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IN THE MATTER OF AN UNCITRAL ARBITRATION

between

Ronald S. Lauder
757 Fifth Avenue
Suite 4200
New York, New York 10153
United States of America

The Claimant

and

The Czech Republic
Letenská 15
118 10 Prague 1
The Czech Republic

The Respondent

represented by:

John S. Kierman, W. Friedman
and M. Ostrove
Debevoise & Plimpton
875 Third Avenue
New York, New York 10022
United States of America

represented by :

Vladimir Petrus and
Miroslav Dubovsky
Clifford Chance Pünder
Charles Bridge Centre
Krizovnicke Nam. 2
110 00 Prague 1
Czech Republic

and

Mr. Jeremy Carver CBE
Mr. Audley Sheppard
Clifford Chance
200 Aldersgate Street
GB-London EC1A 4JJ

1. Introduction

1. In 1989, the Czech and Slovak people overthrew the communist regime and adopted a democratic governance system embracing market economy. New laws had to be adopted, foreign investment was encouraged.

2. Various Bilateral Investment Treaties were concluded to create the necessary legal protection for new investments, among them the Treaty between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment, entered into on 22 October 1991 (the Treaty).

3. On 30 October 1991, a new Act on Operating Radio and Television Broadcasting (the Media Law) was adopted. It provided for the creation of the Council of the Czech Republic for Radio and Television Broadcasting (the Media Council) to ensure the observance of the Media Law, the development of plurality in broadcasting, and the development of domestic and European audio-visual work. The Media Council was also competent to grant operating licences.

4. In 1992, the Media Council commenced the necessary licensing procedures for nation-wide private television broadcasting, and, on 9 February 1993, it granted License No 001/1993 to Central European Television 21, CET 21 spol. s r.o. (hereafter ,,CET 2l"), a company founded by a small number of Czech citizens.

5. During the license application proceedings, CET 21 had worked closely with a foreign group, Central European Development Corporation GmbH (hereafter "CEDC"), in which Mr. Ronald S. Lauder (hereafter the "Claimant" or "Mr. Lauder"), an American citizen, had an important interest. At that time and since then, Mr. Lauder has among other activities been an important player in the audio-visual media in the former communist States of Central and Eastern Europe.

6. The formula which was finally adopted envisaged the formation of a new joint company, Česká nezávislá televizní společnost , spol. s r.o. (hereafter"CNTS"), with

the participation of CET 21, a Czech bank and, as a majority shareholder, a company representing the foreign investors.

7. The key person was Dr. Vladimír Železný, a Czech citizen with a long experience in the media field, also a scriptwriter, etc. Mr. Železný became at the same time what amounted to the Chief Operating Officer of both CET 21 and CNTS. The new television station, TV Nova, immediately became very popular and very profitable.

8. The successful venture came to an end in 1999 when CNTS, on April 19, fired Mr. Železný from his functions with CNTS and when CET 21, on 5 August 1999, terminated its contractual relations with CNTS, after CNTS, on 4 August 4 1999, had not submitted the so-called Daily Log regarding the broadcasting for the following day.

9. During all this period the Media Council of the Czech Republic played an important role, especially during three periods. First, at the end of 1992 and the beginning of 1993, when it granted the License. Then, at the end of 1995 and in 1996, when a new Media Law became effective and the Media Council commenced administrative proceedings against CNTS, whereupon the agreements between CNTS and CET 21 were modified. Finally, during the Spring and Summer of 1999, when the final breach between CET 21 and CNTS occurred.

10. On 19 August 1999, Mr. Lauder commenced arbitration proceedings against the Czech Republic (hereafter the "Defendant") under the Treaty, claiming that the Czech Republic, through its Media Council, had violated the Treaty. This Award examines the claims brought forward by Mr. Lauder.

2. Procedural History

11. On 19 August 1999, Ronald S. Lauder initiated these arbitration proceedings by giving Notice of Arbitration to the Czech Republic. The Notice submitted that the dispute is subject to arbitration pursuant to Articles VI(2) and (3) of the Treaty and should be

heard by a panel of three arbitrators pursuant to Article 5 of the UNCITRAL Rules. The Notice of Arbitration also stated that the Czech Republic had consented to submit the dispute to arbitration pursuant to Article VI(3)(b) of the Treaty. The Claimant sought the following relief:

"[An] order [to] the Czech Republic to take such actions as are necessary to restore the contractual and legal rights associated with the claimant's investments. Among other things, the Czech Republic should:

a) be ordered to impose conditions on the License that adequately reflect and secure CNTS's exclusive right to provide broadcast services and its right to obtain all corresponding income *in connection with the operation of TV Nova;*

b) be required to enforce such conditions, including by revoking the License and reissuing it to CNTS or to such other entity and under such other circumstances as would restore the initial economic underpinnings of Mr. Lauder's investment; and

c) be held liable for the damages Mr. Lauder has incurred to date, in an amount to be determined by the Tribunal, taking into account, among other factors, the fair market value of Mr. Lauder's investment prior to the breaches of the Treaty".

12. The Claimant appointed Mr. Lloyd N. Cutler as co-arbitrator. The Respondent appointed Mr. Bohuslav Klein as co-arbitrator. Both co-arbitrators chose Mr. Robert Briner as Chairman of the Arbitral Tribunal.

13. On 5 November 1999, the Arbitral Tribunal issued Procedural Order No 1 provisionally fixing Geneva, Switzerland, as the place of arbitration, and determining English as the language of arbitration.

14. On 13 December 1999, the Arbitral Tribunal issued Procedural Order No 2 taking note of the agreement of the Parties proposing London as the place of arbitration.

15. On 31 January 2000, the Czech Republic submitted a Statement of Defence in which it requested that reference to arbitration by Mr. Lauder be dismissed on the grounds that the Arbitral Tribunal has no jurisdiction over the claim; and/or no investment dispute contemplated by the Treaty exists; and/or Mr. Lauder's Notice of Arbitration was premature or otherwise formally defective.

16. On 17 March 2000, a Procedural Hearing was held in London. The Arbitral Tribunal (i) decided that the issue of jurisdiction would be joined to the merits and that no separate decision on jurisdiction would be taken unless the Arbitral Tribunal would hold that a separate determination would shorten the proceedings; (ii) took note of the agreement of the Parties that they would make good faith efforts to agree by 30 April 2000 on a solution to the issue of the scope and timing of the production of documents required from the Respondent; (iii) took note of the agreement of the Parties that in general the IBA Rules on the Taking of Evidence in International Commercial Arbitration would be used; (iv) took note of the agreement of the Parties on the schedule for the submission of further briefs; (v) considered that a bifurcation of liability and remedy would not be helpful; (vi) took note of the agreement of the Parties with respect to the issues of confidentiality of the proceedings; (vii) took note of the absence of an agreement between the Parties to consolidate or coordinate the parallel UNCITRAL arbitration between CME and the Czech Republic; and (viii) addressed some other minor issues.

17. On 10 May 2000, the Claimant sent a letter to the Arbitral Tribunal regarding the production of further documents. The 14 March 2000 Declaration of Mr. Richard Baček was attached to this letter.

18. On 17 May 2000, the Arbitral Tribunal issued Procedural Order No 3 pursuant to which the Respondent was given a time limit until 23 May 2000 to answer the Claimant's request for production of further documents.

19. On 31 May 2000, after receipt of the Claimant's letter of 10 May 2000 requesting the production of further files, documents, minutes and other records in the possession of the Media Council, and of the Respondent's letter of 23 May 2000 requesting that the application be rejected, the Arbitral Tribunal issued Procedural Order No 4 rejecting the Claimant's request for production of further documents on the ground that it first needed to receive the Claimant's Memorial and the Respondent's Response.

20. On 30 June 2000, the Claimant filed his Memorial of Claimant. The following Witness Declarations were made in support of the Memorial:

- 29 June 2000 Declaration of Michel Delloye
- 29 June 2000 Declaration of Fred T. Klinkhammer
- 30 June 2000 Supplemental Declaration of Richard Baček
- 30 June 2000 Declaration of Laura DeBruce
- 30 June 2000 Declaration of Martin Radvan
- 30 June 2000 Declaration of Jan Vávra

21. On 16 October 2000, the Respondent filed its Response. The following Witness Declarations were made in support of the Response:
- 13 October 2000 Statement of Doc. Ing. Pave1 Mertlík CSc
- 16 October 2000 Statement of Josef Josefík
- 16 October 2000 Statement of RNDR. Josef Musil
- 16 October 2000 Statement of PhDr. Helena Havíková

22. On 6 November 2000, the Arbitral Tribunal issued Procedural Order No 5 inviting the Respondent to respond by 10 November 2000 to the renewed request of the Claimant that the Respondent be ordered to produce documents and material identified in the Supplemental Statement in Support of the Claimant's Request for Documents of 30 June 2000.

23. On 13 November 2000, the Arbitral Tribunal issued Procedural Order No 6 inviting the Claimant to respond by 16 November 2000 to the letter of the Respondent of 10 November 2000.

24. On 17 November 2000, the Arbitral Tribunal issued Procedural Order No 7 pursuant to which it decided that the Claimant's request for production of general categories of documents was inappropriate, but that the Respondent was ordered to submit to the Claimant and to the Arbitral Tribunal copies of those documents which the Claimant had previously been able to inspect but had not been allowed to copy.

25. On 8 December 2000, the Claimant filed his Reply Memorial. The following Witness Declarations were made in support of this Reply Memorial:
- 14 November 2000 Declaration of Jacob Z. Schuster

- 5 December 2000 Supplemental Declaration of Jan Vávra
- 5 December 2000 Statement of Ing. Jiří Brož
- 5 December 2000 Declaration of OhDr Marína Landová
- 7 December 2000 Declaration of Leonard M. Fertig
- 7 December 2000 Declaration of Nicholas G. Trollope
- 8 December 2000 Supplemental Declaration of Laura DeBruce
- 8 December 2000 Supplemental Declaration of Fred T. Klinkhammer
- 8 December Supplemental Declaration of Martin Radvan
- 21 December 2000 Declaration of Ing. Miroslav Pýcha

26. On 31 January 2001, the Respondent filed its Sur-Reply. The following Witness Declarations were made in support of this Reply Memorial:
- 19 February 2001 Second Statement of Josef Josefík
- 20 February 2001 Statement of Mgr. Milan Jakobec

27. On 19 February 2001, the Arbitral Tribunal issued Procedural Order No 8 in which the Respondent's Requests No 1 for an order for the Claimant to provide certain documents was denied: the Respondent's Request No 2, repeating the Request No 1 and asking in addition that Mr. Morgan-Jones be subpoenaed was denied; the Claimant's request that the Respondent be directed to cease its review of certain stolen and confidential documentation was denied; and the Respondent's Request No3 to submit pleadings, submission and evidence which had been submitted in other proceedings between other parties was denied.

28. On 20 February 2001, the Claimant filed the following additional Witness Declarations:
- 20 February 2001 Second Supplemental Declaration by Laura DeBruce
- 20 February 2001 Supplemental Declaration of Jacob Z. Schuster
- 20 February 2001 Declaration of Ira T. Wender

29. From 5 March to 13 March 2001, the Arbitral Tribunal held hearings in London. The Claimant presented the following witnesses:
- Mrs. Marina Landová

- Mr. Jan Vávra
- Mr. Martin Radvan
- Mrs. Laura DeBruce
- Mr. Leonard M. Fertig
- Mr. Fred T. Klinkhammer
- Mr. Michael Delloye

The Respondent presented the following witnesses:

- Mr. Josef Josefík
- Mr. Milan Jakobec
- Mrs. Helena Havlíková
- Mr. Josef Musil

Two witnesses, Mr. Jiří Brož and Mr. Josef Musil, did not attend the hearings. It was agreed by the Parties on 13 March 2001 that the Arbitral Tribunal would give these witnesses' recorded statements the weight the Tribunal believes to be appropriate (Transcript of 13 March 2001, p. 225-226).

On 13 March 2001, the Chairman declared that the proceedings were closed subject to the Parties' filing of their Written Closing Submissions by 30 March 2001 and their Replies by 6 April 2001, as well as the Parties' filing of their Statement of Costs and Expenses as agreed between the Parties (Transcript of 13 March 2001, p, 230-232).

30. On 30 March 2001, the Claimant filed a Summary of Summation, and the Respondent filed a Written Closing Submissions.

31. On 6 April 2001, the Claimant filed a Rebuttal to the Respondent's Written Closing Submission and the Respondent a Reply Written Closing Submissions.

32. On 17 April 2001, the Claimant filed a Statement of Costs, and the Respondent a Summary of the Costs.

33. On 19 April 2001 the Respondent filed an Amended Summary of Costs to include costs incurred between 1 April and 6 April 2001 and the advance on costs paid to the Tribunal. In this exchange, the Respondent also provided Comments on Costs of the Claimant.

34. On 18 June 2001, the Respondent, referring to an agreement of the Parties, asked for permission to submit pages from the transcript of the hearing held in Stockholm in the arbitration between CME and the Czech Republic (the Stockholm Hearing).

35. On 21 June 2001, the Claimant confirmed his agreement with respect to the submission of excerpts from the transcript of the Stockholm Hearing.

36. On 25 June 2001, the Arbitral Tribunal agreed that each Party may submit (i) by 3 July 2001 a maximum of 25 pages of excerpts from the Stockholm Hearing, together with a short brief not exceeding 10 pages, and (ii) by 10 July 2001 rebuttals not exceeding 5 pages.

37. On 3 July 2001, the Claimant filed Comments on Selected Excerpts from Testimony in Stockholm Proceedings and the Respondent a letter concerning submission of parts of the record from the Stockholm Hearing.

38. On 10 July 2001, both Parties filed their Replies to Submission of the other Party of 3 July 2001.

39. On 12 July 2001, the Respondent filed a larger excerpt of Mr. Klinkhammer's statements at the Stockholm hearing.

40. On 19 July 2001 the Claimant submitted, as proposed by the Respondent, a further excerpt from Mr. Klinkhammer's testimony.

41. The sole remaining dispute regarding discovery was with respect to specific communications (e-mails) from the Media Council, which the Respondent wanted the Claimant to provide along with the name of the person who had provided said communications to the Claimant (see Respondent's Request No 1 of 30 January 2001),

which request the Arbitral Tribunal had denied in Procedural Order No 8. On 1 March 2001, the Respondent declared that it accepted to participate in the arbitration under protest and reserved all its rights with respect to the denial of its request. At the 13 March 2001 hearing, the Chairman stated that the Respondent had not pointed out during the hearing that there was anything which would have impeded presentation of its defence but that due note was taken of the Respondent's reservation thereon (Transcript of hearing of 13 March 2001, p 232-233).

42. In the course of the proceedings, the Claimant withdrew his two first reliefs (see 1.1(a) and 1.1 (b) above), and maintained the relief for damages (see 1.1 (c)) above; Transcript of 5 March 2001, p. 57-58). The final relief sought by the Claimant is an award:

(1) Declaring that Respondent has violated the following provisions of the Treaty:

a. The obligation of fair and equitable treatment of investments (Article II(2)(a));

b. The obligation to provide full protection and security to investments (Article II(2)(a);

c. The obligation to treat investments at least in conformity with principles of international law (Article II(2)(a));

d. The obligation not to impair investments by arbitrary and discriminatory measures (Article II(2)(b)); and

e. The obligation not to expropriate investments directly or indirectly through measures tantamount to expropriation (Article III);

(2) Declaring that Claimant is entitled to damages for the injury that he has suffered as a result of Respondent's violations of the Treaty, in an amount to be determined at a second phase of this arbitration; and

(3) Directing Respondent to pay the costs Claimant has incurred in these proceedings to date, including the costs for legal representation and assistance (Relief Sought By Claimant of 10 March 2001).

