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Case summary

CME Czech Republic B.V. (The Netherlands)
v
The Czech Republic

Year of the award: 2001-2003
Forum: *Ad hoc* tribunal under UNCITRAL arbitration rules
Applicable investment treaty: Netherlands – Czech BIT (concluded in 1991)

Arbitrators	**Timeline of the dispute**
Dr. Wolfgang Kühn – Chairman Mr. Steven M. Schwebel Mr. Jaroslav Hándl (in the damages stage substituted by Mr. Ian Brownlie)	22 February 2000 – Notice of arbitration 21 July 2000 – Arbitral tribunal constituted 13 September 2001 – Partial award (on merits) 14 March 2003 – Final Award (on damages) 15 May 2003 – Judicial review of the Partial Award by a Swedish court (Award upheld)

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I. Executive Summary

CME, a Dutch corporation with a Czech subsidiary CNTS (investment) engaged in media business, brought a dispute against the Czech Republic under the Netherlands-Czech BIT, alleging several violations of the BIT by the Media Council (Czech media regulatory body) and claiming damages of over US$ 500 million.

In accordance with the license granted to a Czech company CET 21 in 1993, CNTS had become an exclusive provider of broadcasting services for the first private Czech TV channel TV Nova, which turned out to be extremely popular and profitable. Following the Media Council's actions and omissions and the conflict with the head of CET 21 Dr. Zelezny, the exclusive position of the CNTS as a services provider for TV Nova was first undermined in 1996 and then fully destroyed in 1999. As a result, CNTS effectively went out of business, with its place being taken by other service providers.

The Tribunal found that Media Council's actions and omissions constituted expropriation of CME's investment and violated other four provisions of the BIT. The Tribunal held that the fair market value of CME's investment should be compensated. In its very detailed award on damages, the Tribunal reviewed several valuation methods suggested by the Claimant. As a primary method to determine the value of CNTS as a going concern, the Tribunal used valuation done by a Swedish media company that had intended to buy CNTS from CME not long before the 1999 events. On this basis, with some adjustments, the Tribunal determined the market price a willing buyer wished to pay for the investment. The Tribunal also accepted the parties' DCF analyses as proper method for CNTS valuation. The Tribunal made its own assessment of the parties' DCF estimates and used the resultant figure to support its findings under the primary valuation method. Remaining valuation methods were declined as unnecessary or otherwise unhelpful.

After making all the adjustments, the Tribunal awarded CME the damages of US$ 270 million plus simple interest of 10% per annum from the date of the arbitration request and up to the date of payment.

The Czech Republic applied to a Swedish domestic court for the judicial review of the arbitral award. The Swedish court upheld the award.

II. Factual Background and Claims of the Investor

The Claimant, CME Czech Republic B.V. ("CME") was a Dutch corporation with a 99% equity interest in CNTS, a Czech television services company. This shareholding had been acquired by CME in the course of 1994-1997.

CNTS together with CET 21, a Czech company without foreign capital, organized the first nation-wide private TV station in the Czech Republic had (TV NOVA) after being authorized to do so by the Czech Media Council (the Czech media regulatory authority), which granted to CET 21 a license for television broadcasting in 1993. License conditions stipulated *inter alia* that CET 21 would be the license holder and CNTS – the operator of the broadcasting station. The license guaranteed CNTS's exclusive control over commercial, technical, management and other activities of the station but prevented interference with the programming and editorial independence. Such dual scheme had been designed as more acceptable for public opinion which largely opposed full foreign control over a private TV channel.

TV NOVA began broadcasting in 1994 and soon became the most popular and successful TV station with a big audience and multi-million dollar net annual income. CNTS produced and bought programmes and sold advertising time to CET 21, while the latter acted only as a license holder. Dr. Železnŷ, an influential Czech journalist and businessman, headed both entities, CNTS and CET 21.

