

**UNCITRAL Arbitration Proceedings  
CME Czech Republic B.V. (The Netherlands)**

**vs.**

**The Czech Republic**

**PARTIAL AWARD**

We hereby certify this  
to be a true copy of the  
original.

Signed *Armin Ahma*  
Clifford Chance  
Limited Liability Partnership  
200 Aldersgate Street  
London  
EC1A 4JJ

**issued in Stockholm, Sweden, on September 13, 2001 in the UNCITRAL  
Arbitration Proceedings**

**between**

**CLAIMANT:** CME Czech Republic B.V., Hoogoorddreef 9, 1101 BA Am-  
sterdam Zuid-Oost, The Netherlands (hereinafter referred  
to as "CME") represented by:

Mr. John S. Kiernan and Mr. Michael M. Ostrove, De-  
bevoise & Plimpton, 875 Third Avenue, New York, New  
York 10022, U.S.A.

and

**RESPONDENT:** The Czech Republic

represented by the Minister of Finance of the Czech Re-  
public Mr. Jiří Rusnoki, Ministry of Finance, Letenzka 15,  
11810 Prague 1, The Czech Republic represented by:  
Mr. Jeremy Carver and Mr. Audley Sheppard, Clifford  
Chance, 200 Aldersgate Street, London EC1A 4JJ and  
Mr. Vladimír Petrus and Mr. Miroslav Dubovský, Clifford  
Chance Pünder, Charles Bridge Center, Křižovnické  
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**BEFORE:** Dr. Wolfgang Kühn, Düsseldorf, Chairman,  
Judge Stephen M. Schwebel, Washington D.C., Arbitrator,  
JUDr. Jaroslav Hándl, Prague, Arbitrator

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A.

**Background of the Dispute**

**(1) The Parties**

1. The Claimant CME Czech Republic B.V. is a corporation organized under the laws of the Netherlands. The Respondent, the Czech Republic, is a sovereign governmental entity, represented in these proceedings by its Ministry of Finance.

**(2) The UNCITRAL Arbitration Proceedings**

2. CME Czech Republic B.V. (CME) initiated these arbitration proceedings on February 22, 2000 by notice of arbitration against the Czech Republic pursuant to Art. 3 of the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

**(3) The Netherlands / Czech Republic Bilateral Investment Treaty**

3. CME brought this arbitration as a result of alleged actions and inactions and omissions by the Czech Republic claimed to be in breach of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, executed on April 29, 1991 (hereinafter: "the Treaty"). The Treaty entered into force in the Czech and Slovak Federal Republic on October 1, 1992 and, after the Czech and Slovak Federal Republic ceased to exist on December 31, 1992, the Czech Republic succeeded to the rights and obligations of the Czech and Slovak Federal Republic under the Treaty.

**(4) CME's "investments" under the Treaty**

4. CME holds a 99 % equity interest in Česká Nezávislá Televizní Společnost, spol. s r.o. ("ČNTS"), a Czech television services company. CME maintains that, among other things, CME's ownership interest in ČNTS and its indirect ownership of ČNTS' assets qualify as "investments" pursuant to Art. 1 (a) of the Treaty. CME and these investments, therefore, are thereby entitled to the protection and benefits of the Treaty.

**(5) CME's shareholding**

5. CME acquired its 99 % ownership interest in ČNTS in steps. It acquired 5.8 % shares in 1997 by purchasing the Czech holding company NOVA Consulting, which owned these shares, and by purchasing, in May 1997, 93.2 % from CME's affiliated company, CME Media Enterprises B.V., which, in turn, in 1996 had acquired 22 % of the shares in ČNTS from the Česká Spořitelna a.s. (Czech Savings Bank) and 5.2 % from CET 21 Spol. s r.o. (CET 21).
6. Earlier, in 1994, CME Media Enterprises B.V. had acquired a 66 % shareholding in ČNTS from the Central European Development Corporation GmbH ("CEDC"), a German company under the same ultimate control as CME and CME Media Enterprises B.V. of an American corporation in turn controlled by Mr. Ronald S. Lauder, an American businessman with domicile in the United States of America.
7. CEDC (with a share of 66 %), CET 21 (with a share of 21 %) and the Czech Savings Bank (with a share of 22 %) were co-founders of ČNTS, formed as a joint venture company in 1993 with the object of providing broadcasting services to CET 21.

**(6) The Broadcasting Licence**

8. CME's investments (its ownership interest in ČNTS and its indirect ownership of ČNTS' assets) are related to a Licence for television broadcasting granted by the Czech Media Council, empowered to issue licences by the Czech Republic's Act on the Operation of Radio and Television Broadcasting, adopted on October 30, 1991, Act No. 468/1991 Coll. (hereinafter, the "Media Law"). This Licence was granted to CET 21, acting in conjunction inter alia with CEDC, for the purpose of the acquisition and use of the Licence for broadcasting throughout the Czech Republic. CME's and its predecessors' investments in this joint venture, inter alia between CEDC and CET 21, are the object of the dispute between the parties.
9. In late 1992 and early 1993, CEDC, on the invitation of CET 21, which was owned by five Czech nationals and advised by Dr. Vladimír Železný, a Czech national, participated in negotiations with the Czech Media Council (hereinafter: "the Council") with the goal of the issuance of the Broad-

casting Licence to CET 21 with a participation therein, either directly or indirectly, by CEDC.

10. The Council issued the Licence to CET 21 on February 9, 1993 to operate the first nation-wide private television station in the Czech Republic. The decision granting the Licence acknowledged CEDC's "substantial involvement of foreign capital necessary to begin television station activities" and the conditions attached to the Licence acknowledged CEDC's partnership with the holder of the Licence, CET 21.

#### **(7) The Formation of ČNTS**

11. Instead of CEDC taking a direct share in CET 21 (as initially contemplated), and instead of a license being issued jointly to CET 21 and CEDC (also so contemplated), the partners of CET 21 and Dr. Železný agreed with CEDC and the Media Council to establish CEDC's participation in the form of a joint venture, ČNTS. The Media Council was of the view that such an arrangement would be more acceptable to Czech Parliamentary and public opinion than one that accorded foreign capital a direct ownership or licensee interest.

#### **(8) The ČNTS Memorandum of Association**

12. The Memorandum of Association was made part of the Licence Conditions, defining the co-operation between CET 21 as the licence holder and ČNTS as the operator of the broadcasting station. CET 21 contributed to ČNTS the right to use the Licence "unconditionally, unequivocally and on an exclusive basis" and obtained its 12 % ownership interest in ČNTS in return for this contribution in kind. Dr. Železný served as the general director and chief executive of ČNTS and as a general director of CET 21. ČNTS' Memorandum of Association ("MOA") was approved by the Council on April 20, 1993 and, in February 1994, ČNTS and CET 21 began broadcasting under the Licence through their newly-created medium, the broadcasting station TV NOVA.

#### **(9) ČNTS' Broadcasting Services**

13. ČNTS provided all broadcasting services, including the acquisition and production of programs and the sale of advertising time to CET 21, which acted only as the licence holder. In that capacity, CET 21 maintained liaison with the Media Council. It was CET 21 that appeared before the Me-

dia Council, not CME, though Dr. Železný's dual directorships of CET 21 and ČNTS did not lend themselves to clear lines of authority.

**(10) TV NOVA's success**

14. TV NOVA became the Czech Republic's most popular and successful television station with an audience share of more than 50 % with US \$109 million revenues and US \$ 30 million net income in 1998. CME claims to have invested totally an amount of US \$ 140 million, including the afore-mentioned share purchase transactions for the acquisition of the 99 % shareholding in ČNTS, by 1997. The audience share, the revenues and amount of the investment are disputed by the Respondent.

**(11) The Change of Media Law**

15. As of January 1, 1996, the Media Law was changed. According to the new Media Law, licence holders were entitled to request the waiver of licence conditions (and Media Council regulations imposed in pursuance of those conditions) related to non-programming. Most of the licence holders applied for this waiver, including CET 21, with the consequence that the Media Council lost its strongest tool to monitor and direct the licence holders.

**(12) The Amendment of the Memorandum of Association**

16. As a consequence of certain inter-actions between the Media Council and CET 21, including ČNTS, the shareholders of ČNTS in 1996 agreed to change ČNTS' Memorandum of Association and replaced CET 21 's contribution "Use of the Licence" by „Use of the Know-how of the Licence“. The circumstances, reasons and events related to, and the commercial and legal effects deriving from? this change are in dispute between the parties. In conjunction with the change of the contribution of the use of the Licence, CET 21 and ČNTS entered into a Service Agreement. That Agreement thereafter was the basis for the broadcasting services provided by ČNTS to CET 21 for operating TV NOVA.

**(13) The 1999 Events**

17. In 1999, after communications between the Media Council and Dr. Železný, the character and the legal impact of these communications being in dispute between the parties, CET 21 terminated the Service Agreement on August 5, 1999 for what it maintains was good cause.



18. The reason given for this termination was the non-delivery of the day-log by ČNTS to CET 21 on August 4, 1999 for the following day. CET 21 thereafter replaced ČNTS as service provider and operator of broadcasting services by other service providers, with the consequence that ČNTS' broadcasting services became idle and, according to CME, ČNTS' business was totally destroyed.

**(14) The Prague Civil Court proceedings**

19. ČNTS sued CET 21 for having terminated the Service Agreement without cause. The Prague District Court on May 4, 2000 judged that the termination was void, the Court of Appeal, however, confirmed the validity of the termination, and the Czech Supreme Court decision was still pending when these arbitration proceedings were closed.

**(15) CME's Allegations**

20. CME claims that ČNTS, the most successful Czech private broadcasting station operator with annual net income of roughly US \$ 30 million, has been commercially destroyed by the actions and omissions attributed to the Media Council, an organ of the Czech Republic.
21. CME claims, inter alia, that an already signed Merger and Acquisition Agreement between CME's interim parent company and the Scandinavian broadcaster and investor SBS was vitiated by these actions and omissions of the Media Council. CME accordingly suffered damage in the amount of US \$ 500 million, which was the value allocated by that Agreement and by the joint venture partners to ČNTS in 1999 before the disruption of the legal and commercial status of ČNTS as a consequence of the Media Council's actions and omissions.
22. The Czech Republic strongly disputes this contention and the purported underlying facts, maintaining that, inter alia, the loss of investment (if any) is the consequence of commercial failures and misjudgments of CME and, in any event, that CME's claim is part of a commercial dispute between ČNTS and Dr. Železný, for which the protection of the Treaty is not available.

**(16) Investment Dispute and Breach of Treaty**

23. CME contends that the dispute between the parties is a dispute “between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter” as defined by Art. 8 (1) of the Treaty. As such, it is the position of CME that the dispute is subject to Arbitration pursuant to Art. 8 (2) through 8 (7) of the Treaty.
24. CME alleges that the Czech Republic has breached each of the following provisions of the Treaty:
- (a) *“Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors” (Art. 3 (1));*
  - (b) *“... each Contracting Party shall accord to [the investments of investors of the other Contracting Party] full security and protection which in any case shall not be less than that accorded either to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned” (Art. 3 (2)); and*
  - (c) *“Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:*
    - a) the measures are taken in the public interest and under due process of law;*
    - b) the measures are not discriminatory;*
    - c) the measures are accompanied by provision for the payment of just compensation” (Art. 5).*

**B.**

**Relief Sought**

25. In its Notice of Arbitration, CME *“requested the Tribunal to provide a relief necessary to restore ČNTS’ exclusive rights to provide broadcasting services for TV NOVA and thereby restore to CME the economic benefit available under the arrangement initially approved by the Council” (restitutio in integrum)*. During the proceedings, CME changed the Relief Sought and requested the Tribunal to give the following Relief to the Claimant. Both

parties instructed the Tribunal that, if damages are to be awarded, the Tribunal shall not decide on the quantum at this stage of the proceedings.

**(1) Relief Sought by CME Czech Republic B.V.**

26. Claimant seeks an award:

1. Deciding Respondent has violated the following provisions of the Treaty:
  - a) The obligation of fair and equitable treatment (Art. 3 (1));
  - b) The obligation not to impair the operation, management, maintenance, use, enjoyment or disposal of investments by unreasonable or discriminatory measures (Article 3 (1));
  - c) The obligation of full security and protection (Art. 3 (2)); and
  - d) The obligation to treat investments at least in conformity with the rules of international law (Art. 3 (5)); and
  - e) The obligation not to deprive Claimant of its investment by direct or indirect measures (Art. 5); and
2. Declaring that Respondent is obliged to remedy the injury that Claimant suffered as a result of Respondent's violations of the Treaty by payment of the fair market value of Claimant's investment in an amount to be determined at a second phase of this arbitration;
3. Declaring the Respondent is liable for the costs that Claimant has incurred in these proceedings to date, including the costs of legal representation and assistance.

27. Claimant confirms that it has withdrawn its request for the remedy of *restitutio in in tegrum*.

28. The Respondent sought the following Relief:

**(2) Relief Sought by the Czech Republic**

29. The Czech Republic seeks an award that:

- (1) CME's claim be dismissed as an abuse of process.
- (2) And/or CME's claim be dismissed on grounds that the Czech Republic did not violate the following provisions of the Treaty as alleged (or at all):
  - (a) The obligation of fair and equitable treatment of investments (Art. 3 (1)).
  - (b) The obligation not to impair investments by unreasonable or discriminatory measures (Art. 3 (1)).
  - (c) The obligation to accord full security and protection to investments (Art. 3 (2)).
  - (d) The obligation to treat investments in accordance with the standard of international law (Art. 3 (5)).
  - (e) The obligation to not deprive investors directly or indirectly of their investments (Art. 5).
- (3) And/or CME's claim be dismissed and/or CME is not entitled to damages, on grounds that alleged injury to CME's investment was not the direct and foreseeable result of any violation of the Treaty.
- (4) And CME pay the costs of the proceedings and reimburse the reasonable legal and other costs of the Czech Republic.

**C.**

**Procedure**

**(1) Initiation and Conduct of Proceedings**

30. After having initiated the arbitration proceedings, the Claimant appointed Judge Stephen M. Schwebel, Washington, and the Respondent JUDr. Jaroslav Hándl, Prague, as party-appointed arbitrators. Both arbitrators appointed Dr. Wolfgang Kühn, Düsseldorf, as Chairman of the Arbitral Tribunal on July 19, 2000, which appointment was accepted by the Chairman on July 21, 2000.

31. On August 4, 2000 the Tribunal issued a Procedural Order No. 1 setting dates for the parties for the Statement of Claim and the Statement of De-

fence, in accordance with Art. 23 of the UNCITRAL Arbitration Rules. The Tribunal requested the parties to annex to their statements the documents that the parties deemed relevant.

32. In accordance with Art. 17 of the UNCITRAL Rules, the Tribunal determined the language to be used in the proceedings to be English and instructed the parties that any documents annexed to the Statement of Claim or Statement of Defence and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into English.
33. In accordance with Art. 16 of the UNCITRAL Rules, the place of arbitration was determined to be Stockholm. The Tribunal convened a meeting with counsel of the parties on November 17, 2000 in Stockholm in order to discuss further conduct of the proceedings and the parties were invited to give a short presentation of their case. The Tribunal also made a proposal with respect to the Arbitrators' fees.
34. The Claimant by letter dated August 10, 2000 accepted the Tribunal's proposal in respect to costs and fees, whereas no answer was received from the Respondent within the specified time. The Tribunal therefore informed the parties by letter dated September 5, 2000 that the Tribunal will proceed on the basis that the parties accept the Tribunal's proposal in Order No. 1 dated August 4, 2000. By letter dated September 25, 2000 the Respondent requested that the whole amount of the costs for the arbitration should be borne by the Claimant and therefore declined to pay the advance payment, which was requested by the Tribunal by Order No. 2.
35. On September 22, 2000 the Claimant submitted its Statement of Claim including exhibits, declarations and authorities. The Claimant made the required deposits for costs. By Order No. 3 the Tribunal requested the Claimant to make the required payment not made by the Respondent, which the Claimant did.
36. By Court Order No. 4 dated October 24, 2000 the Tribunal changed the place of the hearing on November 17, 2000, due to accommodation problems in Stockholm, to Dusseldorf. The change of the place for the hearing

did not change the seat of the arbitration, which still was denominated to be Stockholm.

37. On November 9, 2000 the Respondent submitted its Statement of Defence including witness statements, exhibits and authorities. In its Statement of Defence the Respondent raised, inter alia, the defence of jurisdiction stating that the Tribunal lacks jurisdiction, or, in the alternative, CME's claim is inadmissible.
38. On November 14, 2000 the Claimant submitted a Request for Production of Documents describing the requested documents broadly as Media Council's records related to the grant of the Licence to CET 21, the operation of TV NOVA, the administrative proceedings initiated by the Media Council against ČNTS in 1996 and the correspondence between the Media Council and CET 21, Dr. Železný, CME or ČNTS, including internal minutes for 1998, 1999 and 2000.
39. On November 16, 2000 the Respondent requested the Tribunal to refuse the Claimant's Request for Production of Documents as being too broad and unsubstantiated and, therefore, not in compliance with the International Bar Association Rules on Taking Evidence in International Commercial Arbitration adopted on June 1, 1999 ("IBA Rules").

## **(2) The Procedural Hearing**

40. For the hearing of November 17, 2000, the parties jointly submitted an agenda. Under the first topic, CME suggested the co-ordination of these arbitration proceedings with the so-called *Lauder vs. the Czech Republic* arbitration proceedings. In the *Lauder vs. the Czech Republic* proceedings, the ultimate majority shareholder of CME advanced similar claims in a pending UNCITRAL Arbitration brought against the Czech Republic under a bilateral investment treaty between the United States of America and the Czech Republic. The Tribunal did not take a decision on co-ordination because the parties did not agree to co-ordination.
41. The Claimant's proposal to have the two proceedings inter-linked in their timing was not pursued because the parties were in disagreement.

42. In respect to jurisdiction, the Respondent requested that the Tribunal should hold summary threshold proceedings whereas the Claimant's position was that the jurisdictional issues should be considered in conjunction with the hearing of the merits after the Claimant's Reply Memorial, the Respondent's Sur-Reply and the issues (in substance) had been fully presented.
43. In respect to this and other procedural issues the Tribunal, on November 17, 2000, issued Order No. 5.
44. The Tribunal decided that at this point of time no hearing on jurisdiction or the admissibility of the claim was to be held.
45. In respect to Procedures for Taking Evidence, the parties proposed to apply the IBA Rules except as follows:
- “(i) In interpreting Article 4 (7 and 8), the Arbitral Tribunal can decide, taking into consideration all circumstances, whether to accept or disregard a witness statement if the witness does not appear. The Arbitral Tribunal additionally can decide whether it wants to hear testimony from all witnesses who have previously submitted a witness statement, or only testimony from certain witnesses.*
  - “(ii) The Claimant did not agree to the adoption of Article 3 (2-7) (relating to requests to produce documents) or Article 3 (12) (relating to confidentiality of documents produced by a party). The Respondent, however, invited the Tribunal to adopt these articles.*
  - “(iii) The parties jointly agreed that witness statements and testimony provided in the arbitration between Mr. Lauder and the Czech Republic may be referred to in this arbitration.”*
46. In accordance with Art. 15.1 of the UNCITRAL Arbitration Rules, the Tribunal decided to conduct the arbitration in the manner it considers appropriate. For this purpose, the Tribunal decided, to the extent appropriate, to apply the IBA Rules.
47. In respect to the production of documents the Tribunal decided that the Claimant's Request for the Production of Documents dated November 14, 2000 was not in accordance with the IBA Rules. The Tribunal, by

Order No. 5, instructed the Claimant and the Respondent to submit detailed requests for the production of documents, such documents to be produced in their original language and to be accompanied by an English translation.

- 4%. In respect to the Determination of the Amount of Any Damage Award, the parties jointly informed the Tribunal that they were in agreement that the hearing on the merits should be devoted to resolving issues of liability and the appropriate form of remedy. If the determination of a quantum of monetary damages was necessary - for example, because the Arbitral Tribunal were to order a remedy referred to in § 111 or § 112 of Claimant's Statement of Claim - that quantum should be established in further proceedings, so that the briefs and witness statements will not at this stage deal with the amount of monetary damages.
49. In respect to Confidentiality, the parties informed the Arbitral Tribunal that they were in agreement that these proceedings should not be open to the public; however, the parties indicated that they were in disagreement as to whether they are required to keep the submissions in the proceedings confidential. The Arbitral Tribunal did not comment on this subject.
50. Further, in accordance with the joint proposals of the parties, the Tribunal set dates for further submissions by the parties, for the Claimant for its "Reply" and for the Defendant for its "Sur-Reply", final witness statements to be filed and served by a set date thereafter. Further, the Tribunal set a date for a hearing from April 23, 2001 to May 2, 2001 and reconfirmed the legal seat of the arbitration as Stockholm.
51. The parties complied with the dates set. The Chairman submitted its Reply Memorial on December 22, 2000 and the Respondent its Sur-Reply on February 14, 2001.

### **(3) The Parties' Request for Production of Documents**

52. The Claimant submitted its Request for Production of Documents on December 1, 2000 invoking the Tribunal's procedural Order No. 5 and Art. 3 (3) of the IBA Rules. The Claimant requested the production of documents related to specific Media Council files related to the Licence, comprising 18 specifically described documents. The Claimant further re-



requested the production of six further categories of documents related inter alia to CET 21. These categories of documents were all defined either by dates or by specific file numbers of the Media Council. Further, the Claimant asked for the production of eleven specific documents identified by date and a further description. The Claimant gave reasons in respect to relevance and materiality and also in respect to the possession of the documents.

53. By Order No. 6 dated December 22, 2000, the Tribunal by majority-decision instructed the Respondent to produce the documents requested by the Claimant, however deleting certain documents from the list which were already in the possession of the Claimant, and further deleting a statement of the chief of the legal department of the Media Council dated July 22, 1996, which statement might have a status of privilege or confidentiality.
54. On February 14, 2001 the Tribunal issued Order No. 7 on costs and proceedings. The Tribunal set the date for the hearing beginning on April 23, 2001 in Stockholm and set out a time schedule for the hearings.

#### **(4) The Parties' Request for Interim Remedies or Similar Orders**

55. By submission dated January 30, 2001, the Respondent notified to the Tribunal "that the Respondent has been provided with copies of documents which indicate that Mr. Lauder/CME has been spying on the Media Council, immediately prior to this arbitration being commenced, if not earlier." The Respondent requested the Tribunal to issue an Order that Mr. Lauder/CME disclose immediately all copies of communications related to the Media Council, which have been provided by a source within the Media Council, copies of all communications from a certain investigation agency, copies of CME's instructions to this agency and further to order that Mr. Lauder/CME identify the name of the person(s) who has/have provided any communications referred to herein-above to the investigation agency. By a submission dated February 6, 2001, the Respondent extended the request for an Order and further requested the Tribunal to order that CME shall identify any other person(s) in Czech Government Departments who has/have provided, directly or indirectly, any communications of a similar nature to the investigation agency and/or CME.

56. Further, the Respondent requested permission from the Tribunal to apply for an order securing the attendance before the Tribunal of a certain employee of the investigation agency in order to give oral testimony and to produce documents (pursuant to Section 43 of the English Arbitration Act 1996).
57. By submission dated February 11, 2001, the Respondent extended its previous submissions and requested permission to subpoena the already mentioned employee of the investigation agency under Section 43 of the English Arbitration Act, should the Tribunal decide to hold a hearing in England and repeated the request under Section 26 of the Swedish Arbitration Act and Section 1050 of the German Arbitration Act.
58. By submission dated February 12, 2001, the Respondent requested the Tribunal to issue an Order that the Claimant produce the following documents:
- (1) All pleadings, submissions and evidence submitted by ČNTS in the Czech Court proceedings between ČNTS and CET 21, including both, the Prague Regional Court and Prague Czech Supreme Court (i.e. Appeal Court) proceedings.
  - (2) All pleadings, submissions and evidence submitted by CME Media Enterprises B.V. in the ICC Arbitration proceedings between CME and Dr. Železný. The Respondent stated that the requested documents are relevant to the present Arbitration proceedings.
59. By submission dated February 27, 2001, the Respondent notified to the Tribunal that, after having received from the Czech Civil Court copies of the Court file in the proceedings between ČNTS and CET 21, the request for the production of the respective documents was withdrawn, whereas the Respondent maintained its request for all pleadings, submissions and evidence "submitted by CME Media Enterprises B.V." in the proceedings against Dr. Železný.
60. On the same day, the Respondent reconfirmed that it maintains its position that it should not have to pay for parallel arbitrations brought, in effect, by the same Claimant.

61. By submission dated February 2, 2001 and submissions thereafter, the Claimant rejected the Respondent's request for an Order and accused the Respondent of unlawful use of stolen confidential documents, which allegedly had been taken from CME's offices in London in breach of English law. The Claimant requested the Tribunal to issue an Order that the Respondent be directed to cease its review of stolen CME documents and confidential CME arbitration records that have been improperly provided to it by Dr. Železný or its representatives.
62. Further, the Claimant demanded that Respondent's request for the Orders related to further information be denied and that Respondent's request for permission to subpoena an employee of the investigation agency be rejected.
63. By submission dated February 26, 2001, the Claimant further made the argument that the Respondent's request for disclosure of documents was untimely, as the subject was already substantially discussed between the parties six months prior to the first hearing of these proceedings. The Claimant further took the position that the pleadings and documents of the CME v. Železný ICC proceedings are irrelevant for this Arbitration.

**(5) The Tribunal's Decision on Interim Remedies and Similar Orders**

64. On March 3, 2001 the Arbitral Tribunal decided not to take a decision on Interim Remedies or similar Orders at the present time. The Tribunal issued the following Order No. 8 on Interim Remedies or similar Orders:
  1. *The Tribunal rejects the Respondent's request that the Tribunal order the Claimant*
    - I. to disclose*
      - (a) Copies of all communications relating to the Media Council which have been provided by a source within the Media Council, including any reports of the Council's meetings;*
      - (b) copies of all communications from Kroll to CME, relating to (a) above; and*
      - (c) a copy of CME's instructions to Kroll.*
    - II. to identify the name of the person(s) who has/have provided any communications referred to in (a) above to Kroll and the "intermediary" between Kroll and the informant;*

- III. *to identify any other person(s) in Czech government departments who has/have provided, direct/y or indirectly, any communications of a similar nature to Kroll and/or CME.*

*The request by the Respondent for the arbitrators' consent under Section 26 of the Swedish Arbitration Act of 1999 and/or other national laws to have Mr. Morgan-Jones testify before the respective countries' civil courts is rejected.*

*The Claimant's request dated February 8, 2001 that the Respondent to be directed "to cease its review of stolen CME documents and confidential CME arbitration records that have been improperly provided to it by Dr. Železný or its representative" is rejected.*

*The Tribunal is of the opinion that any flow of information between the Media Council and the Claimant and/or its intermediaries and its usage as alleged by the Respondent, and any flow of information from the Claimant to the Respondent and its usage as alleged by the Claimant are not subject of these proceedings and the respective Claimant's and Respondent's requests should be addressed to the appropriate authorities / courts of the countries involved.*

2. *In respect to the Respondent's request regarding the disclosure by the Claimant of all pleadings, submissions and evidence submitted by CME Media Enterprises B.V. in the ICC Arbitration Proceedings between CME Media Enterprises B.V. and Dr. Železný, the Tribunal is not in a position to order the requested discovery, as the Parties of the ICC Arbitration Proceedings are different from the Parties to these proceedings. The Tribunal understands, however, that the ICC Award of the afore-mentioned proceedings was published on the internet on the CME pages. The Arbitral Tribunal, therefore, instructs the Claimant to submit as soon as possible to the Arbitral Tribunal and to the Respondent the ICC Award to the extent available to the public on the internet. The Tribunal assumes that the Respondent's demand for disclosure of the ICC proceeding will be sufficiently met by the disclosure of the ICC Award.*

#### **(6) Further Conduct of Proceedings**

65. The Claimant in accordance with Order No. 8 submitted to the Tribunal the ICC Award CME Media Enterprises B.V. vs. Dr. Železný
66. By submission dated March 14, 2001 and upon receipt of Order No. 8 dated March 6, 2001 the Respondent maintained its position in respect to the Court Order requested and declared:

*“The Czech Republic continues to participate in this Arbitration under protest and reserves all its rights, in particular its rights under Swedish Arbitration Act, Art. V (2) (b) of the New York Convention 1958 and principles of public policy generally.”*

67. On March 19, 2001 the Respondent declared that without prejudice to its position that it should not have to pay for two parallel arbitrations brought in effect, by the same Claimant; and without prejudice to its protest communicated in its fax of March 14, 2001 the Czech Republic is willing to pay the requested down payment for costs of the Stockholm hearing.
68. Thereinafter the Respondent complied with further Tribunal's request for down payments of costs equally with the Claimant.
69. On April 16, 2001 the Claimant as requested by the Chairman submitted a chronological list of the executives of ČNTS, CEDC/CME and CET 21 and a diagram showing the sequence of shareholdings in ČNTS, including the dates of the share transfer and enclosed a similar diagram showing the sequence of shareholdings in CET 21.

#### **(7) The Submission of Witness Statements**

70. In conjunction with their submissions, the parties have submitted to the Tribunal the following witness statements:

#### **(8) Declarations in Support of the Statement of Claim**

1. Declaration of Richard Bacek dated 22 September 2000 (without attachments)
2. Declaration of Laura DeBruce dated 22 September 2000
3. Declaration of Michel Delloye dated 20 September 2000
4. Declaration of Fred T. Klinkhammer dated 20 September 2000
5. Declaration of Martin Radvan dated 22 September 2000
6. Declaration of Jan Vavra dated 20 September 2000
7. Statement of Ing. Jiří Brož dated 5 December 2000
8. Supplemental Declaration of Laura DeBruce dated 15 December 2000
9. Declaration of Leonard M. Fertig dated 7 December 2000
10. Supplementary Declaration of Fred T. Klinkhammer dated 13 December 2000
11. Declaration of PhDr Marina Landová dated 15 December 2000
12. Supplemental Declaration of Martin Radvan dated 15 December 2000
13. Declaration of Nicholas G. Trollope dated 21 December 2000
14. Supplemental Declaration of Jan Vavra dated 15 December 2000
15. Declaration of Ing. Miroslav Pýcha dated 21 December 2000

16. Second Supplemental Declaration of Laura DeBruce dated 27 February 2001

### **(9) Statements in Support of the Statement of Defence**

1. Statement of Doc. Ing. Pavel Mertlík CSc dated 7 November 2000
2. Statement of Josef Josefík dated 6 November 2000
3. Statement of RNDR. Josef Musil, PhDr. dated 6 November 2000
4. Statement of PhDr. Helena Halvíková dated 6 November 2000
5. Second Statement of Josef Josefík dated 28 February 2001
6. Statement of Mgr. Milan Jakobec dated 28 February 2001

### **(10) Documents and Authorities**

71. The parties attached to their submissions copies of some 300 documents comprising several thousand pages. They further attached binders comprising several thousand pages of authorities in support of their respective memorials.

### **(11) The Stockholm Hearing**

72. From Monday, April 23, 2001 to Wednesday, May 2, 2001 the hearing took place in Stockholm. At the beginning of the hearing, the parties' representatives submitted to the Tribunal the verbatim record of the examination of witnesses taken in London at the *Lauder vs. Czech Republic* UNCITRAL proceeding under US / Czech Republic BIT. At the Stockholm hearing the parties presented their case and the following witnesses were examined:

- Claimant's witnesses: Laura DeBruce  
Michel Delloye  
Fred T. Klinkhammer  
Martin Radvan  
Jan Vavra  
Leonard M. Fertig  
Marina Landová
- Respondent's witnesses: Josef Josefík  
Josef Musil  
Helena Havlíková

73. At the end of the hearing, the parties' representatives summarized orally their respective positions. The Tribunal in agreement with the parties declared the hearing closed (Art. 29 UNCITRAL Rules). The Claimant submitted to the Tribunal Claimant's post-hearing brief on May 25, 2001. The Respondent submitted its written Closing Submissions on the same day.

**D.**

**Position of the Claimant**

74. CME's claims arise out of the Czech Republic's treatment of its investments in the first private nation-wide commercial television station in the Czech Republic. CME maintains that the Czech Republic breached its obligations under the Treaty by actions and inactions of the Media Council which destroyed the Claimant's investment in the Czech Republic.

**I. The Claimant's Investment in the Czech Republic**

75. In 1992, the Czech National Council decided to issue a Licence for the first nation-wide commercial television station. The Licence was to be awarded through a tender process administered by the Czech Media Council which the Czech National Council had created in 1992 as a separate State agency, subject exclusively to the sovereignty of the Czech Republic, to be responsible for regulating the broadcasting industry and ensuring compliance with laws relating to radio and television broadcasting.
76. The Media Law required the Media Council to take into consideration the extent of Czech ownership and management when considering a Licence application from a company with foreign equity participation, but no provision in the Media Law expressly barred (or now bars) foreign parties from holding television licences.
77. CEDC, the Claimant's predecessor, pursued an application for the Licence.
78. Initially, CEDC and CET 21 pursued a joint application for a Licence, contemplating that they would act together to administer the Licence. On January 5, 1993, CEDC and the Czech investors in CET 21 executed an agreement providing that upon the award of a Licence to CET 21, CEDC would "provide financing needed . . . to establish[ ] a commercial television station in Prague through an equity investment in CET 21," in return for a 49 % ownership share in CET 21, with the Czech investors in CET 21 holding 14 % and the remaining equity reserved for further investors.

79. CET 21's Project Proposal, submitted to the Media Council as a centerpiece of the application, presented CEDC as a desirable "direct participant in CET 21's application for the Licence" on the basis that CEDC was "a quality foreign partner," which had "investment experience" in Central Europe, knew how to "advantageously combine[] a commercial . . . TV station with a programme of a higher standard, and with the participation of cultural foundations," offered "sensitive respect for local traditions and a well-qualified understanding of the needs of the Central European region," was financially supported by "prominent entrepreneurial personalities and groups (e.g. the Lauder group)," and offered valuable links to sources of programming. The minutes of a January 25, 1993 public hearing on the Licence application reflect the centrality of CEDC's role and the need for long-term foreign investments.
80. The Media Council publicly announced on January 31, 1993, that after public hearings and full deliberation concerning the twenty-six candidates who had submitted applications for a Licence, it had determined to issue the Licence to CET 21, with CEDC as "a direct participant of the Licence application." In its letter to CET 21 announcing its decision, the Media Council similarly noted that CEDC was "a direct party to the application," listing the proposal's "adequate financing with capital about whose origin and reliability there can be no doubt" as one of the main factors in its decision. Likewise, in a public statement on February 1, the Media Council's chairman, Mr. Daniel Korte, repeated this language and stressed that the choice of the successful Licence applicant had taken into account that "the project has proved sufficiently financially backed by the capital whose origin and reliability cannot be doubted."
81. In the face of intense political pressure, though, the Media Council decided that it would not permit foreign ownership of the Licence. This requirement created a significant practical difficulty because foreign capital was plainly needed to fund the development of the station. As CET 21 had explained in the Project Proposal it submitted to the Media Council, "[i]t would be a . . . pretense to say that the financial funds in terms of millions and billions [of Czech crowns] which must be invested in relatively short time [to establish the station] are available in the Czech Republic, and that CET 21 (as any other starting TV station) will do without foreign partners."



82. In close consultation with the Media Council, CEDC and the Czech investors in CET 21 sought to resolve this difficulty through the creation of ČNTS - an entity that would be jointly owned by CEDC (which would contribute the majority of the cash needed to fund the establishment of the station), CET 21 (as the party that would contribute the use of the Licence), and a Czech bank (as a third investor). Each contributor was to obtain an equity interest in ČNTS corresponding to the economic value of its contribution, and ČNTS was to establish and manage the television station. The Media Council participated actively in negotiating this solution that maintained domestic ownership of the Licence while providing for the obtaining of needed foreign capital from a desirable source.
83. The Media Council openly acknowledged, prior to this dispute, that it had played a central role in directing the formation of ČNTS, and that its motivation for doing so had arisen from its determination that the Licence not fall directly into the hands of a non-Czech investor. In a January 31, 1998 report to the Czech Parliament, for example, the Media Council explained its 1993 insistence on the ČNTS structure, and the reasons for that insistence, as follows:

The reason why this model came into existence [was] the Council's fears of a majority share of foreign capital in the licence-holder's Company.

. . .

When granting the Licence to the Company CET 21, for fear that a majority share of foreign capital in the licence-holder's Company might impact the independence of full-format broadcasts, the Council assumed a configuration that separates the investor from the licence-holder himself. That is how an agreement came into existence (upon a series of remarks from the Council) by which the Company ČNTS was established the majority owner of which is CEDC/CME.

84. The Media Council thus approved the arrangements between ČNTS and CET 21. It realized that direct foreign investment in television would be unacceptable. It, therefore, blessed a structure that gave the foreign investment the economic benefits of Licence ownership through carefully considered and negotiated contractual arrangements, in the formulation of which, leading to the approval it gave, it actively participated.

85. CEDC was entitled to rely and did rely on the Media Council's strong official assurances that ČNTS's role and economic position would be closely integrated with that of CET 21 (as the nominal licence-holder) in the formation, management, operation and broadcasting of the new commercial television station.