43. The final relief sought by the Respondent is an award that:

(1) *Mr. Lauder's claim be dismissed on grounds of lack of jurisdiction, namely (i) no "investment dispute" as contemplated by the Treaty exists; and/or (ii) Mr. Lauder's Notice was premature or otherwise formally defective.*

(2) *And/or Mr. Lauder's claim be dismissed on grounds of lack of admissibility, namely it is an abuse of process*

(3) *And/or Mr. Lauder'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 (Article II(2) (a)).

(b) The obligation to provide full protection and security to investments (Article II(2)(a)).

(c) The obligation to treat investments at least in conformity with principles of international law (Article II(2) (a)).

(d) The obligation not to impair investments by arbitrary and discriminatory measures (Article II(2)(b)).

(e) The obligation not to impair investments directly or indirectly through measures tantamount to expropriation (Article III).

(4) *And/or Mr. Lauder's claim be dismissed and/or Mr. Lauder is not entitled to damages, on ground that the alIeged injury to Mr. Lauder's investment was not the direct and foreseeable result of any violation of the Treaty.*

(5) *And Mr. Lauder pay the costs of the proceedings and reimburse the reasonable legal and other cost of the Czech Republic* (Relief Sought by the Czech Republic of 13 March 2001).

3. Facts

3.1 The 19992-1993 events

43. On 30 October 1991, the Czech and Slovak Federal Republic adopted the Act on Operating Radio and Television Broadcasting (hereinafter: the "Media Law"). The Media Law empowered the Federal Council for Radio and Television Broadcasting (hereinafter: "the Media Council") to grant a license to broadcast radio and television programs (Exhibit R2).

44. Pursuant to the Act on the Czech Republic Council for Radio and Television Broadcasting of 21 February 1992, one of the duties of the Media Council is to supervise the observance of legal regulations governing radio and television broadcasting (Exhibit R6).

45. In 1992, the Media Council invited interested candidates to apply for a license for a new radio and television broadcasting on the third channel (hereinafter: "the License") (Exhibit R53).

46. On 27 August 1992, CET 21, a Czech company originally owned by some individuals (hereinafter: "the Founders"), and whose General Director was Mr. Železný, a Czech citizen, filed an application for the License (Exhibit C63).

47. Prior to the filing of the application, CET 21 had held discussions with the CEDC, a German company over which Mr. Ronald S. Lauder (hereinafter: "Mr. Lauder" or "the Claimant"), an American citizen, had indirect voting control.

48. The original idea was that CEDC would participate in the broadcasting operation by acquiring stock of CET 21 (Exhibit C134). Such a participation would comply with the requirements of the Media Law, which expressly envisaged in Article 10.6 the applications for license *"from companies with foreign equity participation"* (Exhibit R2).

49. On 31 August 1992, CEDC and the Founders of CET 21 agreed on a draft document named "Terms of Agreement". This document provided that CEDC would invest a sum of at least USD 10,000,000 in the establishment of a commercial television station in Prague *"through an equity investment in CET21"* in the form of redeemable *"preferred stock or equivalent equal to 49% ownership of CET 21"* and of "*an equal amount of common stock*". The Founders would be entitled to 2% of CET 21 each, i.e. 14% in total. The remaining 37% of CET 21 would be held by the Founders in reserve for additional investors (Exhibit C139).

50. On 28 September 1992, CET 21 prepared a document named "Project of an Independent Television Station". This document stated that CEDC *"is a direct participant in CET21's application for the license"* (Exhibit C9).

51. On 21 December 1992, the Media Council held preliminary hearings for the granting of the License. Messrs. Mark Palmer, President of CEDC, and Len Fertig, then consultant with CEDC, were present at the portion of the hearings on CET 21's application. The record of this portion of the hearings, drafted by the Media Council, speaks of *"'extensive share reserved for foreign capital"* and *"direct capital share, not credit"*. It also states that *"they [CEDC] see themselves as a predominantly passive investor, we want a station independent of foreign influence and political influence"* (Exhibit R58).

52. On 5 January 1993, CEDC and the Founders of CET 21 signed a document named "Terms of Agreement". This document provided for the same participation of CEDC in CET 21 as the above mentioned draft agreement dated 31 August 1992, i.e. 49% of redeemable preferred stock and of common stock (Exhibit C61).

53. The same day, the Media Council held a hearing which was attended by Messrs. Palmer, Fertig and Železný. The participants addressed the issues of other possible partners besides CEDC in the CET 21 investments, mainly Česká spořitelna, a.s., the Czech Savings Bank (hereinafter: "CSB"), the scope of CEDC's investments in the project, and the programming (Exhibit C141).

54. On 22 January 1993, the Media Council held further preliminary hearings. The record of the portion of the hearings on CET 21 expressly referred to CEDC. It stated that *"the participation of foreign capital is expected"* and *"the combination of domestic and foreign capital is important, necessity of safeguard - diversification of the investments* sources" (Exhibit C64).

55. On 30 January 1993, the Media Council held a session on the issuance of the License. It was decided that CET 21 was awarded the License. The following statements were made by some members of the Media Council at this session: "(...) *it is very significant that this is a business which can not be financed only by credit"* (Mr. Brož); *"considers the Czech and foreign capital in CET 21 positive"* (Mr. Brož); *"positive in that there is a stabilisation factor, as far as foreign capital and its involvement is concerned"* (Mr. Pýcha) (Exhibit R54).

56. The same day, the Media Council issued a press release announcing that CET 21 had been awarded the License. The press release stated that *"A direct participant in the application is the international corporation CEDC (...)"* (Exhibit C11).

57. The same day, the Media Council sent a letter to CET 21 informing them of its decision on the award of the License. This document also referred to *"(...) a direct party to the application being the international* corporation *CEDC* (...)" (Exhibit R9).

58. The Media Council's decision to award the License to CET 21 raised strong opposition, mainly from the political party ODS. The ODS blamed the Media Council for having hastily chosen a company, CET 21, whose representatives were bankrupt politicians and in which foreign capital prevailed (Exhibits R83, C144, and C145).

59. On 3 February 1993, CET 21 and CEDC submitted to the Media Council a document named "Overall Structure of a New Czech Commercial Television Entity". This document stated that CET 21 and CEDC would jointly create a new Czech company, which would have the exclusive use of the License *"(...) as long as CET 21 and CEDC have such* a *license"*. The shareholders of the new company would be CET 21, CEDC and CSB, the last two of them providing the necessary funds (Exhibits Cl4 and C149).

60. At the oral request of Mr. Jakobec, director of the Programming and Monitoring Section of the Media Council, the above mentioned document of 3 February 1993, was significantly modified, mainly to reflect the fact that the License would be granted to CET 21 only, and not to CET 21 and CEDC jointly. The modified document was issued on 5 February 1993 (Exhibit C150; declaration of Mrs. Landová of 5 December 2000, p. 8).

61. The same day, the Media Council held a meeting to which representatives of CET 21 were invited. The latter submitted to the Media Council the modified version of the above mentioned document named "Overall Structure of a New Czech Commercial Television Entity" (Exhibit R55).

62. On 9 February 1993, CET 21 issued a document stating that its general assembly, which had met the previous day, approved the conditions of the Media Council for the legal confirmation of the License (Exhibit R78).

63. The same day, the Media Council rendered the decision to award the License to CET 21. This decision referred to CEDC as CET 21's *"contractual partner"* (Exhibits R10 and C16).

64. The same day, the Media Council issued the License for a period of 12 years, expiring on 30 January 2005. The Appendix to the License set forth 31 conditions (hereinafter: "the Conditions") that CET 21 had to observe. Condition 17 required among other matters that CET 21, CEDC and CSB submit a business agreement to the Media Council for approval within 90 days (Exhibit R5).

65. The same day, CET 21 accepted without reservation the License, including the Conditions (Exhibits R11 and R77).

66. The same day, CSB confirmed its intention to participate in the broadcasting company to be set up together with CET 21 and CEDC (Exhibit R81).

67. On 8 April 1993, Mr. Železný acquired a 16.66% participation in CET 21.

68. On 21 April 1993, after having held several sessions to discuss the draft business agreements between CET 21, CEDC and CSB, and after having had several contacts in this matter with the representatives of these companies, the Media Council issued a letter approving the last version of the business agreement (Exhibit C19).

69. On 4 May 1993, CET 21, CEDC and CSB signed the final version of the business agreement, named "Memorandum of Association and Investment Agreement" (hereinafter: "the MOA"). The MOA provided for the formation of the CNTS, a Czech company which would manage the television station. CEDC would contribute 75% of CNTS's capital and obtain a 66% ownership interest (Article 1.4.3), CSB would contribute 25% of the capital and obtain a 22% ownership interest (Article 1.4.2). and CET 21 would contribute *"the right to use, benefit from, and maintain the License (...) on an unconditional, irrevocable and exclusive basis"* and obtain a 12% ownership interest (Article 1.4.1) (Exhibit R12).

70. On 12 May 1993, the Media Council rendered a decision amending and clarifying the License issued on 9 February 1993. The main amendment regarded Condition 17, which stated that the MOA was *"an integral part of the* license *terms"* (Exhibit C20).

71. On 8 July 1993, CNTS was incorporated in the Commercial Register administered by the District Court for Prague (Exhibit C89).

72. Mr. Železný was appointed General Director of the company.

73. CNTS then launched a television station named TV Nova, which soon became very successful.

3.2 The 1994-1997 events

74. On 12 May 1994, the Czech Parliament's Committee for Science, Education, Culture, Youth, and Physical Training PSP issued a statement that the Media Council had allowed television broadcasting by an unauthorized entity, i.e. CNTS.

75. In an undated opinion, the Media Council answered that CET 21 was the holder of the License, and CNTS was authorized by the former to perform all acts related to the development and operation of TV Nova. However, the License *"as such has not been contributed to CNTS and is separate from all other activities of CNTS"*. The Media Council added that, after having consulted *"with a number of leading legal experts, both Czech and foreign"*, this *"standard business procedure"* was discussed and approved, and did not violate any effective legal regulations (Exhibit C21).

76. On 4 July 1994, CNTS and CSB acquired 1.25% each of CET 21's stock (Exhibit R107). As a result, the participation in CET 21 was as follows:

- Mr. Železný: 16,66%
- The remaining Founders: 80.84%
- CEDC: 1.25%
- CSB: 1.25%.

77. On 28 July 1994, CEDC assigned all its capital interest in CNTS to CME Media Entreprises B.V. (hereinafter: "CME"), a Dutch company over which the Claimant also exercised control (Exhibit C128).

78. In the summer of 1994, the Czech Parliament replaced some members of the Media Council.

79. On 8 December 1995, the Czech Parliament amended the Media Law, effective 1 January 1996. Among the most relevant modification was the deletion of Article 12(3) of the original Media Law, which stated that *"In addition to conditions stated in paragraph 2, the decision to grant a license also includes conditions which the license-granting body will set for the broadcasting operator"*. The Media Law in Article 3 also contained a much narrower definition of the term "broadcaster" as the person to whom a license had been granted (see also the memorandum of Mrs. DeBruce of CME of 15 May 1996; Exhibit C111) (Exhibit R3).

80. On 2 January 1996, CET 21 applied to the Media Council for the cancellation of most of the Conditions set in the License (Exhibit R31).

81. On 18 January 1996, the Media Council asked the District Court for Prague 1, acting as authority for the Commercial Register, to re-examine CET 21's and CNTS's registrations and to submit a report thereon, being noted that such request had already been made on 2 February 1995, and was later repeated on 11 April 1996 (Exhibits R30, R32 and R33).

82. On 12 February 1996, the Media Council requested Mr. Bárta, at the State and Law Institute of the Academy of Science of the Czech Republic, to provide an expert opinion on CNTS's authority to operate television broadcasting (Exhibit C27).

83. On 19 February 1996, Mr. Bárta issued the requested expert opinion on the letterhead of the State and Law Institute of the Academy of Science of the Czech Republic. Based on the assumption that television broadcasting of TV Nova was operated by CNTS, the author came to the conclusion that administrative proceedings could be initiated to impose a fine for unauthorized broadcasting against CNTS. In addition, the Media Council could decide to cancel the License of CET 21 (Exhibit R14).

84. On 13 March 1996, a meeting was held between the Media Council and CET 21. Several issues were discussed, among them the relationship between CET 21 and CNTS regarding the operation of television broadcasting. The Media Council was concerned with the fact that CNTS was operating television broadcasting without being the holder - or the co-holder - of the License. Mr. Železný, acting on behalf of CET 21, argued that the current situation had been approved by the Media Council. At the Media Council's request, it was eventually agreed that a contract on the provision of performances and services between CET 21 and CNTS would be drafted and further discussed. It was also agreed that CET 21 would not require, in its application for cancellation of license conditions dated 2 January 1996, the cancellation of Condition 17. The application for cancellation of this specific condition would be the subject of further administrative proceedings (Exhibit C84).

85. On 21 March 1996, CET 21 applied for cancellation of Condition 17 (Exhibit R62).

86. At some time in April 1996 and as requested at the meeting of 13 March CET 21 and CNTS submitted to the Media Council two draft agreements setting forth their legal relationships (Exhibit R15).

87. On 2 May 1996, the State and Law Institute of the Academy of Science of the Czech Republic provided the Media Council with a legal opinion on the two above mentioned draft agreements between CET 21 and CNTS. It concluded that the situation of CET 21 was correctly resolved, the key point being that CET 21, and not CNTS, actually operated broadcasting on its own account (Exhibit R16).

88. On 15 May 1996, CME expressed its concern to Messrs. Železný and Fertig with respect to the contemplated changes to the MOA resulting from the above mentioned draft agreements. CME specifically referred to CET 21's envisaged power to withdraw CNTS's use of the License if CNTS allegedly breached the agreement (Exhibit Cl11).

89. On 23 May 1996, after two additional meetings between the Media Council and CET 21 (Exhibits R105 and C85), CNTS and CET 21 entered into a new agreement (hereinafter: "the May 1996 Agreement") setting forth their legal relationships. The Agreement stated in preamble that the MOA was not changed. In substance, it set forth that CET 21 was the holder of the License and the operator of television broadcasting, that the License was non-transferable, and was not the subject of a contribution from CET 21 to CNTS. CNTS's role was to arrange the television broadcasting (Exhibit R17).

90. On 4 June 1996, the Media Council informed CET 21 that the latter had breached the License by failing to timely announce changes in the registered capital, in the signing process, and in the company's registered office. It directed CET 21 and CNTS to change their registrations with the Commercial Registry, in particular to modify CNTS's business activity with respect to "*television broadcasting"* (Exhibit R95).

91. In June 1996, the Supreme State Attorney Office requested the Media Council to enable it to consult the files relating to the issue of the License to CET 21 and to CNTS's rights as the administrator of TV Nova. On this occasion, the Media Council

was informed that criminal investigations were pending with respect to CET 21's and CNTS's rights to administer TV Nova (Exhibit R89).