In 1996 the Media Council began pressuring for the reorganization of the CNTS-CET 21 relationship. CNTS (CME) gave in to this pressure, and conditions of the license were changed to weaken the legal tie between the two companies; but CNTS continued to provide its exclusive broadcasting services to CET 21 under the newly concluded Service Agreement. However, in 1999, after communications between the Media Council and Dr. Železnŷ who by that time became resolved to remove CNTS as exclusive provider of broadcasting services, CET 21 terminated the Service Agreement, on questionable grounds. CNTS was subsequently replaced by other providers of broadcasting services.

In the arbitration proceedings instituted under the Netherlands-Czech BIT, CME claimed that CNTS's business, and thus CME's investment, were totally destroyed. CME attributed this result to the actions and omissions of the Media Council, whose control over the issuing, renewing and modification of the mandatory TV license was the main instrument in making CNTS go out of business. CME alleged multiple violations of the mentioned BIT (including expropriation, fair and equitable treatment standard, etc.) and claimed damages of nearly US$ 500 million plus interest. The Czech Republic denied all claims.[1]

[1] CME's owner and the ultimate benefactor of the CME's investment was an American TV entrepreneur, Mr. Lauder. To obtain compensation for his damages, Mr. Lauder pursued several legal avenues including the proceedings before the Czech courts, the ICC International Court of Arbitration, and two investment treaty arbitrations – one initiated by himself under the US-Czech BIT (held in London), and the other initiated by CME under the Netherlands-Czech BIT (held in Stockholm). The London arbitration tribunal found one breach of the US-Czech BIT but did not award damages due to the failure of the Claimant to show causal link between the 1993 breach and the 1999 damages. The Stockholm arbitration was much more successful for the Claimant, as will be seen from this summary.

III. Findings on Merits

Upon its examination of evidence, the Tribunal found that the Media Council "exerted coercion" on CME's investment. As a result of this coercion, the safety of CME's investment was endangered and consequently the investment was destroyed. The Tribunal singled out three episodes of the unlawful behavior of the Media Council in relation to the investor:

1) In 1996 the Media Council materially weakened the legal protection of CME's investment (legal situation of CNTS' exclusiveness as a service provider) by requiring to substitute the original 1993 license scheme by the contractual relationship. The unlawful pressure of the Media Council manifested itself primarily in the threat of (unsubstantiated) administrative proceedings to withdraw the TV license unless CNTS cooperated. (Partial Award, paras. 460-538)
2) In 1999 the Media Council unlawfully supported Dr. Železnŷ – by means of a letter "fabricated in collusion with Dr. Železnŷ" – in his commercial conflict with CME aimed at eliminating CNTS as the *exclusive* service provider for CET 21. (Partial Award, paras. 539-558)
3) In 1999 the Media Council also disregarded CNTS' requests for clarification of the legal situation relating to the question of exclusivity and thereby further supported the elimination of contractual exclusivity of the Service Agreement. (Partial Award, paras. 559-574)

The negative effects of this gradual loss of legal security for CME's investment materialized in 1999 when CET 21 unilaterally terminated the Service Agreement on questionable grounds, and CNTS was effectively squeezed out of business. The Tribunal concluded that the described actions and inactions of the Media Council's constituted **breaches** of the following BIT provisions:

1. **On expropriation.** The Media Council caused the destruction of CNTS' operation, leaving CNTS as a company with assets, but without business. The commercial value of CME's investment in CNTS was destroyed by Media Council's coercion. (Partial Award, para.591)
2. **On fair and equitable treatment**. The Media Council eviscerated the arrangements upon which CME relied when making its investment. (Partial Award, para.611)
3. **Obligation not to impair investments by unreasonable or discriminatory measures.** (Partial Award, para.612)
4. **Obligation to accord full security and protection.** (Partial Award, para.613)
5. **Obligation to treat investments in conformity with principles of international law.** (Partial Award, para.614)

IV. Findings on Damages

A. Law Applicable to the Determination of Damages

The BIT contained a choice-of-law clause that provided:

> The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:
> - the law in force of the Contracting Party concerned;
> - the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;
> - the general principles of international law.

The "Common Position" on interpretation of this Article, agreed to by the Netherlands and the Czech Republic, added that to the extent that there was a conflict between national law and international law, the arbitral tribunal should apply international law. On this basis, the Tribunal rejected the Czech Republic's contention that Czech law prevailed.

