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THE MATTER
Challenge of arbitration award

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JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal denies the Czech Republic's motion that the Court of Appeal declare invalid or, alternatively, set aside the arbitration award issued in Stockholm on September 13, 2001 in the arbitration between CME Czech Republic B.V. and the Czech Republic.

2. The Czech Republic shall compensate CME Czech Republic B.V. for its litigation costs in the amount of thirty-four million kronor (SEK 34,000,000) and interest pursuant to section 6 of the Interest Act (SFS 1975:635) commencing on the date the Court of Appeal's judgment until such time as payment is made.

BACKGROUND

In August 1992, a Czech company, Central European Television (hereinafter "CET 21") applied to the Czech Council for Radio and Television Broadcasts (hereinafter the "Media Council") for a broadcasting license (hereinafter the "license") in accordance with the Czech Media Act. The application was seconded by Central European Development Corporation GmbH (hereinafter "CEDC"), which is a German company and ultimately controlled by a US citizen, Ronald S. Lauder. During the application process for the license, CET 21 was represented principally by the Czech citizen, Dr. Vladimir Železný.

On February 9, 1993, the Media Council formally issued a license to CET 21. The license was subject to certain conditions. According to the Media Act, the license could not be assigned.

A model for the business, which included the formation of a new Czech company, Ceská nezavista televizni spolecnost, spol.s.r.o. (hereinafter "ČNTS") was developed to run TV Nova. In addition to CEDC, a Czech savings bank would finance the new company. In order to form ČNTS, CET 21, CEDC, and the Czech savings bank entered into a Memorandum of Association and Investment Agreement, dated May 4, 1993 (hereinafter the "1993 MOA"). According to the 1993 MOA, *inter alia*, CET 21 would contribute to ČNTS, as payment for the shares in ČNTS which the company was to acquire, "unconditionally, unequivocally, and on an exclusive basis" the right

to use, exploit, and maintain the license. The occurrences referred to as the 1993 events pertain to the Media Council's alleged refusal to accept CEDC as a foreign shareholder of CET 21 (the holder of the license), and the Media Council's requirement that a structure would be created in which CEDC was to participate in CET 21 by holding shares in ČNTS. This is described in the relevant arbitration award as the "split structure".

CME Media Enterprise B.V. (hereinafter "CME Media"), a Dutch company which was also ultimately controlled by Lauder, acquired CEDC's shareholdings in ČNTS in August 1994.

By virtue of an amendment to the Media Act, which entered into force on 1 January, 1996 and resulted in the repeal of many of the conditions which were associated with the license, CET 21 applied to the Media Council in January 1996 for the revocation of certain conditions. CET 21's application was granted and the conditions were repealed.

In 1996, the MOA was amended pursuant to which CET 21's contribution to ČNTS, "the use of the License", was replaced with "the use of the know-how of the License". A provision was also to be incorporated in the 1993 MOA which would thwart any other party (with the exception of CET 21) from using the license (hereinafter the 1996 MOA). CET 21 and ČNTS entered into a service agreement dated May 21, 1997 (hereinafter the "service agreement") which governed CET 21's responsibility for programming and ČNTS' rights and obligations, as an exclusive service company, regarding the operation of TV Nova.

The occurrences referred to as the 1996 events pertain to the coercion exercised by the Media Council on ČNTS to relinquish its exclusive right of use to the license pursuant to the 1993 MOA in order, instead, to obtain an exclusive right to the use of the know-how of the license in accordance with the 1996 MOA and to consent to the other amendments to the agreements with CET 21; the coercion consisted primarily of

an administrative law procedure commenced by the Media Council against ČNTS for broadcasting without a license.

In 1996 and 1997, CME Media purchased shares in ČNTS and increased its stake in ČNTS to 93.2 per cent. In May 1997, CME Media transferred its interest in ČNTS to the wholly-owned subsidiary, CME Czech Republic B.V. (hereinafter "CME"), also a Dutch company, in accordance with the Agreement on Transfer of Participation Interest (hereinafter the "transfer agreement"). Later that year, CME increased its interest in ČNTS to 99 per cent.

On March 2, 1999, the Media Council held a meeting with Železný, as representative of CET 21. On March 3, 1999, CET 21 sent a letter to the Media Council as a consequence of the discussions conducted at the meeting. On March 15, 1999, the Media Council responded in a letter to CET 21 and TV Nova. On April 19, 1999, CME dismissed Železný as Managing Director of ČNTS. However, Železný remained as the Managing Director of CET 21. CET 21 terminated its service agreement with ČNTS on August 5, 1999 on the grounds that ČNTS had failed to deliver a daily report of broadcasts, which allegedly constituted a material breach of contract. CET 21 also ceased using the ČNTS' services.

The 1999 events pertain to the alleged actions and omissions undertaken by the Media Council in 1999, *inter alia*, by the issuance of the letter of March 15, 1999 and the failure to retract said letter.

On February 22, 2000, CME demanded arbitration (hereinafter the "Stockholm proceedings") against the Czech Republic (hereinafter the "Republic") in accordance with the bilateral investment treaty between the Netherlands and the Republic (*Agreement on Encouragement and Reciprocal of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic),* dated April 29, 1991 (hereinafter the "Treaty"). CME commenced the proceedings on the basis of alleged violations of the Treaty by means of the 1993, 1996, and 1999 events.

On July 21, 2000, an arbitral tribunal was composed pursuant to the Treaty by the two arbitrators appointed by the parties, Judge Stephen M. Schwebel (appointed by CME) and Juris Doctor Jaroslav Hándl (appointed by the Republic), appointing Dr. Wolfgang Kühn as the Chairman (hereinafter the "Stockholm Tribunal").

In November 2000, the parties in the Stockholm proceedings agreed that the proceedings would be bifurcated. One of the disputed issues in the matter was the determination of which issues would be examined by the Stockholm Tribunal in the first and second phases respectively. In any case, however, the issue of whether the Republic had violated the Treaty and was *per se* liable for damages would be examined during the first phase of the proceedings while, in any case, the issue as to the amount of damages would be examined in the second phase of the proceedings.

Between April 23 and May 2, 2001, the final hearing was conducted in Stockholm. The Stockholm Tribunal thereafter convened in Düsseldorf for deliberations in the beginning of June 2001. The meeting was preceded by certain correspondence between the arbitrators. The correspondence continued after the Düsseldorf meeting up to the issuance of the arbitration award in the case in Stockholm on September 13, 2001 (hereinafter the "Stockholm award").

The majority of the Stockholm Tribunal found that the Republic had violated the Treaty through actions and omissions relating to the Media Council in 1996 and 1999, but not in 1993. In its decision, the Tribunal stated that the Republic was liable to redress the injury incurred by CME as a consequence of the Republic's violation of the Treaty by paying the fair market value of CME's investment as such was prior to the violation by the Republic of the Treaty in 1999, in an amount to be determined by the Stockholm Tribunal during the second phase. In the second phase of the Stockholm proceedings, the award was issued on March 14, 2003 in which the amount of damages was determined.

The Stockholm award was signed by only two of the three arbitrators, Kühn and Schwebel. The dissenting arbitrator, Hándl, issued a dissenting opinion dated September 11, 2001 which was appended to the Stockholm award. Hándl resigned his appointment as arbitrator on September 19, 2001.

On September 3, 2001, an arbitration award was issued in London between Lauder and the Republic (hereinafter the "London award"). Lauder initiated the arbitration (hereinafter the "London proceedings") against the Republic on August 19, 1999 pursuant to the bilateral investment treaty applicable between the US and the Republic (*Treaty Between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment),* prepared on October 22, 1991 (hereinafter the "American Investment Treaty").

Lauded commenced the London proceedings claiming that the Republic had violated the American Investment Treaty. The alleged violation of the American Investment Treaty consisted of the same actions and omissions by the Media Council which CME asserted in the Stockholm proceedings. The arbitral tribunal in the London proceedings (hereinafter the "London Tribunal") unanimously agreed that only the 1993 events constituted a violation of the American Investment Treaty, but that such violation did not, however, give rise to any liability of the Republic for damages. The London Tribunal dismissed Lauder's claim for damages.

Both the Stockholm proceedings and London proceedings applied the arbitration rules promulgated by the United Nations Commission on International Trade Law (hereinafter the "UNCITRAL rules").

Pursuant to Article 9 of the Treaty, the Republic demanded, in the autumn of 2001, consultations with the Netherlands regarding the interpretation and application of the Treaty. In this context, "Agreed Minutes" were prepared from which it is evident that the parties reached a common position regarding certain issues, *inter alia*, the

applicable interpretation of Article 8.6 of the Treaty and the assignment of claims which took place in accordance with the Treaty.

THE MOTIONS

The Republic has moved that the Court of Appeal declare invalid the Stockholm award in accordance with section 33 of the Arbitration Act (SFS 1999:116) or, alternatively, that the Court of Appeal set aside the Stockholm award pursuant to section 34 of said Act.

CME contests the Republic's motions.

The parties have claimed compensation for their litigation costs.

GROUNDS FOR THE CLAIM

The Republic

1. The Stockholm award and the manner by which it was rendered are obviously incompatible with the basic principles of the Swedish legal system. In addition, two of the arbitrators, who comprised the majority of the Stockholm Tribunal, exceeded the mandate of the Stockholm Tribunal and committed procedural errors as set forth below. Each of the grounds pertaining to the exclusion of an arbitrator from the deliberations and the Stockholm Tribunal's lack of jurisdiction as a consequence of *lis pendens* and *res judicata*, as well as the various grounds invoked by the Republic collectively, constitute such serious errors that they are covered by section 33 of the Arbitration Act.

1.1 The majority of the Stockholm Tribunal excluded one of the arbitrators, Hándl, from crucial parts of the deliberations of the Stockholm Tribunal.

1.2 The Stockholm Tribunal failed to apply the law which the Stockholm Tribunal was obligated to apply pursuant to the Treaty, i.e. Czech law and general principles of international law.

1.3 The Stockholm Tribunal lacked jurisdiction to examine the case *per se* due to *lis pendens* and *res judicata* since: (i) the London proceedings were commenced prior to the Stockholm proceedings; (ii) the Stockholm proceedings involved the same claims, grounds, and damage, and the same investments and factual circumstances in general, and violations of essentially the same treaty obligations as the London proceedings; (iii) the defendants in the Stockholm proceedings and London proceedings were identical and, in practice, the petitioners were the same; and (iv) the London award was issued prior to the Stockholm award. The conflicting outcome of the Stockholm award is unacceptable from a legal standpoint. The existence and content of the parallel proceedings were invoked by the Republic as grounds for dismissal. The Stockholm Tribunal was fully aware of the pending London proceedings. Before the Stockholm award was issued, the Stockholm Tribunal also knew that the arbitration award had been issued in the London proceedings, and the outcome thereof.

1.4 The Stockholm Tribunal based the Stockholm award on the existence of "joint tortfeasors", a ground not invoked by CME in the Stockholm proceedings and which had not been referred to as a fact. Nor had it been the subject of legal argument by any of the parties.

1.5 In violation of the instructions given by the parties, the Stockholm Tribunal examined issues concerning the amount of damages.

Should the Court of Appeal set aside the Stockholm award only with respect to the excess of mandate pertaining to the determination of damages, paragraph 624 (2) of the Stockholm award is to be worded as follows: *"The Claimant is entitled to damages to be determined at a second phase of this arbitration."*

1.6 The Stockholm Tribunal exceeded its mandate when it applied the Treaty to the alleged violations which occurred during a time the investment was held by an investor other than CME.

2. The Republic was not the cause of any of the errors referred to in section 1 above.

3. Collectively or individually, the errors asserted in section 1 above have, or at least likely have, affected the outcome of the Stockholm proceedings.

In addition, the Republic has contested the assertion that any of the grounds of challenge are barred or that the Republic may be deemed to have waived objections in any respect as asserted by CME.

CME

1. CME denies that the Stockholm award and the manner by which it was rendered are obviously incompatible with the basic principles of the Swedish legal system. In addition, it denies that both arbitrators who constituted the majority of the Stockholm Tribunal exceeded the mandate of the Stockholm Tribunal and committed the errors asserted by the Republic.

1.1 The types of errors asserted in section 1.1 do not constitute grounds for invalidation pursuant to section 33 of the Arbitration Act but, rather, should be evaluated in accordance with section 34 of said Act. CME denies that Hándl was excluded crucial parts of the determinations of the Stockholm Tribunal. Hándl was afforded the opportunity to participate at all stages of the deliberations and he was also afforded sufficient time in which to assert his views on all disputed issues. In any case, the alleged error has not affected the outcome of the case.

1.2 The Stockholm Tribunal did not exceed its mandate in the manner asserted by the Republic in section 1.2, and did not act as *amiable compositeur*. Rather, the

Stockholm Tribunal resolved the dispute on the basis of law. Nor was any procedural error committed in this respect which likely affected the outcome of the Stockholm proceedings. The failure to apply Czech legal rules which were not invoked in the Stockholm proceedings cannot constitute an excess of mandate or procedural error.

The interpretation of the choice of law provision in Article 8.6 of the Treaty fell within the purview of the Stockholm Tribunal's mandate and, in the event the Stockholm Tribunal committed an error in the interpretation of the Treaty, such constitutes only a substantive error and does not form a basis of challenge. In any case, the Stockholm Tribunal interpreted the choice of law provision correctly and applied the Treaty and international law, and took into consideration Czech law when the Tribunal examined the issue of whether the Republic had violated the Treaty. Furthermore, the Republic's assertions regarding Czech law are incorrect, and the outcome of the Stockholm proceedings would not have been different had additional Czech legal rules been applied or considered.

In any case, the Republic has caused the alleged errors or, alternatively, the Republic may be deemed to have waived the right to assert the alleged errors. Accordingly, this ground for challenge is barred.

1.3 The type of error asserted by the Republic in section 1.3 does not constitute a ground for invalidating pursuant to section 33 of the Arbitration Act but, rather, is to be assessed only in accordance with section 34 of the said Act. In the event the Republic's claim in this respect is also to be interpreted as an challenge, the basis of challenge invoked is barred since the Republic expressly waived objection to, and denied the existence of, *lis pendens* and *res judicata* in the Stockholm proceedings.

Even if the Republic's claim is examined in accordance with section 34 of the Arbitration Act, and even if its basis of challenge may not be deemed to be barred, the claim cannot be granted. The Stockholm Tribunal has, namely, the jurisdiction to examine the matter on its merits since the principles of *res judicata* and *lis pendens*

are not applicable to this type of international dispute. Even if they were deemed to be applicable, they have not constituted an impediment to examination of the dispute since: (i) Lauder and CME are not the same party; (ii) Lauder and CME invoked different substantive agreements in support of their respective claims; and (iii) the issues disputed in the Stockholm proceedings were not covered by the arbitration agreement applicable in the London proceedings.

1.4 The Stockholm Tribunal examined only issues falling within its mandate and based its decision only on the facts which had been invoked by the parties. The Stockholm award was not based on any type of liability principle pertaining to joint tortfeasors or on any principle regarding joint and several liability for coordinated effort towards a common goal but, rather, on the fact that the Republic, via the Media Council, violated the Treaty and that the Republic was thereby deemed to have caused CME injury. The Stockholm Tribunal referred to joint tortfeasors only as a case of contributory causes when the Stockholm Tribunal decided the issue of causality, including the issue of whether the injury was a foreseeable consequence of the actions of the Media Council. The causality issue fell within the mandate of the Tribunal and, furthermore, pertained to a substantive issue which may not be reviewed by means of challenge. The fact that the Stockholm Tribunal referred to joint tortfeasors had no effect on the outcome of the Stockholm proceedings.

In any case, the Republic may be deemed to have stipulated to the examination of the issue. At any rate, the Republic may be deemed to have waived its right to assert the alleged excess of mandate. Accordingly, the basis of challenge is barred.

1.5 The Stockholm Tribunal did not exceed its mandate when the Tribunal determined that the Republic was liable to pay damages equal to the fair market value of CMS's investment.

It was within the mandate of the Tribunal to examine this issue since (i) the examination of the issue was covered by the agreement entered into in November

2000 regarding bifurcation of the Stockholm proceedings; (ii) the examination of the question was, in any case, covered by the final claim made by CME in writing during the final hearing.

By challenging the claim under (ii) and its failure to object, the Republic, in any case in conjunction with the final hearing, is deemed to have stipulated to the examination of the issue. At any rate, the Republic may thereby be deemed to have refrained from asserting that an examination of the issue is tantamount to an excess by the arbitrators of their mandate. The ground for challenge is thereby barred.

In the event the Court of Appeal finds that the Stockholm Tribunal exceeded its mandate by determining that the Republic was liable to pay damages equal to the fair market value of the investment, the Stockholm award is to be set aside in part. Paragraph 624 (2) of the Stockholm award must, in such case, be worded as follows: "*The Respondent is obligated to remedy the injury that Claimant suffered as a result of the Respondent's violation of the Treaty"*.

1.6 The arbitration agreement covered an examination of violations of the Treaty which allegedly took place both prior to and after CME's acquisition of the investment in May 1997. On this basis alone, the arbitrators had jurisdiction to examine the issue of violations committed prior to 1997. In any case, the arbitrators had jurisdiction to examine the issue regarding previous violations in that the issue was incorporated in the Stockholm proceedings without any assertion by any of the parties that the issue was not covered by the proceedings.

In any case, the Republic forfeited the right to assert that the issue was not covered by the arbitration agreement or that an examination of the issue would exceed the mandate of the arbitrators since the Republic did not, in its Statement of Defence, assert any objection, which the Republic was obligated to do pursuant to Article 8.5 of the Treaty and Article 21 (3) of the UNCITRAL rules and because the Republic,

during the final hearing, expressly waived the right to assert that the issue was not covered by the arbitration agreement or the mandate of the arbitrators.
In any case, the ground for challenge was barred by section 34, second paragraph of the Arbitration Act since the Republic, at any rate, may be deemed to have refrained from asserting that the issue was not covered by the arbitration agreement or that the examination of the issue exceeded the mandate of the arbitrators since the Republic participated in the proceedings without objection.

The examination of the question whether CME's investment was protected with respect to violations committed prior to CME's acquisition of the investment constituted an examination on the merits, and the determination by the arbitrators of the issue thus constituted a substantive assessment. Even if the Stockholm Tribunal made an erroneous assessment in this context, which they did not, such does not constitute a ground for challenge.

DEVELOPMENT OF THE CLAIM

The Republic

Exclusion of an arbitrator from the deliberations

Following the final hearing in the Stockholm proceedings, Kühn sent to Hándl and Schwebel a list of questions by fax dated May 14, 2001. The fax states, *inter alia*, that the list of questions was completed on May 9 but the fax was not sent before May 14. Several items in the list addressed the significance of Czech law, *inter alia*, in sections III, IV, and VI. On May 15, 2001, that is already the day after it was sent, Schwebel replied to the list of questions. The reply was arranged in accordance with Kühn's arrangement in the list of questions and, in the reply, Schwebel discussed, *inter alia*, the import of Czech law. It is also apparent from the reply that Schwebel received a letter from Kühn on May 11. Hándl never received the letter and the Republic has no information regarding the contents of the letter. On May 23, 2001, Hándl replied to the list of questions. It is apparent from the answer, *inter alia*, that

he contributed views on Czech law and the implication of Czech law with respect to certain issues. In certain respects, Händl reached the same conclusions as the London Tribunal.

On May 24, 2001, Schwebel sent a fax which stated, *inter alia*, that Kühn requested that he submit comments to arguments which had been asserted by the Republic's counsel, Professor Lowe, in the Stockholm proceedings. At no time did Kühn request that Händl comment on Professor Lowe's argument. On May 25, 2001, another fax was sent from Kühn to Händl and Schwebel, and from Händl to Kühn.

Händl was present at the meeting in Düsseldorf. However, the meeting lasted only one day, on June 1, 2001. At the meeting, documents were handed out to which Händl had not had prior access. These documents were a memorandum from Schwebel regarding Händl's comments pertaining to the investment protection according to the Treaty, an expanded list of questions from Kühn, and comments from Kühn to Händl's reply to the list of questions. It is apparent from the expanded list of questions that it was completed on May 28. It is apparent from the document containing Kühn's comments to Händl's responses that it was completed on May 25. Notwithstanding the aforementioned, the documents were not distributed until June 1. Furthermore, it is apparent from Kühn's comments to Händl's reply that Czech law was discussed, but the reasoning was not reiterated during the deliberations or in the Award. A comparable document in which Kühn commented on Schwebel's reply to the list of questions does not exist. Händl was not afforded any opportunity to study these documents before they were taken up for discussion at the meeting, which was a clear disadvantage for him. Conducting the deliberations during the period of one day only was altogether too little time for such a complex case as was to be determined by the arbitrators. At the meeting, Kühn and Schwebel ignored all of Händl's comments without any discussion or specific explanation.

