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-

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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].

The chapter proceeds as follows: Section II considers the content of the requirement to state reasons under the UNCITRAL Arbitration Rules; Section III provides further factual and procedural information on the dispute between the Czech Republic and Saluka; Section IV delineates certain desirable characteristics of a well-reasoned award and finds that the tribunal was successful in fulfilling the reasons requirement in the sections on jurisdiction, fair and equitable treatment, non-impairment, and full security and protection; Section V argues that the tribunal fell short of providing adequate reasons in the discussion of expropriation and of the so-called “put option.” Section VI highlights the benefits of a well-reasoned arbitral decision by presenting changes in the parties’ negotiating positions after the release of the award; and Section VII concludes.

II. THE CONTENT OF THE UNCITRAL REASONS REQUIREMENT

The Saluka arbitration was conducted under the UNCITRAL Arbitration Rules of 1976, which contain a default provision requiring that the “arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.”4 Because most of the contributions in this volume discuss cases from the International Center for the Settlement of Investment Disputes (ICSID), it is necessary to note that the UNCITRAL reasons requirement is similar but not identical to its ICSID counterpart.

The ICSID Convention requires that “[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.”5 The ICSID Convention does not allow for a waiver of the reasons requirement (i.e., it is a mandatory, rather than a default provision). Furthermore, Article 52(1)(e) of the ICSID Convention explicitly lists a tribunal’s failure to state reasons as grounds for annulment of the award. By contrast, the UNCITRAL Rules allow for a waiver of the reasons requirement and do not prescribe a formal control mechanism (in the form of an ad hoc committee or otherwise) that could set aside an award based on a failure to state reasons.


Despite these procedural differences, the actual content of the UNCITRAL and ICSID reasons requirements does not differ greatly in practice: it is highly unusual for parties to an UNCITRAL investor-state arbitration to waive the reasons requirement, so UNCITRAL awards, like ICSID awards, ought to contain reasons. Furthermore, in most cases the losing UNCITRAL party could challenge an award under *lex arbitri*, arguing that the failure to state reasons conflicts with public policy.

One source of domestic law regarding international arbitration proceedings is the 1985 UNCITRAL Model Law on International Commercial Arbitration, which has been adopted (with or without modification) in 48 countries and six U.S. states. The Model Law includes “public policy” as grounds for setting aside an award. Moreover, the Explanatory Note to the Model Law lists “serious departures from fundamental notions of procedural justice” as against public policy. Thus, if the arbitration is in a country that has adopted the Model Law, and if a court of that country finds that a failure to state reasons is a “serious departure from fundamental notions of procedural justice,” the court could set aside a poorly reasoned award, much like an ICSID ad hoc committee would. These provisions in the UNCITRAL Model Law function as an indirect control mechanism that mirrors, albeit imperfectly, the more specific set-aside provisions of Article 52(1)(e) of the ICSID Convention.

The proceedings in *Saluka* illustrate the interplay between domestic laws governing international arbitration and the UNCITRAL Rules. The *Saluka* arbitration used Switzerland as its seat and was therefore governed by certain provisions of the Swiss Federal Code of Private International Law (CPIL), which applies to arbitrations seated in Switzerland. Article 180(2)(e) of the Code allows a domestic court to set aside an arbitral award, if it is not compatible with Swiss public policy (*ordre public*). As already noted, it is far from inconceivable that a failure to state reasons would be against domestic public policy. Thus, if the *Saluka* award did

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not adequately state reasons, there was a legal mechanism that could have set it aside, despite the absence of a set-aside provision in the UNCITRAL Rules.

The Swiss CPIL itself contains a default reasons requirement: a tribunal should “set forth the reasons on which [the award] is based.” This requirement does not apply in cases where the parties have agreed upon a different “procedure” or “form” through which the award should be rendered. This provision was not waived in the Saluka case and, by virtue of being seated in Switzerland, the tribunal was bound by two separate requirements to state reasons, one under Article 32(2) of the UNCITRAL Rules, and one under Article 189(2) of Switzerland’s CPIL. It is not unusual for tribunals to be subject to a second reasons requirement under lex arbitri, since Article 31(2) of the UNCITRAL Model Law contains a default provision concerning reasons that mirrors Article 32(2) of the UNCITRAL Arbitration Rules.

III. FACTUAL AND PROCEDURAL BACKGROUND OF THE DISPUTE

A. The Failed Privatization of IPB

Many of the underlying causes of the Saluka dispute can be traced to the reorganization and privatization of the Czech banking system in the early 1990s. After the end of communist rule in 1989 and the dissolution of Czechoslovakia at the end of 1992, the Czech government undertook gradual reforms in the state-owned banking sector. As of 1994, there were four large commercial banks which included the IPB. The banks were owned and controlled either directly by the Czech state or by the National Property Fund (NPF), a state agency, while the Czech National Bank (CNB) served as the banking regulator. The banks’ balance sheets were burdened by large amounts of non-performing loans, some granted to insolvent state enterprises during the communist era, and some granted thereafter to buttress important newly privatized firms as a matter of public policy. By the end of 1999, the stock of non-performing loans held by banks amounted to one third of total loans, or 26 percent of the Czech Republic’s gross domestic product (GDP).

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8 Id., art. 189(2) (“Der Entscheid ist schriftlich abzufassen, zu begründen, zu datieren und zu unterzeichnen.”)
9 Id., art. 189(1).
10 Award, supra note 2, at ¶¶ 33–35.
11 Id., ¶¶ 36–37.
Nomura’s acquisition of a controlling block of IPB shares constituted the first big bank privatization by the Czech government and thus the first case in which the bad debt problem had to be worked out by a private investor. The bank was attractive to Nomura not only because of its core business, but also because of its exclusive license to provide banking services at thousands of branches of the Czech Postal Offices as well as its valuable industrial holdings portfolio, which included a substantial amount of shares in the Pilsner Urquell beer brewery.12 Nomura was somewhat of an insider since it had been active in the Czech Republic since 1990 and had advised the government and the banks (including IPB) on a number of transactions.13 It first expressed an interest in acquiring the state’s IPB shares in mid-1996, but the Share Purchase Agreement (SPA) was not accepted by the government until July 23, 1997, and the actual shares were not transferred until March 8, 1998. After the transfer, Nomura held 46 percent of the IPB’s shares, which gave Nomura effective (albeit minority) control over the bank.14

During the lengthy share purchase negotiations, Nomura was assured by the then-Minister of Finance that he intended to privatize the other big banks under conditions no more favorable than those offered to Nomura and, specifically, that future bank sales would not be preceded by state aid intended to solve the banks’ bad-debt problems. However, he also indicated that he could not bind future governments and hence these assurances were not included in the SPA.15 Also during the negotiations, Nomura emphasized to the NPF that it was not entering into IPB as a strategic partner, but only as a limited recourse equity investor, that is, a portfolio investor.16 Consistent with this, Nomura set up Saluka, a special purpose entity incorporated under the laws of the Netherlands which was to hold Nomura’s IPB shares.17 After acquiring the shares, Nomura transferred them to Saluka in two tranches, one in October

\[12 \text{ Id., ¶ 34.} \]
\[13 \text{ Id., ¶ 43.} \]
\[14 \text{ Id., ¶¶ 54, 62, 65.} \]
\[15 \text{ Id., ¶ 56.} \]
\[16 \text{ Id., ¶ 58.} \]
\[17 \text{ It appears that the Netherlands was chosen not because of its BIT with the Czech Republic, but because of favorable laws governing special-purpose vehicles which can incorporate as tax-advantaged Stichtings, or “charitable trusts.”} \]
1998 and one in February 2000. These Saluka-held IPB shares were at the center of the arbitration.

Before acquiring the IBP shares, Nomura initiated a notable and highly profitable series of transactions with IBP, which involved the “put option” discussed in Section V.B. In February 1998, Nomura concluded a Cooperation Agreement with IBP that aimed to combine IBP’s Pilsner Urquell shares with Nomura’s Radegast Brewery shares and thus effect a merger between the two breweries that had been previously rejected by the Czech competition authority. Through a complex chain of cashless stock-for-stock transactions, the IPB’s Pilsner Urquell shares were sold to an IPB-controlled special purpose entity, which then sold them to a Nomura-controlled special purpose entity, which in turn sold them to Nomura. Nomura exercised the put option it had negotiated, and paid for the valuable Pilsner Urquell shares with IPB shares. Nomura then combined its Radegast shares with the Pilsner Urquell shares and sold them to a Dutch company it owned, which in turn was sold to South African Breweries at a huge profit. These transactions ran parallel to the events described below. Nowhere in its bank acquisition filings with the Czech authorities did Nomura disclose its plans for the Pilsner Urquell and Radegast breweries.

Nomura’s acquisition of the IPB shares in March 1998 coincided with a tightening of bank supervision and the imposition of strict capital adequacy requirements by the CNB. Added to the bad debt problems and the lack of effective legal mechanisms for debt recovery, this put the banking sector in a very precarious position. The government intervened

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18 Award, supra note 2, at ¶ 71. The transfer was structured as a complex sale that is irrelevant for present purposes. The SPA between Nomura and the Czech Republic explicitly allowed for a transfer of the shares to a special purpose entity.

19 This chapter—like the parties’ submissions and the Award—will at times speak of Nomura’s control over the IBP and of Nomura’s “ownership” of IPB shares, even though the shares were nominally held by Saluka.