Importantly, when considering the law applicable to determine the compensation, the Tribunal found that the body of customary international law had been reshaped by an extraordinary number of investment treaties, and that contemporary international law no longer included the possibility of payment of compensation pursuant to the domestic law of the host State (Final Award, para.498)

B. Causation

The Tribunal determined that the collapse of CME's investment was caused by the Media Council's coercion against CME. In connection with the issue of causation, the Tribunal addressed the following questions:

1) whether CME itself contributed to the loss of its investment by agreeing in 1996 to give up the initial 1993 license arrangement;
2) whether the State's liability should be reduced because the damage was caused to the investment not only by the Media Council but also by the actions of Dr. Železnŷ;
3) causation criteria to be applied.

On the <u>first question</u>, the Tribunal held that the Media Council *forced* CME to give up the legal protection for its investment, and that therefore there was no contributory fault that could decrease the amount of compensation. (Partial Award, paras.576-579)

On the <u>second question</u>, the Tribunal referred to rules of international law (including the International Law Commission reports on State responsibility and the ICJ *Corfu Channel* case) to support the view that a State should be held responsible for injury to an alien investor even where it is not the sole cause of the injury. However, the Tribunal also added that the claimant should not ultimately receive more than the full amount of its damages – this implied that if that the harm had been (partly) made good through other proceedings (domestic or international), the awarded amount should be reduced accordingly. (Partial Award, paras. 580-583)

On the <u>third question</u>, the Tribunal referred to different existing causation tests under international law ("directness", "proximity", "foreseeability", "certainty"). Without making an explicit choice for one of these approaches, the Tribunal seemed to opt for the "foreseeability" test, as it went on to state that the Media Council "must have understood the foreseeable consequences of its actions" and that therefore the loss suffered should be allocated to the Czech Republic. (Partial Award, paras. 584-585)

C. Standard of Compensation

According to Article 5 of the BIT (on expropriation), any measures depriving directly or indirectly an investor of its investments must be accompanied "by a provision for the payment of <u>just compensation</u>. Such compensation shall represent the <u>genuine value</u> of the investments effected." (underlining added) The Tribunal noted that an unlawful measure of expropriation *a fortiori* must be remedied by just compensation. (Partial Award, para.614)

With respect to other BIT violations (fair and equitable treatment, etc.), the Tribunal referred to the "generally accepted rule of international law" that it is the general obligation of the responsible State to make **full reparation**. The Tribunal also quoted the well-known *Chorzow* doctrine to conclude that the Czech Republic has to "wipe out all the consequences" of the Media Council's unlawful acts and omissions.

Both, the relevant provision of the BIT and the general rules of international law, led the Tribunal to conclude that the Respondent had to compensate for the **fair market value** of CME's investment (despite the absence of the "fair market value" wording in the BIT). The Tribunal's thus equated the "fair market value" standard with the treaty formula of "just compensation [representing] the genuine value of the investment affected". The Tribunal viewed these "concordant" concepts, scattered around more than 2200 BITs as "variations on an agreed essential theme, namely, that when a State took foreign property, full compensation must be paid." (Final Award, paras.493, 497) The same conclusion followed from international law standards as embodied, in particular, in the Draft Articles on State Responsibility and the World Bank Guidelines on the Treatment of Foreign Direct Investment. (Final Award, para.501) This measure of damages, in the Tribunal's view, would also correspond to the value which restitution in kind would bear. (Partial Award, para.618)

Lastly, the Tribunal noted that by virtue of the BIT's MFN provision, the "fair market value" standard could be invoked from Czech BITs with other countries, for example the BIT between the Czech Republic and the United States. (Final Award, para.500)

Concerning the **date** as to which the fair market value of the lost investment had to be assessed, the Tribunal determined that the date when the damage had occurred was appropriate. This was in accordance with customary international law, with the provisions of BITs, and with the holdings of tribunals applying international law. In this case involving several episodes of wrongful conduct, 5 August 1999 was held to be the decisive date because on this date CET 21 terminated the Service Agreement with the effect that CNTS' business operations became idle. (Final Award, paras.492, 509)

D. Valuation

At the time of breaches, CNTS was a well-established going concern and therefore the fair market value of CNTS as a going concern had to be established. CME proposed five methods of valuation:

1) on the basis of an offer from a Swedish company SBS to buy CME;
2) on the basis of the DCF analysis;
3) on the basis of valuation contained in professional independent analysts' reports;
4) on the basis of past sale of shares to Dr. Zelezny;
5) on the basis of "trading multiple" analysis.