92. On 28 and 29 June 1996, the Media Council held a meeting during which it decided to cancel most of the Conditions to the License. The cancellation of Condition 17 was postponed in light of the court proceedings with respect to the registration in the Commercial Registry and the criminal investigation (Exhibit R56).

93. On 17 July 1996, CME purchased the 22% interest in CNTS held by CSB for a consideration in excess of USD 36,000,000 (declaration of Mrs. DeBruce of 30 June 2000, p. 5; declaration of Mr. Radvan of 30 June 2000, p. 5). As a result, CME held 88% of CNTS's stock, and CET 21 maintained its participation of 12% in CNTS.

94. On 22 July 1996, as its previous requests of 2 February 1995, 18 January and 11 April 1996, had been ignored, the Media Council asked the Regional Commercial Court in Prague to start proceedings on compliance of CET 21's and CNTS's registrations in the Commercial Register (Exhibit R36).

95. On 26 July 1996, the Media Council issued a decision regarding the cancellation of most of the Conditions to the License, as per its above mentioned meeting of 28 and 29 June (Exhibit R35).

96. The same day, the Media Council issued a decision to interrupt the administrative proceedings with respect to the envisaged cancellation of Condition 17 to the License because of the pending criminal investigation (Exhibit R34).

97. On 23 July 1996, the Media Council decided to commence administrative proceedings against CNTS for operating television broadcasting without authorization. CNTS was informed of said decision the same day (Exhibits R37 and R18).

98. On 1 August 1996, CME and Mr. Železný entered into a loan agreement pursuant to which the former would provide the latter with a loan of USD 4'700'000 for acquiring from the other individual shareholders 47% of CET 21's stock. The agreement provided for Mr. Železný to exercise all his voting rights as directed by CME until full

repayment of the loan (Exhibit R38). As a result, the participation in CET 21 was as follows:

- Mr. Železný: 60%
- The four remaining Founders: 37.5%
- CME: 1.25%
- CSB: 1.25%.

99. The Media Council was not informed of the change in CET 21's ownership.

100. On 13 August 1996, the Institute of the State and Law of the Academy of Sciences of the Czech Republic issued a legal opinion to CNTS pursuant to which the Media Council was obliged to meet CET 21's application to cancel the Conditions to the Licence (Exhibit C28).

101. On 21 August 1996, CET 21 requested the Media Council to cancel Condition 17 to the Licence (Exhibit R63).

102. On 4 October 1996, CET 21 and CNTS made proposals to the Media Council aimed at resolving the differences with respect to the legal relationships between the two companies. CET 21 and CNTS would enter into a new agreement providing that CET 21 is the operator of television broadcasting and is entirely responsible before the Media Council. Both companies would request that their registrations with the Commercial Register be modified. The Media Council, in turn, would continue the administrative proceedings on the cancellation of Condition 17 to the License, and would confirm that the arrangements between the two companies are in compliance with legal regulations. However, there was no mention of the administrative proceedings initiated by the Media Council against CNTS for unauthorized conducting of television broadcasting (Exhibit R19).

103. The same day, CNTS provided the Media Council with its position with respect to the initiation of the administrative proceedings against it. It denied the allegation of unauthorized television broadcasting (Exhibit C26).

104. The same day, CET 21 and CNTS signed an agreement (hereinafter: "the October 1996 Agreement") specifying their legal relationships as set forth in the amended MOA. The October 1996 Agreement was similar to the May 1996 Agreement. The main difference was in the October 1996 Agreement's statement that such agreement did not affect CET 21's exclusive liability for the programming (Exhibit R21).

105. On 6 November 1996, the Media Council's legal department issued an internal memorandum on the legal aspects of the October 1996 Agreement. It stated that said agreement "undoubtedly *reacts to the commencement of administrative proceedings against CNTS for illegal broadcasting with the aim of making it seem that CNTS has not been committing such illegal acts*". The memorandum nevertheless expressed some doubts if the October 1996 Agreement fully achieved this purpose (Exhibit R96).

106. On 14 November 1996, CME issued a memorandum expressing its concern about the contemplated amendment of Article 1.4.1 of the MOA. CME's main fear was that the draft amendment would allow CET 21 to chose another party to benefit from the License (Exhibit C112).

107. The same day, a meeting was held between CNTS's shareholders, i.e. CME, CSB and CET 21. Article 1.4.1(a) of the MOA was amended and replaced as follows: "*the Company is granted the unconditional, irrevocable, and exclusive right to use and* maintain *the know-how and make it the subject of profit to the Company, in connection with the License, its maintenance, and protection*". In addition CNTS was granted the right to acquire the License from CET 21 *"[i]n the case of change in the legal regulation and in the prevailing interpretation of the legal community"* (Exhibit C59).

108. On 20 November 1996, the Media Council expressed to the Police of the Czech Republic its opinion that none of the Media Council's members could be criminally liable with respect to CNTS's alleged illegal television broadcasting (Exhibit R66).

109. On 13 December 1996, the October 1996 Agreement was slightly amended (Exhibit R21).

110. On 17 December 1996, the Media Council decided to cancel Condition 17 to the Licence (Exhibits R57 and C30).

111. In December 1996, CME acquired from CET 21 a 5,2% participation in CNTS for a consideration of about USD 5,300,000. During the same period, the Founders of CET 21 transferred an additional 5,8% interest to Nova Consulting a.s. (hereinafter: "Nova Consulting"), a Czech company owned by Mr. Železný (declaration of Mrs. DeBruce of 30 June 2000, p. 5; declaration of Mr. Radvan of 30 June 2000, p. 5). As a result, the participation in CNTS was as follows:

- CME: 93,2%
- Nova Consulting: 5,8%
- The Founders: 1%.

112. On 29 January 1997, the Media Council, which had become aware of the loan agreement between CME and Mr. Železný, held a meeting with CET 21 for the purpose of obtaining information thereon from Mr. Železný (Exhibit R123).

113. On 5 February 1997, the October 1996 Agreement was amended to replace all previous agreements between CET 21 and CNTS with respect to their legal relationships (see Exhibit R21).

114. On 12 February 1997, CNTS's registration in the Commercial Registry was modified as to delete, under the company's business, the sentence "*operating television broadcasting under license no. 001/93*" (Exhibit R25).

115. On 21 April 1997, Mr. Radvan, counsel for CME, issued an affidavit stating that the loan agreement between CME and Mr. Železný had been terminated pursuant to an agreement entered into by the parties on 24 February 1997 (Exhibit C91).

116. On 15 May 1997, the criminal investigation against CNTS for alleged illegal operation of television broadcasting was suspended (Exhibit R25).

117. On 21 May 1997, CNTS and CET 21 entered into an agreement named "Contract on cooperation in ensuring service for television broadcasting," together with a

supplement to this agreement (hereinafter: "the 1997 Agreement"), replacing all previous agreements between the parties. The 1997 Agreement confirmed that CET 21 was the holder of the License and the operator of television broadcasting and had the exclusive responsibility for programming. CNTS had the exclusive rights and obligations to arrange services for television broadcasting (Exhibits C29 and R22).

118. The same day, CME transferred all its interests in CNTS to CME Czech Republic B.V. (hereinafter: also "CME"), a Dutch company, for a consideration of USD 52,723,613 (Exhibit C130).

119. On 1 July 1997, the Czech Parliament passed the Act on the Czech Republic Council for Radio and Television Broadcasting, which represented a consolidated version of the statute (Exhibit R7).

120. In August 1997, CME purchased Nova Consulting, which owned a 5.8% participation in CNTS, from Mr. Železný for a consideration of USD 28,500,000. As a result, CME held 99% of CNTS's stock and the founders of CET 21 were left with a 1% participation in CNTS (declaration of Mrs. DeBruce of 30 June 2000, p. 5; declaration of Mr. Radvan of 30 June 2000, p. 5).

121. On 16 September 1997, the Media Council decided to stop the administrative proceedings against CNTS for illegal operation of television broadcasting. The Media Council's main reasoning was that CNTS had *"removed the inadequacies"* by modifying its registration with the Commercial Registry and by proceeding to *"amendments to the contractual relationship"* with CET 21 (Exhibit R25).

3.3 The 1998-2000 events

122. On 31 January 1998, the Media Council issued its 1997 Report to the Czech Parliament. The report contained a long statement of the Media Council's relationship with CNTS and CET 21. The Media Council explained that the legal relationship set up at the time the License was granted complied with the law as it then was in force

and the Conditions to the License, mainly Conditions 17 and 18 had been issued in accordance with the Law. When the Media Law was amended and provided for the cancellation of all the Conditions, the Media Council protested on the ground that it *"practically lost every possibility of checking on CNTS and its relationship to CET21. (...) The situation changed fundamentally when the amendment of the broadcasting law became effective. The licensing conditions that in principle guaranteed the legal character of the existing links between the license holder and the servicing firms were annulled and the Council had to solve the issue about how to attend, in the newly formed situation, to the sharp loosening up of the regulatory possibilities. The Council had an expertise made concerning the related issues and on the basis of it, initiated gradually negotiations with the affected Companies and opened up administrative proceedings in the subject of unauthorized broadcasting (...)".* CET 21 and CNTS took the necessary steps to carry out the necessary adjustments, by changing their registrations in the Commercial Registry and the agreements setting forth their legal relationships. These actions led to the termination of the administrative proceedings for unauthorized television broadcasting. However, the Media Council's decision was not unanimous (5 in favor, 3 against and 1 abstention), and even reflected *"the big difference of opinions over this case" (Exhibit C12).*

123. On 21 June 1998, Mr. Radvan, counsel for CME, had lunch with Mrs. Hulová, Vice Chairman of the Media Council. According to Mr. Radvan, Mrs. Hulová said during lunch that CNTS had become *"the target for a group of disgruntled persons"* (Exhibit R102).

124. On 1 July 1998, the Media Council informed CET 21 that it was opening administrative proceedings against the latter to revoke the License on the ground that the television station was not providing information *"in an objective and balanced manner"* (Exhibit R124).

125. On 17 November 1998, the Media Council decided to stop the above mentioned administrative proceedings against CET 21, due to the fact that appropriate actions had been taken (Exhibit R125).

126. On 15 December 1998, CME and CET 21 amended the MOA so that all prior changes were incorporated (Exhibit C60).

127. On 24 February 1999, a Meeting of the Board of Representatives of CNTS took place during which the relationships between CET 21 and CME were discussed. The Minutes of the meeting indicate that Mr. Železný reported that at least one member of the Media Council had claimed that the actual situation contravened the law, and 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 CNTS is not correct"*. Mr. Železný asserted that in his view, which he claimed was confirmed by his lawyers, the 1997 Agreement was not exclusive and CET 21 could request any services then provided by CNTS from any other company. He informed CNTS that, based on this assertion, CET 21 would hire another advertising agency. He added that, *"in case he would be asked"*, he would resign from his function of executive as well as General Director of CNTS. He stated that *"his proposal was an ultimatum, which meant that CME could either accept or not"* (Exhibit C31).

128. On 2 March 1999, the Media Council held a meeting to which Mr. Železný was invited. According to the Minutes, CME's alleged financial difficulties were discussed. Mr. Železný, acting on behalf of CET 21, asked the Media Council to repeat some of its previous statements about exclusivity and the withdrawal of the License *"in relation to all steps within the logic of the development of the relationships between CET and the Council"*. It was then stated that *"[I]f Zelezny wants to affect the interests of CNTS, he will need to be supported by a formal or informal letter"* (Exhibit R97).

129. On 3 March 1999, Mr. Železný, on the letterhead of CET 21, sent a letter to the Media Council requesting that the latter issue an opinion defining the relationship between CET 21 and CNTS, to be used by CET 21*"for discussions with our contractual partners"*. The opinion was to assert that *"[r]elations between the operator of broadcasting [CET 21] and its service organisations must be established on an nonexclusive basis"*. CET 21 *"should order services from service organizations at regular prices so as to respect rules of equal competition. (...) the licensed subject must have the ability to select relevant services anytime and anywhere at will"* (Exhibit C33).

130. On 15 March 1999, the Media Council issued a letter to CET 21 laying out, *inter alia*, the non-exclusive basis of the relations between the operator of broadcasting and the service organizations, the operator's responsibility for structuring and composing the program, and the allocation to the operator of the revenues from advertising (Exhibit C34).

131. In March 1999, CME set up an action plan to deal with the tense situation with CET 21 (Exhibit R132).

132. On 19 April 1999, Mr. Železný was dismissed from his position as General Director and Chief Executive of CNTS (Exhibit C68).

133. On 24 June 1999, CNTS requested the Media Council to give its position or to take measures aimed at resolving the current dispute between CNTS, CME and CET 21, resulting, among other reasons, from CET 21 entering into contracts with third parties, which "were *granted rights to trade benefits from the License*" (Exhibit C39).

134. On 28 June 1999, after CNTS had positioned two commercial spots into television broadcasting despite CET 21's disapproval, the Regional Commercial Court in Prague rendered a preliminary measure ordering CNTS to refrain from any interference with television broadcasting operated by CET 21 (Exhibit C13).

135. On 13 July 1999, in the context of the Media Council's opinion to the Permanent Media Commission of the Parliament of the Czech Republic, CNTS provided the Media Council with an analysis of its legal relationship with CET 21 (Exhibit C40).

136. On 26 July 1999, the Media Council sent a letter to CNTS calling it to stop its media campaign in connection with its dispute with CET 21. CNTS was also to inform the Media Council on the steps taken to minimize the risks described in its opinion to the above-mentioned Commission, mainly the risks of breaches of the Media Law, and on the actions taken to come to a final settlement of the dispute. Enclosed with this letter were Sections 7 and 8 of the Media Council's opinion to the Permanent Media Committee with respect to the dispute between CET 21 and CNTS (Exhibit C44).

137. On 2 August 1999, CNTS and CME sent a letter to the Permanent Media Committee of the House of Representatives of the Parliament of the Czech Republic in response to Sections 7 and 8 of the Media Council's opinion to the Permanent Media Committee, a copy of which had been provided to CNTS with the Media Council's letter of 26 July 1999 (Exhibit C41), raising the question that the acts of the Media Council might constitute violations of the Treaty.

138. On 5 August 1999, Mr. Rozehnal, counsel for CET 21, informed CNTS that CET 21 *"hereby withdraws from the Agreement on Cooperation in Provision of Services for Television Broadcasting,* as *amended, concluded on May 21, 1997".* This decision was based on CNTS's failure on 4 August 1999 to submit to CET 21 within the usual deadline the Daily Log, which contains the daily programming, regarding the broadcasting for the following day (Exhibit C35).

139. On 6 August 1999, CNTS filed a request with the Media Council for the withdrawal of the License to CET 21 (Exhibit C42).

140. On 13 August 1999, CNTS informed the Media Council of its willingness to conduct negotiations with CET 21 to resolve their dispute, and requested that CNTS and CME be invited to the Media Council's ordinary session to be held on 17 August 1999 (Exhibit C43).

141. On 16 August 1999, CET 21 sent a letter to CME Ltd. detailing the business relationship between CET 21 and CNTS (Exhibit C13).

142. On 19 August 1999, Mr. Lauder initiated the present arbitration proceedings.

143. Numerous other court and arbitration proceedings opposing CNTS, CME, CET 21, Mr. Lauder and/or Mr. Železný were commenced in the context of the disputes between CNTS, CME and Mr. Lauder, on the one side, and CET 21 and Mr. Železný, on the other side. In particular:

- CME initiated parallel UNCITRAL arbitration proceedings against the Czech Republic on the basis of the bilateral investment treaty between the Netherlands and the Czech Republic;

- CME brought ICC arbitration proceedings against Mr. Železný (Exhibit R46);
- Numerous civil actions were commenced before the Czech courts, most of them opposing CNTS and CET 21 (Exhibit R49).