## II. The Role of ČNTS

86. On February 3 and 5, 1993, after CET 21 and CEDC had been informed of the award of the Licence but before the Licence was actually issued, they entered into a pair of nearly identical agreements describing their relationship and establishing the framework under which ČNTS would operate. Each of these agreements described CEDC as "a direct contractual participant within the terms and conditions of this Licence." The February 3 agreement, entitled "Overall Structure of a New Czech Commercial Television Entity," further stated:

1. CET 21 and CEDC will jointly create a new Czech company which will be *the only Commercial Company to create and run the TV station*. CET 21 and CEDC agree to allow the Commercial Company to have *exclusive use of the Licence* as long as CET 21 and CEDC have such a Licence.
2. CET 21 and CEDC confirm that *neither party has the authority to broadcast commercial television without the other*.

(Emphasis added)

87. The February 3 agreement further provided that "[a]ll operating personnel [of the station] will be employees of the Commercial Company." The agreement stated that within two months following the execution of the conditions to the Licence, CET 21 and CEDC would enter into a more complete agreement respecting the organization of the "Commercial Company" that ultimately became ČNTS. This agreement was submitted to the Media Council which requested changes. It became part of the official file of CET 21's application. The February 5 agreement, entitled "Basic Structure of a New Czech Commercial Television Entity," substantially identical, contained the changes.

88. After receiving the agreements setting out the terms of the ČNTS structure, the Media Council formally issued Broadcasting Licence No. 001/1993 (the "Licence") on February 9, 1993. The Licence documentation included the "Licence Certificate," the "Licence Decision" and the "Licence Conditions."
89. Each of these documents expressly linked CEDC and ČNTS to the Licence grant. The Licence Certificate required CET 21 to "ensure that the broadcasting is in accordance with the information stated in the application on the basis of which this Licence was issued." That "information" included the terms of the arrangements between CET 21 and CEDC that had been described to the Media Council and had been specified in the February 5 agreement submitted to the Media Council before the Licence was issued. That "information" also included the Project Proposal that described CET 21 and CEDC as "partners" in the project.
90. The Licence Decision observed once again the importance of CET 21's "contractual partner, the Company CEDC" to the Licence application process. In listing critical features of the winning applicant, the Media Council explained that the applicant had "demonstrated adequate financing with capital about whose origin and reliability there can be no doubt", and acknowledged with approval "the substantial involvement of foreign capital necessary to begin television station activities".
91. The Licence Conditions which were labelled "Appendix to Licence" and were made a part of the Licence through the Licence Certificate's requirement that the licensee "observe the conditions stated in the appendix to this Licence", provided a more specific presentation of the rules under which the Licence would operate. Condition 17 expressly required that the Licence be used in accordance with the arrangements between CET 21 and CEDC that had been described to the Media Council during the application process and recorded in the February 3 and 5 agreements. In relevant part, it provided:

The licence-holder agrees:

*"17/ that it will submit to the Council for its prior consent any changes in the legal entity that is the licence-holder,*

*capital structure of investors and provisions of the business agreement between the licence-holder and investors. Parties to the business agreement are the licence-holder, CEDC and Česká spořitelna, in the scope and under the conditions set by the business agreement which will be submitted to the Council within 90 days after the decision to issue the Licence takes legal effect; the business agreement will observe the provisions of the "agreement on the business agreement" between the licence-holder and CEDC [i.e. the February 3/5 agreements that had been submitted to the Council] which is an appendix to the Licence conditions. "*

*"18/ that CEDC, as a party to the business agreement specified in the Licence conditions, and other investors specified by the business agreement, will not in any way interfere in the programming of the television station, and, in particular, will not interfere with the editorial independence of newscasting employees. "*

92. With this language, the Media Council not only endorsed, but also made explicitly a part of its Licence grant, the basic contractual agreement between CEDC and CET 21, including the provisions that CET 21 would contribute the "exclusive use of the Licence" into ČNTS, that neither CET 21 nor CEDC would have "the authority to broadcast commercial television without the other," and that all business of the project would be transacted through ČNTS (which would employ all staff). Because the Licence Conditions expressly implicated the rights, obligations and interests of CEDC, and because CEDC was a "direct participant" in the application process, Mark Palmer, the president of CEDC, executed the Licence Conditions for CEDC.

### **III. The Memorandum of Association**

93. Over the next several months, CET 21 and CEDC negotiated a Memorandum of Association and Investment Agreement (the "MOA") to flesh out the February 3/5 agreements that the Media Council had incorporated into the Licence in Condition 17. The Media Council participated actively in this process, providing comments on drafts before the MOA was finalized to ensure that the MOA reflected the Media Council's views about how the ČNTS arrangement was to be structured. For example, on April 9, 1993, the Media Council wrote CET 21 to request (i) that CET 21 provide a final draft of the MOA for its approval by April 19, (ii) that "the final draft of the

contract proposal be in accord with the effective legal status” (making particular reference to “certain comments in the Appendix” containing the Licence Conditions), and (iii) that the parties amend certain provisions of the draft to conform with the requirements of Licence Condition 18. Condition 18 provided that CEDC will not interfere in the programming of the television station with the editorial independence of newscasting employees.

94. CET 21, CEDC and the Czech Savings Bank agreed upon the final terms of an MOA for ČNTS in April 1993 and submitted it to the Media Council for approval. The MOA provided that CEDC would contribute 75 % of ČNTS’s capital and obtain a 66 % ownership interest in return, while the Czech Savings Bank would contribute 25 % of the capital and obtain a 22 % ownership interest. CET 21 contributed no cash, contributing instead “the right to use, benefit from, and maintain the Licence . . . on an unconditional, irrevocable and exclusive basis,” in return for a 12 % ownership interest. *Id.* at art. 1.4.1. Dr. Vladimír Železný, a shareholder of CET 21, who would eventually become its 60 % shareholder and one of its Executives, was appointed to serve as ČNTS’s General Director.
95. Reflecting the parties’ discussions with the Media Council, the MOA recognized that ČNTS would be the operating company for the new television station. Article 3.1 recited that ČNTS’s business would include the “development and operation of a new, independent, private national television broadcasting station.” Paragraph D of the Preamble similarly confirmed that the station would be “managed” by ČNTS.
96. On April 21, 1993, the Media Council released a letter confirming that “in accordance with Article 17 of the Conditions to the Licence,” it had approved “the submitted version of the Business Agreement between” CET 21, CEDC and Czech Savings Bank at its April 20 meeting. CEDC and the other parties executed the MOA shortly afterward, on May 4, 1993. The Media Council confirmed its official approval of the MOA and all its provisions on May 12, 1993, when it issued a decision changing the wording of the Licence to add, among other amendments, a new sentence in Licence Condition 17 expressly stating that the MOA “is an integral part of the Licence terms.”

97. As a result of its actions, the Media Council gave the imprimatur of the State to CME's investment. The Media Council, established by law to "supervise[] the observance of legal regulations governing . . . television broadcasting" (i) approved the ČNTS arrangement, by requiring in the Licence Certificate that the licensee act in accordance with the facts set forth in the application, (ii) required as a Condition to the Licence that CET 21 and CEDC operate in accordance with the February 3/5 agreements, (iii) expressly approved the MOA, including the provision in which CET 21 contributed the exclusive use of the Licence, and (iv) amended the Licence Conditions to make the MOA an "integral part of the Licence."
98. The arrangement between ČNTS and CET 21 was thus known to and approved by the State organ responsible for administering television licences. No organ of the Czech Republic challenged it or asserted that it was illegal. Claimant's entire investment in ČNTS being based on this arrangement, it is legally entitled under the Treaty (and under Czech law) to rely on these approvals and to expect the Czech Republic to adhere to the legal arrangements that the Media Council had itself proposed and had formally and publicly endorsed.
99. The Media Council documents clearly reflect not only substantial Media Council involvement in the negotiation and finalization of the MOA's terms, but also the Media Council's adherence to its original approvals of the ČNTS arrangement until changing political winds prompted a reversal in 1996. In a 1994 opinion responding to a challenge that it had acted improperly in approving the ČNTS arrangement, for example, the Media Council publicly stated:

ČNTS is, by duly registered Memorandum of Association, authorized by the holder of the Licence to perform *all acts related to the development and operation of the NOVA TV television station*. Participation of CET 21 in the company consists of a non-financial contribution, i.e., *the financial valuation of the Licence*. The Licence as such has not been contributed to ČNTS and is separate from all other activities of ČNTS.

This is a standard business procedure which was duly discussed and approved by the licensing body, i.e., by the [Media] Council, and does not violate any effective legal regulations. [*The Media Council*] consulted with a

number of *leading legal experts*, both Czech and foreign [before approving the arrangement].

100. Similarly, in a report to Parliament for the period from February 1-September 30, 1996, the Media Council explained that it was fully aware of and accepted the ČNTS structure:

At the time when [the CET 21-ČNTS] arrangement was made, *there were no doubts about its legitimacy*; in regard to many related steps that were taken, *the Council, as it was then constituted and based on its experience at the time, took a position of consent*.

101. The Media Council's January 1998 Report to Parliament equally acknowledged that it had intended for ČNTS to be a co-participant with CET 21 in all TV NOVA broadcasting:

July 1993: ČNTS . . . gets registered in the Companies register. It[s] general director is V. Železný. As its subject of activity, ČNTS states "full-format television broadcasts." *Two Companies thus appear around one Licence; one that has obtained it, and another that is supposed to co-participate in implementing the broadcasts*. The majority partner of ČNTS is CEDC/CME. This model later appears elsewhere too . . . *and the Council considers it to be legal*, it raised legal doubt only later. . . .

Thus, next to the licence-holder's Company, directly linked to it, a new Company was established which was to co-participate in implementing the broadcasts.

*From the legal viewpoint, this construction did not and does not contradict any law*, but it created a basis for problems . . . .

(Emphasis supplied.)

102. Given the Media Council's discriminatory position as to foreign investment and ownership of the Licence, neither CEDC nor CET 21 intended that ČNTS would hold the actual Licence. All recognized that the Licence would have to be held nominally by a company owned by Czech nation-

als. The parties nevertheless envisioned and sought to structure a symbiotic relationship in which the actual operations of TV NOVA, and all of its economics, would be centered in ČNTS, with the contributing partners enjoying the benefit of the station's success in accordance with their equity interests in ČNTS. The documentary record demonstrates conclusively that the Media Council participated substantively in developing this arrangement, formally endorsed its legality, and gave Claimant every reason to conclude that it could commit funds to the project based on this arrangement without fear that the arrangement would later be forcibly dismantled by Media Council actions.

#### **IV. The Formation of TV NOVA**

103. Following the Media Council's approval of the ČNTS structure, CEDC provided capital to ČNTS for the formation and development of the new television station, TV NOVA. ČNTS registered in the Czech Companies Register in July 1993, indicating that one of its activities was "nation-wide television broadcasting," and in February 1994 ČNTS and CET 21 began broadcasting TV NOVA under the Licence.
104. TV NOVA quickly became the Czech Republic's most successful and profitable private television station, with audience shares consistently above 50 %. In contrast to the experiences of most start-up television operations, TV NOVA became profitable within a year after beginning operations, and grew quickly. By 1995, ČNTS's net income was approximately US \$ 23 million, on revenues of approximately US \$ 98 million. ČNTS's net income climbed to nearly US \$25 million, on revenues of approximately US \$109 million, in 1996, and would ultimately exceed US \$ 30 million on revenues of slightly under US \$ 109 million in the year before ČNTS was shut down and destroyed.
105. As provided by the MOA and contemplated in all of CEDC's dealings with the Media Council, ČNTS from the beginning performed all of the activities associated with operating and broadcasting TV NOVA. ČNTS acquired all programmes, or produced them in its TV NOVA studios and other facilities, and employed all the personnel needed to operate the station. Editorial decisions were made by CET 21 through Dr. Železný,



who became its 60 % shareholder and Executive while also serving as ČNTS's General Director. Pursuant to a June 2, 1994 agreement, ČNTS was authorized by CET 21 to enter into an agreement with Czech Radio-communications (České radiokomunikace) which would perform the technical tasks of transmitting TV NOVA's signal. All other operational, advertising and programming activities took place exclusively within ČNTS. ČNTS also gathered all revenues associated with the television station, using a portion of the revenues to pay all expenses of running TV NOVA and retaining the balance as profit and return on its members' cash and non-cash investments. CET 21, meanwhile, had no separate operations. Its offices consisted of two rooms in a different building, it held no assets other than the Licence, and its only employee was a secretary whose compensation was paid by ČNTS.

106. As ČNTS grew and became a prosperous investment, its Czech investors began seeking to realize the profits from their investments by selling their ownership interests in ČNTS. On July 17, 1996, CME purchased the 22 % interest in ČNTS held by the Czech Savings Bank, at the Bank's request, bringing the bank a profit of well over US \$ 30 million on an investment of slightly more than US \$2 million over the 38 months of its participation in ČNTS, and raising CME's ownership interest in ČNTS to 88 %. In December 1996, CME acceded to a request from CET 21's shareholders that it purchase a 5.2 % interest in ČNTS from CET 21, to accelerate a portion of their return on the investment's success. This transaction raised CME's interest in ČNTS to over 93 %. The shareholders of CET 21 then arranged to pool all but 1% of their remaining interests in ČNTS in a special purpose entity wholly owned by Dr. Železný. At Dr. Železný's insistence, CME purchased this entity (and the 5.8% interest in ČNTS that was its only asset) on August 11, 1997, for US \$28.5 million, thereby increasing its ownership interest in ČNTS to 99 %, while the local Czech investors retained only the remaining 1 %. As a result of these transactions, virtually the entirety of any gain or loss experienced by ČNTS belonged to CME.

## V. The Media Council's Reversal of Position

107. Three years after the Media Council mandated the creation of and gave express approval to the ČNTS structure, it abruptly reversed its position, repudiated the arrangement it had officially approved, and forced ČNTS to surrender the exclusive right to use the Licence that CET 21 had contributed in return for its equity interest. By a letter dated July 23, 1996, but not sent to ČNTS until August 30, 1996, the Media Council commenced administrative proceedings against ČNTS claiming that ČNTS was “operating television broadcasting without authorization.”
108. The Media Council founded its claim of unauthorized broadcasting on assertions that ČNTS had improperly arrogated power to itself by (i) participating in the “agreements” (and, particularly, the MOA) with CET 21, (ii) including “nation-wide television broadcasting” as one of its recited business activities in its Commercial Register entry, and (iii) entering into contracts with an authors’ organization and Czech Radiocommunications in its own name. The Media Council claimed that the Czech Academy Institute of State and Law (the “Academy”) had issued an opinion concluding that ČNTS was carrying out “unauthorized broadcasting” based on these three concerns, but the Media Council refused to provide that asserted opinion to ČNTS. The Media Council also indicated that the Czech police had launched a criminal investigation “for suspicion of committing the crime of ‘unauthorized conduct of business’ and ‘distorting facts in economic and business records,’” that turned on the same determination as was presented in the administrative proceedings.
109. The Media Council offered no reason why the activities of ČNTS that it had approved and had permitted to proceed for several years had suddenly become objectionable. While the Czech Parliament had amended the Media Law as of January 1, 1996, Act No. 301/1995 Coll., the Media Council identified no provision of the new law that could serve as justification for its reversal of position under Czech law.
110. The central motivating concern behind the Media Council’s action appears to have been that ČNTS was simply becoming too prosperous, and that Czech political circles looked with disfavour on permitting a company overwhelmingly owned by foreigners to obtain such substantial

wealth from an investment in such a conspicuous Czech company using a broadcast Licence allocated by the State.

111. ČNTS vigorously defended itself against the Media Council's proceedings, contending that it had been operating as agreed with the Media Council in 1993 and had violated no law. As part of this defence, ČNTS contacted the Academy to inquire about the opinion that the Media Council had indicated was a foundation for its proceedings. ČNTS was told that the Academy had not released an opinion at all, and that the Media Council had merely been inaccurately characterizing as an Academy opinion an expression of views by a single individual, Dr. Jan Bárta. In expressing these views, moreover, Dr. Bárta was responding to a hypothetical question put to him by the Media Council that took no account of the history or specific nature of the CET 21-ČNTS arrangements and was worded in conclusory terms calculated to solicit a response unfavourable to ČNTS.
  
112. On August 13, 1996 the Academy released its only real opinion on the issues presented by the administrative proceeding which concluded that ČNTS's activities did not violate the Media Law. In direct rebuttal to the Media Council's contention that ČNTS's activities constituted unauthorized broadcasting based on the Licence that had been granted to CET 21 rather than ČNTS, the Academy Opinion asserted that the Media Law permitted a "broadcasting operator" as that term is used in the Media Law (such as CET 21) to use another party (such as ČNTS) to carry out broadcasting, stating:

The realization of broadcasting, through third parties is . . . not excluded by the [Media Law] . . . . This means that also somebody else than the operator may ensure broadcasting by conclusion of contracts with third parties . . . .

The relationship of [ČNTS] with the licence-holder is in our opinion just such ensuring of broadcasting through third persons.

113. While the Academy explained that it was not authorized "to assess opinions prepared by [legal] experts" (id. at 2), it made clear that Dr. Bárta's opinion was not an expression of the Academy's views, was directed entirely to the Media Council's irrelevant hypothetical question of what rules

should apply if a licence failed to broadcast and an unlicensed party did broadcast, and unwarrantedly failed to address whether a licensee could arrange to have a third party carry out the operational mechanics of broadcasting so long as the operating company did not interfere with the licensee's editorial functions (as had always been ČNTS's practice). ČNTS submitted the Academy Opinion to the Media Council, but that submission did not alter the Media Council's position or even prompt the Media Council to release the opinion by Dr. Bárta on which it had claimed to rely.

## **VI. The Council Compels ČNTS to Alter the MOA**

114. In opposing the Media Council's proceedings, ČNTS had to weigh the risk that if it failed to dissuade the Media Council, ČNTS could face the fines authorized by Section 20 (5) of the Media Law, plus criminal charges against its statutory representatives and Executives, plus revocation of the Licence. Claimant's representatives recognized that while such actions by the Media Council or other Czech authorities might be subject to court challenges, TV NOVA could be destroyed by any such actions even before any such challenge could be resolved. Moreover, there was the risk, acute in light of the political pressures in the Czech Republic arising from the resentment of ČNTS's profitability, that the Media Council's reversal of position, although violative of the Treaty, might be found by a Czech court to satisfy Czech law.
  
115. In these circumstances, ČNTS had no choice but to make changes to the MOA to obtain the termination of the administrative proceedings. CME and ČNTS capitulated to the Media Council because they quite reasonably believed they could not win if they opposed the Media Council. Thus, its hand forced by the Media Council, CME agreed to amend Article 1.4.1 of the ČNTS MOA, in which CET 21 had contributed the "right to use" the Licence on an exclusive basis, to provide that CET 21 contributed to ČNTS only the "know-how" connected with the Licence, albeit still on an exclusive basis. ČNTS also amended the description of its business activities in the Czech Commercial Register to delete the reference to "nation-wide broadcasting," again yielding to the Media Council's insistence that ČNTS could not be involved in broadcasting because that was the exclusive province of the licensee.

116. As part of the package of contractual changes coerced by the Media Council, on May 21, 1997, ČNTS and CET 21 also entered into a new Agreement on Co-operation in Ensuring Service for Television Broadcasting (the “Co-operation Agreement”, hereinafter also the “Service Agreement”). This agreement expressly identified CET 21 as the licence-holder and the “television broadcasting operator” of TV NOVA. It further provided that ČNTS had the “rights and obligations . . . to ensure, according to this contract, service for the television broadcasting that is conducted on the basis of the Licence issued to CET 21, and that ČNTS is authorized to keep an agreed income from this activity.” An annex identified the “agreed income” as advertising and related revenues, less CZK 100,000 per month paid to CET 21. The Co-operation Agreement further addressed the Media Council’s concerns by stating that ČNTS would enter contracts with the Czech Radiocommunications and authors’ organizations on “behalf of CET 21 as the licence-holder and operator of television broadcasting” while providing that ČNTS would continue to pay all the costs of those contracts. Once again, the Media Council reviewed and approved this agreement which was a direct response to the administrative proceedings.
117. The Media Council dismissed the administrative proceeding against ČNTS in September 1997. Its order of dismissal expressly declared that it had obtained the concessions it required from ČNTS. In a September 1999 opinion to the Czech Parliament, the Media Council made clear that the amendment of the MOA had been a primary condition for the Media Council’s termination of the proceedings, stating that through the 1996 proceedings “the Council made the licence-holder to remedy certain legal faults in the Memorandum of Association.” In connection with the resolution of the administrative proceedings, the Media Council cancelled Condition 17 of the Licence.
118. The agreements for the creation of ČNTS that the Media Council originally approved had not characterized ČNTS as a mere provider of “services,” but rather as the manager of the station and as a co-participant in broadcasting with exclusive rights to use the Licence. Nonetheless, at the time when ČNTS made the concessions compelled by the Media Council, Claimant’s representatives were hopeful, and expected, that the

resulting amendments to the MOA would not alter ČNTS's position as the exclusive manager of TV NOVA and as the economic and operational center-piece of the enterprise. They did not yet know that the changes that the Media Council had lawlessly extorted would become the basis for the destruction of ČNTS.

## VII. The Destruction of Claimant's Investment

119. The consequences to the Claimant of the Media Council's actions in 1996 and 1997 began to become apparent in 1998. At that time, CET 21 and Dr. Železný - having virtually no remaining economic interest in ČNTS - began taking steps to dismantle the exclusive arrangement between ČNTS and CET 21 that had been the foundation for CEDC's original investment in TV NOVA and had been in place since TV NOVA began operations. Those steps were made possible by the Media Council's prior actions, and were carried out with the Media Council's connivance and active assistance.
120. In mid-1998 and continuing thereafter, Dr. Železný began to demand with increasing frequency and intensity that CME agree to fundamental changes in the arrangement between ČNTS and CET 21. While the specific changes Dr. Železný was demanding varied over time, all would have required CME to make substantial economic and contractual concessions to its great financial detriment. Various proposals would have required, for example, that CME agree to delete all references to exclusivity in agreements between CET 21 and ČNTS and permit CET 21 to obtain business from other providers, that CME pay a portion of TV NOVA's revenues to CET 21, and that CME agree to release all obligations from CET 21 to ČNTS at the end of the current Licence period, while surrendering its existing rights to participate in any Licence renewal.
121. The Media Council's actions in 1996, along with the threat of future Media Council action against ČNTS, formed Dr. Železný's primary foundation for these demands. In discussions with Michel Delloye (then CME's President and Chief Executive Officer) and later with Mr. Delloye's successor, Fred Klinkhammer, Dr. Železný repeatedly insisted that the changes he demanded were needed because the Media Council's 1996

administrative proceedings and the resulting amendments to ČNTS's MOA had ended any contractual obligation of exclusivity in the relationship between ČNTS and CET 21. He also contended that the Media Council strongly disfavoured exclusivity, was continuing and would continue to pressure ČNTS to surrender all exclusive arrangements with CET 21, and would take further action if CME refused to make these changes. In late 1998, Dr. Železný caused CET 21, without CME's consent, to begin acquiring programming through sources other than ČNTS.

122. The agreement between the parties that ČNTS would manage TV NOVA and gather all revenues, and the commitment that CET 21 would use its best efforts to obtain the renewal of the Licence in 2005 and to continue the relationship between CET 21 and ČNTS, had been the predicates for CME's investment. Therefore, CME could not let ČNTS be bullied by Dr. Železný into accepting an arrangement according to which CET 21 would elect whether to use ČNTS or some other service provider for each particular line of activity, and pay ČNTS only for the work CET 21 might ask it to perform. Likewise, it could not agree to a termination of the relationship between ČNTS and CET 21 at the end of the current Licence period which Dr. Železný was insisting on. Each of these changes would have had an enormously adverse effect on the value of CME's investment.
123. Over time, Dr. Železný began to threaten that CET 21 would sever all relations with ČNTS if CME did not capitulate to his wishes, relying again on the Media Council's 1996 actions terminating CET 21's contribution to ČNTS of the exclusive "right to use" the Licence and on the continuing pressure assertedly being exerted by the Media Council to alter the relationship. At a February 24, 1999 ČNTS board meeting, for instance, Dr. Železný demanded that CME agree to pay CET 21 4 % of TV NOVA's gross revenues and replace the Co-operation Agreement with a collection of new agreements directed to separate areas of service being provided by ČNTS. These proposed new agreements would have permitted CET 21 to acquire services from sources other than ČNTS and to pay ČNTS only for particular services acquired from ČNTS, would have eliminated ČNTS's right to collect and keep all revenues from advertising, and would have provided that CET 21's relationship with ČNTS would extend only until the end of the current Licence period on Janu-

ary 30, 2005. These changes were needed, Dr. Železný asserted, because the Media Council continued to disapprove of any exclusive arrangement between CET 21 and ČNTS and would shortly issue a statement that the arrangement was “not correct.” Dr. Železný threatened that if CME did not agree to this “ultimatum,” CET 21 would hire another company to sell TV NOVA’s advertising time and shift advertising revenues away from ČNTS - a step that Dr. Železný asserted CET 21 was free to take because the changes to the MOA mandated by the Media Council in 1996 had left CET 21 with no obligation of exclusivity toward ČNTS.

124. The arrangements demanded by Dr. Železný in 1998 and 1999, based on the Media Council’s past actions and threatened future actions, were a far cry from the original arrangement, in which (in the Media Council’s words) “two companies” would “appear around one Licence,” with ČNTS, as a “co-particip[ant] in implementing the broadcasts, “performing“ all acts relat[ing] to the development and operation of the NOVA TV” in an exclusive bond with CET 21 that was to last as long as CET 21 held the Licence.
125. In fulfilment of the threats by Dr. Železný, in early 1999 the Media Council went beyond its 1996 reversal of position leading to the forced amendment of the MOA. Now it provided active assistance to Dr. Železný in his campaign to eliminate ČNTS’S exclusive position respecting CET 21. On March 3, 1999, a few days after threatening CME that the Media Council would issue a letter supporting his position, Dr. Železný surreptitiously wrote the Media Council to solicit a declaration from it that exclusive relations between the licensee and service provider were legally impermissible, particularly as a result of the Media Council’s 1996 action “withdrawing the use of the Licence from a service organization [ČNTS] and taking it back for the licensed holder”. Dr. Železný’s letter asked the Media Council to confirm in writing that:

Relations between the operator of broadcasting and its service organizations must be established on a nonexclusive basis, because exclusive relations between the licence-holder and the service organization may encourage the transfer of some functions and rights that are dependent on the Licence and that are not transferable by law.



126. Dr. Železný further sought confirmation that “CET 21 s.r.o. will act, function, and proceed as an operator, and therefore, it has to carry out relevant managerial, administrative and accounting tasks, and must build up its own company structure” - an express request for a mandate that ČNTS should no longer perform the managerial functions it was created to perform. He additionally sought a declaration that revenues from advertisements “must be revenues of CET 21,” although they had always been collected and, after payment of expenses, retained exclusively by ČNTS.
127. Dr. Železný did not hide his motives for seeking these confirmations in the form of a Media Council declaration. He told the Media Council that “[w]e would like to use this opinion for discussions with our contractual partners, without disclosing other internal matters of our company.” Brazenly, he explained that he wished to use the Media Council’s declaration to restructure the arrangement with ČNTS in critical ways, including not only by “build[ing]-up” CET 21 to perform management functions previously performed by ČNTS and by having CET 21 rather than ČNTS collect all advertising revenues, but also by replacing existing contracts with ČNTS with new short-term contracts that would permit the use of new service providers other than ČNTS and would terminate all obligations to ČNTS upon any Licence renewal.
128. Instead of refusing to make the proclamations Dr. Železný had proposed on the basis that they were flatly at odds with entitlements for ČNTS that the Media Council had expressly approved, the Media Council sent Dr. Železný a letter on March 15, 1999, parroting nearly verbatim from his request the language respecting exclusivity:
- Business relations between the operator of broadcasting and service organizations are built on a nonexclusive basis. Exclusive relations between the operator and the service organization may result in de facto transfer of some functions and rights pertaining to the operator of broadcasting and, in effect, a transfer of the Licence.
129. The Media Council also stated that CET 21 “operates, functions and acts as an operator, *i.e.*, carries out relevant administrative and accounting tasks,” and that all advertising revenues must be treated as revenues of CET 21. In issuing this letter, the Media Council did not disclose that it

was adopting the language and the analysis Dr. Železný had proposed, or that it had received a letter from Dr. Železný asking it to express these views.

130. The Media Council stated in its March 15 letter that the fulfilment of these so-called “requirements” had been the “precondition” for its termination of the 1996 administrative proceedings against ČNTS, and that it believed these requirements had been “confirmed by changes in the Memorandum of Association.” The positions set forth in the letter, like the 1996 administrative proceedings, were wholly at odds with the Media Council’s 1993 approval of the MOA which gave ČNTS the exclusive right to use the Licence and established ČNTS as the manager of TV NOVA, and on the basis of which approval ČNTS had acted for years as the exclusive source of managerial, administrative and other business activity for TV NOVA. The issuance of the letter was also beyond the scope of the Media Council’s authority under the Media Council Act which authorizes the Media Council only to adjudicate rights and obligations in the context of administrative proceedings - not to issue *ex parte* declarations in support of one party to a dispute.
  
131. Dr. Železný used the Media Council’s letter as conclusive proof that the existing exclusive arrangement between ČNTS and CET 21 had to be changed. Based on the letter, over the succeeding weeks he continued to take steps to destroy that exclusive arrangement. On April 19, 1999, CME concluded that given Dr. Železný’s lack of loyalty - indeed, given his outright hostility to CME’s essential interests and those of ČNTS - it had no alternative but to recall Dr. Železný from his position as General Director of ČNTS. Dr. Železný responded by publicly pursuing the development of entities whose mission was to replace ČNTS in the performance of the activities necessary to operate TV NOVA. Finally, on August 5, 1999, three and a half months after his termination, Dr. Železný caused CET 21 to sever its dealings with ČNTS altogether, and to begin broadcasting TV NOVA using the services of new companies under his direction. Since that date, ČNTS has performed no services for CET 21 and has generated no revenues. It has been forced to lay off nearly all of its workforce. It has essentially gone out of business.

132. The pivotal role that the Media Council played in bringing about this State of affairs is apparent from CET 21's August 16, 1999 letter to CME's shareholders. In it, CET 21 again pointed to the Media Council's actions in 1996 and 1999 as the basis for the August 5 termination of its dealings with ČNTS, echoing many of the statements in the Media Council's January 1998 report to the Czech Parliament. CET 21 recited, for instance, that the "partnership structure" that the Media Council approved in 1993 had been "consistently criticized" by "legislati[ve], regulatory and State bodies of the Czech Republic" in succeeding years, on the basis that it provided "excessive powers to foreign investors." These criticisms, CET 21 alleged, combined with the "serious political and social problems" caused by the perception of CME's "extraordinarily high revenues," were the forces that had prompted the Media Council to open the 1996 administrative proceedings against ČNTS and demand that ČNTS amend its MOA. CET 21 also asserted that it was not required to maintain the exclusive relationship with ČNTS, because the "exclusive link" between the two companies had been "terminated" with the 1996 amendment of the MOA. CET 21 additionally referred to the Media Council's March 15, 1999 letter as proof that the Media Council would not tolerate an exclusive arrangement, not only because of the Media Council's view of the Media Law, but also on the ground of CME's focus "on its immediate short-term profit."

### **VIII. The Media Council's Failure to Fulfil its Obligation to Protect Claimant's Investment**

133. As the authority charged with ensuring compliance with the Czech Republic's television broadcasting laws, the Media Council had both the power and the obligation under Czech law to remedy CET 21's unlawful actions to sever its exclusive relationship with ČNTS. The Media Law requires the Media Council to impose an appropriate penalty if it determines that a licence-holder has "violat[ed] the duties specified by this Act or the conditions of the granted Licence." The "duties specified" by the Media Law include an obligation to obtain the Council's advance approval for any "change concerning data stated in an application" for a Licence. *Id.* at §§14(1), 20(4)(g) (requiring a fine for any breach of this obligation). The Media Law further authorizes the Media Council to revoke

a Licence if, among other things, the licence-holder “seriously violates the conditions given by a decision to grant a Licence” or the “duties set by this Act or other legal regulations.” *Id.* at § 15 (2) (a).

134. CET 21’s actions were in direct violation of the Licence which explicitly required CET 21 to broadcast in accordance with the premises described in its Licence application, and were in violation of the undertakings by CET 21 that the Media Council had expressly identified as a basis for issuance of the Licence in Condition 17. The statement of facts submitted with the Licence application included an explanation of the proposed “partnership” with CEDC in the Project Proposal. The same facts as to the arrangement between CET 21 and CEDC were addressed in discussion during oral hearings before the Media Council. The statement in the original version of Condition 17, that the February 3/5, 1993 agreements were attached as an appendix to the original Licence, makes clear that the agreement between CET 21 and CEDC was part of the set of critical “facts” on which the Media Council based its Licence grant. After CET 21 repudiated its exclusive relationship with ČNTS, it was no longer broadcasting through TV NOVA in compliance with the facts set forth in its application for the Licence. The Media Council consequently could and should have acted under the Media Law - even apart from its obligations under the Treaty - and forced CET 21 into compliance with its obligations under the threat of the revocation of the Licence.
135. However, the Media Council has repeatedly refused to take such action, and other organs of the Czech Republic have equally refused to intervene, despite the pivotal role that the Media Council played in bringing about the loss of ČNTS’s exclusive right to use the Licence. Since June 1999, ČNTS and CME have repeatedly asked the Media Council and other Czech bodies to redress these breaches of the Licence, the Media Law and the Treaty:
- In a June 24, 1999 letter to the Media Council, ČNTS identified the Media Council’s approval of the ČNTS arrangement as the basis for the issuance of the Licence, and asked the Media Council to intervene against the unlawful actions by Dr. Železný and CET 21 to repudiate that arrangement. ČNTS followed this request with a letter specifically pointing out that ČNTS’s continued participation in CET 21’s broadcasting was a requirement of the Licence.

- On August 2, 1999, ČNTS and CME wrote to the Permanent Committee of the House of Representatives of the Czech Parliament (“Parliamentary Media Committee”) challenging the Media Council’s policy of passivity in respect to Dr. Železný’s actions and asking that the Media Council (which is answerable to Parliament) be directed to take action. This letter was accompanied by a detailed factual summary with supporting documentation.
  - On August 6, 1999, the day after Dr. Železný caused CET 21 to terminate all dealings between CET 21 and ČNTS, ČNTS asked the Media Council to commence Licence revocation proceedings against CET 21 “due to its . . . material breach of the conditions arising out of the decision granting the Licence, of the obligations stipulated by the [Media Law] and obligations stipulated by other above-stated legal acts.”
  - On August 13, 1999, ČNTS again asked the Media Council to address CET 21’s breaches of the conditions to the Licence and the Media Law, including the failure “to perform the broadcasting in accordance with the facts which it stipulated in the application.”
136. In response to these repeated requests for action, the Media Council publicly characterized the actions of CET 21 and Dr. Železný as mere manoeuvres in a commercial dispute that should be resolved by the private parties, and not by State action. With its July 26, 1999 letter to ČNTS, the Media Council enclosed an excerpt from its most recent report to the Parliamentary Media Committee, in which it stated that the dispute between CME and CET 21 was of a “commercial nature,” in which the Media Council had “no legal reason or right to interfere.” The Media Council has continued to adhere to this position in subsequent public statements. Thus, the Media Council failed to take responsibility for the role it had played in igniting the dispute, ignored its own regulatory obligations to address the resulting violations of the Licence and the law, and has refused to fulfil its obligation, binding on all organs of the Czech Republic, to comply with the Treaty.

## **IX. The Czech Republic’s Additional Continuing Violations of the Treaty**

137. Since this arbitration was filed, the Czech Republic has continued to breach its obligations to provide Claimant’s investment full security and protection, and has continued to take actions (or has refused to act) in ways that, at Claimant’s expense, improperly favour the Czech investors in CET 21. For example, the Media Council has affirmatively assisted

Dr. Železný in evading the effectiveness of orders of an ICC arbitral tribunal. On November 10, 1999, CME obtained an order of interim measures in an ICC arbitration initiated against Dr. Železný, directing him to use his control over CET 21 as its Executive and majority shareholder to restore the partnership between CET 21 and ČNTS to its prior position of economic exclusivity. Dr. Železný refused to comply with this order.

138. ČNTS gave the Media Council a copy of the ICC tribunal's order. Nevertheless, the Media Council approved, on December 21, 1999, a plan by which Dr. Železný, in a sham transaction, transformed his majority shareholding in CET 21 into a minority shareholding, so as to be able to foil the ICC tribunal's order by asserting that he could no longer exercise a 60 % shareholder's power over CET 21. The sham was apparent: Close associates of Dr. Železný agreed to contribute only CZK 4.8 million (less than US \$ 150,000) to the capital of CET 21, paid nothing to Dr. Železný, and were issued large nominal interests in CET 21 designed to dilute Dr. Železný's interest to approximately 12 %. The Media Council had full knowledge of the ICC tribunal's order, and ČNTS explained the sham to the Media Council in a letter dated November 18, 1999. CET 21 was required to obtain the Media Council's approval for the transaction. The Media Council approved this recapitalization. The Media Council's approval brought Dr. Železný the goal he had sought: In an April 17, 2000 ruling, the ICC tribunal amended its order by withdrawing the directive that Dr. Železný use his control over CET 21 to restore ČNTS'S exclusivity, stating that Dr. Železný no longer possessed the majority control over CET 21 that he needed to comply with the order.
139. In addition to helping Dr. Železný avoid his obligations to the foreign investors in ČNTS, the Czech Republic has disregarded criminal wrongdoing by Dr. Železný directed against CME's investment. On October 14, 1999, ČNTS filed a criminal complaint against Dr. Železný with the Prague State Attorney's Office. To date, neither the Czech police nor the City or State Attorney's Office has taken any action with respect to ČNTS's complaint.

