

IN THE MATTER OF AN ARBITRATION  
UNDER THE UNCITRAL RULES

BETWEEN

EUROPEAN MEDIA VENTURES S.A.

Claimant

-and-

THE CZECH REPUBLIC

Respondent

Tribunal:

Lord Mustill (Chairman)  
Sir Christopher Greenwood  
Dr. Julian Lew Q.C.

Secretary to the Tribunal:

Iain Quirk

PARTIAL AWARD ON LIABILITY

A. INTRODUCTION.

1. This Award concludes the second stage of an arbitration between European Media Ventures S.A. ("EMV") as Claimant and the Czech Republic as Respondent determining finally all issues of liability between the parties (except for the costs of this arbitration). The subject-matter of the arbitration is a claim by EMV that the conduct of the Council for Radio and Television Broadcasting of the Respondent ("The Media Council") in relation to the intended transfer of a Licence to broadcast television programmes was a breach of the obligations of the Respondent under the Agreement for the Reciprocal Promotion and Protection of Investments ("the Treaty"), originally concluded between the Belgium-

Luxembourg Economic Union and the Czechoslovak Socialist Republic, to which the Respondent subsequently became a Contracting Party by virtue of succession to the rights and obligations of that Republic.

2. The first stage of the arbitration concluded with an Award on Jurisdiction dated 15 May 2007, a copy of which is appended hereto as Annex A. The terms of that Award are deemed to be incorporated in, and to form part of, the present Award as if they were expressly set out herein.
3. The procedural background to the arbitration is set out in Annex B.

#### **B. THE TREATY**

4. The Treaty is authentic in the Czech and French languages. However, both parties have agreed that the English translation which they provided faithfully reflects the meaning of the authentic texts and it is to that translation that the Tribunal will refer. So far as material, the Treaty provided as follows:

##### **"Preamble**

The Belgian-Luxembourg Economic Union, and the Czechoslovak Socialist Republic,  
Desiring:

- to develop their friendly relations in accordance with the principles of the Final Act of the Conference on Security and Cooperation in Europe, signed in Helsinki on August 1, 1975;
- and to strengthen their economic cooperation by creating conditions favourable for the making of investments by the investors of one of the Contracting Parties in the territory of the other Contracting Party;

Recognizing the beneficial influence that such an agreement might have on the betterment of economic relations and on the fostering of trust in the field of investments;

Have agreed as follows:

## Article 1

(1) The term "investor" shall mean:

(a) with respect to the Belgian-Luxembourg Economic Union:

(aa) any natural person who, according to Belgian or Luxembourg legislation is a citizen of the Kingdom of Belgium or the Grand Duchy of Luxembourg;

(ab) any legal person constituted in accordance with Belgian or Luxembourg legislation with its registered office in the territory of the Kingdom of Belgium or the Grand Duchy of Luxembourg;

(b) ...

(2) The term "investment" shall mean every kind of asset and every direct or indirect contribution in all companies in any sector of economic activity whatsoever, and notably:

(a) movable and immovable property, as well as other rights in rem;

(b) shares and other forms of participation in companies;

(c) titles to money and rights to any performance having an economic value;

(d) rights in the field of industrial and intellectual property as well as goodwill.

Any changes in the legal form of investments or re-investments shall not affect their status within the meaning of the present Agreement.

## Article 2

(1) (...)

(2) (...)

(3) Each Contracting Party shall assure to investments made on its territory by investors of the other Contracting Party a treatment excluding all illegitimate or discriminatory measures, which could impair their management, their maintenance, their use, their exploitation or their liquidation.

(4) Except for measures necessary to maintain the public order [l'ordre public], these investments shall enjoy a constant protection and security, which shall be equal to that enjoyed by investments belonging to investors of the most favored nation.

### Article 3

(1) Investments made by investors of one Contracting Party in the territory of the other Contracting Party may not be expropriated or subjected to other measures of direct or indirect dispossession, total or partial, having a similar effect, unless such measures are:

- (a) taken in accordance with a lawful procedure and are not discriminatory;
- (b) accompanied by provisions for the payment of compensation, which shall be paid to the investors in convertible currency and without delay. The amount shall correspond to the real value of the investments on the day before the measures were taken or made public.

(2)(...)

(3) The provisions of paragraphs 1 and 2 are applicable to investors of each Contracting Party, holding any form of participation in any company whatsoever in the territory of the other Contracting Party.

### Article 7.

(1) Any dispute relating to the interpretation of this Agreement shall be settled, as much as possible, between the Contracting Parties by means of diplomatic channels.

(2)(...)

(3) If the dispute cannot be settled in this manner... it shall be submitted to an arbitral tribunal, at the request of one of the Contracting Parties.

(4)(...)

(5)(...)

(6) The arbitral tribunal shall decide on the basis of the provisions of the present Agreement and the generally-accepted rules and principles of international law.

(7)(...)

### Article 8.

(1) Disputes between one of the Contracting Parties and an investor of the other Contracting Party concerning compensation due by virtue of Article 3 Paragraphs (1) and (3), shall be the subject of a written notification, accompanied by a detailed

memorandum, addressed by the investor to the concerned Contracting Party. To the extent possible, such disputes shall be settled amicably.

(2) If the dispute is not resolved within six months from the day of the written notification specified in Paragraph (1), and in the absence of any other form of settlement agreed between the parties to the dispute, it shall be submitted to arbitration before an ad hoc tribunal.

(3) (...)

(4) (...)

(5) The ad hoc tribunal shall rule on the basis of:

- the national law of the Contracting Party, party to the dispute, on the territory of which the investment is located, including its conflict of law rules;
- the provisions of the present Agreement;
- the provisions of the particular commitment, which may have been entered into relating to the investment;
- the generally recognised rules and principles of international law.

(6) The arbitral award shall be final and binding upon the parties to the dispute.  
(...)"

## C. THE DISPUTE ON JURISDICTION

5. During the first stage of the arbitration two distinct claims were before the Tribunal. The first was founded on Article 2 of the Treaty, asserting that the conduct of the Media Council was illegitimate and discriminatory, and that it had denied to EMV the protection and security to which it was entitled. EMV claimed damages for this breach of the Treaty. The second claim was based on Article 3(1) of the Treaty, and comprised an allegation that, by the conduct of the Media Council in relation to certain investments of EMV, the Respondent had expropriated the investments, or alternatively had subjected them to measures having a similar effect, not excused by anything which fell within sub-paragraphs (a) or (b) of Article 3(1), and that accordingly EMV was entitled to compensation for the resulting loss.

6. At the end of the first stage, the Tribunal held that it had jurisdiction with regard to the

Article 3 claim (for expropriation) but not with regard to the Article 2 claim. EMV did not attempt to disturb that part of the Award which denied jurisdiction in relation to Article 2 but the Respondent did apply in the English High Court to annul the Tribunal's holding that it had jurisdiction with regard to the claim under Article 3 but it did not attempt to disturb that part of the Award which denied jurisdiction in relation to Article 2. The annulment application failed,<sup>1</sup> with the result that the Tribunal is still seised of the dispute, but only in respect of Article 3.

7. These decisions transformed the arbitration. The Article 2 claim meant that an essential part of the dispute, which concerned the propriety of the Media Council's treatment of an application, as part of a plan which we shall later describe, to transfer a terrestrial broadcasting Licence to EMV, did not have to be determined. This would have called for consideration not only of a complex course of conduct, but also of the motives for that conduct, in the light of extensive oral and written evidence, and numerous contemporary documents. Now that the claim under Article 2 has fallen away much of this material has become redundant, although we have closely studied it again for any light which it may shed on the expropriation claim. This latter claim is largely a matter of interpreting the Treaty and applying it to facts which essentially are not in dispute. The account of events which we shall set out is therefore much less broad and detailed than it would have been if the Article 2 claim had still been alive before us.

#### D. NARRATIVE

8. It is to that narrative that the Tribunal now turns. During the year 1998 Mr. [redacted] was operating through his company ("RTV Gemma"), a media business from Hradec Králové, a city in Eastern Bohemia, broadcasting terrestrially and also by cable and satellite a local television programme ("TV Galaxie"), under the authority of a Licence issued to and held personally by Mr. [redacted] ("the Licence"). TV Galaxie was later

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<sup>1</sup> Czech Republic v. Euro Media Ventures SA, [2007] EWHC 2851 (Comm.); (2008) 1 Lloyds Reps. 186 (Simon J.).

renamed and rebranded as TV3.

9. Within its modest ambitions this station had proved successful, and Mr. [redacted] conceived the idea of using it as a model competing with the existing national broadcasters, two commercial and two public. There was no room in the frequency spectrum for another nationally-propagated terrestrial transmission but Mr. [redacted] believed it possible to create a nationwide coverage through a mosaic of local stations, each broadcasting a combination of core national content with locally focussed material. Such a concept would require substantial finance, which Mr. [redacted] set about raising, assisted in particular by Mr. [redacted] an investment manager specialising in Central and Eastern Europe, and Mr. [redacted] a venture capitalist with experience in developing television and radio broadcasting companies in that part of Europe. Considerable interest was generated, but there were two obstacles. First, there was a general sentiment that whatever its merits the Hradec Králové operation was on too small a scale to serve as the growing point of the proposed network. For this purpose it would be necessary to establish a presence in Prague, where viewers and advertisers would be more numerous, wealthy and sophisticated. As it happened, it became known at about this time that the Media Council was planning to allow interested parties to apply for a Licence to broadcast on Channel 11 in Prague: This was one of the few unallocated terrestrial broadcasting frequencies in that city. This would suit the new venture very well, and the obtaining of a Licence for it became a significant element of both Mr. [redacted] expansion plans and the willingness of new investors to finance the project.
10. Accordingly, Mr. [redacted] bid for permission to broadcast on Channel 11. On the advice of a Media Council member he did so in the shape of an application to extend the territorial scope of his existing Licence, rather than to create a completely new Licence in favour of a new broadcaster, as the latter approach was considered to be too politically sensitive for the Media Council. This application was successful, a large step forward in the implementation of Mr. [redacted] plans. However, the attachment of the Channel 11 permission to Mr. [redacted] individual personal Licence was for more than one reason unwelcome to the new investors, who would have preferred the broadcasting rights to be held by a legal

entity; and the obvious response to this objection, which would have been to incorporate a company with the investors as shareholders, and transfer to it not only the business of TV3 but also the Licence which would enable it to be carried on, was not available under Czech media law which disqualified a personal Licence from transfer to a company. This obstacle would have been only temporary, since it was already anticipated that the legislation would be amended so as to permit a one-off transfer from a physical person to a legal entity, but meanwhile the Licence would have to continue in the name of Mr. [redacted] with all the perceived risks which that entailed.