20 This was structured as a deferred payment and by the time payment was made, the IPB shares were already worthless. See Section V.B.

21 Award, supra note 2, at ¶¶ 59, 68–69. This schematic description of the transaction structure is a summary from the already abridged description provided by the tribunal. The sales surrounding the put option were the subject of a separate arbitration, Torkmain Investments Ltd et al. v. Pembridge Investments BV et al. That award has not been made public.

22 Id., ¶ 68.
by purchasing non-performing loans from the state banks in order to accelerate their privatization. Aid to the three big state banks amounted to 19 percent of the Czech Republic’s GDP in 1999, and it led to the successful sale of each of them to a large international banking group.\textsuperscript{23} Even though the IPB faced the same problems as the other big banks, it received no state assistance after Nomura became the controlling shareholder.\textsuperscript{24}

By mid-1999, the IPB was experiencing serious difficulties; inspections by the CNB also revealed major financial deficiencies and irregularities. The bank tried to remedy the problem by lobbying for state aid, while Nomura sought a strategic partner, but both efforts proved unsuccessful. The CNB and the Ministry of Finance repeatedly asked Nomura to provide the IPB with additional capital, but Nomura refused, claiming that it was not interested in acting as a strategic investor. The situation continued to deteriorate and after the IPB suffered a brief bank run in February-March 2000, the Finance Minister “lost trust” in Nomura and was no longer willing to meet with its representatives. Henceforth, all meetings between the government and Nomura were unofficial, conducted by deputies under a “soft mandate,” and off the premises of the Finance Ministry or CNB.\textsuperscript{25} None of the government’s various proposals were acceptable to Nomura and vice versa. As the situation deteriorated further, in May 2000 the CNB identified forced administration, or nationalization of the bank, or the revocation of its license as more likely outcomes than stabilizing the bank with the help of a private investor and state aid.\textsuperscript{26}

About the same time, the government began talks with CSOB, another big Czech bank controlled by the Belgian KBC. At a meeting in Paris, CSOB, the Minister of Finance, and the Governor of the CNB discussed a proposal (the “Paris Plan”) that envisioned the forced administration of

\textsuperscript{23} Id., ¶¶ 76–83.

\textsuperscript{24} Even though not discussed by the tribunal, the refusal of aid to IPB after 1998 and the government’s tougher stance towards Nomura could have been politically motivated. A new Social Democrat government came to power in 1998, and the IPB management was believed to be closely linked to the outgoing Civic Democrats. For more on the political aspects of the IPB privatization, see Vladimír Balaš, Saluka Investments B.V. (The Netherlands) v. The Czech Republic: Comments on the Partial Award of 17 March 2006, 7(3) J. WORLD INV. & TRADE 371 (June 2006).

\textsuperscript{25} Award, supra note 2, at ¶¶ 85, 90–91, 100–101.

\textsuperscript{26} Id., ¶ 113.
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IPB, a narrowly prescribed mandate for a Forced Administrator, and a quick transfer of IPB’s assets and day-to-day business to CSOB, accompanied by substantial state guarantees.

A June 1, 2000, audit found that the IPB was far short of complying with capital adequacy requirements. Media attention and statements by CNB and Ministry of Finance officials on June 8–9, 2000, triggered another, much more sizeable bank run. Nomura presented a new proposal for the IPB and, after talks with the government, was under the belief that a solution would be reached shortly. However, on the fourth day of the bank run, June 15, 2000, the Czech Cabinet met and decided to put the IPB under forced administration. Simultaneously, the Czech Securities Commission imposed an immediate suspension of trading in IPB shares.

On June 16, the Forced Administrator assumed the powers of the Board of Directors, and armed police entered the IPB’s headquarters to remove all bank managers. Three days later, the IPB was transferred to CSOB at the price of one Czech crown. The sale was accompanied by substantial state aid largely in line with the Paris Plan. This transformed CSOB into the largest bank in Central Europe. On June 30, 2000, Saluka attempted to transfer its 46 percent of IPB shares to Nomura, but the government did not approve the transaction. Saluka repeatedly and unsuccessfully attempted to challenge the suspension of trading in IPB shares until it lost standing to do so under a new amendment to the Czech Securities Act in January 2001. Around the same time, the Czech police carried out a search of Nomura’s Prague office and seized a number of documents.

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27 The role of the Forced Administrator is akin to that of a trustee in a bankruptcy (id., ¶ 133).


30 When this award was released in March 2006, Saluka still held the IPB shares, even though as of February 2004, their registered owner has been CSOB (Award, supra note 2, at ¶¶ 72, 152, 163).

31 Id., ¶¶ 136–156.

32 The Czech Constitutional Court subsequently held that the search had violated the company’s fundamental rights and ordered the return of the documents (id., ¶ 157).
B. Arbitration Proceedings

Saluka ("claimant") initiated an arbitration against the Czech Republic ("respondent") under the Czech-Dutch BIT on July 18, 2001. The Czech government filed a counterclaim, which asserted that Nomura had breached its various contractual obligations with regard to IPB and was therefore liable for compensation. After a hearing, the tribunal issued a well-reasoned decision holding that it was without jurisdiction to decide on the respondent’s counterclaim. The partial award discussed here was issued about two years thereafter and largely favors Nomura. Because the place of arbitration was Geneva, the Czech Republic filed a challenge in a Swiss court under *lex arbitri*, claiming the tribunal had failed to distinguish properly between Saluka and Nomura. This challenge was rejected in September 2006. On November 30, 2006, Nomura and the Czech Republic signed an agreement announcing their decision to settle the dispute.

The partial award cannot be analyzed adequately without an overview of the numerous parallel administrative, domestic, and international proceedings related to the IPB privatization. The Czech Parliament’s investigation into the transfer of IPB to CSOB and the approval of state aid found a number of violations of Czech law. Various decisions of Czech courts granted relief against administrative measures taken by the government, but such relief was usually only temporary. Nomura also called on the European Commission to review the legality of the state aid granted to CSOB and, after this request was denied, appealed to the European Court of First Instance (CFI).

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36 Award, supra note 2, at ¶¶ 144–149. The Parliamentary Commission Report did not have the effect of delaying or reversing the transaction.

37 See, e.g., Award, supra note 2, at ¶¶ 156–157.

38 Id., ¶ 161. Case T-233/05, Nomura Principal Investment Plc and Nomura International Plc v. Commission was filed at the CFI in 2005.
The Czech Republic initiated a separate UNCITRAL arbitration against Nomura in Zurich, seeking recovery of the state aid it gave to the IPB after the forced administration ended.\textsuperscript{39} No final award has been rendered, but interim decisions were seen to favor the Czech Republic. Finally, CSOB-controlled funds filed an arbitration against Nomura-controlled funds, disputing Nomura’s right to pay for its acquisition of the Pilsner Urquell brewery with worthless IPB shares. That tribunal decided in favor of Nomura and refused to invalidate the put option agreement.\textsuperscript{40}

IV. THE TRIBUNAL’S OVERALL SUCCESS IN MEETING THE REASONS REQUIREMENT

Neither the UNCITRAL Arbitration Rules, nor the ICSID Convention gives any specific guidance on what constitutes adequate reasoning in an arbitral award. Nevertheless, if we accept that the \textit{raison d’être} of the reasons requirement is the ability to reverse-engineer a decision and check whether it was correct, the following, non-exhaustive list of desirable characteristics can be drawn: internal logic, coherence, consistency, clear discussion of the applicable laws, sufficient background information and detail, and unbroken logical links between the presentation of facts, the arguments accepted by the tribunal, and the decision reached. It should also be remembered that new awards do not enter a vacuum but instead populate the evolving field of international investment law. Therefore, when an award deviates from a well-settled interpretation, it should take extra care to elaborate the legal theory and the specific facts which justify the deviation.

The only conceivable “benefit” of an unreasoned award is that it is difficult to appeal and reverse, since the losing party cannot latch onto any specific legal, logical, or factual errors made by the tribunal. The drafters of the ICSID Convention and—to some extent—of the UNCITRAL Rules and Model Law, have wisely foreclosed this possibility by making failure to state reasons grounds for annulment of the award.

\textsuperscript{39} The National Property Fund of the Czech Republic and The Czech Republic v. Nomura Principal Investment plc (Japan), UNCITRAL, \textit{ad hoc}, Zurich (limited public information available.) The notice of arbitration was filed in December 2002, the tribunal accepted jurisdiction, and then issued an interim award in September 2004. The Swiss Federal Supreme Court declined to set aside the award. Oral hearings on the merits concluded in September 2006. \textit{See Czech News Agency, Chronology of IPB’s Forced Administration, Related Disputes}, Nov. 28, 2006; available through Lexis.

\textsuperscript{40} Torkmain Investments Ltd et al. v. Pembridge Investments BV et al. (the tribunal’s decision has not been made public). For limited case details, see Czech News Agency, \textit{Nomura Wins Arbitration with CSOB Funds over Ceske Pivo Payment}, Apr. 26, 2002; available through Lexis.
A. **Craftsmanship of the Award**

Before delving into the tribunal’s discussion of the specific claims raised under the Czech-Dutch BIT, it is useful to consider the overall craftsmanship of the award. First, the tribunal did a superb job of setting out the relevant facts of the case in a comprehensive manner, not only in the introductory sections, but also throughout its discussion of the case. At critical points in the rather lengthy award, the reader is either reminded of important events relating to the IPB privatization, or directed to the sections that discuss them. To this end, the award contains 19 internal cross-references.