## X. Other Legal Actions by CME or ČNTS Apart from this Arbitration

140. Several actions have been brought in Czech court by both ČNTS and CET 21. On May 4, 2000, the Prague Regional Commercial Court held in an action initiated by ČNTS that CET 21 was obligated under the 1997 Co-operation Agreement to procure all services for the operation of TV NOVA exclusively through ČNTS.
141. CET 21 has refused to comply with this decision. Despite a request by ČNTS, the Media Council has refused to take any action based on the Court's decision.
142. CME's ICC arbitration against Dr. Železný alleges that he personally breached the August 11, 1997 Share Purchase Agreement pursuant to which CME acquired a 5.8% interest in ČNTS held by an entity that Dr. Železný owned. On February 9, 2001 the ICC International Court of Arbitration rendered the Award ordering Dr. Železný to pay US \$23.35 million to CME Media against the return of the NOVA Consulting shares.
143. Ronald S. Lauder, the ultimate controlling shareholder of CME, has himself brought an *ad hoc* arbitration against the Czech Republic pursuant to the bilateral investment treaty in force between the United States and the Czech Republic (the "US Treaty"). The factual predicate of the claims in that proceeding are virtually identical to the factual predicate of this action. An award in favour of Mr. Lauder restoring ČNTS to the exclusive position it held before Respondent's breaches and providing him damages for the losses he has suffered as a result of those breaches could be of substantial assistance to CME and reduce the damage suffered by CME as a result of Respondent's breaches. Such an award would not, however, make CME itself whole.
144. Claimant, ČNTS and Mr. Lauder have properly taken multiple measures to seek to protect their interests and recover for the harm they have suffered in this matter. The existence of other claims neither erases Respondent's egregious violations of binding international obligations nor excuses Respondent from its obligation to remedy those breaches and their proximate results.

**E.**

**Claimant's Argument**

**I. CME's Entitlement to Assert a Claim under the Treaty**

145. As a "legal person[] constituted under the law" of The Netherlands, CME is an investor subject to the protections of the Treaty. Exh. CI at art. I(b). CME directly holds a 99 % ownership interest in ČNTS.
146. The Treaty protects "investments" in the Czech Republic that are made by Dutch investors. The Treaty defines "investment" broadly, to include "every kind of asset." Treaty at art. 1(a). Examples of protected investments enumerated in the Treaty include "movable and immovable property . . . rights," "shares . . . and other kinds of interests in companies and joint ventures, as well as rights derived therefrom," "title to . . . assets and to any performance having an economic value" and "intellectual property, also including technical processes, goodwill and know-how." *Id.*
147. CME's ownership interest in ČNTS, and all that CME has directly or indirectly invested to obtain that ownership interest and cause it to grow, plainly constitutes an investment in the Czech Republic within the meaning of the Treaty. The investment assets of CME in the Czech Republic also plainly include ČNTS's tangible and intangible property - including its buildings, studio equipment, and intellectual property rights, such as its rights to air licensed programmes - and CME's and ČNTS's legal interest in maintaining the exclusive business arrangement between ČNTS and CET 21, all of which CME owns either directly or indirectly by virtue of its 99 % ownership interest in ČNTS.

**II. The Czech Republic's Obligations under the Treaty**

148. The Treaty imposes five central obligations on the Czech Republic: (i) not to deprive investors of their investments, directly or indirectly, if such deprivation is unlawful or without compensation; (ii) to treat investments fairly and equitably; (iii) not to impair the enjoyment of investments by unreasonable or discriminatory measures; (iv) to provide investments full security and protection; and (v) to ensure treatment of investments that complies with the standards of international law.



## 1. The Obligation Not to Deprive Investors of Their Investments

149. Article 5 of the Treaty provides that “[n]either Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments,” unless the deprivation is “taken in the public interest and under due process of law,” is carried out non-discriminatorily, and is accompanied by just compensation.
150. The Treaty’s provision regarding “deprivation” tracks the broadest expropriation provisions in bilateral investment treaties, specifically, and in international law, generally. A “deprivation” thus occurs under the Treaty whenever a State takes steps “that effectively neutralize the benefit of the property for the foreign owner.” Such expropriations may be deemed to have occurred regardless of whether the State “takes” or transfers legal title to the investment. It is also immaterial whether the State itself (rather than local investors or other third parties) economically benefits from its actions. These rules arise under the well-established principle that State interference with an investor’s use of property should be deemed an actionable “deprivation” regardless of the form that the interference takes.
151. The Treaty avoids any narrow definition of expropriation in part by avoiding the use of that word altogether. The Treaty focuses on the interference in the investor’s ownership, rather than any transfer of the investment to the State, by prohibiting “deprivations” rather than “takings.” Article 5 further expressly adopts the international rule against unlawful indirect expropriations (measures may not be taken “depriving, directly or indirectly,” investors of their investments).
152. A deprivation effected by coercing an investor’s agreement to changes in its investment’s status violates the Treaty in the same measure as a direct taking. Attempts by State defendants to use “consent” obtained from an investor on pain of administrative sanction to defend State conduct have a long pedigree in expropriation cases. States often “take the circuitous route of expropriation by consent,” either due to a “recognition of the existence of an international [prohibition against expropriation] or out of a practical desire not to advertise their defiance of it.”

153. The Czech Republic's actions in this case - threatening destruction of CME's investment through regulatory proceedings once the foreign investor's profits appeared too large - fall within this recognizable pattern:
154. The "expropriation by consent" that the Czech Republic extorted from ČNTS through its administrative proceedings is no more permissible under international law than the outright appropriation of an investment.

## **2. The Obligation of Fair and Equitable Treatment**

155. The Treaty further provides that investments are to be ensured "fair and equitable treatment." Treaty at art. 3 (I). The Treaty's Preamble underscores the importance of this obligation, acknowledging that "fair and equitable treatment" of investments plays a major role in realizing the Treaty's goal of encouraging foreign investment.
156. The broad concept of fair and equitable treatment imposes obligations beyond customary international requirements of good faith treatment. The Treaty makes this plain by separating the requirement of "fair and equitable treatment" in article 3(1) from the obligation to adhere to "obligations under international law" in article 3(5). The obligation of fair and equitable treatment is a specific provision commonly at the heart of investment treaties that may prohibit actions - including State administrative actions - that would otherwise be legal under both domestic and international law.
157. Whether conduct is fair and equitable depends on the factual context of the State's actions, including factors such as the undertakings made to the investor and the actions the investor took in reliance on those undertakings. This requirement can thus prohibit conduct that might be permissible in some circumstances but appears unfair and inequitable in the context of a particular dispute.

## **3. The Obligation Not to Engage in Unreasonable and Discriminatory Treatment**

158. The Treaty similarly provides that a State shall not "impair, by unreasonable or discriminatory measures, the operation, management, mainte-

nance, use, enjoyment or disposal” of investments. Treaty at art. 3 (1). As with the fair and equitable standard, the determination of reasonableness is in its essence a matter for the arbitrator’s judgment. That judgment must be exercised within the context of asking what the parties to bilateral investment treaties should jointly anticipate, in advance of a challenged action, to be appropriate behaviour in light of the goals of the Treaty.

#### **4. The Obligation of Full Security and Protection**

159. The Treaty further requires that, “[m]ore particularly, each Contracting Party shall accord to such investments full security and protection.” Treaty at art. 3 (2). Under this provision, each State is required to take all steps necessary to protect investments, regardless of whether its domestic law requires or provides mechanisms for it to do so, and regardless of whether the threat to the investment arises from the State’s own actions or from the actions of private individuals or others.
160. The provision imposes an *obligation of vigilance* under which the State must take all measures necessary to ensure the full enjoyment of protection and security of the foreign investment. The State may not invoke its own legislation to detract from any such obligation.
161. The Treaty stresses the primacy of its “full security and protection” standard over domestic limitations by making clear that the more favourable of domestic or most favoured nation protections is a necessary, but not of itself sufficient, component of what must be accorded to investors of the other Contracting Party. Exh. CI at art. 3 (2).

#### **5. The Obligation of Treatment in Accordance with Standards of International Law**

162. The Treaty contains a broad provision requiring the Contracting Parties to treat investments at least as well as required by “obligations under international law existing at present or established hereafter between the Contracting Parties . . . whether general or specific.” Treaty at art. 3 (5). In addition to all obligations under treaties or otherwise, general principles of international law require host States to provide certain minimum protections to international investments.

### **III. The Czech Republic Has Violated Its Treaty Obligations**

#### **1. The Czech Republic Is Responsible for the Media Council's Conduct**

163. The Media Council is an official organ of the Czech Republic established as an administrative body by the Media Council Act. The Czech Republic is responsible under the Treaty for the Media Council's conduct, based on the well-established principle that a State is responsible for the wrongful acts of its instrumentalities or agents.
164. A State bears international responsibility for the actions of its instrumentalities or agents even if the conduct at issue was beyond the agent's authority under domestic law.
165. The Media Council's official endorsement of the MOA and related agreements which led to Claimant's initial investment thus gave Claimant legally enforceable rights under the Treaty irrespective of whether the endorsement was valid under Czech law (as it was) or whether the Media Council's subsequent reversal of position and failure to intervene to protect ČNTS were valid under Czech law (as they were not).

#### **2. The Media Council's Conduct has Violated the Czech Republic's Treaty Obligations**

166. Respondent has violated each of the foregoing Treaty obligations with respect to CME's investment. The 1993 structuring of the investment through ČNTS was the product of the Media Council's own instigation and approval. The Media Council's 1996 reversal of its own 1993 action approving the partnership between ČNTS and CET 21, as spelled out in the February 1993 agreements and the MOA, violated its obligations not to deprive Claimant of its investments, to provide fair and equitable treatment, not to take unreasonable and discriminatory actions, to provide full security and protection for Claimant's investment, and to act in compliance with principles of international law.
167. The Media Council's continued connivance with Dr. Železný to destroy the exclusive relationship between ČNTS and CET 21 constituted a further breach of its Treaty obligations, including particularly its obligations

to provide full security and protection to Claimant's investment. Indifferent to the Czech Republic's affirmative obligation of protection, the Media Council actively assisted Dr. Železný's efforts, most notably by issuing its March 15, 1999 declaration to support Dr. Železný's avowed effort to eliminate the exclusive economic relationship between ČNTS and CET 21 that had been the foundation of CME's investment. The Media Council's willingness to put forward Dr. Železný's views as its own was unambiguously calculated to gut the "partnership" that had been entered between ČNTS and CET 21 in 1993 at the Media Council's instigation and with its full support.

168. Respondent further breached its obligation to provide full security and protection to Claimant's investments when both the Media Council and the Parliament refused all requests for intervention to protect ČNTS, although at the time of such requests ČNTS was being destroyed by the Media Council's reversal of its original approval of the exclusive arrangements it had brought about between ČNTS and CET 21.
169. ČNTS did not lose its entire business and revenues simply as the result of market forces or a private business dispute, as the Media Council has asserted. The ground for Dr. Železný's termination of the relationship between ČNTS and CET 21 was laid by the amendments to the MOA that the Media Council coerced, since CET 21 could not have severed an arrangement in which ČNTS was entitled to the exclusive right to use the Licence. Even after that wrongful severance which the Media Council facilitated, ČNTS would not have been forced to discontinue its business operations if the Media Council had fulfilled its obligations under the Treaty and Czech law by restoring ČNTS to the exclusive position with respect to CET 21 that the Media Council had approved in 1993.
170. The Media Council's course of dealings - including its initial requirement that the Licence be held by Czech nationals, its commencement of the unfounded administrative proceedings against ČNTS, its actions forcing ČNTS to weaken the contractual underpinnings that were the basis of Claimant's investment, its articulation of a policy disfavoring the exclusive economic relationship it had helped to structure and had approved, and its failure to act to protect ČNTS's interests - enabled Dr. Železný to take actions that have destroyed the value of Claimant's investment. The

Media Council's actions and refusals to act have effected a deprivation of Claimant's investment by the Czech Republic that fails to meet the Treaty's requirements of public purpose, due process, non-discrimination and adequate compensation.

#### **IV. The Czech Republic Is Required to Remedy Its Breaches of the Treaty**

171. The Czech Republic has an obligation under international law to remedy its Treaty violations. The Permanent Court of International Justice recognized more than seventy years ago that States must be required to remedy violations of international treaties, noting that "[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation" in an adequate form.

#### **F.**

##### **Position of the Respondent I. Introduction**

172. The Czech Republic acknowledged its obligations under the Treaty and confirms that it is committed to providing fair and equitable treatment to investment by Dutch nationals and companies. The Czech Republic's position is, however, that it is an abuse of the protection afforded by the Treaty for CME to have brought this arbitration against the Czech Republic.
173. The claims brought by CME relate to a private commercial dispute between the CME group and its former business partner, Dr. Vladimír Železný. The essence of CME's complaint is that Dr. Železný procured the wrongful termination of the contractual relationship between the broadcast licence-holder CET 21 and a provider of broadcast services ČNTS. The Czech Republic is not a party to any contract involving ČNTS. The Treaty is not intended as a means of resolving commercial disputes arising out of private contractual arrangements between two private parties.

174. CME/ČNTS brought legal proceedings against Dr. Železný/CET 21 in the Czech courts alleging wrongful termination of this contractual relationship. In those proceedings, CME/ČNTS alleged that Dr. Železný/CET 21 deprived CME/ ČNTS of their investment in the Czech Republic.
175. On 4 May 2000 the Regional Commercial Court in Prague has held that CET 21 wrongfully terminated the Service Agreement with ČNTS and that ČNTS is to be the exclusive service provider to CET 21. (The judgment was reversed in 2000 by the Court of Appeal). Dr. Železný/CET 21 caused the loss of which CME complains in this arbitration. Those proceedings confirm that there is no substance in CME's argument that it is the Czech Republic that has deprived CME of its investment. Those proceedings raise a *res judicata* and issue estoppel in respect of the issues pleaded and decided therein.
176. The judgment discloses no wrongdoing by the Czech Republic which could give rise to a cause of action under the Treaty.
177. As a further abuse of the Dutch Treaty, Mr. Lauder, who purportedly controls CME, has brought arbitration proceedings under the "US Treaty" in which Mr. Lauder makes identical allegations and seeks identical relief.
178. CME fails to establish that the contractual relationship between ČNTS and CET 21 constitutes an asset of CME invested in the Czech Republic.
179. The Czech Republic requests dismissal of CME's claims on grounds of lack of jurisdiction:
  - (a) CME has not established that it has an asset invested in the Czech Republic as defined in the Treaty;
  - (b) CME's claim is not an investment dispute as defined in the Treaty, but is of a private commercial nature with Dr. Železný/CET 21; and
  - (c) CME may not concurrently pursue the same remedies in different fora;

further and/or alternatively, on grounds of lack of admissibility:

- (a) CME has pursued the same remedies in other fora; and
- (b) CME has failed to plead any loss.

180. The Czech Republic denies that there has been any breach of the Treaty or of Czech law by the State or any of its instrumentalities.

## II. The Treaty

181. The Czech Republic relies on the terms of the Treaty for its full terms and effect and agrees that it is bound by the Treaty as from 1 January 1993.

## III. The Media Law

182. The Media Law of 30 October 1991 provided, amongst other things, for the issuing of a Licence by the Media Council to a “broadcasting operator”.

183. Article 10 set out the “*Conditions for granting a Licence*” and provided, inter alia:

- "(1) *A Licence authorizes its holder to broadcast in the scope and under the conditions set in it.*
- (2) *A Licence is not transferable.*
- ...
- (4) *In evaluating the application (§ 11), the licence-granting bodies give consideration to ensuring the conditions for plurality and balance in the programme services offered, especially local programme services, equal accessibility of cultural values, information and views, as well as ensuring the development of the culture of the nations, nationalities and ethnic groups in the Czech and Slovak Republic, and the extent of the applicant's previous business activities in the area of mass media.*
- (5) *In evaluating the application, the licence-granting bodies see to it that none of the applicants will gain a dominant position in the mass media.*
- (6) *In evaluating applications from companies with foreign equity participation, the licence-granting bodies take into consideration the applicant's contribution to the development of original domestic work, as well as the equity holdings of Czechoslovak natural persons and legal entities, and their representation in the company's bodies. “*



184. Article 11 concerned the “*Licence application*” and provided, inter alia:

„(3) *Only the person or entity who is applying for a Licence is a party to the Licence proceedings.*”

185. Article 12 concerned the “*Decision to grant a Licence*” and provided, inter alia:

“(3) *In addition to conditions stated in paragraph 2, the decision to grant a Licence also includes conditions which the licence-granting body will set for the broadcasting operator.*”

The power to impose conditions was, however, removed in 1996.

186. Article 14 concerned “*Changes in the licence*” and provided, inter alia:

“(7) *A broadcaster is required to notify the body which issued the Licence of all changes relating to the data stated in the application or the fulfilment of the conditions set in the licence and submit documentation of them within 15 days after these changes occur . . .*

(2) *On the basis of the notification under paragraph 1, the licence-granting body, depending on the circumstances of the case, will decide on a change in the granted Licence or will revoke the Licence (§ 15). ”*

187. Article 15 concerned “*Revoking a Licence*” and provided, inter alia:

“(1) *The body which granted the Licence shall revoke it from the licence-holder if:*

(a) *the licence-holder no longer meets the prerequisites for granting a Licence specified in § 10 par. 6 and 7;*

...

(c) *changes have occurred concerning the licence-holder which do not permit fulfilment of the conditions set in the Licence [this provision was removed in 1996]*

...

(2) *The body which granted the Licence may revoke it if*

(a) *the licence-holder violates in a serious manner the conditions set in the Licence, duties specified by this Act or by other generally binding legal regulations;”*

188. Article 20 concerned “*Fines*” and gave the Media Council the power to impose fines if the licence-holder violated its duties set by the Media Law or the Conditions to the licence. In addition, Article 20 (6) provided that a fine will be imposed on anyone who broadcasts without being authorised to do so. The fine could be between CZK 10,000 and CZK 2,000,000.

#### **IV. The Media Council**

189. On 21 February 1992, the Czech Parliament passed an Act (Act No. 103/1992 COLL.) establishing the Media Council or "Council". The function of the Council was to supervise the observance of legal regulations governing radio and television broadcasting, including the observance of the Media Law.
190. The Council has at all times been an autonomous body, independent of the Government and answerable to the Czech Parliament under Article 3 (5) of the Media Law and Article 29 of the Act on Competencies of State Institutions. It has nine members elected by the Czech Parliament. Members of the Council may not be members of Parliament, nor hold offices in political parties or political movements, nor be members of companies that do business in the field of mass media, nor represent business interests that might be in conflict with the performance of their office or that could adversely affect their impartiality and the objectivity of their decision making.

#### **V. Grant of the Licence to CET 21**

191. In 1992, the Council commenced proceedings for the issue of a new Licence for broadcasting commercial television, pursuant to the procedures prescribed in the Media Law. The Council had special regard to the urgency and importance of such task at a time when no competition existed in Czech television broadcasting.
192. The Licence was not to be issued through a tender process (in the sense that it would be awarded to the bidder with the most advantageous financial package to the Government). The Licence was to be issued after a public enquiry which examined the viability and suitability of all submitted bids.

193. The Council invited bidders. Over 20 applications were received, one of which was CET 21, represented by Dr. Železný. In April 1993, Dr. Železný acquired a 17 % interest in CET 21. In August 1996 he increased his interest to 60 %.
194. The Media Law did not bar foreign parties from effectively holding television licences. The Media Law merely stipulated, as many countries do, that a legal entity could only become a licence-holder if it had a registered office on the territory of the Czech Republic and was registered in the Commercial Register. CEDC never applied to the Media Council for a Licence. CME has failed to establish that it assumed the rights and obligations of CEDC as a matter of law.
195. CEDC could have applied for a Licence on its own through a Czech registered company. CEDC chose not to. Neither CEDC (nor later CME) ever raised any formal complaint with the Council or the Government at the time. The Czech Republic has also no knowledge of whether CEDC and CET 21 contemplated pursuing a joint application for a Licence. In any event, only CET 21 submitted an application, dated 27 August 1992.
196. CET 21's application was supported by a document entitled "*Project for an independent Television Station*". It explained that, inter alia, financial backing would be provided by CEDC, the shareholders of which were said to be part of the "Lauder group". CET 21 stated in the Project Proposal, submitted with its application, that CEDC was a "*direct participant in CET 21's application for the Licence*". However, neither the Media Law, nor Czech law in general, recognises any legal term or gives any legal definition to the term "*direct participant*". The Project Proposal itself made clear that it was CET 21, and CET 21 only, that was applying for the Licence. The applicant for the Licence was named as CET 21.

197. In mid January 1993, CET 21 provided the Council with a “business plan” which set out in detail the expected revenues and expenses of CET 21 and ČNTS.
198. The Council received assistance from a Council of Europe expert mission. It evaluated the business plans of the projects. CET 21 and two other companies had the best plans. The Council then had to choose one of the three shortlisted applicants, having regard to the criteria in Article 10 of the Media Law. CET 21 was chosen.
199. The Council, by letter dated 30 January 1993, informed CET 21 that it had been granted a Licence for nation-wide broadcasting. It was clearly understood by Council members such as Dr. Josefík that the applicant for the Licence was CET 21 alone and that CEDC would be a future investor. The letter referred to CEDC being a “*direct participant to the application*”. That reflected the understanding that CEDC would be an investor in the project, and this phrase had no legal significance under the Media Law. In addition to the financial considerations, members of the Council such as Dr. Josefík voted in favour of CET 21 because their broadcasting format appeared most likely to provide competition to the existing public television stations and to provide a plurality of views.
200. Accordingly, as a matter of Czech law, any rights and obligations prescribed by the Media Law and the Licence are only given to and assumed by the party that made the application and is named in the Licence.
201. The Council did not violate the Treaty including in particular by not permitting foreign ownership of the Licence. No political pressure took place. The Media Law does not preclude foreign investment in the broadcasting industry. It only requires that the broadcasting Licence be held by an entity which has a registered office in the Czech Republic and which is registered in the Commercial Register.
202. After the announcement of the decision, CET 21 and CEDC entered into two agreements: the “*Overall Structure of a Czech Commercial Television Entity*” of 3 February 1993 and the “*Basic Structure of a New Czech*

*Commercial Television Entity*” of 5 February 1993. Both agreements provided that CET 21 and CEDC would create a new company to manage the TV station, with investments to be made by CEDC and the Czech Savings Bank. The earlier agreement stated that CET 21 and CEDC agreed to allow the new company to have exclusive use of the Licence but this was omitted from the later agreement. The earlier agreement confirmed *“that neither party has the authority to broadcast commercial television without the other”* but in the later *“CET 21 acknowledges that it is not entitled to carry on broadcasting without the direct participation of CEDC”*.

203. The two agreements were different in certain material respects. Moreover, they were both significantly different from the *“Terms of Agreement”* between CEDC and CET 21 dated 5 January 1993 which provided that CEDC was to be a major shareholder of CET 21.
204. The Council did not participate actively in negotiating a solution which led to the creation of ČNTS. It did not play a central role in directing the formation of ČNTS. It did not discriminate against foreign investors in Czech television. The Council did not bless the arrangements between CET 21 and ČNTS or give its approval to those arrangements or actively participate in their formulation. The Council could not and did not provide any official assurances to CEDC.
205. The Council's Decision and the separate Licence (containing 31 Conditions) were formally issued in writing to CET 21 on 9 February 1993. The Decision stated that the Council *“awards a Licence for nation-wide television broadcasting on the territory of the Czech Republic to the limited liability company CET 21.”*
206. The *“Reasoning”* referred to CET 21's *“contractual partner, the company CEDC”*. The *“Reasoning”* stated that *“the CET 21 proposal best suited the aim to create a project for television broadcasting by a private operator which respects the public interest, contributes to the creation of a democratic society, and reflects a plurality of opinion and will provide objective and balanced information necessary to form opinions free/y.”*

It also noted that the proposal demonstrated adequate financing, but it added that “[d]espite the substantial involvement of foreign capital necessary to begin television station activities, the proposal clearly guarantees the intent to preserve the national character of programming. ”

It concluded:

*"... Through the formulation of Licence conditions and through inspection of their observance, [the Council] intends to ensure that the aims stated in the proposal which convinced the Council that this proposal is the best, will be observed. "*

207. The Licence itself named the “licence-holder” as “CET 27”. It stated:

*“The licence-holder is required to ensure that the broadcasting is in accordance with the information stated in the application on the basis of which this Licence was issued. It also agrees to observe the conditions stated in the appendix to this Licence. ”*

208. The Licence Conditions 17 and 18 (the complete wording already cited above) provided that “any change in the legal entity” of the licence-holder and the investors CEDC and the Czech Savings Bank required the prior approval of the Media Council (Condition 17) and that the investors shall not interfere into “the programming and the editorial independence of the newscasting employees” (Condition 18).

209. The purpose of the Licence Conditions was, to monitor the business arrangements between CET 21 and the investors (CEDC and Czech Savings Bank) and to ensure that the investors actually became parties to the project. At that time (1992/93), many foreign investors promised to fund huge projects in the Czech Republic, but when it came to pay the money they disappeared. Condition 18 also emphasized the requirement of editorial independence (a key attribute of any Licence). Similar conditions were imposed upon other licence-holders. The Czech Republic contends that the wording of Condition 17 has very little legal significance as far as the investors were concerned. It conferred no right on the investors (or ČNTS) vis-à-vis the Czech Republic. The legal effect of the Conditions was exactly according to their terms: they imposed obligations on CET 21. And the Licence and the Conditions were expressly accepted by CET 21, and only by CET 21.

210. The specific reference to the MOA was recognition that the requirement in the original Condition 17 that CET 21 submit the MOA within 90 days had been fulfilled. It also identified the contractual structure which the licence-holder had entered into with its investors and over which the Council intended to exercise regulatory supervision (pursuant to Condition 17). The Council was concerned to ensure that the editorial independence of CET 21 was secured (Condition 18). The Council was responsible for ensuring that this independence remained intact, and it therefore imposed reporting requirements in Condition 17.
211. Thus, the Council envisaged, as reflected in the Licence Conditions, that CEDC and Czech Savings Bank would be “investors” in a company established to manage and operate the television station. The Czech Republic contends that this terminology has no legal significance in the sense contended by CME and does not confer any rights upon CEDC, or the Czech Savings Bank, or ČNTS. Such wording recognised the fact that the licence-holder, CET 21, intended to obtain funding and know-how from CEDC; and that CEDC’s rights vis-à-vis CET 21 were to be contractual. It does not elevate CEDC to the status of co-licence-holder. In the Conditions to the Licence, CEDC is referred to as an “investor”.
212. The Council did not contemplate that CET 21 would transfer the Licence to CEDC or any other entity or person. Indeed, the Media Law forbade it. Neither the Decision nor the Licence required CET 21 to enter into any relationship with CEDC or anyone else whereby it would lose control of broadcasting and programming, nor did the Decision or the Licence approve any such relationship made by CET 21.
213. The Council did not take into account the February agreements when it issued the Licence. The Licence documentation did not link CEDC and ČNTS to the Licence issued to CET 21 in any manner beyond acknowledging that CEDC was to be an investor in the project.

## VI. The Formation of ČNTS

214. CET 21, Czech Savings Bank and CEDC established and became shareholders in ČNTS.
215. Condition 17 of the Licence Conditions required the submission to the Council of a Business Agreement (herein: the "MOA"). A text was submitted to the Council. By letter dated 21 April 1993 the Council notified CET 21 that the Council affirmed in its meeting of April 20, 1993 "in accordance with the Article 17 of the Conditions to the Licence" the submitted version of the MOA between CET 21, CEDC and the Czech Savings Bank.
216. In respect to the formation of ČNTS and its MOA, the Czech Republic's position is that the Council did not participate actively in the negotiation of the MOA. The Council did not have the power or authority to approve the MOA submitted to it. It simply acknowledged that Condition 17 of the Licence had been complied with. The Council did neither approve the arrangements between ČNTS and CET 21, nor proposed them, nor publicly endorsed them. No actions of the Council could release CET 21 and ČNTS from conducting their arrangements in compliance with the Media Law. The Council was not substantially involved in the negotiation and finalization of the terms of the MOA and the adherence to these arrangements until 1996. The Council was not influenced by "changing *political winds*".
217. In 1996, the Council commenced administrative proceedings because there was clear evidence of a violation of the Media Law which ČNTS was unwilling to remedy. The Council was not fully aware of and did not accept the ČNTS structure. The Council never agreed that CET 21 could transfer the Licence to ČNTS. The Council did not take a discriminatory position towards foreign investment and/or ownership of the Licence. The Council did not participate substantively in developing the arrangement between CET 21 and ČNTS, did not formally endorse its legality and did not forcibly dismantle the arrangement.
218. On 4 May 1993 CET 21, Czech Savings Bank and CEDC executed the "*Memorandum of Association*" (the MOA). CET 21 was to have a 12 %



ownership interest in ČNTS; Czech Savings Bank a 22 % ownership interest; and CEDC a 66% (and therefore controlling) ownership interest.

219. The MOA recorded that the subject of ČNTS's business activity was "*the development and management of a new independent private, country-wide television broadcasting station in compliance with the Licence and the conditions attached thereto*". The MOA noted that CET 21 had been "*granted and became the holder of a Licence for nation-wide broadcasting*" and referred to CEDC as an "*investment company*". In addition, the MOA provided (at para. 1.4.1):

*"[CET 21] shall contribute to [ČNTS] unconditionally, unequivocally, and on an exclusive basis the right to use, exploit and maintain the Licence held by [CET 27]."*

The Czech Republic's position is that no specific legal entitlements derive for ČNTS or CME from the MOA and in particular from CET 21's contribution of the use of the Licence to ČNTS. The meaning and effect of the Memorandum of Association is a matter governed by Czech law. CME would have the Tribunal conclude that it allowed ČNTS to broadcast without a Licence. The Czech Republic contends that the wording in the Memorandum of Association did not, and in any event could not, equate to a transfer of the Licence to ČNTS, as that would have been in clear breach of Article 10 (2) of the Czech Media Law. CME may have had a different understanding or expectation: in its Statement of Claim, CME states that "*... the Media Council expressly approved the agreement under which CET 21 assigned the exclusive right to use its Licence to ČNTS*". That premise, namely that ČNTS became assignee of all rights associated with the Licence, is an essential element of CME's case. But that premise is fundamentally wrong both in fact and law.

The Council's understanding of the contribution of the Licence to ČNTS was explained in its Report of May 1994:

*"The Licence as such has not been contributed to ČNTS and is separate from all other activities of ČNTS . . . The Memorandum of Association and the Licence terms specify the relationships between ČNTS and CET 21 and contain a number of mechanisms that prevent the potential non-permissible involvement of ČNTS in the rights and obligations of the licence-holder"*.

In the opinion of the Council, and contrary to CME's contention, the Licence Conditions and in particular, Conditions 17 and 18, were in fact intended to prevent ČNTS becoming the broadcaster.

220. ČNTS was to have a Programming Council consisting of seven (7) members of whom three (3) were to be appointed by CET 21, two (2) by Czech Savings Bank, and one (1) by CEDC. The seventh was to be the Programming Director (para 8.1). This implied that CEDC would not control the programming (as required by Condition 18 of the Licence).
221. At paragraph 10.4, CEDC, Czech Savings Bank and CET 21 expressly agreed *"to be bound and to respect all of the conditions of the Licence, mandated by the Council. In particular, CEDC and [Czech Savings Bank] agree to abide by condition No. 18 not to interfere by any means with the programming of Television station and especially not to interfere with journalistic independence of the news department."*
222. The Council did not consider that it had the power to disapprove the wording of the commercial arrangements between the parties, including the words of CET 21's contribution to ČNTS. But the Council was concerned as to how the arrangement between the various parties would be implemented in practice, and how CET 21 would perform its obligations as broadcaster under the Media Law. The Council understood that ČNTS would provide services to CET 21, but the Council did not foresee that the scope of exclusivity between the licence-holder and the service provider would be so great that CET 21, far from being the broadcaster, would become a mere shell company, the entire operation lying in practice in the hands of ČNTS. Even if the Council had been actively involved in drafting the MOA, that cannot be interpreted as approval of unauthorized broadcasting by ČNTS.
223. At the request of CET 21, the Council issued a Decision dated 12 May 1993 changing the wording of the Licence Conditions. The relevant Conditions which were changed were Conditions 17 and 18:

*"The licence-holder obliges itself:*

- ...  
(17) to submit [to] the Council for approval any changes of legal person which has been the licence-holder, or of the capital structure of the investor which result in a change of control over their activities, and of the provisions of partnership*

*agreement between the licence-holder and investors. The partnership agreement is an integral part of the Licence terms. The partners of this partnership agreement are the licence-holder, CEDC and Česká spořitelna, in the scope and under the conditions stipulated by this Memorandum of Association.*

- (18) *to ensure the CEDC specified as the partner to the partnership agreement in the Licence terms and other investors specified therein will in no way interfere in television station programmes, particularly in editorial independence of news service workers. "*
224. ČNTS was registered on 8 July 1993. ČNTS entered in the Commercial Register that the subject of its business activity was "*nation-wide television broadcasting under Licence no, 001/1993*". This was unknown to the Council. Dr. Železný was appointed General Manager. TV NOVA commenced broadcasting in February 1994.

## **VII. The Unlawful Implementation of the Licence**

225. Soon after broadcasting commenced, the Council became concerned about the role of ČNTS. The Council was contacted by an independent producer of programmes who complained that two television broadcasting licence-holders, TV NOVA and Premiéra TV, were only re-broadcasting existing programmes and not developing domestically produced programmes. It was also observed that the broadcaster was not clearly identified at the end of each TV NOVA programme. The Council started to investigate these issues.
226. On 1 February 1995, the Council received a letter from a law firm claiming that their client believed his reputation had been damaged as a result of a programme broadcast on TV NOVA and intended to start defamation proceedings. They wanted to know the identity of the broadcaster. The letter also referred to a judgment of the Regional Commercial Court in Prague dated 13 September 1994 and a decision of the Municipal Court of Prague 1 which stated that ČNTS was the actual operator of the broadcasting.
227. Following this, the Council requested the Commercial Court to clarify the scope of the registered business activities of CET 21 and ČNTS.

228. Further, it came to the attention of the Council that CME had apparently replaced CEDC (in August 1994) as a party to the business agreement but that no approval had been sought from the Council as required by Condition 17 of the Licence.
229. The Media Council also discovered that it was ČNTS, rather than the licence-holder, CET 21, that had entered into agreements with Czech Radiocommunications which was transmitting the signal, and with OSA and Integram which represented authors and producers respectively and protected their copyright. The Media Law required the broadcaster to enter into these agreements.
230. It thus became evident to the Council that CET 21 was just an empty shell company performing none of the obligations of the licence-holder and that ČNTS was in fact acting as licence-holder and receiving all the revenues therefrom. The Council concluded there had been a de facto transfer of the Licence to ČNTS and that ČNTS was broadcasting without a Licence, in breach of the Media Law.
231. The Council sought an independent legal opinion from the Institute of State and Law of the Academy of Sciences (the "Institute") concerning the arrangements between CET 21 and ČNTS. In February 1996, the Institute issued a legal opinion concluding that ČNTS was not authorised to broadcast as the Licence was issued to CET 21 and therefore ČNTS was in breach of the law. The opinion recommended that the Council initiate administrative proceedings against ČNTS for unlicensed broadcasting and that the Council consider the revocation of CET 21's Licence.
232. On 13 March 1996, the Council met CET 21 to discuss the issue of unlicensed broadcasting by ČNTS and the changes to CET 21's shareholders which had not been notified to and approved by the Council. In April 1996, CET 21 provided the Council with two alternative draft agreements between CET 21 and ČNTS regarding the services to be performed by ČNTS for CET 21. The Council again referred the question of lawfulness to the Institute. On 2 May 1996, the Institute issued a further legal opinion commenting on the draft agreements.
233. The Institute concluded that Draft No. 1 "*basically correctly resolves the situation.*" In summary, the Institute found decisive not so much the text of the agreement but the factual fulfilment of two points:

- (a) CET 21 (and not ČNTS) was to become a party to the agreement with Czech Radiocommunications; and
- (b) Advertising revenues were, in terms of “accounting and taxes, to be revenues of CET 21 (and not ČNTS), and CET 21 was to pay fees to ČNTS for its services.

234. In its second opinion, the institute set out at some length the conditions which had to be satisfied for the issue of unlicensed broadcasting to be resolved. On 4 June 1996, the Council wrote to CET 21 requesting CET 21 to amend the description of the business activities of CET 21 and of ČNTS, and commented on the two draft agreements submitted by CET 21 in April 1996, and requested CET 21 to notify properly the changes to its shareholders. On 27 June 1996, the Council was provided by CET 21 with a copy of an agreement between CET 21 and ČNTS (in fact dated 23 May 1996). It was different to the drafts provided in May. The arrangements between CET 21 and ČNTS still did not satisfy the concerns of the Council.

235. The new Media Law entered into force on 1 January 1996. A licence-holder could request the Council to delete those conditions of its Licence which did not concern control of the programming. On 2 January 1996, CET 21 had applied for the removal of most of the conditions to its Licence, including Conditions 17 and 18. If that were done, the Council would no longer be able to request information on the arrangements between CET 21 and ČNTS, and thereby monitor those arrangements.

236. During 1996, the Council had also been investigating Premiéra TV and Rádio Alfa, discovering that the arrangements between the respective licence-holders and their service providers were not as the Council thought they should be.

### **VIII. Administrative Proceedings Against ČNTS**

237. At a meeting on 23 July 1996, the Council decided to commence administrative proceedings against the service providers involved in TV NOVA, Premiéra TV and Rádio Alfa.