11. This being so, steps were taken to minimise the interim risks by binding the Licence as tightly as possible to the corporate body through which the capital investment would be made. There were three elements. The first was a new corporate structure. A Luxembourg company, European Media Ventures s.a. ("EMV", the present Claimant) was incorporated to provide via shareholdings a single vehicle for the individual investments, the internal relationships being governed by a *Shareholders Agreement*. A Czech company, Cesca medialni spolecnost a.s, ("CMS"), was incorporated as a wholly-owned subsidiary of EMV, in turn owning 100 per cent of the capital of TV3.
12. Next, provision was made for what was to happen when the anticipated change in the statutory regime came into effect. Under a Future Licence Transfer Agreement ("FLTA") Mr. [redacted] undertook to transfer the Licence directly to TV3 as and when this became permissible under Czech law.
13. Finally, two steps were taken to protect the value of the Licence to EMV whilst it remained in the name of Mr. [redacted]. First, under a *Services Agreement*, Mr. [redacted] agreed that the Licence would be employed exclusively to validate the broadcasting of the programming of TV3. Secondly, he undertook to have the terms of the Licence varied by the Media Council so that it could be used only for the propagation of TV3's programme, thus paradoxically restricting his own rights – something which was to prove troublesome in due course.



14. By this time – 31 March 2000 – a degree of optimism would have seemed in order. The initial financing was in place; backers had been mustered; the corporate scaffolding had been erected; the legislative wheels were turning; and all that was left for the future was to await the decision of the Media Council, which had favourably received the application for the Channel 11 Licence and might seem to have no reason to take a different view of the transfer from Mr. [redacted] to TV3.
15. This was not, however, the way matters turned out in practice. The amending legislation duly materialised, but was not entirely as foreseen. Article 68(6) of the new Media Law was in the following terms:
- “Within 6 months of the effective date of this Act, any private individual who is a Licenced broadcasting operator or an operator of retransmission may request that the Licence or registration which was granted to him/her be transferred to a legal entity; the Council shall only grant such a request in the event that the legal entity concerned is 100% owned by the private individual concerned.”
16. Another change brought about by the new Media Law was to enable a legal entity with a registered address outside the Czech Republic to become a Licenced broadcasting operator, provided it had a branch within the Republic. These two alterations in the law appeared to leave the way open for the realisation of the plan: but perhaps only “appeared” to do so, for there was an ambiguity in the passage from Article 68(6) quoted above which was to be a major source of conflict in the present dispute. Was it enough for the intended transferee of the Licence to be 100 per cent owned by the private transferor, in which case the Media Council had no option but to permit the transfer? Or was this no more than a requirement which had to be satisfied before, as a matter of discretion, the Media Council could go on to consider in the light of all relevant circumstances whether or not the transfer should be permitted? We return to this below.
17. Resuming the narrative, it was decided to take advantage of the opportunity afforded by the new Media Law by establishing a legal entity outside the Czech Republic to act as recipient of the Licence. Accordingly, a Luxembourg company (“KTV”) was incorporated, with Mr. [redacted] as its sole shareholder, and with a branch office in Prague, with the intention

that when the Licence had been transferred to KTV, Mr. . would transfer his interest in the latter to EMV. To ensure that this would actually happen, Mr. granted to EMV under a "KTV Call Option Agreement" an option to acquire his shares in KTV, and backed it by pledging his KTV shares to EMV as security for performance of the Call Option Agreement. In addition, TV3 assigned to EMV its rights under the FLTA (see paragraph 11, above), upon which EMV entered into an agreement with Mr. requiring him (a) to assume an obligation to transfer the Licence to KTV, and (b) thereafter to transfer his interest in KTV to EMV. In addition, an Amended Licence Transfer Agreement (the "ALTA") concluded between Mr. and EMV provided that, if the Media Council did not permit the transfer of the Licence to KTV, Mr. would incorporate a Czech company, with the approval of EMV, transfer the Licence to that company, and then transfer his shares in that company to EMV.

18. The outcome of these various agreements was therefore that (a) EMV would become at one remove the owner of TV3, and (b) EMV would control the exercise of the Licence via its control of KTV (or the company to be incorporated and act as transferee under the ALTA). As a step towards the implementation of this package of agreements, the interested parties prepared an application to the Media Council for permission to carry out the transfer to KTV, but before its formal submission the Media Council held a session on 28 August 2001, at which the application was discussed. There is a dispute, which in the present circumstances the Tribunal need not resolve, about how the possibility arose for discussion that the transfer should be, not to KTV but to a Czech company, and, if so, whether it should be to RTV Galaxie ("RTVG"), a Czech company which Mr. controlled.

19. In the event, Mr. went ahead with the plan as originally conceived and submitted to the Media Council a formal application for such a consent. In a response, first contained in a press release issued on 11 September 2001, the Media Council explained that:

"The Council highly values foreign investments flowing into the Czech media environment, but gives priority to such broadcasting operators whose ownership structure and manner of engagement in the Czech Republic is entirely controllable and

can be regulated under Czech laws.”

20. This negative response prompted Mr. [redacted] to make a fresh application, this time for a transfer to RTVG. Notwithstanding protests by EMV, the Media Council on 20 November 2001 approved the transfer to RTVG, and two weeks later formally rejected the transfer to KTV. In accordance with the usage adopted at the hearings in the present case, the Tribunal refers to the decision refusing the application to transfer the Licence to KTV as the “negative transfer decision” and the decision granting the application for transfer to RTVG as the “positive transfer decision”.
21. These developments effectively spelt the end of EMV’s plan. EMV could no longer require the Licence to be transferred to it or its nominee, KTV, because Mr [redacted] no longer had the Licence to transfer, although EMV may have had a remedy in damages against Mr [redacted]. Similarly, TV3, though it still had a contract with Mr [redacted] requiring that the Licence be used only for the broadcasting of TV3 programming, could not enforce that contractual right against RTVG, since RTVG was not a party to the contract. All it was left with was the Licence condition.
22. Initially the Media Council took no steps to resolve this dilemma, but on 29 November 2001 it issued a declaration that TV3 was broadcasting without a Licence, and ordered the broadcasting to cease. TV3 had no alternative but to comply, thus leaving RTVG with no programming content permissible under the Licence condition. During the following month a decision of the Media Council withdrew the Licence from RTVG for breach of the condition.
23. It is unnecessary for present purposes to detail the subsequent history of RTVG’s continuing use of the Licence to broadcast its own programming content, notwithstanding the restrictions imposed by the Licence Condition. During June 2002 a constitutional complaint was brought by KTV before the Municipal Court in Prague to the effect that the Media Council had wrongly failed to recognise KTV as a party to the proceedings in respect of the transfer of the Licence, thus infringing its right to be present at the hearing

and comment on the evidence. The Municipal Court dismissed the claim on the ground that although KTV was the intended transferee of the Licence only Mr. [redacted] had rights and obligations protected by law at the relevant time. On appeal, the Czech Supreme Court took a different view, stating in its judgment of 10 November 2004 that: "Parties to the proceedings are also private individuals or legal entities whose legal status may be directly affected by law and obligations of other entities...". The Supreme Court therefore set aside the judgment of the Municipal Court, leaving KTV to seek a remedy within the general court system. This limited success has no bearing on the present claim by EMV to which we now turn.

24. The challenge through the Courts having ultimately succeeded on purely procedural grounds, the Media Council became once again seised of applications by Mr. [redacted] for the transfer of his personal Licence to KTV or alternatively to RTVG. In the end these led nowhere; the Licence was not transferred to either party; RTVG became a subsidiary of one of the two large commercial television companies; and TV3 went out of business. It was declared bankrupt on 26 June 2002.
25. Meanwhile, RTVG was engaged in challenging the revocation of the Licence, with some initial success, to the extent that the Municipal Court restored the Licence to RTVG, and remitted the matter to the Media Council, which imposed a fine on RTVG during August 2002. By this time, RTVG had ceased broadcasting TV3's material, and was negotiating with TV Prima's parent company ("GES") towards a consolidation of the businesses of RTVG and GES. This bore fruit on 21 January 2003 when the Media Council approved the take-over of RTVG by GES.
26. To complete this outline of the history, recourse was sought through the courts against the decision of the Media Council not to permit the transfer of the Licence to KTV. This failed in the Municipal Court but succeeded before the Constitutional Court, essentially on procedural grounds, and the lower court was directed to annul the determination of the Media Council awarding the Licence to RTVG. After further inconclusive proceedings, Mr. [redacted] surrendered his Licence to the Media Council, which deemed it to have expired

on 10 August 2005. EMV also relied on a report prepared in around October 2001 in relation to the decision not to permit the transfer of the Licence to KTV, provided by JUDr. Pavel Rychetsky, then Chairman of the Legislative Council of the Government and Deputy Prime Minister ("the Rychetsky Report"). The Report expressed concern with the Media Council's decisions on the transfer of the Licence including as to whether those decisions discriminated against a foreign investor.