144. On 19 September 1999, the Media Council issued a written opinion for the Permanent Media Commission of the House of Deputies of the Parliament with respect to the dispute between CET 21 and CNTS. It was qualified as a *"typical commercial dispute"* related to the assessment of the real value of CME in the context of its merger with Scandinavian Broadcasting Services. Generally, this dispute could be identified as an issue of relations between the broadcaster, investors and service organizations, resulting from insufficiently transparent arrangements and leading to a dual broadcasting system. Similar problems were encountered with almost all nationwide broadcasters (Exhibit C68).

145. On 30 September 1999, the Standing Committee for Mass Media of the House of Representatives of the Czech Republic issued a resolution stating its serious dissatisfaction with the work of the Media Council in the context of the dispute between CNTS and CET 21 (Exhibit C108).

146. On 15 November 1999, the Media Council provided the Permanent Commission for the Media of the House of Representatives of the Czech Republic with a supplement to its position on the situation of TV Nova (Exhibit R126).

147. On 21 December 1999, the Media Council rendered a decision pursuant to which CME could be a party to the administrative proceedings regarding changes in the License at CET 21's request (increase in the registered capital, changes in the participants and values of their capital contributions) (Exhibit C50).

148. As a result of the end of the relationships between CET 21 and CNTS, the latter had to take drastic measures to cut its spending, e.g. to lay off many employees (Exhibit C38).

149. On 4 May 2000, the Regional Commercial Court in Prague decided that CET 21 was obligated to procure all services for television broadcasting exclusively through

CNTS. However, the Court refused to decide that CET 21's withdrawal from the 1997 Agreement was invalid, nor to confirm the existence of CNTS's exclusive right on the basis of the 1997 Agreement (Exhibit C54).

150. On 1 June 2000, CET 21 filed an appeal against the above mentioned judgment with the High Court in Prague (Exhibit C55).

151. On 14 December 2000, the High Court in Prague granted CET 21's appeal and decided that CET 21 was not obligated to procure all services for television broadcasting exclusively through CNTS (Exhibit R134).

152. The case is now pending before the Czech Supreme Court.

4. Jurisdiction and Admissibility

4.1 Introduction

153. At various stages of the proceedings, the Respondent challenged the Arbitral Tribunal's jurisdiction on several grounds:

a) The Claimant has failed to prove that he owns or controls an investment within the Czech Republic;

b) The Claimants claim is not an investment dispute under the Treaty;

c) The Claimant already submitted the same dispute to the courts of the Czech Republic and to other arbitral tribunals (Article VI(3)(a) of the Treaty);

d) The Claimant may not concurrently pursue the same remedies in different fora;

e) The Claimant's claim constitutes an abuse of process;

f) The Claimant did not comply with the six-month waiting period (Article VI(2)(a) of the Treaty) (see Statement of Defence, p. 12-13; Response, p. 40-49; Sur-Reply, p. 14-17).

154. In the Written Closing Submissions of 30 March 2001, the Respondent stated that it did not dispute that:

- The Treaty is *prima facie* applicable to events occurring after 19 December 1992;
- Mr. Lauder is a national of the United States;
- CEDC's (and later CME's) shareholding in CNTS is an investment;
- The Claimant's allegations constitute an investment dispute for the purpose of the Treaty;
- For jurisdictional purpose only, the Claimant controlled the investment (see Written Closing Submissions, p. 4-5).

155. The Arbitral Tribunal therefore takes note that the Respondent has withdrawn the two grounds under a) and b) above. The Arbitral Tribunal will therefore only address the four remaining grounds under c), d), e) and f) above.

4.2 The same dispute is submitted to state courts and to other arbitral tribunals

156. The Respondent argues that Article VI(3)(a) of the Treaty precludes the Arbitral Tribunal from exercising jurisdiction on the ground that the same dispute was submitted to Czech courts and to another arbitral tribunal before the present proceedings were initiated. Those proceedings arise from the same circumstances and seek the same substantive remedy, so that the issue in dispute is the same in all cases. As a result, Mr. Lauder has removed the dispute from any arbitral tribunal under the Treaty (Response, p. 47-48).

157. The Claimant argues that the present proceeding is the only one in which he claims that the Czech Republic violated obligations under the Treaty. Article VI(3)(a) actually sets forth a limited form of the principle of *lis alibi pendens,* whose elements are not met (Reply Memorial, p. 50-62).

158. Article VI(3)(a) of the Treaty reads as follows:

"(...) Once the national or company concerned has so consented, either party to the dispute may institute such proceeding provided:

(i) the dispute has not been submitted by the national or the company for resolution in accordance with any applicable previously agreed dispute-settlement procedures; and

(ii) the national of company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a party to the dispute. (...)"

159. The Arbitral Tribunal considers that the word "dispute" in Article VI(3)(a) of the Treaty has the same meaning as the words "investment dispute" in Article VI(1), which reads as follows:

"For the purposes of this Article, an investment dispute is defined as a dispute involving (a) the interpretation or application of an investment agreement between a *Party and* a *national or company of the other Party; (b) the interpretation or application of any investment authorization granted by a Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment".*

160. It is undisputed that the Claimant's allegations concern an investment dispute under Article VI(1)(c) of the Treaty, i.e. *"an alleged breach of any right conferred or created by this Treaty with respect to an investment".*

161. The purpose of Article VI(3)(a) of the Treaty is to avoid a situation where the same investment dispute ("the dispute") is brought by the same the claimant ("the national or the company") against the same respondent (a Party to the Treaty) for resolution before different arbitral tribunals and/or different state courts of the Party to the Treaty that is also a party to the dispute.

162. The resolution of the investment dispute under the Treaty between Mr. Lauder and the Czech Republic was not brought before any other arbitral tribunal or Czech court before – or after - the present proceedings was initiated. All other arbitration or court proceedings referred to by the Respondent involve different parties, and deal with different disputes.

163. In particular, neither Mr. Lauder nor the Czech Republic is a party to any of the numerous proceedings before the Czech courts, which opposed or are opposing CNTS or the various CME entities, on the one side, and CET 2.1 or Mr. Železný, on the other side. The Respondent has not alleged - let alone shown - that any of these courts would decide the dispute on the basis of the Treaty.

164. The ICC arbitration proceeding was between CME and Mr. Železný, and dealt with the latter's alleged breach of the 11 August 1997 Share Purchase Agreement pursuant to which CME acquired a 5.8% participation in CNTS held by Nova Consulting, a.s., an entity owned by Mr. Železný.

165. The parallel UNCITRAL arbitration proceeding (hereinafter: "the Stockholm Proceedings") is between CME and the Czech Republic, and is based on the bilateral investment treaty between the Netherlands and the Czech Republic.

166. Therefore, the Arbitral Tribunal holds that Article VI(3)(a) of the Treaty does not preclude it from having jurisdiction in the present proceedings.

4.3 The same remedies are sought in different fora

167. The Respondent argues that, independently of Article VI(3)(a) of the Treaty, the Claimant cannot seek the same remedies in multiple parallel actions.

168. At first the Respondent asserted that if the Claimant chooses to pursue a contractual remedy in the local courts or in an arbitral tribunal, he should not be allowed to concurrently pursue a remedy under the Treaty. The Claimant could indeed not complain of any mistreatment of his investment by the State until that State's courts had finally disposed of the case. In addition, by initiating proceedings under the Treaty, the Claimant deprives the other party to the court proceedings of the opportunity to argue its case before the Treaty tribunal. Here, the existence of multiple proceedings creates a risk of incompatible decisions, a prospect of disorder *"that the principle of* lis alibi pendens *is designed to avert"* (Response, p. 46-47).

169. Later the Respondent indicated that it was not seeking *"to rely upon technical doctrines of* lis alibi pendens *or* res judicata", but on a new *"important issue of principle, not yet tested (...) in previous court or arbitral proceedings"*. The multiplicity of proceedings involving, directly or indirectly, the State *"amounts to an abuse of process"*, in that no court or arbitral tribunal would be in a position to ensure that justice is done and that its authority is effectively upheld. The Respondent added that there is *"an obvious risk of conflicting findings between the two Treaty tribunals"* (Sur-Reply, p. 14-15).

170. The Claimant argues that no principles of *lis alibi pendens* are applicable here. Should such principles apply, it would not deprive the Arbitral Tribunal of jurisdiction, since the other court and arbitration proceedings involve different parties, different claims, and different causes of action. However, if CNTS could obtain any recovery from the Czech courts, this may reduce the amount of damage claimed in the present proceedings (Reply Memorial, p. 50-62).

171. The Arbitral Tribunal considers that the Respondent's recourse to the principle of *lis alibi pendens* to be of no use, since all the other court and arbitration proceedings involve different parties and different causes of action (see 4.2 above). Therefore, no possibility exists that any other court or arbitral tribunal can render a decision similar to or inconsistent with the award which will be issued by this Arbitral Tribunal, i.e. that the Czech Republic breached or did not breach the Treaty, and is or is not liable for damages towards Mr. Lauder.

172. It is to be noted that the risk of conflicting findings is even less possible since the Claimant withdrew his two reliefs on the imposition of conditions to the License and the enforcement of such conditions, and only maintained its relief for damages. Assuming that the Arbitral Tribunal would decide that the Respondent breached the Treaty and that the Claimant is entitled to damages, such findings could not be contradicted by any other court or arbitral decision. The damages which could be granted in the parallel proceedings could only be based on the breach by CET 21 and/or Mr. Železný of their contractual obligations towards CNTS or any CME entity (decision by Czech courts or the ICC arbitral tribunal) or on the breach by the Czech Republic of its obligations towards CME pursuant to the Dutch/Czech bilateral

investment treaty (decision by the parallel UNICTRAL arbitral tribunal). The only risk, as argued by the Claimant, is that damages be concurrently granted by more than one court or arbitral tribunal, in which case the amount of damages granted by the second deciding court or arbitral tribunal could take this fact into consideration when assessing the final damage.

173. There might exist the possibility of contradictory findings of this Arbitral Tribunal and the one set up to examine the claims of CME against the Czech Republic under the Dutch-Czech Bilateral Investment treaty. Obviously, the claimants in the two proceedings are not identical. However, this Arbitral Tribunal understands that the claim of Mr. Lauder giving rise to the present proceeding was commenced before the claims of CME was raised and, especially, the Respondent itself did not agree to a *de facto* consolidation of the two proceedings by insisting on a different arbitral tribunal to hear CME's case.

174. Finally, there is no abuse of process in the multiplicity of proceedings initiated by Mr. Lauder and the entities he controls. Even assuming that the doctrine of abuse of process could find application here, the Arbitral Tribunal is the only forum with jurisdiction to hear Mr. Lauder's claims based on the Treaty. The existence of numerous parallel proceedings does in no way affect the Arbitral Tribunal's authority and effectiveness, and does not undermine the Parties' rights. On the contrary, the present proceedings are the only place where the Parties' rights under the Treaty can be protected.

175. Therefore, the Arbitral Tribunal holds that the seeking of the same remedies in a different fora does not preclude it from having jurisdiction in the present proceedings.

4.4 The abuse of process

176. Besides the already addressed issue of alleged abuse of process in connection with the fact that the same remedies are sought in different fora (see 4.3 above), the Respondent argues that the Claimant commits an abuse of process (i) in pursuing his

claim in the present proceedings under the Treaty whereas it is alleged in the parallel arbitration proceedings that CME has a better claim, and (ii) in not disclosing a *prima facie* case that the Respondent has breached the Treaty (Response, p. 48-49).

177. The Arbitral Tribunal does not see any abuse of process by the Claimant's pursuit of his claim in the present proceedings and by CME's pursuit of its claim in the parallel arbitration proceedings. As already stated (see 4.3 above), the claimants and the causes of action are not the same in the two cases. Only this Arbitral Tribunal can decide whether the Czech Republic breached the Treaty towards Mr. Lauder, and only the arbitral tribunal in the parallel Stockholm Proceedings can decide whether the Czech Republic breached the Dutch/Czech bilateral investment treaty in relation to CME. As a result, CME has neither a better - nor a worse - claim in the parallel arbitration proceedings than Mr. Lauder's claim in the present arbitration proceedings. It only has a different claim.

178. It should furthermore be noted that the Respondent refused to allow the constitution of identical arbitral tribunals to hear both treaty cases. If the same tribunal would have been appointed in both cases the procedure could have been co-ordinated with the corresponding reduction in work and time and of cost to the Parties. The possibility of conflicting decisions would also have been greatly reduced.

179. There is also no abuse of process by the Claimant's alleged non-disclosure of a *prima facie* case that the Respondent has breached the Treaty. No such obligation derives from the Treaty or from the UNCITRAL Arbitration Rules. Even less would the absence of such disclosure result in the Arbitral Tribunal lacking jurisdiction. Furthermore, as stated hereunder, the Claimant actually disclosed more than just a *prima facie* case against the Respondent.

180. Therefore, the Arbitral Tribunal holds that there is no abuse of process on the part of the Claimant which would preclude it from having jurisdiction in the present proceedings.

4.5 The six-month waiting period

181. The Respondent argues that the Claimant did not comply with the waiting period set forth in Article VI(3)(a) of the Treaty pursuant to which arbitration can be initiated only six months after the dispute arose. For the purpose of this provision, the dispute arises when the State is advised that a dispute exists. Here, the Czech Republic was first advised of Mr. Lauder's complaints under the Treaty by CNTS's and CME's letter to the Media Committee of the Czech Parliament of 2 August 1999. Therefore, the Notice of Arbitration served only 17 days later is defective, and the Arbitral Tribunal lacks jurisdiction (Statement of Defence, p. 13; Written Closing Submissions, p. 5).

182. The Claimant argues that the Respondent has waived or abandoned this objection by not having advanced it between its Statement of Defence of 31 January 2000 and its Written Closing Submissions of 30 March 2001 (Rebuttal to The Respondent's Written Closing Submission, p. 4-5).

183. Article VI(3)(a) of the Treaty reads as follows:

"At any time after six months from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by conciliation or binding arbitration (...) "

184. The Arbitral Tribunal considers that, as stated above with respect to the Respondent's other objection based on Article VI(3)(a) of the Treaty (see 4.2 above), the word "dispute" in the context of the six-month waiting period shall have the same meaning as the words "investment dispute" in Article VI(l), i.e. in this case "*an alleged breach of any right conferred or created by this Treaty with respect to an investment*".

185. However, the waiting period does not run from the date at which the alleged breach occurred, but from the date at which the State is advised that said breach has occurred. This results from the purpose of the waiting period, which is to allow the parties to enter into good-faith negotiations before initiating arbitration.

186. Here, the Respondent's alleged violations of the Claimant's rights under the Treaty occurred during the period from February 1993, when the License was granted, until 15 March 1999, when the Media Council sent a letter to CET 21 expressing its opinion on the requirements of television broadcasting (see Summary of Summation, p. l-9). No evidence was, however, put forward that the Czech Republic was advised of said alleged Treaty violations before CNTS's and CME's 2 August 1999 letter to the Media Committee of the Czech Parliament. Only 17 days lie between said letter and the filing of the Notice of Arbitration on 19 August 1999.