It is apparent, *inter alia*, from Händl's *aide-mémoire* of June 6, 2001 that many questions were left open at the meeting in Düsseldorf. Further, it is apparent that

Kühn and Schwebel referred, as regards the issue of damages, to the fact that certain issues in connection therewith should be determined during the second phase of the proceedings. Some of the issues raised by Kühn in his list of questions are not addressed by Hándl in his *aide-mémoire* and there is nothing in the *aide-mémoire* which indicates that the deliberations were concluded at the Düsseldorf meeting. Purely factually, the deliberations were not concluded at that time. It is apparent from the notes that the arbitrators agreed at the meeting that Kühn would prepare a first complete draft of the arbitration award which was to be sent both to Schwebel and Hándl for their review and comments. The draft was to be sent to them on July 15, 2001.

On June 7, 2001, Schwebel sent a fax to Kühn which indicates that Kühn requested that Schwebel conduct an analysis of the assignment of claims upon the transfer of shares. The fax reveals that the deliberations were ongoing. On June 20, 2001, Hándl sent a fax in which he presented his views regarding certain documents and stated that he would be back in Prague on July 25, 2001. Hándl also appended a supplement to his views during the meeting in Düsseldorf. On July 10, 2001, Schwebel sent a fax to which he appended a memorandum regarding the manner in which American law regulated the assignment of rights in conjunction with share transfers. It is apparent from the fax that it was Kühn who requested that he do so.

On July 30, 2001, Kühn sent a 175-page draft award to Schwebel and Hándl (hereinafter the "First Draft"). Kühn requested that Schwebel and Hándl review and comment on the content as soon as possible. It is not clear from the cover fax whether the deliberations had been concluded. It may be gleaned from the pages of the award which were appended to the fax that the draft award was completed as early as July 25.

As early as August 2, 2001, Schwebel notified Kühn and Hándl that he would send his comments to the First Draft during the afternoon of the same day. Schwebel sent his comments to Kühn, but not to Hándl. Most of Schwebel's comments were

linguistic in nature, but he also had substantive comments. At no time did Händl receive Schwebel's comments and, accordingly, he did not have the possibility to express a view thereon. Schwebel also wrote that he wanted the arbitration award to be signed prior to August 17, 2001.

During the evening of August 3, 2001, Kühn's secretary sent a fax to Händl and asked whether he wished to receive the communication between Kühn and Schwebel as well as a fax to Schwebel in which reference was made to interim draft award which Händl never received. The faxes are dated August 2, 2001. On August 6, 2001, Händl requested that Kühn grant him at least 14 work days to submit his comments regarding the First Draft. Händl stated, *inter alia*, that he intended to criticize the award in certain respects and that the suggestion that the award be signed on August 17 must be regarded as an attempt to outmaneuver him. He also stated that he wanted to receive the communication which had been exchanged between Kühn and Schwebel.

On August 7, 2001, Kühn demanded that Händl immediately submit his comments to the First Draft and that such comments consist of proposals for amendments and corrections of facts and spellings. Kühn also stated in the fax that a majority had been formed at the meeting in Düsseldorf. Furthermore Kühn stated, *inter alia*, that he had worked out a proposal with linguistic assistance from Schwebel and that the changes Schwebel had proposed were only linguistic. On the same day, Kühn sent a "final draft" of the award (hereinafter the "Second Draft"). On August 8, 2001, Schwebel sent a fax in which he indicated, *inter alia*, the types of comments which Händl was to provide in respect of the draft award, and stated that Händl could write a dissenting opinion and that "the substance of the opinion" was clear at the meeting in Düsseldorf.

On August 8, 2001, Kühn sent a fax to Händl and asked whether he wanted to have Schwebel's handwritten comments. On August 9, 2001, Händl reacted to Kühn's and Schwebel's letters of August 7 and 8, 2001 and stated, *inter alia*, that he did not

regard the deliberations as concluded and that he had not understood that he would be held responsible if the award was delayed. Hándl also stated that he would limit his comments in order to avoid being accused of delaying the award. The correspondence of August 7 and 8, 2001 between the arbitrators with respect to the Second Draft reveals, *inter alia*, that Kühn and Schwebel did not wish to conduct further discussions with Hándl, that they were of the opinion that the deliberations had been concluded in Düsseldorf, and that they were not interested in Hándl's opinions.

Hándl submitted his comments on August 16, 2001, i.e. 13 days after he received the First Draft, which was less time than he had requested. Since he only had a limited time in which to review and ponder the draft award, he did not have the possibility to submit his views on all issues raised. Hándl sent his comments regarding the First Draft by fax both to Kühn and Schwebel. In his comments, Hándl raised the issue of Železný's role and stated that it was Zelezný who had caused the injury and that the Media Council was not liable for the injury, and the Republic could only be imputed proportional liability in the event the Republic was found liable. In addition, Hándl, *inter alia*, addressed the issue of Czech law regarding the assignment of rights, the 1993 and 1996 MOAs, the administrative proceedings, and coercion. It is also apparent from his comments that, on many points, he applied the same reasoning as the London Tribunal, *inter alia*, with respect to the Media Council's letter of March 15, 1999. It further appears that Hándl was not of the opinion that the deliberations had been concluded by the meeting in Düsseldorf.

Kühn did not respond to Hándl's comments until August 29, 2001, nearly two weeks later. Kühn dismissed all of Hándl's views and, the same day, sent another "final draft" of the award (hereinafter the "Third Draft"). A copy for signature was to be sent some days later. It may be gleaned from Kühn's response that it was completed on August 21. During the time which transpired between August 16 up to and including the time at which the response was sent on August 29, some discussions must have taken place between Kühn and Schwebel regarding the manner in which they were going to proceed.

On Saturday, September 1, 2001, Kühn sent a fax to Händl dated August 31, 2001. Appended thereto was an additional "final draft" (hereinafter the "Fourth Draft") of the award and separate signature pages dated August 31, 2001, which were already signed by Kühn. The Draft and signature pages were also sent by courier to Händl. As of a consequence of the Fourth Draft, Händl was definitively denied any possibility to comment on the Third Draft on time. Nonetheless, the award was amended following such date. Händl responded and confirmed receipt on September 3, 2001. On that day, the London Tribunal issued the London award in which all claims against the Republic were denied. The award was widely disseminated and became known to Kühn. On September 4, 2001, Kühn requested that Händl send the signature pages directly to Schwebel and stated that further amendments were to be made to the award. On the same day, Händl received another 33 pages with corrections to the award from Schwebel.

On September 5, 2001, Händl stated that he would not sign an award to which the signature pages were not appended to the original and returned the signature pages to Kühn. Händl also pointed out, *inter alia*, that the award could not be dated before it was signed by all of the arbitrators. It was Händl's opinion that the arbitration award was to be dated at the time it was signed by the last arbitrator, particularly since the award was still subject to amendments.

On Friday, September 7, 2001, Kühn sent to Händl six complete and undated copies of the award (hereinafter the "Fifth Draft") for signature which Händl, as a consequence of the intervening weekend, received on Monday, September 10, 2001. Kühn requested that Händl sign and send to Schwebel all copies of the award for his signature. Händl informed Kühn on the same day that he did not intend to sign the award. On September 11, 2001, Händl sent his dissenting opinion to Kühn and Schwebel in which he explained why he would not sign the award.

On September 11, 2001, Hándl sent the award to Schwebel for signature. This was the same day on which the United States of America was attacked and it was impossible to send anything to the US by air on that or subsequent days. On the same day, Hándl stated in a fax to Kühn that he was entitled not to sign the award and that he would append a dissenting opinion. On that day Kühn expressed his views regarding the deliberation process. At this stage Kühn wrote "for the record". Notwithstanding the difficulties in communications with the US, the Stockholm award was sent to the parties on September 14, 2001, signed both by Kühn and Schwebel, and dated September 13, 2001.

On September 23, Hándl gave notice of his resignation as arbitrator and appended to the parties and the other arbitrators what he had told the Republic's Minister of Finance regarding the reasons for his resignation. The stated reasons were, *inter alia*, that the other two arbitrators, particularly Kühn, had excluded him and deliberated without him.

The First Draft was far from a complete draft of the Stockholm award. After the First Draft had been sent to Hándl and Schwebel, a number of amendments and supplements were made which were crucial for the outcome of the case and which incorporated new legal arguments. Hándl received no information from Kühn or Schwebel as to why these new paragraphs were incorporated in the draft or on whose initiative or request this took place. Hándl was not allowed to participate in any discussions regarding these new paragraphs, and Hándl was under the impression that the two other arbitrators were involved in the amendments made to the draft of the Stockholm award in August 2001. Hándl only had five days to review the 175-page First Draft prior to the commencement of the distribution of the next, and many subsequent drafts, all of which were designated "final draft", and had no opportunity to submit his views on a draft before the distribution of the subsequent draft. In addition, Hándl neither expected nor could expect that entirely new sections which contained substantive legal issues would be incorporated in a "final draft" without any prior discussion. At some point, probably commencing June 2001 and onwards, the

two arbitrators ceased to include Hándl in their continued discussions. No internal arrangement of work in the Stockholm proceedings was agreed upon.

In the First Draft of the award, the issue of causality was addressed, and it appears from the draft that the Tribunal concluded that the Republic had caused the injury. This is set forth, *inter alia*, in paragraphs 427, 520, and 590.

The Second Draft contained both amendments which were marked and amendments which were unmarked. This is apparent, *inter alia*, in paragraphs 11, 13, 26, 401, 408, 424, 427, 469, 533, 551, 584, and 586. The amendments were not only linguistic in nature. In the marked paragraphs, 598-604, substantial amendments and supplements were made to the reasons for the award regarding expropriation.

The Third Draft also contained amendments which were not marked. There was also marked text which did not have amendments, e.g. paragraph 393. The work of reviewing the draft was thereby rendered more difficult. Important amendments were also incorporated in paragraphs 580-585, which was a section regarding joint tortfeasors. These paragraphs were entirely new and were based upon the commentary to the draft Articles on State Responsibility which were adopted by the United Nations International Law Commission (hereinafter the "ILC") during its summer session which was held between July 2 and August 10, 2001. In paragraph 580, the term "tortfeasors" was used for the first time. Paragraph 581 reproduced a citation referring to national law which was derived from the commentary to Article 31. Paragraph 582 characterized the Media Council's actions as "torts". In the second, erroneously numbered paragraph 581, reference is made to the sections which do not address the case to be adjudicated by the arbitrators. It appears that the Tribunal incorporated parts of citations from various parts of the commentary in the award and "rearranged" them. In the second, erroneously numbered paragraph 582, the Tribunal discussed causality and proximity issues.

Article 31 of the draft Articles on State Responsibility addresses Reparation. In footnote 500, under section 12 in the ILC commentary to Article 31, there is a paragraph which was cited in the award, with the exception that the award uses "international law" in lieu of "national law". The Tribunal also used in the erroneously numbered paragraph 581 a citation from the commentary to Article 31 and incorporated a case therefrom in the Third Draft. Article 31, however, addresses a state's liability vis-à-vis other states, not vis-à-vis private legal subjects. Paragraphs 580-585 were added to that part of the award which addresses causality, which is not addressed in Article 31. Article 47 addresses situations in which there are several contributing states.

The concept, "joint tortfeasor", which does not exist in international law, was of determinative significance for the position of the majority that the Republic was liable for damages pursuant to the Treaty. The majority also based its decision regarding which principles were to be applied for the determination of the amount of damages on this concept. Only in the Third Draft did Hándl discover this issue. The ILC commentary was not available prior to the latter part of August 2001. Hándl was not sent a copy of the ILC commentary by Kühn or Schwebel. The Fourth Draft was sent to Hándl only two days after he had received the Third Draft. Hándl was not afforded any opportunity to review and express an opinion regarding the concept "joint tortfeasor", and the references to the ILC commentary in the Stockholm award before Kühn demanded that he sign the award.

Paragraphs 613-616 of the Third Draft were also new and addressed the Reparation claim. The term, fair market value, was raised for the first time in paragraph 616. Amendments were also made to paragraph 617, which were reflected in paragraph 620. Neither compensation in general nor particular principles for the determination of the compensation had been addressed by the Stockholm Tribunal prior to the Third Draft. Nor, in this case either, was Hándl afforded the opportunity to submit his comments before he was requested to sign the arbitration award. Nor was Hándl afforded, at this late stage, any opportunity to attempt to prevent the majority of the

Stockholm Tribunal from exceeding the parties' agreement to separate the liability issue from the determination of damages.

Kühn and Schwebel had discussed and added the section regarding joint tortfeasors, damages, and the ILC commentary without affording Händl the opportunity to participate in this work.

In the Fourth and Fifth Drafts, amendments were also made. In addition, there are two final versions of the award in which the paragraphs are numbered differently. The work of finalizing the arbitration award thus continued even after the Third Draft had been distributed.

The fact that Händl stated in his dissenting opinion that he had notified Kühn and Schwebel of his views cannot be regarded as though Händl participated in the discussion concerning the joint tortfeasors since this concept, as well as the paragraphs regarding damages and the ILC commentary, were not known prior to the Third Draft on August 29, 2001. Nor can the text on page 20 of the dissenting opinion concerning "tortfeasor" be regarded as a confirmation that Händl had discussed the issue with the two other arbitrators. It is at this juncture that Händl first expresses his views regarding "tortfeasors".

Händl did not attempt to intentionally delay the rendering of the Stockholm award. It appears obvious, however, that the majority of the Stockholm Tribunal wanted to render the Stockholm award effective as of August 31, 2001 notwithstanding that they were not ready to render it until later. There is no other explanation for pre-dating. The reason for this must have been that the majority was concerned that the London award would entail *res judicata* in relation to the Stockholm award. The final hearing in the London proceedings commenced seven weeks earlier than the final hearing in the Stockholm proceedings, March 5, 2001 compared with April 23, 2001. The London Tribunal conducted deliberations in the case from the conclusion of the final

hearing on March 13, 2001 until the issuance of the London award on September 3, 2001.

Failure to take into consideration applicable law

The conclusions reached by the Stockholm Tribunal in the Stockholm award raised a number of issues which, pursuant to the choice of law provisions in Article 8.6 of the Treaty, were to be determined by application of Czech law. These issues concerned, *inter alia*, the protection afforded the original investor pursuant to the 1993 MOA, the commencement of the administrative proceedings in 1996, and the alleged coercion in conjunction therewith, the relationship between the 1996 MOA and the 1993 MOA, the service agreement, what transpired when CME acquired the interests in ČNTS from CME Media Enterprises B.V. (hereinafter "CME Media") in 1997, the Media Council's letter of March 15, 1999 and the alleged collusion with Železný, the obligation of the Media Council to intervene, and the termination of the service agreement. These issues could only be resolved by the application of Czech law. The Stockholm Tribunal had an obligation to comply with the choice of law clause and, in accordance with the same, an obligation to apply Czech law. The Stockholm Tribunal did not apply Czech law with respect to the aforementioned issues and went so far as to openly disregard Czech law. When the Stockholm Tribunal did not apply Czech law, it could not determine issues raised in the Stockholm proceedings in a correct manner. Nor did the Stockholm Tribunal apply international law or any other legal system with respect to the aforementioned issues, and did not reach its decision on the basis of law. The outcome of the case would have been different had the Stockholm Tribunal applied Czech law.

The Stockholm Tribunal was composed of a jurist with expertise in international law, Schwebel, a jurist with expertise in Czech law, Hándl, and a jurist with expertise in commercial law and international arbitration, Kühn. The parties expected that the Stockholm Tribunal would make use of this collective expertise when it decided the case and believed that Czech law would be investigated, *inter alia,* in light of the fact

that there was a Czech jurist on the Stockholm Tribunal. The Stockholm Tribunal also had an obligation to investigate the content of the applicable law, i.e. Czech law. The Republic's appointment of Hándl as an arbitrator provided the Republic with a well-founded right to anticipate that Hándl's expertise would be taken into consideration by the Stockholm Tribunal. Hándl's expertise in Czech law was necessary for the determination of the dispute. The exclusion of Hándl from the Stockholm Tribunal's deliberations resulted in Czech law being ignored in the Stockholm award.

The expectation that Czech law would be investigated and applied was initially shared by the arbitrators which, *inter alia*, is apparent from the fact that, following the final hearing in Stockholm, Kühn entrusted Hándl with investigating Czech law and Schwebel with investigating international law. The Republic invoked Czech law in the Stockholm proceedings and argued in detail regarding Czech law in its written submissions, *inter alia*, in the Statement of Defence, in the Sur-Reply, and in the Written Closing Submission, and in conjunction with the final hearing before the Stockholm Tribunal. The Republic stated, for example, that the Media Council's role was to monitor and enforce the Media Law, which it was empowered and obligated to do in accordance with Czech law. The Republic also submitted translations of, *inter alia*, the Media Law, the Administrative Proceedings Act, and the Act governing the Media Council. However, in many respects, the burden of proof during the Stockholm proceedings rested with CME. The parties argued both Czech law and international law in the Stockholm proceedings, and the Stockholm Tribunal posed questions concerning Czech law and international law during the final hearing. The failure to apply applicable law could not be discovered before the Stockholm award had been issued. There was nothing against which the Republic could protest during the Stockholm proceedings.

The Republic has stated that the Stockholm Tribunal disregarded Czech law in the award, *inter alia*, as follows.

The Tribunal should have analyzed the manner in which the original investment made by CEDC 1993 was to be characterized and, in such context, investigated a large number of issues covering, *inter alia*, company law and contract law. The Tribunal concluded, without any legal analysis, that the 1993 MOA and "the split structure" were a "carefully designed scheme", that it was in compliance with Czech law, and that it was the basis for CEDC's investment.

The Tribunal concluded, without legal analysis, that "The use of 'know-how' of a broadcasting Licence is meaningless and worthless" and that the 1996 contribution to the MOA of "the use of the know-how of the License" was quite a worthless and meaningless right. The Stockholm Tribunal conducted no analysis of the value of CET 21's contribution to ČNTS in 1993 of the exclusive use of the broadcasting license. When the Tribunal noted which protection the investment enjoyed according to the 1993 MOA compared with the 1996 MOA, the Tribunal did not take into account Czech law but, rather, looked to the actual chain of events in order to find support for its reasoning that the protection had deteriorated. The Tribunal asserted that the service agreement could be terminated and concluded more easily without analyzing whether this was actually the case legally and argued around the legal proceedings which were commenced in the Czech Republic. The Stockholm Tribunal stated in paragraph 476 that the protection enjoyed by the investor pursuant to Czech civil law and in Czech courts was not significant to the conclusions of the Tribunal.

The Stockholm Tribunal assessed whether the Media Council's acts in 1996 could constitute coercion or whether the amendments to the MOA were voluntary. The Tribunal, in this context, questioned whether the "opinion" rendered by Dr. Barta in which he concluded that "the split structure" was not compatible with law and that measures should be taken and concluded that it involved coercion. The Tribunal stated that it was not necessary to examine the Czech administrative law aspect of the issue and how the Media Council's actions were to be adjudged according to Czech law, and whether the structure was legal according to Czech law. Instead, the Tribunal went directly to the Treaty and made an assessment based thereon.

In paragraph 575, the Tribunal described the cause of the collapse of CME's investment and stated that it was the Media Council's acts and omissions. In the conclusion in paragraph 590, the Tribunal stated it was not, in this context, necessary to consult Czech law in order to determine if the Media Councils' acts were in accordance with Czech law but, rather, asserted that the Treaty could be consulted directly to determine whether the acts involved a breach of the Treaty. This was not, however, possible since the Treaty did not answer these issues.

It is also apparent from the arbitrators' correspondence and statements that the majority did not apply, nor considered that it was necessary to apply, Czech law. Czech law was raised in the list of questions prepared by Kühn. Kühn posed questions regarding Czech law and the question whether Czech law was to apply was raised. The reasoning, however, was never followed through. Schwebel stated in his response to the list of questions that he interpreted Article 8.6 of the Treaty to "take into account" entails a freer formulation than "apply". Of the arbitrators, Schwebel was of the opinion that Czech law need not be applied. Rather, the Treaty could be directly consulted in order to determine whether CME had incurred an injury. Characteristic of Schwebel's position was that he devoted himself to opining in lieu of investigating Czech law and the provisions thereof. For example, Schwebel did not analyze the difference between CET 21's contribution to ČNTS in 1993 and 1996, and whether the contribution could be retracted. Instead, Schwebel referred to the fact that the Media Council was of the opinion that the contribution in 1993 was legal. In addition, Schwebel did not know what the change in the 1996 MOA entailed according to Czech law, nor did he concern himself with investigating the impact. Hándl was of the opinion that the amendments to the 1996 MOA did not entail any change, but his opinion was not afforded any weight in the award. However, the award stated, notwithstanding that the arbitrators were not clear regarding the

situation following the deliberations in Düsseldorf, without any analysis pursuant to Czech law or any other legal system, that the protection afforded by the 1996 MOA had deteriorated and that the contribution of the know-how pursuant to the license in 1996 was meaningless and worthless. Schwebel also devoted himself to speculation and not an analysis of Czech law when the issue of the impact of CME's consent to the 1996 MOA, as expressed in the transfer agreement of 1997, was analyzed. On the other hand, Hándl asserted that CME was bound by its consent pursuant to Czech law. However, the majority did not pay heed to Hándl, but found, without any analysis of Czech law, that CME was not bound by the consent in such a way that CME could not bring claims based on the 1996 MOA. Also as regards the import of the Media Council's letter of March 15, 1999, the majority did not take into account Czech law but, rather, engaged in speculation.

