IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE AGREEMENT ON ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS BETWEEN THE KINGDOM OF THE NETHERLANDS AND THE CZECH AND SLOVAK FEDERAL REPUBLIC, SIGNED ON APRIL 29, 1991 ENTERED INTO FORCE ON OCTOBER 1, 1992 ("AGREEMENT")

-and-

THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ARBITRATION RULES, 1976 ("UNCITRAL RULES")

ADMINISTERED BY THE PERMANENT COURT OF ARBITRATION ("PCA")

PCA CASE NO. 2009-11

-between-

HICEE B.V.

("Claimant")

-and-

THE SLOVAK REPUBLIC

("Respondent")

PARTIAL AWARD

23 May 2011

By the Tribunal:

Sir Franklin Berman KCMG QC
Judge Charles N. Brower
Judge Peter Tomka

TABLE OF CONTENTS

I. INTRODUCTION

A. The Parties

1. The Claimant in this matter is HICEE B.V., Van Nelleweg 1206, 3044 BC Rotterdam, the Netherlands (hereinafter the "Claimant" or "HICEE"), a corporation constituted under the laws of the Kingdom of the Netherlands. The Claimant is represented by Mr Pieter de Kok of HICEE B.V.; Mr Stanimir A. Alexandrov, Mr Daniel M. Price, Ms Jennifer Haworth McCandless, and Ms Marinn Carlson of Sidley Austin LLP; and Judge Stephen M. Schwebel.

2. The Respondent is the Government of the Slovak Republic, Ministry of Finance, Štefanovičova 5, P.O. BOX 82, 817 82 Bratislava, Slovak Republic (hereinafter the "Respondent" or the "Slovak Republic"). The Respondent is represented by of the Ministry of Finance of the Slovak Republic; Mr David Kavanagh, Mr Rainer Wachter, and Mr David Herlihy of Skadden, Arps, Slate, Meagher & Flom LLP.

B. Background of the Dispute

3. The present dispute concerns the Claimant's interest in DÔVERA zdravotná poist'ovňa, a.s. (hereinafter "Dôvera"), and APOLLO zdravotná poist'ovňa, a.s. (hereinafter "Apollo"), two health insurance companies organized under the laws of the Slovak Republic.[1] Both entities were subsidiaries of DÔVERA Holding, a.s. (hereinafter "Dôvera Holding"), also incorporated in the Slovak Republic, which in turn was – and still is – wholly owned by the Claimant. In relation to Dôvera and Apollo, the Claimant alleges that the Respondent has breached Articles 3, 4, and 5 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic of 29 April 1991,[2] which entered into force on 1 October 1992 (hereinafter the "Agreement" or the "BIT").[3] Specifically, the Claimant complains about the enactment of

---

1 As explained below, the Claimant informed the Tribunal on October 28, 2010 that, as a result of a merger, Apollo had acquired Dôvera; that Apollo was renamed "Dôvera"; and that the former Dôvera was placed in liquidation under a new name. These changes in the corporate structure, however, do not affect the Tribunal's decision in the present Award.

2 *See* Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, done at Prague on 29 April 1991, entered into force on 1 October 1992 (**Exhibit C-1**). It is not in dispute that, after the dissolution of the Czech and Slovak Federal Republic on 31 December 1992, the Slovak Republic succeeded to the Agreement (see also paragraph 47 below).

3 For greater clarity, the Tribunal reserves the term "treaty" to denote international treaties generally – as in the context of its discussion of the Vienna Convention on the Law of Treaties below – while referring to the 29 April 1991 investment agreement as the "Agreement" or the "BIT".

Act No. 530/2007 Coll. of 25 October 2007, Amending and Supplementing Act No. 581/2004 Coll. on Health Insurance Companies and Healthcare Supervision, and Amending and Supplementing Certain Acts as Amended,[4] by which health insurance companies were prohibited from distributing profits and made subject to a cap on their permissible administrative expenses.

II. PROCEDURAL HISTORY

4. By a Notice of Arbitration dated 17 December 2008, HICEE commenced arbitration against the Slovak Republic, pursuant to Article 8 of the Agreement and Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law adopted on 15 December 1976 (hereinafter "UNCITRAL Rules"). The Respondent received the Notice of Arbitration on 29 December 2008.

5. On 17 December 2008, the Claimant appointed Judge Charles N. Brower as the first arbitrator. On 23 February 2009, the Respondent appointed His Excellency Judge Peter Tomka as the second arbitrator. On 26 May 2009, the co-arbitrators jointly appointed Sir Franklin Berman as the presiding arbitrator.

6. On 8 October 2009, the Tribunal held a Preliminary Procedural Meeting at the Peace Palace, The Hague, the Netherlands. Present at the Meeting were the following:

The Tribunal:
Sir Franklin Berman KCMG QC
Judge Charles N. Brower
Judge Peter Tomka

For the Claimant:
Mr Pieter de Kok, HICEE B.V.
Mr Stanimir Alexandrov, Sidley Austin LLP
Ms Marinn Carlson, Sidley Austin LLP
Ms Miroslava Petrovičová, Škubla & Partneri s r.o.
Ms Daniela Švecová, Škubla & Partneri s.r.o.