238. By letter dated 23 July 1996, the Council advised ČNTS that, as recommended by the Institute in its Opinion, the Council was commencing administrative proceedings against ČNTS seeking the imposition of financial sanctions for unauthorised broadcasting in breach of the Media Law. There were three grounds for such proceedings: (i) the incorrect description of the business activities of ČNTS in the Commercial Register; (ii) that ČNTS rather than CET 21 had entered into contracts with Czech Radiocommunications and OSA; and (iii) the lack of control by CET 21 over the disseminated programmes.
239. Article 20 (5) of the Media Law provides for fines between CZK 10,000 (approximately US \$ 250) to CZK 2,000,000 (approximately US \$ 50,000). It is determined by the Council after a decision on liability is reached. In fact, the Council's intention was not to impose a fine, because that would not solve the problem, but to ensure that the relationship between the licence-holder and the service provider was corrected.
240. It was not relevant to the Council whether the service provider (of TV NOVA, Premiéra TV or Rádio Alfa) was owned or controlled by a foreign entity. It was concerned only with the relationship between the broadcaster and the service provider. Its key concern was that the attributes of the licence-holder were not transferred to the unlicensed service provider. In fact, Premiéra TV a.s. which was a service provider similar to ČNTS, had no foreign ownership (as far as the Council was aware).

### **IX. CME Takes Secret Control of CET 21**

241. About this time in 1996, no doubt aware that the arrangements between CET 21 and ČNTS violated the Media Law and would have to be changed, CME secretly sought to acquire control of CET 21. CME provided a loan to Dr. Železný of US \$4.7 million to enable him to buy an additional 43 % stake in CET 21 (from four of the original five shareholders) thus increasing his holding from 17 % to 60 % which he did. The loan agreement, dated 1 August 1996, provided that Dr. Železný would exercise his voting rights only as directed by CME. The secret control by CME of CET 21 was in clear breach of the requirements of the Media Law and the Licence. The Council was not informed either of Dr. Žel-

ezný's acquisition of a controlling interest in the licence-holder, or of the terms of the loan agreement giving voting control over CET 21 to CME. Condition 17 of the Licence required the Council's prior approval of both arrangements.

242. Upon discovering in late 1996 the Loan Agreement between CME and Dr. Železný, the Council initiated a meeting with CET 21 and Dr. Železný in order to find out more about the loan agreement. Dr. Železný assured the Council that the Agreement was not going to be fulfilled. In fact, as appears from an Amendment to the Loan Agreement, dated 11 March 1997, the Conditions of the original Loan Agreement had been fulfilled and Dr. Železný was released from the obligation to repay the loan.

#### **X. Change of Memorandum of Association of ČNTS and Service Agreement**

243. By letter dated 4 October 1996, ČNTS and CET 21 made a joint proposal to the Council involving a sequence of several steps which it hoped would resolve the Council's concerns over the CET 21/ČNTS relationship. ČNTS and CET 21 asked that the proposal be taken as "*an expression of our goodwill, openness to discussion, and forthcoming attitude.*" CET 21/ČNTS offered, inter alia: to submit to the Council for their information a new business agreement between CET 21 and ČNTS; that ČNTS would conclude in the name of CET 21 agreements with Czech Radiocommunications and agencies representing authors and performing artists (i.e. OSA and Intergram); to change the description of ČNTS's business activities in the commercial register; and to submit for approval by ČNTS's General Assembly a change to Article 1.4.1 of its Memorandum of Association whereby CET 21 contributed the Licence on an exclusive basis. ČNTS and CET 21 also sought the cancellation of Condition 17 of the Licence. These proposals were in principle agreeable to the Council.
244. ČNTS provided the Council with a copy of an agreement between CET 21 and ČNTS, dated 4 October 1996 which was said to govern the relationship between them.

245. In November 1996, the MOA of ČNTS was amended to read that CET 21:

“contributes to [ČNTS] unconditionally, irrevocably and on an exclusive basis, the right to use, make a subject of [ČNTS'S] benefit and maintain, know how related to the Licence, its maintenance and protection”.

246. In December 1996, Condition 17 was removed with legal effect from February 1997.

247. In February 1997, the change of business activities of ČNTS was registered with the Commercial Register. ČNTS deleted “*nation-wide television broadcasting pursuant to Licence no. 001/1993*” from its activities.

248. On 15 May 1997, the investigation by the State Prosecution Office which had commenced in April 1996, was stopped.

249. In May 1997, the 4 October 1996 agreement between CET 21 and ČNTS was superseded by a further agreement dated 21 May 1997 (which was stated to reflect the changes in the Commercial Register). An Addendum to that Agreement was also agreed on the same date. These became known as the “Services Agreement” or “Co-operation Agreement”. This new agreement provided:

*“The parties confirm that the holder of Licence 001/1993 and operator of television broadcasting with the Licence under Act no. 468/1991 Co/l., as amended, is CET 21 and that the Licence is non-transferable. [Art. 1]*

...  
*The parties have agreed that from prior agreements ČNTS has authorization to arrange, under this agreement, services for television broadcasting which is operated on the basis of the licence issued to CET 21 and that ČNTS is authorized to keep an agreed profit from this activity. [Art. 2 (1)]*

...  
*ČNTS shall conduct the activity stated in para. 1 in accordance with generally binding legal regulations, as well as with the content of the Licence whose holder is CET 21. [Art. 2 (3)]*

...  
*If broadcasting on TV NOVA violates obligations to which CET 21, as the licence-holder and broadcasting operator, is bound by law or the Licence, CET 21 is authorized to interfere with program-*



*ming through persons named by the general assembly of CET 21 and whose names CET 21 will announce to the company ČNTS immediate/y after their appointment [Art. 5]"*

250. Also during this period, CET 21 concluded agreements with Czech Radiocommunications, OSA and Intergram.
251. The formal arrangements between CET 21, CME and ČNTS were now considered to comply with the Media Law. Accordingly, the Council stopped the administrative proceedings by its Decision dated 16 September 1997.
252. Premiéra TV and Rádio Alfa eventually made similar changes to their arrangements and the administrative proceedings against their respective service providers stopped on 14 December 1998.

#### **XI. The Media Council did not reverse its Position**

253. The Council did not abruptly reverse its position or repudiate the arrangement it had officially approved or force ČNTS to surrender the exclusive right to the use of the Licence.
254. The Council became concerned that there had been a de facto transfer of the Licence to ČNTS in violation of the Media Law. Such violation could not and was not approved by the Media Council. When it discovered the violation, it first held negotiations with CET 21 and ČNTS in an attempt to persuade them to change their arrangements. When this was unsuccessful, the Council commenced administrative proceedings against ČNTS for unlawful broadcasting. Similar proceedings were commenced against the service providers to Premiéra TV and Rádio Alfa. CET 21 and ČNTS subsequently proposed changes to their arrangements and relationship which appeared to comply with the Media Law.
255. The activities of ČNTS were in violation of the Media Law. They had never been approved by the Council. They did not "*sudden/y become objectionable*". The Council had been concerned for many months that there may have been unlawful broadcasting by ČNTS, and had raised its

concerns with CET 21 and ČNTS. The relevant legislative provisions were those in the original Media Law which forbade a transfer of the Licence. Political factors did not motivate the Council.

256. The Council did receive an Opinion from the Institute, not from Dr. Bárta in his individual capacity. Dr. Jan Bárta was the head of the public law Section at the Institute and thus had to issue legal opinions on Institute letterhead on behalf of the Institute. The Institute's letter dated 13 August 1996 relied on by CME does not support its assertion that the institute disowned the Opinions of Dr. Bárta. The letter addressed to Dr. Železný dated 13 August 1996 was not the Institute's "only *real opinion*".

## **XII. The Media Council did not Compel ČNTS to Alter the MOA**

257. The Council did not "force" ČNTS and CET 21 to amend the Memorandum of Association. ČNTS and CET 21 no doubt "*capitulated*" because they recognised that their implementation of the Licence did, in fact, violate the Media Law. The Council did not insist that ČNTS "could *not be involved in broadcasting*" but rather, the Council insisted that ČNTS could not be the de facto licence-holder.
258. The contractual changes were not "*coerced*" by the Council. This assertion is contradicted by ČNTS's pleadings in the recent Czech Court proceedings against CET 21 in which ČNTS relied on the validity of, inter alia, the amended Memorandum of Association and the Service Agreement dated 21 May 1997.
259. The Czech Republic relies on the "*Reasoning*" which is included in the "*Decision*" of the Council dated 16 September 1997. The Czech Republic is not responsible for the consequences of changes to commercial arrangements required to be made by the parties thereto in order to comply with Czech law.
260. ČNTS could have contested the Council's interpretation of the Media Law through the administrative proceedings or through the Czech courts. Alternatively, it could amend the business arrangements with CET 21 and have the proceedings dropped. It chose voluntarily to amend the business arrangements, and has since relied in the Czech courts upon

those amended agreements as a valid expression of the clear will of ČNTS and CET 21.

### **XIII. March 15,1999 Letter**

261. In response to a request by CET 21, the Council met with Dr. Železný on 2 March 1999 which was in compliance with a licence-holder's right to request a meeting with the Council in order to discuss issues relating to its Licence. They discussed a number of matters relating to CET 21, including its relationship with its service provider.
262. The Council's policy in connection with the arrangements between licence-holders and service providers was discussed. This was a topic of public debate. The Council had expressed its views at meetings of a special Media Panel which had been set up by a number of broadcasters to discuss a new Media Law then being drafted by the Ministry of Culture. Dr. Železný and his lawyer had attended most of those meetings. It was a matter of public record that the Council did not favour exclusive relationships between licence-holders and service providers because that might lead to a de facto transfer of the Licence. That policy was based on its experience with TV NOVA, Premiéra TV and Rádio Alfa.
263. The next day (3 March), Dr. Železný wrote to the Council, setting out his summary of the Council's policy and asking for confirmation. The Council replied by letter dated 15 March 1999. Dr. Železný's summary was generally an accurate summary of the Council's policy, as expressed at the 2 March meeting and elsewhere. The Council wrote a similar letter to at least one other licence-holder.
264. This letter represented the Council's policy and applied to all licence-holders. However, since the Council no longer had the power to impose conditions through which it could monitor the arrangements between the licence-holder and its service provider(s), the Council could not enforce this policy.

#### XIV. The Dispute Between CET 21 and ČNTS

265. In or about October 1998, CET 21 had informed ČNTS that activities performed by ČNTS would in future be performed by a company called AQS a.s. The effect of this on the relations between ČNTS and Dr. Železný is not known, but on 19 April 1999, CME dismissed Dr. Železný from his position as General Manager of ČNTS. Then on 5 August 1999, CET 21 withdrew from the Services Agreement (of 21 May 1997), on the ground that ČNTS's failure to provide daily broadcasting schedules constituted a material breach of contract, and stopped using the services of ČNTS.
266. On 9 August 1999, ČNTS commenced proceedings against CET 21 in the Regional Commercial Court in Prague. The Court decided:
- "[CET 21] is obligated to procure all services for television broadcasting performed on the basis of Licence No. 001/1993 for the operation of a full-coverage television broadcasting station granted to him by the Council exclusively through [ČNTS], and by means of services provided by [ČNTS], in accordance with the terms and conditions of the [Services Contract] concluded between [ČNTS] and [CET 21] on 5/21/1997, ..."*
267. The Court stated that the arrangements between CET 21 and ČNTS had been voluntarily amended.
268. The Services Agreement was not *"part of the package of contractual changes coerced by the Media Council"*. On the contrary, ČNTS relied upon the Services Agreement as the basis of its claim against CET 21. The Regional Commercial Court recorded that ČNTS had submitted that *"[t]he change in the definition of the contribution to the capital stock was not understood by [ČNTS] and [CET 21] as a change altering their legal relationship, but only as a change meeting the requirements of the Council and resulting in staying the administrative proceedings."* The Court noted that, *"[a]ccording to an expert opinion [of ČNTS] valuing this non-monetary contribution [of the Licence know-how], the value of this contribution remain unchanged. "*

The Court stated that CET 21 was not entitled to withdraw from the Services Agreement. The judgment was reversed by the Court of Appeal.

269. The proceedings before the Prague Regional Commercial Court deprive this Tribunal of jurisdiction. CME must be assumed to have elected to pursue ČNTS's commercial rights before the Czech courts. CME cannot refer that same dispute to arbitration under the Treaty. Moreover, the pleadings and judgment in those proceedings confirm that the Czech Republic is not responsible for any harm which CME may have suffered to its alleged investment.

### **XV. The alleged Destruction of Claimant's Investment**

270. The Council is not responsible for the actions of private parties in their dealings with their contractual partners. The steps taken by Dr. Železný and CET 21 were not taken with the Council's "*connivance and assistance*".
271. The Czech Republic cannot comment on the dealings between Dr. Železný and ČNTS/CME. Any action taken by Dr. Železný in relation to ČNTS/CME is part of their private commercial dispute. It is irrelevant to the Czech Republic's obligations under the Treaty. The Council did not threaten further action. The dispute escalating between Dr. Železný and CME has led to any "investment" by CME being harmed.
272. The Council did not provide "*active assistance to Dr. Železný in his campaign to eliminate ČNTS's exclusive position respecting CET 21*". All actions of the Council, including responding to Dr. Železný's request in his letter of 3 March 1999, were carried out in fulfilment of its role of broadcasting regulator. The Czech Republic cannot comment on Dr. Železný's motivations or intentions in writing to the Council.
273. In the Council's letter of 15 March 1999 to Dr. Železný, the Council reiterated its policy concerning the relationship between licence-holders and service providers. That policy had been expressed publicly in meetings of the Media Panel and in its submissions to the Ministry of Culture on

- the proposed new Media Law. The Council wrote a similar letter to at least one other licence-holder.
274. The Council's policy in early 1999 as reflected in its letter of 15 March 1999 was not in conflict with its previous practice. The Council's policy was consistently not to favour exclusive relationships between licence-holders and service providers because that might lead to a de facto transfer of the Licence. The Council's experience with TV NOVA, Premiéra TV and Rádio Alfa was evidence that this might happen. However, the Council had no power to intervene unless a violation of the Media Law occurred.
275. The 15 March 1999 letter did not go beyond the scope of the Council's authority under the Council Act. The Council, as broadcasting regulator, was not only entitled to, but obliged to, respond to queries from licence-holders. The Council was not issuing an ex parte declaration in support of one party to a dispute.
276. The Council did not play a negative role in the events leading to the estrangement of Dr. Železný/CET 21 and Mr. Lauder/ČNTS/CME. The Council was to monitor and enforce the Media Law, as it was empowered and obliged to do under Czech law.

#### **XVI. The Media Council did not Fail to Protect Claimant's Investment**

277. The Council does not have the power to police and enforce private commercial contracts. Nor can it dictate to a licence-holder whom it should choose as a service provider.
278. The Council and other organs of the Czech Republic did not fail to respond as appropriate to complaints made by ČNTS and CME. The Council, inter alia, reported to the Permanent Commission for Media of the House of Deputies of Parliament concerning the dispute between Dr. Železný and ČNTS, and wrote to ČNTS and CET 21 (letters dated 26 July and 29 July 1999).
279. The actions of CET 21 and Dr. Železný of which ČNTS had complained in its letters in June, July and August 1999 to the Council were part of a

commercial dispute that should be resolved by the parties concerned, with resort to the courts, if necessary.

280. The Council is not responsible in any way for the dispute between CET 21 and ČNTS. It did not ignite the dispute, ignore its own regulatory obligations, or refuse to comply with its obligations under the Treaty.

## **XVII. The Czech Republic's Alleged Additional Continuing Violations of the Treaty**

281. The Czech Republic did not continue to breach its obligations under the Treaty since the instigation of this arbitration. It did not favour the Czech investors in CET 21. The Council has not "*affirmatively assisted Dr. Železný in evading the effectiveness of orders of an ICC arbitral tribunal*". The Czech Republic has enacted legislation relating to the recognition and enforcement of arbitral awards in accordance with its obligations under the New York Convention.
282. The Council considered the request to increase the share capital of CET 21 and to transfer certain shares. The Council concluded that there was no legal obstacle preventing the transactions and therefore gave its approval.
283. The Czech Republic did not disregard criminal wrongdoing by Dr. Železný directed against CME's investment. Respective complaints have been properly investigated by the Czech police authorities.

### **G.**

#### **The Respondent's Argument**

##### **I. The Interpretation of the Treaty and Burden of Proof**

284. The Treaty must be interpreted according to the ordinary rules of treaty interpretation as established by State practice and as codified in Article 31 of the *Vienna Convention on the Law of Treaties (1969)*.
285. In respect to the breach of the Treaty as alleged, the burden of proof is on the Claimant to demonstrate that both the breach and the responsibility of the Czech State is engaged: a "[p]arty having the burden of proof

*must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof".*

## **II. The Governing Law**

286. Article 6 of the Treaty provides:

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

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

287. The Respondent's view is that Czech law should be given primacy in determining whether or not the Czech Republic has breached its obligations under the Treaty.

## **III. The Tribunal Lacks Jurisdiction**

288. The Tribunal has jurisdiction in respect of *"All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter"* (Art. 8).

289. *"Investment"* is defined as *"every kind of asset invested either directly or through an investor of a third State . . ."* (Art. 1 (a)).

290. The Tribunal lacks jurisdiction, on the grounds that:

- (i) CME has failed to establish that it has an asset invested in the Czech Republic;
- (ii) CME's claim is not an investment dispute under the Treaty; and
- (iii) CME may not concurrently pursue the same remedies in different fora.



### **1. CME has Failed to Establish that It has an Asset Invested in the Czech Republic**

291. The Claimant's assertion of a claim under the Treaty is unclear and unparticularized. CME is not entitled to bring a claim under the Treaty.
292. CME fails to identify the "investment" which it alleges gives rise to rights under the Treaty. CME failed to identify, whether CME's "investment" is its alleged shareholding in ČNTS or some contractual right allegedly enjoyed by ČNTS or some right conferred on CEDC.
293. Further, CME fails to establish that it has assumed the rights and obligations of CEDC.

### **2. CME's Claim is Not an Investment Dispute under the Treaty**

294. CME'S claim demonstrates a fundamental misunderstanding of the purpose and ambit of the Treaty (and, indeed, BITs in general). The Czech Republic considers that the attempt to use the dispute settlement provisions of the Treaty in order to settle private disputes in the manner sought by CME distorts the Treaty and if successful would represent a grave threat to the stability of the entire network of BITs.
295. This is a private commercial dispute and not an investor-host State dispute.
296. CME seeks to utilise the Treaty regime as an alternative or additional means for the resolution of a dispute arising from a falling out between two business partners, CME/ ČNTS and Dr. Železný/CET 21. The contractual rights and legal rights referred to are exclusively those made between ČNTS or CME and CET 21 or Dr. Železný. The Czech Republic is a party to none of them.
297. It is the contractual arrangements between CET 21 and ČNTS, and not the Licence, upon which the claimed exclusivity that CME seeks to secure in these proceedings is based. The Council did not impose the claimed exclusivity arrangement, and had no power to do so. The grant of the Licence signified no more than that the Council considered, on the basis of the information then available to it, that CET 21 was a proper re-

ipient of the Licence. The Council attached conditions to the Licence that required CET 21 to advise the Council of the business arrangements it entered into with CEDC and the Czech Savings Bank but the Council did not have the power, nor did it, approve or endorse those arrangements.

298. The dispute between Mr. Lauder (and his companies including CME) and Dr. Železný (and his companies) has already been, and is still being, pursued through various courts and arbitral tribunals. The Czech Republic is not a party to that dispute, and it takes no position on the merits of the arguments advanced on either side in the continuing litigation (save as articulated in judgments of the Czech courts). But it is clear from CME's own Statement of Claim that Mr. Lauder's claim against the Czech Republic relates to the withdrawal by Dr. Železný and his companies from various contractual arrangements to which the State was not a party. The Prague Commercial Court has upheld ČNTS's claim that Dr. Železný/CET 21 wrongly withdrew from those arrangements. It is therefore Dr. Železný / CET 21 that has allegedly injured CME's interests within the Czech Republic. The Czech Republic is not responsible for the actions of private parties.
299. In the relief originally sought, CME asked the Tribunal to restore the exclusivity of the relationship between ČNTS and CET 21. CME dropped this request during the proceedings. The relationship of exclusivity is a contractual one for which the parties must bargain and agree, within the limits of the law, and which they must enforce using the procedures of the law. The courts may uphold and enforce such contractual relationships (and it is to the courts which ČNTS has turned to obtain such relief). But contractual relationships between a licence-holder and service provider(s) cannot be imposed or enforced via the licensing procedures of the Czech Republic.
300. This is not a dispute concerning the treatment by the Czech Republic of an investment: it is a dispute concerning an alleged breach of a commercial contract made by private parties. That dispute should be settled either according to procedures agreed by the parties (such as arbitration), or through courts in the Czech Republic or some other State within the jurisdiction of whose courts the dispute falls. Treaty procedures were not intended to be used in these circumstances. If they were allowed to be so used, every commercial dispute involving a foreign investor could be

elevated to the level of a dispute within the Treaty procedures. That is plainly not the intention of the Treaty.

301. CME's claim must be dismissed on grounds that CME's claim is not an investment dispute within the scope of the Treaty.

### **3. CME May Not Concurrently Pursue the Same Remedies in Different Fora**

302. It is an abuse of the Bilateral Investment Treaty regime for Mr. Lauder, who purportedly controls CME, and, subsequently, CME to bring virtually identical claims under two separate treaties. The Czech Republic does not consider it appropriate that claims brought by different claimants under separate Treaties should be consolidated and the Czech Republic asserts the right that each action be determined independently and promptly.

As recognized by CME in its Statement of Claim, the action commenced by Mr. Lauder *"may not provide the full relief to which CME is entitled because it is brought on behalf of only a single controlling ultimate shareholder of CME . . . Only this Tribunal can declare that the Czech Republic has breached its Treaty obligations to [CME] and can provide full relief to [CME] for those breaches"*. In these circumstances, it is an abuse for Mr. Lauder to pursue his claim under the US Treaty and the Czech Republic is fully entitled to insist that CME make good its claim under the Dutch Treaty in separate proceedings.

303. The dispute between CME/ČNTS and Dr. Železný/CET 21 has been conducted as a private dispute. Several actions, in courts and arbitral tribunals, have according to CME itself, already been instituted, including one ICC arbitration and ten law suits at the Regional Commercial Court in Prague.
304. In particular, ČNTS has sought a ruling from the Czech Court upholding its claim to exclusivity under the Services Agreement made with CET 21. That is essentially the same remedy as is sought in the present proceedings. Thus, CME/ČNTS has already taken the present dispute before a competent court. The Regional Commercial Court has ruled in CME/ČNTS's favour and upheld the claim to exclusivity in relations between ČNTS and CET 21, precisely in terms that *"restore the initial eco-*

*conomic and legal underpinnings of [CME's] investment*", as those underpinnings were set out in the Services Agreement. The Prague Court of Appeal meanwhile reversed the judgment. The lawsuit is pending at the Czech Supreme Court. That Services Agreement was said by ČNTS itself to be *"the expression of a clear will of both contractual parties to determine the mutual relationship on an exclusive basis"* between them. CME/ČNTS is seeking at the Prague Civil Courts the remedy that it seeks from this Tribunal. Seeking the same remedy again is a plain abuse of process; and it conflicts with the spirit, if not with the letter, of the *res judicata* principle.

305. The Regional Commercial Court found that CET 21 had acted in breach of the contract, and whatever losses might have been suffered by ČNTS clearly derive from ČNTS's departure from the exclusivity arrangement. There is no suggestion, in the present claim or elsewhere, that there is any compensable loss that is not attributable to the breakdown of the exclusivity arrangement.
306. If a Claimant chooses to pursue a contractual remedy in the local courts or private arbitral tribunals, he should not be allowed concurrently to pursue a remedy under the Treaty.
307. The claims by investors under a BIT depend upon assertions that the State has treated the investment in a manner incompatible with the treaty. "The State" includes also the State's courts. If an investor takes the complaint of mistreatment before the State's court, it cannot be determined how "the State" has treated the investment until the State's courts have finally disposed of the case initiated by the investor. There can be no complaint that "the State" has mistreated the investment until the litigation has run its course.
308. An investor should not be allowed to switch to a treaty procedure which has the result of depriving the other party to the proceedings in the local court of the opportunity of arguing its case before the treaty tribunal.
309. The Tribunal is faced with the danger of incompatible and ostensibly "final" decisions being made not only in the various Czech court proceedings but also by another tribunal set up under the US Treaty and by the ICC arbitral tribunal ruling between CME and Dr. Železný. This is precisely the prospect of disorder that the principle of *lis alibi pendens* is designed to avert.

310. Therefore, the Tribunal lacks jurisdiction, or in the alternative, CME's claim is inadmissible.

#### **IV. CME Czech Republic B.V. has no claim in substance**

311. CME invested in ČNTS only after the broadcasting of TV NOVA commenced in February 1994. CME must have considered the commercial risk of investing in ČNTS as well as the legal framework in which this investment would be made, when it decided to acquire CEDC's rights and obligations in the Memorandum of Association to CME. This assignment was not notified by the Council as required by Condition 17.

#### **V. The Czech Republic's Obligations under the Treaty**

312. CME's claim should be dismissed on grounds that its Statement of Claim does not disclose a prima facie case that the Czech Republic has breached the Treaty having regard in particular to Czech law.
313. Essentially, CME claims that a Czech public body having granted a licence and had filed with it a contractual scheme which on its face did not infringe the law, may not take action when implementation of the Licence clearly does infringe the law. That proposition is patently incorrect, and must be clearly rejected if the entire balance of international instruments for the protection of foreign investment is to be maintained. The Czech Republic owes duties to investors, foreign and domestic, other than CME and Dr. Železný, and to the Czech people. The Czech Republic, like other States, must have the power to enact laws and regulate industries, such as broadcasting, pursuant to those laws, for the good order of the State and its economy. The Treaty was not intended to remove that power and does not remove that power.
314. The very core of the argument advanced by CME is fundamentally misconceived, because it denies the right of States to regulate their own economies, and to enact and to modify the laws, and to secure the

proper application of the law. It is no exaggeration to say that CME's argument involves a repudiation of the Rule of Law.

315. The facts show that the Council consistently applied the Media Law (in particular Article 10 (2) which proscribes the transfer of a Licence) and took action when the implementation of the Licence by CET 21 and ČNTS infringed the law. It took similar action against Premiéra TV and Rádio Alfa. Its position remains the same today: The transfer of a broadcasting Licence to a service provider is contrary to the Media Law. The Czech Republic has done no more than regulate its economy in a normal and entirely proper way. The impact of that regulation upon private contractual relations between investors is solely a matter for such investors.
316. The Czech Republic accepts its obligations under the Treaty.

### **1. The Obligation Not to Deprive Investors of Their Investments**

317. The Treaty provides at Article 5 that "*[n]either Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:*
- (a) *The measures are taken in the public interest and under due process of law;*
  - (b) *The measures are not discriminatory;*
  - (c) *The measures are accompanied by provision for the payment of just compensation. "*
318. In accordance with customary international law, the Treaty does not provide that the deprivation (or expropriation as it is often referred to) of investments is unlawful *per se*. Such deprivation is unlawful only if certain conditions are not met. It is acknowledged that the Treaty includes both "direct" and "indirect" forms of deprivation: however, no deprivation in either form has taken place in this case. There has been no taking attributable to the State.

319. Deprivation or expropriation clearly involves a “*compulsory transfer of property rights*”. It is said to occur if a State interferes with property rights “*to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated*”.
320. In the legal literature, it is said that, *the essence of the matter is the deprivation by State organs of a right of property either as such, or by permanent transfer of the power of management and control. State measures, prima facie a lawful exercise of powers of government, may affect foreign interests considerably without amounting to expropriation. Bona fide regulation must also be distinguished from expropriation or deprivations of property.*
321. The meaning of *deprivation* may be drawn from the *Convention Establishing the Multilateral Investment Guarantee Agency*. Article 11 (a) (ii) defines that expropriation is not given by
- “non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories. ”*
322. The Council’s actions do not fall within the definition of deprivation or expropriation of investments.
323. The Czech Republic’s involvement in this dispute was as follows: (i) the Council issued a Licence to CET 21 in light of the information provided to it; (ii) it reviewed compliance with the Media Law; (iii) the Council commenced administrative proceedings against ČNTS on the basis of unlawful broadcasting in breach of the Media Law; (iv) it withdrew the administrative proceedings in light of the amended arrangement between ČNTS and CET 21; (v) the jurisdiction of Czech courts have been invoked in respect of disputes arising out of the arrangements between ČNTS and CET 21.
324. In addition, a deprivation requires that there has been governmental interference with a property right of CME. It is not enough for CME to say that it is less well off than it thinks that it should be because ČNTS changed its arrangements with CET 21 at the insistence of the Council.

The Respondent refers to the Permanent Court of International Justice stated in the *Oscar Chinn Case*:

*"The Court, though not failing to recognize the change that had come over Mr. Chinn's financial position, a change which is said to have led him to wind up his transport and ship-building businesses, is unable to see in his original position - which was characterised by the possession of customers and the possibility of making a profit - anything in the nature of a genuine vested right. Favourable business conditions and good-will are transient circumstances, subject to inevitable changes. "*

325. CME's complaint is this. CME had an initial arrangement with CET 21 which, it says, gave ČNTS the arrangements of an exclusive supplier to CET 21. That arrangement was amended at the behest of the Council. The amended arrangement, CME fears, does not give ČNTS the rights of an exclusive supplier. But what CME says it has lost is not property, nor even rights under the initial or amended contracts. What CME says it has lost is the measure by which the business advantage to it of the initial agreement exceeds that of the amended agreement. That is not a property right. The law recognises and upholds rights created by contract, but there is no legal concept of a separate property right to the maintenance of a particular balance of commercial power.
326. The Council's actions have been the lawful exercise of the power of Government, carried out as part of the regulation of economic activity in the Czech Republic.
327. The Czech Republic has taken no property of CME, of ČNTS, or of any company owned or controlled by Mr. Lauder. The only property right granted by the Czech Republic, the Licence issued to CET 21, remains in the hands of CET 21 as it has done at all material times.
328. The Czech Republic did not agree, and could not agree, to CET 21 transferring the Licence to ČNTS. The Czech Republic did not create or confirm any rights for ČNTS. ČNTS's rights, and CME's alleged interests, arose solely under contracts made with CET 21. The rights asserted by CME in this case were created and defined by those contracts and were necessarily constrained by Czech law: those rights could not amount to a



transfer of the Licence to ČNTS. ČNTS is correct to look to CET 21, rather than the State, as the source of any remedy for unlawful injury to its rights.

329. The authorities cited by CME do not support the case it has advanced. The Czech Republic denies that it had any intention of injuring CME or its investment.
330. There is no *a priori* limit on the kind of State measure or action that may amount to deprivation or expropriation. CME has, however, entirely failed to explain why it considers that the actions of the Czech Republic do so.
331. Although in some circumstances a coerced capitulation may constitute an expropriation, a review of the authorities indicates that there is no solid or wide consensus on coercion outside of the cases dealing with physical force.
332. Far from maintaining that ČNTS was coerced into the making of a new agreement with CET 21 in 1997, in the proceedings in the Prague Commercial Court, ČNTS stated, "*that the Services Agreement as well as the agreements previously concluded between [ČNTS] and [CET 21] on 6/2/1994, 5/23/1996 and 10/4/1996 determining the rights and obligations relating to operating the television broadcasting facilities, have always been the expression of a clear will of both contractual parties to determine the mutual relationship on an exclusive basis.*"
333. ČNTS makes no suggestion that the Services Agreement, described in CME's Statement of Claim as "*part of the package of contractual changes coerced by the Media Council,*" was coerced or was invalid. On the contrary, it was used as the basis of ČNTS's claim; and the Regional Commercial Court upheld its validity (meanwhile reversed by the Court of Appeal).

CME has failed to establish a *prima facie* case of deprivation or expropriation.

334. The Respondent's position is that expropriation has not occurred due to the fact that
- (1) the Claimant invested in ČNTS after the 1996 changes had been made; therefore, it cannot have lost the 1993 safety net by expropriation;
  - (2) it is a matter of pure speculation, whether the 1996 safety net was materially better or more effective than the 1993 safety net;
  - (3) that, in any event, the 1996 changes were voluntarily, if reluctantly, made by ČNTS; and
  - (4) that the institution of the 1996 administrative proceedings could not, in the absence of proof of abuse of power or mala fides, or some such defect, amount to coercion. In essence, it is not established that anything was taken from the Claimant or that the Respondent forced the Claimant to give anything up.

## **2. The Obligation of Fair and Equitable Treatment**

335. The Treaty provides that investments shall be accorded fair and equitable treatment (Art. 3 (1)). The support given for this principle in its Preamble provides:

*"Recognising that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and economic development of the Contracting Parties and that fair and equitable treatment is desirable".*

336. There is no precise definition of the requirement contained in Article 3 (1) of the Treaty to provide investments with *"fair and equitable treatment"*. What is fair and equitable is an issue to be interpreted on the facts in each individual case.
337. CME does not point to the facts relied upon in order to support the allegation that this obligation has been breached. No case is made out to which the Czech Republic can respond.

338. It is denied that the Czech Republic treated CME's alleged interests less than fairly and equitably. The Media Law has been applied according to its terms. Unlawful broadcasting by ČNTS has been treated in the same way as that by other service providers, in particular Premiéra TV and Rádio Alfa. Due process has been respected.
339. CME has failed to establish a prima facie case that the Czech Republic breached its obligation of fair and equitable treatment.
340. In particular in respect to the March 15, 1999 letter addressed by the Media Council to Dr. Železný, the Czech republic is of the opinion that there is no unfair or non-equitable treatment. The Council could not ignore Dr. Železný's request for giving guidance and had to consider CET 21's right to be heard. Further, the letter was addressed to TV NOVA, being also represented by Dr. Železný at that time. The letter itself had no legal effect. No proceedings were connected to it. The Media Council explained its general policy.
341. Also, the 1996 administrative proceedings did not breach the obligation on fair and equitable treatment as other broadcasters were treated in the same way. Until 1996, both, CET 21 and ČNTS were joined in a continuing duty to comply with the terms of the Media Law, and that included a duty not to effect a de facto transfer of the Licence. ČNTS appeared to be breaking that obligation. The Media Council simply tried to bring it back into line with the law.

### **3. The Obligation Not to Engage in Unreasonable and Discriminatory Treatment**

342. The Treaty provides that a State party shall not "*impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal*" of investments (Art. 3 (1)).
343. The term "*unreasonable*" is not defined in the Treaty. It is insufficient to show discrimination; unreasonable conduct must also be demonstrated. In any event, the actions of the Czech Republic have been neither unreasonable nor discriminatory.
344. CME's claim fails at two levels.

345. First, CME does not explain why it considers that the Czech Republic behaved unlawfully. In the view of the Czech Republic, the Council acted at all times in conformity with Czech law. The Czech Republic notes that CME did not seek to raise in the Czech courts at the time of the administrative proceedings, or subsequently, arguments that the Council had violated Czech law. Second, CME does not explain what unreasonableness it finds in the allegedly unlawful conduct of the Council.
346. The term “discriminatory” is not of itself defined in the Treaty.
347. The complete failure to indicate what facts are alleged to amount to discrimination prevents a reasoned response by the Czech Republic. The Czech Republic notes, that it cannot be seriously suggested that administrative proceedings to stop unlicensed broadcasting lacked any legal basis in Czech law or bona fide governmental purpose. It should also be noted that ČNTS and CET 21 were treated in accordance with the Media Law, and in the same manner as Premiéra TV and Rádio Alfa were treated in similar proceedings at the same time.
346. CME’s assertion that the requirement that the licence-holder had to be Czech is a violation of the Treaty’s prohibition against discrimination, is wrong. It is routine in international practice that foreign investors invest in the State through the medium of a locally incorporated company, which is a regulation stipulating how foreign investment is to be organized.
349. CME’s Statement of Claim refrains from any explaining as to why the Council’s reconsideration of the initial arrangement and agreement with ČNTS and CET 21 of the amended arrangement might be thought unreasonable and discriminatory.
350. CME has failed to establish a prima facie case that the Czech Republic breached its obligation not to engage in unreasonable and discriminatory treatment.

#### 4. The Obligation of Full Security and Protection

351. The Treaty provides that “*each Contracting Party shall accord to such investments full security and protection*” (Art. 3 (2)).
352. The phrase “*full security and protection*” has received attention in both arbitral and judicial bodies. The cases indicate that CME must demonstrate both that the standard contained in the phrase “*full security and protection*” has been breached; and that the breach is the result of the actions of the Czech Republic.
353. The requirement to provide constant or full security and protection *cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed*. Similarly an obligation to provide the nationals of the other Contracting State to a BIT with “*full protection and security*” is not an absolute obligation *in the sense that any violation thereof creates automatically a ‘strict liability’ on behalf of the host State*. A government is only obliged to provide protection which is reasonable in the circumstances.
354. CME asserts a failure to provide full security and protection for its investment. CME is arguing that it was the responsibility of the Czech authorities to maintain and enforce the contractual arrangements into which ČNTS entered with CET 21. That is absurd. The obligation of “*full security and protection*” is an obligation of due diligence relating to the activities of the State. No Czech authority was a party to the contracts between ČNTS and CET 21. It was for ČNTS to enforce its rights under those contracts, as it is doing through the Czech courts.
355. Also, CME’s argument that the alleged change of position of the Council in 1996 deprived ČNTS of benefits that it had enjoyed by virtue of the alleged previous position of the Council in 1993, is untenable. The Council did not change its position between 1993 and 1996. At all times the Council has taken the view that the Media Law forbids the transfer of licences, and has sought to apply that law. What changed was the nature of the relationship between CET 21 and ČNTS. On the basis of facts

discovered in 1994 - 1996, the Council reacted so as to ensure that CET 21 and ČNTS complied with Czech law.

