

Comments relating to Applicable Law on the Stockholm Tribunal's Final Award of 14 March 2003

By Christoph Schreuer

1. General Observations

I have been asked by counsel for the Czech Republic to comment on the Stockholm Tribunal's Final Award of 14 March 2003. The present comments are restricted to the issue of applicable law. They are designed to supplement the Legal Opinion that I submitted together with Professor Reinisch on 22 May 2002 ("Legal Opinion").

In the Final Award the Tribunal prefaces its analysis with a section entitled "The Law Applicable to this Arbitration" (paras. 396-413). To introduce the examination of the merits of a case with an analysis of the applicable law is normal practice in international arbitration. Such an analysis is lacking in the Partial Award of 13 September 2001.

The section on applicable law in the Final Award is devoted almost entirely to a defence of the Partial Award's treatment of the applicable law against the analysis contained in our earlier Legal Opinion. In our Legal Opinion we pointed out that the Tribunal stated in several contexts in the Partial Award that it was not applying Czech law (Legal Opinion, paras. 95-97) and, in fact, did not apply Czech law (Legal Opinion, paras. 106-122). In the Final Award, the Tribunal now seeks to justify its approach to applicable law in the Partial Award.

The key passage on applicable law in the Final Award is contained in para. 402. The Tribunal analyzes Article 8(6) of the Bilateral Investment Treaty between the Czech Republic and the

Netherlands (“the BIT”) containing the choice of law clause¹ and comes to the conclusion that this provision is broad and grants a discretion to the Tribunal. The Tribunal adds that there is no exclusivity in the application of these laws. The Tribunal points out that the provision instructs the Arbitral Tribunal to take into account (not: to apply) the sources of law, in particular though not exclusively. Additional points made by the Tribunal in that paragraph are discussed below.

The Tribunal’s analysis is unconvincing as a matter of textual analysis. The Tribunal attempts to introduce a distinction between “take into account” and “to apply”. However, on the same page of the Final Award, at the beginning of para. 400, the Tribunal speaks of “...the **application** of the four sources of law as provided for in Art. 8(6) of the Treaty...” (emphasis added).

The Tribunal’s chief argument is that Article 8(6) gives discretion. But under the provision’s wording, the discretion refers to the application of additional sources not to disregarding the sources listed in Article 8(6). The four sources listed there are mandatory not discretionary. This provision cannot mean that the Tribunal has a discretion to apply some (or one) of the sources listed in Article 8(6) but to disregard others. If that were true the Tribunal would also have the discretion to disregard the BIT itself – an obviously absurd result. Therefore, the Tribunal does not have the discretion to disregard Czech law or any of the other sources listed in Article 8(6).

The Tribunal appears to think that the only real obligation arising from Article 8(6) of the BIT is to “decide on the basis of the law” (see Final Award, paras. 402, 403, 406). This interpretation renders the entire text of Article 8(6) after the words “decide on the basis of the law” meaningless. The Tribunal would be free to apply just any law.

The Tribunal finds in para. 403 that Article 8(6) is a self-explanatory confirmation of the basic principle of law according to which the tribunal is not allowed to decide *ex aequo et*

¹ Czech/Netherlands BIT Article 8 (6): The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:

- the law in force of the Contracting Party concerned;
- the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;

- the provisions of special agreements relating to the investment;
- the general principles of international law.

bono without authorization of the parties. This interpretation renders all of Article 8(6) meaningless. The restatement of this principle in the BIT would be superfluous. It is implausible to read a detailed provision like Art. 8(6) of the BIT as a mere restatement of the prohibition to decide *ex aequo et bono*.

The Tribunal's analysis is difficult to reconcile with Article 33(1) of the UNCITRAL Arbitration Rules applicable in the present case. Article 33(1) says:

The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

Therefore, the UNCITRAL Arbitration Rules distinguish between two situations:

- a) the parties have designated the applicable law in which case that designation is to be respected, or
- b) the parties have not designated the applicable law in which case the tribunal has discretion.