For the Respondent:
Ministry of Finance of the Slovak Republic
Ministry of Finance of the Slovak Republic
Ministry of Finance of the Slovak Republic
Mr David Kavanagh, Skadden, Arps, Slate, Meagher & Flom LLP
Mr Rainer Wachter, Skadden, Arps, Slate, Meagher & Flom LLP
Mr David Herlihy, Skadden, Arps, Slate, Meagher & Flom LLP
Ms Genevieve Poirier, Skadden, Arps, Slate, Meagher & Flom LLP

---

[4] Act No. 530/2007 Coll. of 25 October 2007, Amending and Supplementing Act No. 581/2004 Coll. on Health Insurance Companies and Healthcare Supervision, and Amending and Supplementing Certain Acts as Amended (**Exhibit C-19**).

For the Permanent Court of Arbitration:
Mr Dirk Pulkowski
Mr Garth Schofield

Court Reporting:
Ms June Martin, T and M Reporting

Other:
Dr Anke Meier, Arbitration Legal Assistant to Judge Brower

7. On 8 October 2009, in the course of the Preliminary Procedural Meeting, the Parties and the Tribunal signed the Terms of Appointment.

8. Taking into account the Parties' 3 October 2009 agreement on procedural issues and the further agreement reached during the 8 October 2009 Meeting, the Tribunal issued Procedural Order No. 1 on 9 November 2009.

9. On 22 February 2010, in accordance with Procedural Order No. 1, the Claimant filed its Statement of Claim together with witness statements, an expert report, and accompanying exhibits.

10. On 16 March 2010, the Respondent, in accordance with Procedural Order No. 1, notified the Tribunal of three jurisdictional objections.[5] The Respondent also proposed to file its Memorial on Jurisdiction, which would be limited to a discrete point of treaty interpretation, on 14 May 2010.

11. On 29 March 2010, the Parties submitted a joint letter to the Tribunal indicating their agreement that the proceedings should be bifurcated in order to address what the Parties termed the "Treaty Interpretation Issue" as a preliminary matter. The Respondent agreed to submit its Memorial on Jurisdiction on 23 April 2010, and the Claimant agreed to file its Counter-Memorial on Jurisdiction on 22 June 2010. The Parties proposed to hold a two-day hearing (the "Hearing") in mid-July 2010 or soon thereafter.

12. On 7 April 2010, in response to the Parties' joint letter of 29 March 2010, the Tribunal held a telephone conference with the Parties regarding the scheduling for the Hearing on the Treaty Interpretation Issue. The Parties agreed to the Tribunal's proposal that the Hearing be held from the afternoon of 20 July 2010 to 21 July 2010, with the possibility of an extension, if needed, to the morning of 22 July 2010.

13. On 23 April 2010, in accordance with the agreed schedule, the Respondent submitted its Memorial on the Treaty Interpretation Issue, together with exhibits.

---

[5] Two of which (relating to the Agreement's application *ratione temporis* and to the effect of Slovakia's accession to the European Union) need no further consideration here; *see* below, paragraph 11.

14. On 29 April 2010, the Tribunal wrote to the Parties in further detail regarding the organization and conduct of the July 2010 Hearing.

15. On 22 June 2010, in accordance with the agreed schedule, the Claimant submitted its Counter-Memorial on the Treaty Interpretation Issue, together with witness statements, expert reports, and accompanying exhibits.

16. On 9 July 2010, the Tribunal held a pre-Hearing telephone conference with the Parties to confirm the names of the witnesses that would be called during the Hearing, the schedule for the oral pleadings, and relevant logistical arrangements.

17. On 19 July 2010, the Respondent wrote to the Tribunal, requesting leave to introduce three additional documents (numbered R-3, R-4, and R-5) into the record as exhibits in advance of the Hearing on the Treaty Interpretation Issue.

18. On the same day, the Claimant wrote to the Tribunal, requesting that it reject the Respondent's application and asserting that the Respondent had failed to establish either the relevance of the indicated documents or any exceptional circumstances that would warrant their admission.

19. From 20 to 21 July 2010, a Hearing on the Treaty Interpretation Issue was held at the Peace Palace, The Hague, the Netherlands. Present at the Hearing were the following:

The Tribunal:
Sir Franklin Berman KCMG QC
Judge Charles N. Brower
Judge Peter Tomka

For the Claimant:
Mr Pieter de Kok, HICEE B.V.
Mr Stanimir Alexandrov, Sidley Austin LLP
Mr Daniel Price, Sidley Austin LLP
Ms Jennifer Haworth McCandless, Sidley Austin LLP
Ms Miroslava Petrovičová, Škubla & Partneri s r.o.
Ms Daniela Švecová, Škubla & Partneri s.r.o.

For the Respondent:
Ministry of Finance of the Slovak Republic
Ministry of Finance of the Slovak Republic
Mr David Kavanagh, Skadden, Arps, Slate, Meagher & Flom LLP
Mr David Herlihy, Skadden, Arps, Slate, Meagher & Flom LLP
Ms Genevieve Poirier, Skadden, Arps, Slate, Meagher & Flom LLP
Mr Jose Torres, Skadden, Arps, Slate, Meagher & Flom LLP
Mr Martin Šubrt, Rowan Legal s.r.o.

For the Permanent Court of Arbitration:
Mr Dirk Pulkowski
Mr Garth Schofield
Mr Vladyslav Lanovoy

Court Reporting:
Mr Trevor McGowan

Other:
Mr Epaminontas Triantafilou, Arbitration Legal Assistant to Judge Brower

20. On 20 July 2010, with the Parties' agreement, the Tribunal determined that the Respondent could refer in its opening statement to the three additional documents that it had requested leave to introduce, without prejudice to the Tribunal's final ruling on their admissibility the following day.