356. CME contradicts the position that ČNTS has taken in its successful litigation in the Czech courts. It cannot be argued that investors have any right to suppose that positions taken by State authorities and provisions of State law are forever unalterable. Nor can it be argued that every regulatory change made by a State in accordance with its laws must be accompanied by compensatory payments to anyone whose profits are adversely altered by the change. There can be no legitimate expectation that provisions and laws become frozen the minute that they touch the interests of a foreign investor.
357. CME fails to identify any factual circumstances that could support its allegation that the Czech Republic failed to provide full security and protection for its investment, or that the Czech Republic breached the obligations of full security and protection.
358. Further, it should be noted that the Media Council simply had no competence to act outside administrative proceedings. Condition No. 17 of the Licence was to be lifted under the new Media Law as of January 1, 1996; the Media Council had no influence any more on the relationship between CET 21 and ČNTS. There was and is full protection and security for ČNTS's legal rights available under the Czech legal system provided by Czech courts.

## **5. The Obligation of Treatment in Accordance with Standards of International Law**

359. The Treaty provides that if "*obligations under international law . . . entitling investments by investors . . . to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement,*" (Art. 3 (5)).

360. CME has quoted from the decision in the International Court of Justice in the *Barcelona Traction Case* to affirm that "[w]hen a State admits into its territory foreign investments, . . . it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them." The judgment in the *Barcelona Traction Case* continues with the sentence, "These obligations, however, are neither absolute or unqualified." The Court's comment was made in the quite different context of a State's right to provide diplomatic protection to shareholders of entities incorporated in a third State. The Court did not set up absolute standards for treatment of foreign investment.
361. No argument is presented to indicate why it is thought that the Czech Republic has violated its obligations to treat CME in accordance with general international law. CME mentions this obligation, but it is not possible to discern what, if any, argument CME seeks to make in relation to it. This obligation has not been breached.

## **VI. The Czech Republic has not Violated its Treaty Obligations**

### **1. The Czech Republic is Responsible for the Media Council's Conduct**

362. The Czech Republic accepts responsibility for the actions of the Council for the purposes of this case. The Czech Republic does not accept the characterisation of the Council activities made by CME, and denies any breach of the Treaty by reason of the Council's actions.

### **2. The Council's Conduct did not Violate the Czech Republic's Treaty Obligations**

363. CME must demonstrate that the State has acted in breach of its Treaty obligations, i.e. unlawfully, so as to harm its "investment". Here, nothing that the State has done, through the Council or the Institute or the courts, can be described as unlawful or otherwise a breach of the Treaty. On the contrary, the Council has sought to uphold the law by ensuring that the implementation of the Licence was in accordance with the Media Law; and that it was the licensee, CET 21, not the unlicensed ČNTS which controlled broadcasting by TV NOVA.

364. The administration of the law or insistence upon compliance with the law cannot be described as “*unreasonable*” or “*discriminatory*” conduct by the Council. Neither can they be characterised as actions “*tantamount to deprivation*” by the Czech Republic.
365. CME knew the Media Law from the start of its involvement in the Czech Republic. CME cannot complain about the consequences of its acting unlawfully. CME’s own case and the facts known to the Council suggest that CME was fully aware of the legal conditions under which television broadcasting was licensed; and sought by various means to ensure its control over the Licence despite the provisions of the Media Law and of the Licence itself.
366. CME abandoned its attempts to circumvent the Media Law in 1997, when ČNTS voluntarily agreed new contractual terms with CET 21. Subsequent events have shown that CME’s loss of control of the Licence and TV NOVA may have harmed its investment in ČNTS. But this cannot be attributed to the Czech Republic.
367. CME now claims that the actions of the Council in addressing the ways in which CET 21 and ČNTS were implementing the Licence, and in bringing administrative proceedings against ČNTS for unlawful broadcasting in 1996, constitutes an unlawful deprivation and otherwise breaches the obligations of the Czech Republic under the Treaty. This ignores the fact that the response of CET 21 and ČNTS was voluntarily to agree between themselves to change their relationship so as to comply with the law. The Media Law, in common with the laws and procedures of many other nations, licences scarce broadcast spectrum on the basis of prudential and public interest considerations; and does not permit unlicensed broadcasting. Under no circumstances can it be held that the conduct of the Council gave rise to any breach by the Czech Republic of the Treaty.
368. The Council in its letter of 15 March 1999 was not supporting Dr. Železný’s effort to eliminate the exclusive economic relationship between ČNTS and CET 21; it did not put forward Dr. Železný’s views as its own. The Council was stating the policy which it had publicly declared in the meetings of the Media Panel and in submissions on the proposed new Media Law, as well as to individual licence-holders.



369. CME does not indicate what specific obligations it considers the Council and Parliament to have in respect of ČNTS's requests. The Czech Republic notes that three of the four requests were made in the fortnight preceding the filing of Mr. Lauder's Notice of Arbitration in mid-August 1999, and the fourth some six weeks before that. Under no circumstances is it reasonable to expect a Parliamentary Committee to take action within two weeks on the basis of "a detailed factual summary with supporting documentation". The requests were intended to establish a record for the purpose of the dispute which had by then broken out between CME and Dr. Železný.
370. The Council did not fail to fulfil its obligations under the Treaty and the Council did not cause ČNTS's business operations to be discontinued. The Council only ever took action to ensure that broadcasting was conducted in accordance with the Media Law.
371. The Council's course of dealings did not enable Dr. Železný to take actions that may have affected CME's investment. The Council was merely fulfilling its obligations under Czech law by requiring that the Licence not be transferred and by commencing the administrative proceedings against unauthorised broadcasting. The Council's actions did not force ČNTS to weaken the contractual arrangements under which CME's investment was made. The Council did not adopt a policy disfavouring the exclusive economic relationship between CET 21 and ČNTS. The Council did not fail to act to protect ČNTS's interests.

## **VII. CME Failed to Plead Any Loss**

372. The Czech Republic has an obligation under international law to remedy any violations under the Treaty for which it is responsible. However, CME failed to plead any loss. CME must demonstrate that it has in fact suffered damage. No plea has been made addressing questions of the nature of the loss, causation, the identity of the specific companies or individuals that are alleged to have suffered loss, the ownership and control of the companies at the material times and of the heads of damages.
373. The remedies which the companies owned or controlled by Mr. Lauder, allegedly including CME which may be obtained in the various fora in

which his dispute with Dr. Železný/CET 21 is being fought out, may compensate for any losses which such entities may be found to have suffered. It may be found that no damage has been suffered by any of the entities involved in this affair, including CME. Thus the failure to plead that CME has suffered damage not only strikes at the heart of the claim, but is an inevitable consequence of the realities of the dispute. If CME has suffered no damage, this claim fails *in limine*. CME must show that it has suffered damage for the claim to be admissible under the Treaty.

### **VIII. Respondent's Conclusion**

374. The Czech Republic requests that CME's claim be dismissed on grounds of lack of jurisdiction; alternatively on grounds of lack of admissibility; alternatively on grounds that CME has failed to establish any breach of the Treaty; alternatively on grounds that CME has failed to plead any loss.

#### **H.**

#### **The Analysis of the Tribunal**

##### **I. Jurisdiction**

##### **(1) The Claimant's Investment**

375. The Tribunal has jurisdiction to decide this dispute under Article 8 of the Treaty. According to Article 8.2 of the Treaty, each Contracting Party consents to submit an investment dispute as defined in Article 8.1 to arbitration. Investment disputes covered by this arbitration clause are disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter. The Claimant is an investor in accordance with Article 1 (b) of the Treaty, as the Claimant is a legal person constituted under the law of one of the Contracting Parties, the Kingdom of the Netherlands. The dispute concerns an investment of the Claimant within the terms of Article 1 (a) of the Treaty. Article 1 (a) provides that the term investment shall comprise every kind of asset invested either directly or through an investor of a third State. The investment can be (inter alia) shares, other kinds of interests in companies and joint ventures, as well as rights deriving therefrom, title to

money and other assets and to any performance having an economic value.

376. The Claimant is the 99 % shareholder of ČNTS. These shares as well as all rights deriving therefrom qualify as an investment of the Claimant under Article 8.1 and Article 1 (a) (ii) of the Treaty.
377. CME, the Claimant, acquired its 99 % ownership interest in ČNTS in two steps. CME acquired 93.2 % in May 1997 from its parent company, the Czech Media Enterprises B.V. The Claimant further acquired 5.8 % shares in 1997 by purchasing the Czech holding company NOVA Consulting, which held a 5.8 % shareholding in ČNTS.

## **(2) The Claimant's 1997 Share Acquisition**

378. The Respondent, for the first time at the Stockholm hearing, expressed its view that the investment of the Claimant in the Czech Republic within the meaning of the Treaty was (only) made when it purchased in 1997 the ČNTS shares held by CME Media Enterprises B.V. The Respondent, in respect to this investment of the Claimant in the Czech Republic, expressly did not raise the defence of lack of jurisdiction. The Respondent is, however, of the opinion that Claimant's investment in 1997 limits timewise the Claimant's claim in substance which, therefore, will be dealt with hereafter, when dealing with the merits of the Claim.
379. Any possible defence in respect to lack of jurisdiction related to the Claimant's acquisition of the ČNTS shares in 1997, therefore, must be deemed as waived. That also would be consistent with Rule 21.3 of the UNCITRAL Rules, according to which objections in respect to jurisdiction must have been made in the Statement of Defence.
380. The Arbitral Tribunal considered whether (by disregarding the Respondent's waiver of a defence of lack of jurisdiction in respect to the 1997 share acquisition), the Tribunal is obligated ex officio to decide on this subject. The majority of the Tribunal is of the opinion that, disregarding possible Czech national law requirements, the clear provision of the UNCITRAL Rules must supersede national law, if deviating. According to

the UNCITRAL Rules, a defence of jurisdiction is deemed to be waived, if not raised in time. This concept derives from the assumption that defences on jurisdiction can be waived by the Parties, with the consequence that a Tribunal is not able to set aside or disregard a Party's waiver in respect to the defence of lack of jurisdiction.

381. Therefore, the Respondent's argument that the investment of the Claimant in the Czech Republic was not made until May 21, 1997 must be dealt with by the Tribunal in accordance with the Respondent's express pleadings as a substantive defence, not as a defence to jurisdiction.

### **(3) The Claimant's Predecessor's 1994 Share Acquisition**

382. The Respondent in its Statement of Defence dated November 9, 2000 raised the defence of lack of jurisdiction in respect to the Claimant's predecessor's share acquisition. The Respondent claimed inter alia that CME has failed to establish that it has an asset invested in the Czech Republic as defined under the Treaty. The Respondent's position is that the Claimant did not sufficiently identify its investment by leaving open whether CME's investment "is its alleged shareholding in ČNTS or some contractual right allegedly enjoyed by ČNTS or some right conferred on CEDC". According to the Respondent, CME fails to establish that it has assumed the rights and obligations of CEDC as a matter of law. This defence of lack of jurisdiction, even if accepted as sufficiently specified, is not justified. The Claimant's investment is vested in its shareholding in ČNTS which is an investment covered by Article 1 (a) (ii) of the Treaty.
383. As recounted in Section A. 5 of this Award, CME acquired its 99 % ownership interest in ČNTS in 1997, an acquisition which, in respect to jurisdiction is not in dispute between the Parties (as described above). CME's predecessor, its parent company, Czech Media Enterprises B.V., had acquired in 1994 66 % of ČNTS from CEDC, a German company under the same ultimate control as CME of an American corporation, in turn controlled by Mr. Ronald S. Lauder. The transfer document done in Prague on July 28, 1994 between CEDC and CME Media Enterprises B.V. gives sufficient proof that CME Media Enterprises B.V. acquired CEDC's 66 % shareholding in ČNTS. Under this Assignment Agreement and

Declaration on Accession to Memorandum of Association of ČNTS, the Claimant's predecessor CME Media Enterprises B.V. acquired CEDC's shares in ČNTS, comprising all rights and obligations thereto.

384. The acquired shares, including all rights and legal entitlements, are protected under the Treaty. Upon the acquisition, the Claimant's predecessor became owner of the investment in the Czech Republic. The Treaty does not distinguish as to whether the investor made the investment itself or whether the investor acquired a predecessor's investment. In this respect, Article 8 of the Treaty defines an investment dispute as existing, if a dispute concerns an investment of the investor. Article 1 of the Treaty clearly spells out that an investment comprises every kind of asset invested either directly or through an investor of a third State, which makes it clear that the investor need not make the investment himself to be protected under the Treaty.

**(4) The 1994 Share Assignment not notified**

385. The Respondent did not expressly argue in these arbitration proceedings that the assignment of the 66 % ČNTS shares from CEDC to CME Media Enterprises B.V. was void. The Respondent stated, however, that the assignment was not notified to the Media Council which, in the view of the Respondent, was necessary under Condition 17 of the Licence.
386. The non-notification of the assignment did not remove the Claimant's protection under the Treaty. Under Section 12.1 of the MOA, the assignment of shares to an affiliated company was permitted without requesting the Media Council's approval. Under Condition 17 of the Licence as amended as of May 12, 1993, the Media Council stipulated that the partnership agreement (the MOA) is an integral part of the Licence terms. Further, the Media Council prescribed that the partners of the MOA are the licence-holder (CET 21), CEDC and the Czech Savings Bank in the scope and under the conditions stipulated by the MOA.
387. CET 21 was obligated to submit to the Council for approval any changes of the legal person which has been the licence-holder, or of the capital structure of the investor which results in a change of control over the ac-

tivities and of the provisions of the partnership agreement between the licence-holder and investors (the MOA). The change-of-control clause of the MOA (Section 12.1) linked the shareholding in ČNTS to the Licence. Article 12. 1 of the MOA stated that, in accordance with the terms and conditions of the Licence, CEDC, CET 21 and the Czech Savings Bank cannot and shall not assign their shares to any third Party without obtaining in advance the express consent of all partners and the Council, which would be given after a full disclosure of the intended transaction.

388. However, this provision does not apply to any “direct family member or associated persons”. An associated company was defined as an entity controlled by the same last partner of the shareholders. Therefore, the MOA, being an integral part of the Licence, did allow a change of control without having obtained in advance the express consent of the Council.
389. The Council requested by its resolution of April 9, 1993, the submission of the final draft of the MOA for approval and by its resolution of April 9, 1993, requested final changes. At the Council Meeting on April 20, 1993, the Council approved the final wording of the MOA which was implemented accordingly. On May 12, 1993, the Council approved Licence Condition 17 which referred to the amended MOA as approved by the Council. This sequence of events is not in dispute between the Parties, although the Parties interpret these facts differently.
390. In respect to jurisdiction, it is clear that CEDC’s investment in ČNTS could be assigned to CME Media Enterprises B.V. without requesting prior approval from the Council. On the contrary, it is clear that CEDC’s investment in ČNTS included the right to freely transfer this investment to an affiliated company. The assignment by CEDC of its shares in ČNTS to CME Media Enterprises B.V. was made with express reference to the MOA. It is therefore clear that CME Media Enterprises B.V. (as a permitted successor under the MOA, which was approved by the Council), when acquiring CEDC’s investment in the Czech Republic, acquired full protection for this investment under the laws of the Czech Republic which include the bilateral investment treaties the Czech Republic had entered into, including the Treaty.

**(5) The Claimant's Predecessor's 1996 Share Acquisitions**

391. The acquisition of 22 % of the shares in ČNTS by CME Media Enterprises B.V. in 1996 from the Czech Savings Bank also qualifies as an investment under the Treaty. The same applies to the acquisition of 5.2 % shares in ČNTS from CET 21, also in 1996. These further acquisitions were not the subject of any judicial dispute by the Parties in these arbitration proceedings. These shares were part of the same initial investment made by the founding shareholders, CEDC (with a share of 66 %), CET21 (with a share of 21 %) and the Czech Savings Bank (with a share of 22 %) as co-founders who formed the joint venture company ČNTS in 1993.
392. In respect to jurisdiction, CEDC's and CME Media Enterprises B.V.'s acquisition of shares qualify as an investment within the meaning of Article 8 of the Treaty in conjunction with Article 1 (a) (ii) of the Treaty. When initiating these arbitration proceedings, the Claimant was and still is owner of 99 % of these shares in ČNTS. It is true that the shares themselves were not directly affected by the Respondent's alleged breach of the Treaty. The dispute to be defined as an investment dispute under Article 8 of the Treaty does not necessarily relate to the shares themselves, but to the value of the shares, which, the Claimant alleges, have been eviscerated by the Respondent. It is the Claimant's case that the Respondent, in breach of the Treaty, expropriated (inter alia) ČNTS' legal and commercial assets and rights. Such an expropriation of assets and, in particular, legal rights and entitlements of ČNTS, a joint venture of the Claimant with Czech nationals (the Czech Savings Bank and CET 21), could and allegedly did affect the value of CME's shares in the joint venture, such shares clearly being an "investment" in accordance with Article 1 of the Treaty. Therefore, the Arbitral Tribunal will have to examine whether the Czech Republic expropriated the joint venture company ČNTS as alleged by the Claimant (see *Tradex Hellas S.A., Greece vs/ Republic of Albania*, ICSID Arbitration Award, April 29, 1999).

**(6) CME's Predecessor's Original 1993/1994 Contributions qualify as Investment under the Treaty**

393. The original contributions by CEDC, the Czech Savings Bank and CET 21 were made on the basis of the Memorandum of Association and Investment Agreement (the MOA) notarized in front of a Czech notary on/or about May 4, 1993 and submitted for registration on/or about July 8, 1993. The registered capital of ČNTS was 148 million Czech Crowns. CET 21's non-monetary contribution, evaluated at 48 million Czech Crowns, was to contribute to ČNTS "unconditionally, unequivocally and on an exclusive basis the right to use, exploit and maintain the Licence held by CET 21." The Czech Savings Bank contributed 25 million Czech Crowns and CEDC contributed 75 million Czech Crowns. The ownership interests were allocated as follows: CEDC 66 %, Czech Savings Bank 22 %, CET 21, 12 %.
394. According to Sec. 2 of the MOA, CEDC and the Czech Savings Bank agreed to provide additional financing to ČNTS as additional contributions to the registered capital of up to 400 million Czech Crowns. Thereafter, the shareholders agreed to provide additional financing up to 900 million Czech Crowns as needed through bank loans. This obligation to provide additional financing either by share capital or by bank loans was secured under Section 2.5 of the MOA by 20 % interest on the debt sum in respect to which a shareholder was in default. CEDC, therefore, and the Czech Savings Bank obligated themselves to make substantial contributions for the future of ČNTS, dedicated for "the development and management of the Television Station".
395. The Claimant's predecessor's investments, by acquiring in 1994 and thereafter ČNTS' founders' shares and by consummating their obligations under the MOA, qualify as an investment under the Treaty.
396. The Respondent, in this context, raised the defence that the Claimant exercised some kind of (unacceptable) forum shopping. The Respondent characterized the initiation of parallel treaty proceedings by Mr. Lauder and by the Claimant as an abuse. In respect to jurisdiction, this defence is not persuasive. CEDC, when making the investment in ČNTS in 1993/1994, was under the protection of the German-Czech Republic In-



vestment Treaty which, in essence, provides a similar protection as the Treaty. The assignment of the investment in ČNTS from a German corporation to a corporation having its legal seat in the Netherlands does not have, on the face of it, the stigma of an abuse. The Respondent characterized the initiation of parallel treaty proceedings by Mr. Lauder and by the Claimant as an abuse.

397. The Arbitral Tribunal's view is that the contribution made by CEDC and the assignment thereof in compliance with the investment structure approved by the Media Council to CME Media Enterprises B.V., qualifies as an investment under Article 8 of the Treaty. The Respondent's argument in respect to an alleged forum (or treaty) shopping is not sustainable.
398. In this context, the Tribunal refers to the FEDAX Award on jurisdiction dated July 11, 1997, an ICSID arbitration (37 I.L.M. 1378/1998). In that case, the FEDAX tribunal accepted ICSID jurisdiction for a claim under promissory notes which had been transferred and endorsed to subsequent holders and to the claimant outside of the host country of the original investment. The FEDAX tribunal rejected the argument that the foreign owner of the promissory notes did not qualify as an investor, because it has not made an investment in the territory of the host country and accepted that, although the identity of the investor will change with every endorsement, the investment itself will remain constant, while the issuer of the notes will enjoy a continuous credit benefit until the time the notes become due.
399. In the Claimant's case, the situation is even clearer. CEDC made the investment by making its shareholder's contribution at the formation of ČNTS in 1993. ČNTS enjoyed the benefit of the investment during its corporate life-time. TV NOVA started broadcasting in February 1994 by using CEDC's invested funds (together with the funds invested by the Czech Savings Bank). By mid-1994, when the Claimant's predecessor acquired the investment, the investment was at full risk and it was not until one year later that the investment turned out to be a success for the investors.
400. Further, CEDC's investment in ČNTS must be seen in its legal entirety as approved by the Media Council. A company affiliated to the investor,

being an acknowledged (permitted) successor under the investment structure approved by the Media Council, is protected by the investment protection laws of the host country. Article 8 of the Treaty does not set specific requirements related to the circumstances under which an investment can be regarded as belonging to the investor protected by the Treaty. This is in accord with the great majority of modern bilateral investment treaties (see Antonio R. Parra in "Economic development, foreign investment and the law", published by Kluwer 1996, page 35). In respect to jurisdiction, therefore, the Claimant enjoys the full protection of the Treaty, having acquired through its predecessor CEDC's investment 66 % shareholding in ČNTS in 1994. The same applies to the further shareholding in ČNTS acquired thereafter by the Claimant and the Claimant's predecessor.

#### **(7) The Investment Dispute under the Treaty**

401. The dispute between the parties as alleged by the Claimant derives from the destruction of the joint venture's assets and the devaluation of its factual and legal position connected with the use of the broadcasting Licence, contributed by CET 21 to ČNTS as a founding shareholder of ČNTS. This dispute qualifies as an investment dispute within the meaning of Article 8 of the Treaty. In particular, it is not disqualified as an investment dispute because it is not, as alleged by the Respondent, a private commercial dispute but an investor-host State dispute.
402. ČNTS' disputes and legal proceedings with CET 21 and Dr. Železný also do not transform the dispute between the Claimant and the Czech Republic into a commercial dispute unrelated to the Treaty. Commercial disputes and proceedings between private parties, though one party be the investor and/or his joint venture company, do not per se exclude the existence of an investment dispute under the Treaty.
403. The investment dispute under the Treaty and the commercial dispute between the investors' joint venture company in the Czech Republic and its shareholders and/or business partners must be distinguished. The Claimant's position is that the Czech Republic, represented by the Media Council, violated its duties under the Treaty in various ways. The Arbitral

Tribunal has jurisdiction over such an investment dispute, whereas jurisdiction over private commercial disputes between ČNTS and CET 21 / Dr. Železný is vested in the Czech Republic's courts or in arbitration as the case may be.

404. The private commercial disputes in question are different in respect to the parties, certain basic facts and underlying legal rights and obligations. This Tribunal has jurisdiction in respect to the dispute concerning the alleged violation of the Treaty by the Czech Republic. The Tribunal has no jurisdiction related to commercial disputes, regardless of whether the respective civil court proceedings, in particular as initiated by ČNTS vs. CET 21, may provide a remedy to ČNTS (depending on the final judgment of the Czech Supreme Court). These civil court proceedings may effect the quantum of the damage as claimed by CME in these arbitration proceedings. The civil court proceedings, however, have no effect on the jurisdiction of this arbitral Tribunal under the Treaty.
405. Although the contractual arrangements between CET 21 and ČNTS could be decisive for the Claimant's claim under these arbitration proceedings, this does not take away jurisdiction from this Tribunal. The Claimant's claim is based on the Czech Republic's interference and non-protection of the Claimant's and its predecessor's investment which is clearly an investment dispute and not a private commercial dispute. The fact that a contractual arrangement between CET 21 and ČNTS is also the basis for civil law proceedings between these contractual parties does not deprive the Claimant of its claims under the Treaty deriving from the alleged breach of the Treaty committed by the Czech Republic acting through the Media Council.
406. The Czech Republic's position that the grant of the Licence signified no more than the Council considered, on the basis of the information then available to it, that CET 21 was a proper recipient of the Licence, is irrelevant for the qualification of these arbitration proceedings as investment treaty proceedings.
407. Whether the Media Council, as the Czech Republic stated, did not have the power to approve or endorse the business arrangement between

CEDC, the Czech Savings Bank and CET 21 is a question of the substance of the claim and not a question of jurisdiction.

408. Furthermore, the Respondents position, according to which the prejudice to the Claimants and its predecessor's investment was caused not by the Media Council but by Dr. Železný, is a matter of substance and not of jurisdiction. Decisive for the matter of jurisdiction is only the issue of whether the Czech Republic by the Media Council's action breached the Treaty and caused injury to the Claimant's and/or its predecessor's investment. The Arbitral Tribunal is aware that it may well be that a variety of circumstances may have caused the debasement of the Claimant's investment. That will not take away jurisdiction from this Tribunal, which is obliged to investigate and adjudicate the case restricted to the investment treaty dispute, whereas civil law claims might be sorted out between the respective parties in other proceedings.

#### **(8) Parallel Proceedings**

409. The Czech Republic's view that Treaty procedures were not intended to be used in these circumstances is not sustainable. Treaty proceedings are barred by civil law proceedings only if the respective investment treaty contains such a provision. Modern bilateral investment treaties usually do not contain judicial limitations like that. Modern investment treaties tend to allow a broad and extended access in the same way as modern treaties avoid any kind of restrictions which may provide uncertainties for the identification of the protected investment (Giorgio Sacerdoti "Bilateral Treaties and Multilateral Instruments on Investment Protection" in *Recueil des Cours* 1997).
410. The Respondent's contention that the Claimant exploited a dispute under a commercial contract to pursue Treaty proceedings must be rejected. The Claimant based its claim on the alleged breach of the Treaty. In parallel the Claimant's subsidiary in the Czech Republic has pursued its civil law claims in front of the Czech Civil Courts. The fact that the object of the two proceedings, compensation for injury to the Claimant's investment, is the same, does not deprive the parties in the Treaty proceedings nor in the civil court proceedings of jurisdiction. An affirmative award

and/or judgment may have impact on the quantum of the damages adjudicated in the proceedings or give the right to the respective defendant to raise legal defences in the respective enforcement proceedings with the argument that the adjudicated damage claim has been already remedied under the award and/or judgment of the respective other proceeding. However, jurisdiction is not affected by this incidence of parallel proceedings.

411. The Respondent's defence that the Claimant may not concurrently pursue the same remedies in different fora is, therefore, rejected. Further, it is understood and agreed between the Parties that the Claimant is not obligated under the Treaty to exhaust local remedies in the Czech Republic.

**(9) No abuse of Treaty Proceedings**

412. There is also no abuse of the Treaty regime by Mr. Lauder in bringing virtually identical claims under two separate Treaties. The Czech Republic views it as inappropriate that claims are brought by different claimants under separate Treaties. The Czech Republic did not agree to consolidate the Treaty proceedings, a request raised by the Claimant (again) during these arbitration proceedings. The Czech Republic asserted the right to have each action determined independently and promptly. This has the consequence that there will be two awards on the same subject which may be consistent with each other or may differ. Should two different Treaties grant remedies to the respective claimants deriving from the same facts and circumstances, this does not deprive one of the claimants of jurisdiction, if jurisdiction is granted under the respective Treaty. A possible abuse by Mr. Lauder in pursuing his claim under the US Treaty as alleged by the Respondent does not affect jurisdiction in these arbitration proceedings.

**(10) Outcome of Civil Court Proceedings have no Effect on Jurisdiction**

413. Moreover, the Respondent's further contention that the outcome of the civil court proceedings between ČNTS and CET 21 will finally determine

whether the Claimants shareholding in ČNTS was prejudiced, is not conclusive. The final judgment by the Czech Supreme Court may reinstate the Czech Regional Commercial Court judgment which ruled that CET 21 did not validly terminate the Service Agreement and that CET 21 is obligated to exclusively have broadcasting services supplied by ČNTS. The outcome of the civil court proceedings was open at the closing of the hearing of these proceedings. The civil law suit was still pending at the Czech Supreme Court. However, even if the Czech Supreme Court were to reinstate the Regional Commercial Court judgment, this would not remedy the harm to the Claimant's investment.

414. On the contrary, the dependence of the Claimants investment on the contradictory Civil Court judgments clearly shows how fragile the Claimant's investment is (the alleged consequence of the Czech Republic's breaches of the Treaty). Even if the regional Commercial Court's judgment is reinstated by the Czech Supreme Court, this will not remedy the Claimant's investment situation. CET 21 may well, at any time, terminate again the Service Agreement for good cause, whether given or not, thereby recurrently jeopardizing the Claimant's investment.
415. The Claimant was, therefore, not obligated to wait for the Czech Supreme Court's decision before instigating Treaty proceedings. The outcome of the civil court proceedings is irrelevant to the decision on the alleged breach of the Treaty by the Media Council acting in concert with the Respondent. It may affect the quantum of a damage claim which, pursuant to agreement between the parties, is not a subject of this Partial Award.

#### **(11) Respondent's Defence that no Loss Occurred**

416. The Respondents' argument that under the Claimant's pleadings there is no suggestion that there is any compensable loss that is attributable to the breakdown of the exclusivity arrangement should be dealt with on the merits of the claim, not in respect to jurisdiction. The Respondents' position that an investor's complaint of a mistreatment in investment proceedings cannot be determined before the State has treated the investment finally including through judicial process, is a position which is not sustainable. It is generally accepted that claims under investment trea-

ties can be and shall be dealt with separately from the judicial process in local courts, unless otherwise specifically provided for in the respective Treaty. Such a requirement to exhaust local remedies is not found under this Treaty and the initiating of a judicial process in the Czech Republic does not bear upon proceedings under the Treaty. This is the understanding also of the Respondent, as specifically stated by Prof. Lowe, the Respondent's representative at the Stockholm hearing, when he said that there was plainly no requirement under the Treaty for the Claimant to exhaust local remedies.

417. The Respondent's position was, as submitted by Prof. Lowe, a slightly different one. The Respondents' view is that the Claimant cannot prove any loss as long as the Claimant did not exhaust the legal remedies under the Czech Civil Court system. This contention is not acceptable. A purpose of an international investment treaty is to grant arbitral recourse outside the host country's domestic legal system. The clear purpose is to grant independent judicial remedies on the basis of an international, accepted legal standard in order to protect foreign investments. An investment treaty therefore may even grant indemnification in case of expropriation where the domestic law does not (see *Sacerdoti* as cited above at page 289 referring to a decision of the Italian Supreme Court on this subject). As the Treaty is silent on the obligation of exhaustion of local remedies, the Claimant is entitled and in the position to substantiate its loss without being obligated to have its subsidiary ČNTS obtain a final civil law court decision by the Czech Supreme Court.

## **(12) Claimant itself made no Investment**

418. The Respondent's further argument that the Claimant itself never made an investment in the Czech Republic is rejected for the reasons already mentioned above. The Treaty does not require that the assets or funds be imported from abroad or specifically from the Netherlands or have been contributed by the investor itself. (As *Sacerdoti* as cited above observes, this requirement is rarely found in recent bilateral investment treaties. This is in compliance with the above-cited *FEDAX Award* which held that the acquisition of promissory notes by the Dutch claimant was a foreign investment despite the fact that *FEDAX* itself never transferred

funds to Venezuela. FEDAX N.V. vs. Republic of Venezuela ICSID Case no. ARB 96/3, the award on jurisdiction dated July 11, 1997 published in ILM 37 (1998), 1378/1390 and the award in substance of March 9, 1998 published in ILM 37 (1998), 1391/1398.)

## **II. The Substance of the Claimant's Case**

### **1. Admissibility / Timewise Limitation**

#### **(1) Parallel Treaty Proceedings**

419. The same reasons for the Tribunal to acknowledge jurisdiction apply to the admissibility of the Claimant's case. The Respondent's argument that the Claimant's case is not admissible, submitted by the Respondent as an alternative to the defence of non-jurisdiction, is rejected. The inadmissibility argument is predominantly based on the fact that Mr. Lauder in parallel to the Claimant initiated other Treaty proceedings. However, the Claimant is free to initiate the Treaty proceedings, if there is an investment dispute in the meaning of Article 8 of the Treaty. The argument of abusive Treaty shopping is not convincing. A party may seek its legal protection under any scheme provided by the laws of the host country. The Treaty as well as the US Treaty are part of the laws of the Czech Republic and neither of the treaties supersedes the other. Any overlapping of the results of parallel processes must be dealt with on the level of loss and quantum but not on the level of breach of treaty. The Claimants' case is admissible.

#### **(2) No restriction of the Claimant's case timewise**

420. There is no time bar to the Claimant's case. The Respondent's position is that the investment of the Claimant in the Czech Republic was not made until May 21, 1997, when it purchased the shares held by CME Media Enterprises B.V. in ČNTS. This, as the Respondent clarified, is the Respondent's defence on the merits. However, this defence, whether in substance or in respect to admissibility, cannot succeed.

421. The Claimant acquired the shares held by CME Media Enterprises B.V. under the Agreement on Transfer of Participation Interest. The Claimant,



under the MOA, was an authorized transferee and the transfer did not need the consent of the Media Council under Condition 17 of the Licence which referred to the MOA of ČNTS, because the transferor and transferee of the assignment had the same ultimate shareholder, Mr. Ronald S. Lauder. The Claimant acquired the participation interest as it was at the day of transfer. The purchase price was US \$52,723,613 and the acquired participation interest reflected a contribution of 344 million Czech Crowns. The Agreement on Transfer expressly stipulated that the Claimant, being the transferee, declared its consent with the MOA without any reservation. The Claimant, therefore, acquired its parent company's shares in ČNTS without any reservation or limitation. The participation interest transferred the legal status as it was, including all rights and liabilities connected thereto.

422. The Respondent's view that the Claimant, by declaring its consent to the MOA, may only advance claims in respect of violations of the Treaty that occurred after May 21, 1997, is not sustainable. The consent to the MOA which is required by Czech law has effect only between the shareholders. The consent is not a waiver of claims which derive from the Respondent's violations of the Treaty already incurred at the transfer date and the consent did not waive the Claimant's protection under the Treaty, should such protection derive from acts and circumstances that occurred before the transfer of shares took place.
423. The Respondent's view that the transfer of shares deprived the Claimant of the protection under the Treaty, because the investment changed hands from one (Dutch) shareholder to the other is not convincing. The Memorandum of Association was approved by the Media Council in 1993 and thereafter again, when the new MOA was implemented on November 14, 1996 without providing for any change of the change-of-control clause. Therefore, any claims deriving from the Claimant's predecessor's investment (also covered by the Treaty) follow the assigned shares.
424. Article 8 of the Treaty, therefore, does not debar the Claimant's claims on the ground advanced by the Respondent. In accordance with Article 8 of the Treaty, an investment dispute under the Treaty is covered, if the dispute derives from an investment of the investor. As already shown above under the issue of jurisdiction and now, and in respect to the ad-

missibility of the claims, it is the Tribunal's view that the investment need not have been made by the investor himself. This conclusion is supported by Article 1 of the Treaty which defines an investment as "any kind of asset invested either directly or through an investor of a third State". This indicates a broad interpretation of the investment which also allows the (Dutch) parent company's investment to be identified as an investment under the Treaty. If the Treaty allows - as it does - the protection of indirect investments, the more the Treaty must continuously protect the parent company's investment assigned to its daughter company under the same Treaty regime.

### **(3) Admissibility of the Claimant's case in respect to the 1994 Share Acquisition**

425. The Parties did not specifically address under the aspect of admissibility of the Claimant's claim or elsewhere the Claimant's predecessor's acquisition of shares from CEDC in 1994. The reason for not addressing this subject might be that the alleged violations of the Treaty took place thereafter. Therefore, this 1994 transfer need not specifically be dealt with under the aspect of admissibility of the Claimant's case. However, it is obvious that the Claimant's predecessor, when acquiring the ČNTS shares from CEDC (as admitted transferee under the MOA's Change of Control clause), acquired CEDC's full investment, including all ancillary rights and obligations.
426. In respect to this share transaction, the Respondent raised the view that the Claimant's predecessor CME Media Enterprises B.V., when acquiring the shares in 1994, "must have considered the commercial risk of investing in ČNTS as well as the legal frame work, in which this investment would be made, when it decided to acquire CEDC's rights and obligations in the MOA". It is undisputed between the Parties to these arbitration proceedings that CME Media Enterprises B.V. understood the legal framework of CEDC's investment when acquiring the ČNTS shares. This knowledge, however, has no influence on the investment's protection under the Treaty. It is not the case that the Claimant and its predecessors entered willingly into the risk that their investments in ČNTS will be eviscerated by acts of the Media Council. On the contrary, it became

clear from the documents and other written communications submitted by the Parties to these proceedings that the Claimant and its predecessors relied on the protection of their investments by the Czech legal system, including the Czech Republic's obligations under the Treaty. Therefore, the Claimants case is admissible and there is no time bar to CME's claim related to the Claimants and its predecessor's investment in the Czech Republic.

## **2. The Merits of the Claimant's Case under the Treaty**

427. The Claimant's case is justified in substance. The Czech Republic violated the Treaty by actions and inactions of the Media Council which led to the complete collapse of the Claimants and the Claimants predecessor's investment in the Czech Republic.