An example of the issues in which the Stockholm Tribunal did not apply Czech law and, where appropriate, international law, and in which the outcome of the case would thereby have been different, the Republic states as follows.

The legal basis for the investment

The Stockholm Tribunal concluded that "the split structure" was the basis of the investment and that it was a well-defined legal basis therefor. However, the Tribunal did not make any analysis of what CET 21's contribution to ČNTS consisted of and how it was to be defined. The Tribunal did not investigate which rights CEDC acquired through its investments in the Czech Republic and what protection the 1993 MOA afforded the investment. The Tribunal did not state, nor did it refer to, any law which explained why the 1993 MOA afforded greater protection than the 1996 MOA, nor did it state in any other manner what had occurred from a legal perspective.

The Republic referred, with respect to this issue, to Czech law and stated objections based on Czech law. Had the Stockholm Tribunal applied Czech law, it would had determined that the only rights acquired by the CEDC through its investment were

contractual rights vis-à-vis CET 21 and that it was only CET 21 which obtained the broadcasting license pursuant to Czech law.

Changes in 1996 and 1997 in the contractual relationships with CET 21

The Tribunal did not conduct an analysis of what had occurred in conjunction with the change to the MOA 1996 and the execution of the service agreement. The Tribunal assumed that the legal protection was lost and stated, without legal support therefor, the value of the contribution of "know-how" of the license.

Dr Radvan was a Czech lawyer who participated in the negotiations concerning the 1996 MOA, and testified during the proceedings as a witness regarding the facts in the case and not regarding the import of Czech law. During the proceedings, the Tribunal did not attach any importance to Dr. Radvan's testimony regarding the import of Czech law but, rather, requested a written opinion of another person. His testimony cannot be taken as a pretext that the Tribunal based its award on Czech law. Nor can the statement of CME's corporate counsel regarding the legal protection in 1993 compared with the protection in 1996 be taken as a pretext therefor since she did not testify regarding the import of Czech law but, rather, regarding the facts. Independent appraisers also concluded that the value of the contribution was the same in 1993 as it was in 1996.

The content and effect of 1993 MOA and the 1996 MOA and the service agreement should have been adjudged according to Czech law. Without analyzing the content and effect pursuant to Czech law of the contractual relationships between CET 21 and ČNTS in 1993 compared with 1996 and 1997, and the content of the revocation of the terms and conditions of the license, it was not possible for the Stockholm Tribunal to determine whether CME/ ČNTS had lost its legal safety net. Had the Stockholm Tribunal applied Czech law, it would have concluded that CET 21 would have been able to broadcast TV Nova irrespective of the provisions of the 1993 MOA and found that CME/ ČNTS had not lost any legal protection by virtue of the 1996 events.

Commencement of administrative proceedings and coercion

The Stockholm Tribunal found that the Media Council commenced the administrative proceedings in 1996 for the purpose of coercing CET 21 and ČNTS into dissolving the exclusive relationship and bring about the end of the 1993 "split structure". The issue of whether coercion existed was of determinative significance to the outcome of the case. Without concluding that coercion existed, the Tribunal could not reach the conclusion rendered by the Tribunal.

The award refers, *inter alia*, in paragraph 515 to "unlawful pressure" and in paragraph 516 to "unlawful acts", but it does not refer to any legal system upon which such are based. Within international law, there is nothing other than physical coercion. Professor Vagts' article, to which the Tribunal referred in paragraph 517 of the award, does not constitute international law, and Professor Vagts himself emphasized that the statements in the article did not constitute international law. The reference to Professor Vagts' article is not tantamount to the application by the Tribunal of international law since reference to the article falls outside the scope of the application of international law. The Tribunal did not apply any legal system at all. According to Czech law, certain conditions must be satisfied in order for coercion to be deemed to exist. The act which constitutes coercion must, *inter alia*, be unlawful. In addition, according to Czech law, acts which are coerced are void. Where, following the cessation of coercion, a party who is subject to such coercion invokes a legal act which came about under such coercion, the legal act is no longer regarded according to Czech law as having come about under coercion.

Had the Tribunal analyzed the administrative proceedings according to Czech law, the Tribunal would have found that, in accordance with the Media Law, the Media Council had an obligation to commence proceedings in the event there was a suspicion of a violation under the Media Law. Since the Media Council had an obligation to commence administrative proceedings against ČNTS, there can be no

talk of coercion pursuant to Czech law. Instead of applying Czech law, the Tribunal stated that it was not necessary to determine whether the Media Council's acts were in accordance with Czech law, that it was not obligated to determine the Czech administrative law aspect of the issue, and that it was not the duty of the Arbitral Tribunal to determine whether the Media Council's acts were compatible with Czech law. Instead, the Tribunal stated that it needed only determine whether the Media Council's acts were compatible with the Treaty.

The Republic invoked Czech law regarding the Media Law and the Media Council's obligations and the Administrative Proceedings Act, *inter alia,* in its Statement of Defence and during the final hearing in the Stockholm proceedings.

The London Tribunal analyzed these questions on the basis of Czech law and concluded that the commencement of the administrative proceedings was a normal procedure for the Media Council.

Had the Stockholm Tribunal applied Czech law, the Tribunal would have concluded that the Media Council was obligated to ensure compliance with the Media Law, that the Media Council had not acted unlawfully, and that the administrative proceedings could not entail coercion. Had the Tribunal concluded that the amendments of the 1996 MOA occurred under coercion, the Tribunal would have also concluded that they were void and, accordingly, no amendment would have been made to the 1993 MOA.

Transfer agreement between CME Media and CME

The Stockholm Tribunal failed to apply Czech law when it analysed the import of the transfer of the shares in ČNTS from CME Media to CME in accordance with the transfer agreement. The Stockholm Tribunal reach the conclusion in its award that CME's consent to the 1996 MOA was effective only as between the shareholders, and that the consent did not entail a waiver of rights pursuant to the Treaty which arose due to the violations prior to CME's acquisition of the shares in ČNTS. The Tribunal conducted no analysis of Czech law notwithstanding that Czech law undisputedly governed the transfer. The Republic made objections regarding the import of the consent according to Czech law. Neither international law nor the Treaty contains any rule which could have applied to the assessment of the issue. Instead, Kühn charged Schwebel with carrying out an investigation to see whether there were any analogies which could drawn from American law on the issue.

According to Czech law, a party is bound by the provisions included in the agreement, and the Tribunal should have concluded, by an application of Czech law, that CME was bound by Article 4 of the transfer agreement. Pursuant to Czech law, CME was required to provide such consent as provided by CME in Article 4. By granting its consent, CME approved the 1996 MOA and the alleged amendments vis-à-vis the 1993 MOA, including the alleged coercion. According to Czech law, claims inuring to a person do not follow the shares in a share transfer. Nor did CME Media transfer any claims to CME. Had the Stockholm Tribunal applied Czech law in order to determine the significance of the content of the transfer agreement, the Stockholm Tribunal would not have concluded that CME was able to assert the claims based on the alleged coercion in 1996.

The Media Council's letter of March 15, 1999

The Stockholm Tribunal failed to apply Czech law and international law when it analysed the Media Council's letter of March 15, 1999 to CET 21. The conclusion

drawn from the letter by the Stockholm Tribunal was that the Media Council had assisted CET 21 in eliminating ČNTS. The Stockholm Tribunal concluded that the issuance of the Media Council's letter of March 15, 1999 and the failure to revoke such letter were violations of the Treaty. The Stockholm Tribunal concluded, without any legal support, that such a letter was a letter entailing a formal and binding decision (regulatory letter) of the supervisory authority for broadcasts, and that the letter contained requirements and not recommendations. The Republic's standpoint in the proceedings was that the letter could not have the legal effects as ascribed by the Tribunal.

After having applied Czech law, the London Tribunal found that the letter was not intended to, nor could it have, any legal consequence since it was only an expression of the supervisory authority's general understanding of the correct interpretation of the Media Act.

Had the Stockholm Tribunal applied Czech law, it would have reached the conclusion that the letter could not have had the legal effect ascribed by the Tribunal. By failing to apply Czech law regarding the legal status of the letter, the Stockholm Tribunal reached the conclusion that the letter could eliminate exclusivity in accordance with the service agreement and weaken the legal protection. Neither Czech law, international law, nor the Treaty provided any support for the conclusion that the mere issuance of a letter by a state supervisory authority could eliminate an exclusivity clause in an agreement between two private entities. The Stockholm Tribunal did not apply any legal system when it reached its conclusions.

Possible intervention by the Media Council

The Stockholm Tribunal failed to apply Czech law or international law in determining whether the Media Council could or should have revoked the letter of March 15, 1999. The award contains no analysis of Czech law as to whether the Media Council could and should have revoked the letter.

The Stockholm Tribunal found that the Media Council could have, not later than a certain time, clarified the legal situation and remedied its intervention by revoking its letter of March 15, 1999. The Stockholm Tribunal also stated, without providing any legal grounds therefor, that the Media Council was not entitled to refrain from "regulatory clarification". When the Stockholm Tribunal reached these conclusions, the Stockholm Tribunal failed to take into account the Media Council's authority pursuant to Czech law. The Stockholm Tribunal's conclusion that the Media Council was obligated to protect CME's investment was not based on any legal analysis of Czech law, international law, or the Treaty.

Had the Stockholm Tribunal taken into account Czech law, it would have found that the Media Council could only have acted in accordance with Czech legislation and that there was no possibility for the Media Council to intervene in a private dispute as that existing between CET 21 and ČNTS.

Termination of the service agreement

The Stockholm Tribunal failed to apply international law or Czech law when it analysed the alleged termination of the service agreement by CET 21. At the time of the Stockholm proceedings, litigation was underway in Czech courts regarding the termination of the service agreement. According to international law, the Stockholm Tribunal was not entitled to disregard judgments issued by the Czech courts in these disputes only to replace the judgment of the courts with its own assessment. The Stockholm Tribunal could not disregard the decisions of the Czech courts as an interpreter of Czech law. Without analysing the termination of the service agreement according to Czech law, the Tribunal reached the conclusion that it was CET 21 that had committed a breach of contract.

In order for the Stockholm Tribunal to have been able to state that there was a violation of international law, the Tribunal must have found that the Czech judgment

itself, or the Czech legal system, entailed a violation of the Treaty, e.g. in that CME was denied justice or due to the fact that the judgment or the legal system are incompatible with some rule according to international law.

The London award found that the Republic had an obligation to make its legal system available to CME, which the Republic also had done. For its part, the Stockholm Tribunal criticised the Czech courts and declared that it was not the role of the Stockholm Tribunal to take decisions regarding the legal protection which a foreign investor enjoyed for its investment according to Czech civil law and in the Czech civil court system. The Tribunal also stated that the fact that two different conclusions were reached in the two instances which had examined the termination showed that the investment was fragile.

Joint tortfeasors

The Stockholm Tribunal applied neither international law nor Czech law when it introduced the legal concept of "joint tortfeasors" in the Stockholm award. The conclusion regarding joint tortfeasors was determinative to the outcome of the Stockholm proceedings since the Republic could not have been held liable for Železný's actions without such a determination. In support of its assertion regarding joint tortfeasors, the award contained a short citation from an ILC commentary which referred to Dr. Weir's chapter in "The International Encyclopaedia of Comparative Law". The ILC commentary does not constitute applicable international law. Dr Weir's work was neither a work about Czech law nor international law but, rather, concerned comparative national law. The term, joint tortfeasors, postulated by the Tribunal exists neither in international law nor in Czech law. A natural or legal person cannot be jointly liable for damages together with a state according to international law. A state may be liable according to international law, and a natural or a legal person may only be liable according to national law. Accordingly, a state and a natural or a legal person cannot be jointly and severally liable for damages for a "tort" according to international law. The Stockholm Tribunal has postulated a term

without support in any applicable legal system. This is not a question of the erroneous application of international law but, rather, the non-application of international law to a determinative issue.

Obligations as senior executive

The Stockholm Tribunal found that Železný had breached his obligations as a senior executive of ČNTS notwithstanding that this fact had not been invoked either by CME or the Republic. The Stockholm Tribunal drew this conclusion without stating which obligations a senior executive has in a Czech company vis-à-vis the company according to Czech law. The Tribunal stated, without providing any legal basis or any support in Czech or any other law, *inter alia*, that Dr Železný's open breach of his obligations according to company and civil law was a massive, clear, and intentional violation of his obligations as Managing Director, a violation of law which must be adjudged to be a serious crime in all legal systems. The aforementioned conclusion was determinative for the Stockholm Tribunal's conclusion that the Republic and Železný were joint tortfeasors and that the Republic thereby breached the Treaty in 1999. The conclusion regarding Dr Železný's actions was reached without any analysis of Czech law.

The Stockholm Tribunal failed to apply Czech law when it reached the aforementioned conclusions. Neither did the Stockholm Tribunal apply international law nor any other legal system. Had the Stockholm Tribunal applied applicable law when it reached the aforementioned conclusions, the outcome of the case would have been different.

Lis pendens* and *res judicata

The principles of *lis pendens* and *res judicata* are a part of the *ordre public* and the principles are applicable between arbitration proceedings in different countries and which are carried out under different bilateral investment treaties. The Stockholm

award is thereby invalid. In any event, the Stockholm Tribunal committed a procedural error by not dismissing CME's claim during the proceedings with reference to the principle of *lis pendens*, and after the issuance of the London award with reference to the principle of *res judicata*.

The identity criteria between the London proceedings and the Stockholm proceedings were fulfilled. The London proceedings and the Stockholm proceedings concerned the same investment, the same alleged treaty violations, the same facts, the same damage, the same claims for, firstly, restitution and, secondly, damages, the same parties, and the same legal grounds.

Both Lauder and CME invoked the same legal grounds based on their respective bilateral investment treaties. The two investment treaties provide the same protection and notwithstanding that they are variously drafted there is no great difference between them. The linguistic differences are insignificant. The obligations of the Republic pursuant to the two investment protection treaties are essentially identical. A claim pursuant to any of the treaties leads to the same legal consequences. CME did not in any of the arbitration proceedings claim that the treaties were different. In a letter of March 10, 2000 from CME's counsel to the London Tribunal, it was stated that the treaties were indistinguishable documents, which was also stated in CME's Notice of Arbitration and Statement of Claim in the Stockholm proceedings.

Notwithstanding that Lauder and CME were not formally the same legal entity, they were to be regarded as the same party with respect to the issue of *lis pendens* and *res judicata*. Lauder and CME constitute shareholders at different levels in the chain of companies which Lauder used to make his investment in ČNTS. Lauder owned and owns a minority of the shares in the parent company, Central Media Enterprises Ltd, which, in turn, through inactive wholly-owned subsidiaries, owns 99 per cent of the shares in ČNTS. Lauder was and is the controlling shareholder of the parent company, which made it possible for him to exercise control over CME and over the companies in the CME group. Such control was also a necessary condition in order

for Lauder to be able to bring his claim pursuant to the American Investment Treaty. Lauder was the only shareholder who was, the entire time, a constant in the chain of companies which controlled ČNTS from 1993 until the Stockholm proceedings.

CME revealed the identity between CME and Lauder when CME's counsel, in both proceedings, proposed that the London proceedings and the Stockholm proceedings be consolidated. It was the same representative for Lauder and CME, Frederic T. Klinkhammer, who instructed the same lawyers to represent Lauder in the London proceedings and CME in the Stockholm proceedings and who also participated during both proceedings.

It would not have been possible to resolve the problem of two awards against the Republic merely by setting off the amount which the Republic was to pay, *inter alia,* due to company and tax law rules.

Also according to English law, the res judicata effect does not only extend to the same party in a strict sense, but can also be extended and, by the application of English law, the res judicata effect of the London award affects the Stockholm proceedings.

The Republic immediately and persistently objected to parallel proceedings by invoking various grounds during the Stockholm proceedings, and took the position that either the London or Stockholm proceedings would have to be discontinued. It is true that the Republic did not invoke the legal-technical import of the doctrines of *lis pendens* and *res judicata* when it objected, but the Republic moved for dismissal and stay. This was due, *inter alia*, to the existence of the large number of disputes regarding CME, CET 21, ČNTS, and Železný, in addition to the disputes between Lauder/CME and the Republic which the Republic also referred to in the Stockholm proceedings. This is apparent, *inter alia*, from the Republic's Statement of Defence, Sur-Reply, and its opening statement in the Stockholm proceedings. The Republic invoked all circumstances in the Stockholm proceedings which are invoked in the

present case regarding *lis pendens* and *res judicata* notwithstanding that the Republic did not use the same legal labels in the Stockholm proceedings.

The Republic did not raise any new objection regarding *res judicata* after the London award was issued since the proceedings at that time had been concluded and the Stockholm Tribunal had deliberated for four months. The Stockholm Tribunal was aware the entire time of the London proceedings. On a number of occasions, Kühn telephoned the parties' legal counsel to find out whether the London Tribunal had issued its award. The arbitrators in the Stockholm Tribunal learned of the London award when it was issued. When the London award was issued, the Stockholm Tribunal should have stayed the proceedings to consult the parties.

Immediately after CME had requested the Stockholm proceedings, CME wanted the proceedings to be consolidated. The Republic was of the opinion that it was not lawful to allow both proceedings to proceed, and that it was not possible to consolidate the cases pursuant to the respective treaties but, rather, that CME/Lauder should choose which proceeding they wanted to pursue. The Republic was left only to continue to object and hope that one of the proceedings would be terminated. Consolidating the proceedings was also incompatible with the Republic's position that neither of the proceedings could be pursued according to the respective Investment Treaties. The Republic did not state that its actions constituted a waiver of the right to assert the principles of *lis pendens* and *res judicata* in subsequent proceedings.

Excess of mandate – joint tortfeasors

CME did not invoke joint tortfeasors or the grounds on which it depends in the case. Joint tortfeasors was referred to only one time throughout the entire proceedings, which was during the penultimate day of the main hearing. CME also made a reference to "concurrent causation". CME did not invoke the necessary legal grounds for the application of joint tortfeasors.

In order for the Stockholm Tribunal to be able to determine damages, an impermissible act or omission must first have occurred – a principle upon which liability is based – on which a claim could be based and, secondly, causation must have exist between the act or omission and the injury incurred. The term, joint tortfeasors, exists in national law and, in the sense the term was used in the award, the term entails that there must exit a coordinated action between several "tortfeasors" towards a common end. Joint tortfeasors is a principle on which liability is based, and not a principle of concurrent causation.

Joint tortfeasors is referred to by CME's counsel in the reasoning pertaining to the Media Counsel's role and pertaining to causation and the proximity arguments. CME talked about causation between the Media Council's actions and omissions and the injury incurred, and stated that liability existed for states even in conjunction with concurrent causation. CME's counsel stated, *inter alia*, that a state could be liable notwithstanding the existence of other intervening events in the chain of causation, but no reference was made that someone had committed a "tort", neither Železný nor the Media Council, nor that one or more was a joint tortfeasor and that this principle was to be applied. CME claimed that there was direct causation between the Media Council's acts in 1996 and 1999 and the injury incurred through the termination of the service agreement, and that the termination of the service agreement was an intervening act which did not sever the causal link. CME did not assert that two persons acted towards a common end, nor did it invoke the necessary requisites for the application of joint tortfeasors. Counsel for the Republic referred to the principles of causation and foreseeability when he stated that it was a correct summary of the principles rendered by CME, not the principle of joint tortfeasors.

The Stockholm Tribunal found that the 1996 events gave rise to an injury due to the fact that the investment's safety net was weakened and that the value of the in-kind property – CET 21's contribution of the exclusive use of the license – was undermined. The Tribunal did not find coordination between Železný and the Media Council at this time but, rather, to the contrary, at this time, Železný worked against

the Media Council. It does not appear in the award that, in 1996, the Media Council could foresee what would occur in 1999 when the service agreement was terminated. In paragraph 585, the Tribunal stated that the Media Council, in 1996, could foresee that the safety net would be ruined, but not that the Media Council could foresee what would subsequently transpire. The Tribunal did not find the Media Council's actions and omissions in 1999 caused any injury directly, but that there was coordination between the Media Council and Železný in order to undermine the exclusivity and that the Media Council supported Železný. The Tribunal also found that it was Železný's termination of the service agreement which eliminated the exclusivity, which led to the injury in the form of a decline in revenues and that the Media Council could foresee this event in 1999. According to the Stockholm Tribunal, the actions in 1996 were the decisive attack on CME's investment since the Tribunal found that the Media Council compelled amendments to the MOA.

In order for the Stockholm Tribunal to be able to impute liability to the Republic notwithstanding that it was Železný who was the direct cause of the injury through termination of the service agreement, the Tribunal was compelled to assume that, in 1996, the Media Council could foresee Železný's actions in 1999. The Tribunal could not do so since Železný worked against the Media Council at this time. Nor could the Tribunal find that it would be the most proximate cause of the injury. The Tribunal could not, by means of a normal tort reasoning, find that the Media Council and the Republic could be liable for the injury. However, the Tribunal was compelled to find a link between the injuries caused by the termination of the service agreement and the Council's actions and omissions, and therefore introduced the concept of joint tortfeasors. The Media Council was found by the Tribunal to be a "joint tortfeasor", together with Železný, who the Tribunal, without such having been invoked by CME, had found to be a "tortfeasor" in causing the injury incurred by CME's investment. Their actions were coordinated. The concept and reasoning therefor were incorporated in paragraphs 580-585 only in the Third Draft of the award.