The Tribunal's conclusion that it has complete discretion as to which law it does apply or does not apply can only be reached if the parties have not designated the applicable law. This would require a finding that Article 8(6) of the BIT is not a choice of law clause and, hence, is meaningless. This result is at odds with the Tribunal's own statement in para. 396 of the Final Award: "... the Tribunal is bound by provisions of Article 8(6) of the Treaty ...".

The Tribunal's conclusion of discretion as to the sources of law to be applied is also in contradiction to the Agreed Minutes of July 2002. The Agreed Minutes state (with appropriate emphases added):

2. On the issue of investment disputes and interpretation of Article 8.6 of the Agreement

The delegations agree that the arbitral tribunal shall decide on the basis of the law. When making its decision, the arbitral tribunal shall take into account, in particular, though not exclusively, the four sources of law set out in Article 8.6. **The arbitral tribunal must therefore take into account** as far as they are relevant to the dispute **the law in force of the Contracting Party concerned** and the other sources of law set out in Article 8.6. To the extent that there is a conflict between national law and international law, the arbitral tribunal shall apply international law.

The Agreed Minutes confirm the result, reached above, that resort to the law of the host State, in our case to Czech law, is mandatory and not discretionary.

2. Application of Czech Law in the Final Award

After having defended its Partial Award against the charge of non application of the proper law, specifically the non application of Czech law, the Tribunal proceeds to deal with the merits before it. In doing so, the Tribunal in the Final Award shows a treatment of Czech law that is markedly different from the Partial Award. Whereas the Partial Award explicitly disavowed Czech law, the Final Award now contains repeated and detailed references to it.

In the Partial Award, para. 476, the Tribunal said:

It is not the Tribunal's role to pass a decision upon the legal protection granted to the foreign investor for its investment under the Czech Civil Law and civil court system.

In contrast to that earlier statement, the Final Award now contains detailed references to and discussion of Czech Civil Law:

- in para. 452 there is a discussion of Art. 438 of the Czech Civil Code dealing with joint tortfeasors,
- in para. 486 there is a discussion of coercion under Czech civil law containing an analysis of Articles 37 and 49 of the Czech Civil Code and of Article 267(2) of the Czech Commercial Code,
- in para. 492 there is reference to Art. 443 of the Czech Civil Code in the context of the relevant time for the assessment of the amount of damage,
- in paras. 503-507 there is a detailed discussion of the applicability of Czech law to the issue of valuation. This discussion relies not only on the BIT but also on Art. 25(3) of the Czech Commercial Code and on Articles 23 and 34 of the Czech Valuation Act,
- the Tribunal's discussion of interest is introduced in para. 627 by the statement: "In awarding interest in respect of the rate and period, the Tribunal has considered the provisions of the Treaty (...), Czech law and international law principles (...).",
- in para. 624 the Final Award reproduces the Respondent's detailed position with regard to interest under Czech civil and commercial law,
- in para. 629 the Tribunal relies on Art. 517 of the Czech Civil Code and a related Government Decree of 1994 in relation to interest on late payments,
- in paras. 631-632 the Tribunal states that in determining the period of interest it took into account Czech law. It proceeds to rely on Art. 563 of the Czech Civil Code , on a

legal opinion of the Czech Supreme Court and on a scholarly publication on the Czech Civil Code,

- in paras. 637-641 the Tribunal first states that neither the BIT nor international law provide for an interest rate. It then applies the provisions of Czech law contained in Art. 517 of the Czech Civil Code and the Government Decree of 1994. The latter Decree is discussed in some detail and even quoted in the Czech language,
- in para. 642 the Tribunal relies on Art. 369 of the Czech Commercial Code and on the Government Decree for the question of simple or compound interest,
- in para. 648 the Tribunal relies on Art. 142(2) of the Czech Civil Procedure Code in the context of allocating costs between the parties.

This detailed reliance on Czech law in the Final Award is in clear contrast to the Partial Award. It creates the impression that the Tribunal realized that its treatment in the Partial Award of the applicable law, specifically Czech law, was out of order and that it was necessary to make amends.

3. Specific Points

The Tribunal's discussion of applicable law in the Final Award in attempting to justify its treatment in the Partial Award calls for a number of comments.

