(1). Accordingly, on a clear reading of the language of Article 8(1), the Tribunal considers that it does not have jurisdiction to determine whether or not there have been any "illegitimate or discriminatory measures" which could impair the management, maintenance, use, exploitation or liquidation" of the Claimant's investment, or any failure to assure "constant protection and security" for the Claimant's investments, as provided in Article 2(3) and (4).
85. The Tribunal does not consider the ADC or Metalclad awards to be authority requiring it, or even allowing it, to determine whether or not there was a breach of Article 2(3) and (4) of the Treaty. First, although each award was issued by a tribunal comprising eminent international arbitrators those awards were decided on their specific facts and circumstances. They were under different treaties: the ADC award under the BIT between Hungary and Cyprus; Metalclad under NAFTA; this case is concerned with the BIT between Belgium-Luxembourg and the Czech Republic. The language in the particular treaties with which those cases were concerned and the issues on which the arguments to extend jurisdiction are based differ. Whilst interesting, the rationale used by the ADC and Metalclad tribunals are not binding on this Tribunal.
86. The applicable law as provided in Article 8(5) is of no relevance to the issue of jurisdiction. What it does is provide the standards according to which the Parties' rights and obligations should be determined. It cannot and does not

affect the Tribunal's power to determine issues other than in respect of Article 3(1) of the Treaty.

87. Accordingly, the Tribunal has concluded that it would be exceeding its authority and contrary to the meaning of Article 8(1) of the Treaty if it were to determine and make declarations as to whether there was a violation of the protections in Article 2(3) and (4.)

AWARD ON JURISDICTION

88. For all of the reasons set out above the Tribunal has concluded:

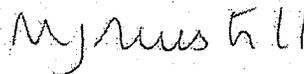
- (1) The Tribunal has jurisdiction under Article 8(1) to determine whether (i) the events alleged by the Claimant amounted to an expropriation or other measures of direct or indirect dispossession, (ii) were not taken in accordance with lawful procedures and were discriminatory, and (iii) were not accompanied by payment of compensation to the value of the investment on the day before the measures were taken.
- (2) The Tribunal does not have jurisdiction, and is not prepared to claim extended jurisdiction, to (i) determine whether the actions complained of by the Claimant constitute a breach by the Respondent of its obligations under Article 2(3) or (4) of the Treaty, or (ii) issue declaratory relief of the nature sought by the Claimant even if the Tribunal determines in the future, in the context of the expropriation claim under Article 8(1), that there has been a violation by Respondent of the rights protected in Article 2(3) and (4) of the Treaty.

Place of arbitration London

Date 15th May 2007

Signed:

Lord Mustill, Chairman



Dr Julian Lew Q.C., Co-arbitrator

Professor Christopher Greenwood Q.C., Co-arbitrator