Second, with the notable exception of the expropriation section discussed in Section V.A, the award considers the text of the Czech-Dutch BIT in great detail and frequently backs its interpretation by reference to well-selected international investment law cases and public international law cases. In doing so, it conforms to the widely accepted hierarchy of authorities in international law contained in Article 38(1) of the Statute of the International Court of Justice (ICJ). The tribunal paid very close attention to all aspects of the parties’ pleadings: it either referenced or discussed some 24 cases that were briefed, including the majority of recent ICSID, North American Free Trade Agreement (NAFTA), and UNCITRAL investment law cases, and it also considered various secondary sources on international investment law, including law journal articles and treatises.

Third, again with the notable exception of the expropriation section, the award is very careful to decide contested issues based on the applicable law, as selected by the contracting parties. At each stage of the analysis, the tribunal considered what body of law would be applicable, justified its choice, and then clearly presented the legal standard that would be used. This was particularly important in the case of Saluka, since Article 8(6) of the Czech-Dutch BIT provides the following broad and non-exhaustive list of sources of law available to an arbitral tribunal: “the provisions of [the treaty], and other relevant Agreements between the Contracting Parties; the provisions of special agreements relating to the investment; the general principles of international law.” Despite the

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42 Art. 8(6), Czech-Dutch BIT (bullet points replaced with semi colons). This pro-
treaty’s open-endedness with regard to the applicable law, the tribunal was—for the most part—methodological in its derivation and discussion of the various legal standards relevant to the case.

Last but not least, most of the award is written in a lucid manner and is organized very logically, with legal and factual issues clearly separated in different sub-sections. Even though easier to do, the tribunal did not address the parties’ arguments sequentially because such an approach would have resulted in redundancy and could have obscured the award’s reasoning. Instead, the tribunal synthesized the key issues and organized the award around them, for the most part making special effort to address all arguments presented by the parties.

This assessment of the award’s craftsmanship is shared by at least one longtime observer of the legal disputes surrounding the failed IPB privatization, who wrote that “the Tribunal’s description is really very well done and allows those that have been familiar with the case from the very beginning to see also that the Tribunal[‘s] members know much more than they point at. Such a well-elaborated award also allows readers to read in between the lines.”

B. Decision on Jurisdiction

The detailed discussion of the respondent’s objections on jurisdiction is one of the strongest aspects of the award. Since jurisdiction is a threshold inquiry, this part also helps buttress many of the subsequent sections of the award.

The tribunal began by summarizing the various jurisdictional arguments raised by the parties in each of their submissions. It distinguished between the respondent’s notice to dismiss, which alleged that the tribunal lacked jurisdiction to hear Saluka’s claims, and the respondent’s procedurally unorthodox countermemorial, which raised counterclaims against Saluka and Nomura. The tribunal then explained its decision to join the notice to dismiss with the present award on the merits, and to
consider the countermemorial in the separate decision on jurisdiction, noted in Section III.B.44

The tribunal set out the Czech Republic’s eight key jurisdictional objections in paragraph 199 of the award and then grouped them under two rubrics—arguments that Nomura/Saluka had not made a qualifying “investment” under Article 1(a) of the BIT, and arguments that Saluka does not fit the definition of “investor” under Article 8(1) of the BIT. While the order of the claims was changed to avoid redundancy, the tribunal addressed all of the arguments raised by the parties, even though they themselves had not always been fully consistent in the submissions and in the hearings.

Under the rubric of “investment,” the Czech Republic had argued that the purchase of IPB shares was not an investment, since Nomura/Saluka had invested nothing in the IPB, i.e., that a portfolio investment can become a “real” investment only if it actively contributes capital or otherwise “invests” in the enterprise after acquiring its shares. The tribunal rejected this argument by referring to the BIT, which expressly lists as investment “shares, bonds and other kinds of interests in companies and joint ventures, as well as rights derived therefrom.”45 Furthermore, the tribunal noted that nothing in the BIT makes investor motivation part of the inquiry into whether an “investment” had been made. The tribunal could have easily stopped there, but it also addressed with sophistication the Czech Republic’s complex inter-textual argument, which looked to the syntax of the chapeau of Article 2 of the BIT to argue that active “investing”—for example, making a substantial contribution to the local economy or the well-being of the company—is required in order for an “investment” to arise.46

The tribunal considered the respondent’s second challenge under the rubric of investment in the same methodological manner. The Czech Republic had argued that Nomura’s purchase of IPB shares was unlawful, because it constituted a “dishonest scheme to secure enormous profits” through the Pilsner Urquell transactions.47 Nomura had allegedly violated a CNB regulation by failing to mention its intentions with regard

44 Award, supra note 2, at ¶¶ 173–192.
45 Art. 1(a) (ii), Czech-Dutch BIT, reproduced at ¶ 198 of the award.
46 Award, supra note 2, at ¶¶ 203–211.
47 Id., ¶ 212.
to the brewery in the business plan it submitted when acquiring the controlling block in IPB. The tribunal dismissed this claim by examining the CNB regulation and noting that it could not be read to raise a legal obligation for the investor to disclose its long-term plans beyond the immediate transaction. As further reasons to deny this claim, the tribunal pointed out that the Czech Republic had consistently treated Nomura as the rightful owner of the shares, and that even if the purchase had been somehow tainted by unlawfulness under Czech law, the shares were now held by Saluka and not Nomura.48

In a second set of claims, the Czech Republic disputed the tribunal’s jurisdiction under the BIT by arguing that Saluka did not qualify as an “investor.”49 Pointing to the closeness of Saluka’s relationship with Nomura, the Czech Republic argued that Saluka was fully owned and controlled by Nomura Europe and that it was the same as Nomura Europe. The latter, being an U.K. entity, could not have recourse to the Czech-Dutch BIT. The Czech Republic also alleged that it was Nomura that made the investment, while Saluka was merely a conduit or surrogate, and as such it could not be a *bona fide* investor under the BIT. The tribunal dismissed these arguments by referring to the language of the treaty and noting that had the parties envisioned such an interpretation, they could have easily adopted a definition of investor not covering wholly owned subsidiaries. Moreover, the tribunal recognized that even though Nomura and Saluka were closely related, such corporate arrangements were “commonplace in the world of commerce.”50 At the same time, in another marker of the high quality of reasoning in the award, the tribunal did not reject unequivocally the Czech Republic’s corporate veil-piercing argument. Instead, it explained that veil-piercing could be appropriate as an equitable remedy in certain cases where the corporate structure had been used to perpetuate fraud or other malfeasance, but that this standard had not been met in the instant case.51

48 Id., ¶¶ 213–218.

49 The Czech-Dutch BIT defines “investors” as “legal persons constituted under the laws of [the Netherlands]” (art. 1(b)(ii)), and grants the tribunal jurisdiction over “[a]ll disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter” (art. 8.1) (reproduced at ¶ 194 and ¶ 197 of the award).

50 Award, supra note 2, at ¶ 228.

51 Id., ¶ 230.
The Czech Republic also alleged that Saluka was not an investor under the BIT because it did not act in good faith and because it made its IPB investment through “abuse of rights.” While these arguments mirrored in part claims already raised by the Czech Republic, the tribunal discussed them in sufficient detail and found that Nomura’s failure to disclose its long-term plans did not constitute a lack of good faith and that execution of the put option did not violate international bonos mores. Even if this were the case, however, the culpable party would be Nomura and not Saluka—the sole claimant in the arbitration.52

The Czech Republic’s final attack on Saluka’s status as an investor under the BIT was predicated on the entity’s lack of factual, social, or economic links to the Netherlands. Such an entity, it argued, cannot qualify as a Dutch investor under the BIT and should not be able to take advantage of the treaty. The tribunal noted that it had “some sympathy” for this claim, which—if true—allows for “abuses of the arbitral procedure, and to practices of ‘treaty shopping’ which share many of the disadvantages of the widely criticized practice of ‘forum shopping.’”53 In view of the clear provisions of the BIT, however, the tribunal refused to “in effect impose upon the parties a definition of ‘investor’ other than that which they themselves agreed” when they had complete “freedom of choice in this matter.”54 It therefore held that Saluka qualified as a Dutch investor.

The tribunal’s reasoning on the question of jurisdiction was exemplary because it gave thorough consideration to each of the respondent’s arguments. The terms of the BIT are not ambiguous and another tribunal could have quickly (and rightly) concluded that the “investor” and “investment” requirements were satisfied based on the plain meaning of the text. The Saluka tribunal, however, did not short circuit the process and provided strong analytical support for its decision to accept jurisdiction over the dispute. It also displayed the necessary discipline and consistency in doing so. It found that Saluka qualified as an investor under the BIT by treating Saluka and Nomura as separate entities; correspondingly, it did not extend its jurisdiction over Saluka to then cover Nomura, despite the closeness of the corporate relationship. Instead, the tribunal emphasized that it refused jurisdiction “in respect of any claims of

52 Id., ¶¶ 231–238.
53 Id., ¶ 240.
54 Id., ¶ 241.
Nomura, or any claims in respect of damage suffered by Nomura and not by Saluka, or any claims in respect of damage suffered in respect of the IPB shares before October 1998 when the bulk of those shares became vested in the Claimant.55

C. Decision on Fair and Equitable Treatment

The discussion of Saluka’s claims under fair and equitable treatment (F&ET) is perhaps the finest example of clear and manifest reasoning in the award. Before reaching a decision on this question, the tribunal was very careful to locate the appropriate F&ET standard under the Czech-Dutch BIT, to consider whether the customary international law standard modifies the treaty standard in any way, and then to apply the correct standard to the specific facts of the case. The consideration of Saluka’s various claims under the F&ET treaty provision is very nuanced: the tribunal neither accepted, nor rejected all of them, but instead considered them methodologically and with considerable sophistication.