187. However, the Arbitral Tribunal considers that this requirement of a six-month waiting period of Article VI(3)(a) of the Treaty is not a jurisdictional provision, i.e. a limit set to the authority of the Arbitral Tribunal to decide on the merits of the dispute, but a procedural rule that must be satisfied by the Claimant (Ethyl Corp. v. Canada, UNCITRAL June 24, 1998, 38 I.L.M. 708 (1999), paragraphs 74-88). As stated above, the purpose of this rule is to allow the parties to engage in good-faith negotiations before initiating arbitration.

188. Here, although there were only 17 days between CNTS's and CME's letter to the Media Committee of the Czech Parliament of 2 August 1999 and the filing of the Notice of Arbitration on 19 August 1999, there is no evidence that the Respondent would have accepted to enter into negotiation with Mr. Lauder or with any of the entities he controlled and which were involved in the dispute during the waiting period. On the contrary, the Media Council did not react at all to CNTS's letter of 13 August 1999 requesting that CNTS and CET 21 be invited to the Media Council's ordinary session to be held on 17 August 1999 in order to try to find a solution to their dispute (Exhibit C43).

189. Furthermore, the Respondent did not propose to engage in negotiations with the Claimant following the latter's statement in his Notice of Consent of 19 August 1999, filed together with the Notice of Arbitration, that he remained "*open to any good faith efforts by the Czech Republic to remedy this situation*". Had the Respondent been willing to engage in negotiations with the Claimant, in the spirit of Article VI(3)(a) of the Treaty, it would have had plenty of opportunities to do so during the six months after the 19 August 1999 Notice of Arbitration.

190. To insist that the arbitration proceedings cannot be commenced until 6 months after the 19 August 1999 Notice of Arbitration would, in the circumstances of this case, amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties.

191. Therefore, the Arbitral Tribunal holds that the requirement of the six-month waiting period in Article VI(3)(a) of the Treaty does not preclude it from having jurisdiction in the present proceedings.

5. Findings

5.1 Introduction

192. The Claimant alleges that the Respondent, through the Media Council actions, has breached five independent obligations under the Treaty within three separate time periods.

193. The five obligations are the followings:

a) the prohibition against arbitrary and discriminatory measures;
b) the obligation to provide fair and equitable treatment;
c) the obligation to provide full protection and security;
d) the obligation of treatment in accordance with general principles of international law;
e) the obligation not to expropriate unlawfully (Reply Memorial, p. 62; Summary of Summation, p. 13-14).

194. The three time periods are the followings:

a) the 1993-1994 period;
b) the 1996-1997 period;
c) the 1998-1999 period (see Mr. Kiernan's oral opening submission, 5 March 2001, p. 18).

195. The Arbitral Tribunal feels it appropriate to address the issues in the following order:

a) the obligation not to expropriate unlawfully with respect to all time periods;

b) the obligation of treatment in accordance with the general principles of international law with respect to all time periods;

c) all remaining alleged violations of the Treaty within the 1992-1993 time period;

d) all remaining alleged violations of the Treaty within the 1994-1997 and 1998-1999 time periods.

5.2 The obligation not to expropriate unlawfully (all time periods)

196. The Claimant alleges that the Media Council committed unlawful expropriation by instituting administrative proceedings against CNTS in 1996 and by other actions that forced CNTS to amend the MOA, as well as by the accumulation of actions and inactions over the period from 1996 through 1999 to which the Claimant never consented voluntarily or otherwise. The Claimant precisely referred to (i) the 1996 administrative and criminal proceedings, (ii) the indication by the Media Council in 1998 and thereafter that it did not accept an exclusive business relationship between CET 21 and CNTS, coupled with the Media Council's continued pressures to restructure said relationship, (iii) the Media Council's 15 March 1999 letter to CET 21, and (iv) the Media Council's refusal to take action against CET 21 when the latter severed all dealings with CNTS (Reply Memorial, p. 73-77).

197. The Claimant argues that the Treaty protects foreign investors from direct and indirect expropriation, i.e. not only from the taking of tangible property, but also from measures tantamount to expropriation. Expropriation includes interference by the State in the use of property or with the enjoyment of its benefits, even if legal title to the property is not affected. There is even heightened protection against deprivations resulting from regulatory actions when the acquired rights have obtained legal approval on which investors justifiably rely. The intent of the State to deprive the investor of property is not a necessary element of expropriation. There is no regulatory exception (Memorial, p. 50-52; Reply Memorial, p. 63-73).

198. The Respondent argues that, although the Treaty includes both direct and indirect forms of expropriation, interference with property rights has to be so complete as to amount to a taking of those rights. Detrimental effect on the economic value of property is not sufficient. Parties to the Treaty are not liable for economic injury that is the consequence of bona fide regulation within the accepted police powers of the State. The Respondent asserts that the lawful commencement of administrative proceedings against CNTS in 1996 in respect of a suspected violation of the law did not constitute expropriation. Furthermore, there is no evidence that the Media Council threatened to revoke the License. In addition, CNTS and/or Mr. Lauder made no mention of expropriation before the Notice of Arbitration was filed on 19 August 1999. Finally, Mr. Lauder failed to prove that the Czech Republic caused CET 21 to withdraw from its contractual relationship with CNTS, the acts of the latter's contractual counter-party not constituting expropriation by the State (Response, p. 50-55; Written Closing Submissions, p. 9-10).

199. Article III(1) of the Treaty provides:

"Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in accordance with due process of law; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with the general principles or treatment provided for in Article II(2) ".

200. The Bilateral Investment Treaties (hereinafter: "BITs") generally do not define the term of expropriation and nationalization, or any of the other terms denoting similar measures of forced dispossession ("dispossession", "taking", "deprivation", or "privation"). Furthermore, the practice shows that although the various terms may be used either alone or in combination, most often no distinctions have been attempted between the general concept of dispossession and the specific forms thereof. In general, expropriation means the coercive appropriation by the State of private property, usually by means of individual administrative measures. Nationalization involves large-scale takings on the basis of an executive or legislative act for the

purpose of transferring property or interests into the public domain. The concept of indirect (or *"de facto"*, or *"creeping")* expropriation is not clearly defined. Indirect expropriation or nationalization is a measure that does not involve an overt taking, but that effectively neutralizes the enjoyment of the property. It is generally accepted that a wide variety of measures are susceptible to lead to indirect expropriation, and each case is therefore to be decided on the basis of its attending circumstances (Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties, p. 98-100 (1995); Georgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection, 379-382 (1997)). The European Court of Human Rights in *Mellacher and Others v. Austria* (1989 Eur.Ct.H.R. (ser. A, No. 169)), held that a *"formal"* expropriation is a measure aimed at a *"transfer of property"*, while a *"de facto"* expropriation occurs when a State deprives the owner of his *"right to use, let or sell (his) property"*.

201. The Arbitral Tribunal holds that the Respondent did not take any measure of, or tantamount to, expropriation of the Claimant's property rights within any of the time periods, since there was no direct or indirect interference by the Czech Republic in the use of Mr. Lauder's property or with the enjoyment of its benefits.

202. The Claimant has indeed not brought sufficient evidence that any measure or action taken by the Czech Republic would have had the effect of transferring his property or of depriving him of his rights to use his property or even of interfering with his property rights. All property rights of the Claimant were actually fully maintained until the contractual relationship between CET 21 and CNTS was terminated by the former. It is at that time, and at that time only, that Mr. Lauder's property rights, i.e. the use of the benefits of the License by CNTS, were affected. Up to that time, CNTS had been in a position to fully enjoy the economic benefits of the License granted to CET 21, even if the nature of the legal relationships between the two companies had changed over the time. Because the Claimant has not alleged – and even less proved - that the action which seriously interfered with the Claimants property rights, i.e. CET 21's decision to withdraw from the 1997 Agreement on 5 August 1999, was one of the State, and not one of a private entity completely independent of the State, there can be no expropriation under the Treaty.

203. In addition, even assuming that the actions taken by the Media Council in the period from 1996 trough 1999 had the effect of depriving the Claimant of his property rights, such actions would not amount to an appropriation - or the equivalent - by the State, since it did not benefit the Czech Republic or any person or entity related thereto, and was not taken for any public purpose. It only benefited CET 21, a independent private entity owned by private individuals.

204. Finally, the Claimant, directly or through CNTS or any other entity controlled by himself, did not complain of *any* action taken by the Media Council and which allegedly constituted an expropriation, or a measure tantamount to expropriation, before CME's and CNTS's letter to the Czech Parliament of 2 August 1999, after Mr. Železný had been dismissed of his functions with CNTS and at a time of great tensions between CNTS and CET 21. This failure by the Claimant to invoke the Treaty or to advance any violation of the obligations of the Czech Republic when the now disputed actions were taken, tends to show that no violations of his property rights were committed at that time.

5.3 The obligation of treatment in accordance with general principles of international law (all time periods)

205. The Claimant alleges that the Media Council violated its obligations arising under international law when it withdrew its prior approval of CNTS's activities, and by committing *"the same wrongs that establish its breach of other individual protections under the Treaty"* (Reply Memorial, p. 89; Mr. Kiernan's oral closing submissions, p. 177-178).

206. The Claimant argues that the general principles of international law include, among others, a variant of *pacta sunt servanda*, the protection of acquired rights, the treatment of foreign investment in good faith, the principle of estoppel, and recognized standards relating to the protection of property. These general standards refer exclusively to international law, to the exclusion of domestic law (Reply Memorial, p. 88-89; Mr. Kiernan's oral closing submissions, p. 177-178).

207. The Respondent argues that the Claimant has not identified any obligation of treatment in accordance with general principles of international law which is distinct to the other obligations (Written Closing Submissions, p. 14).

208. Article II(2)(a) of the Treaty provides that *"[i]nvestment (...) shall in no case be accorded treatment less than that which conforms to principles of international law"*.

209. The Arbitral Tribunal considers that the Claimant has not identified any specific obligation of international law which would provide the foreign investor with a broader protection than the other four Treaty obligations on which he otherwise relies. In particular, the Claimant does not allege that either the variant of the principle pacta *sunt servanda*, which would create under certain circumstances a *sui generis* investor-state relationship, or the general obligation of good faith goes further in the protection of the foreign investor than the Respondent's obligation to provide fair and equitable treatment (see below 5.5.3) or the Respondent's obligation to provide full protection and security (see below 5.5.4). On the contrary, by stating that the Respondent's alleged *"breach of the obligation to adhere to general international law arises from the same wrongs that establish its breach of other individual protections under the Treaty"*, the Claimant himself recognizes that there is no action or inaction by the Czech Republic which could amount exclusively to a violation of the obligation of treatment in accordance with general principles of international law, without also constituting a violation of other obligations under the Treaty.

210. Therefore, the Arbitral Tribunal will refer to the developments made in the other sections of the present award.

5.4 The 1992-1993 time period

5.4.1 Introduction

211. Because the Claimant, in his more general statement about the *"totality of other actions and inactions by the Media Council"*, expressly refers to the rights provided to

CNTS, the Arbitral Tribunal considers that his allegation of unfair and inequitable treatment does not cover the events leading to the creation of CNTS and the replacement of the Media Council, i.e. the first time period in 1993-1994, but includes only the second and third time periods in 1996-1997 and 1998-1999.

212. With respect to the separate obligation to provide fair and equitable treatment, the Claimant alleged that the Respondent breached said obligation through the Media Council's reversal of critical prior approvals, i.e. when the Media Council directed in 1996 the removal in the MOA of the provision giving CNTS the exclusive right to use, benefit from and maintain the License, and through its hostile conduct towards CNTS, i.e. the totality of other actions and inactions by the Media Council that undermined the rights which had been provided to CNTS (Reply Memorial, p. 77-83; Summary of Summation, p. 13).

213. The only identified alleged violation of specific Treaty obligations within the 1992-1994 time period concerns the prohibition against arbitrary and discriminatory measures. Such measures occurred when the Media Council insisted on CEDC not becoming a direct shareholder of CET 21 in 1993 (Reply Memorial, p. 87; Mr. Kiernan's oral closing submissions, 12 March 2001, p. 175).

5.4.2 The prohibition against arbitrary and discriminatory measures

214. The Claimant alleges that the Respondent took arbitrary and discriminatory measures when the Media Council insisted in 1993 on CEDC not becoming a direct shareholder of CET 21. The Claimant argues that the prohibition against arbitrary and discriminatory measures must be inferred from the circumstances. It is not necessary that a measure be founded on a violation of domestic law for such a measure to be arbitrary and/or discriminatory. Arbitrary action may actually include regulatory actions without good-faith governmental purpose (Memorial, p. 54; Reply Memorial, p. 85-88; Mr. Kiernan's closing submissions, Transcript of 12 March 2001, p. 175-176; Summary of Summation, p. 14).

215. The Respondent argues that Article II(2)(b) of the Treaty, in comparison with Article II(1), requires the Claimant to prove that the Respondent's conduct was both arbitrary and discriminatory. Only an illegal act under domestic law can be - but is not necessarily – arbitrary, and the Claimant did not even prove that the Czech Republic behaved unlawfully. For an act to constitute discrimination, it must first result in actual injury and, second, it must be done with the intention to harm the aggrieved party. In particular, there is no discrimination in the requirement that foreign investors invest in the State through the medium of a locally-incorporated company, since it is only a regulation on how foreign investment is to be organized. Here, the Media Council awarded the License on the precise terms of CET 21's application, pursuant to which CEDC would become a minor shareholder in CET 21. The CNTS structure was proposed by CEDC (Response, p. 56-57; Written Closing Submissions, p. 12-13).

216. Article II(2)(b) of the Treaty provides:

"Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investment. For the purpose of dispute resolution under Articles VI and VII, a measure may be arbitrary and discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party".

217. Article II(1) of the Treaty reads as follows:

"Each Party shall permit and treat investment, and activities associated therewith, on a nondiscriminatory basis, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty. (…)".

218. Clause 3 of the Annex to the Treaty provides:

"Consistent with Article II, paragraph 1, the Czech and Slovak Federal Republic reserves the right to make or maintain limited exceptions to national treatment in the sectors or matters it has indicated below:

ownership of real property; and insurance".

219. The Arbitral Tribunal considers that a violation of Article II(2)(b) of the Treaty requires both an arbitrary and a discriminatory measure by the State. It first results from the plain wording of the provision, which uses the word "and" instead of the word "or". It then results from the existence of Article II(1) of the Treaty, which sets forth the prohibition of any discriminatory treatment of investment, except in the sectors or matters expressly listed in the Annex to the Treaty. If Article II(2)(b) prohibited only arbitrary *or* discriminatory measures, it would be partially redundant to the prohibition of discriminatory measure set forth in Article II(1).

220. A discriminatory measure is defined in Article II(1) and the Clause 3 of the Annex to the Treaty. It is one that fails to provide the foreign investment with treatment at least as favorable as the treatment of domestic investment (*"national treatment":* see Annex 3 to the Treaty). For a measure to be discriminatory, it does not need to violate domestic law, since domestic law can contain a provision that is discriminatory towards foreign investment, or can lack a provision prohibiting the discrimination of foreign investment. It is only in the sectors or matters for which it has reserved the right to make or maintain an exception in the Annex to the Treaty that the State may treat foreign investment less favorably than domestic investment. Due to the fact that the Czech Republic has not made any reserve in the matter of broadcasting television, contrary to the reserve made by the United States of America in the matter of *"ownership and operation of broadcast or common carrier radio and television stations"* (Clause 1 of the Annex to the Treaty; Exhibits R1 and Cl), the Czech Republic is bound to provide U.S. investment in the field of broadcasting with a treatment at least as favorable as Czech investment.