27. In short, the position came down to this. The holder of the Licence was able to make use of it only subject to a condition about programming which it could not fulfil, whereas the programmers had no means of broadcasting their programme. It proved impossible to bridge this gap and Mr. . . . plan, and the ambitions of his backers, were totally frustrated. The backers pointed the finger of blame at the Media Council for their losses, asserting not only that the Council had no idea of the principles which it should apply when considering a transfer request, but more seriously that the refusal of the transfer was the result of double-dealing. The more serious allegations were denied by the Council, which claimed to have acted in good faith within its powers, and asserted that even if it might have acted wrongly, its actions had not caused the loss in respect of which the claim was made, since the . . . plan had always been impossible of realisation. The concept of a piecemeal accumulation of nationwide transmission was in the opinion of the Media Council fanciful, since it was already widely acknowledged that there was no space for it in the frequency spectrum.
28. This was the shape of the dispute when EMV started the present arbitration. It is essential to keep in mind that the claim had two elements. First, there were allegations of serious misconduct at all stages, the outcome, so it was said, of a chosen strategy to wreck Mr. . . . project. The brief account given above shows how the largely undisputed bare bones of the events can make this seem a plausible account, though not necessarily the sufficient proof, of a breach of Article 2 of the Treaty. The second element is quite different. For a claim under Article 3 the focus is much narrower than under Article 2. It is neither necessary nor sufficient to show that the acts of the Media Council prevented there from being a "level playing field" or that they amounted to unfair treatment. The test is

whether the acts complained of amounted to an "expropriation" or similar measures, in the very special sense in which those terms are used in Article 3. Unless this test is satisfied there is no breach of Article 3, however unconscionable the conduct of the respondent. It follows that just as the test is narrower, so also is the scope of the enquiry. At the time when Article 2 was still a feature of the present case the large volume of documentation, oral and written evidence, and submissions was directly relevant to the outcome of the dispute. The Tribunal studied it closely at that stage, and has sifted all of it again during the second phase, to see what was to be found there of relevance to the claim under Article 3. In the event however, little of it proved to be of substantial importance, which has enabled the facts to be stated in very much less detail than would have been required for a decision under Article 2.

#### **E. THE ISSUES**

29. The claim under Article 3 raises three issues:-

- (1) Did the Claimant possess an investment, within the meaning of Article 1 of the Treaty? If it did not, then the obligations of the Respondent under Article 3 are simply not engaged;
- (2) If the Claimant did possess an investment, was the treatment of that investment an expropriation or other measure of similar effect such as to involve a violation of Article 3?
- (3) If there was a violation of Article 3 in respect of the Claimant's investment, what sum of money (if any) is the Claimant entitled to receive by way of compensation or damages?

Before turning to those questions, however, the Tribunal must first address an argument raised by the Respondent for the first time during the hearings.

## F. THE RESPONDENT'S PUBLIC POLICY ARGUMENT

30. During the course of its cross-examination of Mr. [redacted] one of the Claimant's key witnesses, the Respondent raised for the first time the suggestion that the Claimant might have been blackmailing<sup>2</sup> the Deputy Chairman of the Czech Chamber of Deputies. On that basis, the Respondent then developed an argument which may be summarised as follows:-

- (i) International public policy demands probity in international commercial dealings.
- (ii) Violations of international public policy do not ipso facto invalidate rights created by commercial contracts. That is a matter for the governing law. But such a violation may render rights unenforceable in an international investment arbitration, at least if there is a sufficient nexus between the violation and the investment in question.
- (iii) In the present case, two aspects of international public policy are said by the Respondent to be relevant. First, so it is said, it flows from Article 1 of the OECD Convention on Combating Bribery of Public Officials that anyone who offers a pecuniary or other advantage to a foreign public official in order that the official shall act or refrain from acting in relation to official duties, or to obtain or retain business or other improper advantage in the conduct of international business, commits a breach of international public policy which renders unenforceable any rights so obtained. Secondly, the Respondent contends that blackmailing a public official to confer an advantage in relation to an investment is an infringement of international public policy which equally renders unenforceable any claim in an arbitration founded on that investment.
- (iv) In the present case, entries in the diary or jotter of Mr. [redacted] (the Deputy Chairman of EMV) made on 5 April 2001 were said to show that persons on the

side of EMV were contemplating the use of information discreditable to the Deputy Chairman of the Chamber of Deputies of the Czech Parliament, a person with influence over the Media Council, to induce him to use that influence in favour of granting additional frequencies to TV3. (See *post*). Such conduct would have been an infraction of the principles stated above.

- (v) Accordingly, whatever the rights and wrongs of EMV's complaints about the conduct of the Media Council during September 2001 in relation to the transfer of the Licence its conduct six months earlier aimed at enlarging its spread of frequencies should entirely exclude its claim in the present arbitration.

On this basis, the Respondent applied for a stay of proceedings.

31. In the opinion of the Tribunal this reasoning cannot be sustained, even if the statements of principle which it embodies can be endorsed to their full extent (as to which the Tribunal expresses no view).
32. As a preliminary observation, the Tribunal feels bound to state that the application for a stay was made too late, even allowing for the fact that the grounds for such an application only emerged when Mr. [redacted] documents were produced. Almost without preamble, Mr. [redacted] was asked in cross-examination whether he or his colleagues were blackmailing the Deputy Chairman. When he denied that, he was pressed with entries in his diary, to the general effect that he and his colleagues had damaging information which they could, if they chose, make use of against the Deputy Chairman, and that they had had it in mind to do so. The Tribunal finds this disturbing. An allegation of blackmail, or even of a contemplation of it, is very serious, especially in the public domain, and the ground for it must be scrupulously laid, because of the obvious risk of unfairness. That did not happen here, which risked being unfair to Mr. [redacted] on whom the allegation was sprung without any opportunity to cast his mind back to the time in question, more than six years

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<sup>2</sup> See the questions put by counsel at Transcript Day 2, page 16, lines 7-8; page 18, line 23. In his responses at pages 17, 19 and 21 Mr. [redacted] uses the word three times. There can be no doubt that he understood what was being put to him.



previously, and consider how the scribbled entries might be presented in a more favourable light. It risked being unfair to EMV, which could have set to work in advance to investigate and marshal for the Tribunal a full account of the circumstances in which the words were written, rather than have the presentation of its case interrupted by the introduction of a contentious new issue. And it risked unfairness to all concerned, by distracting the attention of the Tribunal from the real issues which it was appointed to resolve.

33. Nevertheless, what should have happened did in the end happen. The Tribunal halted the examination of Mr.                    on this particular issue, and permitted separate written submissions upon it, which all concerned had an adequate opportunity to consider. No lasting harm was done. The Tribunal has, therefore, considered the Respondent's submission, notwithstanding the circumstances in which it was raised.
34. The Tribunal is clear, however, that the public policy argument must fail. There was no sufficient link between the conduct said to have infringed public policy and the right being asserted in the arbitration so as to make it unconscionable to enforce the latter. Evidence of discreditable conduct on the part of Mr.                    might have been relevant to an attack on his credibility as a witness when giving evidence about what happened around the time when the Licence was up for transfer, some months later, but this is not what the Respondent is saying. What is urged is that the Claimant's conduct has cast such a shadow over the investment that it would be wrong to entertain proceedings which assert that the investment had been devalued by misconduct on the part of the Respondent. The argument asks too much. Important as probity in international life undoubtedly is, some element of proportionality must be maintained, and the Tribunal would have hesitated long before finding a sufficient link between the misconduct and the investment for which a large claim for compensation is being maintained to justify the disqualification of the claim from even being put forward for consideration.
35. There is however another, and more fundamental, answer to the Claimant's public policy argument, which is that there is simply no foundation for it on the facts. Whatever standard of proof is required to establish an assertion of contemplated blackmail, it must at least be

for the party who asserts such conduct to show that it is more likely than not to be true. In the opinion of the Tribunal the evidence falls far short of this standard. The Respondent shows no more than scribbled jottings by Mr. [redacted] of which he was unable to give a convincing account when faced with them years later. True, this might on one view be said to show him in a poor light, but his general character and credibility are not in issue here. True also, this episode might have been relevant to a case under Article 2, but no such case is before the Tribunal, because of the earlier decision on jurisdiction. To justify its allegation of bribery or conduct contrary to public policy, what the Respondent has to show is a sufficiently high degree of wrongdoing to rank as a breach of international law, actually having a disqualifying impact on the investment in question. The Tribunal has no doubt that in this it has totally failed.

#### G. INVESTMENT

36. The Tribunal therefore turns to the arguments of the parties regarding the expropriation claim, beginning with the first group of issues identified in paragraph 29, above. The Respondent has complained, with some justification, that the Claimant has never fully and consistently identified the investment or investments which it argues was expropriated. It is true that in part the Claimant's case is straightforward. At one remove, it was the owner of the share capital of TV3, a company incorporated and carrying on business in the Czech Republic. We do not understand it to be challenged that this was a relevant investment for the purposes of the Treaty; and in any event it is obvious that it was. No doubt for good reason, the Claimant thought it prudent to reinforce its case by alleging an investment of a different kind, taking the form of contractual rights. The identification of this second investment mutated as the dispute progressed. This wasted some time and effort for the parties, and the Tribunal, in accommodating different conceptions of the issue, but no lasting harm has been done, and we are content to approach the case by reference to the most recent formulation, according to which the investment consisted of: "... rights to any performance having economic value..." in the shape of the agreements "... which gave EMV contractual rights against [redacted] to ensure the ongoing, exclusive use by

TV3 of the Licence, and the ultimate transfer of the Licence to an entity approved by EMV”<sup>3</sup>.