The fair and equitable treatment clause, together with the non-impairment and the full security and protection clauses discussed in Section IV.D and Section IV.E is found in Article 3 of the BIT, which provides that:

1. Each Contracting Party shall ensure *fair and equitable treatment* to the investments of investors of the other Contracting Party and *shall not impair*, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.

2. More particularly, each Contracting Party shall accord to such investments *full security and protection* which in any case shall not be less than that accorded either to investments of its own investors or to investments of investors of any third States, whichever is more favourable to the investor concerned.56

The tribunal began the discussion of F&ET by assessing the content of the standard, first based on the parties’ submissions, and then based on the tribunal’s own interpretation according to the ordinary meaning of the BIT text, the context of the F&ET provision, and the object and

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55 *Id.*, ¶ 244.

56 Art. 3(1) and 3(2), Czech-Dutch BIT, reproduced at ¶ 280 of the award (emphases added).
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purpose of the treaty. After considering a number of arguments, it concluded that the F&ET standard here is an “autonomous Treaty standard” that should not be tied to the customary international standard. Because the approach taken to reach this conclusion is illustrative of the award’s high standard of reasoning, it will be presented in some detail below.

The tribunal first noted that the parties agreed with the Mondev award that “[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.” The claimant, however, argued that Article 3 of the BIT does not limit an investor’s recourse to protection only against conduct that is egregiously unfair, but is meant to ensure, in the language of Pope & Talbot v. Canada, “the kind of hospitable climate that would insulate [it] from political risks or incidents of unfair treatment.” Opposed to this view of F&ET as a positive duty, the respondent argued that the standard is rather a minimum standard of conduct which, in the language of Genin, is violated by “acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.” The Saluka tribunal did not adopt or blindly rely on either of these formulations, and instead noted that the difference suggested by the parties “may well be more apparent than real,” and that “an in-depth analysis [of the various thresholds] may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied.”

The tribunal then noted that because the Czech-Dutch BIT does not make a reference to the customary international standard, the inquiry should be under an autonomous and narrowly tailored BIT standard. As such, it would not share the difficulties that may arise under treaties such as NAFTA, which, even though aiming to promote investment, expressly

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57 Id., ¶¶ 294, 309.
58 Mondev International Ltd v. United States of America, ICSID Case No. ARB (AF)/99/2, Final Award, ¶ 118 (Oct. 11, 2002) (quoted by the Saluka tribunal in Award, supra note 2, at ¶ 285).
59 Pope & Talbot Inc. v. The Government of Canada, NAFTA, Award on the Merits of Phase 2 at ¶ 116 (Apr. 10, 2001) (quoted by the Saluka tribunal in Award, supra note 2, at ¶ 286).
60 Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2 at ¶ 367 (June 25, 2001) (quoted by the Saluka tribunal in Award, supra note 2, at ¶ 289).
61 Award, supra note 2, at ¶ 292.
tie the F&ET standard to the customary minimum standard. The tribunal effectively rejected the Czech Republic’s contention that the minimum standard is incorporated implicitly in Article 3(1) of the BIT, by examining the Genin case and showing that it does not support the proposition which the respondent sought to derive from it.

After looking at the case law and the parties’ submissions to determine what the F&ET standard is not, the tribunal began to narrow-tailor its own approach. It adopted the mode of treaty interpretation suggested by the Vienna Convention and first considered the ordinary meaning of the BIT’s provisions and the immediate context in which the F&ET language is used. Unsurprisingly, this inquiry proved unfruitful due to the fairly subjective nature of the terms used in the BIT. Next, the tribunal considered the object and purpose of the BIT from the preamble and aptly noted that it presents:

a more subtle and balanced statement of the Treaty’s aims than is sometimes appreciated. The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties’ economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty’s substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties’ mutual economic relations.

In line with this interpretation, the tribunal considered but ultimately refused to follow some of the recent, much-criticized arbitral awards that have read F&ET to require, in effect, a freezing of the host country’s regulatory apparatus just as the investor found it upon entry.

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62 Id., ¶ 294.
63 Id., ¶ 295.
64 Article 31(1) of the Vienna Convention requires that a treaty be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” See Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969).
65 Award, supra note 2, at ¶ 300.
66 This over-emphasis on investor expectations and investor reliance can be seen
The tribunal aptly noted that to do so would impose an “inappropriate and unrealistic” obligation upon the host state and that F&ET “cannot exclusively be determined by foreign investors’ subjective motivations and considerations.” To be protected, those should “rise to the level of legitimacy and reasonableness in light of the circumstances.”

After this carefully reasoned investigation, the tribunal reached its conclusion on F&ET, which has already been cited with approval by commentators, and is therefore worth quoting in full:

The “fair and equitable treatment” standard in Article 3.1 of the Treaty is an autonomous Treaty standard and must be interpreted, [sic] in light of the object and purpose of the Treaty, so as to avoid conduct [...] that clearly provides disincentives to foreign investors. The Czech Republic, without undermining its legitimate right to take measures for the protection of the public interest, has therefore assumed an obligation to treat a foreign investor’s investment in a way that does not frustrate the investor’s underlying legitimate and reasonable expectations. A foreign investor whose interests are protected under the Treaty is entitled to expect that the Czech Republic will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e., unrelated to some rational policy), or discriminatory (i.e., based on unjustifiable distinctions). In applying this standard, the Tribunal will have due regard to all relevant circumstances.

The subsequent application of this standard was just as careful as its derivation. For example, in considering whether the Czech Republic’s
response to the bad debt problems in the banking sector had been discriminatory and had therefore violated the F&ET standard, the tribunal: (1) established the comparable position of the big four banks regarding the bad debt problem, (2) detailed the differential treatment of IPB with regard to state assistance, and (3) examined thoroughly whether there were reasonable justifications for the Czech Republic’s actions. Only after following this logical chain and supporting each finding with facts from the record did the tribunal conclude that the Czech Republic had violated the standard through its discriminatory response to the bad debt problem.70

Similarly, in evaluating the claim that the Czech Republic had failed to ensure a predictable and transparent framework for investment, the tribunal set out the test (frustration of Saluka’s “legitimate expectations regarding the treatment of IPB without reasonable justification”71) and then considered each of the prongs that could sustain it. Through references to the facts, the tribunal established: (1) that Nomura had no basis for expecting that there would be no future change in the government’s policy towards the bank sector’s bad loan problem, or in state aid policies; (2) that Nomura was not reasonable in expecting that the government would not introduce a more rigid system of prudential regulation in the banking sector that could affect its IPB investment adversely; and (3) that Nomura should have been aware of the longstanding shortcomings of the Czech legal system with regard to the protection of creditors and could not have reasonably expected these shortcomings to be fixed quickly. Because the tribunal found each of Saluka and Nomura’s expectations to have been unreasonable, it did not need to consider whether there were any reasonable justifications for the government’s actions. It concluded that the claim that the Czech Republic had violated the F&ET standard by failing to ensure a predictable and transparent framework for investment was without any merit.72

The tribunal discussed Saluka’s next F&ET claim—that the Czech Republic had refused to negotiate in good faith—over 71 lengthy paragraphs.73 Again, the analysis began with a clear statement of the appro-

70 Id., ¶¶ 311–347.
71 Id., ¶ 348 (emphasis added).
72 Id., ¶¶ 348–360.
73 Id., ¶¶ 361–432.
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appropriate standard, which was finely tuned to the facts of this dispute and did not merely cite a set of general propositions:

[T]he Czech Republic’s conduct was unfair and inequitable if it unreasonably frustrated IPB’s and its shareholders’ good faith efforts to resolve the bank’s crisis. A host State’s government is not under an obligation to accept whatever proposal an investor makes in order to overcome a critical financial situation like that faced by IPB. Neither is a host State under an obligation to give preference to an investor’s proposal over similar proposals from other parties. An investor is, however, entitled to expect that the host State takes seriously a proposal that has sufficient potential to solve the problem and deal with it in an objective, transparent, unbiased and even-handed way.74

In applying this test, the tribunal carefully detailed (1) the Czech Republic’s discriminatory and one-sided assistance to CSOB in its acquisition of IPB and (2) the government’s repeated refusals to negotiate with Nomura during the crisis. The tribunal then found: (1) that the Czech Republic was culpable for a lack of even-handedness because it failed to deal with the IPB and Nomura, on the one side, and CSOB, on the other, in an unbiased and even-handed way; (2) that the Czech Republic had displayed a lack of consistency in its dealings with Nomura which made it “difficult or even impossible” for Nomura to accommodate the government’s position in its successive proposals; (3) that the Czech Republic’s communications with Nomura and the IPB lacked sufficient transparency to allow them to understand the government’s terms and conditions for an acceptable solution; and (4) that the Czech Republic had unreasonably refused adequate and direct communication to Nomura at a time when active engagement was crucial to finding a solution.75 All of this led the tribunal to decide that the Czech Republic had not complied with the F&ET standard and had breached Article 3 of the BIT. The analysis of this claim was sophisticated, consistent, and coherent, and the conclusion followed logically from the reasons presented.