In paragraph 580, the Tribunal stated that liability could be imputed to states notwithstanding concurrent causes. In addition, the Tribunal stated in paragraph 581 that international law contains the principle of joint tortfeasors. In paragraph 582, the Tribunal stated that it was not only Železný who was a "tortfeasor" but also the Media Council, and subsequently that the principle of joint tortfeasors applies in this case, which was fundamental to the Tribunal's assessment. Accordingly, the Tribunal stated that there were two tortfeasors and that the principle of joint tortfeasors applied in this case. In this way, the Media Council could be held liable for the injury which occurred as a consequence of Železný's actions. In paragraph 583, the Tribunal reiterated that liability could be imputed notwithstanding other events in the chain of causation which were not related to the state. In paragraph 584, the Tribunal stated the terms which are generally used in an analysis of causation giving rise to liability, which is more in the way of a general analysis. In paragraph 585, the Tribunal stated that the Media Council, in 1996, did not foresee what would happen in 1999 but, rather, that the Media Council could foresee that the safety net would be removed and that the Media Council supported Železný in 1999, i.e. that they were joint tortfeasors.

There was nothing against which the Republic could object during the Stockholm proceedings, since the fact that the Stockholm Tribunal had applied the principle of joint tortfeasors became known only after the Stockholm award was issued. Nor had CME invoked the principle of joint tortfeasors or claimed that anyone had committed a "tort". As noted above, joint tortfeasors is a principle regarding liability for damages, not regarding causation, therefore the Republic did not have any reason to object to the principle.

Without the conclusion that there existed joint tortfeasors, the Republic could not have been held liable for the injury incurred by CME's investment and the outcome of the case would have been different.

Excess of mandate – decision regarding determination of damages

At CME's request, the parties agreed to bifurcate the question of liability and the determination of damages into two sub-proceedings. In accordance therewith, the Stockholm Tribunal was instructed not to decide upon any damages prior to the determination of liability in a partial award. In the first proceedings, the parties referred to the Stockholm Tribunal to decide whether there was a breach of the Treaty. The Stockholm Tribunal went further in its award and took a decision regarding which injuries would be compensated and rendered, *inter alia*, assessments regarding joint tortfeasors.

The limits on what the Stockholm Tribunal could decide upon were determined by Article 8 of the Treaty and Agreed Minutes. The parties further limited the Stockholm Tribunal's mandate by their presentations during the proceedings, *inter alia,* through the Notice of Arbitration, the Statement of Claim, and instructions and submissions to the Stockholm Tribunal.

In CME's Notice of Arbitration and Statement of Claim, CME argued all matters in the Stockholm proceedings and not only the first part which was addressed in the Stockholm award. Originally, CME's claims extended to *restitutio in integrum* (restitution) alternatively/and damages. In the pleadings pertaining to the entire proceeding, reference was made to fair market value. What was presented in those documents thus had significance to the mandate of the Stockholm Tribunal as to the entire Stockholm proceedings, but was not insignificant to the scope of the Stockholm Tribunal's mandate in the first phase of the proceedings.

Following the parties' agreement to bifurcate liability and determination of damages, CME did not argue in its Reply-Memorial of December 22, 2000 that the Republic would pay damages equal to the fair market value of the investment. CME only reiterated its basic position that, in the event the Stockholm Tribunal was of the opinion that the Treaty had been violated, the Republic would be obligated to pay restitution or damages. The Stockholm Tribunal would, in the first phase of the proceedings, only declare whether or not a violation of the Treaty had occurred.

In his opening statement in the Stockholm proceedings, CME's counsel stated orally that the restitution claim had been withdrawn. Accordingly, only the issue of whether the Republic had breached the Treaty remained. In addition, CME's counsel asserted a claim which was in accordance with the agreement of the parties, namely that the Stockholm Tribunal was to establish that the Republic had violated the Treaty and that CME had a right to damages in an amount which would be determined in later proceedings. CME's counsel did not refer to fair market value in the claim.

During the last day of the final hearing, the parties submitted the specifics of their claims in writing and reference was made in CME's claim, for the first time since the bifurcation agreement to compensation equal to the fair market value of the investment. This claim did not accord with the agreement between the parties and the Stockholm Tribunal. At this time, the parties had, ever since the agreement was reached, been in agreement that the principles governing the determination of damages would be addressed in the second phase of the proceedings, and this question had not been addressed during the proceedings. When the Stockholm Tribunal requested the claims in writing, the Tribunal probably wanted CME to clarify its position due to the withdrawal of the restitution claim.

In its Post-Hearing Brief, which was submitted to the Tribunal on May 25, 2001, CME stated that it was seeking "an award declaring that Respondent has breached the Treaty and that Claimant is entitled to damages to be determined at a second phase of this proceeding, plus costs". In its summary, CME accordingly did not refer to fair market value. CME stated, quite simply, that it was seeking a declaratory award according to which the Republic had violated the Treaty and that CME was entitled to damages. Questions concerning the grounds, causality, and other questions of this kind pertaining to fair market value were not addressed. This pleading was in compliance with the bifurcation agreement.

It is apparent from the award that questions concerning the determination of damages would be addressed at the second phase of the proceeding, e.g. in paragraphs 415 and 525. The question concerning the calculation of damages, i.e. that the Republic would compensate CME for fair market value, was incorporated only in the Third Draft; paragraphs 615-618 of the final award. It was in this draft that a reference to joint tortfeasors was incorporated, which was part of the determination of what liability could be imputed to the Republic. The Stockholm Tribunal established that the Republic would be liable for the entire injury. The Stockholm Tribunal concluded that the Republic would compensate CME by paying "a sum corresponding to the value which a restitution in kind would bear" which was "the fair market value" of CME's investment. By incorporating reasoning in the award pertaining to the principles for the determination of the damages, the Stockholm Tribunal addressed important questions which had been reserved for the second phase of the proceedings, e.g. with respect to the issue of whether more than one party was liable for damages and that this could affect the amount to be paid.

No argumentation was presented during the proceedings regarding the issues of the principles for the determination of damages, e.g. concerning contributory fault and adjustment or whether "genuine value" in the Treaty was the same as "fair market value". Neither CME nor the Republic invoked any principles for the determination of the damages during the proceedings.

The term, fair market value, exists in the American Investment Treaty but not in the Treaty. It is probable that CME obtained the term from this source. Nor is fair market value equivalent to "just compensation", which is what the Treaty prescribes.

During the second phase, CME moved for compensation in an amount equal to the fair market value of the investment. The Republic introduced in the proceedings, *inter alia*, arguments pertaining to the questions regarding which standard would be used for the calculation of damages which, among other things, raised issues that should have been addressed when determining how the damages were to be

calculated. The Republic argued, *inter alia*, the manner in which CME's injury would be determined and the manner in which the valuation should be carried out. During the proceedings, CME claimed that the Republic attempted to incorporate questions which did not pertain to the determination of fair market value in the dispute but which, rather, related to other ways of calculating the damages. The fact that the Tribunal decided on compensation equal to fair market value meant, according to CME, that they eliminated a number of objections which the Republic could have made.

Determining damages equal to the fair market value of the investment is in no way natural but, rather, there are a number of other ways of calculating compensation.

Prior to the Stockholm award, the Republic could not know that the Stockholm Tribunal reached its decision in such a manner.

In the event the Court of Appeal only sets aside the Stockholm award in this respect, according to the Republic, paragraph 624 (2) is to be worded as follows: "The Claimant is entitled to damages, if any, to be determined at a second phase of this arbitration".

The proposed wording is in accord with CME's Post-Hearing Brief, which ultimately determined CME's claim in the first phase of the Stockholm proceedings.

Excess of mandate – previous investors and prior breaches

The original investment in the Republic was made by the German company, CEDC, in 1993. In 1996, 93.2 per cent of the shares in ČNTS were owned by CME Media. In April 29, 1997, CME was formed. In May 21, 1997, CME made its investment in the Republic through the acquisition of CME Media's interests in ČNTS.

The Treaty affords protection when the investment is made and does not protect an investment made by an investor against events which occurred prior to the investment. As set forth in the Agreed Minutes and the Treaty, it is possible to assign rights according to the Treaty in two different ways. There are no international law rules which address the relevant questions in the case pertaining to the assignment of rights in accordance with bilateral Investment Treaties. CME Media did not assign to CME any rights in accordance with the Treaty.

The transfer of the shares in ČNTS between CME Media and CME was governed by Czech law. According to the transfer agreement, CME acquired shares in ČNTS without reservation. CME acquired the company with the alleged reduced value as a consequence of the 1996 MOA.

In its Statement of Defence in the Stockholm proceedings, the Republic claimed that CME was compelled to show that CME was an investor according to the Treaty. This was a jurisdictional objection pursuant to Article 21.3 of the UNCITRAL rules. Thereupon the Republic made a reservation that it wanted to be able to develop the issue regarding CME's right to bring a claim if the company could prove that it was an investor according to the Treaty.

CME presented evidence regarding the transfer, to which the Republic responded by saying that CME presented evidence that the company was an investor but the Republic also made a reservation that CME, in any case, did not have a right to bring the claim pursuant to the Treaty.

During the first day of the final hearing, the Republic asserted that CME did not have any right to bring a claim based on amendments to the 1996 MOA, and that CME had not acquired a right to any claims which its predecessor could have brought against the Republic as a consequence of its activities in the Media Council. Such a claim fell outside the mandate of the Stockholm Tribunal since no investor could base a claim on a violation asserted to have taken place before the investment was made. In the

transfer agreement, CME had expressly accepted the wording of the MOA following the amendments in 1996 when CME made its investment in 1997. The asserted objection was maintained through the final hearing and in subsequent documents, and it is this objection that is asserted by the Republic in this case. The Republic claimed that the arbitration clause in Article 8 of the Treaty did not cover claims based on violations of the Treaty before CME made its investment.

The Republic did not abstain from making the aforementioned objection. It is also an absolute objection which cannot be waived since the Treaty does not cover such a claim. The Treaty was entered into between two sovereign states and there was no possibility for the parties in the Stockholm proceedings to expand the scope of the agreement through a waiver of the asserted type and thereby empower the Stockholm Tribunal to issue decisions regarding previous violations in the manner in which the Tribunal did; this is irrespective of whether the Tribunal has examined the issue as a substantive issue or not. In order for the Stockholm Tribunal to have been able to examine the issue, it would have been necessary that the rights according to the Treaty had been transferred to CME in the manner prescribed in the Agreed Minutes.

CME

Exclusion of an arbitrator from the deliberations

Hándl participated in both the oral hearing in Stockholm and the deliberations in Düsseldorf, received and reviewed all drafts of the Stockholm award before the award was issued, informed the other arbitrators of his views before the award was issued, and wrote a dissenting opinion comprising approximately 11,000 words. Hándl had the same possibilities as the other arbitrators to present and discuss his opinions. Hándl's possibilities to participate were the same since he had access to the same documentation and had the same time at his disposal as the other arbitrators. Between the conclusion of the final hearing and the date of issuance of the award, Hándl had ample time to review the draft award and comment thereon, which he also did.

On May 14, 2001, Kühn distributed a list of questions which comprised four pages of single-spaced text and was aimed at facilitating the deliberations. The list of questions contained 37 questions divided under six sub-headings. The list of questions covered all important issues in the case, namely applicable law, the jurisdiction of the Stockholm Tribunal, the status of the investment in accordance with the Treaty, whether CME's legally protected status had been violated, the extent to which CME was caused any loss, and the significance of the termination in 1999 of the service agreement between ČNTS and CET 21. On May 15, 2001, Schwebel sent a 13-page long memorandum to both Kühn and Hándl. On May 23, 2001, after having had access to Schwebel's comments for over a week, Hándl sent Kühn a 15-page long memorandum containing replies to Kühn's questions in which he described in detail his position on many issues. It is evident from the reply that Hándl and Schwebel had different opinions on many issues but that they presented their opinions on all questions and neither of them was excluded from submitting a reply.

On May 24, Schwebel sent both Kühn and Hándl his analysis of the arguments raised by the Republic in its final pleading with respect to international law. At the time, Schwebel had not received Hándl's memorandum and expressed his disquiet with respect thereto.

Prior to the meeting in Düsseldorf and after having received Hándl's memorandum, Schwebel wrote a comment to Hándl's argument as to why CME had not made any investment which was protected under the Treaty. Kühn made a revised presentation of the main issues which were to be addressed at the meeting in Düsseldorf which, through one of a few changes, took specifically into consideration Hándl's questions concerning administrative law in the Republic and compiled a detailed written comment to Hándl's memorandum of May 23, 2001, which he attached to the memorandum.

The entire Tribunal was present at the meeting in Düsseldorf and submitted comments regarding relevant issues in the case. There was a lively exchange of views during the

deliberations. In his notes from memory from the meeting, Hándl listed 12 points which the arbitrators had discussed. Hándl presented his comments but they were not accepted by the other arbitrators. Hándl was of one opinion and Schwebel and Kühn of another. Hándl's comments were not rejected by Kühn and Schwebel without a discussion or detailed explanation and the majority of the Stockholm Tribunal had not decided to disregard the opinions Hándl might have. Hándl made it clear at the end of the meeting that he did not wish to receive any incomplete drafts of the Arbitral award but, rather, wished to wait until a complete draft was available.

In a letter dated June 6, 2001, which was also sent to Schwebel and Hándl, Kühn notified the parties that the Stockholm Tribunal had held deliberations in Düsseldorf on June 1 and 2 and as to the time expended so far by the arbitrators. Hándl raised no objections to the description of the time he had expended.

Following the deliberations, on June 7, 2001, Schwebel sent by fax a brief explanation as to why he believed that the parties had not debated whether CME might be deemed to be an investor in accordance with the Treaty, notwithstanding that a German company had made the initial investment. The issue had been addressed by Hándl in his reply to Kühn's list of questions and by Schwebel in the memorandum he distributed during the deliberations. From the conclusion of Schwebel's fax, it is evident that in May 2001 Kühn had not already assigned Schwebel the task of studying the issue of assignments of rights in connection with transfers of shares but, rather, that this request was made at the deliberations in Düsseldorf. Hándl raised no objection whatsoever to Schwebel's study in this part of his memorandum of June 20, 2001. Hándl further stated in his memorandum of June 20 that he had postponed his vacation in order to be back in Prague on July 25, 2001.

On July 30, 2001, Hándl received from Kühn an essentially complete draft of the arbitration award. This First Draft was 175 pages long, of which 97 pages contained a neutral and non-controversial description of the conduct of the Stockholm proceedings and the parties' claims and arguments. The remaining pages contained

the Stockholm Tribunal's award and the reasons for the award. The draft contained in all essential respects what would become the final award. In the award, only the words "in 1999" were incorporated in the second point of paragraph 599. The First Draft contained all of the decisions that the Tribunal was required to make. In the reasons for the award, the destruction of CME's investment was addressed point by point, as was the fact that the Republic had violated the Treaty.

Schwebel sent his relatively modest comments to Kühn on August 2, 2001. The faxed letter was sent to both Kühn and Hándl but comments were sent only to Kühn. At this point in time, Kühn and Schwebel were in agreement regarding the award and the reasons for the award.

Kühn incorporated Schwebel's amendments and notified Hándl thereof. From Hándl's fax of August 6, one can also read that Hándl did not wish to receive the intermediate draft in which the amendments had been incorporated. Hándl wished to have almost one month at his disposal in order to submit comments to the First Draft. Hándl stated that he wanted the time not merely to suggest amendments to the award but also to provide critical comments. Kühn informed Hándl regarding his contacts with Schwebel with respect to the proposed corrections described by Schwebel in his fax to Kühn of August 2, 2001 and Kühn gave Hándl the possibility to review them and comment on them. This aforesaid is also evident from Hándl's reply of August 6, 2001 to the fax from Kühn.

On August 7, 2001, Kühn wrote that he had amended the award in certain places and stated that amendments which had been inserted on the advice of Schwebel had not been marked specifically and that Hándl could review Schwebel' handwritten amendments. Kühn also wished Hándl to review the award and provide his comments as soon as possible. Kühn was of the opinion that they had exchanged views at the meeting in Düsseldorf and that the opinion of the majority on key issues was clear after the meeting. Kühn was disturbed by the time that Hándl wished to have at his disposal and the timetable. Kühn did not think it appropriate that Hándl's dissenting

opinions should be incorporated in the award. On August 9, 2001, Hándl wrote to Kühn that he indeed wished to have an opportunity to once again fully present his views in order to attempt to persuade the other arbitrators to change their opinions, but that his views which differed from those of the majority should not constitute a part of the award.

The Second Draft was distributed eight days after the First Draft. Seven paragraphs, 598-604, which related to the expropriation claim, had been added to the draft. The paragraphs addressed one of the five obligations that CME alleged the Republic had breached and the issue whether the Media Council's actions could be deemed to constitute expropriation. No new independent arguments were added but, rather, the supplement was a development of analyses made previously. In addition, a number of linguistic adjustments were made in light of Schwebel's corrections. The linguistic changes were not marked. The actual conclusions in the award were not changed.

Hándl wrote a 23-page long criticism of the award which he sent to his fellow arbitrators on August 16, 2001, 18 days after having received the First Draft. The issues addressed by Hándl in his document had largely already been taken up during the deliberations, as is evident from Hándl's reply to Kühn's list of questions and his notes from memory. The issues addressed by Hándl included, *inter alia*, Železný's roll, the 1993 and 1996 MOAs, and the administrative law proceedings in 1996. The issues which he had not previously addressed included, *inter alia*, CEDC's transfer of shares in ČNTS. Kühn awaited these comments notwithstanding his wish that the award be issued promptly.

In a fax dated August 29, 2001, Kühn described point by point his views regarding Hándl's letter of August 16. Kühn's reply contained a description as to why he did not share Hándl's opinions and as to which parts of Hándl's proposed changes he accepted. Schwebel's fax to Kühn of August 29, 2001, which Kühn forwarded to Hándl on August 30, 2001, clarified Schwebel's position regarding Hándl's comments and the fact that Schwebel regarded Kühn's reply as excellent.

The Third Draft was distributed simultaneously with Kühn's reply to Hándl's criticism. The draft contained changes which were probably due to Kühn's desire to demonstrate and clarify to Hándl why the latter was in error. The amendments which were inserted addressed Źelezný's role and the fact that his behaviour was included in the causal chain, but that the behaviour did not affect the Republic's liability since the injury was foreseeable based on the Media Council's actions and omissions. From a memorandum prepared by Hándl dated November 5, 2001 it is evident that Hándl believed that the new paragraphs in the Third Draft came about as a result of his comments. The addition of paragraphs 580-583, which in effect were six paragraphs, occurred in the part of the award that addressed the issue whether the Media Council's actions had caused any injury. Hándl had previously argued that it was Źelezný's actions - and not the Media Council's - that were the cause of the injury, as is evident from Hándl's reply to Kühn's list of questions. In the Third Draft, in addition to the aforementioned supplement, sections were added concerning “reparation”, and amendments were made to the section concerning costs. No amendments were made to the conclusions in the award. Hándl was not excluded from the deliberations insofar as certain amendments were incorporated in the Third Draft.

After August 29, 2001, only entirely non-controversial amendments were incorporated into the award. These consisted of linguistic amendments and a correction of a decision regarding payment of costs as a consequence of the Republic having made a payment which the Republic was ordered to make. On August 31, 2001, the Fourth Draft was sent to Hándl, which was largely identical to the Third Draft. On September 3, 2001, Hándl had received the Third and Fourth Drafts and had, on this occasion, no objection to signing a separate signature page. On September 4, Kühn notified the arbitrators that he would not use the signature page prior to being requested to do so by the fellow arbitrators. On September 4, Hándl received 33 pages containing supplements which had been prepared by Schwebel and which contained corrections of spelling errors and similar corrections. These did not result in any amendments to the award other than certain general linguistic changes

which were incorporated into the Fifth Draft of September 5. Hándl himself did not believe that the supplements were of any significance.

On September 5, 2001 Hándl announced that he would not sign the separate signature page and requested the definitive and appended versions of the award and averred several times that he would sign the award. At this point it can be noted that Hándl did not wish the Stockholm award to be dated before the London award, which by that time had been made public.

Hándl did not sign the arbitration award but, rather, forwarded the copies to Schwebel without any signature. Hándl appended instead a dissenting opinion. Hándl's dissenting opinion contained 12 sections and his arguments accorded largely with what he had stated during the deliberations. Hándl expressed his opinion regarding the majority's assessment of joint tortfeasors, whereupon he stated that the majority were not correct on this issue and that, in his opinion, the Republic was neither a tortfeasor nor a joint tortfeasor. Hándl also expressed his opinion regarding determination of the damages. The dissenting opinion also contained errors as early as the introductory section, in which Hándl stated that Kühn and Schwebel wished to blame the Republic. Hándl also stated that he had presented the argument in the dissenting opinion to the other arbitrators and, primarily, to the chairman.