### **(1) CME's and CME's predecessor's investments in the Czech Republic**

428. The 66 % shareholding in ČNTS which was acquired by CME's predecessor from its affiliated company CEDC in 1994 qualifies, as explained above, as an investment under the Treaty. The same applies to the further 33 % shareholding in ČNTS acquired by the Claimant and the Claimant's predecessor. CEDC made a capital contribution under the MOA for the initial share capital in the amount of 75 million Czech Crowns. A further investment obligation obligated CEDC and the Czech Savings Bank to invest further 1.3 billion Czech Crowns. The purpose of the investments was to develop and manage the television station TV NOVA, for which the broadcasting Licence was granted to CET 21 by the Media Council, acting as the statutory regulator of the Czech Republic. CEDC's investment was made under an investment scheme which was developed in close liaison with and under approval of the Media Council. It was also CEDC which had to provide the know-how for developing the new TV station, as neither the Czech Savings Bank as co-founder of ČNTS, nor CET 21 and its shareholders had relevant experience. The five Czech nationals who were the shareholders of CET 21 which initiated the joint project never worked in the broadcasting indus-

try. The investment structure was developed by CEDC, jointly with its Czech Republic joint venture partner CET 21 in close conjunction with the Media Council. While the broadcasting Licence was granted to CET 21 (having no foreign shareholder), the operation of the TV station was in its totality vested in the joint venture company ČNTS.

429. The documents submitted by the Parties in these proceedings, in particular, the Media Council's own statements to the Czech Parliament leave no doubt that the investment, made by CEDC for the exclusive use of the broadcasting Licence granted to CET 21, was monitored, directed and approved by the Media Council. The basis for the investment structure with the participation of CEDC is the broadcasting Licence as awarded by decision of the Media Council of February 9, 1993 to CET 21. Its reasoning clearly spells out that the substantial involvement of foreign capital and broadcasting know-how was necessary to begin and operate television station activities. The legal tool to safeguard the public interest was to require that the leading positions in the television station were taken by Czech nationals, that the programming was not influenced by the foreign investor and that journalistic independence was safeguarded. These were the Licence conditions designed to ensure the national character of the programming of the new television station.
430. The Media Council further, in its justification for the Licence, stated that the Media Council created sufficient mechanisms through which it could monitor the observance of the schedule for implementation of the new TV station. Through the formulation of Licence conditions and through the inspection of their observance, the Media Council ensured that the aims of the Media Council were realized.
431. The basis for the Media Council's decision to grant the Licence to CET 21 was the "all-over structure" of a new Czech commercial television entity dated February 5, 1993 which was submitted jointly by CET 21 and CEDC to the Media Council. This "all-over structure" clearly described the separation of the broadcasting operation vested in a new legal entity ("the Commercial Company") to be formed by CEDC, the Czech Savings Bank and CET 21, whereas the broadcasting Licence was granted to CET 21 as the holder of the Licence for nation-wide television broadcasting under the legal Act No. 468/1991 Col. The "all-over

structure” clearly spelled out that CET 21 and CEDC (CEDC as “direct participant” in the contract under the conditions of that Licence) agreed on the structure of the new entity which was formed with the purpose to finance and run the commercial, technical, management and other activities of the station. It was further clearly spelled out that the new company would be authorized to carry out these activities as long as CET 21 held the television Licence.

432. Further, it was stated that CET 21 acknowledged that it does not have the authority to perform broadcasting “without the direct participation of CEDC”. The “all-over structure” provided that a Board of Directors shall govern the basic decisions in respect to the economic management of the corporation. The day-to-day management and administration as well as the programming of the station was to be performed by the operating management. All operating personnel must be employees of the joint venture company. 90 % of the employees and the management of the station must be citizens of the Czech Republic. This management was to be complemented by the best foreign experts talented in engineering and technology, marketing and other areas to assist and train the local personnel.
433. The “all-over structure” of February 5, 1993 was made an integral part of the Licence granted by the Media Council to CET 21 by reference in the Licence conditions to an appendix to it. In Licence conditions Nos. 17 and 18, CET 21 as licence-holder agreed

*17/ that is will submit to the Council for its prior consent any changes in the legal entity that is the licence-holder, capital structure of investors and provisions of the business agreement [i.e. the Memorandum of Association] between the licence-holder and investors. Parties to the business agreement are the licence-holder, CEDC and Česká Spořitelna a.s., in the scope and under the conditions set by the business agreement which will be submitted to the Media Council within 90 days after the decision to issue the Licence takes legal effect; the business agreement will observe the provisions of the “agreement on the business agreement” between the licence-holder and CEDC which is an appendix to the licence conditions;*

*18/ that CEDC, as a party to the business agreement specified in the Licence conditions, and other investors specified by the business agreement, will not in any way interfere in the programming*

*of the television station , and, in particular will not interfere with the editorial independence of newscasting employees;”*

434. The reference to the “agreement on the business agreement” was a reference to the “all-over structure” of February 5, 1993, as was confirmed by witnesses at the Stockholm hearing. This is consistent with the minutes of the meeting of the Media Council on February 4 and February 5, 1994, where CET 21 submitted “only one of the requested materials, the agreement on the structure of broadcasting between CET 21 and CEDC”. The witness Mr. Josefík, who was in 1993 member of the Council and later its chairman, confirmed that on February 5, 1993 the Council received “a new organizational structure of the future commercial broadcasting”. The witness confirmed that the appendix to the Licence condition was the February 5 agreement. It is, therefore, clear that the “all-over-structure” of CEDC’s investment was made part of the Licence. Mr. Josefík further confirmed that the Council discussed the future arrangement between CET21 and CEDC. The Council expressed its opinion on proposals made by CET 21 in respect to the structure and, based on the Council’s comments, CET 21 submitted the amended structure dated February 5, 1993 which was made part by reference of Licence condition No. 17.
435. The various witness statements clarified that the “over-all structure” dated February 5, 1993 was a carefully designed scheme to allow the foreign investor CEDC take part in the operation of the TV station without becoming a shareholder of licence-holder CET 21. The scheme was developed in close inter-action between the Media Council and CET 21. It was developed from the an initial proposal submitted by CET 21 to the Council dated February 3, 1993 which was prepared by CEDC’s representative, Mr. Fertig, and submitted to the Council by Dr. Železný. Both papers follow the same idea, having the holder of the broadcasting Licence separated from the operator.
436. The separation of the licence-holder CET 21 and the operator became necessary after the Council’s decision to grant the Licence to CET 21 was published on January 31, 1993. This decision created an uproar in the Czech Parliament and the Czech public. Members of the Parliament in particular criticised the grant of the Licence to CET 21. The Council developed the view that, accordingly, it would not be feasible to transfer

a share in CET 21 as originally contemplated to the foreign investor CEDC.

437. This sequence of events is supported by the underlying documents related to the application for the broadcasting Licence by CET 21, including personal presentations by CEDC's representatives in front of the Media Council before the Council decided to grant the Licence to CET 21.
438. The justifications of the decision to award the Licence of February 9, 1993 expressly stated that the Council's decision is based on the application by CET 21 for the broadcasting Licence, the written documents submitted to the Council and also the facts presented in the public hearing by CET 21 and CEDC. The documents submitted as part of the CET 21 application for the broadcasting Licence comprised inter alia the "project of an independent television station CET 21" which spelled out that CEDC is "a direct participant in CET 21's application for the Licence" and, in the enclosed Letter of Intent, it was made clear that CEDC was going to acquire a 49 % shareholding in CET 21 in exchange for its commitment to fund the broadcast station and provide the seed capital.
439. The agreement between CET 21 and "its foreign partners and experts" was communicated by CET 21 on December 21, 1992 to the Council. At the Council hearing on December 21, 1992, Mr. Palmer and Mr. Fertig represented CEDC and submitted the proposal to the Council according to which an "extensive share [was] reserved for foreign capital" and it was clearly indicated that this would be "a direct capital share, not credit". The financing to be provided by CEDC was an amount of US \$10 million which was confirmed in the Letter of Intent issued by CEDC to CET 21 as an attachment to the application documents.
440. After the grant of the Licence to CET 21 was released to the public in a press conference, followed by the uproar in the Czech Parliament, as described by the witness Mr. Fertig, the Council communicated to CET 21 that direct shareholding of CEDC was "politically impossible". Mr. Fertig stated that the Council requested the replacement of the direct shareholding by a structure which would give an equivalent level of participation from an economic standpoint and an equivalent level of influence from a business standpoint. In accordance with this request,

Mr. Fertig worked out the “over-all structure” dated February 3, 1993 which he typed on his personal computer. A Czech translation was submitted to the Council. Mr. Fertig stated that the “all-over structure” dated February 5, 1993 was developed by incorporating the changes requested by the Council.

441. The purpose of the changes was to have a separation of the Licence on the one hand and the operations on the other hand. As Mr. Fertig stated, the official “Decision to Award a Licence” at the Council meeting on February 9, 1993 was not made before the amended “all-over structure” dated February 5, 1993 was signed by CET 21 and CEDC.
442. This sequence of events as stated by the witness is confirmed by the minutes of the Council meeting dated February 4, 1993 and the “Decision to Award a Licence” dated February 9, 1993 which, in its reasoning, referred to the necessity of the substantial involvement of foreign capital for beginning television station activities and referred to the legal structure set out in the Licence conditions, “which shall fully guarantee the leading positions of domestic persons in the television station and their programming and journalistic independence” and further, by the official Licence document, including the Licence conditions and in particular the Licence conditions Nos. 17 and 18, all dated February 9, 1993.
443. The split structure of the licence-holder CET 21 and the operator ČNTS was developed on the basis of the Media Law of October 30, 1991. The Media Law of 1991 defined broadcasting as “*dissemination of programme services or picture and sound information by transmitters, cable systems, satellites and other means intended to be received by the public*”. A broadcaster under the Media Law 1991 is (inter alia) anyone, who obtained authorization to broadcast on the basis of an Act of the Federal Assembly, an Act of the Czech National Council, etc. or by being granted a Licence under this Act (a licence-holder). The Media Law 1991 did not describe the commercial or technical requirements to be performed by a licence-holder. However, according to Section 12.3 of the Media Law 1991, the Council was entitled to impose conditions on the licence-holder as part of the Licence.



444. Therefore, the Media Council, the regulator of the Czech Republic under the Media Law, decided to monitor the operation of the Licence under the split structure (CET 21 as licence-holder and ČNTS as operator) on the basis of inter alia the Licence conditions Nos. 17 and 18. This scheme was carefully designed legally and, on the face of it, in compliance with the Media Law, as the Media Law did not contain any restrictions or requirements in respect to the operation of the broadcasting system by the licence-holder or another operator. The Council, under condition No. 17, imposed as a part of the broadcasting Licence, the condition on CET 21 to submit the MOA between CET 21 and CEDC within 90 days after the decision to issue the Licence was to take legal effect. The MOA must reflect the provisions of the “agreement on the business agreement” which was the “all-over structure” dated February 5, 1993.
445. At the Council meeting dated April 8, 1993, the Council reviewed the draft MOA as submitted by CET 21. The Council declined to approve the MOA. With reference to the conditions of the Licence, the Council required that CET 21 shall provide the final version of the MOA between CET 21, CEDC and the Czech Savings Bank to the Council for approval by April 19, 1993 with the amendments required by the Council. This request for a change of the MOA was communicated by the Council to CET 21 on April 9, 1993 with reference to the terms of the Licence. Further, the Council approved Dr. Železný becoming a shareholder of CET 21. CEDC did not agree with the proposed amendments and its president and chief executive officer Mark Palmer sent a responsive letter to the Chairman of the Council on April 13, 1992. At the Council meeting on April 20, 1993, the final wording of the MOA was approved in accordance with Article 17 of the Licence conditions which was communicated to CET 21 on the next day.
446. The MOA, with the full title “Memorandum of Association and Investment Agreement”, thereby became the basic document for the Claimant’s predecessor’s investment in the Czech Republic. The clear wording established that the television station shall be managed by the new company and that the object of the new company’s business activity was “the development and operation of the new, independent, private, national television broadcasting station in compliance with the Licence and the

terms and conditions attached to it.” The purpose of the new company was to operate an independent television station and to achieve profits and ensure a high rate of return of equity for the partners, while providing a popular television channel for the Czech public.

447. The business decisions of the new company were vested in the Committee of Representatives which committee in particular had the power for decision-making on the programming principles, the programme structures and the programme plan of the TV station “in consultation with the chairman of the Programming Council”. The Programming Council had certain veto rights in respect to the programming and CET 21, despite its minority shareholding in ČNTS, was entitled to appoint three members to a Programming Council, two of its members to be appointed by the Czech Savings Bank and only one member to be appointed by CEDC, the seventh member being the programming director. The shareholders expressly agreed to be bound by and to respect the terms and conditions of the Licence granted by the Council.
448. Under Article 1.4.1 of the MOA, CET 21 was obligated to contribute to the company “the right to use, benefit from and maintain the Licence of the company on an unconditional, irrevocable and exclusive basis“. The value of the non-monetary contribution was denominated by 48 million Czech Crowns.
449. Further, the partners expressly agreed that they shall not undertake any action that would present a well-founded concern that it will make it more difficult to obtain a prolongation or renewal of the Licence in favour of the company.
450. *“In consideration of the efforts and the contributions to the Company, CET, CEDC and CS herewith commit themselves not to undertake any actions, either by assuming a contractual obligation or by negligence, that would jeopardize the granting of the Licence in general, and especially in accordance with the Act on Television Broadcasting in the Czech Republic (No. 468/1991 Sb.), to assign any right, in part or in full, relating to the aforementioned Licence to any third Party that is not a Party to this Agreement, with the exception of any successor appointed by the Company with the approval of the Council”.*

451. It is the view of the Arbitral Tribunal that this structure, as it appears from the MOA in conjunction with the Licence and its conditions Nos. 17 and 18, is a well-defined legal basis for the Claimant's predecessor's investment in the Czech Republic, granted after intensive consultations with and following requests and advice by the Media Council.
452. It is obvious that the structure of the split of the licence-holder and the operator, as specifically described and set out in this scheme, was the legal basis for the Claimant's predecessor's investment. The purpose of this scheme was to secure the Claimant's predecessor's investment in the Czech Republic in compliance with the Media Law of 1991. The scheme was recognized and developed in conjunction with the Media Council. In scrutinizing this scheme, it is apparent that the Claimant's predecessor's position was substantially more than a financial investor as suggested by the witness Mr. Josefík, who, in the eyes of the Tribunal, showed a rather selective and unpersuasive memory of the facts as the documents show them to be.
453. The Parties to these arbitration proceedings described CET 21's contribution, the right to use the Licence, as a lawful contribution. The Media Council itself in its report of October 1996 to the Czech Parliament reiterated that, *"at the time when the arrangement was made, there were no doubts about its legitimacy; in regard to many related steps that were taken, the Council, as it was then constituted and based on its experience at the time, took a position of consent"*. The Council in its report to the Czech Parliament described the structure which was used by TV NOVA, Premiéra TV and Rádio Alfa as having the following analogous features:
- "Their operation and programming are provided by other companies than the companies that were awarded the Licence, namely, on the basis of a special legal construction which captures, on the basis of a contract, their collaboration and mutual rights and duties. Therefore, there are two companies [related] to one Licence, the one that was awarded the Licence and the one that was established in order to implement it"*.
454. The witnesses confirmed that the CET 21 / ČNTS structure was used for other broadcasting stations. It was in particular used also for Pre-

miéra TV (a minor enterprise) and for Rádio Alfa (also controlled by CME).

455. Also, the report (called "opinion") of the Council to a Parliament Committee of May 1994 qualified the structure as "*standard business procedure which was duly discussed and approved by the licensing body, i.e. by the Council, and does not violate any effective legal regulations, [The Council] consulted with a number of leading legal experts, Czech and foreign*".

456. Further, the Council stated in its legal opinion to the Parliament that

*"the operation of a television station, it is of a television organization (e.g., for the production of programmes), should be in no case confused with the operation of television broadcasting, i.e. the dissemination of programmes (Article 2 para. 1, letter (a) of Act No. 468/1991 Coll.). The Memorandum of Association and the Licence terms specified the relationship between ČNTS and CET 21 and contain a number of mechanisms that prevent the potential non-permissible involvement of ČNTS in the rights and obligations of the licence-holder. CET 21 is responsible to the Council to the full extent for the operation of television broadcasting. For the reasons stated above, the Council does not share the opinion of the Committee for Science [Parliament Committee]. The Council is convinced about the correctness of the procedure and does not admit any doubts of its legitimacy. "*

457. Therefore, the Council itself viewed the CET 21/ČNTS structure when created and at least until May 1994 as a structure in compliance with the Czech Media Law. The Tribunal accordingly concludes that the Claimant's predecessor's investment was based on a carefully designed legal structure which was developed in conjunction with the Media Council and implemented with its approval. The Tribunal concludes that such structure must be regarded as a legally well-founded basis for the Claimant's predecessor's investment. It was also the legal basis for CME Media when acquiring CEDC's 60 % shareholding in ČNTS in 1994. At that point of time, the investment in TV NOVA was still at a high risk after having started the TV station in spring 1994 with a substantial investment commitment under the MOA as requested and approved by the Council. Any change of the CET 21/ ČNTS investment structure by law or by Council's interference, therefore, must be considered in the light of

whether such changes adversely affected CME's investment in the Czech Republic and whether it could be seen as a breach of the Treaty.

458. It is undisputed between the Parties that TV NOVA within one year after having started broadcasting in February 1994 became the most successful and profitable private television station in the Czech Republic with revenues which increased by 1996 to more than US \$ 100 million per year with a profit of roughly US \$30 million per year (or US \$51 million pre-tax profit). This success is to be attributed to CEDC's operational support which enabled broadcasting to start within a timetable set by the Licence, one year, which was seen as rather ambitious.
459. The witness Mr. Klinkhammer stated that CEDC and CME invested US \$ 140 million in TV NOVA which included the share acquisitions made between 1994 and 1999. In the first purchase of 5,2 % ČNTS shares from the CET 21 shareholders, CME Czech Media Enterprises B.V. had paid US \$5 million. In 1997, in the share transaction with Dr. Železný, CME paid US \$ 27,5 million for 5,8 %, evaluating ČNTS at that time at roughly US \$500 million. Also, the acquisition of 22 % interest in ČNTS held by the Czech Savings Bank for roughly US \$ 30 million on July 17, 1996 indicated that the investment in ČNTS was regarded as sound and prosperous, a success must be, to a large extent, attributed to the foreign investor CEDC and CME because the Czech nationals who initiated the joint venture as shareholders of CET 21, including Dr. Železný, never had practical experience in starting and running a TV station.

**(2) The Media Council in 1996 coerced CME to abandon the legal security for its investment in the Czech Republic**

460. In 1996, the Media Council reversed its position related to the split broadcasting structure between the licence-holder and the operator. The reason for the reversed position is clearly spelled out in the Council's report of October 1996 to the Czech Parliament. In this report, the Council made it clear that the split structure was in compliance with the Media Law as long as it could be controlled by the Council via the Licence conditions. *"... in 1995 there existed a sufficient tie, in the form of Licence terms [Licence conditions] between the licence-holder and the other*

*company, to make it possible for the Council to intervene in the event the existing split became truly problematic. "*

461. *"At the beginning of 1996, however, the amended law on broadcasting that came into effect included the mandatory abolishing Licence terms, and the operators of broadcasting reacted to it by requesting some changes in the Licence. That meant a weakening and/or nullification of the above-mentioned tie as a certain guarantee of the legality of the existing situation".*
462. Indeed, as the Council stated in its report to the Parliament, all three broadcasting companies TV NOVA, Premiéra TV and Rádio Alfa requested that the relevant condition be abolished, which would have had the effect that the Council would have lost control of the operator of the Licence under the split Licence/operator scheme. The Council, in its report to Parliament, identified the problem as follows: *"The focus of the problem is a subtle legal question of who is the operator of broadcasting, which activities [it] may provide itself and which ones it may delegate to other entities without actually transferring the Licence to them. The Law on Broadcasting [Media Law], which stipulates inter alia the basic rules for this very specific business activity, suffers from deficient shortcomings in this respect;"*
463. The Arbitral Tribunal's clear view and understanding is that the Council, in order to avoid loss of control of the operator of the split licence-holder/operator scheme in 1996, decided to put pressure on the participants of the split scheme in order to change it. This transpires from the facts, in particular the Council's own statements in this respect, the documents and the witness statements.
464. As one step of its strategy, the Council did not comply with CET 21 request to delete condition No. 17 of the Licence which is "the tie" in the words of the Council to the Parliament, to safeguard the split structure of licence-holder and operator.
465. On February 12, 1996, the Council instructed Dr. Jan Barta of the State and Law Institute of the Academy of Science of the Czech Republic to render a legal opinion on the split structure. Dr. Barta rendered a legal

opinion submitted under the letterhead of the institute of the State and the Law within one week, on February 19, 1996, which concluded that CET 21 does not operate broadcasting and never did, whereas ČNTS was broadcasting without authority. Dr. Barta stated that the approval of the MOA by the Council has no significance as the Council has not issued any resolution on this subject. In Dr. Barta's view, the MOA expressly stated that the law would be violated (*the Licence-holder pledges not to broadcast, and the company that is being established carries on unauthorized broadcasting*). This was a violation of the law and the Council was not in the position to permit that which is not permitted by the law. Dr. Barta suggested initiating administrative proceedings for unauthorized broadcasting against ČNTS and he suggested as an alternative to withdraw the Licence from CET 21. He further stated "*the given group of investors can be excluded from broadcasting in accordance with the law by these methods*". Further, as an alternative, Dr. Barta suggested to compel CET 21 through penalties to initiate broadcasting at its own expense and to modify contractual relations with the group of investors accordingly. As a further alternative, Dr. Barta suggested to issue a new Licence for ČNTS. "*Until such Licence is legally effective, however, the broadcasting is still unauthorized and the fine has to be levied in such a case as well*".

466. The circumstances of the rendering of Dr. Barta's legal opinion are dubious. It is quite obvious that this legal opinion was rendered in response to the Council's instruction letter of February 12, 1996 with the purpose of laying the ground for the Media Council's reversal of position which was opposite to the Media Council's view that the CET 21/ČNTS split structure was in compliance with the Media Law, when implemented. Dr. Barta's legal opinion had serious deficiencies. Contrary to Dr. Barta's statement under Section 4 of his opinion, the Media Council by resolution of May 11, 1993 topic 2 by unanimous vote approved Licence condition No. 17, which decision was certified under the date of May 12, 1993 in full form. Further, the legal opinion did not deal with the question whether an official State body, when reversing its decision by declaring a legal structure for the use of a broadcasting licence illegal, must pay compensation to the foreign investor who, in reliance on the validity of the split structure, made large investments in the television station. Dr. Barta was of the opinion that the Council at that time (1993) from a

formal point of view, acted incorrectly as administrative body. Dr. Barta's legal conclusion was that the Council is obligated to disregard the MOA and that a decision of the Council shall "simply (be) *based on the determined facts described above.*"

467. This suggestion for the application of administrative law shall not be dissected by the Arbitral Tribunal. Dr. Barta's opinion, however, is unacceptable under the requirements of the Treaty which does not allow reversal and elimination of the legal basis of a foreign investor's investment by just taking the view that an administrative body's formal resolution, the corner-stone for the security of the investment, was simply wrong. The Tribunal is not to decide on the Czech Administrative Law aspect of this question. However, Dr. Barta's legal opinion is not in compliance with the Respondent's obligations under the Treaty.
468. On the face of it, Dr. Barta's opinion was requested by the Media Council simply as a tool to cover up the reversal of the Council's legal position towards CET 21 and the foreign investor CEDC/CME. This view of the Arbitral Tribunal is supported by the sequence of events, ending with CME being forced to change the MOA and to give up the "safety net" (as it was described by the Respondent's representative Prof. Lowe at the Stockholm hearing) by replacing in the MOA the "use of the Licence" as CET 21's contribution in ČNTS by the "use of the know-how of the licence".
469. It is clear that the replacement of the "use of the Licence" (which ČNTS enjoyed under the split structure) by the "use of the know-how of the licence" vitiated the Claimant's protection for its investment in the Czech Republic. The Tribunal need not decide whether the contribution of the "use of the Licence" in 1993 was legally valid under Czech law. The parties to these proceedings are in agreement that (in contrast to Dr. Barta) the contribution of the use of the Licence was legally not questionable. This view of the Respondent is supported by the Media Council's legal opinions and reports to Parliament cited above.
470. However, the Respondent at the Stockholm hearing took the position that the 1993 "safety net" (use of the Licence) was not better than the amended structure (use of know-how of the licence and conclusion of a



Service Agreement). The Respondent's position on this subject is unsustainable. The use of "know-how" of a broadcasting Licence is meaningless and worthless. The obvious purpose for replacing the wording of "use of the licence" by "use of the know-how of the licence" was to buttress a wording in the MOA which could sustain the interpretation that CET 21 did not receive a pay-back of its share capital made by a contribution in kind.

471. The Respondent's position that the waiver of the "use of the Licence" was counterbalanced by the new Section 10.8 of the new 1996 MOA is unsustainable. The wording of Section 10.8 speaks against it:

*"[CET 21] hereby undertakes not to entrust the subject matter of its contribution, or any other right connected with the Licence, or the Licence itself, to the ownership or use of another legal entity or natural person, or to enter into any legal relationship with any legal entity or natural person other than the Company, by which it would give that, or another, person or entity any right to the subject matter of its contribution to the Company or to CET 21 as such which would result in the creation of rights similar to those which the Company has, and undertakes not to even begin any negotiations with another legal entity or natural person about the creation of such a legal relationship."*

472. The "subject matter of its contribution" which, under Section 10.8 is restricted in respect to transfer or even negotiations, is nothing else than the "use of the know-how of the Licence" which, as indicated above, was a rather meaningless and worthless right. Further, CET 21's undertaking not to assign the Licence itself was useless as the assignment of the Licence is not permitted under the Media Law anyway. The only important issue was, whether CET 21 as licence-holder was obligated to contribute the use of the Licence to ČNTS which contribution alone was the "safety net" for ČNTS, ensuring that CET 21 would exclusively use the operational services of ČNTS.

473. Moreover, the Respondent's argument that the waiver of the "use of the Licence" under the 1993 split structure was fully compensated by the Service Agreement entered into between CET 21 and ČNTS 1996/1997, is unsustainable. The contribution of the use of the Licence under the MOA is legally substantially stronger than the Service Agreement, as was demonstrated by the further sequence of events. A Service Agree-

ment could be terminated much more easily for good cause at any time by CET 21 compared with a change or amendment of CET 21's contribution in kind as shareholder of ČNTS under the MOA. Such contribution cannot be recalled by an unilateral act of the shareholder who made the contribution. This may not always apply, e.g. if ČNTS as user of the Licence by its conduct would have jeopardized the Licence, which was never seriously suggested, either by CET 21 or by the Media Council.

474. In 1999, the legal weakness of the 1996 arrangements materialized. On August 5, 1999, CET 21 terminated the Service Agreement for good cause with the effect that the alleged non-delivery of the daily work log for one (!) day (August 4, 1999) gave sufficient reason to terminate the Service Agreement. Thereby, the legal basis for the co-operation between CET 21 and ČNTS was vitiated with the consequence that the Claimant's investments of purportedly US \$ 140 million, evaluated at US \$ 500 million, was put at the risk of civil court decisions which ended up with the first instance Regional Commercial Court decision which decided that the termination was void, which decision was reversed by the Appellate Court with the consequence that the dispute was still pending at the Czech Supreme Court without a final decision having been obtained at the time of the closing of the hearing of these arbitration proceedings, the Claimant's investment meanwhile having been totally destroyed.
475. The Arbitral Tribunal cannot accept the argument that the 1996 "safety net" was a real safety net in comparison with the 1993 safety net. Even if the Czech Supreme Court were to reverse the Appellate Court's decision and re-instate the first instance court decision, this would not change the Tribunal's assessment. Even if ČNTS would be in the position to restore the status of the TV station as it was on August 5, 1999, CET 21 could easily jeopardize the arrangement by repeating the same procedure, terminating the Service Agreement for purported good cause and again dragging ČNTS into Civil Court proceedings.
476. It is not the Tribunal's role to pass a decision upon the legal protection granted to the foreign investor for its investment under the Czech Civil Law and civil court system.

477. Nevertheless, the Tribunal, after having studied the first instance judgment and the Court of Appeal judgment, cannot conceal its opinion that the Court of Appeal inadequately dealt with the facts and circumstances. It permitted a US \$ 500 million value investment to be destroyed by the purported non-delivery of a one-day day-log under a Service Agreement imposed on the investor by the Media Council, which circumstances and facts were set out in detail by the first instance Court judge.
478. The Arbitral Tribunal is charged with assessing whether the amendment of the legal structure of the Claimant's investment in 1996 prejudiced the protection of the Claimant's investment in the Czech Republic and whether this was a breach of the Treaty.
479. The facts in respect to the change of the so called "safety net" themselves are to a large extent undisputed, whereas the Parties' legal and factual interpretation of these facts is controversial. The Respondent's view that the change of the "safety net" in 1996 did not change or prejudice the protection of the Claimant's investment is, as explained, unsustainable.
480. The events in 1996 as documented by the exhibits to the parties' submissions are decisive in sustaining the conclusion that the Media Council in 1996 forced ČNTS and CME to agree to undermine the legal protection of CME's investment. Considering the interpretation of the documents and the witness statements, the Tribunal is of the view that the Council, in order to re-establish its control over the broadcasting operations of CET 21/ČNTS (which operations were disconnected from the licence-holder by the 1993 split structure), "made a very intensive effort" (Mr. Josefík's oral report to the Standing Committee of Parliament on September 30, 1999) to force CET 21 / ČNTS and its shareholders to surrender the 1993 split structure.
481. At the March 13, 1996 Council Meeting, the representatives for CET 21 were confronted in the presence of Dr. Barta with the request to enter into a different contractual relation; Dr. Barta acting in a rather inquisitorial function. He requested that measures be taken so that the physical operator will be CET 21. After the cancellation of Licence condition No. 17, a trade contract between CET 21 and ČNTS was necessary as,

in Dr. Barta's view, "CET 21 does not operate broadcasting". The conclusion to this part of the meeting was:

*"Lawyers of the Council and CET 21 will prepare the first version of a contract on provision of performances and services between CET 21 and ČNTS, so that the first version of this contract will be prepared by CET 21 within 10 days and submitted to the Council for discussion. "*

482. Keeping Dr. Barta in the process, Dr. Barta rendered a further legal opinion dated May 2, 1996 which would have turned the existing 1993 split structure, CET 21 being the licence-holder and ČNTS the operator, upside-down. This legal opinion stipulated, in particular, that all payments for advertising are the income of CET 21 which would deprive ČNTS of its original source of income. The Council asked for a consequent change of the MOA which was discussed at the Council Meeting of May 7, 1996. On May 15, 1996, CME's legal counsel, Laura DeBruce, circulated a letter to the lawyers of CET 21 and ČNTS, expressing CME's concern about the Council's recent proposal that the MOA be amended so that the CET 21 contribution of the "exclusive use" of the Licence would be deleted from the MOA and replaced by a Service Agreement. Laura DeBruce made clear that ČNTS as a consequence of the change requested by the Council would be in rather weak legal position, should CET 21 simply claim that ČNTS was in breach of the Service Agreement and terminate it.
483. The Council at that time involved itself in the draft of the Service Agreement, sending comments to the parties to the agreement with the request to incorporate the comments in the agreement or to comment on them within five business days of receiving the Council's request which dated June 4, 1996.
484. The Council put the issue of CET 21's legal structure on the agenda of the Council Meeting on June 28 and June 29, 1996 and decided at that meeting in respect of ČNTS that a warning of illegality of broadcasting shall be sent to ČNTS, which shall include a time-period for remedy, ending on August 27, 1996. Further, the Council decided to postpone a decision on a cancellation of Condition No. 17 of the Licence, "because of the preliminary question of proceedings before a court and proceedings at the State Prosecutor's Office".

485. On July 23, 1996, the Council initiated administrative proceedings to impose a fine for operating television broadcasting without authorization against ČNTS. In the letter addressed to ČNTS which reached ČNTS in September 1999, the Council set out three reasons.

- The first reason was that the Commercial Register for ČNTS showed it to be operating television broadcasting on the basis of the Licence as its business activity.
- The second reason was that the agreement with the Authors' Protection Union was concluded by ČNTS and not by CET 21.
- The third reason was described as follows:

*"Another basis are the agreements between ČNTS and the company CET 21 spol. s. r. o. which indicate, among other things, that ČNTS is arranging the broadcasting on its own account. There is no control by the broadcasting operator over the disseminated programming; the broadcasting operator's liability is rendered unclear by the Agreement. "*

486. In support, the Council, in its letter to ČNTS, referred to Dr. Barta's legal opinion rendered in the name of the Institute of State and Law of the Academy of Sciences of the Czech Republic.

487. Mr. Josefík, who was Member of the Council and later Chairman of the Council, stated at the Stockholm hearing that *"the agreements between ČNTS and the company CET 21"*, referred to in the Council's letter to ČNTS, were the MOA. This interpretation of Mr. Josefík confirms the wording of the Council's letter, taking into account that no other agreements between CET 21 and ČNTS related to the use of the Licence were in existence at that point of time.

488. The letter of July 23, 1996 and Mr. Josefík's interpretation are in clear contrast to the Respondent's view and position that not the contractual basis of the 1993 split structure but its implementation violated the Media Law. Indeed, Dr. Barta's opinion also did not suggest that the implementation of the 1993 split structure was a violation of the Media Law. Dr. Barta maintained that the 1993 split structure itself was illegal.

489. Therefore, the Media Council reversed its legal position in 1996, taking the view that the 1993 split structure was illegal. The Respondents interpretation of the events as an unlawful implementation of a lawful structure is, in the light of the facts, unsustainable.
490. The purpose of initiating administrative proceedings against ČNTS was solely to put pressure on CET 21 and ČNTS, with the aim of elimination of the 1993 split structure. This assessment, although contested by the Respondent and some of the Respondent's witnesses in these proceedings, is confirmed by the Media Council's own written documents, reports and legal opinions. The legal opinion of the Media Council's legal department dated November 6, 1996 stated in its review of the draft Service Agreement::

*"It may be stated that the said Agreement undoubtedly reacts to the commencement of administrative proceedings against ČNTS for illegal broadcasting with the aim of making it seem that ČNTS has not been committing such illegal acts."*

491. In the report to Parliament of January 31, 1998, the Council repeated its position, stating that the Council halted the proceedings with ČNTS in September 1997 because, in its opinion, once the scenario of actions agreed with ČNTS and CET 21 was fulfilled, the reasons for which the proceedings about unauthorized broadcasting were conducted ceased to exist.
492. In this report, the Council also confirmed the legality of the original 1993 split structure, which the Council considered to be *"legal and which raised legal doubts only later"*.
493. *"The reasons why this model came into existence were the Council's fears of a majority share of foreign capital in the licence-holder's company. The licensing conditions were an insurance of this configuration that the Council considered to be a sufficient tool for regulating the broadcast, even after the softening of them"*.
494. In a sequence of events, the Council initiated administrative proceedings after CET 21 and ČNTS presented a proposal for an amicable solution in

individual legal steps (which did not please the Council). In this respect, the Council reported to the Parliament that, in December 1996, *“after a partial success regarding the legal documents of CET 21 as well as ČNTS, the Council abolished the licensing conditions according to the application. The proceedings concerning unjustified broadcast against ČNTS, however, continue”*. In the period from January till July, 1997, according to the Council’s report to Parliament, CET 21 and ČNTS gradually documented the implementation of the promised steps. On June 3, the Council concluded that the premises for stopping the proceedings were thus fulfilled.

495. On September 15, 1997 (as the Council further stated to the Parliament), having examined the remaining legal issue, the Council stopped the proceedings against ČNTS.

496. The Council, in its report to Parliament of January 31, 1998 reiterates that the original 1993 construction “from the legal view-point did not and does not contradict any law, but it created a basis for problems ...”.

*“When it came into existence, such a construction was just right and had its logic, on top of that, an integral part of this configuration were the licensing conditions set by the Council by means of which inadmissible influences on the broadcasting, emanating from the procurement organization ČNTS, were ruled out.”*

497. The Council (in the response to Parliament’s request) fully disclosed the motivation for the 1993 split structure:

*“When granting the Licence to the company CET 21, for fear that a majority share of foreign capital in the licence-holder’s company might impact the independence of full-format broadcasts, the Council assumed a configuration that separates the investor from the licence-holder himself That is how an agreement came into existence (upon a series of remarks from the Council) by which the company ČNTS was established the majority owner of which is CEDC/CME. Thus, next to the licence-holder’s company, directly linked to it, a new company was established which was to co-participate in implementing the broadcast.*

498. This is clear. The alleged unlawful implementation was not referred to. The Respondent’s view that the structure itself was legal, whereas the

implementation was illegal, is not supported by the Council's own report to Parliament on January 31, 1998.

