

CME Czech Republic B.V. (The Netherlands) v The Czech Republic,
UNCITRAL, Partial Award

Summary: CME claimed against the State for the acts and omissions of its Media Council which allegedly assisted its local partner in terminating the exclusive relationship which had been the foundation of CME's investment.

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

vs.	We hereby certify this to be a true copy of the original.
The Czech Republic	Signed <i>Clifford Chance</i>
PARTIAL AWARD	Clifford Chance Limited Liability Partnership 200 Aldersgate Street London EC1A 4JJ

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

between

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

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

and

RESPONDENT: The Czech Republic

represented by the Minister of Finance of the Czech Republic Mr. Jiří Rusnoki, Ministry of Finance, Letenzka 15, 11810 Prague 1, The Czech Republic represented by: Mr. Jeremy Carver and Mr. Audley Sheppard, Clifford Chance, 200 Aldersgate Street, London EC1A 4JJ and Mr. Vladimír Petrus and Mr. Miroslav Dubovský, Clifford Chance Pünder, Charles Bridge Center, Křižovnické nám. 2, 1 10 00 Prague 1, Czech Republic

BEFORE: Dr. Wolfgang Kühn, Düsseldorf, Chairman,
Judge Stephen M. Schwebel, Washington D.C., Arbitrator,
JUDr. Jaroslav Hándl, Prague, Arbitrator

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

4. The Obligation of Full Security and Protection

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

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

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

4. The Obligation of Full Security and Protection

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

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

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

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

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

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

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

(8) Parallel Proceedings

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

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

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

(9) No abuse of Treaty Proceedings

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

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

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

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

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

(11) Respondent's Defence that no Loss Occurred

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

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

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

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

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

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