221. The Treaty does not define an arbitrary measure. According to Black's Law Dictionary, arbitrary means *"depending on individual discretion; (...) founded on prejudice or preference rather than on reason or fact"* (Black's Law Dictionary 100 (7th ed. 1999)).

5.4.2.1 CEDC not becoming a shareholder in CET 21

222. The Arbitral Tribunal holds that the Czech Republic took a discriminatory and arbitrary measure against Mr. Lauder in violation of Article II(2)(b) of the Treaty when the Media Council, after having accepted the idea of a direct investment in CET 21 by CEDC , a company which Mr. Lauder controlled, eventually did not allow such investment, and required that a third company, CNTS, be created.

223. There is clear evidence that CEDC intended to acquire a direct participation in CET 21, should the latter be awarded the License. The draft "Terms of Agreement" prepared by CEDC and CET 21 in August 1992 (Exhibit C139) as well as the final version of this document signed by both companies in January 1993 (Exhibit C61) expressly referred to *"an equity investment in CET 21"* from CEDC. The document named "Project of an Independent Television Station" drafted by CET 21 in September 1992 stated that CEDC is *"a direct participant in CET 21's application for the license"* (Exhibit C9).

224. There is also clear evidence that the Media Council was aware of such intention. The Minutes of the preliminary hearings held on 21 December 1992 by the Media Council with the various bidders for TV Nova stated, as regards CET 21, that *"extensive share [is] reserved for foreign capital; (...) direct capital share, not credit"*(Exhibit R58). The Minutes of the further preliminary hearings held on 22 January 1993 provided that *"[t]he participation of foreign capital is expected"* and that *"the combination of domestic and foreign capital is important, necessity of safeguard - diversification of the investments sources"* (Exhibit C64). The Minutes of the session of the Media Council of 30 January 1993, where the decision to award the License to CET 21 was made, stated some member's of the Media Council's words that *"(...) it is very significant that this is a business which can not be financed only by credit"*, *"the Czech and foreign capital in CET 21 [is] positive"*, and it is *"positive in that there is a stabilisation factor, as far as foreign capital and its involvement is concerned"* (statements of Messrs. Brož and Pýcha; Exhibit R54).

225. The above mentioned statements also clearly indicate that the Media Council had accepted, and even was satisfied with, the fact that CEDC would be a shareholder of CET 21. As a result, this Tribunal Arbitral considers that there can be no doubt that when the Media Council informed CET 21 in its letter of 30 January 1993 (Exhibit R9) and the public in its press release of the same day (Exhibit C11) that the License had been granted to CET 21 and that *"[a] direct participant in the application is the international corporation CEDC"*, the Media Council agreed and approved meant that CEDC would be a shareholder of CET 21.

226. Even assuming that the Media Council thought of another form of participation of CEDC at the time it made the decision to award the License to CET 21, CEDC could reasonably believe that its project of becoming a shareholder in CET 21 had been properly understood and accepted by the Media Council. At no time until the decision was made did the Media Council express any misunderstanding or dissatisfaction with such project.

227. The various statements of the members and staff of the Media Council in the beginning of 1993 submitted in the present proceedings, the immediate rising of strong political opposition to the Media Council's choice in favor of CET 21, and the overall circumstances of the case show that the Media Council realized immediately after the decision on the award of the License had been made that it had to bring some modifications to the project of CET 21 and CEDC. In particular, the Media Council could no longer accept CEDC as a shareholder of CET 21, as it became clear from the political reactions to the recent decision to award the License to CET 21 that even stronger political opposition would arise, opening the way for an attack on the entire selection process. The Media Council therefore gave CET 21 and CEDC the task of proposing an acceptable structure (declaration of Mrs. Landová of 5 December 2000, p. 6-7; declaration of Mr. Brož of 5 December 2000, p. 2-3; declaration of Mr. Pýcha of 21 December 2000, p. 1-3; Exhibits R83, C144 and C145).

228. As a result, CET 21 and CEDC prepared a document named "Overall Structure of a New Czech Commercial Television Entity" pursuant to which CET 21 and CEDC would jointly create a new Czech company which would have the exclusive use of the License. The shareholders of the new company would be CET 21, CEDC and CSB,

the last two of them providing the necessary funds. There was no mention anymore of any direct participation of CEDC in CET 21 (Exhibits C14 and C149). After some modifications were made at the request of the director of the Programming and Monitoring Section of the Media Council, the final version of the document was submitted to the Media Council on February 5, 1993 (Exhibits C150 and R55). On the basis of this document, the Media Council rendered its decision to award the License to CET 21, which stated that CEDC was a *"contractual partner"* of CET 21 (Exhibits R10 and C16).

229. The 1997 Report of the Media Council to the Czech Parliament actually provides a good summary of the actions and their motivations which took place between 30 January and 9 February 1993: *"When granting the license to the Company CET 21, for fear that a majority share of foreign capital in the license holder's Company might impact the independence of full-format broadcasts, the Council assumed a configuration that separates the investor from the license holder himself. That is how an agreement came into existence (upon a series of remarks from the Council) by which the Company CNTS was established the majority owner of which is CEDC/CME".*

230. The Arbitral Tribunal holds that the Media Council decision to move from a direct participation by CEDC, a German company controlled by Mr. Lauder, an American citizen, to a contractual relationship providing for the creation of a third company amounted to an arbitrary and discriminatory measure.

231. The measure was discriminatory because it provided the foreign investment with a treatment less favorable than domestic investment. It indeed results from the above mentioned circumstances that the Media Council changed its mind because of its fear that the strong and rising political opposition to the granting of the License to an entity with significant foreign capital could lead to an attack on the entire selection process. It is probable that if CEDC had been a Czech investor, there would have been no political outcry, and the original plan of becoming a shareholder in CET 21 could have been carried out.

232. The measure was arbitrary because it was not founded on reason or fact, nor on the law which expressly accepted *"applications from companies with foreign equity participation"* (Exhibit R2), but on mere fear reflecting national preference.

233. However, there is no single piece of evidence that CEDC opposed, or protested against, or even less fought against, this measure. On the contrary, it results from the circumstances that CEDC immediately proposed a new structure in which it would become a contractual partner of, rather than a shareholder in, CET 21. CEDC and its successor CME actually accepted the measure without reservation for the next six years, as long as it was able to conduct the joint venture profitably. It is only in the context of the present proceedings, after CET 21 had terminated the contractual relationship with CNTS, which was by that time fully controlled by CME, that CME complained about the measure. Even the Notice of Arbitration did not refer to the measure, which was first mentioned in the Memorial (p. l-2).

234. The question therefore arises if the breach by the Respondent of its Treaty obligations gives rise to any damages to be paid to the Claimant. It is most probable that if in 1993 Mr. Lauder's investment in the Czech television could have been made directly in CET 21, the Licence holder, the possible breach of any exclusive agreements in 1999 could not have occurred in the way it did. Even if the breach therefore constitutes one of several *"sine qua non"* acts, this alone is not sufficient. In order to come to a finding of a compensable damage it is also necessary that there existed no intervening cause for the damage. In our case the Claimant therefore has to show that the last, direct act, the immediate cause, namely the termination by CET 21 on 5 August 1999 (and the preceding conclusions by CET 21 of service agreements with other service providers) did not become a superseding cause and thereby the proximate cause. In other words, the Claimant has to show that the acts of CET 21 were not so unexpected and so substantial as to have to be held to have superseded the initial cause and therefore become the main cause of the ultimate harm. This the Claimant has not shown. First of all, the Claimant itself in 1993 did not protested against the change imposed by the Media Council. Furthermore, it was completely impossible at that time to envisage that the Claimant itself would actively participate in all those later steps which allowed Mr. Železný to disengage himself from CNTS and to acquire control of CET 21 in order to be able to pursue his own interests without having to rely on CME. These acts

of CET 21, and through it by Mr. Železný, are the real cause for the damage which apparently has been inflicted to the Claimant.

235. The arbitrary and discriminatory breach by the Respondent of its Treaty obligations constituted a violation of the Treaty. The alleged harm was, however, caused in 1999 by the acts of CET 21, controlled by Mr. Železný. The 1993 breach of the Treaty was too remote to qualify as a relevant cause for the harm caused. A finding on damages due to the Claimant by the Respondent would therefore not be appropriate.

5.5 The 1994-1997 and 1998-1999 time periods

5.5.1 Introduction

236. Within the 1994-1997 and 1998-1999 time periods, the Claimant alleges that the Respondent violated all five obligations under the Treaty (see above 5.1). As the Arbitral Tribunal has already addressed the alleged violations of the obligation not to expropriate unlawfully (see above 5.2) and of the obligation of treatment in accordance with general principles of international law (see above 5.3) with respect to all time periods, it will address the three other alleged violations in the context of the events which occurred in the period from 1994 through 1999, i.e.:

a) the prohibition against arbitrary and discriminatory measures;
b) the obligation to provide fair and equitable treatment:
c) the obligation to provide full protection and security (Reply Memorial, p. 62-89; Summary of Summation, p. 13-14).

5.5.2 The prohibition against arbitrary and discriminatory measures

237. The Claimant alleges that the Respondent took arbitrary and discriminatory measures (i) when the Czech Parliament replaced the Media Council in 1994, (ii) when the Media Council initiated in 1996 the administrative proceedings against CNTS for

unauthorized television broadcasting, (iii) when the Media Council stated in its 1996 and 1998 reports that the target of its investigations was CNTS, and that the others did not receive any attention: (iv) through ongoing efforts to eliminate the original structure between CET 21 and CNTS in favor of non-exclusive contractual arrangements; (v) by statements of a Media Council's member, Mr. Štěpánek, that CNTS was promoting flight of Czech capital abroad; and (vi) when Mr. Josefík admitted that it did not even occur to him to consider the interest of foreign investor after Mr. Železný's request of March 2, 1999 (Reply Memorial, p. 87-88; Mr. Kiernan's closing submissions, Transcript of 12 March 2001, p. 175-176).

238. The Respondent mainly alleges that the Media Council did not discriminate in the treatment of the Claimant's investment. The administrative proceedings were initiated because there were objective grounds for suspecting a breach of the law, especially when similar proceedings were commenced against others in a similar situation. Furthermore that the existence of anti-American feelings within the Czech Republic was the result of a democratic freedom of expression (Response, p. 56-57; Written Closing Submissions, p. 12-14).

239. As regards the content of the prohibition against discriminatory and arbitrary measures, the Arbitral Tribunal refers to the developments made in the context of the 1992-1993 time period (see above 5.4.2).

5.5.2.1 The replacement of the Media Council

240. The Arbitral Tribunal holds that the replacement of the Media Council in 1994 did not amount to an arbitrary and discriminatory measure of the Czech Republic.

241. There is indeed no evidence that this replacement was in any direct relation to the involvement of Mr. Lauder in TV Nova, nor that it constituted in any manner a discriminatory and arbitrary measure vis-a-vis the Claimant and his investment in CNTS.

242. Furthermore, any country is entitled to organize its own organs as it pleases as long as this does not result in a discriminatory and arbitrary measure against a foreign investor, protected by the investment Treaty.

243. The replacement of the Media Council in 1994 as such did not cause any harm to Mr. Lauder's investment in the Czech Republic.

5.5.2.2 The Media Council's 1996 and 1998 reports, and Messrs. Štěpánek 's and Josefík's statements

244. The Arbitral Tribunal holds that the Claimant's allegations of discriminatory and arbitrary measures with respect to the Media Council statements in its 1996 and 1998 reports that the target of its efforts was CNTS; to Mr. Štěpánek's statements that CNTS was promoting flight of Czech capital abroad; and to Mr. Josefík admission that it did not even occur to him to consider the interest of foreign investor after Mr. Železný's request of 2 March 1999, are clearly unfounded for similar reasons. Therefore, the Arbitral Tribunal will examine these three allegations together.

245. First, the Media Council alleged statement in its 1996 and 1998 reports that its target effort was CNTS does not constitute a "measure" under the Treaty. Such a statement did indeed not have any direct effect on the Claimant's investment, and it is not alleged that it had such an effect. In the light most favorable to the Claimant, it may only have been evidence of the Media Council's intent to treat CNTS as a target in the context of a measure contemporaneously taken by the Media Council. Therefore, such a statement in itself cannot amount to an arbitrary and discriminatory measure.

246. Then, the alleged statements of Mr. Štěpánek that CNTS was promoting flight of Czech capital abroad does not constitute a "measure" under the Treaty either. Furthermore, a statement by a member of the Media Council is not attributable as such to the Media Council, and to the Czech Republic. On the contrary, it must be considered as a personal opinion of said member, which may or may not reflect the Media Council's opinion on the subject. Therefore, it cannot amount to an arbitrary

and discriminatory measure. It apparently also did not occur to the Claimant that this alleged measure would constitute a violation of the Treaty at the time the statement was made, as this allegation of a violation of the Treaty was raised for the fist time in the course of the present arbitration proceedings.

247. Finally, the alleged admission by Mr. Josefík that it did not even occur to him to consider the interest of foreign investor after Mr. Železný's request of 2 March 1999 is also a personal statement, and, as such, does not constitute a "measure" under the Treaty. In addition, it is not attributable to the Czech Republic. Therefore, it cannot amount to an arbitrary and discriminatory measure. Apparently it did also not occur to the Claimant until the August 2, 1999 letter of CNTS and CME (Exhibit C41)!

5.5.2.3 The initiation of the administrative proceedings

248. The Arbitral Tribunal holds that the initiation in 1996 of the administrative proceedings against CNTS for unauthorized television broadcasting did not constitute an arbitrary and discriminatory measure of the Czech Republic.

249. There is indeed sufficient evidence that the Media Council thought – or could think – that CNTS was violating the Media Law. The Media Council had indeed received complaints from the public on the content of the programs of TV Nova. As regulatory body for radio and television broadcasting, it was responsible, among other duties, for ensuring the observance of the Media Law (Article 16(2)).

250. Article 3(l) of the Media Law, as amended with effect on 1 January 1996, set forth that a broadcasting operator was one who had "*acquired authorization to broadcasting on the basis of law (a "broadcaster by law") or being granted a license under this Act (a "licensed broadcaster") or by registration under this Act (a "registered broadcaster")*". According to Article 2(1)(a), broadcasting *"means dissemination of program services or pictures and sound information by transmitters, cable systems, satellites and other means intended to be received by the public"* (Exhibit R3).

251. Here, the License had been granted to CET 21, and not to CNTS (Exhibits R10 and C16). CNTS actually did not enter into any of the three categories of broadcaster under Article 3(1) of the Media Law (broadcaster by law, licensed broadcaster and registered broadcaster).

252. Several objective facts existed which could cast the doubt on whether CET 21 or CNTS was actually operating the broadcasting of TV Nova. For instance, CNTS's entry into the Commercial Registry stated that its business activity was *"operating television broadcasting on the basis of the license no. 001/1003"* (Exhibits R10 and C16). CNTS had also directly entered into agreements with other companies for the dissemination of broadcasting. In addition, Mr. Železný held at that time the position equivalent to that of a Chief Operating Officer of both companies. Finally, most activities in connection with TV Nova were performed from CNTS's large premises in Prague with an important staff, whereas CET 21 had a much smaller organization.