By estimating a rough average of these valuations, CME valued CNTS at US$ 560 million. The proposed valuation methods and the Tribunals findings will be reviewed in turn.

1. Offer from a Swedish company SBS to buy CME

During late 1998 and early 1999 CME Ltd. (CME's parent company) was negotiating a potential merger with a Swedish company SBS, and even executed a merger contract in March 1999 (the contract never came to closing due to the 1999 events). In the Tribunal's assessment, the SBS/CME merger was negotiated at arms-length and SBS' valuation of CNTS reflected the valuation of a willing buyer and a willing seller at the relevant point in time.

Before entering into the merger contract, SBS undertook an evaluation of CME's business. This was done on the basis of management projections on CNTS' profitability. Very generally, the approach was to attach a certain multiple (in this case, multiple 8.0x) to CNTS' projected station operation cash flows ("STOCF"), a measure closely similar to EBITDA,[2] for the years 2000/2001 (US$ 50 million). On this basis, the Tribunal determined that the estimated value of CNTS as a basis for the merger transactions was US$ 400 million (US$ 50 million x 8).

The multiple of 8.0 was selected by SBS (and accepted by CME) to account for the risks of operating in Eastern Europe in contrast to other countries. The Tribunal decided that these risks should not be compensated by increasing the multiple, as requested by the Claimant – in support the arbitrators referred to the jurisprudence of the Iran-United States Claims Tribunal, which had held that "a general deterioration or the economic situation of the country where the investment was made […] must not be compensated to the investor. The purpose of the investment treaty is not to put to put the investor into a more favourable position than he would have been in the normal development of his investment within the circumstances provided by the host country." (Final Award, para.562)

In accordance with the SBS calculations, the value of US$ 400 was further discounted by the Tribunal by US$ 72 million – this was the so-called "peace price" that

[2] Company's earnings before interest, taxes, depreciation and amortization.

presumably had to be paid to prevent Dr. Zelezny from damaging CME's investment by interfering with CNTS' exclusive position ("Zelezny Factor").

(See Final Award, paras.100, 140-155, 514-562)

2. DCF Analysis

Both parties agreed that the DCF analysis was an appropriate methodology to establish the value of CNTS. However, the experts retained by the parties to perform the analysis arrived at substantially different results (US$ 546 million v. US$ 335 million).

Both experts followed the same valuation procedure, consisting of two parts:

1) Determining investment's value for a 10-year "forecast period" (1999 to 2008), for which an explicit forecast was prepared year by year (for 1999-2005 their forecasts were based on the 1999 CNTS management forecast figures; for 2006-2008 the forecasts were based on experts' own extrapolations);
2) Determining investment's "terminal value", or "continuing value" – the value for the period following the "forecast period" in perpetuity (based on experts' cash flow projections for the last year of the "forecast period").

Although both experts agreed on the same discount rate (10.83%[3]) and largely based themselves on the same forecast figures of CNTS management, they disagreed on a number of assumptions as to CNTS' projected performance. The two significant areas of controversy were the CNTS' advertising market share estimates, and the development of CNTS' programming costs. The Tribunal reviewed and adjusted the experts' estimates, and made a "rough assessment" of the CNTS value on 5 August 1999 in the range between US$ 400-420 million.

The Tribunal decided not to treat its DCF findings as an independent basis of awarding compensation, as they still contained "a rather high element of uncertainty and speculation" but used these calculations to support its conclusions on the primary valuation approach (SBS valuation).

(Final award, paras. 563-604)

3. Additional methods of valuation

The Claimant offered three additional methods of valuation of the lost investment. They will be briefly reviewed in turn.