37. We must therefore consider, as a first step, whether the rights so defined are capable of amounting to an investment for the purposes of Article 3. The Respondent offers more than one reason why they are not. In the first place, it is said that a mere right *in personam* against a private party cannot of itself constitute an investment because, unlike the case of a right *in rem*, the host State has no constructive notice of rights *in personam* unless it is itself the counterparty to the contract. We do not follow this argument. The Treaty is concerned with the status of an asset as an investment, and not with whether the host State is aware of its existence, although such an awareness or otherwise may be relevant to whether there has been a breach of Articles 2 or 3.
38. Nor are we persuaded by the proposition that it is not possible to localise a right *in personam*, and that accordingly the Treaty cannot apply to such a right since it is concerned only with protecting assets which are “on the territory” of one of the contracting State Parties. We accept the latter part of this proposition, but not the remainder of it. While it is true that many rights *in personam* cannot be said to have a situs in a particular State, this is not the case with all such rights. In the present case the contractual right in question related to an intended transfer by a Czech individual, effected in accordance with a Czech statute, of a Licence issued by the Czech State, the subject-matter of the Licence being the transmission of broadcasts within the territory of that State. This right appears to this Tribunal to be firmly anchored within the territory of the Czech State, and hence to qualify, other things being equal, for the protection of that State.
39. The third ground of objection is that a right *in personam* cannot qualify unless and until it has been recognised by an adjudication. Until then it is rootless, and cannot be an investment “in the territory” of any State. We do not follow this argument. Examination of the widely differing definitions contained in the hundreds of investment treaties does not, we believe, disclose any hint that whilst the protection of the international investment law

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<sup>3</sup> Claimant’s Post-Hearing Brief, para. 5.

regime can in principle extend to a contractual right, this is so only if it has been "franked" by a judgment or award. Naturally, if an asset in the shape of a contractual right is put forward as an investment for the purposes of a claim under an investment treaty the existence of the right is a prerequisite to the success of the claim, and if this proves controversial some form of adjudication may be required. But this is simply a matter of proof, not of the re-characterisation of the right by the act of adjudication. We cannot see any reason why the parties to the treaties should have wished to create a situation in which the international investment law regimes offer no protection to a contractual right at the outset, and yet begin to apply if and when the right has been challenged and held to exist. We must reject this aspect of the Respondent's submissions.

40. So also with another proposition, namely that a contractual right will not qualify as an investment unless the other party to the contract is the host State. Again, we cannot see the rationale for this. It may be that in the early days of the international investment law system it would have been possible to argue that an obligation owed to a foreign party by the State could not be a relevant investment, because the whole purpose of the ICSID regime was to protect the foreigner from the depredations of the State, and that it would be absurd for the State to promise that it would not interfere with its own obligations. The purpose of the international investment law regime was (so it might have been argued) to inhibit *external* interference by the State as a dominant power, not *internal* wrongdoing by the State as an obligor. Whatever the merits of this opinion might have been, the jurisprudence of international investment law tribunals quite clearly leaves no room for it. But this does not mean that only obligations of the host State are protected by that regime. Although the proposition was argued with vigour for the Respondent we cannot see any ground, either in the words of the Treaty or in its underlying economic policy, why this consequence should have been intended; and indeed we believe that the prime object of the Treaty and its subordinate bilateral and multilateral offspring, was not so much to protect the foreign party from breaches by the host State of its own contractual obligations, a protection which would already be afforded to some degree by the domestic courts or by chosen private dispute-resolution methods, but to make sure that the State did not cut across rights established by the kind of dealings between the foreigner and a party within

the State, which in the past had been unsupported save by diplomatic intervention.

41. Finally, it is suggested that an investment must be something which is capable of expropriation otherwise Article 3 will not work. This must surely be wrong. The whole Treaty is permeated by a single concept of investment, which cannot in any way be controlled by Article 3, any more than it is controlled by the wider provisions of Article 2.<sup>4</sup> In our opinion, the non-exclusive definitions in Article 1 mean what they say and they are quite broad enough to cover the different assets which the Claimant here contends constitute investments.

42. We therefore reject, with due respect to the skill which they were advanced, the specific grounds advanced by the Respondent for limiting the scope of "investment". We are sustained in this view by the fact that all of the grounds argued by the Respondent could, if the drafters of the Treaty had thought fit, have been made plain by express provision, of which there is no trace.

43. We must, however, advert to a wider problem which has caused us some concern, namely the apparent breadth of the language of Article 1, when applied to the second of the two investments postulated by the Claimant. Does the indirect right of EMV to require the transfer of the Licence from Mr. to KTV, by virtue of the ALTA, amount to a "...right to any performance having an economic value..." within the meaning of Article 1 (2) c) of the Treaty? The answer is not obvious. Taken in isolation, KTV's right to a transfer had no monetary worth. Offered in the market it could never have found a buyer. Nobody would have "invested" by purchasing it. However, after due consideration we have concluded that this right has to be viewed in context and that, seen as such, it does indeed have an economic value and thus constitutes an investment.

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<sup>4</sup> While we reject the Respondent's argument on this point, we do, of course, have to consider whether the investment in question is capable of expropriation under Article 3, since that is the only claim over which we have jurisdiction. We do so below (see paras. 62-65). We wish to make clear, however, that we consider the questions (a) whether the contractual rights on which the Claimant relies constitute an investment within Article 1 of the Treaty; (b) whether those rights are capable of expropriation under Article 3; and (c) whether they were in fact expropriated, to be three entirely separate questions.

44. Accordingly, the Tribunal concludes that each of the two assets identified by EMV was an investment for the purposes of the Treaty. Accordingly, we turn now to the central group of issues, relating to expropriation.

## H. EXPROPRIATION

45. This leads to the central issue, namely whether either or both of the investments of EMV were the victims of conduct prohibited by Article 3 of the Treaty. The text of that provision is set out in para. 4, above, and need not be repeated here. It is instructive to look more closely at the shape of the relevant treaty provision than has been the practice in most published discussions of expropriation. Article 3(1) prohibits two classes of act:
- (i) expropriation
  - (ii) other measures of dispossession (direct or indirect)/(total or partial) having a similar effect (sc. to expropriation).

Article 3(1) goes on to provide that the measures in question are permissible if they meet the following requirements, namely:

- (i) they are taken in accordance with a lawful procedure;
  - (ii) they are not discriminatory, and
  - (iii) they are accompanied by the required provisions for the payment of compensation.
46. A number of points need to be made regarding this provision. First, the concept of "expropriation" is not defined in the Treaty. It is appropriate, therefore, to look to general international law for assistance in ascertaining what the State Parties meant when they included reference to expropriation in Article 3(1). The need to do so is reinforced by the fact that the Tribunal is directed by Article 8(5) of the Treaty<sup>5</sup> to apply the generally

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<sup>5</sup> Article 8(5) provides –  
"The ad hoc tribunal shall rule on the basis of:

recognized rules and principles of international law. Unfortunately, neither the leading commentaries nor the case law yields a clear definition. Writing a few years before the conclusion of the Treaty, Professor Rosalyn Higgins (as she then was) observed that neither international law nor municipal law had developed a coherent meaning of expropriation.<sup>6</sup> Dolzer and Stevens, in their leading commentary on *Bilateral Investment Treaties*, published in 1995 note that expropriation includes “indirect expropriation” but then go on to state that, in spite of the case law, there is “no clear definition of the concept of indirect expropriation”.<sup>7</sup> A leading recent commentary – McLachlan, Shore and Weiniger, *International Investment Arbitration* (2007) – concludes that “the concept of expropriation is reasonably clear: it is a governmental taking of property for which compensation is required”<sup>8</sup> but then adds that

“However, it is difficult to define with precision the situations covered by the concept. The definitions of expropriation appearing in investment treaties are of such a generality that they provide little guidance to parties or arbitral tribunals confronted by concrete cases. In the absence of firm guidance, arbitral tribunals have fashioned a variety of tests for assessing whether States are liable for expropriation, which can create both opportunities and uncertainties for parties in circumstances where expropriation has arguably occurred.”<sup>9</sup>

47. It is plain from these discussions that international law offered no clear and generally agreed definition of expropriation when the Treaty was concluded in 1989 and does not do so now. Nevertheless, the Tribunal considers that the core features of the concept are sufficiently clear. The essence of expropriation is the taking of property by the State. Although it has come to include notions of indirect and “creeping” expropriation, this central element has not been lost: the measures in question must, however indirect, amount to a “taking” and they must be carried out by the State. Moreover, the taking of property is not absolutely prohibited; such taking is not a breach of international law if it meets certain criteria. While those criteria may be stated in different terms in different places, the

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- The national law of the Contracting Party, party to the dispute, on the territory of which the investment is located, including its conflict of law rules;  
 - The provisions of the present agreement;

<sup>6</sup> R. Higgins, “The Taking of Property by the State”, (1982) 159 *Recueil des Cours* 259 at 268.

<sup>7</sup> Page 100.

<sup>8</sup> Page 266.

essential elements are that for a taking to be lawful it must be non-discriminatory, it must be for a legitimate purpose (or, at least, carried out in accordance with a lawful procedure) and it must be accompanied by provision for the payment of appropriate compensation. The Tribunal is mindful of the provision, in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, 1969, that in interpreting a treaty it is necessary to take into account "any relevant rules of international law applicable in the relations between the parties" and accordingly considers that it was this concept of expropriation to which the Parties to the Treaty intended to refer when they adopted the text of Article 3(1).

48. At first sight, the structure of that provision suggests that it is only the second class of act encompassed by Article 3(1), namely measures similar to expropriation, and not the first class, expropriation itself, which can be saved from illegality by compliance with the three requirements set out in paragraph 45, above. However, as we have explained, generally recognized rules and principles of international law treat takings of property which are for a public purpose, in accordance with law, non-discriminatory and accompanied by proper provision for compensation as falling outside the scope of expropriation. In any event, the case has not been argued by either party as though there were any difference for these purposes between expropriation and "other measures...having a similar effect". The Tribunal has not, therefore, pursued this discussion any further.

49. In the course of their submissions, both parties have made extensive reference to other arbitration awards concerned with claims for expropriation, as well as to the decisions of international courts and bodies, including, in particular, the Iran-United States Claims Tribunal. This jurisprudence, while not, of course, binding on the Tribunal, is helpful, provided that two caveats are borne in mind. First, the courts and tribunals in question derived their jurisdiction from, and were applying the provisions of, treaties which were not identical to the one under which this Tribunal operates. It cannot, therefore, be assumed that the standards which those courts and tribunals applied invariably coincide with those on which this Tribunal is required to base its decision. Secondly, while it is always tempting for a party to extract isolated sentences, apparently stating general principles,



from past awards and judgments, those statements of principle cannot be divorced from the factual setting in which they were given. When a tribunal makes a statement about, for example, what constitutes indirect expropriation, it is necessary to have regard to the particular conduct which that tribunal was considering. That is particularly important with some of the statements made by the Iran-United States Claims Tribunal on which the Claimant has relied, as the facts which gave rise to those statements were very far removed from the facts of the present case.