253. All these facts lead to a confusion of the roles actually played by CNTS and CET 21, and the Media Council could legitimately fear that a situation had arisen where there had been a *de facto* transfer of the License from CET 21 to CNTS.

254. Furthermore, the Media Council, upon its request, had been provided with an expert opinion from Mr. Jan Bárta from the State and Law Institute of the Academy of Science of the Czech Republic stating that the License was issued to CET 21, and therefore this company had to itself operate the broadcasting activities. Assuming that broadcasting was actually operated by CNTS, administrative proceedings to impose a fine could be initiated against the latter (Exhibits C27 and R14). In this respect, the Arbitral Tribunal considers that this opinion was issued by the State and Law Institute of the Academy of Science of the Czech Republic and not only by Mr. Bárta personally, since the Media Council's letter requesting the opinion had been sent to Mr. Bárta at the Institute, and the opinion was issued on the Institute's letterhead.

255. The commencement of the administrative proceedings against CNTS for alleged unauthorized broadcasting constituted the normal exercise of the regulatory duties of the Media Council. Therefore, this measure was not arbitrary.

256. In addition, administrative proceedings for unauthorized broadcasting were not only initiated against CNTS, a company controlled by a foreign investor, but also against two other companies, Premiera TV a.s. and Radio Alfa a.s. (Exhibits R37 and C22). Although Radio Alfa was also controlled by CME in 1996 and thus can equally be qualified as a foreign investor, Premiera TV was controlled by a domestic investor.

257. The Arbitral Tribunal considers that the Media Council decision to initiate administrative proceedings against CNTS was objectively not discriminatory, since the same measure was taken against Premiera TV, which was controlled by a domestic investor. The foreign investment of Mr. Lauder was therefore not provided a treatment less favourable than the domestic investment controlling Premiera TV. In this respect, the Arbitral Tribunal is of the opinion that the Claimant's allegation that the consequences of the administrative proceedings were less serious for Premiera TV than for CNTS is not relevant, because the measure itself is the same in both cases, i.e. the existence of administrative proceedings for unauthorized broadcasting. Discrimination can only occur when the measure against foreign investment and the measure against domestic investment are of a different nature, and the former is less favourable than the latter.

258. Therefore, the initiation of the administrative proceedings against CNTS was also not discriminatory.

259. This being said, the Arbitral Tribunal notes that neither CNTS nor CME raised any objection at the time the administrative proceedings were initiated that this action was in violation of any Czech law let alone that they violated the Treaty or any obligation of the Czech Republic.

5.5.2.4 The Media Council's ongoing efforts to eliminate the original structure between CET 21 and CNTS

260. The Arbitral Tribunal also considers that the alleged ongoing efforts by the Media Council to eliminate the original structure between CET 21 and CNTS in favor of non-

exclusive contractual arrangements did not constitute an arbitrary and discriminatory measure of the Czech Republic.

261. It is first to be noted that this allegation is rather vague. The Arbitral Tribunal understands that the alleged ongoing efforts to eliminate the original structure between CET 21 and CNTS refer both to the changes in their contractual relationships, i.e. the amendment to the MOA and the conclusion of the various agreements, and to the issuance by the Media Council of its 15 March 1999 letter, in response to CET 21's request of 3 March 1999 (Exhibit C34).

262. For the sake of clarity, the Arbitral Tribunal will examine these two sets of facts separately.

5.5.2.4.1 The changes to the contractual relationships between CET 21 and CNTS

263. The Arbitral Tribunal considers that the Media Council's actions leading to the changes to the MOA and the conclusion of the various agreements between CET 21 and CNTS did not constitute arbitrary and discriminatory measures.

264. The Arbitral Tribunal is of the opinion that the main reason for the Media Council to direct CME, CET 21 and CNTS to bring some modifications to their legal relationships was the same as the ground for initiating the administrative proceedings against CNTS for unauthorized broadcasting, i.e. the fear that the unclear legal and factual situation could actually amount to a *de facto* transfer of the License from CET 21 to CNTS, in violation of the Media Law.

265. Article 1.4.1(a) of the original MOA stated that *"CET shall contribute to the Company unconditionally, unequivocally, and on an exclusive basis the right to use, exploit and maintain the License held by CET"*. The MOA did not contain any definition of the words *"use, exploit and maintain"*, which remained open for interpretation.

266. This legal uncertainty, reinforced by the doubts about the factual allocation of responsibilities between CET 21 and CNTS, led the Media Council to ask the two companies to enter into a service contract setting forth their respective roles in the operation of TV Nova. This process was initiated at the meeting between the Media Council and CET 21 of 13 March 1996. The first conclusion of this meeting was that *"[l]awyers of the Council and CET 21 will prepare the first version of a contract on provision of performances and services between CET 21 and CNTS (...)"* (Exhibit C84).

267. As a result, CET 21 and CNTS concluded the May 1996 Agreement. This agreement expressly set forth in the preamble that its *"purpose (...) is to specify the mutual rights and mutual obligations* which *arise to CET 21 as the party making and CNTS as the party accepting a contribution made under the memorandum of association of May 4, 1993, by which CNTS was established. The memorandum of association is not changed by this agreement"*. The agreement stated that CNTS had the authorization to *"arrange"* the television broadcasting operated on the basis of the License (Article 2(1); Exhibit R17).

268. The amendment to the MOA in November 1996 (Exhibit C59), as well as the conclusions of the October 1996 Agreement (Exhibit R21) and of the 1997 Agreement (Exhibits C29 and R22), were further steps of the same process consisting in specifying the legal relationship between CET 21, CME and CNTS in order to ensure the creation of a clear situation in observance of the Media Law.

269. In this respect, the October 1996 Agreement was mainly similar to the May 1996 Agreement, except for the new Article 1(3) providing that said agreement *"does not affect the exclusive liability of CET 21 for the programming"* under the Media Law. The amended Article 1.4.1(a) of the MOA stated that *"the Company is granted the unconditional, irrevocable, and exclusive right to use and maintain the know-how and make it the subject of profit to the Company, in connection with the License, its maintenance, and protection"*. Finally, the 1997 Agreement further specified CNTS's activities by listing the scope of its business (Article 1(3)), and expressly stated that the contracts on the provision of services would be concluded by CNTS on behalf of CET 21 (Article 5(1) and (2)).

270. As they were based on an objective ground, i.e. the efforts to create a clear legal situation in compliance with the Media Law, and as there is no sufficient evidence that they were specifically targeted against foreign investment, the Media Council's actions leading to the changes to the MOA and the conclusion of the various agreements between CET 21 and CNTS did not constitute arbitrary and discriminatory measures.

271. This being said, neither CNTS nor CME raised any objections to this process to the Media Council. On the contrary, both CET 21 and CNTS fully collaborated. The letter sent by both companies to the Media Council on 4 October 1996 indeed constituted a proposal to take several steps *"(...) for how to best and most quickly meet the parliamentary commission's demands and thus how to amicably resolve the prolonged differences which arose in addressing the legal situation concerning the arrangement of legal relationships between [CNTS] and CET 21 s.r.o., as well as around the cancellation of license conditions (...)"* (Exhibit R19). These steps were, among others, the above mentioned amendment to the MOA and conclusion of the agreements between CET 21 and CNTS.

272. This collaboration took place despite the CME's awareness that their legal situation vis-à-vis CET 21 might be affected. In an memorandum dated 15 May 1996, Mrs. DeBruce of CME indeed expressed her concern with respect to the contemplated amendment to the MOA. All proposed amendments to the MOA and contracts between CET 21 and CNTS should be reviewed by legal counsel prior to be entered into (Exhibit C111).

273. Therefore, the Arbitral Tribunal holds that the Claimant acquiesced to the Media Council's above mentioned actions, and is in any event barred from making a claim deriving therefrom.

274. Finally, the Arbitral Tribunal notes that no sufficient evidence was offered that the damage claimed by Mr. Lauder in the present arbitration proceedings, i.e. the termination of the contractual relationship between CET 21 and CNTS on 5 August 1999 on the initiative of the former, was caused by the insistence of the Media Council on the respect of the Media Law in 1996 and 1997. On the contrary, such damage was

the direct result of Mr. Železný's own behavior, which was not backed in 1996 or 1997 by the Media Council or any other organ of the Respondent. Regarding further the question of causality between the alleged acts of the Media Council and the damage claimed see above § 234 and 235.

5.5.2.4.2 The 15 March 1999 opinion of the Media Council

275. The Claimant especially draws the attention of the Arbitral Tribunal to the visit by Mr. Železný to the Media Council on 2 March 1999 (R97), the following letter of CET 21, signed by Mr. Železný to the Media Council on 3 March 1999 (C33) and the answer to the Media Council by its Chairman Josef Josefík of 15 March 1999, addressed to Mr. Železný "CEO of TV NOVA and Executive Director of CET 21" (C34). According to these documents, and especially the description of the oral discussion which took place between Mr. Železný and the Media Council, it is clear that the Media Council was informed of the differences between Mr. Železný as master of CET 21 and CNTS. It was clear that Mr. Železný wanted the support of the Media Council in his struggle to free CET 21, and therefore himself, from the restrictions of the arrangements with CNTS. Although not in all points but at least in one of the key issues, namely the exclusive nature of the agreements between CET 21 and CNTS, the Media Council clearly expressed its opinion that in the context of television broadcasting the *"business relations between the operator of broadcasting and service organizations are built on a non-exclusive basis."*

276. This view would seem to be contrary to what the 1996 Agreements, which were discussed and agreed with the Media Council in 1996, with the very active participation of Mr. Železný, then wearing the two hats of CEO of both CNTS and CET 21 have stipulated. The question which this Arbitral Tribunal, however, has to decide is not whether the Media Council was allowed to send such a letter, but whether the sending of the letter constituted a breach of the Treaty obligations of the Respondent.

277. The Arbitral Tribunal considers that the issuance of the Media Council's 15 March 1999 letter does not constitute an arbitrary measure and therefore cannot be considered as a breach of the Treaty.

278. As stated above (see 5.5.2.3 and 5.5.2.4.1), the Media Council was concerned with the fact that the unclear legal and factual situation may lead to a *de facto* transfer of the License to CNTS, in violation of the Media Law. The exclusive relationship between CET 21, the licensed broadcaster, and CNTS, its partner in the operation of TV Nova, was regarded with suspicion, because the Media Council was of the opinion that it presented the inherent danger of a *de facto* transfer of the License.

279. The Media Council's view on this issue was expressed, for instance, in its opinion to the Permanent Media Commission of the House of Deputies of the Parliament of 19 September 1999 with respect to the dispute between CET 21 and CNTS. Chapter 4 reads 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 exclusively through CNTS 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 closer to the opinion that an exclusive relationship between the license holder and a service company is not desirable as it gives an opportunity to manipulate with the license"* (Exhibit C68). The Media Council also expressed its view on this issue in the supplementary report of 15 November 1999 to the same Commission: *"Administrative proceedings to revoke a license can be started only in the event of serious violation of the Broadcasting Act, and there must be provable reasons for them. Interrupting the cooperation of two private companies is not such a reason, and in addition, the council considers the exclusive relationship between the broadcaster and the only service organization as undesirable, due to the danger of a hidden transfer of the license"* (Exhibit R126).

280. The disputed 15 March 1999 letter to CET 21 contained the following statement: *"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 license" (Exhibit C34).

281. This statement is to be replaced in the context of the letter, which expressed the Media Council's opinion on the requirements of the Media Law with respect to television broadcasting: *"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 licenses, we would like to summarize requirements that, in our opinion, express the contents of television broadcasting: (...)".* Beside the list of said requirements, among them the above mentioned statement on regarding the exclusive relationship, the letter also explained the reason for terminating the administrative proceedings against CNTS for unauthorized broadcasting, and requested CET 21 to inform the Media Council about the implementation of the various changes with respect to the legal relationships between CET and CNTS, and to submit the current program composition and broadcasting schedule.

282. Although the statement about the non exclusive basis of the relationship between the holder of the license and the service organization might be viewed as a change of the previous position of the Media Council with respect to this issue, because the Media Council had been satisfied with the amendment of the MOA and the various 1996 and 1997 agreements between CET 21 and CNTS, which all stated the exclusive basis of the relationship between the two companies, the Arbitral Tribunal considers that it does not constitute a "measure" within the meaning of the Treaty, but merely expresses the general opinion of a regulatory body regarding the proper interpretation which should be given to the Media Law.

283. This letter was not aimed at having, and could not have, any legal effect. Condition 17 to the License, which required CET 21 to submit to the Media Council for approval any change in the MOA, had been cancelled end of 1996 (Exhibits R57 and C30). Since then, the Media Council had no authority to approve or disapprove any modification to the relationship between CET 21 and CNTS.

284. Since the Media Council's 15 March 1999 letter to CET 21 did not amount to a "measure", the Respondent did not violate the prohibition against arbitrary and discriminatory measures.

285. The Arbitral Tribunal also considers that said letter was neither arbitrary nor discriminatory. There indeed existed reasonable grounds, even if not necessarily conclusive, for the Media Council to view the existence of an exclusive relationship between CET 21 and CNTS as a danger of a de facto transfer of the License.

286. In addition, the Media Council remained independent from the dispute between CET 21 and CNTS. The 15 March 1999 letter was indeed significantly different from the request for said letter filed by CET 21 on 3 March 1999. In particular, the Media Council's letter did not reproduce CET 21's statement that the operator, i.e. CET 21, *"should order services from service organizations at regular prices so as to respect rules of equal competition "*, nor the statement that *"[f]or the level of provided services to agree with the terms of the license and Czech regulatory requirements, the licensed subject must have the ability to select relevant services anytime and anywhere at will"* (Exhibit C33). Those differences between CET 21's request and the Media Council's letter show that the latter did not just follow the wishes Mr. Železný, who controlled CET 21 at that time.

287. In this respect, the Arbitral Tribunal notes that the Claimant or the entities he controls did not commence any administrative or other proceedings before the appropriate courts of the Czech Republic in the course of which the issue of the overall attitude of the Media Council in this affair, mainly its alleged contradictory interpretation of the Media Law, could be addressed and decided. The Arbitral Tribunal considers that these proceedings do not constitute the appropriate forum to decide on hypothetical questions of the interpretation of the Media Law.

288. The Arbitral Tribunal also considers that the issuance of the Media Council's 15 March 1999 letter was not the cause of the damage incurred by the Claimant. Although this letter might have strengthened the resolve of Mr. Železný to break up the relationship between CET 21 and CNTS, it was not used to achieve this purpose. CET 21 did not terminate the 1997 Agreement on the basis that it provided for an

exclusive relationship with CNTS whereas the Media Council expressed the view such a relationship was undesirable. The legal reason for the termination was that CNTS had failed to submit a television program (Daily Log) on time, a requirement under the 1997 Agreement. Furthermore, there is no evidence that even if the Media Council had not written the 15 March 1999 letter, CET 21 would not have tried to terminate the 1997 Agreement on the ground of breach of contract.