21. On 21 July 2010, the Tribunal issued the following ruling regarding the three additional documents:

> [T]he Tribunal has noted what appears to be agreed between the Parties, that the three documents fall into two rather different classes: the documents numbered R-3 and R-4 into one class, and the document numbered R-5 into a different class, inasmuch as they are addressed, so it would seem, to rather different questions.
>
> Leaving that point aside for the moment, the Tribunal starts from the fact that both Parties have put directly in issue before it the intentions of the treaty parties in agreeing on the key provisions of the bilateral agreement, and the Tribunal is clear in its own mind that it would benefit from whatever assistance is available to it in confronting this question.
>
> All three documents are therefore admitted. But the admission of the documents is without prejudice to an assessment of their relevance or their materiality, notably the question of the relevance of document R-5 to the treaty issue, which I have just described. And the admission of the documents is of course entirely without prejudice to a determination which remains to be made by the Tribunal, and will be made in due course, of what weight to attach, if indeed any weight, to the documents in relation to the points at issue before the Tribunal.
>
> All of that said, the Tribunal has further decided that in the circumstances it would be neither fair nor reasonable for any of the documents to be used in cross-examination of the witnesses who are to be heard later in the day. Counsel may not therefore put the documents or any of them to a witness.
>
> Counsel will, however, be permitted to put to any witness by alternative means a line of questioning similar to that which might have been developed in direct reliance on the documents themselves.[6]

22. During the course of the Hearing, the following witnesses were called by the Claimant and questioned by the Parties:

Mr Rafael Nagapetiants
Mr Jozef Bakšay
Mr Jiří Brabec
Mr Pavel Novický

23. On 26 July 2010, the Tribunal issued Procedural Order No. 2, which required the Parties:

---

[6] Hearing Tr., 21 July 2010, at 1:17-2:25. For better readability and consistency, defined terms are capitalized throughout the present Award, including when they occur in quotations from the Hearing Transcripts.

> [t]o produce jointly to the Tribunal within one month of today's date:
>
> 1. any or all jointly agreed minutes of the negotiating sessions on the text of the Agreement
> 2. in the event that no such agreed minutes can be found, any official report by the Czechoslovakian or Netherlands delegations to the said negotiations
> 3. any reports by the competent Czechoslovakian or Netherlands Ministries seeking the formal approval of their Governments of the text of the Agreement and authorizing its signature
>
> which may throw light on the description of the negotiation of Article 1 of the Agreement contained in the letter from the Minister of Foreign Affairs of the Netherlands to the Chairm[e]n of the First and Second Chambers of the States-General dated 31 March 1992 (Document R-1).
>
> Should difficulties be encountered in securing access to the above documents, or in securing consent to their production, the Parties are to report back to the Tribunal for further directions.

24. On 26 and 27 August 2010, the Parties wrote to the Tribunal, jointly requesting an extension until 3 September 2010 of the time period to produce documents in response to the Tribunal's Procedural Order No. 2. On 27 August 2010, the Tribunal granted the Parties' request.

25. On 3 September 2010, the Parties jointly wrote to the Tribunal enclosing "all documents in Claimant's and Respondent's possession that either party obtained in connection with requests to the Slovak Republic, the Czech Republic, and the Kingdom of the Netherlands". The Parties noted that they were unable to agree on which, if any, of these documents were responsive to the Tribunal's request in Procedural Order No. 2, but were in agreement that further requests to the Governments concerned would be unlikely to yield additional *travaux* relevant to the Treaty Interpretation Issue. The Respondent further requested that, in the event that the Tribunal deemed any of the documents provided to be material to the Tribunal's decision, the Parties be given the opportunity to comment on the documents in question.

26. On 16 September 2010, the Respondent submitted, on behalf of both Parties, a letter to the Tribunal indicating that the Parties had discussed and agreed to a timetable should the case proceed beyond the Treaty Interpretation Issue.

27. On 28 October 2010, the Claimant wrote to the Tribunal to indicate that the merger between Apollo and Dôvera had been approved by the Slovak authorities. More specifically, Apollo had acquired Dôvera; Apollo was renamed "Dôvera"; and the former Dôvera was placed in liquidation under a new name. As a result of the corporate restructuring, the Claimant's damages had been mitigated to some extent, and the Claimant included a letter from its damages expert to explain the effect of the merger on the damages calculation.

28. On 16 November 2010, a telephone conference was held with the Parties to address the implications of the timing of the Tribunal's decision in relation to the Treaty Interpretation Issue for the schedule of the proceedings. During the telephone conference, it was agreed that the Tribunal would provide the Parties with an indication of alternative dates in 2011 for a possible hearing on the merits and any remaining jurisdictional objections, and that the Parties would consult with each other and inform the Tribunal of any agreement that may be reached regarding the schedule for the proceedings. The President also addressed the scope of the Parties' additional document production in accordance with Procedural Order 2, noting the absence of responsive documents originating from the Government of the Netherlands. Both Parties indicated that they believed the documents currently before the Tribunal represented the entirety of available records and that "no further productive effort" could be made to secure additional documents from Netherlands or the Slovak Republic.