50. Nevertheless, with those allowances duly made, the jurisprudence confirms three points which the Tribunal considers can properly be derived, in any event, from the text of Article 3(1):-

- (1) It is only acts attributable to the State which can constitute a violation of Article 3(1). That follows both from the general international law on State Responsibility, which plainly states that only actions attributable to the State can engage the international legal responsibility of the State,<sup>10</sup> and from the principle, discussed above, that the essence of expropriation is a taking of property *by the State*. This consideration is particularly important in the present case because the claim concerns allegations of interference with contract rights contained in a contract between private parties. While the Media Council is an organ of the Czech State whose actions are attributable to that State, the conduct of Mr [redacted] and RTVG is not so attributable and, consequently, is not capable of amounting to a breach of Article 3(1); only conduct of the Czech Republic is so capable.
- (2) In determining whether or not there has been a violation of Article 3(1), a two-stage analysis is normally required. First, it is necessary to determine whether or not the act or acts attributable to the State amount to an expropriation (or other measures of dispossession having an effect similar to expropriation). Secondly, if those acts do so amount, it must then be asked whether the measures in question are nonetheless compatible with the Treaty, because they comply with the requirements outlined in

paragraph 45 above. In the Tribunal's view, it is entirely wrong to invert this analysis and begin by inquiring whether or not the three conditions have been satisfied and then, if one or more of them has not been met, to deduce from that failure that there must, therefore, have been an expropriation or equivalent measure.

The fact that a measure adversely affects a foreign investment and is not "taken in accordance with a lawful procedure" and/or is discriminatory and/or is not accompanied by appropriate provision for compensation does not mean that it constitutes expropriation. The conditions in the second part of Article 3(1) come into play only if there has been an expropriation or a measure having similar effect; the absence of one or more of them is not in itself indicative of expropriation or a similar measure. This is an important point which has been emphasized by some other tribunals<sup>11</sup> but which is all too frequently overlooked. It is again of particular significance in the present case.

- (3) Expropriatory measures and measures of similar effect no longer have to entail a direct taking of property. There is abundant arbitral authority<sup>12</sup> for the proposition that contemporary international law prohibits indirect forms of expropriation. This represents a development of the law beyond the classic notion of expropriation as a direct confiscation of assets or rights which prevailed until comparatively recently. That development is reflected in the present Treaty, since the text of Article 3(1) refers to "other measures of direct or indirect dispossession, total or partial, having a similar effect" (emphasis added). Nevertheless, it is easy to exaggerate the significance of this development. Indirect expropriation must still be expropriation and, as the text of Article 3(1) makes plain, "measures of ... indirect dispossession" must involve dispossession and must be of "similar effect" to expropriation.

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<sup>10</sup> See Article 1 and following of the International Law Commission Articles on State Responsibility, reprinted in Crawford, *The International Law Commission's Articles on State Responsibility* (2002), p. 94.

<sup>11</sup> See, in particular, the award in *Fireman's Fund Insurance Company v. Mexico*, ICSID Case No. ARB(AF)02/01, para. 174. Although this award was not cited at the hearing, the Tribunal considers that the proposition which it states is self-evident.

<sup>12</sup> See, e.g., Dolzer and Stevens, above, at p. 99, and the awards in *Metalclad v. Mexico*, 5 ICSID Reps 209 at 230, *Tecmed v. Mexico*, (2004) 43 ILM 133 at 161, *Tippetts v. Iran* 6 Iran-US CTR 219 at 225, *Feldman v. Mexico* 7 ICSID Reps 341 at 366.

### The Positions of the Parties

51. As explained above (para.36), the Claimant identifies two separate investments which it maintains have been expropriated: its shareholding in TV3 and its contractual rights vis-à-vis Mr . It does not contend that these have been the subject of a direct taking. It continued to have both legal title to, and physical possession of, its shareholding until TV3 was put into liquidation, and its contracts with Mr . were not abrogated by the Media Council (or any other organ of the Czech State). Nevertheless, it contends that there was an indirect, "creeping" expropriation which effectively deprived it of the economic substance of its investments. It relies, in particular, upon the following:-

- (a) The decision of the Media Council, announced in the press release of 11 September 2001, not to approve Mr application to transfer the Licence to KTV ("the negative transfer decision");
- (b) The decision of the Media Council to allow Mr . later application to transfer the Licence to RTVG ("the positive transfer decision"); and
- (c) The alleged failure of the Media Council to enforce the condition in the Licence requiring that the operator (Mr and subsequently, following the transfer, RTVG) broadcast TV3's output, culminating in the Council's decision, following a petition from RTVG, to lift the condition altogether.

52. The Claimant maintains that the transfer decisions effectively expropriated its contractual rights to have the Licence transferred to KTV and then have Mr shares in KTV transferred to the Claimant, thus giving the Claimant control and ownership over the company which held the Licence. By blocking the original application to transfer the Licence to KTV, the Media Council (so it is claimed) prevented the ALTA contract from being performed in the manner envisaged by its parties; then, by allowing the application to transfer the Licence to RTVG, the Council made it impossible for the Claimant to secure the Licence and left it with a claim for damages against Mr which, so the

Claimant states, was worthless because Mr [redacted] had insufficient assets to satisfy that claim.

53. In advancing this argument, the Claimant maintains that the Media Council acted unlawfully as a matter of Czech law. It refers in this regard to the decision of the Constitutional Court, which found that there was a procedural defect in the way in which the Media Council arrived at the negative decision, and the broad criticisms made of the decision by the Rychetsky Report. The Claimant maintains that the Media Council lacked the power to refuse the original application for the transfer of the Licence to KTV. On the Claimant's analysis, once it was shown that the company to which the Licence was to be transferred was wholly owned by Mr [redacted], the Media Council had no discretion and was required to approve the transfer. The negative decision was thus ultra vires and, if the Council had acted lawfully, the second application and the consequent positive decision would never have been made. However, the Claimant also contends that the positive decision is flawed in its own right, since the Council was aware that, in making this application, Mr [redacted] was acting in breach of contract and, had the Council exercised the same powers of review which it had employed in relation to Mr [redacted] first application, it would have refused the second application.<sup>13</sup>

54. The Claimant also maintained, however, that the Tribunal did not need to decide whether the Media Council had a discretion or not, since, even if the Council had acted lawfully under Czech law, that did not prevent its conduct being a breach of the Treaty. That, the Claimant contended, it plainly was, because the negative decision was discriminatory and neither decision was reached in accordance with lawful procedure. Moreover, the effect of the decisions was to destroy the economic value of the contract rights without any form of compensation.<sup>14</sup>

55. The Claimant also contends that the actions and omissions of the Media Council deprived its shareholding in TV3 of its economic value. The Claimant's pleadings do not always

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<sup>13</sup> See Claimant's Post-Hearing Brief, para. 34.

distinguish between the effects on the contractual rights and the effects on the shareholding in TV3. Nevertheless, it is clear that the Claimant maintains that by allowing Mr [redacted] to transfer the Licence to a company (RTVG) over which the Claimant and TV3 had no control, by failing to enforce the Licence condition requiring the Licence holder to broadcast TV3's output and eventually by removing the Licence condition altogether, the Media Council deprived TV3 of the only guaranteed outlet for its production and thus destroyed its business, rendering the shares in TV3 worthless.<sup>15</sup>

56. An important part of the Claimant's reasoning was its argument that, prior to the decisions of the Media Council, TV3 was a viable company with significant economic prospects. While this part of the Claimant's case (and the Respondent's reply thereto) was presented chiefly in connection with arguments on the measure of compensation (an issue which arises only if the Claimant is successful in establishing a violation of Article 3(1) of the Treaty), it is also an important part of the case on whether such a violation occurred, because if TV3 was a failing company with no real prospects (as the Respondent argued; see para.61 below), then the actions and omissions of the Media Council could not have been the cause of the Claimant's losses. In effect, had TV3 been non-viable even before the decisions of the Media Council, those decisions could not have destroyed an economic value which the company did not possess in any event.
57. The Respondent counters by arguing, first, that the Claimant's rights under the contracts with Mr [redacted] were not capable of being expropriated. The Respondent notes that the contracts in question were of a purely private character; that is to say they were between private parties and did not bind any organ or agency of the Respondent State. According to the Respondent, rights derived from contracts of that kind are not susceptible of expropriation by the State and have never been held to be so susceptible.<sup>16</sup>

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<sup>14</sup> See Claimant's Post-Hearing Brief, paras. 37-45.

<sup>15</sup> See Claimant's Post-Hearing Brief, para. 46.

<sup>16</sup> See Respondent's Rejoinder at paras. 40 et seq. and Post-Hearing Brief at paras. 19 et seq.

58. Secondly, the Respondent argues that the chronology of the Media Council's actions precludes there having been an expropriation of the Claimant's contract rights (even if those rights were capable of being expropriated). This argument proceeds as follows:-

- (a) The press release of 11 September 2001<sup>17</sup> was not a legally binding decision and could not therefore amount to an expropriation. The Media Council's negative decision only took effect some weeks later when it was formally published.
- (b) The formal decision could not amount to an expropriation either, because by the time that formal decision was issued, Mr [redacted] had withdrawn his original application and lodged the second application which the Media Council was obliged to grant.
- (c) Accordingly, by the time any formal decision was taken by the Media Council, the only action which negatively affected the Claimant's contractual rights was Mr [redacted] action in breaking his contract with the Claimant.<sup>18</sup>

59. Thirdly, the Respondent contends that the Media Council acted lawfully throughout under Czech law. In particular, it not only had a power to inquire into whether Mr [redacted] had beneficial ownership and actual control over KTV, as opposed to mere formal ownership and control, it had a duty to do so. The Respondent maintained that, if the Media Council had acted throughout in accordance with Czech law, its conduct could not amount to an expropriation of the Claimant's contract rights, nor could it give rise to a claim for any diminution of the value of the shares in TV3.<sup>19</sup>

60. Fourthly, the Respondent argued that the Claimant had misrepresented the effect of the international decisions on indirect expropriation, which, it maintained, were of far more limited effect and, in particular, did not extend to conduct of the kind involved in the present case.<sup>20</sup>

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<sup>17</sup> See paragraph 19, above.