5.53. The obligation to provide fair and equitable treatment

289. The Claimant alleges that the Respondent breached the obligation to provide fair and equitable treatment to the Claimant's investments through the Media Council's reversal of critical prior approvals. This concerns the Media Council's proceedings in 1996 aimed at removing in the MOA the provision giving CNTS the exclusive right to use, benefit from and maintain the License. Furthermore the Claimant asserts that the Media Council demonstrated hostile conduct towards CNTS, by the totality of its other actions and inactions that undermined the rights which had been provided to CNTS (Reply Memorial, p. 81; Summary of Summation, p. 13).

290. The Claimant argues that the obligation to provide fair and equitable treatment has its basis in the general principle of good faith. The State bound by the Treaty must indeed pursue the stated goal of achieving a stable framework for investment. The minimum requirement is that the State not engage in inconsistent conduct, e.g. by reversing to the detriment of the investor prior approvals on which he justifiably relied. Such a requirement is independent of the State's domestic law, i.e. the obligation to provide fair and equitable investment can be violated even if the State complied with the requirements under its domestic law. In addition, it is not relevant whether domestic investors in the same field received the same treatment as the foreign investor, since the level of protection may be different under domestic law and under the Treaty (Reply Memorial, p. 77-83; Mr. Kiernan's oral closing submissions, p. 161-168).

291. The Respondent argues that there exists no precise definition of the obligation to provide fair and equitable treatment. What is fair and equitable is to be determined on the basis of the facts in each individual case. Anyway, this obligation is concerned with the conduct of the State, not with the results of the investments. Therefore, the fact that the investor loses money does not indicate that the State has breached the obligation to provide fair and equitable treatment. There is no evidence of a violation of this obligation by the Czech Republic. Up to 1997, the Media Council was indeed seeking to monitor and enforce the Media Law in the face of growing concern that CNTS was breaching it. The Media Council did not discriminate against the Claimant in favor of nationals, did not reverse prior express permissions, and did not maliciously misapply the law. Between 1997 and 1999, the Media Council did not want to take sides with respect to the dispute between CET 21 and CNTS, which was considered a commercial dispute. In particular, the Media Council's letter of March 15, 1999, whose wording is different from the one requested by Mr. Železný, expressed the Media Council's policy in a lawful and non-discriminatory manner (Response, p. 55; Written Closing Submissions, p. 10-11).

292. Article II(2)(a) of the Treaty sets forth that *"[i]nvestments shall at all times be accorded fair and equitable treatments, (...)"*. As with any treaty, the Treaty shall be interpreted by reference to its object and purpose, as well as by the circumstances of its conclusion (Vienna Convention on the Law of Treaties, Articles 31 and 32). The preamble of the Treaty states that the Parties agree *"that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources"*. The Arbitral Tribunal notes that there is no further definition of the notion of fair and equitable treatment in the Treaty. The United Nations Conference On Trade And Development has examined the meaning of this doctrine. Fair and equitable treatment is related to the traditional standard of due diligence and provides a *"minimum international standard which forms part of customary international law"* (U.N. Conference On Trade & Development: Bilateral Investment Treaties In The Mid-1990s at 53, U.N. Doc. UNCTAD/ITE/IIT/7, U.N. Sales No. E.98.II.D.8 (1998) (English version). In the context of bilateral investment treaties, the "fair and equitable" standard is subjective and depends heavily on a factual context. It *"will also prevent discrimination against the beneficiary of the standard, where discrimination would amount to unfairness or*

inequity in the circumstances" (U.N. Conference On Trade & Development: Fair And Equitable Treatment, Vol. III at 10,15, U.N. Doc. UNCTAD/ITE/IIT/II, U.N. Sales No. E.99.11.D.15 (1999) (English version)).

293. The Arbitral Tribunal holds that none of the actions and inactions of the Media Council, which have already been examined with respect to the prohibition against arbitrary and discriminatory measures (see above 5.5.2), constitutes a violation of the duty to provide fair and equitable treatment.

294. In order to avoid redundancy, the Arbitral Tribunal mainly refers to the developments made under the chapter addressing the issue of the prohibition against arbitrary and discriminatory measures, for most of the arguments denying the existence of any arbitrary and discriminatory measure from the Czech Republic as from 1996 also apply to the Respondent's compliance with the obligation to provide fair and equitable treatment.

295. This being said, the Arbitral Tribunal does not see any inconsistent conduct on the part of the Media Council which would amount to an unfair and inequitable treatment.

296. In particular, the initiation of the administrative proceedings for unauthorized broadcasting in 1996 was not inconsistent with any prior conduct of the Media Council. At that time, the Media Council had objective reasons to think that CNTS was violating the Media Law, i.e. that it was the broadcaster of TV Nova in lieu of CET 21, the holder of the License. The Media Council's duties were, among others, to ensure the observance of the Media Law.

297. There can not be any inconsistent conduct in a regulatory body taking the necessary actions to enforce the law, absent any specific undertaking that it will refrain from doing so. No such undertaking was given by the Media Council or any other organ of the Czech Republic.

298. The prior approval by the Media Council of the MOA, in the context of the License being granted to CET 21, contained no commitment to allow CET 21 and CNTS to violate the Media Law. On the contrary, the License expressly stated that *"[t]he*

license holder (...) also agrees to observe the conditions stated in the appendix to this license". Condition 1 to the License set forth that *"[t]he license holder agrees (...) that its broadcasting will be in accordance with the laws of the Czech Republic and the international obligations of the Czech Republic. Broadcasting will, in particular, observe (...) the provisions of Act no. 468/1991 Coll., on operating radio and television (...)"* (Exhibit R5). The amendment to the Media Law did not change anything with respect to CET 21's obligation to comply with the Media Law.

299. The administrative proceedings against CNTS for unauthorized broadcasting was not initiated on the ground that CNTS would have abided by the previously approved MOA, which would itself then be considered as violating the Media Law. As already stated, the reason for commencing such proceedings was the Media Council's concern that CNTS was operating the broadcasting of TV Nova in violation of the License and of the Media Law.

300. Regarding the changes to the legal relationships between CET 21 and CNTS, i.e. the amendment to the MOA and the conclusion of the various agreements between the two companies, there was also no inconsistent conduct on the part of the Media Council.

301. At no time did the Media Council decide that the approval of the original MOA was deemed null and void, and that any guarantee given to CET 21 and CNTS at that time had to be withdrawn. As stated above (see 5.5.2.4.1), all changes to the legal relationships between CET 21 and CNTS made in 1996 and 1997 were aimed at *specifying*, not altering, the content of said relationships in order to ensure a clear situation in observance of the Media Law.

302. Furthermore, CET 21, CNTS and CME fully cooperated to this process, after being given proper legal advice on the various issues addressed.

303. Finally, the issuance of the 15 March 1999 letter by the Media Council, although in some way in contradiction with the previously approved MOA on the question of the exclusive nature of the contractual relationship between CET 21 and CNTS, was nothing more than an opinion without any legal effect. It did not alter - and was not

aimed at altering – the contractual relationships between the two companies, which remained governed by the 1997 Agreement then in force.

304. In addition, the Arbitral Tribunal is of the opinion that the 15 March 1999 letter was not the direct cause of the damage allegedly suffered by the Claimant. Any damage resulted from the decision of CET 21, controlled by Mr. Železný, to terminate the 1997 Agreement with CNTS. CET 21 made no use of the 15 March 1999 letter. There is no evidence that CET 21 would not have terminated the contractual relationships with CNTS if the Media Council had not issued the 15 March letter, or, for argument's sake, had stated that it was of the opinion that an exclusive relationship between the two companies fully complied with the Media Law. With respect to causality in general see above § 234 and 235.

5.5.4 The obligation to provide full protection and security

305. The Claimant alleges that the Respondent failed to provide full protection and security to his investment (i) by forcing a change in the Media Law, (ii) by initiating the administrative proceedings against CNTS in 1996, (iii) by subsequent pressures to bring about the restructuring of CNTS, (iv) by issuing the 15 March 1999 letter, (v) by refusing all CNTS's requests to halt CET 21's dismantling of all dealings with the former, and (vi) by authorizing a share capital increase in CET 21 with knowledge that it would frustrate the ICC arbitral panel's interim order and would defy an express contrary request from Parliament (Reply Memorial, p. 85).

306. The Claimant argues that the obligation of full protection and security requires that the State take all steps necessary to protect foreign investments whatever the requirements of domestic law are and regardless of whether the threat to the investment arises from the State's own actions. The State has an obligation of vigilance under which it must take all measures necessary to ensure the full enjoyment of protection and security of the foreign investment (Memorial, p. 55; Reply Memorial, p. 83-85).

307. The Respondent argues the obligation of full protection and security is not an absolute obligation. A State is only obliged to provide protection which is reasonable under the circumstances. Furthermore, the obligation is limited to the activities of the State itself, and does not extend to the activities of a private person or entity. There can also be no legitimate expectation that there will not be any regulatory change (Response, p. 57-59).

308. Article II(2)(a) of the Treaty provides that *"[i]nvestment (...) shall enjoy full protection and security"*. There is no further definition of this obligation in the Treaty. The Arbitral Tribunal is of the opinion that the Treaty obliges the Parties to exercise such due diligence in the protection of foreign investment as reasonable under the circumstances. However, the Treaty does not oblige the Parties to protect foreign investment against any possible loss of value caused by persons whose acts could not be attributed to the State. Such protection would indeed amount to strict liability, which can not be imposed to a State absent any specific provision in the Treaty (Dolzer and Stevens, Bilateral Investment Treaties, p. 61).

309. The Arbitral Tribunal holds that none of the facts alleged by the Claimant constituted a violation by the Respondent of the obligation to provide full protection and security under the Treaty.

310. Here again, in order to avoid redundancy, the Arbitral Tribunal refers to the findings made under the chapter addressing the issue of the prohibition against arbitrary and discriminatory measures (see above 5.5.2), for most of the arguments denying the existence of any arbitrary and discriminatory measure from the Czech Republic as from 1996 also apply to the Respondent's compliance with the obligation to provide full protection and security.

311. In particular, as regards the amendment to the Media Law in late 1995, effective on 1 January 1996, there is no evidence that such amendment, enacted by the Czech Parliament, was forced by the Media Council. Furthermore, the change in the Media Law did not constitute a danger for the Claimant's investment in the Czech Republic. In particular, the deletion of Article 12(3) authorizing the Media Council to include conditions to the grant of a license was not aimed at, nor suited to, destroying

Mr. Lauder's investment. On the contrary, such a change was favorably viewed by the entities operating TV Nova, since CET 21, represented by Mr. Železný, who was at that time on the side of the Claimant, immediately applied to the Media Council for the cancellation of most of the Conditions set in the License, among others Condition 17 (Exhibit R31).

312. Furthermore, the Arbitral Tribunal considers that it is not the Media Council's role to halt the alleged dismantling by CET 21 of all its dealings with CNTS, nor to enforce an ICC arbitral tribunal interim order. In any event, if the Media Council had acted in violation of its own obligations in respect of these two issues, the present arbitration proceedings are not the proper forum to seek relief. The Claimant should have and in fact did initiate action before the competent administrative or civil courts of the Czech Republic.

313. In addition, the Arbitral Tribunal considers that none of the actions or inactions of the Media Council caused a direct or indirect damage to Mr. Lauder's investment. The action which actually caused the Claimant to lose part of his investment was the termination by CET 21 of its contractual relationship with CNTS in 1999. In other words, the business relationship between CET 21 and CNTS survived all the alleged actions and inactions of the Media Council. It so did until Mr. Železný changed sides and decided to act in favor of CET 21, which by 1999 he controlled, against CNTS in which he no longer had any direct or indirect control. Regarding the issue of causality for the alleged loss suffered by the Claimant see especially § 234 and 235 above.

314. The investment treaty created no duty of due diligence on the part of the Czech Republic to intervene in the dispute between the two companies over the nature of their legal relationships. The Respondent's only duty under the Treaty was to keep its judicial system available for the Claimant and any entities he controls to bring their claims, and for such claims to be properly examined and decided in accordance with domestic and international law. There is no evidence – not even an allegation – that the Respondent has violated this obligation. On the contrary, the numerous Czech court proceedings initiated by CNTS, CME and Mr. Lauder against CET 21 and Mr. Železný show that the Czech judicial system has remained fully available to the Claimant. In particular, the 4 May 2000 decision by the Regional Commercial Court in

Prague that CET 21 was obligated to procure all services for television broadcasting exclusively through CNTS (Exhibit C54) is conclusive evidence of this availability. While this decision was later annulled by the High Court in Prague (Exhibit R134) an appeal is now pending before the Czech Supreme Court, which may still rule in favor of CNTS.

6. Costs

315. Article 38 of the UNCITRAL Rules states that the Arbitral Tribunal shall fix the costs of arbitration in its Award and defines the term "costs".

316. At the Hearing of 17 March 2000 the Parties and the Arbitrators agreed on the formula for the fees of the Arbitral Tribunal. The fees and travel and other expenses incurred by the Arbitrators are herewith fixed at United States Dollars 501'370.20

317. According to Article 40 of the UNCITRAL Rules, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the Arbitral Tribunal may apportion such costs between the Parties if it determines that apportionment is reasonable, taking into account the circumstances of the case. The same applies according to Article 40(2) with respect to the costs of legal representation and assistance. The Arbitral Tribunal can take into account the circumstances of the case and is free to determine which Party shall bear such costs or may apportioned such costs between the Parties if it determines that apportionment is reasonable.

318. Among the circumstances the Tribunal has taken into account is its finding that the Respondent, at the very beginning of the investment by the Claimant in the Czech Republic, breached its obligations not to subject the investment to discriminatory and arbitrary measures when it reneged on its original approval of a capital investment in the licence holder and insisted on the creation of a joint venture. Furthermore, various steps were taken by the Media Council, especially, but not only, the 15 March 1999 letter to CET 21. Although the Arbitral Tribunal came to the conclusion that such acts did not constitute a violation of the Treaty obligations of the Respondent, the Claimant

bona fide could nevertheless feel that he had to commence these arbitration proceedings. Furthermore, the behaviour of the Respondent regarding the discovery of documents, which the Claimant could rightly feel might shed more light on the acts of the Respondent, needs to be mentioned in this context.

319. Taking all these circumstances of the case into account, the Arbitral Tribunal comes to the decision that each Party shall pay one half of the fees and expenses of the Arbitral Tribunal and the hearing cost and bear its own costs for legal representation and assistance and the costs of its witnesses.

NOW THEREFORE THE ARBITRAL TRIBUNAL

DECIDES

1. It has jurisdiction to hear and decide this case.

2. The Respondent committed a breach of its obligation to refrain from arbitrary and discriminatory measures when in the Winter of 1993 it changed its original position, which had been made known to the Claimant and to the public at large, allowing an equity investment of the Claimant in CET 21, the holder of the licence to broadcast, and insisted that the participation of the Claimant could not be made in the form of an equity participation but only through a joint venture company.

3. The claim for a declaration that the Respondent committed further breaches of the Treaty are denied and all claims for damages are denied.

4. Each Party shall pay one half of the fees and expenses of the Arbitral Tribunal which are fixed at US$ 501‘370.20

5. Each Party shall pay one half of the direct costs involved in the London Hearings, including room hire, cost of court reporters, etc.

6. Each Party shall carry its own costs for legal representation and assistance, including the travel and other expenses of witnesses presented by the respective Party.

7. All other claims are herewith dismissed.

Place of arbitration: London

Date of this Arbitral Award: 3 September 2001

The Arbitral Tribunal

Lloyd Cutler
Arbitrator

Robert Briner
Chairman

Bohuslav Klein
Arbitrator