29. On 2 December 2010, the PCA wrote to the Parties on behalf of the Tribunal to inquire whether, as an alternative to hearing dates from 27 June 2011 to 8 July 2011, the Parties would be available from 28 November 2011 to 9 December 2011. In response, on 22 December 2010, the Tribunal was informed that the Parties had discussed and agreed to two alternative schedules should the case proceed beyond the Treaty Interpretation Issue.

30. On 14 January 2011, the Tribunal informed the Parties that it was unlikely to be in a position to communicate its decision in time to permit recourse to the earlier of the two agreed schedules. The Tribunal accordingly adopted the Parties' alternative proposal, pursuant to which a hearing on the merits and any remaining questions of jurisdiction was to take place between 28 November and 9 December 2011.

III. STATEMENT OF FACTS

31. The factual background of the formation of the Agreement between the Netherlands and the Czech and Slovak Federal Republic, the acquisition by the Claimant of Dôvera Holding, and the creation of the Claimant's interest in Dôvera and Apollo are summarized as follows.

A. Relevant Provisions of the Agreement

32. Following negotiations which were held in 1989 and 1990, the Governments of the Netherlands and Czechoslovakia signed the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic of 29 April 1991, which entered into force on 1 October 1992.

33. As set out in the Preamble to the Agreement, the Parties wished to "extend and intensify the economic relations between them particularly with respect to investments by the investors of one Contracting Party in the territory of the other Contracting Party".

34. Article 1 of the Agreement provides:

> For the purposes of the present Agreement:
>
> (a) the term "investments" shall comprise every kind of asset invested either directly or through an investor of a third State and more particularly, though not exclusively:
>
> i. movable and immovable property and all related property rights;
>
> ii. shares, bonds and other kinds of interests in companies and joint ventures, as well as rights derived therefrom;
>
> iii. title to money and other assets and to any performance having an economic value;
>
> iv. rights in the field of intellectual property, also including technical processes, goodwill and know-how;
>
> v. concessions conferred by law or under contract, including concessions to prospect, explore, extract and win natural resources.
>
> (b) the term "investors" shall comprise:
>
> i. natural persons having the nationality of one of the Contracting Parties in accordance with its law;
>
> ii. legal persons constituted under the law of one of the Contracting Parties.
>
> (c) the term "territory" also includes the maritime areas adjacent to the coast of the State concerned, to the extent to which that State may exercise sovereign rights or jurisdiction in those areas according to international law.

35. Article 3(2) of the Agreement provides:

> 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 State, which is more favourable to the investor concerned.

36. Article 3(5) of the Agreement provides:

> If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.

37. The Parties have also addressed argument to the Tribunal as to the relevance of other documents related to the Agreement, notably the Explanatory Notes submitted by the Netherlands as part of its domestic ratification of the Agreement (hereinafter the "Dutch

Explanatory Notes")[7] and the Agreed Minutes of the Consultations on the interpretation and application of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech Republic conducted pursuant to Article 9 on 17 June 2002 (hereinafter the "Agreed Minutes").[8]

38. In relevant part, the Dutch Explanatory Notes state:

> **Explanatory notes by article**
>
> **Article 1** provides a description of various terms used in the Agreement. The Agreement covers direct investments and investments made through a company in a third country. Normally, investment protection agreements also cover investments in the host country made by a Dutch company's subsidiary which is already established in the host country ("subsidiary"-"sub-subsidiary" structure). Czechoslovakia wishes to exclude the "sub-subsidiary" from the scope of this Agreement, because this is in fact a company created by a Czechoslovakian legal entity, and Czechoslovakia does not want to grant, in particular, transfer rights to such company. This restriction can be dealt with by incorporating a new company directly from the Netherlands. As the restriction is therefore not of great practical importance, the Dutch delegation has consented to it. Czechoslovakia's request to use the term "investor" rather than "national" was granted by the Netherlands.

39. In relevant part, the Agreed Minutes state:

> Both delegations agree that the purpose of the Agreement is to protect investments of investors of one Contracting Party in the territory of the other Contracting Party. The Agreement creates rights and obligations for the Contracting Parties and gives rights to investors in respect of their investments. They agree that the [Investment Promotion and Protection Agreement] IPPA is applicable to investments of investors made after 1 January 1950 from the moment an investor of one Contracting Party acquires an investment in the territory of the other Contracting Party. The IPPA protects investments of investors who are either natural persons, having the nationality of one of the Contracting Parties in accordance with its law, or legal persons constituted under the law of one of the Contracting Parties. The investments covered by the IPPA are invested either directly or through an investor of a third State. Investors and investments not falling within these categories are not protected by the IPPA. Investments can be new investments (greenfield investments) or existing investments acquired by an investor.

B. Relevant Facts Regarding HICEE's Interests in Dôvera and Apollo

40. While the Parties differ as to whether certain share acquisitions by Dôvera Holding were effective or in conformity with Slovak law, the following facts relating to the creation of the

---

[7] Letter from the Minister of Foreign Affairs to the Chairmen of the First and Second Chambers of the States-General, 31 March 1992, and Explanatory Notes to the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, Prague, 29 April 1991 (Treaty Series 1991, 94), *submitted* to the Staten-Generaal as Parliamentary Paper 22 580 (R 1432), Nr. 1, vergaderjaar 1991-1992, Nr. 278 (**Exhibit R-1**), *referenced* in Tractatenblad van het Koninkrijk der Nederlanden, No. 146 (1992).