499. From the witness statements at the Stockholm hearing, it became apparent that CME had to take Council's threat against ČNTS seriously. As an ultimate possibility which was already mentioned in Dr. Barta's legal opinion, the Council could have imposed substantial fines on ČNTS in order to stop ČNTS operating TV NOVA and, furthermore, the Council could have withdrawn CET 21's broadcasting Licence.
500. Dr. Železný, who, at this point of time was in full accord with CME and ČNTS, informed the Representative Committee of ČNTS that the broadcasting Licence will be seriously endangered as a consequence of administrative proceedings and there was a substantial risk for the Licence, should CET 21/ ČNTS not comply with the Media Council's request for change of the legal structure. From the minutes of this meeting, confirmed by the witness statements at the Stockholm hearing, it becomes clear that, at that point of time, Dr. Železný was not acting in conflict with ČNTS and/or CME. On the contrary, he fully supported the joint position of ČNTS and CME towards the Council.
501. By a joint letter of ČNTS and CET 21 dated October 4, 1996, both companies gave in to the pressure of the Council and submitted a proposal to amicably resolve the prolonged differences, *"which arose in addressing the legal situation concerning the arrangement of legal relationship between ČNTS and CET 21, as well as around the cancellation of Licence conditions in connection with Act No. 301/1995 Col."*
502. The proposal was:
- *"First, to enter into a Service Agreement between CET21 and ČNTS related to television broadcasting services to be provided by ČNTS to CET 21;*
  - *second, to amend ČNTS's entry in the Commercial Register;*
  - *third, to delete radio broadcasting from CET 21's registration and*
  - *fourth, to obligate ČNTS "to submit to the Council a draft amendment to Article 1.4. 1 of the Memorandum of Association of ČNTS*



*which will be submitted to the ČNTS General Assembly for approval.*”

503. By letter dated October 4, 1996, Dr. Železný, acting as “General Manager and Agent” on behalf of TV NOVA, summarized the legal view and situation on behalf of ČNTS. This letter fully explained ČNTS’ position in respect to the legality of the ČNTS/CET 21 structure, supported by a legal opinion of the Institute of State and Law of the Academy of Science which confirmed that the licence-holder, in compliance with the Media Law, may broadcast through other persons.
504. In reference to the proposal submitted by ČNTS by its joint letter with CET 21 of October 4, 1996, in which they proposed steps for a conciliatory settlement to the administrative body, ČNTS requested termination of the administrative proceedings.
505. The shareholders of ČNTS did not give in on a voluntary basis. The amendment of the MOA on November 14, 1996, and the implementation of the Service Agreement was the result of the Council’s threat to discontinue ČNTS’ broadcasting operations. CME decided to disregard its own counsel’s legal advice according to which the replacement of the CET 21 contribution “use of the Licence” by the “right to use, benefit and maintain the know-how concerning the Licence” will be detrimental for ČNTS’ position as exclusive supplier of broadcasting services to CET 21, the basis of ČNTS’ business. CME carefully considered this advice, however it was clear that without the amendment requested by the Council the broadcasting Licence would be endangered. The change lifting CME’s legal “safety net” for its investment was made because of coercion exerted by the Council.
506. This clearly transpires from the submitted documents, in particular the Council’s own report to the Parliament, and this position was supported by Mr. Fertig. The witness, who communicated through Dr. Železný with the Media Council, confirmed that the danger of losing the licence as final consequence of the Media Council’s action was to be taken seriously, if an amicable solution were not reached. The Council demonstrated the seriousness of the threat by initiating administrative proceedings against ČNTS, when ČNTS tried to negotiate and delay the amendment of the MOA.

507. The witness stated that only because of the exercise of coercion was the legal basis for the investment changed. Only the amendment of the MOA to be redrafted along the lines that would satisfy the Media Council could have solved the situation which otherwise would have been destructive for CME's investment.
508. Also, the witness Ms. Landová, who, in the years 1993 to 1997 worked as a senior member of the staff of the office of the Council, supported this position. She clearly stated that the Council initiated administrative proceedings for unauthorized broadcasting against ČNTS in order to put pressure on ČNTS to change the MOA and to make the other changes requested by the Council.
509. The witness Mr. Radvan, a Czech lawyer who represented CEDC, also testified that the Council insisted on deletion of the use of the Licence from the MOA. Dr. Železný's efforts to change the wording without changing the substance had no success. According to Mr. Radvan's witness statement, it was clear that, in respect to the legal protection of ČNTS, it made a huge difference between the use of a licence and the contractual relationship which was introduced in 1996 instead of it, and that it was abundantly clear for everybody involved that the use of the Licence was different from the use of the know-how. By changing the MOA, CET 21's contribution to ČNTS in the eyes of this witness was almost eliminated and the witness stated that the new Article 10.8 did not adequately protect ČNTS.
510. The witness Mr. Musil who was at the relevant time a member of the Media Council, also confirmed to a large extent the sequence of events. His interpretation of the events was that the Media Law of 1991 was unclear in respect to the definition of the "broadcasting operator". He was of the opinion that the administrative proceedings against ČNTS achieved a better status for the Council which was a stricter distinction between the broadcasting operator and the service company. Also, his witness statement made clear that the Council had the clear target of changing the legal structure which was the basis for the Claimant's investment.

511. According to the statement of Mr. Josefík, who later became the Chairman of the Media Council, the administrative proceedings must have been seen in the eyes of ČNTS as a real threat. The witness stated that, on the same basis as the Council initiated administrative proceedings against ČNTS, the Council, in accordance with the legal opinion of Dr. Barta, could initiate proceedings to withdraw the Licence from CET 21.
512. This threat was not a theoretical threat, as the Council in its notification of the initiation of administrative proceedings to ČNTS, referred explicitly to the legal opinion of Dr. Barta which opinion was made known to all respective parties involved and which clearly spelled out the possibility for the Council to initiate proceedings to withdraw the Licence from CET 21.
513. This threat was fundamental because a withdrawal of the Licence in the same way as interference with ČNTS' broadcasting operations would have destroyed the Claimant's investment in the Czech Republic.
514. CME, at this point of time, could not take the risk of entering into long-lasting legal battles, civil law and/or administrative law proceedings, as such proceedings would carry the danger that, if the lawsuits were to be lost, CME's investment would have been irreversibly destroyed.
515. The Claimant decided to give in, which is a normal commercial consequence in any situation of unlawful pressure, when the affected victim of such pressure has to make a careful assessment.
516. Such a decision for a compromise, however, does not make the Council's unlawful acts legal and cannot be deemed as a waiver of CME's rights under the Treaty. This is the considered conclusion of the Arbitral Tribunal.
517. This view is supported by prominent legal authors such as Professor Detlev F. Vagts "Coercion and Foreign Investment Re-Arrangements" 1978, published in the American Journal of International Law. Professor Vagts pointed out that, for example:

*"The threat of cancellation of the right to do business might well be considered coercion . . . Such coercion might be found, even where a "clean" waiver of rights is signed".*

518. The Respondent's contention that CME voluntarily and of its own free will amended the basis for its investment is unsustainable. The (unlawful) situation of coercion is documented by the Media Council's above-cited reports and opinions to Parliament and, furthermore, in the Media Council's letter dated March 15, 1999 to Dr. Železný in his capacity as CEO of TV NOVA and as Executive Director of CET 21. In this letter, which was described by the Respondent as a letter containing the Council's general policy in respect to the relationship between a broadcasting operator and a service organization, the Chairman of the Media Council stated:

*"I confirm the fulfilment of the Council's requirements that were a pre-condition for the termination of the proceedings on unauthorized broadcasting by the ČNTS company. "*

*"The Council terminated the administrative proceedings on unauthorized broadcasting, because most of the above-mentioned material characteristics of the operator were respected and documented, by CET 21. According to the report and documents submitted by CET 21, this cause was also confirmed by changes in the Memorandum of Association and its business contracts. "*

519. The Media Council, also by this letter, gave an authentic interpretation of the reasons for initiating administrative proceedings against ČNTS. The purpose of the proceedings was to force ČNTS to release CET 21 from its contribution, the exclusive use of the broadcasting Licence. The Council's aim was to bring back the right of the use of the Licence to CET 21 which as the licence-holder, was, under the new Media Law in force since 1996, the only legal entity which the Council could control, whereas ČNTS, enjoying the exclusive use of the Licence under the 1993 split structure, could not be monitored and controlled any more by the Council, since Condition No. 17 of the 1993 Licence was to be cancelled under the new Media Law.
520. The Media Council violated the Treaty when dismantling the legal basis of the foreign investor's investments by forcing the foreign investor's joint venture company ČNTS to give up substantial accrued legal rights. The clear alternative available for the Media Council in this situation was to abstain from any pressure on CME/ČNTS and allow the foreign investor

to maintain its investment on the basis of the legal structure which was developed jointly with the Media Council and which was the basis for the foreign investor's investment decision. Any consequences deriving from such coercion against the foreign investor and/or its investment company ČNTS must be remedied. The Respondent's contention that the change of the legal basis of the Claimant's investment was made voluntarily or was the result of a commercial dispute between CME and/or ČNTS and Dr. Železný is unsustainable and must be rejected.

521. It is speculation whether the Media Council would finally have exercised its powers to the full, or whether CME could have gained support through the Czech Republic's administrative and/or civil courts. A threat does not become legal upon the victim's surrender to the threat and the surrender cannot be deemed as a waiver of its legal rights. The possibility that the threatening State Authority would not exercise its powers or that law courts would grant sufficient relief do not qualify the victim's surrender as voluntary.
522. A reasonable investor, having invested financial funds deriving from public placements, such as the CME group, the parent group of which was listed on the New York Stock Exchange, cannot jeopardize the funds raised in the public financial markets by taking unforeseeable risks. The Respondent's suggestion that CME could have sorted out the problem with the Media Council, if any, in the law courts is therefore unacceptable.
523. The Respondent's further contention that the coercion in reality did not take place as the communication between CME and the Media Council was, to a large extent, channelled through Dr. Železný who followed his own target which was, to regain the usage of the licence for CET 21, of which he was majority shareholder, is unsustainable. Not a single document or witness statement proves that in 1996, Dr. Železný exploited the situation of being communicator between CET 21/ČNTS and the Media Council. On the contrary, more than one witness stated that, at that period of time, Dr. Železný acted as an honest representative of both corporations, pursuing the business interest solely of these corporations.
524. The Arbitral Tribunal is aware that coercion claims suffer significant practical difficulties as they may raise the suspicion that the Claimant has

been playing a too clever game, first taking what he could get from the deal with the foreign government and then, coming for a second bite under the Treaty proceedings (see Professor Vagts as cited with similar concern on page 34). The Arbitral Tribunal is of the view that such danger does not exist in these arbitration proceedings.

525. Should the Claimant's joint venture company ČNTS receive a remedy through Czech Republic civil or administrative court proceedings, this may have an impact on the quantum of the damage claim. This issue however, must clearly be distinguished from the question whether the 1996 treatment of ČNTS and CME by the Media Council was a breach of the Treaty. The Arbitral Tribunal's response to this question is affirmative. The danger that the coercion claim under the Treaty in these arbitration proceedings will grant compensation in addition to ČNTS Civil Court claim (if granted), is not present, as the Parties instructed this Tribunal not to deal with the quantum at this stage of the arbitration proceedings.
526. Professor Vagts made the following suggestion for the elements of a code of unfair bargaining practices during investor-government negotiations (page 34 of Professor Vagts' publication as cited above) which, inter alia, prohibits a government from the following acts:

*“Cancellation of the franchise, permit, or authorization to do business in which the investor relies, except in accordance with its terms; and Regulatory Action without bona fide governmental purpose (or without bona fide timing) designed to make the investor's business unprofitable.”*

This seems to be a reasonable threshold which is passed by the Council's actions in this case.

527. The Respondents argument that a breach of the Treaty by coercion did not take place, because ČNTS' business under the amended 1996 MOA and the Service Agreement was even more profitable than before is unsustainable. The effect of the coercion was that CME lost its legal protection for the investment. It is not necessary that the economic disadvantage, as a consequence of the loss of legal protection, occurred immediately after the Media Council's intervention into the contractual relationship between CET 21 and ČNTS took place. Causation arises if the

damage or disadvantage deriving from the deprivation of the legal safety of the investment is foreseeable and occurs in a normal sequence of events. The protection of rights in corporate life does not materialize before a commercial conflict arises. This may occur years later. The mere lapse of time does not diminish the Claimant's rights as a consequence of the Media Council's unlawful interference in ČNTS' basic legal right to operate TV NOVA on the basis of the exclusive use of the Licence. The negative effects of the loss of the legal security of the investment materialized and surfaced in 1999 which is roughly 30 months later. This is not a long time neither in corporate life nor in respect to a long-term investment in a TV station.

528. The Respondent's further contention is that the 1996 change of CME's investment protection is not a breach of the Treaty, as the 1993 investment protection, if construed in any legal action in accordance with Czech law, would not have been enforced by a court as the Media Law prohibited the transfer of the Licence under Article 10.2 of the Media Law. The Respondent's actions therefore, as Professor Lowe at the Stockholm hearing argued, did not violate any legal disposition.
529. This contention is unsustainable. The Media Council jointly with CEDC developed the investment scheme by creating the 1993 split structure which was thereafter also used by other broadcasters. CME and its predecessor as foreign investor could reasonably rely on this structure which was developed in close conjunction with and approved by the Media Council.
530. Whether a Czech National Court would support and defend this structure is not dispositive. The Media Council was obligated to defend and secure this structure, after having attracted foreign investment on the basis of it. This placed the obligation on the Media Council not to interfere with the legal foundation of the Claimant's predecessor's investment.
531. The Respondent's position, also submitted by Professor Lowe at the Stockholm hearing, that CET 21, by law, was always in the position to use and exploit the Licence itself, is in clear contradiction to the MOA, under which CET 21 contributed the exclusive use of the Licence to ČNTS. The legality or non-legality of the 1993 split structure is not at

- stake. At stake is the protection of the structure and the Council's obligation not to undermine this structure by pressing the investor to give up basic rights which secured his investment.
532. The Respondent's further contention submitted by Professor Lowe that the efficiency of the 1996 arrangement has never been tested is not convincing. The lack of efficiency of the 1996 arrangement was seriously displayed in civil law court proceedings. The Regional Commercial Court protected the validity of the Service Agreement after it was terminated by CET 21 on questionable grounds. The first instance judgment was however overturned by the Appellate Court by a highly unconvincing judgment, leaving the final decision to the Czech Supreme Court. This unacceptable legal and commercial risk of prolonged legal battles was exactly what CEDC as foreign investor tried to avoid, when making its investment decisions in 1996. Such risk for the investor's investment is unacceptable and demonstrates the inadequacy of the 1996 arrangements (in contrast to Professor Lowe's submissions).
533. The Czech Republic and/or the Media Council are as a matter of principle not debarred from amending or altering the basis for CME's investment, subject to acquired rights and treaty obligations. This is a question of the Czech Republic's national sovereignty. However, any such action should have been done under due process of law, providing just compensation to the deprived investor (Art. 5 of the Treaty). The silent and coerced vitiation of CME's basis for its investment does not fulfil such a requirement and is, therefore, under the standards of the Treaty, and the rules of international law, a breach of treaty obligations.
534. The Respondent's further contention that ČNTS could have avoided the pressure from administrative proceedings: it only had "to stop breaking the law", is unsustainable. The Arbitral Tribunal cannot identify a breach of law by ČNTS, having scrutinized the documents submitted in these proceedings and the witness statements made, as well as the testimony of witnesses.
535. The Respondent's contention that CET 21 / ČNTS improperly implemented the 1993 legal arrangements is not supported either by documents or by witness statements. On the contrary, as shown in detail



above and also later in this Award, administrative proceedings were initiated not to enforce the proper implementation of the 1993 legal arrangements but to undo these arrangements. Otherwise, the Media Council could have requested a change of the implementation without requesting the change of the MOA and without requesting the implementation of the new Service Agreement. This was not the case. The Media Council requested a complete change of the basic legal protection of CME's investment by substituting for "the use of the licence" contributed by CET 21 to ČNTS the (useless) use of know-how of the licence.

536. Therefore, the final argument of the Respondent at the Stockholm hearing, in particular alleging the "hand-over of the reins from CET 21 to ČNTS", is not convincing. The reins were not handed over by CET 21 to ČNTS in the years 1993 to 1996. The legal basis for the investment was not changed before 1996. The implementation of the 1993 legal arrangements conformed to the legal documents of its formation.
537. The legal arrangements between CET 21 and ČNTS were implemented in accordance with the wording and the intentions of the Parties, including the Media Council, which co-designed and approved the structure in 1993.
538. The Media Council, acting on behalf of the Czech Republic, in 1996 breached the Treaty by coercing CME and ČNTS into giving up legal security for CME's investment in the Czech Republic.

### **(3) The Media Council supports the destruction of CME's investment**

539. In 1999, the Media Council actively supported the destruction of CME's investment in ČNTS. This conclusion is based predominantly on the documents submitted to the Arbitral Tribunal and by the statements of the witnesses. According to the minutes of the Council Meeting of March 2, 1999, Dr. Železný, at that time CEO of TV NOVA (ČNTS) and Executive Director of CET 21, visited the Media Council on the so-called "Visitation Day". According to the minutes, the reasons for the visit were "the current relationships with the foreign investor, current internal situa-

tion of the investor". Dr. Železný informed the Council about purported financial difficulties of ČNTS' 99 % shareholder CME (1 % shareholding by CET 21). Dr. Železný informed the Council about the conflict between CET 21 (Dr. Železný having a majority of 60 % shareholding in this company at that time) and ČNTS and that CET 21 had set a deadline for CME for changing the MOA. Otherwise, CET 21 would sell its 1 % share in ČNTS and withdraw the broadcasting Licence from ČNTS, unless ČNTS were prepared to enter in a new set of agreements "on the sale of advertisements, technology operations and technology support". If CME would not accept this solution by March 20, CET 21 will enforce this "clean alternative". Dr. Železný, in his capacity as Executive Director and shareholder of CET 21, requested the support of the Council against ČNTS, in spite of being the CEO of this company as well:

*"CET 21 would like to ask the Council to repeat some statements of the Council (exclusivity, withdrawal of the Licence) in relation to all steps within the logic of the development of the relationships between CET 21 and the Council. If and when harming the interests of ČNTS, Železný will need to be supported by a formal or informal letter. They are interested in a long-term stability, also in connection with a re-granting of the Licence. They ask the Council, whether it would be willing to remind of the principles which it had discussed with NOVA during various administrative proceedings and other negotiations".*

540. Dr. Železný further gave details for the contemplated new legal structure which he was going to impose on ČNTS.

*"It is a shift from a general [Service] Agreement to 5 specific agreements. The only exception - exclusivity in case of re-granting of the Licence. Železný asks for a letter redefining the general principles on the basis of which a package of sufficiently specific agreements could be proposed to the partners. If the Council decides that such letter is not suitable, because it would pre-conceive some formulations of the act, Železný will solve the situation. He would need as one of the documents a relevant document with a new date, the partners consider it more convenient not to reflect to it and not to risk a criminal recourse for not having reported correctly on changes (amendment) . . . "*

541. In the further discussions, the Council suggested to Dr. Železný to put concrete questions to the Council. Further, the minutes say:

*"We have a common interest. It is not a problem for Železný to formulate the questions. The current version of the agreement will be attached. They are willing to hand-over the agreements which have been prepared in order to make the matter more transparent. "*

542. On the next day, on March 3, 1999, Dr. Železný, under the letterhead of CET 21, sent the questionnaire to the Council. The letter spelled out that the communication between the Council and Dr. Železný should not be disclosed:

*"It is extremely important for us to receive the formulated principles in the form of an independent report of the Council as a reply to our request. We would like to use this opinion for discussions with our contractual partners, without disclosing other internal matters of our company . . . "*

*"We consider this type of co-operation with the regulatory body, in the form of a preliminary inquiry and professional consultation, to be very suitable, and we would like to apply it in the future as well . . . "*

543. Further, Dr. Železný offered (as promised) to supply to the Council the new set of contracts to be implemented for the future co-operation with ČNTS. Further, Dr. Železný asked for the confirmation of his principles:

*"These are formulations of general principles, on which we want to base our activities. We ask you to confirm their validity in the form of the Council's opinion:*

*"CET 21 will act, function and proceed as an operator, and, therefore, it has to carry out relevant managerial, administrative, and accounting tasks, and must build up its own company structure to include functions that cannot be transferred to service organizations. Employees responsible for programming and programme composition must be persons appointed or authorized directly by the CET 21 company.*

*Relations between the operator of broadcasting and its service must be established on a non-exclusive basis, because exclusive relations between the licence-holder and the service organization may encourage the transfer of some functions and rights that are dependent on the Licence and that are not transferable by law. In our opinion, CET 21, the operator, should order services from service organizations at regular prices so as to respect rules of equal competition. The selection of services should be decided by the licensed company independently, so that services are in ac-*

*cordance with the profile of the television station stipulated in the Licence and the quality of the services meet the requirements of the licensed company, For the level of provided services to agree with the terms of the Licence and Czech regulatory requirements, the licensed subject must have the ability to select relevant services anytime and anywhere at will which consideration ensues from the responsibility to operate television broadcasting.*

*Because the broadcasting time reserved for advertisements is by law a direct function of the Licence, and broadcasting business activity is registered by the operator only, revenues from advertisements that result from the sale of broadcasting time must be revenues of CET 21, from which proportional profit is reported and properly taxed in accordance with the Commercial Code. The accounting methodology for the company should be adapted to this fact. Of course, the right of the CET 21 company to pay fees for services ordered by CET 21 is not affected by this fact.*

*CET 21 will unequivocally decide on the composition of broadcasting, on programming and allotted time slots and genre, on the ratio of domestically produced and foreign programmes, and on questions of journalistic independence, objectivity, and balance in news reporting. The right to use programme Licences and copyrights in the form of broadcasting is exclusively within the scope of the operator who, for this purpose, must acquire Licences and rights from servicing organizations or directly from the owners of such rights and Licences. "*

544. The Council responded to this letter on March 15, 1999 by a letter signed by the Chairman of the Council, Josef Josefik, on the Council's official letterhead. The Council confirmed the "general principles" by six bullet points which, in essence, repeat (to some extent word by word) the proposal of Dr. Železný, the main difference being that the Council generalized the principles by replacing "CET 21" by "operator" or "licence-holder". In essence, the contents of the bullet points and the "general principles" as proposed by Dr. Železný are identical:

*"In regard to the preparation of the Annual Activity Report of the Council for Radio and Television Broadcasting, the Council also dealt with the current status of private television broadcasting.*

*I refer to your personal visit to the Council during which you informed us about the current situation in broadcasting and I confirm the fulfilment of the Council's requirements that were a precondition for termination of the proceedings on unauthorized broadcasting by the ČNTS company.*

*Because the Council was also asked by the Parliamentary Media Committee to issue an opinion on whether commercial television broadcasting complies with the Act on Broadcasting and valid Li-*

cences, we would like to summarize requirements that, in our opinion, express the contents of television broadcasting:

*An operator operates, functions and acts as an operator, i.e. carries out relevant administrative, and accounting tasks. Employees responsible for programming and composition of programmes are persons employed and appointed (authorized) directly by the licence-holder;*

*Business relations between the operator of broadcasting and service organizations are built on a non-exclusive basis. Exclusive relations between the operator and the service organization may result in de facto transfer of some functions and rights pertaining to the operator of broadcasting and, in effect, a transfer of the licence;*

*The operator is fully responsible for the structure and composition of programme and carries full editorial responsibility. The operator broadcasts programme in its own and on its own account and responsibility. The operator, therefore, must unequivocally decide on the content of broadcasting, its time and genre composition, and the ratio between domestic and foreign programmes;*

- *The operator concludes contracts in its own name with protection organizations for authors and performing artists.*

*The redemption of programme rights and copyright in the form of broadcasting shall be from the exclusively by the operator. For that purpose, the operator is obliged to obtain Licences and rights from commission organizations or directly from their owners;*

- *The operator concludes contracts in its own name with organizations providing technical transmission of television signals;*

*Revenue from advertising is the result of the sale of advertising time which is directly connected to the Licence; therefore, it must be reported and taxed by the entity performing the actual fulfilment [Translator's Note: broadcasting the commercials], i.e., the operator. (Of course, it is permitted with respect to this area of business that the operator concludes a contract with an agency which will purchase the advertisement for the operator).*

*The Council terminated the administrative proceedings on unauthorized broadcasting because most of the above-mentioned material characteristics of the operator were respected and documented, by CET 21 s.r.o. According to the report and documents submitted by CET 21, this course was also confirmed by changes in the Memorandum of Association and its business contracts,*

*We ask you to inform us about the current status of the implementation of the above-mentioned procedures and to document the manner of the actual implementation of the above-mentioned points in the current wording of the Memorandum of Association*

*and related business contracts concluded by the operator of broadcasting, CET 21, s.r.o.*

*The Council inspects the current status of private television broadcasting and monitors whether the broadcasting of commercial television stations complies with the Act on Broadcasting and whether these stations broadcast on basis of valid Licences.*

*Therefore, we ask you to submit the current programme composition and broadcasting schedule, in accordance with the Licence terms.*

*[illegible signature]  
Josef Josefík*

545. The Parties' interpretation of the March 15, 1999 letter differs. While the Claimant is of the opinion that the letter is a Treaty violation, the Respondent's view is that the letter expressed the Council's general policy, not binding in the specific situation of ČNTS. The witness Josef Josefík, at that time Chairman of the Council, interpreted the letter as a recommendation and the witness Musil said that the letter reflected the Council's model, the Council's policy and that this letter was used as a model by the Council.
546. The Arbitral Tribunal's assessment is that the letter cannot be interpreted without taking the circumstances into consideration. The letter was addressed and sent to Dr. Železný in both of his capacities: as CEO of TV NOVA and as Executive Director of CET 21. The letter stated general principles of the current status of private television broadcasting and, in this letter, the Council summarized "requirements that, in our opinion, express the contents of television broadcasting." The principles summarized under six bullet points are, therefore, not recommendations. The Council summarizes "requirements". Specifically addressed to CET 21 and TV NOVA, the Council requested TV NOVA and CET 21 *"to inform the Council about the current status of the implementation of the above-mentioned procedures and to document the manner of the actual implementation of the above-mentioned points in the current wording of the Memorandum of Association and related business contracts concluded by the operator of broadcasting, CET 21."*
547. This letter, therefore, as its clear wording demonstrates, is not just the expression of the Council's general policy. It is directly addressed to ČNTS and CET 21 and deals with their specific contractual situation.

Moreover, the Council stated that *“it terminated the administrative proceedings on unauthorized broadcasting because **most** of the above-mentioned material characteristics of the operator were respected and documented by CET 21. According to the report and documents submitted by CET 21, this course was also confirmed by changes in the Memorandum of Association and its business contracts”*.

548. A neutral reader of this letter must interpret this letter as a clear request by the Council to CET 21 and ČNTS to comply with all of the “requirements” because the 1996/1997 contractual changes had fulfilled most but not all of the “characteristics”. The reference to administrative proceedings was a clear warning by the regulator about possible consequences, should CET 21 and ČNTS not comply with the “characteristics” or “requirements”.
549. The “characteristics” or “requirements” in the six bullet points substantially deviate from the 1993 legal concept (the above so-called 1993 split structure) and further, they also substantially deviate from the 1996/1997 required amendment of the legal structure between CET 21 and ČNTS. The first bullet point stipulates that the licence-holder has to carry out relevant administrative and accounting tasks. The second bullet point stipulates that the business relations between the operator of broadcasting and service organizations are built on a non-exclusive basis (which was in clear contrast to the exclusive Service Agreement between CET 21 and ČNTS) and, the sixth bullet point stipulates that revenues from advertising must be reported and taxed by the entity performing the actual fulfilment, i.e. the operator (in the meaning of the licence-holder).
550. This letter of the broadcasting regulator was a further blow to the already fragile 1996/1997 contractual basis of CME’s investment (the exclusive use of the know-how of the Licence as stipulated in the MOA and the exclusive Service Agreement). It was a clear interference by the Council with the 1996/1997 structure as implemented under the pressure of the Council by ČNTS being forced to enter into the Service Agreement and agree on the amendment of the MOA. It was a serious interference, as it contained the Regulator’s threat to enforce the requested changes, referring to the administrative proceedings for unlawful broadcasting by

ČNTS. The waiver of exclusivity would clearly destroy the legal basis for CME's investment in the Czech Republic.

551. This interference by the Media Council in the economic and legal basis of CME's investment carries the stigma of a Treaty violation. The Media Council was obviously working hand-in-hand with Dr. Železný when supporting Dr. Železný in his attack upon CME's already fragile basis for CME's investment in ČNTS. The March 15, 1999 letter refers to the personal visit of Dr. Železný to the Media Council. It, however, conceals Dr. Železný's letter dated March 3, 1999 which provided the wording for the bullet points. As the witness Mr. Klinkhammer stated, the letter of March 3 was found in Dr. Železný's papers by the company's auditors after Dr. Železný was dismissed later in the year. The March 3, 1999 letter was not seen by Mr. Klinkhammer, CME's representative in the Czech Republic, when it was communicated. The Respondent's witnesses (including Mr. Josefík and Mr. Musil) could offer no explanation for the failure of the Council's letter of March 15 to refer to Dr. Železný's letter of March 3, despite the former letter in fact being a reply to the latter.
552. Dr. Železný, at the meeting with the Media Council on March 2, 1999 openly disclosed to the Council that the purpose of the requested intervention by the Council was "to harm ČNTS". Dr. Železný further openly discussed with the Council his conflict of interest ("*Dr. Železný - I am sitting on two chairs which move off one from the other*"). The Media Council, the Czech Republic's broadcasting regulator, at the Council Meeting on March 2, 1999, when dealing with the topic "the current relationship with the foreign investor", did not abstain from actively supporting Dr. Železný who clearly and openly violated his duties as CEO of ČNTS, the joint venture company, the beneficiary of the foreign investor's investment. This unconcealed violation by Dr. Železný of his duties under corporate and civil law cannot be seen as a harmless commercial difference between the majority shareholder and Executive Director of CET 21 on one side and the service company ČNTS on the other side. It is a massive, clear and intentional breach by Dr. Železný of his director's duties, a breach of law that must be assessed as a serious criminal offence in any functioning judicial system.



553. The minutes of the March 2, 1999 Council Meeting which disclosed the foregoing facts are from the Media Council's files, remitted to the Arbitral Tribunal by its Order at the request of the Claimant. The parties are in agreement on the translation submitted to the Arbitral Tribunal. The parties disagree on the interpretation, but they do not dispute the wording of the minutes. This wording is consistent with the witness statements, according to which written minutes were in conformity with the facts or speeches of what was heard at the Council Meeting.
554. The Arbitral Tribunal's conclusion is that the sole purpose of the March 15, 1999 letter was to support Dr. Železný in putting pressure on the foreign investor CME in order to achieve a re-arrangement of the contractual relations between CET 21 and ČNTS as desired by Dr. Železný, an arrangement that would destroy the legal basis (the safety net) of the foreign investor's investment. There was no other purpose. In particular, there was no serious follow-up to this letter. In response to the specific question by the Tribunal at the Stockholm hearing, Mr. Josefík stated that he could not recall off the top of his head that the Council had received a response to the part of the letter that asked CET 21 to inform the Council about the current status of the implementation of the requirements. On the face of it and quite obviously, the Media Council did not pursue any regulatory purpose with the letter. The only object was to put the letter with the agreed wording into Dr. Železný's hands, the purpose of which was clearly described by Dr. Železný to the Media Council at the Council meeting on March 2, 1999, which was "harming the interest of ČNTS".
555. The March 15, 1999 letter was not a private matter of the Council's Chairman. According to Mr. Josefík, the letter was drafted in a standard procedure, cleared through individual departments and then presented to the Council. The letter referred to Dr. Železný's visit at the Council Meeting on March 2, 1999, but did not reveal that the bullet points were prepared by Dr. Železný in his letter of March 3, 1999. The March 15, 1999 letter, a regulatory letter of the broadcasting regulator, was fabricated in collusion between Dr. Železný and the Media Council behind the back of ČNTS (TV NOVA) to give CET 21 a tool to undermine the legal foundation of CME's investment.

556. The Respondent's view, supported by Mr. Josefík, according to which the Council did not intend to support Dr. Železný in his dispute with CME, is not convincing. The clear facts and circumstances speak against it. In this context, the Arbitral Tribunal is constrained to observe again that Mr. Josefík showed a selective memory. Specifically questioned on his personal contacts with Dr. Železný in 1999, he responded on page 48 of the Stockholm hearing outprint of day 7: *"However, I do not recall that I had any other talk than a courtesy talk"*. When further interrogated as whether he talked to Dr. Železný over the telephone in 1999, he admitted that telephone conversations took place about the relationship between CET 21 and ČNTS, Dr. Železný carrying on a monologue on the subject. *"However, I do not recall any specific topic."* The witness Mr. Josefík was vague in recollecting these communications, whereas in respect to other details of the March 15, 1999 letter, his recollection was precise and clear.
557. The Arbitral Tribunal's impression was that Mr. Josefík's witness statements were coloured voluntarily or involuntarily by his desire not to qualify the Media Council's actions as a breach of the Treaty, taking into account that Mr. Josefík prepared his written witness statements at a time when he was still holding the position of the Chairman of the Council.
558. The Tribunal, therefore, is of the opinion that the Respondent's witness' statements and the Respondent's suggestions for the interpretation of the minutes of March 2, and the March 3 and the March 15, 1999 letters do not overturn the plain wording of these documents which speak for themselves. The Czech Republic, acting through its broadcasting regulator, the Media Council, massively supported Dr. Železný in his efforts to destroy CME's investment in the Czech Republic by eliminating ČNTS as the exclusive service provider for CET 21.

**(4) ČNTS' dismantling as exclusive service provider supported by Council's actions and inactions**

559. With the Media Council' letter of March 15, 1999 in his hands, Dr. Železný fulfilled the threats of his ultimatum which he had given to CME at the meeting of the Board of Representatives of ČNTS on February 24, 1999. At this meeting, Dr. Železný had requested a change of the

Service Agreement by eliminating exclusivity. Otherwise, he threatened, he would change the contractual relation between CET 21 and ČNTS unilaterally. In that case, Dr. Železný announced, CET 21 will hire another advertising agency for the sale of the advertisement time and procure broadcasting services from other providers on the basis that the Service Agreement between CET 21 and ČNTS was not exclusive. This was, de facto, the withdrawal of the use of the Licence, what Dr. Železný later at his visit at the Media Council, according to the minutes of this meeting, described as "the clean alternative".

560. Dr. Železný, at the Board Meeting, further announced that *"the Council wants to change its original decision and to write a letter with the statement that the present relationship between CET 21 and ČNTS is not correct"*. In particular, due to the announcement of this yet-to-be-written letter of the Media Council, it is obvious that, in contrast to the Council's chairman Mr. Josefík's rather vague and evasive oral witness statement at the Stockholm hearing, Dr. Železný had prepared his ultimatum and the implementation of his threats in communications with the Council, which communications were confirmed by Mr. Josefík (who denied any talk of substance) and which communications are also confirmed by Mr. Klinkhammer's witness statement, according to which Dr. Železný in this critical period, as revealed by company telephone charges, made numbers of telephone calls on the ČNTS mobile phone to the Council.
561. The witness Mr. Klinkhammer, who took over as a Chief Executive of CME on March 23, 1999, stated that CME made substantial efforts to prevent the dismantling of ČNTS by Dr. Železný by making various commercial approaches to bring to him such as merging CET21 and ČNTS in order to retain the use of the licence for the joint venture company. The witness stated that, as part of these efforts, CME and/or its ultimate shareholder Mr. Lauder, offered to pay to Dr. Železný up to US \$ 200 million in order to find a suitable arrangement securing the continued exclusive use of the Licence which was the basis for the investment of CME in the Czech Republic. These efforts failed and it appears obvious that Dr. Železný had gained the Media Council's legal support for CET 21's view that the Service Agreement was not exclusive. This legal position of the Regulator provided the basis for Dr. Železný to

dismantle the Service Agreement relationship and take over TV NOVA without compensating the foreign investor CME.

562. According to Mr. Klinkhammer's witness statement, ČNTS' majority shareholder CME at the shareholder's meeting on April 19, 1999 dismissed Dr. Železný as CEO of ČNTS after having confronted Dr. Železný with documents proving that CET 21 through Dr. Železný's actions already had breached the exclusive Service Agreement with ČNTS, inter alia submitting a letter which Dr. Železný had written announcing that ČNTS had been withdrawn from the business of programme acquisition and that this would now be handled by a company AQS, a clear breach of the Service Agreement.
563. Dr. Železný's breach of contract was strongly supported by the Council's letter dated March 15, 1999. This view is supported by the further sequence of events as derived from the documents and confirmed inter alia by the witness Mr. Klinkhammer. Mr. Klinkhammer, as representative of CME, appeared in front of the Council in April 1999 and gave a two-hour presentation on CME's/ČNTS' factual and legal position as basis for CME's investment. Mr. Klinkhammer explained the events that led to Dr. Železný's dismissal. This presentation, according to Mr. Klinkhammer, made the situation abundantly clear for the Media Council. CME made the clear statements about CME's/ČNTS's conviction and intent to continue to operate within the broadcasting and all other laws of the Czech Republic and all regulations imposed on ČNTS, the MOA and the Service Agreement of 1997. CME, also according to Mr. Klinkhammer, put the Council on notice that CME thought that the Council's action of March 15, 1999 *"had confiscated at least a portion of our investment in the Czech Republic"*.
564. At the latest at this point of time the Media Council, the broadcasting regulator in the Czech Republic, must have clearly understood the consequences of its interference in the legal relations between ČNTS as service provider and CET 21 as licence-holder. The Council, at the latest at this point of time, could have clarified the legal situation and remedied its interference by recalling its letter of March 15, 1999.