After having resigned as arbitrator, Hándl prepared and submitted a document containing arguments as to the manner in which the award might be challenged, and handed over to the Republic's counsel all documents to which he had access in the Stockholm proceedings.

CME was unaware that Hándl had been provided with a copy of the ILC commentary. The document was publicly available and Hándl did not request Kühn or Schwebel to provide him with it. Hándl never demanded further meetings for deliberations or telephone conferences, nor did he raise any new issues for discussion.

Händl attempted to delay the Stockholm proceedings and thereby made it possible that the London award might be issued before the Stockholm award, which conclusion the Stockholm Tribunal majority also reached when it held that Händl had deliberately delayed the issuing of the Stockholm award.

Failure to take into consideration applicable law

The fundamental issue in dispute which the Stockholm Tribunal was obliged to adjudicate was whether the Media Council's actions or omissions, in relation to ČNTS, entailed that the Republic had violated the provisions of the Treaty. The Stockholm Tribunal stated also in paragraph 590 of the award that its task was to determine whether the Republic had violated the Treaty. The Stockholm Tribunal carefully considered applicable law and did not act as *amaible compositeur*. The Stockholm award is based on sources of law that are relevant for the assessment of a claim which is based on a violation of the Treaty, i.e. the investment protection provisions in the Treaty, and international law. In its assessment on the merits of the dispute, the Stockholm Tribunal took into consideration other issues with respect to legal and factual circumstances, to the extent such were relevant.

The Republic devoted little attention to Czech law during the Stockholm proceedings. The relevant Czech law related to the Media Act, the Media Council, and the Czech Administrative Procedure Act. In the Stockholm proceedings, the Republic presented no evidence regarding Czech law corresponding to that which has been presented in the instant case and referred neither to the Czech Commercial Code nor the Civil Code. Of the legal experts retained by the Republic, it was not a Czech lawyer but rather an English professor of international law, Professor Lowe, who solely expressed opinions regarding international law. However, the Republic's team of lawyers in the Stockholm proceedings also included Czech lawyers.

At the time they answered Kühn's list of questions, Schwebel and Händl held differing views regarding the purport of the choice of law clause in the Treaty, but both considered what it entailed and deemed themselves as bound by it. Händl

believed, *inter alia*, that Czech law should take precedence. At the time of the Düsseldorf meeting, Kühn also regarded himself as bound by the choice of law clause but did not share Hándl's opinion that the clause meant that precedence be accorded to Czech law. The issue of applicable law was addressed during the deliberations of the arbitrators and all of the arbitrators regarded themselves as bound by the choice of law clause.

The Stockholm award is based on an analysis of the Treaty and applicable law. The following can be cited as examples of instances in which the Stockholm Tribunal applied international law and the Treaty.

- In the award, the Stockholm Tribunal carefully analysed the concepts that governed CME's right to demand arbitration, e.g. "investment dispute" and "investors".

- The Stockholm Tribunal investigated whether the Czech authorities had approved the legality of the original investment. The Stockholm Tribunal verified whether the split structure was legal in order to seek whether prior investors could have relied on the actual approval, which was an assessment that the Stockholm Tribunal conducted on the basis of international law.

- CME argued in the arbitration proceedings, *inter alia*, that a deprivation/ expropriation had taken place, which was a claim based on the provisions of the Treaty. CME claimed that there had been coercion and that the company had been deprived of its investment. In its assessment whether expropriation existed, the Stockholm Tribunal found that CME and its predecessor had been able to rely on the Media Council's approval of the split structure. The Tribunal further described when a public authority's behaviour might constitute deprivation and expropriation in accordance with international law. The Tribunal assessed that the Media Council's behaviour could be attributable to normal administrative law measures. In addition, the Tribunal described when an expropriation might pertain and that such might be the case even in the event of failure to act. The Tribunal subsequently referred to

sources of international law with the regard to expropriation, such as various cases, before the Tribunal concluded that the Media Council's actions in 1996 and the actions and omissions in 1999 were to be deemed expropriation under the Treaty.

- In paragraphs 575-585 of the award, the Stockholm Tribunal carefully examined whether a breach of the Treaty had occasioned any injury. In this section, the Tribunal also addressed an objection raised by the Republic with respect to causality.

- In paragraphs 615-618, the Stockholm Tribunal addressed the principle governing the determination of damages and, also in this section, the Tribunal referred to sources of international law.

None of the examples cited by the Republic provide support for the view that the Stockholm Tribunal failed to apply governing law, entailing that the Tribunal acted as *amiable compositeur*. The Stockholm Tribunal reached its decisions based on law and applied the sources of law stated in the choice of law clause to the extent such was necessary. The application made by the Tribunal was also correct.

The Stockholm Tribunal was not obliged to take into consideration Czech law to the extent claimed by the Republic, as is evident, *inter alia*, from the following examples.

In both the challenge and the Stockholm proceedings the Republic has addressed the Media Council's role. During the Stockholm proceedings, however, the Media Council's role was not in dispute and, accordingly, there was nothing for the Stockholm Tribunal to decide upon in this regard. Nor was it disputed that it was not possible to assign the license pursuant to the Media Act and, in addition, the parties were agreed that CET 21's contribution of the exclusive use of the license to ČNTS did not entail an assignment of the license. It was not disputed that CET 21 was the sole holder of the license and only CET 21 could assert rights as a consequence thereof. In the Stockholm proceedings, CME did not argue that it held any rights as licensee. In addition, the parties were agreed that CEDC was not a “direct

participant" in the license application and this matter was not a matter for adjudication in the Stockholm proceedings. CME did not invoke any rights as direct participant in accordance with the Media Act but, rather, argued that it was an investor under the Treaty and had been able to rely on an approval from the Czech authorities. The parties were agreed that the purport of the 1993 and 1996 MOAs was subject to Czech law.

In paragraph 467, the Stockholm Tribunal stated that "The Tribunal is not to decide on the Czech Administrative Law aspect of this question", which does not mean that the Stockholm Tribunal chose to disregard Czech law. The Stockholm Tribunal found that Dr. Barta's statement that the Media Council was not entitled to decide upon approval of the split structure did not address the international law aspect of the issue and noted that Dr. Barta's opinion was not in accordance with the Republic's obligations under the Treaty. The issue of the Media Council's approval having violated Czech Administrative Law was not relevant under international law and CME could not have based any claim on the Media Council having violated Czech Administrative Law. What was relevant was that there existed an approval from the Media Council in 1993 and that the approval could not be changed without the investor receiving compensation. The Republic thus was not entitled to weaken the structure which the Republic had previously approved. The Stockholm Tribunal thereupon conducted an assessment whether Czech law was relevant to the issue of whether the Treaty had been breached.

In paragraph 590, the Stockholm Tribunal stated that "It is not the task of the Arbitral Tribunal to judge whether these actions are in compliance with the Czech law and regulations", which does not provide any support for the view that the Stockholm Tribunal failed to apply law. The statement was made in a section in which the Stockholm Tribunal summarized its assessment whether the Republic had breached the Treaty. The issue which was relevant for the Stockholm Tribunal was whether the Media Council's actions were in accordance with the Treaty or whether they

constituted a violation thereof, and the Stockholm Tribunal was of the opinion that the issue should be determined on the basis of the provisions of the Treaty.

The Stockholm Tribunal's statement in paragraph 476 that "It is not the Tribunal's role to pass a decision upon the legal protection granted to a foreign investor for its investment under the Czech law and civil court system" does not mean that the Stockholm Tribunal failed to apply law. The statement was made in a part of the award in which the Stockholm Tribunal addressed the issue of the weakening of the safety net for the investment. In the Stockholm proceedings, the Republic argued that the amendment to the MOA in 1996 was offset by the service agreement and the fact that Article 10.8, which was incorporated in the 1996 MOA, maintained the exclusivity and that the safety net had not been weakened. The Stockholm Tribunal found that the safety net in accordance with the 1996 MOA and the service agreement were weaker than the safety net enjoyed under the 1993 MOA. The outcome of the dispute between ČNTS and CET 21 regarding termination of the service agreement in the Czech courts and the issue of whether CET 21 was entitled to terminate the service agreement was, in the opinion of the Stockholm Tribunal, irrelevant to the question of whether the protection had been weakened in 1996 compared with 1993. The Stockholm Tribunal thereafter made its determination in paragraph 476.

The Stockholm Tribunal did not conduct an assessment of the Czech legal system and its courts since the issue was not relevant for the assessment by the Stockholm Tribunal. It is evident from paragraph 525 of the award that the Stockholm Tribunal drew a distinction between whether ČNTS and could be successful in civil law disputes against CET 21 and whether CMT was entitled to damages based on the Republic's breach of the Treaty, and stated that in the event ČNTS were to obtain damages this might have significance for the issue of the amount of the damages, but not the issue of liability.

In the Stockholm proceedings, the Republic did not invoke any Czech rules of law which were alleged to be of significance for the comparison between the protection in

accordance with the 1993 and 1996 MOAs. The Republic's position during the Stockholm proceedings was, however, that there was a difference between the 1993 and 1996 MOAs. The Republic argued that CME was obliged to prove that the protection under the 1996 MOA was weaker than under the 1993 MOA, and that CME had lost something. In order to prove this, CME was forced to go to court and pursue litigation in the matter. The Republic argued that it was not possible in advance to determine whether the protection had become weaker and it was merely a matter of speculation that such was the case. The Republic did not present a claim that CME should exhaust local legal remedies by first pursuing a claim in the Czech courts.

The statement in paragraph 380 that "UNCITRAL Rules must supersede national law, if deviating" relates to a procedural issue and addresses issues of objections to jurisdiction. The statement is entirely irrelevant to the issue whether Czech law was applied. It was not until the final hearings that the Republic raised an objection that CME was not able to raise claims derived from the period prior to 1997. The Republic declared that this did not constitute an objection to jurisdiction but, rather, was a substantive objection. The Stockholm Tribunal considered whether the Tribunal was obligated, of its own motion, to decide the issue of jurisdiction, i.e. without taking into consideration that the Republic expressly refrained from raising an objection to jurisdiction. In this context, the Stockholm Tribunal took into consideration that the provision in the UNCITRAL Rules is based on a party being able, with binding effect, to waive an objection to jurisdiction, and reached the conclusion that the Tribunal should not, of its own motion, try the objection as constituting an objection to jurisdiction.

Nor does the statement in paragraph 469 that "The Tribunal need not decide whether the contribution of the "use of the Licence" in 1993 was legally valid under Czech law" mean that the Stockholm Tribunal disregarded Czech law. CME and Republic were agreed in the Stockholm proceedings that the contribution in question was lawful. The Stockholm Tribunal was thus obliged to assume that such was the case

and, for procedural reasons, it followed that this matter need not be tried. The Republic's position was that the structure in question was valid, while the realization thereof, on the other hand, was unlawful. In holding that the original investment was legally well founded, the Tribunal took into account the 1993 MOA and the fact that the original structure was approved by Czech authorities. The Stockholm Tribunal took into account the Media Act and came to the conclusion that it did not contain any restrictions as to the identity of the party responsible for the operation of TV stations. The Stockholm Tribunal took into consideration Czech law when the Tribunal investigated whether the approval might have created reasonable expectations amongst at CME in accordance with Czech law, which was the relevant issue under international law. In paragraph 609, the Stockholm Tribunal stated what was to be regarded as expropriation under the Treaty. It was that the Media Council deprived CME of the original capital contribution – the exclusive use of the license. The original approval, which created reasonable expectations by the investor, and the consequent revocation of the approval, were a breach of international law.

With respect to certain specific issues, where the Republic has argued that the Stockholm Tribunal did not apply Czech law or any other law and that the outcome of the case would have been different had governing law been applied, CME has asserted the following.

The legal basis for the investment

The manner in which the Stockholm Tribunal came to the conclusion that the split structure constituted a legally well-founded basis for CEDC's investment is evident from paragraphs 453-456 of the award. Among other things, the Media Council's own written statements and letters constituted a basis for the conclusion that the structure was compatible with Czech law and, in light of all these circumstances, CME and its representative were entitled to rely on the approval from the Media Council.

Changes in 1996 and 1997 of the contractual relationship with CET 21

The Stockholm Tribunal took into consideration Czech law when the Tribunal analyzed the 1996 changes in the MOA and service agreement. The Stockholm Tribunal noted that the 1993 contribution entailed a stronger protection for the investment than the service agreement, which was justified by the fact that the contribution could not be terminated unilaterally. This was entirely in accordance with Czech law. In the Stockholm proceedings, Dr. Radvan testified, *inter alia*, that an owner could not retract a unilateral contribution. The Republic adduced no evidence in rebuttal of Dr. Radvan's testimony, notwithstanding that the Stockholm Tribunal proposed during the proceedings that this might take place in writing. In its subsequent final submissions, CME commented on the evidence in question, notwithstanding that the Republic made no claims regarding the issue in its final submissions. Dr. Radvan also said that the service agreement might be terminated for due cause. CET 21 would have borne the burden of proof with regard to a retraction of the contribution, while CMPS had the burden of proof in the event of termination of the service agreement. The Republic concurred, during the final hearing, with what CME had stated on the issue and the Republic's counsel stated that CME had correctly emphasized the difference between the protection under the 1993 MOA and the 1996 MOA. However, he stated the reasons why, in the Republic opinion, this issue was not relevant in the Stockholm proceedings. Following the final hearing, the parties were able to submit a pleading in order to comment on matters that had arisen in the course of the hearing. In its Written Closing Submission, the Republic did not raise any arguments which rebutted what Dr. Radvan had stated in the hearing. In its Post-Hearing Brief, CME emphasized that there was a difference between the contribution of the exclusive use of the license and the contribution of know-how to the license, and referred to Dr. Radvan's testimony and the legal rules cited to by him. The Stockholm Tribunal referred to Dr. Radvan's testimony in paragraph 509 of the award.

The Stockholm Tribunal did not apply the subsequent events as the basis for its assessment of the issue but noted that subsequent developments were a consequence of the weakened protection. The Stockholm Tribunal was of the opinion that the risk of termination of the service agreement had materialized and was demonstrated by subsequent events.

Czech law contains no legal provisions regarding the weakening of the legal protection other than those presented in the Stockholm proceedings. The Republic did not invoke any rule of law which might be applicable, nor did it do so in these proceedings. The Stockholm Tribunal's statement that the contribution of know-how was worthless and meaningless was part of a comparison which the Tribunal made between the 1993 and 1996 MOAs. When the Stockholm Tribunal interpreted the MOA, the Tribunal came to the conclusion that the replacement of "use of the license" with "use of know-how of the license" constituted a weakening. Nor is it possible to reach any conclusion other than that reached by the Stockholm Tribunal in its comparison of the 1993 and 1996 MOAs.

Initiation of administrative law proceedings and coercion

The Stockholm Tribunal did not fail to take into consideration Czech law when it came to the conclusion that the administrative law proceedings were commenced for the purpose of forcing CET 21 and ČNTS to get rid of the split structure. The Republic's position in the Stockholm proceedings was that the Media Council commenced administrative law proceedings since the very implementation of the structure was illegal, not the legal structure *per se*. The Stockholm Tribunal based its conclusion as to the purpose of the proceedings, *inter alia*, on the fact that the Media Council, under questionable circumstances, obtained a legal opinion which attacked the split structure and not the actual implementation, on the fact that the Media Council rejected a proposal whereby CET 21 consented to all of the Media Council's demands apart from the modification to the ČNTS structure, and that, during the administrative law proceedings, the Media Council expressly insisted on a

modification of the split structure and not the actual implementation. The conclusion was thus based on the evidence in the case. The Stockholm Tribunal did not need to decide whether the Media Council's behavior and commencement of the administrative law proceedings were in accordance with Czech Law. Nor did the Stockholm Tribunal believe that it needed to determine whether the administrative law proceedings were in accordance with Czech law, since this was not relevant for a determination of the issue whether the Republic had violated the Treaty.

In the Stockholm proceedings, CME claimed, *inter alia*, that the Republic had violated Article 5 of the Treaty, which addresses expropriation, through the Republic having forced through a modification of the 1993 MOA. The Republic argued in the proceedings that there could be no question of expropriation since CME and ČNTS had voluntarily accepted the amendments to the 1993 MOA. CME, in its Statement of Claim, invoked an article by Professor Vagts, as well as international cases. The Republic replied in its Statement of Defence to CME's arguments and referred to international law. Also during the final hearing, the Republic argued the issue of coercion on the basis of international law. The Republic argued on the basis of international law principles and not on the basis of Czech law with respect to the issue of whether it was proven that there was expropriation as referred to in Article 5 of the Treaty. The Republic did not explain the purport of Czech law in relation to coercion. The assessment whether coercion existed should be made on the basis of international law and the argumentation was based thereon. In the Stockholm proceedings, the Republic raised no objection that Professor Vagts' Article did not constitute a part of international law.

In paragraph 526, the Stockholm Tribunal made an assessment of reasonableness within law when the Tribunal stated what should constitute a reasonable threshold, and this constituted a part of the Tribunal's interpretation of international law and the Treaty. The Stockholm Tribunal applied, or attempted to apply, international law. If the Stockholm Tribunal had applied Czech law, it would also have found that coercion existed and the Tribunal's conclusion would not have been different.

Transfer agreement between CME Media and CME

The Stockholm Tribunal took into consideration both international law and Czech law when it analyzed the contents of the transfer of the shares in ČNTS from CME Media to CME. The Republic claimed that CME, through declaring its consent to the MOA, could only assert claims relating to breaches of the Treaty after May 21, 1997. It was not until the final hearing that the Republic argued that a provision in the transfer agreement entailed that CME acceded to the MOA when CME acquired the shares in ČNTS without reservation. CME emphasized that the statement "without reservation" was a formal requirement in Czech law which did not entail that CME waive its right to bring claims in respect of previous violations of the Treaty. In paragraph 422 of the award, it is stated that the Tribunal found that the consent to the MOA did not result in a waiver of the right to bring claims based on previous violations of the Treaty. This interpretation of the transfer agreement is correct under both international law and Czech law. The Republic has not proven any rule of law which might entail that CME, through its consent to MOA, had waived its right to bring claims against the Republic.

The Media Council's letter of March 15, 1999

In the Stockholm proceedings, CME did not argue that the letter of March 15, 1999 was a formal act and did not claim that the letter had any legal consequences under Czech law. The issue whether the Media Council's letter of March 15, 1999 constituted a formal act and whether the letter constituted a decision in accordance with Czech administrative law was not relevant in the Stockholm proceedings. CME did not pursue a claim for any legal sanctions under Czech law and, in order to prove CME's grounds in the Stockholm proceedings, the Stockholm Tribunal was not required to determine whether the letter had any effect under Czech law. CME argued in the Stockholm proceedings that the letter expressed the Media Council's position and purpose, and that it had actual consequences and legal consequences in accordance with the Treaty and international law. Taking into consideration the

purpose and consequences of the letter, CME argued that the issuance of the letter constituted a violation of the Treaty which resulted in CME being entitled to damages.

In paragraph 575 of the award, the Tribunal stated the effect the letter had. The Stockholm Tribunal's statement in the award accorded with the Republic's position in the Stockholm proceedings when the Republic shared the opinion that the letter was a regulatory letter. The Stockholm Tribunal was not of the opinion that the letter had a legal effect which entailed that the exclusivity in the service agreement terminated between the contracting parties. The Stockholm Tribunal held that the letter *de facto* eliminated ČNTS's exclusivity as it existed after the modifications in 1996. The Stockholm Tribunal did not come to the conclusion that the letter had any effect on the civil law contractual relationship between CET 21 and ČNTS. The Stockholm Tribunal assessed the actual effect of the letter by interpreting the letter and considering the surrounding circumstances. The Stockholm Tribunal's analysis was not based on the legal status of the letter under Czech law. The effect and the purpose of the letter were matters of evidence and an additional legal analysis of the letter would not have had any effect.

The possible intervention by the Media Council

The responsibility of the Media Council to intervene constituted an international law obligation as a consequence of the Media Council's previous intervention through the issuance of the letter of March 15, 1999, which was sought by Železný. It is evident from paragraph 563 of the award that CME's Managing Director had warned the Media Council that the Media Council, through its actions and the letter of March 15, 1999, had confiscated part of CME' investment. In the subsequent paragraphs in the award, the Stockholm Tribunal expressed the opinion that the Media Council, by this time at the latest, could have intervened and clarified the legal situation and cured its previous intervention by retracting the letter. Even if the Media Council had no legal possibility to prepare such a letter, the issue was not relevant from an international

law perspective. The Media Council could have prepared a correcting letter under the same circumstances as it had prepared the letter of March 15, 1999.

Termination of the service agreement

The Stockholm Tribunal did not determine the issue whether the termination of the service agreement was compatible with Czech law. The Stockholm Tribunal found that the Republic had violated the Treaty through its actions in 1996 and 1997 and, accordingly, the outcome of the dispute between CET 21 and ČNTS was irrelevant in the Stockholm proceedings.

It is evident from the award that the Stockholm Tribunal did not need to determine what conclusions the Czech Courts had reached with respect to the issue whether the termination of the service agreement was valid. In paragraph 477, the Stockholm Tribunal stated that "nevertheless" it could not conceal its opinion in the matter. The remark that the Stockholm Tribunal made shows only how vulnerable the investment became after the Media Council forced through the changes to the 1993 MOA.