<sup>18</sup> See Respondent's Rejoinder at paras. 97 et seq.

<sup>19</sup> See Respondent's Post-Hearing Brief at paras. 26-44.

<sup>20</sup> See Respondent's Post-Hearing Brief at paras. 45-94.

61. Finally, the Respondent contested the Claimant's case that TV3 was a viable economic concern and argued that it was already facing grave financial difficulty and would not have been able to succeed economically in any event.<sup>21</sup>

### The Decision of the Tribunal

#### (a) *Was the Claimant's Investment Capable of Being Expropriated*

62. It is appropriate to begin with the Respondent's argument that an investor's *in personam* rights under a contract with a private party are not capable of expropriation. This argument is closely related to the argument that the contract rights were not an investment within the meaning of the Treaty, an argument which the Tribunal has already rejected (see paragraph 44 above). But the rejection of that earlier argument does not of itself entail rejection of the Respondent's thesis that, even if they were capable of constituting an investment, the contract rights were not capable of being expropriated.
63. There is no inconsistency in holding that rights to performance under a contract with a private party constitute an investment but not one which is capable of being expropriated. Protection against expropriation is not the only safeguard which the Treaty affords to investments, even though it is the only one the breach of which would fall within the jurisdiction of a tribunal established under Article 8.
64. Nevertheless, the Tribunal is not persuaded by the Respondent's argument on this point. Nothing in the text of Article 3(1) suggests, let alone compels, the conclusion that some investments are simply incapable of expropriation or of being subjected to other measures of similar effect. Nor is such a conclusion dictated by considerations of logic. Once it is accepted that rights to performance under a contract between an investor and a private party

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<sup>21</sup> See Respondent's Post-Hearing Brief at paras. 95-118.

constitute an investment (as the Tribunal has decided), then if the State intervenes to abrogate those rights, it follows that the State has taken, or at least destroyed the economic value of, that investment. An obvious example would be a case in which the State legislated to terminate rights for foreign investors under contracts concluded between those investors and nationals of the State concerned. Moreover, the Tribunal is not convinced by the Respondent's analysis of the case law on this subject. While the Respondent argued with great ingenuity that the decisions in *Certain German Interests in Upper Silesia*<sup>22</sup> and the *Norwegian Shipowners' claims*<sup>23</sup> were in reality decisions regarding rights in rem, the actual reasoning in both cases strongly suggests that those who decided the two cases considered that private contractual rights were, in principle, capable of expropriation and they clearly approached the cases on that basis. While the Respondent is, of course, entitled to argue that the two cases could have been decided more coherently on other grounds, the Respondent's attempts to force the actual decisions into the framework of its own legal analysis begins to resemble the attempts to force an ungainly foot into Cinderella's glass slipper and is no more successful.

65. The Tribunal therefore rejects the Respondent's argument on this point and holds that the Claimant's rights under its contracts with Mr [redacted] were capable of being expropriated by the Czech Republic. The Tribunal considers that its conclusions on this point are supported both by the two decisions cited in the previous paragraph and by the language of the Treaty. Rights under a private contract plainly fall within the definition of an investment under Article 1 of the Treaty and there is no indication in the text of the Treaty, or in considerations of principle, that the Parties intended this category of investment to fall outside the protection of Article 3(1). Whether the contract rights were in fact expropriated is, of course, an entirely different matter. The Respondent's arguments, though unsuccessful on the broad argument of principle, nonetheless highlight the fact that rights under a contract to which the State is not a party and which the State has not intervened to annul will not easily be found to have been the subject of expropriation or measures having a similar effect. The Tribunal turns to this issue at para.70 below.

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<sup>22</sup> PCIJ, Series A, No.7, 1926

<sup>23</sup> *Norway v USA*, (Award, 13 October 1922) I RIAA 307.



(b) *The Respondent's Arguments Concerning the Sequence and Timing of the Different Actions of the Media Council*

66. Nor is the Tribunal persuaded by the Respondent's arguments regarding the sequence and timing of the Media Council's actions. The Respondent's case, developed in particular in its Rejoinder, is that the press statement published on 11 September 2001 had no legal effect as a matter of Czech law, since decisions of the Media Council do not have binding effect until formally served on the parties and the negative decision was not formally delivered to Mr [redacted] until 17 October 2001 by which date he had made the second application, requesting permission for transfer to RTVG. The Respondent argues that the publication of the press statement on 11 September was not a "measure attributable to the Czech Republic" and that the formal decision on 17 October, while plainly a measure attributable to the Czech Republic, cannot be impeached because of Mr [redacted] acts in the intervening period which left the Media Council with no choice but to reject the initial application since "the Licence-holder's choice of legal entity is sovereign in an application under Article 68(6) of the Media Law".<sup>24</sup>

67. This argument is not convincing. The Tribunal accepts that the decision taken by the Media Council became effective in Czech law only when formally notified on 17 October. But the plain fact is that the decision was taken on an earlier date and then made public. The Media Council is an organ of the Czech State for the purposes of international law<sup>25</sup> and both the decision which it took, and the action of publishing a statement about that decision, are acts which are attributable to the Czech State. If, when that decision became legally effective, it would have amounted to expropriation of the Claimant's rights (a matter we consider below), then it would be contrary to principle to hold that it lost that character because Mr [redacted] had acted on the informal press announcement and made a new and different application before he received the formal notification of the rejection of

<sup>24</sup> Rejoinder, para. 101.

<sup>25</sup> International Law Commission Articles on State Responsibility, Article 4; reprinted in Crawford, *The International Law Commission's Articles on State Responsibility* (2002), p. 94.

his original application. The reality is that once the initial negative transfer decision had been taken and notified, albeit informally, to Mr [redacted] what followed was influenced by that decision.

(c) *Whether Compliance with Czech Law Precludes a Breach of the Treaty*

68. The Claimant is plainly correct in its general assertion that even if the Media Council complied throughout with the requirements of Czech law, that fact would not, by itself, preclude the Council's conduct from amounting to a breach of the Treaty. As Article 3 of the International Law Commission's Articles on State Responsibility provides –

“The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”<sup>26</sup>

This provision states a well established rule of international law of particular importance in the investment field.

69. However, the fact that conduct *might* violate a rule of international law even though that conduct is in accordance with the internal law of the State concerned does not mean that the position under national law is irrelevant. This point is considered further below.

(d) *Whether the Acts and Omissions of the Media Council Amounted to Expropriation*

70. As the Tribunal has already explained, the present case turns on the concept of indirect expropriation. The Claimant, understandably, urged on the Tribunal a very broad concept of indirect expropriation, which, it maintained, occurs “whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that the

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<sup>26</sup> Op. cit., p. 86.

deprivation is not ephemeral”.<sup>27</sup> On the Claimant’s analysis, the intention of the State is largely immaterial; “the intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact”.<sup>28</sup> The critical test is said to be whether “the measures of which complaint is made substantially deprive the investment of economic value”.<sup>29</sup>

71. These statements (and a number of others relied upon by the Claimant) certainly point to an expansive (and expanding) concept of indirect expropriation but the Tribunal believes that these statements should be approached with a degree of caution and it has come to the view that they do not sustain the conclusions advanced by the Claimant with regard to the facts of the present case.
72. First, the context in which the statements about indirect expropriation were made is important. The very broad language of the statement from *Telenor*<sup>30</sup>, for example, is in the context of an award dealing only with jurisdiction, in which the relevant issue was whether or not the claimants had demonstrated a prima facie case of expropriation, rather than whether such a claim was made out on the merits. The *Telenor* tribunal concluded (in what may be described as fairly robust terms) that the claimants had failed to establish even a prima facie case. The tribunal did not, therefore, have to grapple in any detail with the limits of the concept of indirect expropriation.
73. *Tippetts*<sup>31</sup> was a case in which the claimants were left with legal title to the investment but that legal title had been reduced to a mere shell by the action of the Iranian Government in taking over the management of the concern and effectively excluding the claimants from

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<sup>27</sup> Post-hearing Submissions, para. 25, quoting from the award of the Iran-United States Claims Tribunal in *Tippetts v. Iran* 6 Iran-US CTR 219 (29 June 1984) at 225.

<sup>28</sup> Loc. cit., para. 26, quoting *Tippetts* at p. 225-6.

<sup>29</sup> Loc. cit., quoting *Telenor v. Hungary*, ICSID Case No. ARB/04/15, Award (13 September 2006) at para. 63.

<sup>30</sup> *Telenor v. Hungary* ICSID Case No. ARB/04/15, Award (13 September 2006).

<sup>31</sup> *Tippetts v. Iran* 6 Iran-US CTR 219 (29 June 1984).

any participation therein. *Starrett Housing*<sup>32</sup>, another decision of the Iran-United States Claims Tribunal on which the Claimant has relied, is very similar. It is not difficult to see that the facts of these cases fall squarely within any concept of indirect expropriation. Yet they are very far removed from the facts of the present case. Here, the Czech Republic has not assumed control of the Claimant's investment, which the Claimant continued to manage to the last.

74. Moreover, the approach of the Iran-US Claims Tribunal in these cases is more cautious than the brief quotations in the pleadings would suggest. Thus, the full text of the paragraph in the *Tippetts* award from which the two clauses quoted in paragraphs 25-26 of the Claimant's Post-Hearing Submissions were taken is as follows (the part not quoted in the Submissions being shown in italics):

*"While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact."*<sup>33</sup>

Seen as a whole, this passage is not only less expansive than the parts originally quoted might appear, it is also very clearly linked to the assumption of control by a State of the investment. That is not at all the case here.

75. Similarly, several of the cases, such as *Metalclad*<sup>34</sup>, which contain broad statements about the scope of expropriation, were concerned with the refusal or withdrawal of permits which had been granted, or at least promised, to the investor or his investment and without which the business concerned could not lawfully be carried on. That is not this case. Nor is the

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<sup>32</sup> Starrett Housing Corporation et al v. Islamic Republic of Iran (Interlocutory Award No. ITL 32-34-1) 4 Iran-US CTR 122.