[8] Consultations on the interpretation and application of the Agreement on Encouragement and Reciprocal Protection of Investments between the Czech Republic and the Kingdom of the Netherlands, Agreed Minutes, 17 June 2002, *published in* Tractatenblad van het Koninkrijk der Nederlanden, No. 27 (2007) (**Exhibit R-2**).

Claimant's interest in the companies at issue in these proceedings are common ground between the Parties.

41. HICEE is wholly-owned by Penta Investments Limited (hereinafter "Penta"), which is based in Cyprus.[9] HICEE was established in the Netherlands on 23 June 2006 and incorporated on 9 August 2006.[10] On 15 August 2006, immediately after its formation, HICEE acquired an existing Slovak company (Západoslovenské piesky, a.s.) that it renamed Dôvera Holding on 1 September 2006.

42. At the time it incorporated HICEE, Penta directly owned 100 percent of Dôvera a.s., a Slovak company which owned 100 percent of Dôvera and had exercised options to purchase 49 percent of Apollo.[11] Penta also owned, through various subsidiaries, 94 percent of SIDERIA–ISTOTA združená zdravotná poisťovňa ("Sideria"), another Slovak health insurance company.[12]

43. On 13 November 2006, Dôvera Holding executed a share transfer agreement to acquire 100 percent of Dôvera from Dôvera a.s.[13] At the same time, Sideria and Dôvera entered into a merger agreement, which took effect on 1 January 2007. At that point, HICEE, through Dôvera Holding, owned approximately 66 percent of the successor company of the merger, which also took the name Dôvera. Penta, through various other subsidiaries, owned approximately 33 percent of the post-merger Dôvera.[14]

44. HICEE continued to acquire and consolidate Penta's holdings in the Slovak health insurance sector. By way of a purchase agreement entered into on 1 June 2007, the Apollo shares were transferred from Dôvera a.s. to Dôvera Holding – and thus to HICEE – on 19 June 2007.[15] At the same time, HICEE moved to acquire the shares in Dôvera that remained outside its control following the Dôvera-Sideria merger. As of 19 June 2007, HICEE, through Dôvera Holding, owned 99.26 percent of Dôvera and 49 percent of Apollo. HICEE subsequently acquired the

---

9 Witness Statement of Marián Krajňák, 15 February 2010, at para. 1 (**Exhibit CWS-3**).

10 Witness Statement of Pieter de Kok, 15 February 2010, at para. 14 (**Exhibit CWS-1**).

11 Claimant's Statement of Claim, para. 86.

12 Claimant's Statement of Claim, para. 86-87.

13 Claimant's Statement of Claim, para. 86; Respondent's Memorial on the Treaty Interpretation Issue, para. 6.

14 Claimant's Statement of Claim, para. 87; Respondent's Memorial on the Treaty Interpretation Issue, para. 6.

15 Claimant's Statement of Claim, para. 88; Respondent's Memorial on the Treaty Interpretation Issue, para. 6.

remaining shares in Dôvera, which had previously been tied up in bankruptcy proceedings, in October 2008.[16]

IV. THE PARTIES' REQUESTS

45. The Respondent requests the following:

> that the Tribunal render an award pursuant to Article 31 and 32 of the UNCITRAL Arbitration Rules declaring that it lacks jurisdiction over the Claimant's claims under the BIT, or alternatively that HICEE's claims as set out in the Notice of Arbitration and Statement of Claim are inadmissible, and awarding to the Respondent its legal fees, arbitration costs and other costs incurred in connection with this proceeding.[17]

46. The Claimant requests as follows:

> that the Tribunal reject Respondent's objection to the Tribunal's jurisdiction on the basis of the Treaty Interpretation Issue. Claimant also respectfully requests an award of its legal fees and other costs incurred in connection with this proceeding.[18]

V. SUMMARY OF THE PARTIES' ARGUMENTS

A. The Principles of Interpretation to be Applied by the Tribunal

47. At the time of signing of the Agreement, both the Netherlands and Czechoslovakia were parties to the 1969 Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention").[19] The Slovak Republic is also party to the Vienna Convention, having succeeded to it on 28 May 1993.[20] The Parties are additionally in agreement that the applicable rules of international law regarding the interpretation of international treaties are embodied in Articles 31 and 32 of the Vienna Convention.[21]

---

16 Claimant's Statement of Claim, para. 89; Respondent's Memorial on the Treaty Interpretation Issue, para. 6.

17 Respondent's Memorial on the Treaty Interpretation Issue, para. 61.

18 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 108.

19 Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980, 1155 *U.N.T.S.* 331. The Netherlands and Czechoslovakia acceded to the Vienna Convention on 9 April 1985 and 29 July 1987 respectively.

20 Respondent's Memorial on the Treaty Interpretation Issue, para. 8.

21 Respondent's Memorial on the Treaty Interpretation Issue, paras. 8-10; Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 12; Hearing Tr., 21 July 2010, at 33:2 ff.