Joint tortfeasors

The Republic's argumentation on this issue is based on an erroneous interpretation of the award. The Stockholm Tribunal made the statements referred to by the Republic in conjunction with the Tribunal's assessment of the issue of a causal link as a result of an objection raised by the Republic that it was Železný who caused the injury and not the Republic. In paragraph 580, the Stockholm Tribunal held that this objection was not sustainable since the existence of another tortfeasor who contributes to the injury does not release the state from liability under international law. The Stockholm Tribunal did not base its statements on the grounds relating to the other tortfeasor's liability since this is not relevant under international law. In paragraph 581, the Stockholm Tribunal stated that there existed a general rule with the import asserted by the Stockholm Tribunal. The statement in the middle of paragraph 582 regarding tort probably refers to the fact that there was no civil law agreement between ČNTS/CME

and the Media Council/the Republic. Already in paragraph 580, the Stockholm Tribunal reached the conclusion that the Republic's liability to CME was not reduced by the claim that CME might have against the Železný.

The ILC commentary, to which the Stockholm Tribunal referred, correctly describes international law and the decision to accord weight to various sources of international law constitutes a substantive assessment made by the Stockholm Tribunal. The Stockholm Tribunal correctly stated in its judgment the international law as expressed in the ILC commentary and any erroneous assessment cannot be reviewed.

Obligations as senior executive

The question whether Železný had violated his obligations as senior executive did not have any effect on the Stockholm Tribunal's conclusions in the issue of the Republic's liability for violations of the Treaty. The Stockholm Tribunal was only interested in considering whether Železný's behavior might release the Republic from liability. The Stockholm Tribunal would have come to the same conclusion with respect to the issue of the Republic's liability even if the Tribunal had not stated that Železný had violated his obligations.

In the challenge proceedings, the Republic has raised a number of new allegations regarding the content of Czech law and references to Czech rules of law which were not invoked in the Stockholm proceedings.

In the Stockholm proceedings, both parties stated that Article 1.4.1 of the 1993 MOA constituted a contribution from CET 21 to ČNTS and, during the proceedings, the Republic did not claim that any further legal act was required in order for the contribution to be valid. Nor was it asserted that the purport of the contribution was not established through Article 1.4.1 of the 1993 MOA. Nor is the allegation correct that, according to Czech law, the content of Article 1.4.1 of the 1993 MOA did not determine the scope of the contribution.

The argument that the change in Article 1.4.1 of the 1993 MOA to the wording in the 1996 MOA did not have any effect is an argument which was not raised during the arbitration proceedings. At the time, both parties were in agreement that an amendment took place with legal effect in the 1996 MOA, but the question was whether this change weakened the safety net for the investment. The Republic was of the opinion that the amendment to the 1996 MOA was offset, *inter alia*, by Article 10.8 of the MOA and the service agreement. The argument that the amendment of Article 1.4.1 in the 1996 MOA with respect to the contribution had no effect on the 1993 contribution under Czech law is also not correct.

An allegation that the service agreement and the 1996 MOA are invalid if they came about as a consequence of coercion and that, in such case, the 1993 MOA is still valid, constitutes a new claim which was not raised during the arbitration proceedings. In this respect, the Republic argued on the basis of international law. The allegation *per se* is not correct.

In the challenge proceedings, the Republic has raised an objection that CME cannot invoke events prior to 1997, since CME consented to the 1996 MOA in the transfer agreement in the arbitration proceedings, and raised a similar objection during the final hearing in the proceedings. However, the Republic does not cite any Czech law or other rule of law in support of the claim in the proceedings. In addition, the Republic's assertions in this regard in respect of Czech law are erroneous, since under Czech law consent to the MOA could not have had the effect claimed by the Republic.

Nor, under Czech law, could CME waive the claim for damages, since according to Czech law a person is not entitled to waive a future claim for damages and, in accordance with Czech law and also international law, a claim for damages does not arise until it has materialized in a financially measurable manner.

Lis pendens* and *res judicata

None of the parties in the arbitration proceedings, their legal counsel, nor the arbitrators, were Swedish. It is clear from the award that it was not written on the basis of Swedish principles of *lis pendens* and *res judicata*. The parties in the case argued on the basis of international *lis pendens* and *res judicata* and it may be stated that there was some form of silent agreement between the parties to apply certain types of international principles in the proceedings. However, this probably did not extend as far as to the criteria for *lis pendens* and *res judicata*, or to the application thereof in cases before Swedish courts of law.

The principles of *lis pendens* and *res judicata* do not fall under section 33 of the Arbitration Act but, rather, are to be assessed on the basis of the rules in section 34 of the same Act. Nor are the principles of *lis pendens* and *res judicata* applicable in the instant case between two different international arbitration proceedings in accordance with two different bilateral investment protection treaties.

Nor was there any identity between Lauder and CME. Lauder did not own more than 30 percent of the controlling company, Central Media Entertainment Limited – a Bermuda registered company which is listed on the New York Exchange and has approximately 3,000 shareholders – nor was such the case when the arbitration proceedings were pending. Lauder controlled the company through a majority of the voting capital, but did not own a majority of the share capital. The companies, which were structured as the parent company Central Media Enterprises Limited and CME, were wholly owned.

Nor was there identity between the bases for CME's and Lauder's claims. CME's and Lauder's claims were based on two different bilateral investment protection treaties between the Republic and Holland, and the USA respectively. The investment protection treaties are in all essential regards identical but there are differences between the treaties. These are, *inter alia*, that it is not obvious that CME's right as

successor to a previous investor should be assessed equally under both treaties; that Lauder, in accordance with the American Investment Treaty, could claim compensation as a controlling shareholder; and that there are differences in the treaties with respect to the time in which a party may claim compensation. In addition, Lauder would not have been able to pursue a claim based on the Treaty and CME would not have been able to pursue its claim in accordance with the American Investment Treaty.

The injuries were not the same for Lauder and CME. In the London proceedings, Lauder could only claim damages in an amount corresponding to his loss, while CME claimed injury as owner of 99 percent of the ČNTS. The injury and the calculation of damages would have been different. Nor would the Stockholm Tribunal have ordered different damages with the consequences that the Republic would have to pay twice. The Stockholm Tribunal also discussed the question of the Republic's different behavior in different cases with respect to the jurisdiction issue and came to the conclusion that the jurisdiction of the Tribunal was not affected.

If CME cannot have a claim tried in accordance with the Treaty since Lauder brought a claim in accordance with the American Investment Treaty, the consequence is that CME and other shareholders, apart from Lauder, are being denied the possibility to have their claims tried.

In the Stockholm proceedings, the Republic explicitly stated that the Republic refrained from raising any objection regarding *lis pendens*, a matter which the Stockholm Tribunal and CME seized on. This is evident, *inter alia*, from the Republic's Statement of Defence, Sur-Reply, and the opening statement in the Stockholm proceedings. The Republic argued on the basis of a concept of "abuse of process" in the Stockholm proceedings. Abuse of process is a concept which exists within the English legal tradition and an objection on the basis thereof does not include an objection based on *lis pendens*. There was no illegitimate purpose behind Lauder and CME commencing separate proceedings. Lauder was obliged to use the

American Investment Treaty and the Treaty prescribes a waiting time which meant that Lauder could commence arbitration proceedings six months earlier than CME, which he also did.

The Stockholm Tribunal did not find that there existed any abuse of process and that the overlapping awards could be handled when the amount of the damages was to be determined; on the other hand, an assessment could not be made as to whether there existed a breach of the Treaty.

The London Tribunal also found the co-ordination could take place on the damages level when determining an amount and that there was no abuse of process.

In any event, the Republic was the cause of the parallel proceedings. CME made a large number of attempts to coordinate the London and Stockholm proceedings in order to avoid a situation such as the instant one. CME proposed that the proceedings be consolidated, that they should have the same arbitrators, that the arbitrator appointed by CME should be the same in both proceedings, that the Stockholm Tribunal should stay its proceedings, and that the London Tribunal's award with a respect to the issue whether there existed a breach of the American Investment Treaty should be binding on the Stockholm Tribunal in its assessment whether there was a violation of the Treaty. Both the Stockholm and the London Tribunals referred to the aforementioned facts in their reasons for their awards.

Excess of Mandate – joint tortfeasors

CME claimed in the arbitration proceedings that the Media Council had withdrawn its previous approval of the split structure which constituted the basis for the original investment. The Arbitral Tribunal found that the Media Council acted in this manner through the Media Council having forced ČNTS to make modifications to the 1996 MOA and that the protection for the investment was thereby weakened. The Tribunal also reached the conclusion that the Media Council, in 1999, supported Železný at a

time when the latter no longer had any ownership interest in ČNTS, in his attempt to exploit the weakened protection and divested ČNTS of the license. The Tribunal further found that a state was liable for the entire consequences of its actions irrespective of whether there existed joint causes of injury and irrespective of whether the joint cause of injury constituted an action by a natural person. The Tribunal stated that the state was liable for the entire injury irrespective of whether there was another tortfeasor who was liable in damages.

The opinion that the issue of causality should not be determined in the first part of the proceedings is not correct. The Republic claimed in the proceedings that CME's claim should be dismissed since the alleged injury was not a direct and foreseeable injury due to a violation of the Treaty. Thus, the Republic wished the Tribunal to determine the issue of causality, and the parties argued the matter. It was not a part of the Tribunal's mandate to determine whether there existed a causal link between the Media Council's behavior and CME's injury.

In CME's Statement of Claim, CME stated the circumstances that CME invoked in support of the view that the Media Council had caused the investment to be destroyed. *Inter alia*, it was stated that the Media Council sent its letter of March 15, 1999 to Železný, which in content accorded with Železný's demand. The factual circumstances that CME alleged to have occurred were examples of circumstances that CME argued constituted a violation of the Treaty, not examples of coordinated behavior towards a common goal between the Media Council and Železný.

In its Statement of Defence, the Republic argued that it was Železný who had caused CME injury and that the Republic was not liable for the actions of private legal subjects.

In its Reply-Memorial, CME claimed that States are fully liable for their actions in conjunction with joint contributory causes of injury under international law and that the Republic bore full liability for damages also in the event there were other

tortfeasors. CME argued on the issue of causality and asserted that there was a causal link between the Media Council's actions and the injury suffered by CME, and that what occurred was a foreseeable consequence of the Media Council's actions, irrespective of the fact that it was Železný who terminated the service agreement, and Železný's role.

The parties thus argued the issue of causality before the final hearing. Also during the final hearing the parties - both CME and the Republic - argued the issue of causality. CME argued in great detail with respect to the causal link and argued that there existed a causal link between the Media Council's actions and CME's injury, notwithstanding that it was Železný who terminated the service agreement. In his argumentation, CME's counsel referred to joint tortfeasors in the argumentation whether the Republic could be held liable in damages without reference to Železný's actions. CME's counsel stated that if there were joint tortfeasors in the causal chain, there existed joint and several liability towards the injured party for the full injury. The tortfeasor's liability was not reduced by the existence of other tortfeasors in the causal chain. CME argued that a causal chain which resulted in liability for the state could also include actions of other persons, insofar as such actions were foreseeable. CME also referred to previous ILC reports.

In principle, the Republic agreed on the principle of foreseeability and that there existed liability as long as the actions of an intervening third party were not unexpected, and stated that CME's summary of the legal position was correct. The Republic argued that the principle was not applicable in this case and that evidence was lacking that the injury had been foreseeable. The Republic did not state that the Tribunal would exceed its mandate by deciding in the issue.

In CME's Post-Hearing Brief, CME further argued with respect to the causality issue and that the Republic was liable for foreseeable consequences of its actions and its omissions. In the Republic's Written Closing Submissions, the Republic argued that it

was ČNTS's own actions, as well as CET 21's and Železný's actions, which had caused CME injury, and not the Republic.

Thus, the concept of joint tortfeasors was not invoked as any ground for coordinated behavior towards a common goal. The concept is mentioned in the causality issue in response to the Republic's objection, and not as a basis for liability.

The section in the award in which joint tortfeasors are referred to is included in the Arbitral Tribunal's handling of the issue of causality in paragraphs 575-585. The Tribunal applied international law principles regarding contributory causes of injury and not liability for contributory behavior towards a common goal. The core of the Tribunal's reasoning was that the Tribunal held that CME's injury constituted a foreseeable consequence of the Media Council's actions and omissions in 1996 and 1999.

In paragraph 580 of the award, the Arbitral Tribunal held that a state was liable for its actions towards foreign investors irrespective of the existence of other tortfeasors. In paragraph 581, the Tribunal stated that this was compatible with the manner in which joint tortfeasors are treated under national and international law. In this paragraph, an article was cited which is also cited in the ILC commentary. The issue was whether the state's liability is reduced, not the liability grounds with respect to other tortfeasors. The Tribunal found that a state which has violated a treaty is liable for its actions irrespective of the presence of other tortfeasors in the causal chain. In paragraph 582, the Tribunal applied the principle of a state's liability notwithstanding the presence of other tortfeasors in the causal chain. The Tribunal found that the Republic's liability is not reduced by Železný being a part of the causal chain, even in the event Železný was liable in damages. The Tribunal stated that when determining the amount, it was possible to take into consideration whether CME had obtained damages from another tortfeasor. The principle applicable in the case was that the Republic bore full liability for the amount of the damages notwithstanding that there existed other tortfeasors in the causal chain who were also liable in damages. In

paragraph 583, the Tribunal referred to the ILC's commentary and to cases in which there existed contributory causes of injury and where only one of these causes of injury was imputable to the liable state. In addition, the Tribunal stated that international practice did not provide any support for the damages being reduced. In paragraph 584, the Tribunal described the causal link between a state's unlawful actions under international law and injury for which liability existed under international law. In paragraph 585, the Tribunal concluded as to how the principle should be applied in the Stockholm proceedings and came to the conclusion that the Media Council must have understood the foreseeable consequences of its actions and omissions in 1996 and 1999.

The argumentation in paragraphs 580-583 was raised in order to refute the Republic's objection that the Republic bore no liability, since it was Železný who had caused the injury. The fact that the Arbitral Tribunal stated that Železný had violated his obligations did not constitute a ground for imposing any joint and several liability on the Republic for coordinated behavior towards a common goal.

What the Arbitral Tribunal stated in paragraph 554 of the award regarding Železný's violation of his obligations did not affect the Tribunal's assessment, since Železný had stated that he intended to injure ČNTS, which meant that the injury was foreseeable for the Media Council. The Tribunal's conclusions that the Republic had violated the Treaty would also have been the same even if the Tribunal had not stated an opinion regarding Železný's actions and whether the actions were criminal. The Tribunal did not base the award on Železný's behavior but, rather, on the Media Council's own actions and omissions. The Stockholm Tribunal had, already before stating its reasons in paragraphs 580-585 in which joint tortfeasors are mentioned, come to the conclusion that it was the Media Council's actions which had caused the injury. In a later section in the award, the issue of liability is addressed. It is there stated that the liability was based solely on violation of the Treaty and joint tortfeasors are not mentioned in this regard.

Paragraphs 580-585 of the award were inserted in the Third Draft, after Hándl had written his memorandum of August 16, 2001. Hándl was of the opinion that there was no causal link between the Media Council's actions and the injury. Hándl was of the opinion that it was Železný who had caused the injury. However, the Stockholm Tribunal had already previously made an assessment regarding the issue of causality. The issue of causality was addressed in Kühn's list of questions. Schwebel stated in his answer to the list of questions that there existed a causal link between the Media Council's actions and the injury, irrespective of Železný's actions, and that the state's liability was not reduced as a consequence of the actions of third parties. In Kühn's reply to Hándl of August 29, 2001, he stated that the Arbitral Tribunal was aware of Železný's role in the causal chain. Notwithstanding this, paragraphs 580-585 were inserted in the Third Draft. However, this document has no significance for the outcome in the case. The conclusions and the outcome were clear before the supplement was made. Hándl was of the opinion that the document constituted a reply to what he had stated in his memorandum of August 16, 2001.

Since the Republic shared CME's opinion regarding the existence and content of the international law principles regarding liability in the event of contributory causes, pursuant to which the existence of another contributory tortfeasor does not release the state from liability, it argued on the basis of this principle and did not protest against what CME asserted, and the Republic may be deemed to have accepted that the issue be tried. In any event, the Republic may thereby be deemed to have refrained from asserting the alleged excess of mandate.

Excess of mandate– decision concerning determination of the damages

Initially, CME claimed in the Stockholm proceedings both restitution and damages. In the Notice of Arbitration, CME stated that the damages should be determined, *inter alia*, taking into consideration a fair market value. In the document, CME argued on a legal basis and it stated that the compensation should correspond to the genuine value of the investment and asserted that, in the event of the unlawful expropriation – as

well as in the event of lawful expropriation - the investor was entitled to compensation corresponding at least to the genuine value of the investment.

In the Statement of Claim, CME developed the manner in which it regarded the amount of damages and referred, *inter alia*, to cases with respect to the manner in which the damages should be determined. CME argued as to the amount of compensation to which CME was entitled if the investment could not be restored. Initially, CME claimed both restitution and damages but the argumentation applied equally to the principles as to how the damages should be determined. CME's opinion was that the starting point for determination of damages was the fair market value of the investment. From this, it was possible to reach the value of the restitution and loss of income in order to achieve the amount of the damages. CME further argued that, in the event the Tribunal was unable to decide upon restitution, CME should be awarded the full amount. Fair market value thus corresponded to compensation in full; CME should obtain full compensation. The fact that, in the award, a decision was made regarding compensation corresponding to the fair market value of the investment was thus in accordance with the claim presented by CME. In addition, CME proposed a bifurcation of the proceedings and that the amount of monetary damages be left until the second phase of the proceedings.

In the letter from CME's Counsel dated November 7, 2000, containing a proposal for an agreement, it was proposed that a determination of the actual amount of damages be left until the second phase. In the letter, it was stated that it was the actual amount of any damage award which should be left until the second phase of the proceedings. The proposal was accepted by the Republic, which affirmed that the first phase should not relate to the quantum of damages. The Republic further wished to reserve its right to pose arguments with respect to the determination of the damages in the first phase.

In an interim award agreement, it was thus stated that the quantum and amount of monetary damages should be handled in the second phase.

In conjunction with the final hearing, CME withdrew its initial motion for restitution. CME's counsel stated that it should be declared in the arbitration proceedings that a breach of treaty had been committed and that CME was entitled to damages, and that any amount of damages be left until the second phase. The starting point for the claim for damages after the initial claim for restitution was withdrawn was fair market value. CME wished to obtain a declaration that the Republic had violated the Treaty and that CME was entitled to damages in an amount to be determined in a second phase.

During the concluding phase of the final hearing, the arbitrators requested that the parties state in writing their final claims with respect to the first phase. CME argued that the Tribunal should declare that the Republic had violated the Treaty and that the "Respondent is obliged to remedy injury the Claimant suffered as a result of the Respondent's violation of the Treaty by payment of the fair market value of the Claimant's investment in an amount to be determined at a second phase in this arbitration." In addition, there was a confirmation that CME had withdrawn the claim for restitution. The claim did not entail any modification of what CME had previously claimed in the proceedings and was covered by the interim award agreement.

CME's motion led to no reaction from the Republic. The Republic did not argue that the claim violated what had been agreed or that the Tribunal did not possess jurisdiction to try the claim. The Republic objected, instead, to CME's claim in detail, point by point, and asserted that the Republic had not violated the Treaty, and raised under point 2 – under the same point in which CME presented in its claim for damages - an objection relating to causality.

Following the final hearing, the parties submitted concluding pleadings. Nor at this stage did the Republic protest against the claim presented by CME during the final hearing. In the final point of its concluding pleading, CME summarized its claim,

however this did not mean that CME had changed its claim as presented during the final hearing.

Already in the First Draft it was stated in the award that compensation should correspond to fair market value. In later drafts, the award was detailed in this respect but the finding that compensation should correspond to fair market value was not modified. The award reproduced correctly CME's motion as presented during the final hearing.

In paragraphs 625-618 [sic], the Tribunal stated the manner in which CME had asserted that the liability to repair the injury was derived from Article 5 of the Treaty and general international law principles, and that this constituted "just compensation" corresponding to the genuine value of the property. In paragraph 616, the Tribunal referred to the case cited by CME and, in paragraph 618, also referred to the case in the manner CME had done. Since CME no longer claimed restitution, the Republic was obligated to pay damages in an amount corresponding to what restitution would entail. Already initially, CME had claimed that, in the event the claim for restitution was accepted, CME should obtain damages for the difference up to a fair market value, and the Tribunal came to the conclusion that the Republic should compensation CME for the fair market value.

Excess of mandate– prior investors and previous violations

The UNCITRAL rules were applicable in the Stockholm proceedings and these contain rules as to when an objection to jurisdiction must be raised. The Republic was obliged to comply with this provision. The argument that the Arbitral Tribunal's mandate could only be restricted through the actions of the parties is not correct; rather, the mandate could also be extended and, in such case, the Republic was obliged to raise an objection in accordance with the applicable UNCITRAL rules.