<sup>33</sup> 6 Iran-US CTR 219 at 225-6.

<sup>34</sup> Metalclad Corporation v. The United Mexican States ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000.

Tribunal assisted by the award in the case of *CME v. Czech Republic* (unreported). That award is not only highly controversial and, indeed, directly contradicted by the award in *Lauder v. Czech Republic* (unreported) which arose out of the same set of facts, the Tribunal considers that the Respondent is right in its submission that the case is distinguishable from the present case on the facts.

76. Secondly, an investor who contracts with a private party, as the Claimant did here, and who depends for the achievement of the full benefit of those contracts upon the host State's exercise of its regulatory powers is not entitled to compensation for expropriation merely because regulatory decisions go against him, even if the consequence is that his business is ruined. Certainly, he is entitled to fair and equitable treatment and not to be subjected to a denial of justice but these are entitlements quite separate and distinct from the right not to be subjected to expropriation; unfair and inequitable treatment by a regulatory agency is not necessarily expropriation.
77. In the present case, the conduct of the Media Council may have fallen short of the standard of fair and equitable treatment – the criticism of its behaviour by the Rychetsky Report and the Constitutional Court certainly raise a *prima facie* case to that effect – but that issue falls outside the jurisdiction of the Tribunal.<sup>35</sup> The Tribunal has concluded, however, that, whether the individual acts and omissions are considered separately or as a whole, they do not amount to expropriation of the Claimant's two investments.
78. To take, first, the negative transfer decision of the Media Council. This is said to amount (whether by itself or in combination) to an expropriation of the Claimant's rights under its contracts with Mr . But the decision, whether or not it was *ultra vires* the Council, did not alter the Claimant's rights under the contracts. It did not even frustrate the performance of the contracts. On the contrary, it was an event for which the ALTA contained specific provision. In the event of the Media Council refusing permission for the transfer of the Licence to KTV, the ALTA expressly provided a "plan B" in the form of a

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<sup>35</sup> Similarly, these considerations may give rise to rights under national law but these also, and *a fortiori*, are not within the jurisdiction of this Tribunal.

requirement for Mr [redacted] to make a fresh application for transfer of the Licence to a Czech company owned by himself and of the Claimant's choosing. It cannot be said that by rejecting the contractual "plan A", the Media Council negated the Claimant's rights under the ALTA.

79. What then went wrong for the Claimant was that, instead of complying with the fallback provisions of the contract, Mr [redacted] applied to transfer the Licence to a company which had not been approved by the Claimant. This may well have been a breach of contract by Mr [redacted] but that is not an act attributable to the Czech Republic and cannot give rise to a claim before this Tribunal. The Claimant maintains that the Media Council should have rejected the application and thus prevented Mr [redacted] from committing a breach of contract. It is questionable whether the Council had the power to do that; its function was not to enforce private contractual obligations but to ensure compliance with the Media Law. However, even if it could or should have rejected the application on the grounds suggested by the Claimant, its failure to do so did not amount to expropriation of the Claimant's rights under the ALTA.

80. Contrary to the way the Claimant has sometimes expressed its case, the Claimant had no right vis-à-vis the world at large to the Licence, nor did it have any such right to acquire the Licence. What it had was (i) a right against Mr [redacted] to have Mr [redacted] make certain applications to the Media Council, and (ii) once one of those applications was successful, a right to have Mr [redacted] transfer his shares in the recipient company to the Claimant.

81. The Claimant argues that the decisions of the Media Council left it with nothing but a right to claim damages from Mr [redacted] and that Mr [redacted] financial circumstances rendered that claim worthless.<sup>36</sup> There are three reasons why the Tribunal does not accept that argument.

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<sup>36</sup> See Claimant's Post-Hearing Brief at para. 36.

82. First, even after the positive transfer decision had been taken, it was still open to Mr [redacted] to transfer his interest in RTVG to the Claimant. Had he done so, the Claimant would have been in the same position as if the ALTA's plan B had been properly carried out from the outset. It is arguable that Mr [redacted] had a duty to behave in this way. Conversely, had the Licence been transferred to a Czech company approved by the Claimant, there would still have been the risk that Mr [redacted] would then have declined to transfer his ownership interest. In other words, the reason why the Claimant failed to get what it considered was its contractual entitlement was the behaviour of Mr [redacted]. That behaviour by a private party is not a "taking of property by the State" even if the State (in the form of the Media Council) could have prevented that behaviour.
83. Secondly, and more fundamentally, if the Claimant were right, then a court which failed to order performance of a contract between a private party and a foreign investor (whether by way of an order for specific performance or some equivalent form of relief) in circumstances where damages later proved an inadequate remedy because of the private party's penury would have committed an expropriation of the investor's contract rights. Such a proposition is simply untenable and there is no authority which comes anywhere near supporting it. And if such an argument cannot succeed in the case of a court, which has a duty to enforce contractual rights, then, *a fortiori*, it cannot be correct in the case of a regulatory body with very different functions.
84. Thirdly, and perhaps most fundamentally of all, the Claimant's argument is based upon a misconception of the relationship between contractual rights and the law of expropriation. While the Tribunal accepts that rights contained in a contract between an investor and another private party are capable of being expropriated by the State (see paragraphs 62-65 above), such an expropriation will normally take the form of action by the State which terminates or substantially amends the contractual rights and entitlements of the investor. In the present case, the Media Council did nothing of the kind. The extent of the Claimant's rights against Mr [redacted] under the ALTA were not altered in any way.

85. The Claimant's case is, of course, that, even though its contractual rights remained, they were rendered worthless, so that the Media Council's actions amount to a form of indirect expropriation. But that misunderstands the nature of rights under the contract. The essence of those contractual rights was that one party to the contract has a right to performance of the contract by the other party and a right, in the event of that other party failing to perform, to damages for non-performance. Even if one accepts that the combined effect of the negative and positive transfer decisions was that the Claimant could no longer secure performance of the ALTA, it was left with its right to damages. The Claimant's answer is that that right was worthless, because Mr [redacted] had insufficient assets,<sup>37</sup> so that the practical effect of the decisions was to destroy its rights under the ALTA. That suggests, however, that, if Mr [redacted] had had sufficient assets, then there would have been no destruction of the Claimant's contract rights and no expropriation (or other breach of Article 3(1)). Whether the action of a State amounts to a taking of an investor's rights under a contract with another private party cannot, however, be dependent upon the financial circumstances of that other private party. The host State of an investment is not the guarantor of the performance by private parties of their contractual obligations, nor is it the guarantor of their financial viability.
86. That leaves the rights under the service agreement between TV3 and Mr [redacted] and the shareholding in TV3. The service agreement gave TV3 the right to broadcast its programmes through Mr [redacted] channel. That was a private contractual right. TV3 also had the benefit of the Licence condition which required the Licence holder to use TV3's output.
87. The decisions of the Media Council were not the reason for the breakdown of the service agreement. Following the transfer of the Licence, Mr [redacted] (as the owner of RTVG) offered to enter into negotiations for the continuation of the service agreement provisions but TV3 declined to do so. Whether Mr [redacted] was in breach of contract or whether TV3 was being obdurate, there can be no question of an expropriation at this point. This was a contract dispute between the parties to a private law agreement. The behaviour of

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<sup>37</sup> See Claimant's Post-Hearing Brief at para. 36.



those parties was not conduct attributable to the Czech Republic as a matter of international law and it was not capable of amounting to an expropriation or a measure similar to an expropriation.

88. Nor is the treatment of the Licence condition a measure of – or similar to – expropriation. The Licence condition imposed obligations upon the Licence holder but it did not confer rights upon TV3. Moreover, the relationship between TV3 and Mr (and RTVG) was already in a bad state when the Media Council was confronted with this issue. While the Council's attempts to enforce the Licence condition may have been half-hearted, neither the failure of those attempts nor the subsequent removal of the Licence condition, which occurred after TV3 had indicated that it could not work with RTVG, could be said to amount to an expropriation of the rights under the service agreement. On the contrary, the record shows that the Media Council took action against RTVG to ensure that it complied with the Licence and only revoked the Licence condition after TV3 had written to it to make clear that it could not work with RTVG. Thus, on 25 February 2002 TV3 stated, in a letter which was copied to the Media Council, that "in the current situation there is absolutely no possibility of co-operation of TV3 a.s. with the company RTV Galaxie a.s. in any sphere" and that "TV3 a.s. does not wish to be associated with RTV Galaxie a.s. and its broadcasting in any manner".<sup>38</sup>

89. Nor does the Tribunal accept that any of the measures referred to by the Claimant and discussed above can amount to an expropriation of the Claimant's indirect shareholding in TV3. The Claimant's legal interest in TV3 was not altered by these measures – what it owned (directly or indirectly) before those measures, it still owned after they had been taken. The Claimant's case is, of course, that the measures had had the effect of destroying the value of that legal interest. The Tribunal does not agree. For the reasons given above, the Tribunal considers that it was the actions of Mr and RTVG, rather than those of any organ of the Czech Republic, which caused the losses which the Claimant sustained.

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<sup>38</sup> Exhibit R-57 to the Statement of Defence.

90. That fact, by itself, is fatal to the Claimant's case and makes it unnecessary for the Tribunal to consider the Claimant's legal arguments. Nevertheless, in view of the skill with which they were advanced we wish briefly to comment upon them. The Claimant's argument was that the destruction of the value of its indirect legal interest in TV3 was such as to amount to an indirect expropriation or similar measure. The Tribunal considers that this pushes the concepts of indirect expropriation and measures similar thereto beyond what is sustainable either as a matter of the interpretation of the text of Article 3 or by way of application of the general principles of the law of expropriation.
91. As explained above (paragraphs 46-50), while both the Treaty and the general international law recognize a concept of what may be termed "indirect expropriation", they do so only within limits. Article 3 refers to "measures of ... indirect *dispossession*" having an effect similar to expropriation. In the present case, the Tribunal cannot see that there has been any dispossession – total or partial, direct or indirect – of the Claimant's legal interest in TV3. So far as the general law is concerned, indirect expropriation must still be expropriation. The cases in which indirect expropriation has been found to have occurred notwithstanding that there has been neither a physical taking nor a transfer of legal title have to be approached with considerable care. The most prominent of these awards, those emanating from the Iran-United States Claims Tribunal, concerned cases in which the owner of property had effectively been deprived of any opportunity to manage or control that property, e.g., through the appointment by government of managers who took over the entire operation of the investment. In a case of that kind, it is appropriate to speak of the owner being subjected to indirect expropriation even though he retained the legal title to the property in question. But that is not the case here. The Claimant retained not only legal title but full control of the investment throughout. Certainly that investment had declined in value but that is not at all the same as saying that it had been expropriated. As the Tribunal in the *Fireman's Fund* case put it, for indirect expropriation, there "must be a substantially complete deprivation of the economic use and enjoyment of rights to the property, or of identifiable distinct parts thereof (i.e. it approaches total impairment)". We do not consider that the present case reaches that level.

