CHAPTER 5

THE AWARD IN

SALUKA INVESTMENTS V. CZECH REPUBLIC

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I. INTRODUCTION

This chapter analyzes the award issued over the claim that the Czech Republic had violated its bilateral investment treaty with the Netherlands through actions following the failed privatization of one of the biggest Czech banks. The chapter focuses on the award’s reasoning and finds that, overall, the tribunal provided sufficient information about the grounds for its decision. The treatment of the jurisdiction claim, the fair and equitable treatment claim, the non-impairment claim, and the full security and protection claim is sophisticated, cogent, and thorough. In these areas, the tribunal completely fulfilled its obligation to state reasons under Article 32(2) of the Rules of the U.N. Commission on International Trade Law (UNCITRAL). Some other aspects of the tribunal’s analysis, including that of the unlawful expropriation claim, exhibit flawed or attenuated reasoning, but do not threaten the overall coherence of the award. The discussion here also demonstrates the benefits of well-reasoned arbitral decisions by noting the award’s contribution to the negotiated settlement of this and other related disputes.

The Saluka arbitration arose out of the failed privatization of the Czech Republic’s third largest bank, IPB (Investiční a Poštovní banka a.s.). In 1998, the government sold a controlling block of IPB shares to Nomura Europe, which in turn transferred them to Saluka Investments BV (Saluka), a Nomura special-purpose company incorporated in the Netherlands. While the bank’s performance improved considerably under its new owner and management, the IPB still lacked sufficient operating capital and was burdened by a large amount of non-perform-
ing loans. In 1999 and 2000, the Czech government continued to privatize state-owned banks and began to supervise the sector more closely. After repeatedly failing to comply with new and more stringent regulatory requirements, in June 2000 the IPB was put under forced administration by the Czech National Bank and then sold to another banking group. Nomura lost managerial control over the bank, and the IPB shares it held through Saluka were rendered worthless.

In July 2001, Saluka commenced arbitration proceedings under the bilateral investment treaty (BIT) between the Netherlands and the Czech Republic. Saluka alleged that the Czech Republic had deprived Saluka of its investment unlawfully and without just compensation, and that the Czech Republic had failed to accord Saluka’s investment fair and equitable treatment. After several delays caused by procedural maneuvers, actions in Czech courts, administrative investigations, and parallel international arbitration proceedings, the tribunal issued a detailed partial award on March 17, 2006. The tribunal accepted that it had jurisdiction to hear the dispute and found the Czech Republic liable under the fair and equitable treatment and the non-impairment clauses of the BIT, but not liable under the expropriation clause or the full security and protection clause.

This chapter examines the adequacy of the tribunal’s reasoning in the partial award, as measured by the award’s internal logic, coherence, and consistency. The correctness of the tribunal’s arguments and the overall merits of the decision shall not be considered. Because this project posits that the merits can be properly evaluated *only if* a tribunal provides adequate reasons, the analysis here would nonetheless be the necessary first step if we were to determine whether Saluka was adjudicated correctly.

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2 Saluka Investments BV (The Netherlands) v. The Czech Republic, UNCITRAL, Partial Award (Mar. 17, 2006), available at http://www.pca-cpa.org/ENGLISH/RPC/#Saluka [hereinafter Saluka Award or Award].