(a) Valuation by stock market analysts

Independent market analysts assessed the CNTS' prospects periodically throughout the late 1990s. CME submitted these reports as evidence of the investment's value.

[3] No indication is given in the award as to how the experts arrived at this rate. CME submitted that it was "based on the weighted average cost of capital in accordance with conventional valuation practice". (Final Award, para.164)

The Tribunal decided to disregard these reports due to the fact that more reliable valuation was available (see above). The Tribunal added that analysts, as a matter of principle, can only value a company on the basis of the underlying facts and financial data of the corporation and that the Tribunal could not determine what level and what quality of financial data had been given to the analysts. (Final Award, paras.607-609)

(b) Valuation on the basis of the past sale of shares

As another alternative, CME suggested using the amount the company paid in 1997 to Dr. Zelezny for his 5.8% stake in the investment. The Claimant argued that this figure could be extrapolated to derive a purchase price for 100% of CNTS in 1997, and then divided by the company's EBITDA[4] for that year to derive a multiplier. Applying this multiplier, which CME asserted was 10x, to CNTS' EBITDA for the year preceding expropriation yielded an amount of US $542 million.

The Tribunal dismissed this method for the following reasons:

- the price offered was largely a result of Dr. Zelezny's significant personal leverage over CME, given his threats to sell this share to a questionable third party;
- as this method relied on extrapolating a purchase price for 100% of the enterprise from the value of a 5.8% stake, serious errors could result from the magnification of relatively minor inaccuracies in the pricing of the minority share.

(Final Award, paras.610-611)

(c) Valuation by virtue of the "trading multiple" analysis

This valuation method entailed a review of the market capitalization of "comparable companies" within the broadcasting market. A "trading multiple" was derived by dividing the market value of each company by its EBITDA for a given year, and then determining the average resulting ratio for all the companies analyzed. CME's expert examined 29 publicly traded broadcasting companies around the world, and found that the European companies' average ratio of EBITDA to market capitalization was 10.6. When applied to CNTS's EBITDA, this multiple yielded a total value for the company of $582 million. (Final Award, para.166) The Tribunal did not address the trading multiple method in its analysis.

E. Deductions

1. Residual value

Because CME maintained ownership of CNTS despite the destruction of the company's value, the Tribunal considered that the residual value of the enterprise would have to be deducted from compensation. The Tribunal stated that the residual value comprised:

[4] Company's earnings before interest, taxes, depreciation and amortization.

- the assets of CNTS that have been liquidated and paid to Claimant since 5 August 1999;
- the liquidatable value of CNTS' remaining assets minus the costs of winding up CNTS.

The total amount of the residual value was determined to be US$ 38.5 million. (Final Award, paras.612-619)

2. Reduced shareholding

At the start of the arbitration CME held 99% of CNTS shares. However, due to the outcome in a parallel ICC arbitration, CME's shareholding in CNTS shrank to 93.2%. Therefore, to determine compensation payable to the Claimant, the Tribunal reduced the established value of CNTS by 6.8%. (Final Award, paras.513, 620)

F. Interest

CME sought an award of interest at a rate of 12% from the date of expropriation until the date of payment. This rate was based upon Czech law. CME argued that because Czech investors would be entitled to this statutory interest rate for obligations owed them by the Czech government, the national treatment provision of the BIT required at least as favourable a rate in this case. The Czech Republic, meanwhile, argued that interest should only be awarded at a rate "appropriate for the currency claimed" which it insisted was the LIBOR for U.S. dollars. The parties also disagreed as to whether the interest should be simple or compound. (Final Award, paras.621-626)

To justify the award of interest as such, the Tribunal stated that compensation could only be "just" if it considered delayed payment – and the loss resulting therefrom – on the basis of an interest rate. The Claimant therefore was entitled to be awarded interest in order to achieve "full" compensation. (Final Award, paras.628-629)