The tribunal did not find a violation under Saluka’s last two claims based on the F&ET standard. This again showed the tribunal’s thorough understanding and nuanced treatment of the circumstances surround-

74 Id., ¶ 363.
75 Id., ¶¶ 407–432.
ing the failed IPB privatization. Saluka had argued that the provision of financial assistance to IPB after its acquisition by CSOB was in violation of the F&ET standard because it had been unlawful under Czech and EU law. The tribunal examined the case law and noted that “unlawfulness of a host State’s measures under its own legislation or under another international agreement [. . .] is neither necessary nor sufficient for a breach of [the F&ET standard].”76 The tribunal also found that the alleged unlawfulness should have been the proximate cause of some harm to the investor, and that no such harm to Saluka could be gleaned from the factual record, since IPB and CSOB received state aid only after Saluka had lost control of the bank.77

The tribunal used similar logic to dismiss the final F&ET claim—that the Czech Republic was liable for CSOB’s unjust enrichment at the expense of Saluka. The award cited the Iran-United States Claims Tribunal to clarify the content of the unjust enrichment standard as a general principle of international law.78 Quite notably, however, it did not make the mistake of inserting this international law standard into the autonomous, treaty-based F&ET standard. The relationship between the F&ET standard and the general principle of unjust enrichment is contested, and to equate them here would have required much argumentation. Instead, the tribunal prefaced its discussion of unjust enrichment by noting that it would assume, but not decide that unjust enrichment is part of F&ET.79 The tribunal then found that, as a matter of principle, neither the Czech Republic, nor CSOB could be held liable for CSOB’s alleged enrichment, because the Czech Republic did not control CSOB, and because CSOB was not a party to the BIT or the arbitration. Furthermore, based on the facts, the Czech Republic’s actions, while still in violation of the F&ET standard on other grounds, did not satisfy the proximate cause requirement here and did not sufficiently cause or enable CSOB’s unjust enrichment at the expense of Saluka.80 Since there

76 Id., ¶ 442.
77 Id., ¶¶ 445–447.
78 See Benjamin Isaiah v. Bank Mellat, 2 IRAN-U.S. CL. TRIB. REP. 232, at 236–37 (Mar. 30, 1983). (“There must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched.”)
79 Award, supra note 2, at ¶ 450.
80 Id., ¶¶ 448–456.
was no finding of unjust enrichment, the tribunal did not have to wrestle with the difficult question of whether the principle of unjust enrichment is covered by the Treaty’s F&ET provision.

Just like the section on jurisdiction, the award’s treatment of fair and equitable treatment is outstanding. The tribunal considered multiple sources and took extra care to determine the appropriate F&ET standard for the Czech-Dutch BIT. It then addressed each of Saluka’s various claims under F&ET comprehensively, first setting out the legal test to be used for a given claim, and then evaluating the claim based on the factual record. The treatment of the claims was careful and nuanced: the very same set of basic facts pointed to a violation of the F&ET requirement under some claims (discriminatory response to the bad debt problem, persistent refusal to negotiate in good faith) but did not rise to a violation of the F&ET requirement under others (failure to ensure predictable and transparent framework for investment, unlawful provision of financial assistance to CSOB, unjust enrichment of CSOB at the expense of Saluka).

D. Decision on Non-Impairment

The legal basis of the argument that the Czech Republic had violated its treaty obligations by failing to “not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal [of Saluka’s investment]” is found in Article 3(1) of the Czech-Dutch BIT, reproduced in Section IV.C. Non-impairment must surely have been a novelty, if not a challenge, for the tribunal to address, because the claim is not a standard part of investment law awards and because the content of the non-impairment standard can overlap, sometimes in imperfect and uncertain ways, with the content of the F&ET and expropriation standards. The tribunal, however, provided a thorough treatment of the claim and once again reached a lucid and well-supported decision.

Given the scarcity of authorities on non-impairment, the tribunal reasoned only from the ordinary meaning of the treaty to derive a standard that might well become the benchmark for non-impairment in

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81 A digest annotating publicly available investment treaty decisions and awards as of September 2006 listed only one other decision mentioning a non-impairment claim (in that case, actually termed “impairment”)—Occidental Exploration and Production Co. v. Ecuador (UNCITRAL, Final Award (July 1, 2004)). See Devashish Krishan & Ania Farren, Digest of Investment Treaty Decisions and Awards, 31 Y.B. COMM. ARB. 199–317 (2006).
investment law jurisprudence. The tribunal read “impairment” to mean “any negative impact or effect caused by ‘measures’ [i.e., actions or omissions] by the Czech Republic.”\textsuperscript{82} The treaty only covers measures that are “unreasonable or discriminatory,”\textsuperscript{83} and, accordingly, the tribunal noted that the standards of reasonableness and non-discrimination have no different meaning here than they do in the context of F&ET. The tribunal also determined that the standard of conduct that would violate the non-impairment requirement does not differ substantially from the F&ET standard. It noted, however, that non-impairment looks almost exclusively to the specific effects of a violation, while the F&ET standard also has a conduct-based component.\textsuperscript{84} This subtle distinction renders the overlap incomplete: it is still possible for a pattern of conduct that does not violate the F&ET standard to be found in violation of the non-impairment standard, based on the conduct’s effect upon the investor.

The tribunal applied its non-impairment test to three sets of facts related to the failed IPB privatization. The first set of facts, already discussed above, was the one supporting the F&ET violation. After brief reconsideration, the tribunal found that this conduct also violated the Czech Republic’s non-impairment obligation. The second set of facts related to Saluka’s deprivation (or expropriation) claim,\textsuperscript{85} and the tribunal decided that, just as that pattern of conduct did not support a finding of deprivation, it also did not support a finding of non-impairment.\textsuperscript{86}

The third set of facts had not been considered before and, presumably, would not have led to a finding of deprivation or a F&ET violation. The claim was that government officials leaked information to the media and helped trigger the second run on the IPB, thereby breaching the non-impairment obligation. The tribunal found some evidence of such conduct, but was still careful to set out the appropriate legal test: “[t]he crucial question [. . .] relates to causation: was the publication of the information [. . .] a conditio sine qua non for IPB’s forced administra-

\textsuperscript{82} Award, supra note 2, at ¶¶ 458–459.

\textsuperscript{83} Art. 3(1), Czech-Dutch BIT. For the full text, see supra note 56 and accompanying text.

\textsuperscript{84} Award, supra note 2, at ¶¶ 460–461.

\textsuperscript{85} Chronologically, the award discusses the deprivation claim before the non-impairment claim, but for reasons which will become obvious, this chapter delays analysis of deprivation until Section V.A.

\textsuperscript{86} Award, supra note 2, at ¶¶ 468–470.
tion?" After considering the available evidence, it found that even though the public was already aware of the IPB’s troubles, government leaks precipitated the bank run: once forced administration was discussed publicly, it became a self-fulfilling prophesy. The government’s actions were also unreasonable and discriminatory. This led the tribunal to conclude that the Czech Republic had violated its non-impairment obligation under Article 3(1) of the BIT.

E. Decision on Full Security and Protection

Similar to non-impairment, the discussion of full security and protection (FS&P) was fairly short because the tribunal had already considered the majority of the facts and claims related to the dispute and could incorporate them by reference as needed. This did not result in a lack of consideration of the appropriate legal standards, however. The tribunal referred to several arbitral awards and commentators in order to clarify the obligation to “accord [foreign] investments full security and protection” found in Article 3(2) of the BIT. It explained that the standard “obliges the host State to adopt all reasonable measures to protect assets and property from threats or attacks which may target particularly foreigners or certain groups of foreigners.” However, the FS&P standard “does not imply strict liability of the host State” and is “not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force.” Finally, the tribunal noted that a situation involving “civil strife and physical violence” would “essentially” be necessary for the successful invocation of the FS&P standard.

The tribunal did not find the circumstances surrounding the IPB privatization to involve civil strife and physical violence. Since such contingencies were declared “essential” prerequisites for a breach of FS&P, the tribunal could have legitimately ended the inquiry there. Instead, it proceeded and applied the legal standard to each of Saluka’s claims. In a sequential and well-reasoned fashion, the tribunal determined that even if the initial threshold to beginning a FS&P inquiry were met, none of Saluka’s three arguments established a violation of the standard. The sus-

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87 Id., ¶ 480.
88 Id., ¶ 481.
89 Id., ¶ 484.
90 Id., ¶ 483.
pension of trading of IPB shares, however unfortunate for Saluka, could not be shown to be “totally devoid of legitimate concerns relating to the securities market.” The prohibition of transfers of Saluka’s shares, and the police searches of Nomura’s headquarters, while disruptive, were being addressed by domestic courts (with relief already granted to Nomura for the police searches), and did not rise to a denial of justice that would signal a violation of the Czech Republic’s full security and protection obligation.91

V. THE TRIBUNAL’S SHORTCOMINGS

Despite the thorough and sophisticated treatment of the Czech Republic’s objections to jurisdiction and Saluka’s arguments under fair and equitable treatment, non-impairment, and full security and protection, the patterns of reasoning in a few other sections of the award do not rise to the same high standard. The instances of adequate or even exemplary reasoning outnumber those of less-than-adequate reasoning, and this chapter finds that—on the whole—the Saluka award satisfied the reasons requirement under Article 32(3) of the UNCITRAL Rules. The purpose of the discussion that follows is not to challenge the soundness of the tribunal’s overall reasoning or the eventual decision, but to highlight two areas where the award could have been improved. These “glitches” in the analysis, while far from trivial, do not amount to a miscarriage of justice that would threaten the validity of the award.