B. The Parties' Views Regarding the Interpretation of Article 1(a) of the Agreement

1. The Ordinary Meaning of the Terms of Article 1(a) of the Agreement

(a) The Ordinary Meaning of the Terms "either directly or through an investor of a third State"

The Respondent's Position

48. The Respondent argues that the ordinary meaning of the terms "either directly or through an investor of a third State" limits the scope of the Agreement's protection to investments made "directly" by an investor covered by the Agreement. The Respondent interprets the meaning of "directly" based on the following dictionary definition: "[s]omething which is made without intervention of a medium or agent, immediately, by direct process or mode".[22] The Respondent further defines the term "direct" to mean that which is "[u]ninterrupted, immediate and proceeding in an unbroken line".[23] When used in reference to investments, the Respondent concludes, the ordinary meaning of "directly" is an investment made without intervening subsidiary owners. In support of this interpretation, the Respondent refers to the reasoning of other tribunals to have considered the phrase "directly or indirectly" in other Netherlands BITs and found it to refer to the absence of an intermediary entity.[24]

49. In the Respondent's view, the Agreement permits a single exception to this rule when investments are channelled through an intermediary entity in a third state.[25] Indirect investments, however – those made by the subsidiaries of a protected investor – are excluded by the Agreement's plain terms.

50. As a legal matter, the Respondent argues, the plain textual meaning of the parties' chosen wording forms the "primary element of interpretation" under Article 31 of the Vienna Convention and is most likely to reflect the parties' intentions.[26] The ordinary meaning of the Agreement, the Respondent submits, operates to exclude the assets of Dôvera and Apollo from protection under the Agreement: they are not assets that a Dutch investor has invested directly, but were rather channelled through Dôvera Holding, a Slovak company.[27]

---

22 Hearing Tr., 20 July 2010, at 29:10-12.

23 Hearing Tr., 20 July 2010, at 29:14-15.

24 Hearing Tr., 21 July 2010, at 176:4-10.

25 Hearing Tr., 20 July 2010, at 28:12-16.

26 Respondent's Memorial on the Treaty Interpretation Issue, para. 13.

27 Hearing Tr., 20 July 2010, at 29:20-24.

The Claimant's Position

51. According to the Claimant, nothing in the text of Article 1(a) states or otherwise indicates that a specific type of investment structure – such as investment through a subsidiary into so-called "sub-subsidiaries" – is excluded from the scope of the Agreement's protection.[28] The ordinary meaning of the phrase "either directly or through an investor of a third State" in Article 1(a) of the Agreement, the Claimant argues, is that a Dutch company's investments in the Slovak Republic are covered whether they are made by the Dutch company through companies in third states (what many treaties refer to as "indirectly"), or by the Dutch company into Slovak Republic without the involvement of third-state entities ("directly").[29] The Claimant's interest in Dôvera and Apollo is accordingly covered by the Agreement and is unaffected by the involvement of Dôvera Holding.

52. In establishing the ordinary meaning of the word "directly", the Claimant relies upon the Legal Opinion of Professor Christoph Schreuer, in which Professor Schreuer says, *inter alia*:

> Article 1(a) speaks of "every kind of asset invested either directly or through an investor of a third State". The use of the word "or" together with the preceding "either" signifies two mutually exclusive alternatives. The two alternatives are "directly" and "through an investor of a third State". Therefore, the meaning of "directly" in this context is "*not* through an investor of a third State".[30]

"Directly", the Claimant argues, means not through a third state. The word refers to the geographic routing of the investment and was not intended to impose a particular structure on the investment.[31]

53. In the Claimant's view, what the Respondent proposes as the ordinary meaning of the terms of the Agreement is, in fact, contrary to their ordinary meaning. The Respondent would have "directly" read to mean "without being held through an intermediary legal entity established in the host state".[32] This interpretation cannot, however, be read into Article 1(a) due to the use of "or" to indicate the alternative: the Respondent's ordinary meaning is, the Claimant submits, not an alternative to the phrase "through an investor of a third state".[33]

---

[28] Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 11. Legal Opinion of Christoph Schreuer on the Respondent's Memorial on the Treaty Interpretation Issue in *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11, 21 June 2010, paras. 7-9 (hereinafter "Schreuer Legal Opinion") (**Exhibit CER-3**).

[29] Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 11.

[30] Schreuer Legal Opinion, para. 9; *see also* paras. 13-15 (**Exhibit CER-3**).

[31] Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 14.

[32] Hearing Tr., 21 July 2010, at 11:11-13.

[33] Schreuer Legal Opinion, paras. 9-10.

(b) The Scope of Article 1(a) Interpreted in Good Faith

The Respondent's Position

54. The Respondent submits that – having established the ordinary meaning of the terms – the contours of Article 1(a) of the Agreement are to be determined through interpretation in good faith.[34] The Respondent concedes that, interpreted literally, the term "directly" could be understood to exclude from the scope of the Agreement's protection any asset, including land or other property, owned by an investor's Czechoslovak subsidiary.[35] In the Respondent's view, however, a good faith interpretation does not produce such a result – any more than it would represent good faith to permit the extension of protection under the Agreement to any number of sub-subsidiaries, no matter how far removed.[36] Rather, balancing "the ordinary meaning of the phrase 'directly' with the principle of good faith"[37] would lead the Tribunal to "find a middle ground"[38] and to draw the line "lower down in the chain".[39]

55. The purpose of good faith interpretation, the Respondent asserts, is to ensure that the legitimate expectations of the Contracting Parties – arising from the agreed treaty text – are honoured. The Respondent acknowledges that the principle of good faith "is also capable of a sufficiently broad meaning to include the principle of effective interpretation".[40] In the context of the specific treaty exclusion contained in Article 1(a), however, the Respondent submits that good faith and *effet utile* are served not by interpreting the Agreement as broadly as possible, but by abiding strictly by the Parties' agreement and the principle of *pacta sunt servanda*.[41]

56. In the Respondent's view, the "line beyond which the chain of assets can no longer be considered to be directly invested by a Dutch company" must be drawn when a sub-subsidiary structure is established, as this "introduces a separate legal owner into the investment chain which is distinct from the holding company which is owned directly by the Dutch investor".[42]

---

[34] Respondent's Memorial on the Treaty Interpretation Issue at paras. 40-46, *citing* Gardiner, Treaty Interpretation (2008), at 151 (**Exhibit RLA-34**); Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (2009), at 425 (**Exhibit RLA-35)**; *Amco Asia Corp. et. al. v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction of 25 September 1983, para. 14 (**Exhibit RLA-16**).