1. Period of interest

The Tribunal ruled that the period of interest should run <u>not</u> from the date of expropriation, but only from the date CME initiated arbitration proceedings, approximately six months later. This decision was based upon language in the applicable treaty calling for payment of compensation for expropriation "without undue delay". Before it received a formal request for payment, the Tribunal reasoned, the Czech government was not on notice that it owed CME compensation, and was justified in delaying payment. The Tribunal cited Czech law for this conclusion, but no international arbitration cases. As the arbitrators recognized, this particular decision represented a departure from international practice, as many international law authorities provide for interest to run from the date of expropriation. (Final Award, paras.630-635)

2. Rate of interest

As to the rate of interest, the Tribunal rejected the Czech Republic's arguments, ruling that the Claimant's decision to denominate its claim in U.S. dollars had no bearing on the interest rate that should apply to its recovery. The arbitrators agreed with CME that Czech law should determine the interest rate, and accepted the particular formula put forth by the Claimant. However, given that the Tribunal had decided that interest would accrue only from the date arbitration was initiated, rather than the date of expropriation, the prevailing rate as of the former date was applied, resulting in interest at 10% per annum (rather than 12% as CME had requested). (Final Award, paras.636-641)

3. Interest should not be compounded

The Tribunal declined to award compound interest, citing the prevalence of simple interest in civil law systems including the Czech Republic and the reluctance of many international tribunals to award compound interest absent special circumstances. In particular, the Tribunal noted that the Iran-U.S. Claims Tribunal had rarely awarded compound interest. Although it recognized the recent practice in arbitration under BITs to award compound interest, the Tribunal reasoned that such outcomes were "in recognition of the prevalent contemporary commercial reality that companies that borrow pay compound interest." Reasoning that CME had not borrowed money with compound interest, the Tribunal held that "the calculation of the compensation itself [taking into account the generous interest rate] already fully compensates Claimant for the damage suffered." (Final Award, paras.642-647)

G. Costs

In the Partial Award on liability, the Tribunal had ordered the Czech Republic to pay CME US$ 750,000 in legal costs and expenditures incurred to date, as well as two-thirds of the arbitration costs. (Partial Award, para.624(3)). In the Final Award on damages, however, the Tribunal divided the costs equally. The Tribunal recognized that under the UNCITRAL Rules the costs of arbitration should in principle be borne by the unsuccessful party. However, the Tribunal affirmed its discretion to determine what apportionment would be reasonable, taking into account the circumstances of the case. The Tribunal further held that each party should bear its own costs of legal representation. (Final Award, paras.648-649)

V. Separate Opinion of Arbitrator Brownlie

Although the CME damages award was unanimous, Mr. Ian Brownlie signed a separate opinion challenging many aspects of the award. Prof. Brownlie, a renown scholar of international law, was chosen by the Czech Republic to replace Dr. Hándl, who had resigned from the Tribunal after dissenting from the Partial Award.

In his Separate opinion, Prof. Brownlie sought a closer connection between the text of the BIT and the criteria applicable to the determination of compensation. He noted, first, that the BIT did not protect all foreign property, but only "investments." Therefore, the basic criterion of compensation should be the actual investment made by the Claimant. (Separate Opinion, paras.17-21)

Secondly, in Brownlie's opinion, the application of the BIT provisions involved the element of reasonableness, which ruled out the compensation of returns which went beyond the legitimate expectations of the investor. Brownlie suggested in this connection that merely speculative benefits, based upon unproven economic projections, did not count as investments or as returns. (Separate Opinion, para.34)

Thirdly, with reference to *Kuwait v. Aminoil* arbitration, Prof. Brownlie suggested that the award of compensation and the valuation methods used should also take into account that cases under BITs are not purely "commercial" disputes, as they concern sovereign States responsible for the well-being of their people. Investment treaties did not imply liabilities "likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the Czech Republic". (Separate Opinion, paras.58, 74-75, 78)

Accordingly, in the opinion of Prof. Brownlie, the "just compensation" and "genuine value" standards contained in the BIT allowed compensation only on the basis of the reasonable rate of return, which included foreseeable profits but ruled out uncertain and speculative future benefits. On this basis, Prof. Brownlie rejected the DCF analysis as inappropriate because it did not exclude purely speculative benefits and thus was inconsistent with BIT provisions. Brownlie concluded the same in relation to other valuation methods used by the Tribunal. (Separate Opinion, paras.66, 69, 99-104, 115-116)