In its Notice of Arbitration, CME stated that CME was regarded as an investor under the Treaty and that CME held a 99 percent holding ČNTS. CME stated that CME Media had taken over the investment in 1994 and that CME acquired the investment from CME Media in 1997.

In its Statement of Claim, CME stated that the company had acquired the rights and obligations from CME Media. When the Republic was to submit its Statement of Defence, the Republic was aware of the circumstances stated by CME which, *inter alia*, entailed that the Republic was aware that the claim was based on events that had occurred prior to May 1997 and that a transfer and acquisition of the shares in ČNTS had occurred, and that CME had acquired the shares in May 1997.

The Republic raised certain objections to jurisdiction in its Statement of Defence but no objection pursuant to which the Arbitral Tribunal could not render an award based on claims which related to events which occurred in 1996. The Republic objected substantively that CME had not acquired CME Media's rights and obligations and that CME bore the burden of proving such acquisition. The Republic's reservation regarding the possibility to comment when it knew more about the investment is irrelevant, since it referred to an objection which was based on the dispute not being covered by the Treaty; the dispute was a the dispute being between private subjects. This objection was tried separately by the Arbitral Tribunal.

CME submitted evidence of its acquisition of the shares in its Reply Memorial, *inter alia*, the transfer agreement between CME and CME Media.

After CME had submitted evidence, the Republic stipulated that CME had presented evidence that it was an investor in accordance with the Treaty and that CME was regarded as an investor. However, the Republic raised another substantive objection with respect to notification of the transfer. Nor, after the Republic had received other written evidence from CME, did it raise any objection that CME was unable to present claims based on events which had occurred before CME's acquisition of the

shares in ČNTS, or that the Tribunal did not possess jurisdiction to try such claims in accordance with the Treaty.

On the first day of the final hearing, the Republic's counsel referred to the fact that CME had presented claims based on events that had occurred before CME had made its investment. Counsel stated then, for the first time, that pursuant to Article 4 of the transfer agreement between CME and CME Media CME did not have any basis for raising claims based on violations which allegedly had occurred prior to CME's acquisition in 1997. This was a substantive objection. The Republic further asserted that CME was not entitled to any of the rights that the previous investors had held vis-à-vis the Republic. CME reacted and interpreted the Republic's assertions both as an objection to jurisdiction and as a substantive objection. CME's counsel stated, *inter alia*, that the Republic was regarded as having waived the objection to jurisdiction and stated, substantively, that Article 4 of the transfer agreement could not be deemed to entail a waiver of rights. Furthermore, counsel stated that if the objection had been made in the Statement of Defence, the matter could have been rectified through CME Media having been joined in the proceedings.

On the same day, the Republic's counsel stated that the Republic did not assert any objection to jurisdiction but, rather, an objection on substantive grounds. The Republic thereby refrained explicitly from asserting that it was beyond the scope of arbitration agreement or the Tribunal's jurisdiction to assess the issue. In the Republic's closing arguments, the Republic's counsel stated that no right had been transferred to CME and that, even if such right had been transferred to CME, CME could not assert any rights taking into consideration the consent to MOA 1996 in Article 4 of the Transfer Agreement. CME reverted to this matter and stated that the Republic had refrained from asserting objections based on the UNCITRAL rules and, substantively, that if the objection was that CME had waived its rights, in accordance with international law such a waiver must be express.

Also after the final hearing, the Republic, in its concluding pleading, stated that CME could only assert claims based on violations that had occurred after May 1997. The Republic thereupon referred to the consequences of Article 8.1 of the Treaty. The Republic asserted that claims based on violations that had occurred before May 1997 were not covered by the arbitration agreement. The Republic asserted, simultaneously, that this did not constitute an objection to the Tribunal's jurisdiction but, rather, related to the Republic's defense from a substantive perspective. In addition, the Republic stated that CME had no legal grounds in substance and asserted that the transfer agreement had not entailed any transfer of rights and, in addition, that CME had waived the right to bring any claims through its consent to the MOA 1996. The Republic did not raise the objection which it has raised in this case, namely that the objection related to jurisdiction but, rather, was only that it was an objection on substantive grounds.

The Arbitral Tribunal found that CME was an investor who made an investment in accordance with the Treaty. The Tribunal further considered the objection raised by the Republic at the final hearing and stated that it should be determined substantively. The Tribunal also stated that the Republic must, in any event, be deemed to have waived the assertion of an objection to jurisdiction in relation to CME's acquisition of the shares in ČNTS in 1997. The Tribunal also addressed the issue of whether the Tribunal should, of its own motion, consider the issue and came to the conclusion that it should not. The Tribunal further found that CME's acquisition and the rights which accompanied the acquisition were protected under the Treaty. The Tribunal also examined the Republic's argument that there was a deadline for CME's claim, but did not share the Republic's opinion. The Tribunal also considered substantively the Republic's objections based on the consent to the 1996 MOA in the transfer agreement and concluded that it could not be interpreted as a waiver of rights under the Treaty. The Tribunal found that CME Media's rights under the Treaty had been transferred to CME together with the transfer of the shares in ČNTS.

The arbitration agreement and Article 8.1 covered an assessment of transfers which had occurred prior to the investment being made. The Treaty imposes no requirement that the investor must own the investment when the transfer takes place. The Tribunal assessed substantively in the award what demands could be imposed under the Treaty, e.g. the issue of which rights had been transferred to CME from previous investors and what protection the Treaty afforded CME. Even if one disregards the Republic's failure to raise an objection and accepts that the issue be tried, the Tribunal acted within its authority. The issue whether CME had acquired the right to assert rights and claims based on previous violations was determined in the award on the basis of law and cannot be challenged. Substantively, both Czech law and international law led to the conclusion that a full claim for damages existed in 1997 which was transferred to CME together with the acquisition. The claim for damages only came into being, however, when there existed an injury which was quantifiable in money terms, which was in accordance with both Czech law and international law.

REASONS FOR THE JUDGMENT

Generally

The Court of Appeal has held a main hearing in the case. At the hearing, testimony was heard from the following persons. Professors Christoph Schreuer, August Reinisch, Filip De Ly, Philippe Sands, and Jan Dedic, as well as the arbitrator, Dr. Jaroslav Hándl, testified on behalf of the Republic. The arbitrators, Dr. Wolfgang Kühn and Judge Stephen M. Schwebel, as well as Van Vechten Veeder (QC), Professor Giorgio Sacerdoti, and Dr. Tomas Pohl, testified on behalf of CME. The parties have submitted and invoked very extensive written evidence, including legal opinions issued by Schreuer, Reinisch, De Ly, Sands, Dedic, Veeder, Sacerdoti, and Pohl. The parties have also submitted opinions issued by the former Chancellor of Justice, Johan Lind, and Professor Lars Heuman. Extensive reference has also been made to case law and literature.

Applicable law in the challenge

The Republic has challenged the arbitration award and moved that it be declared invalid or set aside, in whole or in part, based on sections 33 and 34 of the Arbitration Act (SFS 1999:116). At the same time, the Republic has emphasized that there exists an international dimension, since what is involved is an international commercial dispute which has been handled within the scope of a bilateral investment treaty. According to the Republic, as a consequence of this international dimension certain legal concepts may have a different meaning than in accordance with Swedish law, a fact which should be afforded significance when adjudicating in the case.

It is correct *per se* that an international commercial arbitration is involved and that none of the parties has any connection to Sweden other than the fact that the arbitration proceedings took place here. However, according to section 46 of the Arbitration Act the Act shall apply to arbitration proceedings that take place in Sweden notwithstanding that the dispute has an international connection. In conjunction with the enactment of the current Arbitration Act, consideration was also given to developments in international arbitration law. In this context mention may be made, *inter alia*, of the Model Law on International Commercial Arbitration of 1985 created by UNCITRAL, United Nations Trade Commission, which has been accorded significance in conjunction with the drafting of the Swedish Arbitration Act. The fact that a particular solution finds support in the Model Law has been accorded great significance and has had a significant intrinsic value. In connection with each individual provision in the new Act, consideration has been given as to the extent to which the provision accords with the Model Law (Government Bill 1998/99:35, New Arbitration Act, p. 47).

Accordingly, the Court of Appeal finds that the fact that there exists an international dimension has no consequence other than that the issue whether the arbitration award shall be declared invalid or set aside shall primarily be determined in accordance with Swedish law; international law is deemed to be a part of Swedish law. To the extent it

may be proven in the case that foreign law may be of significance for the adjudication and that the law in any respect differs from Swedish law, the foreign law may also be taken into consideration.

Generally regarding challenges and enforcement of international awards

In line with what might be deemed to be an expression of the legal situation in many other countries, by virtue of the Arbitration Act the Swedish legislature has adopted a restrictive approach towards to the possibilities to successfully have an arbitration award declared invalid or set aside based on a challenge (see Government Bill, pp. 142, 148, and 234). The same approach characterizes the rules in the aforementioned Recognition and Enforcement of Foreign Arbitration Awards Act and the underlying reasons given therefor. This has also been expressed in decisions of the Supreme Court when applying corresponding older provisions (see the cases reported in NJA 1979, p. 527 and 1992, p. 733). On the international plane, this restrictive approach has been expressed in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and in UNCITRAL's Model Law. In this context, it may be noted that, in a judgment cited in this case, the European Court of Justice stated that "... it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize an award should be possible only in exceptional circumstances".

Exclusion of an arbitrator from the deliberations

Generally

To begin with, it may be noted that the Arbitration Act contains no formal requirements as to the manner in which the arbitrators' deliberations shall be conducted. Clearly, a general reason why the procedure is not governed in detail has been to allow for the possibility to smoothly and expeditiously adapt the various stages in the proceedings to the circumstances of the particular case. This thereby promotes the public interest of promptness and flexibility in arbitration proceedings.

Some guidelines as to the manner in which proceedings are to be conducted are provided in sections 21 and 30 of the Arbitration Act.

Section 30, first paragraph provides that where an arbitrator fails to participate in the arbitrators' assessment of an issue without valid cause, such fact shall not prevent the other arbitrators from determining the issue. In a former provision in the Arbitration Act it was stated that all arbitrators must participate in the determination of dispute. The present provision is modeled on UNCITRAL's Model Law. The reason given is that, particularly in international disputes, an arbitrator may sabotage or delay the proceedings by not participating in the hearing or deliberations or by otherwise preventing or delaying the issuance of an award. This is to be prevented through the amended wording (Government Bill 1998/99:35, p.128). From the previous wording, combined with the stated reasons for the amendment, the conclusion may be drawn that the main rule under section 30 is that all arbitrators shall participate in the deliberations.

Section 21, first sentence provides that the arbitrators shall handle the dispute impartially, expeditiously, and promptly. This must also include the deliberations. The requirement of impartiality thus means that the arbitrators shall be treated equally and be provided the same possibilities to participate in the deliberations and attempt to influence the other arbitrators though substantive arguments. The requirement of expeditiousness means that the deliberations shall be conducted in a cost-efficient and flexible manner. As a consequence of the lack of formal rules, the deliberations may be oral or written, a timetable for the deliberations may but need not be established, deadlines may be set within which the arbitrators must express their opinions. However, the deadlines may also be changed as required. The lack of formal rules also means that there is no obligation on the chairman to arrange a formal vote when it becomes clear that two arbitrators are in agreement regarding an outcome of the dispute which the third arbitrator cannot support. Against the requirement of promptness, due process aspects must of course be guaranteed. The parties have legitimate interests in the arbitrated dispute being adjudicated in detail and with due

care. However, the requirement of promptness and the provisions of section 30 entails that when two arbitrators have agreed upon the outcome of the dispute, the third arbitrator cannot prolong the deliberations by demanding continued discussions in an attempt to persuade the others as to the correctness of his opinion. The dissenting arbitrator is thus not afforded any opportunity to delay the writing of the award. On the other hand, the deliberations should not be deemed concluded before the arbitral award is signed. The dissenting arbitrator should, therefore, be afforded an opportunity to submit comments on the proposed award. Better conditions are thereby created for a substantively correct award.

The Court of Appeal's assessment

After the hearing was concluded on May 2, 2001, Kühn drafted a list of questions. The various issues were set out in this list of questions and testimony has been given in the case that Kühn had thereby carried out very serious and ambitious work. In addition, in a cover letter, Kühn also invited both of the other arbitrators to make their own supplements to the list of questions. The list of questions was answered in detail by Schwebel and Hándl. Kühn thereafter processed the list of questions so that it could serve as a basis for the oral deliberations in Düsseldorf which, from what appears to have been proven, were held during the whole of June 1 and for a couple of hours in the morning of June 2. It has been testified that essentially all significant issues were discussed at the meeting. Both Schwebel and Kühn have stated that Hándl was the one who spoke most. The focal point of the deliberations must be deemed to have been the list of questions, the answers thereto, and the discussions between the arbitrators in Düsseldorf. Nothing has come to light in the case which entails criticism of the manner in which the deliberations were conducted up to and including the Düsseldorf meeting. Nor does the Republic otherwise appear to allege that Hándl was excluded from this part of the deliberations. Rather, the Republic is instead of the opinion that the entire chain of events from the final hearing onwards must be considered in order to determine whether Hándl was excluded.

Prior to the meeting in Düsseldorf, both Schwebel's and Hándl's positions in the dispute were probably clear to the others, while Kühn had not yet reached a decision. Following the meeting, it was clear what the outcome would be since Kühn had then decided to side with Schwebel's opinion that the Republic had breached the Treaty, while Hándl was of the opposite opinion. Schwebel has stated that he believed that Hándl, directly after the meeting, would begin writing a dissenting opinion. Kühn has stated that he proposed that Hándl write the introduction to the award – "to keep him in the team" – since he would not be able to participate in the drafting of the reasons for the award. Schwebel has also stated that Hándl made it entirely clear that he did not wish to participate in the production of the draft award. In addition, Hándl stated very clearly that he did not wish to receive the introduction or parts of the draft award. Instead, he would submit comments only after having received a complete draft award. The veracity of the Republic's allegation that Hándl was excluded from the continued deliberations must be adjudged in light of the aforesaid.

On July 30, Kühn had prepared a complete draft award, which he distributed to Schwebel and Hándl. Hándl commented on the award in detail in a letter dated August 16, which Kühn responded to two weeks later. Both Kühn and Schwebel have stated that they regarded Hándl's comments as largely constituting a repetition of his reply to the list of questions and what he stated at the deliberations in Düsseldorf. Thereafter, there were additional draft awards in which various amendments and supplements were made, which did not, however, affect the outcome.

According to the Republic, Hándl's position is that he only reached a dissenting opinion sometime after September 3, and accordingly, it is only the period of time thereafter which is "irrelevant" to the assessment of whether or not he was excluded. However, through the testimony of Kühn and Schwebel it must be deemed proven that it was entirely clear to the arbitrators – without any formal voting having taken place – that Hándl had a dissenting opinion at the Düsseldorf meeting. The Republic argues that from the commencement of the drafting of the award, Hándl no longer participated on the same terms as the two other arbitrators; the two other arbitrators

held discussions without him, he was not awarded sufficient time to rebut the various draft awards, and he was thereby deprived of the possibility to express his opinion on certain essential questions.

Kühn has stated that, admittedly, he desired to receive comments to the draft award as soon as possible but that he made no attempt to hurry Händl. His desire for promptness has not been stated as due to his desire to have the award ready before the London award. Besides, he had believed that the London award would be rendered much earlier than in fact was the case. Schwebel's desire that an award be ready before August 17 was due to the fact that he was to go on a journey on that date, while Kühn has stated that he did not attach any great significance to that date. Kühn was of the opinion that Händl was given the time that he deemed necessary but that, in the end, Kühn got the impression that Händl was attempting to delay the award.

Händl has received all essential communications between the arbitrators. The evidence in the case does not support the Republic's allegations that the two other arbitrators deliberated without Händl and that Händl did not have an opportunity to participate on equal terms, that they worked against him, and that the two other arbitrators ignored his opinions. On the contrary, Kühn appears the whole time to have treated Händl correctly and Händl appears to have been afforded an opportunity to submit his comments to the extent which reasonably may be dictated by considerations of courtesy between colleagues. Händl's feeling of having been excluded is probably, in all essential regards, connected to the fact that he did not meet with support for his opinion in the case. When assessing the issue of whether Händl was afforded sufficient time to comment and submit opinions on the various draft awards, it must be borne in mind that Kühn, as chairman, had a responsibility to issue the award without unnecessary delay. In addition, there is the fact that what are, in the opinion of the Republic, the significant issues which were first introduced into the draft award towards the end and on which, in the opinion of the Republic, Händl did not receive sufficient time to comment, consisted of additional legal arguments introduced by the majority in support of their position. However, as the arbitrator in

the minority, Hándl no longer played any necessary role with respect to these reasons for the majority's award. The Court of Appeal further believes that certain of the deadlines which Hándl requested appear to be unreasonably long and that the reasons he advanced in connection with his need for the requested time cannot be deemed to be reasonable. On the contrary, they are difficult to understand. Accordingly, the Court of Appeal finds that Hándl received due time to submit comments to the draft award.

The Republic's other assertions in this regard, *inter alia*, that Kühn attempted to convince Hándl to sign pre-dated separate signature pages already signed by Kühn, are devoid of significance and, all in all, the Court of Appeal finds the Republic's allegation that Hándl was excluded from the deliberations to be unproven and close to groundless. Accordingly, the Republic's claim based on the aforesaid ground cannot be accepted.

Failure to take into consideration applicable law

The Republic has alleged that the arbitral tribunal failed to apply the law that the arbitrators were obligated to apply in accordance with the Treaty, namely Czech law and international law. The arbitral tribunal has, instead, based the award on general assessments of reasonableness. According to the Republic, the arbitral tribunal has thereby exceeded its mandate and, in any event, committed gross procedural errors, each of which individually, and in any event taken together, affected the outcome of the arbitration proceedings.

As distinct from UNCITRAL's Model Law, the Arbitration Act does not contain any rules as to the legal premises on which arbitrators should determine a dispute. In the legislative history to the Arbitration Act it is stated that such a rule may be dispensed with and, *inter alia*, the following is also stated. In Sweden, there is probably a unanimous view that arbitrators should base their awards primarily on governing law, unless the parties may be deemed to have decided differently. In light of the desire to

restrict the possibilities of challenge, in favor of the finality of an arbitration award, there exist predominant reasons against the implementation of any rule as to the legal premises on which a dispute shall be determined. However, the aforesaid does not prevent the parties from entering into an agreement that the dispute shall be determined in accordance with the law of a particular country or that the arbitrators shall determine the dispute based on reasonableness. Where it is evident that the arbitrators have applied the law of a different country in violation of such an agreement, upon application to the Court, the award may be set aside on the ground that the arbitrators have exceeded their mandate. On the other hand, in conjunction with a challenge, the Court should not, of course, determine whether the arbitrators erroneously applied the law agreed upon by the parties. Such a fact can still not lead to the arbitration award being set aside (Government Bill 1998/99:35 p. 123).

A general conclusion which may be drawn from that which is stated in the legislative history is that the legislature has sought to reduce the possibilities to challenge an arbitration award on the ground that the arbitrators have applied the wrong law. The arbitrators may be deemed to have exceeded their mandate only where they have applied the law of a different country in violation of an express provision that the law of a particular country shall govern the dispute; in the opinion of the Court of Appeal, an almost deliberate disregard of the designated law must be involved. There is no excess of mandate where the arbitrators have applied the designated law incorrectly. Nor can there hardly be any question of excess of mandate where the arbitrators have been required to interpret the parties' designation of applicable law and, in so doing, have interpreted the designation incorrectly.

In accordance with Articles 8.2 and 8.5 of the Treaty, the arbitration proceedings have taken place within the scope of the UNCITRAL rules. Articles 33.1 and 33.2 of the UNCITRAL rules provide, *inter alia*, that the arbitral tribunal shall apply the law which the parties stated to be applicable to the dispute and that the tribunal shall base its decision on assessments of reasonableness (shall decide as *amiable compositeur* or *aequo et bono*) only where the parties have expressly authorized the tribunal to do so.

The relevant choice of law clause is found in Article 8.6 of the Treaty. It is worded as follows:

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

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

A Swedish translation of the clause is as follows:

Skiljenämnden skall besluta på grundval av lagen och i synnerhet ehuru ej uteslutande ta hänsyn till

- *gällande rätt i berörd avtalspart;*
- *stadgandena i detta avtal och andra relevanta avtal mellan avtalsparterna;*
- *stadgandena i särskilda avtal med avseende på investeringen;*
- *de allmänna principerna i folkrätten.*

The first part of the provision whereby the arbitrators "shall decide on the basis of the law" is clear, while the following parts leave room for interpretation, as shown by the arbitrators' differing opinions regarding the correct legal purport of the provision. The arbitrators have been obliged to comply with the choice of law provision and, accordingly, their mandate has also included interpretation of the provision insofar as it is not clear or not unambiguous. In the opinion of the Court of Appeal, an excess of mandate may be involved only where the arbitrators' interpretation of the choice of

law clause proves to be baseless such that their assessment may be equated with the arbitrators almost having ignored a provision regarding applicable law.