A. Attenuated and Flawed Reasoning on Expropriation

The tribunal’s discussion of the deprivation claim against the Czech Republic exhibits certain puzzling traits. First, the tribunal was neither clear nor consistent in the legal standard it used to evaluate Saluka’s allegations that it had been unlawfully deprived of the value of its IPB shares. Second, the tribunal summarily dismissed—without evaluation and without any explanation—several of Saluka’s depletion claims which could have been viable at least in theory.

The legal basis for the deprivation claims is Article 5 of the Czech-Dutch BIT, which reads as follows:

Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party

91 Id., ¶¶ 485–496.
of their investments unless the following conditions are complied with:

a. the measures are taken in the public interest and under due process of law;

b. the measures are not discriminatory;

c. the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in any freely convertible currency accepted by the claimants.\(^92\)

Two general observations about Article 5 are in order. First, it speaks only of “deprivation” and does not mention “expropriation,” but—in line with the practice adopted by the tribunal—the two terms will be used interchangeably here.\(^93\) There could be no linguistic disagreement based on nuances in the meaning of the Czech and Dutch terms for “deprivation,” since the BIT sets English as the controlling language. Second, on its face, the structure of the deprivation provision is straightforward: a direct or indirect deprivation of investment would not be considered unlawful only if all three of the enumerated conditions are met. Nonetheless, the tribunal did not adopt this seemingly self-contained framework and instead launched into a precarious search for a standard that interprets the deprivation provision in light of customary international law.

1. Unclear and Contradictory Legal Standards

The tribunal began the discussion of expropriation with a succinct overview of Article 5 and the parties’ main arguments. Saluka emphasized that (1) the Czech Republic’s actions caused Saluka to be deprived of the value of its IPB shares and (2) that the Czech Republic’s actions did not satisfy any of the exculpatory conditions in Article 5(a)–(c). For

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\(^92\) Art. 5, Czech-Dutch BIT, reproduced at Award, \textit{supra} note 2, ¶ 245.

\(^93\) A similar claim of “deprivation” in lieu of “expropriation” appears in \textit{Eureko v. Poland} (ad hoc, Netherlands-Poland BIT, Partial Award, Aug. 19, 2005). It appears that the use of “deprivation” is specific to Dutch BITs.
example, Saluka contended that by rejecting its proposal, the Czech Republic had not acted in the public interest, thereby breaching Article 5(a) of the BIT. It also claimed that the Forced Administrator of the IPB, selected by the Czech Republic, never exercised truly independent judgment, that this rendered his actions discriminatory and in violation of due process, and thereby in breach of Article 5(a) and Article 5(b).94 The Czech Republic, on the other hand, contended that the forced administration entailed “permissible regulatory actions which cannot be considered expropriatory.”95 While the award does not specify this, it appears that the Czech Republic disputed the first prong of Saluka’s claim, i.e., that a taking had occurred, and then argued that it is not necessary to inquire into whether the action was unlawful (and tantamount to expropriation), or lawful (either through compliance with Articles 5(a)–(c), or through a regulatory powers exception).

After the brief presentation of the parties’ positions, the tribunal looked into the appropriate legal standard in a sub-section entitled “The Law.” It quickly noted that the BIT’s deprivation provision

is drafted very broadly and does not contain any exception for the exercise of regulatory power. However, in using the concept of deprivation, Article 5 imports into the Treaty the customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order.96

The tribunal went on to state that “[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.”97 No case authority or other support was provided for either of these assertions.

The tribunal then evoked the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens to suggest that an uncompensated taking could be excused if it is, inter alia, “incidental

94 Award, supra note 2, at ¶¶ 246–249.
95 Id., ¶ 250 (internal quotation marks omitted).
96 Id., ¶ 254.
97 Id., ¶ 255.
to the normal operation of the laws of the State.”98 The tribunal also noted that the 1967 OECD Draft Convention on the Protection of Foreign Property provides that “measures taken in the pursuit of a state’s political, social or economic ends do not constitute compensable expropriation.”99 (Both of these authorities are draft conventions.) Next, the tribunal quoted one of the comments to the Restatement (Third) of the U.S. Law of Foreign Relations, which includes in its list of non-compensable regulatory measures “other action of the kind that is commonly accepted as within the police power of the State.”100 Curiously, the tribunal omitted the caveats that immediately follow: “. . . if it [the action] is not discriminatory, [. . .] and is not designed to cause the alien to abandon the property to the state or sell it at a distress price.”101 After citing these three authorities and referencing several cases in an endnote, the tribunal concluded that the notion of deprivation should be understood in the meaning it has acquired in customary international law (CIL).102

It is useful to pause and consider the pattern of reasoning employed here. By deciding to adopt one particular view of CIL, the tribunal severely curtailed the probability that a finding of expropriation would be reached. And yet, the tribunal did not explain sufficiently why the deprivation inquiry required a reference to CIL. The parallel between deprivation (Article 5 of the BIT) and fair and equitable treatment (Article 3 of the BIT) is perfect: in both cases, the treaty provision is, in the words of the tribunal, “drafted very broadly” and “vague,”103 and in both cases there is a customary international law standard. If an autonomous treaty standard was sufficient to judge the fact-specific inquiry into F&ET, why isn’t an autonomous treaty standard along the same lines sufficient to carry out the fact-specific inquiry into deprivation?

98 Id., ¶ 256.

99 Id., ¶ 259 (internal quotation marks omitted).

100 Id., ¶ 260.

101 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712, cmt. (g). This omission is notable in view of the tribunal’s finding, already discussed, that the Czech Republic’s response to the banking crisis had been “discriminatory” and in violation of the fair and equitable treatment standard. Still, the content of the two discrimination tests is not entirely identical: the BIT targets mostly economic discrimination, whereas the Restatement is aimed at more invidious discrimination.

102 Award, supra note 2, at ¶ 261.

103 Id., ¶¶ 254 (on art. 5), 297 (on art. 3).
The line of reasoning used to identify the CIL standard is also logically suspect. The tribunal provided an endnote citation to cases from ICSID, NAFTA, and the Iran-United States Claims Tribunal, and discussed three secondary sources, but it did not make clear why it thought these carried sufficient weight to justify an adoption of a CIL standard. Had the tribunal presented the authorities in some detail, it would have become apparent that they do not in fact point to one and the same CIL standard. Moreover, commentators have warned against using such an approach by noting that “[l]ights from decisions handed down by disparate fora cannot [. . . ] be thrown into a single stew for subsequent analysis, [because] there are important distinctions to be made between each source of precedent.”

Furthermore, the tribunal adopted the view that uncompensated takings resulting out of bona fide regulations aimed at the general welfare could be justified under CIL without even acknowledging the splits in the case law and in scholarly opinion. While it might be true that this view has almost acquired the status of jurisprudence constante in recent years, there are numerous valid authorities and commentators who disagree with it. For example, some argue that only actions resulting from the state’s police powers, strictly construed, should be excused from a finding of unlawful expropriation, while others argue that “adequate compensation” is always required when there is expropriation, but leave flexible the question of how it should be calculated. The claim here is not that the tribunal made a legal mistake and should have followed any of these positions. An arbitral tribunal is, to be sure, fully empowered to choose the CIL standard it will apply. However, for that choice to meet the reasons requirement, it should be made after adequate consideration and discussion of the other standards that might be available. The less uniformity there is between the various standards, the more time should be spent motivating a tribunal’s eventual choice.

Finally, the tribunal did not explain why, in setting out the legal test, it skipped the first two steps in a traditional deprivation inquiry. Its exclusive focus here was on how to determine whether a set of actions had “crossed the line” from permissible regulation into expropriation. The test for expropriation, however, does not start with an inquiry into the nature of the action. An action that might amount to expropriation is first judged by its impact on the investor (Did the investor suffer a taking of property?), and not on its face (Was the action somehow impermissible or unlawful?). If an investor is found to have suffered a taking of property, the tribunal needs to inquire into whether the state’s action proximately caused the taking. Only if this condition is also met does a tribunal have to examine the permissibility or lawfulness of the action.\textsuperscript{107} Since the Saluka tribunal presented only the last condition in this subpart of the award, one of the following conclusions seems warranted:

1. The tribunal had \textit{already} assumed that the first two conditions (effect on investor, proximate cause) had been met. If these conditions are not included in the legal test, however, the reasoning on expropriation is rendered inadequate.\textsuperscript{108}
2. The tribunal’s logic was flawed. It confused impermissible regulation, which is only a \textit{necessary} condition in the determination of expropriation, for a \textit{sufficient} condition.

The tribunal picked up the discussion of expropriation in the “Analysis and Findings” sub-section, which follows directly after the “The Law” sub-section just analyzed. At the outset, the tribunal tried to restate its test for deprivation as follows:

Pursuant to Article 5 of the Treaty, the Czech Republic was prohibited from taking any measures depriving, directly or indirectly, Saluka of its investment in IPB \textit{unless one or more of the cumulative conditions set out in that Article were complied with}. If the Tribunal finds that the Czech Republic has adopted such measures \textit{without having complied with one or more of these conditions}, the

\textsuperscript{107} Failure to follow this approach, though clearly erroneous, is not uncommon. See Paulsson & Douglas, supra note 104, at 148–50.