According to Prof. Brownlie, the appropriate compensation in the case at hand would total US$ 160.9 million and would consist of three parts:

- actual investments made (US$49.3 million);
- retained profits (US$ 32.8 million); and
- foreseeable profits (US$ 85.4 million), assessed up to 2005 on the basis of the CNTS 1993 Business Plan; Brownlie excluded any recovery for losses after 2005, when the TV license would have expired, as not constituting "direct and foreseeable benefits" and not complying with the "standard of the reasonable rate of return". Brownlie further discounted future-profits amount by 10 per cent to account for the CNTS' dominant position in the relevant market.

(Separate Opinion, para.107, 116-119)

VI. Implications / Initial Analysis

- According to the Tribunal, the **standard of compensation** is the same regardless of whether the expropriatory measure was lawful or unlawful.
- **Fair market standard** may apply on the basis of rules of international law, even the investment treaty in question does not expressly refer to this standard (in this case, the Treaty referred to "just compensation" and "genuine value").

- In the event of **multiple treaty violations**, one of which is expropriation, an expropriation standard tends to be applied.
- Under contemporary customary international law, the law of the host State cannot determine the **standard of compensation** (measure of damages). Rather, by now the "fair market value" has become the customary international law standard being embodied in more than two thousand of concordant BIT provisions.
- The Tribunal (as well as tribunals in other cases) extensively referred to the **ILC Commentary to the Articles on State Responsibility**, even though the latter deal with State-to-State responsibility. It appears that the rules of customary public international law embodied in the Draft Articles, also apply when States are held liable to private investors.
- **Date of valuation.** Under international law, the appropriate date for valuation purposes is the date when the damage occurred. In case of a prolonged breach or a wrongful act consisting of several episodes, it is the date before consummation of breach.
- **Contributory fault** is a concept applicable in international investment law and, in principle, can reduce compensation. There can be no contributory fault if the investor is forced to inflict damage upon itself.
- According to the Tribunal, if the damage is due to **several causes** only one of them being attributable to a State, this State is nevertheless liable under international law to pay compensation for the whole damage, unless an unidentifiable element can properly be allocated to one of the several concurrently operating causes alone.
- There is no universal approach for assessing the **causal link** between the wrongful act and the damages; this approach has to be determined on a case-by-case basis at the discretion of the tribunal. A test of "foreseeability" may apply even in these tort-like cases (in contradiction to the *S.D. Myers* award, where the Tribunal suggested that the concept of foreseeability was only applicable in contract claims).
- A claimant should not receive more than full compensation for the damages it suffered – in case of multiple proceedings against different tortfeasors, arbitral tribunals should take into account (deduct from the award) the amount already awarded in different proceedings (**no "multiple recovery"**);
- **Going concern**. No problems with valuation of a going concern because it was well-established and had a sufficient history of profitable operations.
- Economic losses due the generally deteriorating economic/political/etc. situation in the host country should not be compensated (**investment risk**).
- The company's **management projections** can be used for constructing the price a willing buyer would pay, as well as for the DCF analysis.
- The 'multiples' valuation method used to derive the fair market value of the company/investment (EBITDA used a the relevant indicator).
- When expropriation results in the going out of business but not in the actual taking of assets, **residual value** of the assets has to be deducted from

compensation. The cost of winding up the company is deducted from the residual value.

- Award of **simple or compound interest** may depend on the interest rate applied (the higher the rate, the less in the probability of compound interest awarded), as well as on whether the claimant had to borrow money on compound-interest terms. In the end, the issue before the tribunal is to decide what kind of interest will fully compensate the losses of the investor.
- Where domestic law of the host country provides for a high **rate of interest**, investors may invoke it on the basis of the national treatment provision of the relevant (applicable) investment treaty.
- **Brownlie's Separate Opinion** is valuable as he attempted to balance the private interests of investors with the public interests of States and indicates possible legal tools for achieving this balance (reasonable rate of return, rejection of merely speculative benefits, inappropriateness of awards that would endanger the well-being of the State's population).