The Tribunal repeatedly states that Czech law was never pleaded before it in the First Phase leading to the Partial Award (paras. 400, 407). It states that a tribunal is not bound to research find and apply national law which has not been argued or referred to by the parties (para. 411).

This statement is not borne out by the text of the Partial Award. The Partial Award contains sections entitled "Position of the Respondent" and "The Respondent's Argument". In these sections there is extensive reference to reliance by the Respondent on Czech law. In particular, there is extensive reliance on the Czech Media Law. These references and citations may be found in paras. 182-188, 194, 196, 199-201, 212, 219, 235, 239, 241, 254, 255, 257, 276, 315, 338, 341, 347, 355, 365, 366 and 367. References to other areas of Czech law, including contract law, administrative law and Czech law in general, may be found in the

Tribunal's own summary of the Respondent's position and arguments at paras. 196, 200, 219, 276, 312, 313, 345, 347 and 371.

It is difficult to reconcile these references in the Partial Award to numerous pleadings of Czech law by the Respondent with the Tribunal's assertion that Czech law "has not been argued or referred to by the parties" (Final Award, para. 411). In addition, the statements by the Tribunal in the Partial Award (paras. 467, 469, 476, 590) that it was not its task to apply Czech law, can only be understood in the context of the invocation of Czech law by one of the parties.

Even if it were true that Czech law was not pleaded or referred to in the First Phase, the Tribunal was under an obligation to establish, interpret and apply any legal rules relevant to the case before it. An international tribunal which is bound to apply international law and domestic law cannot restrict itself to applying international of its own accord and treat domestic law as a fact that must be proven by the parties. The principle *iura novit curia* applies to all parts of the applicable law. It was open to the Tribunal to seek information on Czech law even if it was not pleaded by the parties.

ICSID *ad hoc* Committees hearing annulment cases have uniformly rejected the idea that tribunals in drafting their awards were restricted to the legal arguments presented to them by the parties. They held that tribunals committed no procedural error in relying on legal authorities that had not been put forward by the parties.²

In addition to explaining why it did not apply Czech law, the Tribunal, somewhat surprisingly, states that "[t]he Tribunal in point of fact in its Partial Award addressed various issues under Czech law..." (Final Award, para. 407). An example given by the Tribunal refers to Dr. Barta's opinion. That opinion is dealt with in paras. 465-469 of the Partial Award. In para. 465 of the Partial Award the Tribunal summarizes Dr. Barta's opinion. In para. 466 the Tribunal, without an analysis of Czech law, declares that the circumstances of the opinion's rendition were dubious and that it has serious deficiencies. In para. 467 the Tribunal states that it would not "dissect" the application of administrative law, that Dr. Barta's opinion is

² *Klöckner v. Cameroon*, Decision on Annulment, 2 ICSID Reports 128/129; *MINE v. Guinea*, Decision on Annulment, 4 ICSID Reports 82, 106, 109; *Wena Hotels v. Egypt*, Decision on Annulment, 41 ILM 933 (2002) at para. 70; *Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux v. Argentine Republic* (the *Vivendi* case), Decision on Annulment, 41 ILM 1135 (2002) at paras. 82-85 .

unacceptable under the requirements of the BIT and that the Tribunal is not to decide on the Czech Administrative Law aspects of the question. In para. 469 the Tribunal states that it need not decide whether the “use of the Licence” in 1993 was legally valid under Czech law.

Far from being an example for the Tribunal addressing issues under Czech law, the Tribunal’s treatment of Dr. Barta’s legal opinion is actually an instance of the denial of the application of Czech law.

The second example given by the Tribunal in para. 407 of the Final Award for its having addressed issues under Czech law in the Partial Award relates to its review of the Czech Civil Court decisions. But the discussion of these proceedings, as the Final Award itself points out, only led to the Tribunal declaring them irrelevant.