[35] Hearing Tr., 20 July 2010, at 49:14 to 50:3.

[36] Hearing Tr., 20 July 2010, at 50:4-9.

[37] Hearing Tr., 20 July 2010, at 66:18-20.

[38] Hearing Tr., 20 July 2010, at 50:10.

[39] Hearing Tr., 20 July 2010, at 67:8.

[40] Respondent's Memorial on the Treaty Interpretation Issue, para. 45.

[41] Respondent's Memorial on the Treaty Interpretation Issue, para. 45.

[42] Hearing Tr., 20 July 2010, at 50:10 to 51:5.

Good faith and the Parties' intention, the Respondent submits, cannot command the total exclusion of all assets not held directly in the name of HICEE.[43] At the same time, the ordinary meaning of "directly" "simply cannot be possibly reconciled"[44] with the protection of sub-subsidiaries (or their assets) beyond the initial Czechoslovak subsidiary.[45] The decision to draw the line at sub-subsidiaries, the Respondent argues, was "deliberate and carefully done".[46]

57. In the Respondent's view, the best evidence of the Parties' intention can be found in the Dutch Explanatory Notes,[47] which explain the deviation from the Dutch model BIT and other Czechoslovak BITs[48] and require the Tribunal to draw a distinction between HICEE's indirect interests in Dôvera and Apollo and other assets.[49] In other words, under Article 1(a), "a Slovak holding company formed by a Dutch company may own movable and immovable property, all related property rights, title to money and other assets . . . , but will not be protected to the extent of shares that it buys in a wholly owned subsidiary".[50]

The Claimant's Position

58. In the Claimant's view, not only do the "lines" drawn by the Respondent not represent a good faith rendering of the Parties' bargain, but they are "fashioned . . . for the sole purpose of trying to exclude Claimant's interests . . . from the Treaty's reach"[51] and produce a result that is "manifestly unreasonable".[52]

59. First, the Claimant asserts, the textual interpretation advocated by the Respondent would require a Dutch investor to hold all of its Slovak assets in its own name.[53] This is contrary to the typical manner in which international investments are structured and would significantly limit the scope of the Agreement.[54] Second, the Claimant observes, such an interpretation would be contrary to Czechoslovak law at the time, which among other things significantly

---

43 Hearing Tr., 20 July 2010, at 66:10-24.

44 Hearing Tr., 20 July 2010, at 50:7-9.

45 Hearing Tr., 20 July 2010, at 49:14-18.

46 Hearing Tr., 20 July 2010, at 49:18.

47 Hearing Tr., 20 July 2010, at 31:20 to 32:4.

48 Hearing Tr., 20 July 2010, at 39:2-5.

49 Hearing Tr., 20 July 2010, at 67:12-17.

50 Hearing Tr., 20 July 2010, at 80:13-21.

51 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 23.

52 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 20.

53 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 21.

54 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 22.

restricted the right of foreign nationals to purchase land[55] – the very structure required by the Respondent's interpretation of the Agreement. Under the applicable legislation, "it was effectively impossible for a Dutch company to own 'directly' (in Respondent's understanding of the term) assets such as immovable property".[56] Good faith interpretation, in the Claimant's view, does not include interpreting treaty provisions in such a way that it would deprive them of legal effect.[57]

60. The implications of the Respondent's proposed interpretation can be reconciled, the Claimant submits, only by inventing a "distinction between 'shares, bonds, and other kinds of interests in companies' on the one hand, and all of the other assets that also qualify as investments under Article 1(a), on the other hand".[58] There is, in the Claimant's view, simply no textual support for such a distinction.[59] Finally, even if the distinction advocated by the Respondent were accepted, it would simply create a further contradiction. Whatever limit may be read into the term "directly", the Claimant argues, there is no "wording in which Respondent could find a similar limitation" to the protection of sub-subsidiaries in the second prong of Article 1(a) under which an investment is made "through an investor of a third State".[60] The result, the Claimant submits, is the unreasonable situation – divorced from "any legal, policy, economic or practical perspective" – in which Slovak sub-subsidiaries would suddenly (and only) be entitled to protection under the Agreement where an entity from a third State were to interrupt the ownership chain.[61]

2. The Terms "either directly or through an investor of a third State" in Their Context and in Light of the Agreement's Object and Purpose

61. In support of their respective interpretations of the ordinary meaning of the phrase "either directly or through an investor of a third State", the Parties turn to the context of the Agreement's terms and to its object and purpose.

(a) The Meaning and Relevance of the Dutch Explanatory Notes

62. According to the Respondent, the "limited scope of the BIT is unequivocally confirmed" by the "Explanatory Notes to the BIT submitted by the Netherlands as part of its domestic

---

55 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 30.