565. The Council did not respond to CME's two-hour-presentation which, according to Mr. Klinkhammer, was accompanied by a written communication which was handed over, after the presentation was finished.
566. By letter dated June 24, 1999, signed by both its new executive and general director and its lawyer, ČNTS repeated its position to the Media Council with copies to the Vice-Chairman of the Permanent Media Committee of the House of Representatives of the Parliament of the Czech Republic, to the Vice-Chairwoman of the same Committee and with copies to three Vice-Chairpersons of the Media Council. ČNTS, again, described the legal basis for CME's investment in the Czech Republic in 1993 which was amended in 1996 as approved and adopted by the Council in 1997. ČNTS referred to the exclusivity of the legal arrangement and described Dr. Železný's breaches of CET 21's obligations under the various agreements, in particular under the MOA and the Service Agreement. ČNTS requested the Media Council to explain its legal position in respect of the legal structure of the inter-relation between CET 21 and ČNTS and CME or *"to take measures which would resolve the current dispute between CET 21, ČNTS and CME in connection with the legal structure of these relationships and prevent their violation on the part of CET 21 and Dr. Vladimír Železný"*.
567. The Media Council disregarded CME's and ČNTS' request for clarification of the legal situation and abstained from any action or intervention, thus tolerating CET 21's breach of contract, supported by and based on the Council's March 15, 1999 letter.
568. By letter of July 13, 1999 ČNTS, again, requested the Council's evaluation of the exclusivity of the relationship between CET 21 and ČNTS. ČNTS, in full detail, referred to the history of the contractual relation, the Council's involvement and the inter-relation between the exclusive Service Agreement and the foregoing agreements between the contractual parties, as the basis for the Claimant's investment in the Czech Republic.
569. ČNTS concluded its request as follows:

*"We hope the above specified facts ... will help to evaluate the legal relationship between ČNTS and CET 21 impartially, and thus to conclude that the relationship between ČNTS and CET 21 is an*

*exclusive relationship which was as such established, construed, and, up until the creation of the dispute with Dr. Železný, as such respected by all participated physical and legal entities and by concrete legal acts was being fulfilled”.*

570. The Media Council did not reverse its unlawful interference. On the contrary, the Tribunal increased its pressure on ČNTS. In a response letter dated July 26, 1999, the Council referred to a legal opinion which the Council had prepared at request of the Permanent Commission for Media of the Parliament on the dispute between ČNTS and CET 21 with special regard to disputed matters regarding the exclusivity of agreements between ČNTS and CET 21, and which the Council provided to the Parliament on the same day. The Council attached an excerpt of this opinion to the letter to ČNTS requesting ČNTS *“to stop immediate/y your media campaigns in connection with a trade dispute and to inform the Czech Media Council by August 15, 1999 on new steps that shall minimize the risks mentioned and shall lead to a final settlement of the dispute in compliance with the applicable laws”.*
571. The legal opinion submitted to the Parliament referred to the *“risk of a breach of the Media Law taking the position that as long as the dispute did not deviate from its commercial nature, the Council had no legal reason or right to interfere in it.”* The Media Council neither addressed the issue of the non-exclusivity of the Service Agreement nor did it revoke its letter of March 15, 1999.
572. This non-response and inaction by the Media Council aggravated the deterioration of CME’s legal basis for its investment in the Czech Republic by reiterating and further supporting the elimination of the contractual exclusivity of the Service Agreement, the (already fragile) basis for the protection of CME’s investment in the Czech Republic. In August 1999 and thereafter, the Media Council, although recurrently informed by ČNTS and CET 21 of Dr. Železný’s further acts to dismantle ČNTS’ legal and factual position as exclusive service provider to CET 21 (including the termination of the Service Agreement on August 5, 1999), disregarded ČNTS’ request to protect the legal arrangement which was the basis for CME’s investment in the Czech Republic.

573. The Media Council, after having coerced the 1996/1997 change in the legal basis for CME's investment and after having further jeopardized in conjunction with Dr. Železný the (already) fragile legal arrangements between ČNTS and CET 21 by the Council's letter dated March 15, 1999, was obligated to re-establish and secure the legal protection for CME's investment. As a minimum measure to clarify the legal uncertainty for the Claimant's investment (caused by Council's acts), the Council should have recalled its collusive March 15, 1999 letter by confirming the exclusive service relation between CET 21 and ČNTS. The Council, in its capacity as broadcasting regulator, was bound to have abstained from supporting the dismantling of CME's investment by Dr. Železný.
574. After the Council by its acts had jeopardized the legal basis of CME's investment, it was not sufficient for it to keep silent and abstain from any regulatory clarification of the legal situation when, beginning in July 1999 and thereafter, Dr. Železný and CET 21 exploited the vitiation of the legal protection of CME's investment by eliminating ČNTS as exclusive service provider, which was the basis of CME's investment in the Czech Republic.

#### **(5) Causation of damage by Council's actions and omissions**

575. The collapse of CME's investment was caused by the Media Council's coercion against CME, in requiring in 1996 the amendment of the legal structure as the basis of its investment and by aggravating the Media Council's interference with the legal relationship between CET 21 and ČNTS by issuing an official regulator's letter which eliminated the exclusivity of the Service Agreement, an exclusivity that was the cornerstone of CME's legal protection for its investment. The destruction of CME's investment after the termination of the Service Agreement on August 5, 1999 was the consequence of the Media Council's actions and inactions. The legal disputes, proceedings and actions between CET 21, ČNTS and CME thereafter do not affect the qualification of these actions and omissions as breach of the Treaty.
576. The key question of these arbitration proceedings, whether the Council by coercion forced CME to give up its legal "safety net" in 1996, is to a

large extent answered by the Council's own interpretation of the sequence of events. In contrast to the Respondent's submission in these arbitration proceedings (according to which CME 1996 voluntarily agreed on the change of ČNTS' Memorandum of Association and on the implementation of the Service Agreement), the Media Council's own description of the events is probative. In the Report of the Council for the Czech Parliament of September 1999, the Council made it abundantly clear that the Council was successfully requiring CME to change the MOA by threatening it with administrative proceedings. In respect to the exclusivity of the use of the Licence, which was a cornerstone for the protection of the Claimant's investment in the Czech Republic, the Council reported to the Parliament as follows:

*"Each party has its own version of the heart of the issue based on a different interpretation of concluded agreements. CME insists on exclusivity and claims that CET 21 is obliged to broadcast exclusivity through ČNTS whereas CET 21 denies exclusivity and claims its right to conclude service agreements with any companies it pleases. As in the past, the Council's position in this matter is close to the opinion that an exclusive relationship between the licence-holder and a service company is not desirable as it gives an opportunity to manipulate with the licence. However, in this dispute the Council will not provide interpretation of relevant provisions of agreements concluded between the two parties of the dispute as it is not its authority from the nature of matters. The Council can only state that results of past administrative proceedings, when the Council made the licence-holder to remedy certain legal faults in the Memorandum of Association and to adhere to laws, are currently showing in this matter".*

577. This is a very modest description of the Regulator's pressure put on CME/ČNTS in order to change the legal basis for the co-operation between CET 21 and ČNTS, now describing this as *"the remedy of certain legal fault"* in the MOA which, in 1993, the Council (at that time composed of other Council members) had jointly developed and implemented in order to attract the investment and support of the foreign investor CEDC.
578. Also, the oral report of the Chairman of the Council, Mr. Josefík, at the meeting of the Standing Committee for Mass Media of the Parliament of September 30, 1999, as reported by the minutes of the meeting, explained the background for the Council's reversal of its legal position in



respect to the 1993 split structure, taking the ex-post-view that the 1993 structure was the illegal transfer of the licence to ČNTS:

*“The arrangement between the service organization and the operator was quite unclear from the very beginning, and the Council was criticized for insufficient control of whether, for example, the licence was being transferred from the licensed entity to the ČNTS company. In May 1994 the Council was recalled precisely because, in the opinion of the House of Representatives, it had accepted a situation in which the provisions of the Act on Broadcasting were constantly violated in the case of the operation of nation-wide broadcasting by a subject that was not authorized to perform such activity. Therefore it tolerated the illegal transfer of the licence to ČNTS.*

*Then came a period in which the Council, in its new composition, made a very intensive effort to achieve clear relationships between the service organization and the operating company which would be in compliance with the Act on Broadcasting. After an unsuccessful attempt to delete an activity entered in the Commercial Register for the ČNTS company, the Council initiated an administrative proceeding concerning violation of the Act on Broadcasting by this company’s unauthorized broadcasting. . . . [in the following Mr. Josefík dealt with the new Media Law of 1996.] ...however, it then proceeded with administrative proceedings concerning unauthorized broadcasting and terminated them only when the operator, CET 21, proved that the broadcasts were in compliance with the law. These changes were also reflected in the Memorandum of Association and the modification of relationships between CET and ČNTS”.*

579. The Respondent’s position in these arbitration proceedings, according to which the original 1993 split structure did not violate the Media Law, that (only) its implementation was unlawful and (further) that, in 1996, CME/ČNTS voluntarily agreed to change the MOA is unsustainable, in the light of the Media Council’s and its Chairman’s own reports to the parliament. The Media Council required CME to give up its legal protection for its investment and aggravated its so doing by interfering in conjunction with Dr. Železný into the contractual relationship between CET 21 and ČNTS in 1999. These acts caused the complete destruction of CME’s investment in the Czech Republic, ČNTS holding now idle assets without a business operation after Dr. Železný and his company CET 21 established new service providers for TV NOVA.

580. The Respondent further argued that no harm would have come to CME's investment without the actions of Dr. Železný; hence, the Media Council and the Czech State are absolved of responsibility for the fate of CME's investment. This argument fails under the accepted standards of international law. As the United Nations International Law Commission in its Commentary on State responsibility recognizes, a State may be held responsible for injury to an alien investor where it is not the sole cause of the injury; the State is not absolved because of the participation of other tortfeasors in the infliction of the injury (*Articles on the Responsibility of States for Internationally Wrongful Acts, adopted on second reading by the United Nations International Law Commission, 9 August 2001, Article 31, "Reparation", Commentary, paragraphs 9-10, 12-13*).

581. This approach is consistent with the way in which the liability of joint tortfeasors is generally dealt with in international law and State practice:

*"It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause ... . In other words, the liability of a tortfeasor is not affected vis-à-vis the victim by the consideration that another is concurrently liable"* (J.A. Weir, "Complex Liabilities", in A. Tunc (ed.), *International Encyclopedia of Comparative Law*. (Tubingen, Mohr, 1983), vol. XI., p. 41).

582. The Media Council's actions in 1996 interfered with CME's investment by depriving ČNTS's broadcasting operations of their exclusive use of the broadcasting licence, which was contributed by CET 21 to ČNTS as a corporate contribution. This interference with ČNTS' business and the Media Council's actions and omissions in 1999 must be characterized similar to actions in tort. The Tribunal therefore is of the view that the above described principles apply in this case. CME as aggrieved Claimant may sue the Respondent in this arbitration and it may sue Dr. Železný in separate proceedings, if judicial protection is available under Czech or other national laws. In this arbitration the Claimant's claim is not reduced by the Claimant's and/or ČNTS's possible claims to be pursued against Dr. Železný in other courts or arbitration proceedings, although the Claimant may collect from the Respondent and any other

potential tortfeasor only the full amount of its damage. This question is not dealt with in this Partial Award, It could be decided when deciding on the quantum of the Claimant's claim or by national courts when dealing with the enforcement of an award or judgment, which adjudicates the recovery for the same damage.

583. The U.N. International Law Commission observed that sometimes several factors combine to cause damage. The Commission in its Commentary referred to various cases, in which the injury was effectively caused by a combination of factors, only one of which was to be ascribed to the responsible State. International practice and the decisions of international tribunals do not support the reduction or attenuation of reparation of concurrent causes, except in cases of contributory fault. The U.N. International Law Commission referred in particular to the *Corfu Channel case*, according to which the United Kingdom recovered the full amount of its claim against Albania based on the latter's wrongful failure to warn of mines at the Albanian Coast, even though Albania had not itself laid the mines (see *Corfu Channel, Assessment of the Amount of Compensation*, I.C.J. Reports 1949, p. 244 at p. 350). "*Such a result should follow a fortiori in cases, where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals*", (UN International Law Commission as cited). The U.N. International Law Commission further stated:

*"It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct."*

584. Various terms are used for such allocation of injury under international law.

*"The allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses "attributable [to the wrongful act] as a proximate cause", or to damage which is "too indirect, remote, and uncertain to be appraised."*

*"In some cases, the criterion of "directness" may be used, in others "foreseeability" or "proximity". But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule (see U.N. international Law Commission with further extensive citations).*

585. Pursuant to these standards, the allocation of injury or loss suffered by CME to the Media Council's acts and omissions is appropriate. The Media Council, when coercing ČNTS in 1996 to amend its MOA and to implement the Service Agreement must have understood the foreseeable consequences of its actions, depriving CME of the legal "safety net" for its investment in the Czech Republic. Also in 1999 the Media Council must have foreseen the consequences of supporting Dr. Železný, in dismantling the exclusiveness of ČNTS' services for CET 21 by the Council's regulatory letter of May 15, 1999, which supported Dr. Železný's actions "to harm ČNTS."

#### **(6) The Respondent breached the Treaty**

By the Media Council's actions and failures to act, the Respondent has violated its obligations towards the Claimant and its predecessors under the Treaty.

586. The Respondent's violation of the Treaty relates only to the Media Council's actions and omissions, although the Czech Parliament had substantial influence on the Media Council. For example *"In May 1994, the Council was recalled precisely because, in the opinion of the House of Representatives, it had accepted a situation, in which the provisions of the Act on Broadcasting were constantly violated in the case of the operation of nation-wide broadcasting by a subject that was not authorized to perform such activity"* (minutes of the 6th meeting of the Standing Committee for Mass Media of September 30, 1999, page 9 of the translation). Thereafter, the Council "in its new composition" reviewed the situation and took certain steps to reverse the relationship between the service company and the operating company.

587. Further, the Council was obligated to render regular reports to the Permanent Commission for the Media of the Lower House of the Parliament and further, was obligated to give special reports on certain issues such as *“the situation of the television station NOVA”* as requested by the Permanent Commission in its resolution of September 30, 1999.
588. Moreover, the Czech Parliament, by implementing the new Media Law in force as of January 1, 1996, strongly affected broadcasting licences already granted by the Media Council, in particular by allowing the licence-holder to request the waiver of licence conditions. This amendment of the Media Law had substantial influence on the 1993 split structure as developed by the Media Council for CET 21/ČNTS and other broadcasters to secure the proper co-operation of the licence-holder and the service provider. By this amendment of the Media Law, the Media Council lost its tool to monitor and supervise this co-operation. It remained a broadcasting regulator responsible for the fulfilment of the legal requirements and duties under the Media Law, whereas the service provider, providing the broadcasting operation, as a consequence of the new Media Law, escaped the Council’s survey and control.
589. It transpires from the documents submitted to the Arbitral Tribunal in these proceedings that the Media Council clearly understood and deplored this development. However it is also clear that the Czech Parliament has the authority to organize national broadcasting in any way it feels suitable, subject to any relevant international obligations of the Czech State. The acts of the Czech Government, the Czech Parliament or its Commissions are not under scrutiny by the Arbitral Tribunal in these proceedings.
590. The Czech State acted towards the Claimant and its predecessors as investors under the Treaty solely by acts of the regulator, the Media Council. It is not the task of the Arbitral Tribunal to judge whether these acts were in compliance with Czech law and regulations. The only task for this Tribunal is to judge whether the actions and omissions of the Media Council were in compliance with the Treaty. The Tribunal’s considered conclusion is that the actions and failures to act of the Media Council as described above, affecting CME and ČNTS, were in breach of the Treaty.

**(i) The obligation not to deprive the Claimant of its investment  
(Treaty Article 5)**

591. The Claimant's expropriation claim under Article 5 of the Treaty is justified. The Respondent, represented by the Media Council, breached its obligation not to deprive the Claimant of its investment. The Media Council's actions and omissions, as described above, caused the destruction of ČNTS' operations, leaving ČNTS as a company with assets, but without business. The Respondent's view that the Media Council's actions did not deprive the Claimant of its worth, as there has been no physical taking of the property by the State or because the original Licence granted to CET 21 always has been held by the original Licensee and kept untouched, is irrelevant. What was touched and indeed destroyed was the Claimant's and its predecessor's investment as protected by the Treaty. What was destroyed was the commercial value of the investment in ČNTS by reason of coercion exerted by the Media Council against ČNTS in 1996 and its collusion with Dr. Železný in 1999.
592. The reversal of the Media Council's position in respect to CME's investment (after Council members were replaced by the Czech Parliament in response to criticism of the Licence granted to CET 21 in conjunction with the foreign investment in ČNTS) might have been motivated by the new Media Law as of January 1, 1996. However, this does not justify the Council's new interpretation of the legal situation or other regulatory necessities seen by the Council in 1996 and there is no justification for the Council's actions in 1996, enforcing the amendment of 1993 arrangements.
593. The Respondent's defence that this interference in 1996 did not do any harm, as *"the Czech Court determined that, as a matter of law as well as a matter of fact, ČNTS had the exclusive right to provide certain television services to CET 21 before ČNTS took the step that terminated the 1997 Service Agreement and that step, of course, was the withholding of the daily programme log on the 4th August 1999"*, is not convincing. In particular, the Defendant's view: *"That step plainly had nothing whatever to do with the Czech Authorities"*, is unsustainable. The amendment of the MOA by replacing the licence-holder's contribution of the Licence by

the worthless “use of the know-how of the Licence” is nothing else than the destruction of the legal basis (“the safety net”) of the Claimant’s investment. This destruction was clearly caused by the Czech State, acting through the Media Council.

594. The Respondent’s claim that the Media Council has never reversed its attitude to exclusivity, as it accepted exclusivity in 1993, but also accepted exclusivity in the amended provisions in 1996, is not supported by the clear wording of the documents. The contrary is the case, as already explained above. The Respondent’s contention that the Media Council consistently tried to make clear that it was not concerned by the question of exclusivity but by the question of the danger that an exclusive arrangement may lead to an unlawful transfer of the Licence, is not convincing. The clear facts speak against it. The Council, according to its own interpretations in its reports to the Czech Parliament, reversed its assessment of the legal situation in respect to the validity of the 1993 split ‘structure and took the necessary steps to implement this view by coercing the change in the 1993 legal arrangements.
595. The Respondent’s further argument that the Council, in its internal deliberations, never discussed the matter of exclusivity until recently, might well be the case. Indeed, the Council’s interference in 1996, enforcing the amendment of the MOA, was much more far reaching. The Council forced the shareholders of ČNTS to replace CET 21’s contribution of “use of the Licence” by a worthless substitute, carrying a similar name. The amendment was extracted from ČNTS by the institution of administrative proceedings which sprung from the Media Council’s own assessment of the events. As already dealt with above, the Respondent’s argument that the 1993 arrangement was not better than the 1996 amended arrangement is not convincing.
596. The Respondent’s further argument, also already rebutted above, that the 1993 legal arrangements did not prevent CET 21 from obtaining broadcasting services from other providers, goes against the exclusivity of the 1993 arrangement in the MOA.
597. The Respondent’s further argument, according to which the efficacy of the 1993 arrangement has never been tested, is also not convincing.

The Czech Civil Courts tested the arrangements. The Czech Appeal Court's view that ČNTS' refusal to deliver the 4th August daily log gave good cause for CET 21 to terminate the Service Agreement is a clear proof of the fragile character of the (coerced) 1996 amendment. Since 1996, the legal safety net for the investment was based on the fragile structure of a Service Agreement which could be terminated by CET 21 under any given or invented reason, creating by this an intolerable uncertainty for a long-term investment.

598. In this respect, it would be superfluous to say that the contribution of "the use of a Licence" (approved by the regulator) provided substantially more legal safety for ČNTS than the bilateral Service Agreement whose legal uncertainty is demonstrated by the sequence of the following events and the differing court decisions on this subject by the Regional Commercial Court of Prague, the Appellate Court of Prague and the Czech Appeal Court's decision pending when the hearing of these arbitration proceedings were closed.
599. The Respondent's argument that no loss occurred in 1996 and 1997 as a direct consequence of the legal changes in 1996 and that CME was in the position to equally enjoy its investment after the implementation of the 1996 arrangements, is not convincing. Legal protection (and safety nets, as the Respondents representatives said) prove their strength not at the day of implementation but at the day of breach. The enforced or coerced waiver of legal protection was per se a substantial devaluation of the Claimant's investment. The persons involved, including the representatives of the Media Council, CET 21 and ČNTS and also ČNTS' shareholders, clearly understood the character and the impact of the enforced changes on the protection of ČNTS' operations as exclusive service provider for CET 21. The Media Council deprived the Claimant of its investment's security by requiring CME in 1996 to enter into a new MOA and thereby giving up the exclusive right to use the Licence and further, in 1999, by actively supporting the licence-holder CET 21, when it breached the exclusive Service Agreement with ČNTS.
600. The Council, after having issued on March 15, 1999 a regulatory letter to ČNTS and CET 21 requesting the implementation of the non-exclusive service arrangement in support of Dr. Železný's openly disclosed inten-



tion to harm the foreign investor, was obligated to rectify the situation. In the least, the Council should have withdrawn the March 15, 1999 letter and made clear that the 1996 contractual relations were not in breach of the Media Law. However the Media Council, although frequently notified by ČNTS and CME of the consequences of its actions and failures to act, remained silent or disclaimed jurisdiction and so supported the vitiation of the Claimant's investment.

601. The basic breach by the Council of the Respondent's obligation not to deprive the Claimant of its investment was the coerced amendment of the MOA in 1996. The Council's actions and omissions in 1999 compounded and completed the Council's part in the destruction of CME's investment.
602. The Media Council, by its actions and omissions in 1996 and 1999, caused the damage suffered by the Claimant. Causation arises because the Media Council intentionally required ČNTS to give up the right of the exclusive use of the Licence under the MOA. The Media Council's possible motivation for such action -- to obtain regulatory control again over the broadcasting operation of CET 21 after the new Media Law came into force in 1996 -- is irrelevant. A change of the legal environment does not authorize a host State to deprive a foreign investor of its investment, unless proper compensation is granted. This was and is not the case. Furthermore, it must be noted that the change of the 1993 legal arrangement in 1996 as required by the Media Council, for whatever reasons, does not justify the Council's collaboration in the assault on CME's investment by supporting CET 21's breach of the Service Agreement in 1999. The Respondent, therefore, is obligated to remedy the damages which occurred as a consequence of the destruction of Claimant's investment.
603. Of course, deprivation of property and/or rights must be distinguished from ordinary measures of the State and its agencies in proper execution of the law. Regulatory measures are common in all types of legal and economic systems in order to avoid use of private property contrary to the general welfare of the (host) State. The Council's actions and inactions, however, cannot be characterized as normal broadcasting regulator's regulations in compliance with and in execution of the law, in par-

ticular the Media Law. Neither the Council's actions in 1996 nor the Council's interference in 1999 were part of proper administrative proceedings. They must be characterized as actions designed to force the foreign investor to contractually agree to the elimination of basic rights for the protection of its investment (in 1996) and as actions (in 1999) supporting the foreign investor's contractual partner in destroying the legal basis for the foreign investor's business in the Czech Republic. The actions and inactions affected the value of CME's shares in ČNTS, such shares being clearly a "foreign investment" in accordance with the Treaty, as already dealt with above (see also the TRADEX case as cited above).

604. The expropriation claim is sustained despite the fact that the Media Council did not expropriate CME by express measures of expropriation. De facto expropriations or indirect expropriations, i.e. measures that do not involve an overt taking but that effectively neutralize the benefit of the property of the foreign owner, are subject to expropriation claims. This is undisputed under international law (G. Sacerdoti page 382 as cited above, referring to numerous precedents such as the German Interests In Polish Upper Silesia case, 1926, PCIJ, Series A, No. 7, reprinted in M. Hudson, ed., I World Court Reports 475 (1934); see also Southern Pacific Properties (Middle East) Ltd. v. Egypt, ICSID Case No. ARB/84/3 (1992), 32 I.L.M. 993, 1993, dealing also with the expropriation of contractual rights of the operating company).
605. Furthermore, it makes no difference whether the deprivation was caused by actions or by inactions. [See Biloune, et al. v. Ghana Investment Centre, et al. 95 I.L.R. 183, 207-10 (1993); also published in the Yearbook Commercial Arbitration XIX (1994, page 11) and see also the International Technical Products Corp. v. Iran Award No. 196-302-2 (1985), 9 Iran-US CTR Rep. 273, page 239].
606. In the Metalclad Corporation v. United Mexican States case (ICSID Case No. ARB (AF)/97/1 (2000) in respect to NAFTA Article 1110 (expropriation), the ICSID Tribunal stated that an expropriation under this provision included not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with use

of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably to be expected economic benefit of property even if not necessarily to the obvious benefit of the host State. Thus, by permitting or tolerating the conduct of the municipality, which the tribunal had held amounted to an unfair and inequitable treatment that breached Article 1105, and by participating or acquiescing in the denial to the investor of the right to operate, notwithstanding the fact that the project had been fully approved and endorsed by the federal Government, the State Party must in the tribunal's opinion have taken a measure tantamount to expropriation in violation of Article 1110 (1). This view of the ICSID Tribunal is supported by the Biloune award as cited above.

607. Expropriation of CME's investment is found as a consequence of the Media Council's actions and inactions as there is no immediate prospect at hand that ČNTS will be reinstated in a position to enjoy an exclusive use of the licence as had been granted under the 1993 split structure (even if the Czech Supreme Court would re-instate the Regional Commercial Court decision). There is no immediate prospect at hand that ČNTS can resume its broadcasting operations, as they were in 1996 before the legal protection of the use of the licence was eliminated.
608. In this respect, the Iran-United States Claims Tribunal stated:

*“A deprivation or taking of property may occur under international law through interference by a State in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected. [Citations omitted.] 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.”*

(see Tippetts, Abbett, McCarthy, Stratton v. TAMS/Affa Consulting Engineers of Iran et al. of 29.06.1984; 6 Iran-United States CTR, 219 et seq. page 225 as confirmed by Phelps Dodge Corp. et al v. 2. Iran, Award

No. 217-99-2 (1986), reprinted in 10 Iran - U.S. Cl. Trib. Rep. 121 (1987); see also *Sea-Land Service, Inc. v. Iran*, 6 Iran-United States C.T.R. 149 at 166):

*"A finding of expropriation would require, at the very least, that the Tribunal be satisfied that there was deliberate governmental interference with the conduct of Sea-Land's operation, the effect of which was to deprive Sea-Land of the use and benefit of its investment."*

609. In the case before this Tribunal, the situation is even clearer. The object of the Media Council in 1996 was to amend the 1993 split structure by removing the exclusive use of the licence from ČNTS to CET 21, the only company which under the new Media Law in force as of January 1, 1996 was under control of the Council. This deprivation of ČNTS' "exclusive use of the Licence" was compounded by the Media Council's actions and inactions of 1999. This qualifies the Media Council's actions in 1996 and actions and inactions in 1999 as expropriation under the Treaty.

**(ii) The remaining claims**

610. The remaining claims are based on the same facts as the expropriation claim.

**a) The obligation of fair and equitable treatment (Article 3 (1) of the Treaty)**

611. The Media Council's intentional undermining of the Claimant's investment in ČNTS equally is a breach of the obligation of fair and equitable treatment. The Respondent's position that the Media Council also required other broadcasters in the same way to revise the structure of the 1993 split legal arrangements between licence-holder and service provider is irrelevant. The facts and circumstances of the legal arrangements of the other broadcasters were not a subject of these arbitration proceedings. Should the Media Council have interfered with the contractual relations of other broadcasters in the same way as it did between CET 21 and ČNTS, these other actions might also be qualified as a breach of law as the case may be. These other cases, however, to the

extent that they are realistic, do not legitimate the Media Council's actions and inactions versus CME/ČNTS as being fair and equitable. The standard for actions being assessed as fair and equitable are not to be determined by the acting authority in accordance with the standard used for its own nationals. Standards acceptable under international law apply, e.g. the threshold test of Professor Vagts as cited above. The Media Council breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon with the foreign investor was induced to invest.

**b) The obligation not to impair investments by unreasonable or discriminatory measures (Article 3 (1) of the Treaty)**

612. The same considerations set out under the expropriation claim govern the claim for unfair and inequitable treatment as well. On the face of it, the Media Council's actions and inactions in 1996 and 1999 were unreasonable as the clear intention of the 1996 actions was to deprive the foreign investor of the exclusive use of the Licence under the MOA and the clear intention of the 1999 actions and inactions was collude with the foreign investor's Czech business partner to deprive the foreign investor of its investment. The behaviour of the Media Council also smacks of discrimination against the foreign investor.

**c) The obligation of full security and protection (Article 3 (2) of the Treaty)**

613. The Media Council's actions in 1996 and its actions and inactions in 1999 were targeted to remove the security and legal protection of the Claimant's investment in the Czech Republic. The Media Council's (possible) motivation to regain control of the operation of the broadcasting after the Media Law had been amended as of January 1, 1996 is irrelevant. The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment with-

drawn or devalued. This is not the case. The Respondent therefore is in breach of this obligation.

**d) The obligation to treat investments in conformity with principles of international law (Articles 3(5) and 8 of the Treaty)**

614. The Media Council's actions as described above are not compatible with the principles of international law, which the Arbitral Tribunal is charged with applying. On the contrary, the intentional undermining of the Claimant's investment's protection, the expropriation of the value of that investment, its unfair and inequitable treatment, the Media Council's unreasonable actions, the destruction of the Claimant's investment security and protection, are together a violation of the principles of international law assuring the alien and his investment treatment that does not fall below the standards of customary international law.

**(7) The Reparation Claim**

615. The Respondent, as a consequence of the breach of the Treaty, is under an obligation to make full reparation for the injury caused by the Media Council's wrongful acts and omissions as described above. A causal link between the Media Council's wrongful acts and omissions and the injury the Claimant suffered as a result thereof, is established, as already stated above. The Respondent's obligation to remedy the injury the Claimant suffered as a result of Respondent's violations of the Treaty derives from Article 5 of the Treaty and from the rules of international law. According to Article 5 subpara. c of the Treaty, any measures depriving directly or indirectly an investor of its investments must be accompanied *"by a provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments effected."* A fortiori unlawful measures of deprivation must be remedied by just compensation.

616. In respect to the Claimant's remaining claims, this principle derives also from the generally accepted rules of international law. The obligation to

make full reparation is the general obligation of the responsible State consequent upon the commission of an internationally wrongful act (see the Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the U.N. International Law Commission as cited above). The general principle of the consequences of the commission of an internationally wrongful act was stated by the Permanent Court in the Factory at Chorzów case:

*“It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.”* (Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9, para. 21).”

617. In a subsequent decision the Permanent Court in the Factory at Chorzów case went on to specify in more detail the content of the obligation of reparation. It said:

*“The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”* (Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17, para. 47).

618. This view has been accepted and applied by numerous arbitral awards (Commentary of the Articles on the Responsibility of States for Internationally Wrongful Acts with further citations). The Respondent is obligated to “wipe out all the consequences” of the Media Council’s unlawful acts and omissions, which caused the destruction of the Claimant’s investment. Restitution in kind is not requested by the Claimant (as restitution in kind is obviously not possible, ČNTS’ broadcasting operations having been shut down for two years). Therefore, the Respondent is obligated

to compensate the Claimant by payment of a sum corresponding to the value which a restitution in kind would bear. This is the fair market value of Claimant's investment as it was before consummation of the Respondent's breach of the Treaty in August 1999. In accordance with the parties joint request, the quantum of the Claimant's claim shall not be determined by this Award. Therefore, on request of the Claimant, the amount of the Claimant's claim is to be determined in a second phase of this arbitration.

### **III. Costs of the proceedings**

619. The parties instructed the Arbitral Tribunal to render an Award, if affirmative in respect to the Claimant's claims, that does not decide on the quantum of the claims. The parties further requested the Arbitral Tribunal to adopt a decision in respect to the costs of the proceedings incurred by the rendering this Partial Award. The Arbitral Tribunal, however, cannot, at this stage, judge to what extent the Claimant will be successful in respect of the quantum of its damage claims although the decision on the quantum would provide a better basis for the allocation of costs. In respect to costs, the Tribunal, therefore, makes an assessment on the basis of the present status of the proceedings without by this assessment pre-judging the quantum of damages, and on the basis as well of Article 40, paragraph 1 of the UNCITRAL Rules, which says that "the arbitral tribunal may apportion each of such costs between the parties, if it determines that apportionment is reasonable, taking into account the circumstances of the case."
620. In assessing what costs of the Claimant to be refunded by the Respondent are acceptable and reasonably incurred, the Tribunal further considered inter alia that the Claimant initiated these arbitration proceedings after having initiated and partly carried through the *Lauder vs/ The Czech Republic UNCITRAL Arbitration Proceedings* which, in essence, deal with the same dispute. The parties used, as the Tribunal was informed, the work product of their advisors and the witness statements of these parallel UNCITRAL Arbitration Proceedings. The Respondent expressly stated in its Statement of Costs that the Respondent was able to use to a large extent the pleadings and witness statements originally



drafted for the use by the Respondent in the Lauder vs. Czech Republic UNCITRAL Arbitration.

621. The Arbitral Tribunal took account of this situation and also the fact that the Claimant and its ultimate shareholder, by initiating two parallel UNCITRAL Treaty Proceedings had, as the Claimant expressed it, "*two bites of the apple*", and thereby enlarged costs and risks. It is, therefore, reasonable to decide that the Respondent, although this Partial Award is wholly unfavourable to it, shall be required to refund to Claimant only a portion of the Claimant's legal fees and disbursements, which portion is determined by the Arbitral Tribunal being US \$ 750,000.
  
622. For the Tribunal's costs and disbursements the Tribunal charged the parties in the total amount of US \$ 1,096,498.86 for the Tribunal's services and as compensation for the Tribunal's expenses for the period until the rendering of this Partial Award. The Claimant made an advance of costs in the amount of US \$623,249.43 and the Respondent an advance of US \$400,000, all together US \$ 1,023,249.43. By letter dated August 28, 2001, the Respondent informed the Tribunal that the payment of the final advance of costs in the amount of US \$ 73,249.43 to the Tribunal as requested by the Tribunal on August 15, 2001, will be made. The Tribunal, therefore, by letter dated August 30, 2001, withdraw its instruction to the Claimant dated August 30, 2001 to pay this amount. The Tribunal dealt with the respective payment in this Partial Award as if it has been made. The Tribunal may render a further partial award on costs, should such payment fail.
  
623. In respect to the allocation of these costs to the parties the Arbitral Tribunal took account of the above-mentioned facts and circumstances and allocated these costs as decided below.

**J.  
Decision**

624. The Tribunal decides as follows:

1. The Respondent has violated the following provisions of the Treaty:
  - a. The obligation of fair and equitable treatment (Article 3 (1));
  - b. the obligation not to impair investments by unreasonable or discriminatory measures (Article 3 (1));
  - c. the obligation of full security and protection (Article 3 (2));
  - d. the obligation to treat foreign investments in conformity with principles of international law (Article 3 (5) and Article 8 (6), and
  - e. the obligation not to deprive Claimant of its investment (Article 5); and
2. The Respondent is obligated to remedy the injury that Claimant suffered as a result of Respondent's violations of the Treaty by payment of the fair market value of Claimant's investment as it was before consummation of the Respondent's breach of Treaty in 1999 in an amount to be determined at a second phase of this arbitration;
3.
  - (1) The Respondent shall bear its own legal costs.
  - (2) The Respondent shall pay to Claimant as refund of Claimant's legal costs and expenditures US \$750,000.
  - (3) The Claimant shall bear one third and the Respondent two thirds of the Arbitral Tribunal's costs and expenditures. The Respondent, therefore, shall further pay to the Claimant as refund of Claimant's payments of the Tribunal's fees and disbursements US \$257,749.81.

4. This Partial Award is final and binding in respect to the issues decided herein. The legal seat of the proceedings is Stockholm, Sweden.

The Tribunal will continue the arbitration proceedings in order to decide on the quantum of the Claimant's claim upon request of one of the Parties.

**K. Statement in accordance with Article 32 (4) UNCITRAL Arbitration Rules related to Dr. Hándl's failure to sign the Partial Award**

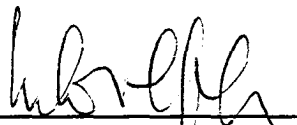
625. By letter dated September 11, 2001, Dr. Hándl requested the Chairman to attach to the Award (whose issuance he delayed) an explanation of his failure to sign the Award, as well as a dissenting opinion. Dr. Hándl refused to sign the Award with the following remark:

*"Partial Award not signed by Dr. Hándl as expression of his protest and dissenting from this Award - dissenting opinion enclosed, date: 11.9.2001, signature Dr. Hándl"*

The Chairman of the Tribunal, on his behalf and that of Judge Schwebel, pointed out to Dr. Hándl that his failure to sign would be in breach of his obligations as arbitrator. In the event, it is also a breach of his repeated recent assurances to the Chairman, in writing, that he "will sign" the Award.

The UNCITRAL Rules that govern this arbitration provide, in Article 32 (4), that: *"An award shall be signed by the arbitrators . . ."* (emphasis supplied). The Tribunal is confirmed in the conclusion that an arbitrator's failure to sign the award is a violation of the arbitrator's professional responsibilities by its examination of the rules and practice of the principal arbitral institutions as well as the papers and proceedings of the Stockholm and Paris Congresses of the International Council on Commercial Arbitration. Dr. Hándl's failure to perform his responsibilities as arbitrator is matched by the intemperance and inaccuracy of his dissent. He makes charges about the conduct of the hearings and the deliberations that are groundless. His position on the merits of the dispute speaks for itself.

Stockholm, 13 September 2001



(Dr. Wolfgang Kühn)  
Chairman of the  
Arbitral Tribunal)



(Judge Stephen M. Schwebel)  
Arbitrator

(JUDr. Jaroslav Hándl)  
Arbitrator