In addressing the analysis of applicable law in our Legal Opinion, the Tribunal concentrates on what it sees as an insistence on the exhaustion of local remedies (Final Award, paras. 398, 412, 413). In fact, our Legal Opinion never proposed that the Claimant had to exhaust local remedies in the Czech Republic before going to international arbitration. What it did say was that a question preliminary to the one before the Tribunal was whether the investor had indeed been deprived of its protection under Czech law as a consequence of the change of the contractual arrangements. The last authority on this question of Czech law are the Czech courts. (Legal Opinion, paras. 118, 119). This point is different from a requirement to exhaust local remedies. Exhaustion of local remedies would mean that the main claim between CME and the Czech Republic would have to be pursued first through the Czech courts before it can be pursued through international arbitration. No such suggestion was ever made by me.

The Tribunal’s discussion in the Final Award of the applicable law repeatedly rejects the idea of a ranking of the sources of law listed in Article 8(6) of the BIT (Final Award, paras. 398, 400, 402). In para. 410 the Tribunal attributes to me the view that an arbitral tribunal must follow a certain ranking when applying the law applicable to an investment treaty and describes this view as unpersuasive. As a matter of fact, I never propose a ranking of sources. I report a case (*Goetz v. Burundi*) and a scholarly article (by *M. Reisman*) which seem to suggest a ranking (Legal Opinion at paras. 88 and 90). My only suggestion is that the examination of the host State’s law should come first as a matter of temporal sequence. But

the result reached under the host State's law must then be checked for compliance with international law.

The Tribunal rejects most of my precedents on the ground that in these cases there was no agreement on choice of law (Final Award, paras. 402, 408, 409). This is not entirely correct. These cases were decided under Article 42(1) of the ICSID Convention.³ That provision directs that the Tribunal shall apply any agreement on choice of law between the parties. In the absence of such an agreement, the tribunal is to apply host State law and international law. By agreeing to ICSID arbitration without agreeing on a specific choice of law, the parties implicitly agree on the second clause of Article 42(1) which directs the tribunal to apply host State law and international law. This choice of law corresponds to the one contained in Article 8(6) of the BIT. The four categories of law listed in that provision can be broken down to host State law (items 1 and 3) and to international law (items 2 and 4).

The Tribunal rejects my reliance on cases in which tribunals applied choice of law clauses in other BITs (Final Award, paras. 402, 409). In these cases the tribunals reached the conclusion that host State law had to be applied. These cases are *Fedax*, *Maffezini* and *Goetz* (Legal Opinion, paras. 39-50). The similarity of the choice of law clauses in the BITs in these cases to Article 8(6) of the Czech/Netherlands BIT is set out in our Opinion. The Tribunal in paras. 402 and 409 dismisses these cases stating that the choice of law clauses applicable in these cases are significantly different and do not mirror the broad choice of law clause in Art. 8(6) of the BIT. No explanation is given for this alleged difference. While all four choice of law clauses show variations in language, I am unable to see any peculiarity of Article 8(6) of the Czech/Netherlands BIT that would set it apart from the clauses that were applied in the other three cases.

The Tribunal is of the opinion that I confuse the application of the principles of international law with *ex aequo et bono* decisions and that I give the dubious impression that only the reference to specific national law rules would prevent a tribunal's decision from being characterized as a decision *ex aequo et bono* (Final Award, paras. 404, 405). My conclusion that over large parts of the Partial Award the Tribunal was deciding *ex aequo et bono* is not

³ Art. 42(1): The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable

just based on its non application of Czech law. It is equally based on the absence of legal authority in international law on a number of points (see Legal Opinion, para. 128).

In para. 413 of the Final Award the Tribunal expresses serious concerns about the policy implications of my views. The Tribunal sees a high risk that arbitration under a BIT would be subject to annulment because local remedies had not been exhausted or domestic law had not been properly applied. I believe that the Tribunal's concerns are exaggerated but not entirely unjustified. As explained above, there is no such risk with respect to the non exhaustion of local remedies. Neither is there a risk if the host State's law has not been *properly* applied. A mere error *in judicando* in the application of the proper law is no ground for annulment. But the risk does exist if the domestic law has not been applied although it is part of the applicable law. Failure to apply the proper law is an excess of mandate and a ground for annulment.

A handwritten signature in black ink, appearing to read 'Christoph Schreuer', written in a cursive style.

Christoph Schreuer, Vienna, 30 March 2003