General principles regarding interpretation of treaties under international law are found in the 1969 Vienna Convention on the Law of Treaties. The basic rule in Article 31.1 is that a treaty shall be interpreted in good faith and in accordance with the normal meaning which the treaty provisions are to be accorded in the treaty in its context and in light of its purpose and goals. In accordance with Article 31.3 (c), each relevant international law rule which is applicable to the relationship between the parties is of interest for interpretation by the arbitral tribunal. This accords, in essence, with the general rules regarding interpretation of treaties.

The wording that the arbitral tribunal shall "take into account in particular although not exclusively" must be interpreted such that the arbitrators may also use sources of law other than those listed. The four sources of law are not numbered, nor are they otherwise marked in such a manner that governing law in the relevant contracting state should primarily be applied and general principles of international law applied thereafter. The un-numbered list almost gives the impression that the contracting states have left to the arbitrators the determination, on a case by case basis, as to which source or sources of law shall be applied. If the case concerns an alleged violation of the Investment Treaty, it might be relevant first of all to apply international law, in light of the Investment Treaty's purpose of affording protection to foreign investors by prescribing norms in accordance with international law.

In the Agreed Minutes, it is stated concerning the interpretation of the choice of law clause that the arbitral tribunal must *"take into account as far as they are relevant to the dispute the law in force of the Contracting Party concerned and the other sources of law set out in Article 8.6"*. The interpretation which can be given to the wording of the clause is thus hereby confirmed, namely that the clause leaves to the arbitral tribunal to take into account Czech law and other sources of law insofar as such are relevant in the dispute.

The Court of Appeal does not believe that the various sections in the arbitral award are to be reviewed in order to ascertain which of the sources of law listed in Article 8.6 of the Treaty have been applied by the arbitral tribunal. In the Court of Appeal's opinion, when assessing whether the arbitrators have exceeded their mandate, it is sufficient to clarify whether the arbitral tribunal applied any of the sources of law listed in the choice of law clause or whether the tribunal has not based its decision on any law at all but, rather, judged in accordance with general reasonableness. The various sections in the arbitration award which the parties have invoked in the case in support of their respective opinions as to which source or sources of law were or were not applied and as to the extent to which such has occurred leads to no conclusion other than that the arbitral tribunal has complied with the provisions of the choice of law clause as such must be interpreted, i.e. applied relevant sources of law, primarily international law, and thus has not based its decision that the Republic violated the Treaty on a general assessment of reasonableness devoid of any basis in law. The fact that each legal statement in the award is not directly derived citing a rule of law cannot be deemed to mean that the tribunal conducted a general assessment of reasonableness.

Accordingly, taking into consideration the aforesaid, the Court of Appeal finds that the arbitral tribunal did not exceed its mandate by failing to apply applicable law.

With respect to the issue of whether the arbitrators committed procedural errors by failing to apply Czech law on certain parts, the Court of Appeal finds, taking into consideration the aforesaid, that the Republic has not shown ample reasons for its allegations that such errors have arisen as referred to in section 34, first paragraph, sub-paragraph 6 of the Arbitration Act. The Republic's claim cannot be accepted based on the now addressed ground either.

Lis pendens* and *res judicata

When deciding whether the arbitration award should be set aside on the grounds of alleged *lis pendens* and *res judicata,* an assessment must first be made whether the stated grounds at all are applicable with respect to arbitration awards issued by two different arbitral tribunals following arbitration proceedings in accordance with the UNCITRAL rules under two different bilateral investment treaties. In this regard, the parties have different opinions. The issue whether *lis pendens* and *res judicata* may be applicable in a situation such as the instant one has not, as far as is known, arisen previously. The mere fact that the arbitrations were initiated under different investment treaties which were entered into between different states, the Czech Republic and the United States in the one treaty and the Czech Republic and the Netherlands in the other, militates against these legal principles being applicable at all. However, a couple of arbitration awards have been invoked from which it at least is evident, that the dispute has been considered to be the same in different arbitration proceedings which were brought under two different treaties.

Since, in any event, it cannot be ruled out entirely that the principles of *lis pendens* and *res judicata* may become applicable as between two different international arbitrations, the Court of Appeal will proceed with its assessment.

The UNCITRAL rules contain no provisions which shed light on the issue. The Republic has argued that English law might be applicable. However, the claim has not been based on any investigation which clarifies in detail the position under English law and the legal opinions that have been submitted do not contribute to a clarification of the legal situation. Taking the aforesaid into consideration, and since the issue whether English law is applicable to some extent is unclear, the Court of Appeal will disregard this matter for the time being.

To begin with, the Court of Appeal notes that, according to Swedish law, in arbitration proceedings *lis pendens* and *res judicata* constitute bars to substantive

adjudication which are taken into account only after a party has raised an objection with respect thereto. Since the parties are free to raise, or not raise, an objection of *lis pendens* and *res judicata*, any violation thereof should not violate *ordre public*. Consequently, a violation based on the aforesaid cannot result in invalidity in accordance with section 33 of the Arbitration Act. Instead, the matter is to be adjudged as a ground for challenge in accordance with section 34 of the same Act (see Government Bill, p. 236). From section 34, second paragraph it is evident that a party is not entitled to invoke a circumstance which, through participating in the arbitration proceedings without objection or otherwise, he may be deemed to have waived. Thus, in such a case, the right to invoke a circumstance is barred. The Court of Appeal will now proceed to determine whether this is the case.

In the arbitration proceedings, the Republic expressly stated in its "Sur Reply" that it did not rely on the doctrines of *lis pendens* and *res judicata*. The statement was made in connection with the Republic's claim that the arbitral tribunal should declare that CME's claim was not acceptable and should not be adjudicated. Instead, the Republic argued that – even excluding the arbitration proceedings in London – it had been exposed to or affected by a large number of actions brought by Lauder and the CME companies and that this constituted a type of abuse of process by the initiation of similar cases.

Accordingly, the Republic expressly waived raising an objection of *lis pendens* or *res judicata*. The aforesaid strongly supports the view that the right to challenge the Stockholm award is barred with respect to the allegation that the Stockholm tribunal acted erroneously in failing to take into consideration the principles of *lis pendens* and *res judicata*.

In the present case, however, the Republic has argued that the objection during the arbitration proceedings regarding abuse of process constitutes an objection with a special meaning which also includes the principles of *lis pendens* and *res judicata*. By invoking abuse of process the Republic has, so it is argued, nevertheless not

waived an objection of *lis pendens* and *res judicata*. Thus, the Republic claims that it is still entitled to invoke such grounds in the challenge proceedings.

The concept of abuse of process has no direct equivalent in Swedish law and it has also been questioned whether it can be applied in conjunction with international arbitration proceedings. Taking into consideration what has come to light in the case, it appears to be unclear whether an objection of abuse of process includes or does not include an objection regarding *lis pendens* and *res judicata*.

In light of the aforesaid, the Court of Appeal elects, for reasons of judicial economy, not to adopt a definite position regarding the issue of a bar but, rather, will determine whether the conditions are otherwise fulfilled in order for *lis pendens* and *res judicata* to be applicable. The Court of Appeal will, in this context, first determine whether identity may be deemed to exist between the claimant parties in the different arbitration proceedings, namely Lauder and CME.

It has come to light in the case that Lauder, a private person who is a citizen of the United States, holds not more than 30 percent of the share capital in CME's parent company and is the controlling shareholder in such company. CME is a legal entity with its registered office in the Netherlands. It has not even been argued that identity in the formal sense exists between Lauder and CME. However, the Republic has argued that, in reality, they may nevertheless be deemed to be the same party. Based on the fact that the Court, primarily bearing in mind the international dimension of the case, should not adopt a too restrictive approach when making its assessment, the Republic has in support of its position referred, *inter alia,* to principles regarding piercing the corporate veil, which for example may entail, in certain circumstances, that a shareholder may be equated with the company, and to the concept of privy in English law.

CME has called into question the application of English law and denied that there exists a situation in which any form of piercing of the corporate veil is applicable.

CME has, *inter alia*, further argued that Lauder would not have been able to bring his claim under the Treaty even if he had been a citizen of the Netherlands and that CME would not have been able to bring its claim based on the US and Czech Investment Treaty even if the company had a registered office in the United States.

The Court of Appeal notes that the concept of "privy", and what it might be deemed to entail – the meaning of the concept has not been clarified entirely – lacks any direct equivalent in Swedish law. There is no reason to take this concept into consideration in conjunction with the assessment.

With respect to piercing the corporate veil, no international cases have been presented in the case in which, in an actual situation of *lis pendens* and *res judicata*, a controlling minority shareholder has been equated with the company.

According to Swedish law, one of the fundamental conditions for *lis pendens* and *res judicata* is that the same parties are involved in both cases. As far as is known, the same condition applies in other legal systems which recognize the principles in question. Identity between a minority shareholder, albeit a controlling one, and the actual company cannot, in the Court of Appeal's opinion, be deemed to exist in a case such the instant one. This assessment would apply even if one were to allow a broad determination of the concept of identity.

Thus, since Lauder and CME cannot be deemed to be the same party, one of the pre-requisites for *lis pendens* and *res judicata* is lacking. Based on the aforesaid, the Republic's claim cannot be accepted based on the ground now considered.

Excess of mandate – joint tortfeasors

The Republic has argued that the arbitral tribunal exceeded its mandate by basing the arbitration award on an application of the concept of joint tortfeasors, which is a ground that CME did not invoke in the arbitration proceedings and which had not

been mentioned as a circumstance, nor was it the subject of legal argument by any of the parties in the arbitration proceedings.

The Republic has argued that without the conclusion that joint tortfeasors existed the outcome in the arbitration would necessarily have been different. The arbitral tribunal was, in fact, forced to find a direct causal link between Železný's termination of the service agreement, which was the direct cause of the damage, and the Media Council's behavior in 1996 and 1999, which the tribunal was unable to do. Therefore, the tribunal introduced joint tortfeasors and found, without this concept having been invoked by the parties, that the Republic and Železný were joint tortfeasors. The argument that the arbitral tribunal felt itself forced to base the award on joint torts is also supported by the fact that this concept was introduced into the award only at a very late date.

CME has objected, primarily, that the award has not been based on any type of principle of joint tortfeasor liability or on any principle of joint and several liability in conjunction with coordinated behavior towards a common goal, and that the tribunal thus did not exceed its mandate. In the alternative, CME argues that the ground for challenge is barred. CME has argued that the award was based on the fact that the Republic, through the Media Council, violated the Investment Treaty and that the Republic, through the Media Council, thereby caused CME damage.

The Republic has denied that the ground for challenge is barred, since the tribunal's application of joint tortfeasors only became known after the award was issued.

The Court of Appeal's assessment

The expression “joint tortfeasors” is found in paragraph. 581 of the award in the section headed "Causation of damage by Council's actions and omissions". The section addresses, *inter alia*, whether the Media Council's actions and omissions have caused damage.

In the opinion of the Court of Appeal, it cannot be inferred from the award other than that the arbitral tribunal, in accordance with international law principles as found by the tribunal, held that there existed a link between the Media Council's actions and omissions and CME's damage which, in accordance with the arbitral tribunal's assessment of international law, meant that it was reasonable to impute CME's damage to the Media Council's actions and omissions, see, e.g., paragraphs 575 and 584-585 of the award. Thus, the arbitral tribunal found that there existed a causal link between the Media Council's actions and omissions and CME's damage. The arbitral tribunal further found that the Media Council's actions and omissions constituted a violation of the Treaty and that, as a consequence of violation of the Treaty, the Republic was obligated to make good the damage caused by the Media Council's unlawful actions or omissions. In the Court of Appeal's opinion, it follows from the aforesaid that the Republic's liability for damages is not based on the Republic and Železný being joint tortfeasors.

Nor can it be inferred from the award other than that the Tribunal – following an objection from the Republic that no damage would have been caused to CME's investment but for Železný's actions and that the Media Council and the Republic bore no liability for what happened to CME's investment – made the assessment that a state may be held fully liable for damage suffered by a foreign investment company, notwithstanding that the state is not alone in having caused the damage. It is further evident from the award that the tribunal applied this assessment as a basis for its conclusion that the Republic was fully liable in the instant case, irrespective of Železný's actions which contributed in causing the damage.

Taking into consideration the aforesaid, the Court of Appeal does not find it established that the arbitral tribunal exceeded its mandate in basing the award on the existence of joint tortfeasors and, therefore, the Republic's claim cannot be accepted on the aforesaid ground. In light of this assessment, there is no reason to decide whether the ground of challenge might be barred.

Excess of mandate – decision concerning determination of the damages

The Republic has argued that the arbitral tribunal exceeded its mandate by determining questions concerning the amount of the damages, in violation of the parties' instructions. In support for its claim in this regard, the Republic has, *inter alia*, argued that CME's original claim in the arbitration proceedings comprised this entire procedure, including the issue of the amount of the damages based, *inter alia*, on the principle of fair market value. After the parties agreed that the dispute would be limited to the existence of liability for damages as such, the claim related exclusively to what was thus agreed upon; the amount of the damages was to be determined in a second phase of the arbitration proceedings. Following the agreement, CME did not argue further on the basis of the concept of fair market value and, in any event, it was not agreed between the parties that the method of calculation for any damages would be established in the first phase of the proceedings. In this context, the Republic has pointed out that the Treaty does not contain any reference to fair market value provision; instead, the concept of "just compensation" and "genuine value" are used.

CME has objected to the assertion that the concept of fair market value is covered by both its original claim and the final claim which CME presented in writing during the final hearing. The ground for challenge is barred due to the fact that Republic answered the final claim with respect to this issue without raising any objection other than that CME's claim for compensation based on fair market value should be dismissed, since CME had no grounds for its claim. Thus, the Republic did not object

to an assessment of the claim on the ground that the claim should be deemed to entail an amendment to the claim, or any other procedural grounds.

The Court of Appeal's assessment

It has not been established that the Republic – based on allegations of violation of the bifurcation agreement – raised any objections against the claim for compensation in accordance with fair market value that CME presented in writing during the final hearing in the arbitration proceedings. If the Republic believed that the claim was to be regarded as a new claim in excess of that agreed upon by the parties and, thereby, in the Republic's opinion constituted an impermissible amendment to the claim, the Republic should have objected thereto.

Section 34, second paragraph of the Arbitration Act provides, as stated previously, that a party is not entitled to invoke a circumstance which, by participating in the arbitration proceedings without objection or otherwise, it may be deemed to have waived. The Court of Appeal finds that the Republic's failure to raise the objection against CME's claim in conjunction with the submission of the written document at the final hearing has the result that the Republic is now barred from arguing that the arbitral tribunal exceeded its mandate in this respect. Thus, the Republic's claim based on the aforesaid ground cannot be accepted.

In light of this assessment, the Court of Appeal has no reason to determine whether the arbitral tribunal's assessment of the principle of fair market value as a ground for determination of the damages was properly included as part of the tribunal's mandate with respect to the first phase of the proceedings or whether the tribunal's assessment preceded what should have been adjudicated during a second phase of the arbitration proceedings and thus should be deemed to constitute an excess of mandate.

Excess of mandate – previous investors and prior violations

The Republic has argued that the arbitral tribunal exceeded its mandate by applying provisions in the Treaty with respect to alleged violations which took place when the investment was held by a different investor than the one that brought the claim in the arbitration proceedings. To be precise, according to the Republic, the Treaty provides protection only when an investment is made; it does not protect an investment against events which occurred before the investor made his investment.

CME has objected to the assertion that all of CME's allegations regarding violations of the Treaty are covered by the arbitration agreement and that the arbitrators thus enjoyed jurisdiction to determine the issue. In any event, they gained jurisdiction through the issue being introduced into the arbitration proceedings without the Republic arguing that the issue was not covered by the arbitration agreement. In any event, in CME's opinion, the Republic has waived the right to claim that the issue was not covered by the arbitration agreement or that an assessment thereof was in excess of the arbitrators' jurisdiction. In fact, in its Statement of Defense, the Republic raised no objection that the arbitration agreement did not cover the dispute, which the Republic was obligated to do in accordance with Article 8.5 of the Treaty and Article 21 (3) of the UNCITRAL rules. The ground for challenge is barred in accordance with section 34, second paragraph of the Arbitration Act, since the Republic participated in the proceedings without raising the objection that the issue was not covered by the arbitration agreement.

The Court of Appeal's assessment

It is apparent from the evidence that the Republic questioned whether CME was entitled to bring the action based on the Treaty. However, the Republic never expressly stated, in its Statement of Defense or in a later pleading (Sur Reply), that CME's claim fell outside the scope of the Treaty and thereby the arbitrators' mandate on the ground that the alleged events occurred before CME became the investor and the claim was not assigned to CME.

It has further transpired that, during the final hearing, the Republic argued that CME raised claims based on events that occurred before CME made its investment. After CME questioned whether the Republic was thereby raising an objection to jurisdiction, the Republic replied that no such objection was involved but, rather, only a substantive objection. Following the final hearing, the Republic asserted in writing that CME had only been entitled to bring claims which were based on events that occurred after May 1997 and stated that claims based on circumstances that occurred before May 1997 were not covered by the arbitration agreement. At the same time, the Republic argued that this did not constitute an objection to the arbitral tribunal's jurisdiction but, rather, was related to the Republic's substantive defense.

In light of the aforesaid, the Court of Appeal holds that the Republic, as its statements during the arbitration proceedings must be understood, expressly refrained from raising objections to jurisdiction. Thus, the issue is whether the ground for challenge is barred. The Republic has argued that, since the Treaty did not cover claims related to the time before a person became an investor, it was not possible for the parties, in the arbitration proceedings, to waive this type of objection to jurisdiction. The Treaty has, in fact, been entered into between two sovereign States and, accordingly, the parties do not have any possibility to expand the scope of the arbitration agreement through a waiver of the type in question.

The Treaty refers to the UNCITRAL rules which, including the limitation clause in Article 21 (3), are thus covered by the intention of the contracting States. In the Court of Appeal's opinion, taking the aforesaid into consideration, it is hardly incompatible with the aspect of sovereignty that a party should be able to expressly refrain from raising objections to jurisdiction. Thus, the Court of Appeal finds that the Republic has not shown ample reason for the claim that a waiver cannot be taken into consideration.

In light of the above and in accordance with that which has been stated in connection with other grounds for challenge, in this context the Republic is deemed to have refrained from arguing that the arbitral tribunal exceeded its mandate by applying the Treaty with respect to alleged violations which took place at a time when the investment was held by an investor other than CME. This assessment leads to the conclusion that the ground for challenge based on section 34, second paragraph of the Arbitration Act is barred. Thus, the Republic's claim based on the aforesaid ground cannot be accepted.

Irrespective of this assessment with respect to the issue of preclusion of claims, the Court of Appeal cannot avoid noting that the assessments made by the arbitral tribunal, insofar as such are at issue, were probably of a substantive nature and, consequently, were not challengeable.

Invalidity in general

The Republic has also argued that the Stockholm award and the manner in which it came about are manifestly incompatible with the principles on which the legal system of Sweden is based. Furthermore, according to the Republic, each of the grounds concerning the exclusion of an arbitrator from the deliberations and the lack of jurisdiction of the Stockholm tribunal as a consequence of *lis pendens* and *res judicata*, and also the other grounds invoked by the Republic taken together, are of such a serious nature that they are covered by section 33 of the Arbitration Act.

The Court of Appeal finds that the Republic has not shown ample reason for why the arbitration award or the manner in which it came about should be in violation of *ordre public* and thereby invalid based on the grounds asserted. Thus, the Republic's claim cannot be accepted in this regard either.

Litigation costs

In light of the outcome in the case, the Republic shall compensate CME for its litigation costs.

CME has claimed compensation for litigation costs in the amount of SEK 38 million, of which SEK 30.3 million relates to counsel's fees and SEK 7.7 million to disbursements. The Republic has stipulated to an amount of SEK 34 million as reasonable *per se*, which corresponds to the amount that the Republic has claimed as compensation for its litigation costs.

Chapter 18, section 8 of the Swedish Code of Judicial Procedure provides that compensation for litigation costs shall correspond in full to the costs for the preparation and pursuit of a claim in the case, as well as fees to counsel or representatives insofar as the costs are reasonable for furtherance of the parties' rights.

Neither party has provided detailed information with respect to its claim in this regard; both parties have orally stated their claims for costs broken down only between counsel fees and disbursements. The Court of Appeal cannot find that CME has proven that an amount in excess of that stipulated to by the Republic is reasonable. Accordingly, the Court of Appeal finds that CME shall be deemed reasonably entitled to SEK 34 million without such amount being broken down into fees and disbursements.

The judgment of the Court of Appeal may not be appealed

In accordance with section 43, second paragraph of the Arbitration Act, the Court of Appeal's decision regarding a claim against an arbitration award pursuant to sections 33 and 34 of the same Act may not be appealed. However, in accordance with the same paragraph, the Court of Appeal may allow an appeal of the decision where it is of importance for the development of case law that the appeal be reviewed by the Supreme Court. Based on the assessment described by the Court of Appeal in this

judgment, the Court of Appeal finds that no grounds exist for allowing an appeal of the judgment.

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Court of Appeal President Ulla Erlandsson and Court of Appeal Judges Per Eklund and Måns Edling, *rapporteur*, participated in the judgment. Held unanimously.