\textsuperscript{108} The tribunal does state, without adducing proof, that Saluka “ha[d] been deprived of its investment in IPB” in the following sub-section (Award, supra note 2, at ¶ 267). The point here, however, is that the deprivation inquiry needs to be a clear part of the legal test.
conclusion will inevitably follow that the Respondent has breached Article 5 of the Treaty.109

Instead of a restatement, however, this is a new and logically flawed test. The first sentence suggests that fulfilling “one or more” of the conditions of Article 5 would be sufficient to bring the Czech Republic’s actions in compliance with its BIT obligation. This is incorrect under any conceivable interpretation of Article 5. The second sentence then correctly restates the actual content of Article 5, which requires compliance with all three conditions. The two sentences of the test are in logical contradiction with one another and cannot be reconciled.

Even without this oversight, this is an entirely different test from the one the tribunal established in the previous sub-section of the award. Here, Article 5 is interpreted as self-contained: there is no reference to the CIL standard, and certainly no possibility for a “bona fide regulatory action” or even a “police powers” exception. The tribunal went to considerable lengths to reject such an autonomous interpretation of Article 5 in the immediately preceding paragraphs, but it seems to endorse it here. The two sub-sections of the award also stand in logical contradiction to one another and cannot be reconciled.

The only piece of evidence the tribunal references during its consideration of deprivation is the CNB’s Decision from June 16, 2000, imposing forced administration upon the IPB. That decision is nevertheless reproduced in full, taking up over four pages in the award.110 The CNB decision motivated the regulatory measure according to the various provisions of Czech law and appears well-reasoned. Without examining any specific points in it, the tribunal concluded:

The CNB’s decision is, in the opinion of the Tribunal, a lawful and permissible regulatory action by the Czech Republic aimed at the general welfare of the State, and does not fall within the ambit of any of the exceptions to the permissibility of regulatory action which are recognised by customary international law. Accordingly, the CNB’s decision did not, [sic] fall within the notion of a “deprivation” referred to in Article 5 of the Treaty, and thus did

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109 Award, supra note 2, at ¶ 266 (emphases added).

110 Id., ¶ 270 (pp. 54–58).
not involve a breach of the Respondent’s obligations under that Article.\textsuperscript{111}

This conclusion stands in logical contradiction with several previous statements and findings of the tribunal. First, it is unclear why the tribunal defers to an examination of the regulatory action only under Czech law, when in the previous sub-section it framed the legal test as requiring “permissible” and “commonly acceptable” actions under customary international law.\textsuperscript{112} The presentation of the “non-expropriatory jurisprudence” under CIL, albeit one-sided, was predicated on the very notion that there is indeed a minimum international standard that governs the lawfulness of regulatory actions that result in a taking. This international standard is entirely missing from the tribunal’s analysis here. The implication seems to be that, regardless of the legality of a regulatory action under CIL, such an action does not constitute unlawful expropriation so long as it complies with the host state’s own laws.\textsuperscript{113} If the tribunal meant what it said, this would be a far-reaching and illogical deviation from the existing case law.

The quoted paragraph also contains yet another (third) restatement of the tribunal’s test for unlawful expropriation. By referring to “exceptions to the permissibility of regulatory action,” the tribunal adopts a standard whereby all regulatory actions, including those resulting in a taking, are permissible unless they fall within certain exceptions under CIL. Yet, under the CIL view announced earlier (and also based on the plain meaning of Article 5), regulatory actions resulting in a taking are by default impermissible unless they comply with certain narrowly defined conditions. This error in logic and the third consecutive alteration of the applicable standard simply do not allow the reader to ascertain which legal test was used to reach the ultimate decision.

The second sentence in the quoted statement is problematic even further, because it equates “deprivation” with “unlawful deprivation.” In so doing, the tribunal contradicts itself and summarily whites out the BIT

\textsuperscript{111} Id., ¶ 275 (emphasis added).

\textsuperscript{112} Id., ¶¶ 261, 263.

\textsuperscript{113} This oversight is also puzzling given that the tribunal correctly separated domestic from international standards with respect to the unlawfulness of a state action in the section on fair and equitable treatment. There, it noted “[t]he unlawfulness of a host State’s measures under its own legislation [. . .] is neither necessary nor sufficient for a breach of Article 3.1 of the Treaty” (Award, supra note 2, at ¶ 442).
provisions under Article 5(a)–(c). The tribunal had already determined that deprivation took place: “There can be no doubt, and the Tribunal so finds, that Saluka has been deprived of its investment in IPB as a result of the imposition of the forced administration.” Yet, here it concludes the opposite: that the state’s actions “do not fall within the notion of a ‘deprivation’ referred to in Article 5 of the Treaty.”

To assume that this is a problem of semantics rather than faulty reasoning would do nothing to redeem the sentence in question. The tribunal concludes that there is no breach of Article 5 because there is no deprivation. This is equivalent to the following logical statement: If no “deprivation,” then no “breach.” The logic of the treaty, however, is different. To find a breach, the tribunal needs to find deprivation, which does not meet one or more of the conditions under Articles 5(a)–(c), or: If “deprivation” & no “Art. 5(a)–(c),” then “breach.” The two statements are simply not logical equivalents. In reasoning under the first instead of the second, the tribunal commits the “necessary vs. sufficient condition” fallacy and entirely disregards the three cumulative exculpatory conditions of Articles 5(a)–(c).

In sum, both the derivation and the application of the legal test used in the analysis of expropriation contain significant logical lacunae that undermine the coherence of this part of the award. The tribunal used inadequate authorities, failed to justify its reliance on one particular view of the CIL test when a split was present, employed faulty reasoning, and seemed to apply three contradictory legal standards to decide the same question in the same sub-section.

2. Plausible Claims Not Addressed

Even though the tribunal presented all of Saluka’s claims under Article 5 of the BIT at the beginning of the section on deprivation, it subsequently considered only some of them. After finding that the Czech Republic was not liable for unlawful expropriation based on the imposition of forced administration on IPB, the tribunal noted that it would:

not consider the Claimant’s allegations that the Czech Republic was an accessory to CSOB’s alleged plan to take over IPB, that

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114 Award, supra note 2, at ¶ 267 and ¶ 275.
115 There are also some unexplained differences in the presentation of Saluka’s claims at the beginning (id., ¶ 249) and at the end (id., ¶ 278) of the section on deprivation.
the Forced Administrator did not exercise truly independent judgment or that the Czech Government discriminated against IPB by granting State aid to Saluka’s competitors. These allegations, even if proven, would not rise to the level of a breach of Article 5. They will in any event be considered in the next Chapter [ . . . ] that addresses [ . . . ] Article 3 of the Treaty.\textsuperscript{116}

There is a manifest absence of reasoning in this statement. Just because a claim will be considered under Article 3 of the treaty does not excuse the tribunal from having to consider it under Article 5. The legal standard for unlawful deprivation (Article 5), and the legal standards for fair and equitable treatment, non-impairment, and full security and protection (Article 3) contain some of the same elements, but they are by no means identical or even linked in any formal way. A claim that does not prevail under Article 3 (sometimes considered an easier standard to meet), could nevertheless be successful under Article 5. Under the approach adopted by this tribunal, such a claim would be overlooked.

As already discussed in Section II, the Saluka arbitration was conducted under the UNCITRAL Rules that, unlike the ICSID Convention, do not contain a formal requirement that every question submitted by the parties should be addressed by the tribunal.\textsuperscript{117} But this does not obviate the problem. It is difficult to conclude that the tribunal here fulfilled the requirement to state reasons for its decision, a formal element of the UNCITRAL Rules, if it left doubts that Saluka could have prevailed on the unaddressed claims. At a minimum, the tribunal should have (1) stated the legal threshold these three claims must meet in order to rise to the level of unlawful expropriation and (2) explained why they do not meet it.

Finally, even if Saluka’s claims could not satisfy the requirement for direct deprivation, they could have been sufficient for a finding of indirect deprivation. For example, the tribunal in Metalclad v. Mexico found indirect expropriation based on two elements also present in the Saluka case—specific undertakings or representations on the part of the host state, and legitimate reliance or expectations on the part of the investor.\textsuperscript{118} It is

\textsuperscript{116} \textit{Id.}, ¶ 278.
\textsuperscript{117} See supra note 5 and accompanying text.
\textsuperscript{118} Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1 (Aug. 30, 2000).
uncertain whether a similar conclusion could be reached in *Saluka*. Nevertheless, without a discussion of indirect deprivation—an express source of liability under Article 5—it is difficult to conclude that this section of the award exhibits clear and manifest reasoning.

**B. Insufficient Discussion of the “Put Option”**

Any possible criticisms of the award outside of its discussion of deprivation are significantly less serious. The only one that casts a shadow over the adequacy of reasoning is the insufficient consideration given by the tribunal to the put option negotiated and exercised by Nomura. As explained in Section III.A, Nomura bought IPB’s shares in the Pilsner Urquell brewery through a complex series of transactions, combined the Pilsner shares with the Radegast ones it already owned, and sold the resulting entity to a major international brewing company at a huge profit.