## I. QUANTUM

92. The Tribunal is glad to acknowledge the skill and care devoted by the parties to the preparation of the evidence and submissions on the issue of quantum, to which the arbitrators themselves devoted equal attention. Inevitably, it is a matter of some disappointment that this material cannot be deployed in the present award. Nevertheless the Tribunal is quite clear that there would be no benefit to the parties, or to the world of arbitration at large, by entering into this area of the dispute. Given the conclusions of the Tribunal on liability an exploration of quantum would have been empty of practical content, and the expression of a purely academic line of reasoning could be a real impediment if the same or similar questions were to arise in the future. It will be better to leave these questions for decision elsewhere if and when they become live issues.

## J. COSTS

93. There remains the question of costs. Although the State has ultimately prevailed, it had only a partial success on the separate issue of jurisdiction, and not all of its submissions on liability were accepted. It may be that a simple solution, that "costs follow the event", is nevertheless appropriate here, or that the successes were so evenly divided that it would be fair to allow the costs to lie where they fall; or that some intermediate solution best fits the circumstances. While the Tribunal could proceed immediately to a choice, and embody it in the present Award, the amount of money involved in costs is likely to be substantial, and the Tribunal considers it more fair to allow time for a possible compromise on costs, or at least for the exchange of submissions. We therefore leave out this topic which will thereby become a further partial award.

## K. CONCLUSION

94. Accordingly, the Tribunal hereby makes and publishes its Partial Award as follows:

- a. The Claimant's claim fails and is dismissed
- b. All issues regarding the costs of and occasioned by the arbitration and this our Award are reserved for subsequent determination.

..... M. Mustill

Lord Mustill (Chairman)

..... Christopher Greenwood

Sir Christopher Greenwood

..... Dr. Julian Lew Q.C.

8<sup>th</sup> July 2009

London

## ANNEX B

### The Parties and Representation

1. The Claimant is European Media Ventures S.A., a company incorporated and organised under the laws of the Grand Duchy of Luxembourg and having its registered address at 12, rue Léon Thyès, L-2636 Luxembourg.
2. The Claimant is represented by Brenda D.Horrigan of Salans, 9, rue Boissy d'Anglas, 75008 Paris, and Ladislav Štorek of Salans, Platnéřská 4, 110 00 Prague 1, Czech Republic. In addition, Mr Jeffrey M Hertzfeld is acting as Special Counsel to Salans.
3. The Respondent is the Czech Republic, a sovereign State, represented by its Ministry of Finance as the body responsible for, among other matters, protection of foreign investments. The address of the Ministry of Finance of the Czech Republic is Letenská 15, 118 10 Prague 1, Czech Republic.
4. The Respondent is represented by Zachary Douglas of Counsel, Luděk Vrána of Linklaters, Palác Myslbek, Na Příkopě 19, 117 19 Prague 1, Czech Republic, and Greg Reid of Linklaters, One Silk Street, London, EC2Y 8HQ. By letter dated 11 June 2009, Linklaters notified the Tribunal that the Prague office had become part of an independent law firm rebranded as Kinstellar, but retaining the same address.

### The Treaty

5. The Agreement between the Belgian-Luxembourg Economic Union and the Czechoslovak Socialist Republic concerning the Reciprocal Promotion and Protection of Investments, 1992 ("the Treaty") was entered into between the Czechoslovak Socialist Republic and the Belgium Luxembourg Economic Union on 24 April 1989 and, in accordance with its Article 10(1), entered into force on 13 February 1992. As of 1 January 1993, the Respondent succeeded to the rights and obligations of the Czechoslovak Socialist Republic under the Treaty and is now a Contracting Party thereof.

### The seat and language of the arbitration

6. At the first procedural conference held on 18 October 2006, the Tribunal confirmed that the seat of the arbitration was to be London and the language English.

### Progress of the Proceedings

7. The Claimant filed a Notice of Dispute in this matter under Article 7(1) of the Treaty addressed to the Respondent dated 17 February 2003. During the course of 2003 and

2004, the parties engaged in efforts towards an amicable resolution, but settlement was not achieved.

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

(2) Whether an Article 8(1) claim can extend to the minimum standard of treatment obligation.

15. In addition, the Tribunal established a timetable for the parties' written and oral submissions on the preliminary issues; the format and delivery of statements of case; and confirmed that the seat and language of the arbitration were to be London and English respectively.

16. The preliminary issues were heard on Thursday 18 January 2007 at Essex Court Chambers, London. On Thursday 22 February 2007 the Tribunal communicated to the parties in these terms:

1. *The Tribunal has deliberated on the jurisdictional objections raised by the Czech Republic which were the subject of the oral hearing held on 18 January 2007.*

2. *The Tribunal has concluded, not without some hesitation:-*

a. *that its jurisdiction is circumscribed by the provisions of Article 8(1) of the Agreement between the Belgian-Luxembourg Economic Union and the Czechoslovak Socialist Republic concerning the Reciprocal Promotion and Protection of Investments, 1992 ("the Treaty");*

b. *that, contrary to the Claimant's submissions, jurisdiction does not extend to making findings in respect of Article 2(3) and (4) of the Treaty;*

c. *that, contrary to the Respondent's submissions, jurisdiction extends to determining whether there has been an expropriation and, if so, whether there arises, under Article 3(1) of the Treaty, a duty on the part of the Respondent to pay compensation; and*

d. *that the burden of establishing that there has been an expropriation and that there is a consequent duty under Article 3(1) of the Treaty to pay compensation rests on the Claimant.*

3. *In light of the above decision, the Tribunal intends to go ahead with the short procedural hearing scheduled for the morning of 1 March 2007, with a view to prescribing a timetable and fixing the date and duration of the substantive hearing. The parties are requested to consult regarding the agenda for that hearing and a proposed timetable for the next phase of written and oral pleadings and the appropriate date and approximate duration of the substantive hearing; and to notify the Secretary of their proposals not later than 5.00 pm, London time, on 27 February 2007.*

*4. The Tribunal will set out its detailed reasons for its conclusions regarding jurisdiction in its award on the merits.*

17. At the second procedural conference on Thursday 1 March 2007, the Respondent requested the Tribunal to furnish the parties with a reasoned award on the preliminary issues prior to the third procedural conference scheduled for Thursday 15 May 2007.
18. In addition, at the second procedural conference, and as recorded in the second procedural order, dated 1 March 2007, the Tribunal determined the forthcoming timetable for the reference, including in relation to disclosure, service of Reply by the Claimant and Rejoinder by the Respondent, and further rebuttal witness statements and expert reports. Dates for the substantive hearing were reserved.
19. On 15 May 2007, the Tribunal provided to the parties its Award on Jurisdiction, in which it gave a reasoned award in relation to the decision communicated to the parties on 22 February 2007.
20. At the third procedural conference on 15 May 2007, and as recorded in the third procedural order of the same date, the Tribunal heard applications for and ordered the disclosure of certain documents, following requests for disclosure by both parties.
21. The Respondent commenced proceedings in the Commercial Court in London, seeking to set aside the Tribunal's Award of Jurisdiction dated 15 May 2007, pursuant to section 67(1)(a) of the Arbitration Act 1996, on the grounds that the Tribunal lacked substantive jurisdiction. A hearing in the Commercial Court took place on 6 September 2007. On 5 December 2007, Simon J handed down judgment finding that the Tribunal was conferred with substantive jurisdiction and dismissing the Respondent's application.
22. By letter dated 13 September 2007, the Claimant informed the Tribunal that the parties had agreed that the service of the Claimant's Reply be deferred to 17 or 18 September 2007 due to a hospitalisation of one of the witnesses for whom the Claimant was submitting a statement.
23. In the event, the Claimant submitted its Reply with exhibits on 19 September 2007.
24. By letter dated 4 December 2007, the Respondent's solicitors set out a proposed variation to the procedural timetable, by which the time limits for submission of the Respondent's Rejoinder, and the rebuttal witnesses were extended, and the hearing listed to take place in London during the second week of the period previously set aside. The Claimant agreed in large part to the variation. By email on 5 December 2007, the Tribunal informed the parties that it agreed to this variation of the timetable.
25. The Respondent submitted its Rejoinder on 21 December 2007, together with exhibits.



26. The Tribunal issued a procedural order by email on 23 January 2008 in relation to the service of rebuttal witness statements, and convening a procedural hearing for 7 February 2008.
27. The Claimant submitted rebuttal witness statements and reports from its experts on 25 January 2008. The Respondent submitted a rebuttal expert report on 5 February 2008.
28. A procedural hearing was held by telephone on 7 February 2008 regarding outstanding steps and housekeeping matters before the main hearing.
29. Written pre-hearing briefs were submitted by both parties.
30. The main hearing was held between 18 to 22 February 2008. The Tribunal heard opening submissions from Counsel. We also heard evidence from the following witnesses:
- (a) Mr
  - (b) Mr
  - (c) Mr
  - (d) Ms Lauren Cole (expert)
  - (e) Mr
  - (f) Mr
  - (g) Mr
  - (h) Mr
  - (i) Mr
  - (j) Mr Ronald Miller (expert)
  - (k) Mr William Inglis (expert)
31. The parties submitted written post-hearing briefs. In addition, the Respondent submitted an application based on its international public policy argument, which the Claimant replied to.