The put option is notable because it allowed Nomura to pay for its purchase of other assets with IPB shares and because it was eventually exercised to pay for Nomura’s acquisition of Pilsner Urquell shares. The Pilsner Urquell transaction was structured as a deferred payment: Nomura bought these Pilsner shares *before* the forced administration of the IPB (i.e., when the IPB shares still had value), but it paid for the Pilsner shares *after* the forced administration of the IPB, when the IBP shares used as means of payment were entirely worthless. Thus, Nomura acquired a valuable asset from IPB and then paid CSOB for it with something that had no value. This transaction gave rise to an arbitration claim that was decided in favor of Nomura in *Torkmain Investments Ltd et al. v. Pembridge Investments BV et al.* The huge profit Nomura made from the sale of an IPB asset, while simultaneously refusing to enter into IPB as a strategic investor, was also the source of much public attention both before and after the forced administration of the bank. There is evidence that this transaction “was the last drop and the main officially articulated reason why the [Czech] government strictly refused to provide any financial assistance to IPB.”

Even though the award contains some discussion of the put option, the consideration given seems insufficient in light of its importance to the dispute between Nomura/Saluka and the Czech Republic. But was the put option a part of the Czech Republic’s defense? The tribunal

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119 *See supra* note 40 and accompanying text.
120 Balaš, *supra* note 24, at 374.
indeed noted that the Czech Republic referred to the legality and the propriety of the put option as part of its arguments under jurisdiction and under fair and equitable treatment. The submissions of the parties in Saluka are not publicly available, so it is not possible to ascertain how central the put option was to the Czech Republic’s defense. However, there is reason to believe that it was quite important. In its discussion of the parties’ submissions, the tribunal suggested that the respondent’s notice to dismiss and its countermemorial contained similar arguments. The decision on jurisdiction over the Czech Republic’s counterclaims indicates that the put option was central to the Czech Republic’s counterclaims against Saluka, which in turn suggests that the put option must have been similarly important to the respondent’s defense in the current arbitration.

Despite this significance, the tribunal’s discussion of the put option was in effect limited to the following pronouncement under fair and equitable treatment:

So far as concerns any alleged illegality involved in the creation or operation of the Put Option, the Tribunal notes, and sees no reason to dissent from, the decision of the tribunal in the first arbitration under the Put Option agreement in Torkmain Investments Ltd et al. v. Pembridge Investments BV et al., in its second interim award, that the Put Option agreement was valid, as was the Put Option itself. Moreover, the Tribunal notes that, in the second such arbitration, it was accepted by CSOB (apparently acting on behalf of the Czech Republic) that those two matters were res judicata as a matter of Czech law.

Even though this statement does not entirely disregard claims related to the put option, it is not an example of clear and manifest reasoning.

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121 Award, supra note 2, at ¶¶ 183(a), 184(d), 212, 231, 233.

122 Id., ¶¶ 12–21.

123 See Decision on Jurisdiction, supra note 33. The separately-issued decision on jurisdiction over the Czech Republic’s counterclaim should not be confused with the tribunal’s decision on jurisdiction in this award, discussed in Section III.B.

124 The question of the put option was not discussed on the merits in the decision on jurisdiction over the Czech Republic’s counterclaim and so it could not have been res judicata.

125 Award, supra note 2, at ¶ 216.
That CSOB accepted the legality of the put option under Czech law is not sufficient to remove questions about the put option’s compliance with international bonos mores. CSOB, a private party, also cannot formally bind the Czech Republic, a sovereign, through its alleged acquiescence to the legality of the put option. CSOB might have conceded this point for a variety of reasons, including strategic litigation reasons. If the Czech Republic raised questions about the put option before the Saluka tribunal, the tribunal should have addressed those questions in a reasoned manner, independent of third parties’ prior positions on the matter.

In a similar vein, it would also have been helpful, if the tribunal had explained what led it to “see no reason to dissent from” the decision in the separate put option arbitration that was made by a different tribunal. For the outside observer, the entire Torkmain v. Pembridge arbitration is a black box, since nothing in connection with it has been made publicly available. Reliance on such non-public materials here is problematic in view of the fact that arbitral awards are not merely for the consumption of the parties to the dispute, but are frequently relied upon by subsequent awards, and thus have a substantial impact on the development of international investment law jurisprudence.

VI. THE BENEFITS OF THE WELL-REASONED AWARD IN SALUKA

After scrutinizing and critiquing the patterns of reasoning employed by the Saluka tribunal, it is useful to return to the history of the underlying dispute. Developments following a Swiss federal court’s refusal to set aside the award provide an interesting post-mortem of the Saluka arbitration and make it a compelling case study of the benefits that well-reasoned arbitral decisions can confer.

This chapter found that the Saluka tribunal drafted an award that is for the most part coherent, cogent and persuasive, and that fulfills the reasons requirement under Article 32(3) of the UNCITRAL Rules. As

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126 It is also not clear whether the tribunal’s statement about CSOB’s position is even correct. When the award was released, CSOB was still engaged in domestic court litigation over the legality of the Pilsner Urquell transaction of which the put option was an integral part. See Czech News Agency, supra note 39.

127 That the Czech Republic and CSOB are not behaving as a single actor in this arbitration and indeed have separate interests is confirmed by the fact that CSOB had still not joined the settlement between Nomura and the Czech Republic several weeks after it was negotiated. See Section VI.
already noted, observers have also found that it allows them to “read in between the lines.” The award most likely gives the parties who are insiders to the dispute even more information about the tribunal’s disposition with regard to the range of damages that might be awarded at the next stage. Such specific information is beneficial, because it allows the parties to limit or resolve the dispute in an amicable way, without continuing to bear the uncertainties and the expense involved in open-ended arbitration proceedings.

This is exactly what happened in the Saluka case. Even though the parties had been trying to reach a settlement at least since the autumn of 2005, it was only after the present award was cleared by a Swiss court in September 2006 that these negotiations met with some success. On November 30, 2006, Nomura and the Czech Republic announced a preliminary settlement that placed a $332 million (U.S.) cap on the amount of damages the tribunal can award to Saluka in the final stage of the arbitration. In return, the Czech Republic agreed to drop its counterarbitration against Nomura, in which a decision had been expected shortly. The negotiated damages cap is notable in light of the $1.9 billion in damages Saluka had demanded from the Czech Republic, and the $5.7 billion in damages the Czech Republic had demanded from Nomura in the parallel arbitration. Nomura expected that this agreement would lead to a settlement of its dispute with CSOB as well, thereby putting an end to the seven-year chain of domestic and international litigation over the failed privatization of the IPB.

The final terms of the settlement between the Czech Republic and Nomura were announced on June 20, 2007. The government agreed to pay around $300 million, or 10 percent of the difference between the price of IPB in 2000 when it was put under forced administration and taken over by CSOB, and the costs of rescuing IPB’s assets.
The amicable conclusion of the dispute between Nomura and the Czech Republic stands as a counterpoint to post-arbitration developments in disputes where the tribunal failed to comply with the reasons requirement. The ICSID case of Wena Hotels Ltd. v. Arab Republic of Egypt, discussed in detail in Chapter 8, serves as a good example. The lack of clear and manifest reasoning in the original award and in the ad hoc committee’s review of the award led to much further litigation in domestic courts by parties related to the dispute, and, some seven years after the beginning of the arbitration, to an application for interpretation of the original award. The prevailing party, Wena, was forced to relitigate the case for years and in multiple fora because, in failing to state reasons, the original tribunal created the impression that it had actually not decided a number of important subsidiary questions. In contrast, the Saluka tribunal foreclosed such a nebulous outcome in this case by providing well-elaborated reasons at each crucial stage in the award, and by eventually advancing a settlement that includes and binds all parties to the dispute.

VII. CONCLUSION

Because of the lack of precise standards for what constitutes adequate reasoning, any such assessment is necessarily subjective. To analyze the Saluka award, this chapter considered its internal logic, coherence, consistency, the discussion of applicable law, the presentation of background information, and the logical links between the facts, the arguments accepted by the tribunal, and the decision reached. Evaluated on these criteria, the Saluka award stands in contrast to the majority of the decisions discussed in this volume.

The award also contains an interesting contrast within itself: it highlights the difference between adequate and inadequate reasoning on legal claims that are based on the very same set of facts. The discussion on expropriation, unreasoned in its own right, seems even more inadequate when compared to the tribunal’s masterful treatment of fair and equitable treatment, non-impairment, full security and protection, and jurisdiction. The analysis of the latter promotes a thorough understanding of the dispute’s complexity and builds confidence in the ultimate decision on the merits; the analysis of the former confuses and prompts the reader to at least question parts of the eventual outcome.

Virtually all of the claims that arise in investment arbitrations require a highly contextual analysis that, in turn, requires clear and manifest rea-

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133 See Julie Maupin, The Award in Wena Hotels Limited v. Arab Republic of Egypt, supra Chapter 8, particularly Section V.
soning in order to be persuasive. As Saluka shows, it is not possible to apply a general legal test without narrow-tailoring it to the specific circumstances of the dispute, the treaty regime, and the legal context. The tribunal in Saluka provided excellent examples of how an award should be drafted and what it should contain. Such an approach predicated upon adequate reasoning, even though more elaborate, is central to the integrity of the international investment arbitration system. It contributes to the finality of the dispute, creates models of reasoning that can be adopted by later tribunals, advances international investment law, and provides host states with much-needed, detailed guidance about the specific treatment they are required to accord to foreign investors.