56 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 30.

57 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 30.

58 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 26.

59 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 26.

60 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 32.

61 Claimant's Counter-Memorial on the Treaty Interpretation Issue, paras. 32-33.

ratification of the Treaty [which] leave no room for doubt that the plain language of Article 1(a) was intended to mean what it says".[62]

63. The Respondent relies upon the following portion of the Dutch Explanatory Notes:

> Article 1 provides a description of various terms used in the Agreement. The Agreement covers direct investments and investments made through a company in a third country. Normally, investment protection agreements also cover investments in the host country made by a Dutch company's subsidiary which is already established in the host country ("subsidiary"-"sub-subsidiary" structure). Czechoslovakia wishes to exclude the "sub-subsidiary" from the scope of this Agreement, because this is in fact a company created by a Czechoslovakian legal entity, and Czechoslovakia does not want to grant, in particular, transfer rights to such company. […][63]

(i) Admissibility under the Vienna Convention

The Respondent's Position

64. The Respondent submits that the Dutch Explanatory Notes constitute "an instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" under Article 31(2)(b) of the Vienna Convention.[64]

65. In the alternative, the Respondent submits that the Explanatory Notes are admissible under Article 32 of the Vienna Convention in order to confirm the Agreement's meaning.[65] Should the Tribunal find the Respondent's interpretation of "directly" to be "too literal" in nature, it would bring the Tribunal "automatically into the territory of ambiguity or obscurity, which would entitle the Tribunal to open the door to the Dutch Explanatory Note . . . pursuant to Article 32 of the [Vienna] Convention".[66]

The Claimant's Position

66. In the Claimant's view, the Tribunal may only have recourse to supplemental documents such as the Dutch Explanatory Notes if they (1) represent the agreement of the Parties, or (2) confirm or determine the meaning of the treaty text if the text is "ambiguous or leads to an

---

62 Respondent's Memorial on the Treaty Interpretation Issue, para. 14.

63 Respondent's Memorial on the Treaty Interpretation Issue, para. 14.

64 Respondent's Memorial on the Treaty Interpretation Issue, at para. 14, fn. 7, *citing* Gardiner, Treaty Interpretation (2008), at 215 (**Exhibit RLA-34**).

65 Hearing Tr., 20 July 2010, at 86:1 to 88:16. As authority for the use of similar notes, the Respondent relies on *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB (AF)/05/1 (NAFTA), Award of 19 June 2007, para. 106 (interpreting the NAFTA in light of the report on the treaty prepared prior to its approval by the Mexican Senate) (**Exhibit RLA-26**).

66 Hearing Tr., 20 July 2010, at 91:15-21.

absurd or unreasonable result".[67] The Dutch Explanatory Notes, the Claimant argues, fulfil neither role, and recourse to them is therefore inappropriate.

67. First, the Claimant observes, the Notes do not constitute an agreement between the Parties, and the Respondent has never argued that they do. Nor, the Claimant further notes, are the Notes an instrument accepted by the Slovak Government – the Respondent has never established that the Czechoslovak Government knew of the Notes' existence or ever accepted their accuracy. To the contrary, the Claimant points to witness testimony from former Czechoslovak Government officials to the effect that they had no knowledge of the Notes.[68]

68. Second, the Claimant asserts that no grounds exist for the Tribunal to have recourse to supplementary means of interpretation under Article 32 of the Vienna Convention. Rather than using the Notes to confirm the ordinary meaning of the text of the Agreement, the Claimant argues, "Respondent is trying to use the Notes . . . to supply a definition that is entirely different from the unambiguous ordinary meaning of the term".[69] In the Claimant's view, "the only thing that renders this treaty text unclear, or that leads to an absurd result, is the interpretation Respondent gives it".[70] The Respondent's argument, in the Claimant's eyes, amounts to advancing an absurd interpretation and then inappropriately seeking recourse to Article 32 to avoid the absurdity.[71]

(ii) The Substantive Scope of the Dutch Explanatory Notes

The Respondent's Position

69. According to the Respondent, the Dutch Explanatory Notes record clearly "that Article 1(a) was drafted specifically to exclude from the BIT situations in which the Czechoslovakian subsidiary of a Dutch company invests in another Czechoslovakian company".[72]

70. In the Respondent's view, the Notes serve to confirm the ordinary meaning of the term "directly" in the treaty text and are ultimately in keeping with good faith and the object and purposes of a bilateral investment treaty.[73] The Notes, the Respondent emphasizes, do not

---

67 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 40.

68 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 42; *see also* Witness Statement of Jozef Bakšay, para. 8 (**Exhibit CWS-8**), Witness Statement of Pavel Novický, para. 7 (**Exhibit CWS-11**).

69 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 44.

70 Hearing Tr., 21 July 2010, at 33:17-20.

71 Hearing Tr., 21 July 2010, at 34:1-10.

72 Respondent's Memorial on the Treaty Interpretation Issue, para. 14.

73 Hearing Tr., 21 July 2010, at 183:3-9.

alter or restrict the textual interpretation: indeed, they "actually marginally expand[] it"[74] insofar as they make clear that the Parties' concern was only with sub-subsidiary investment structures (due to questions regarding the appropriate scope of transfer rights), rather than with other types of assets held by a Dutch investor's first-level Slovak subsidiary.[75]

71. Finally, the Respondent rejects the Claimant's argument that the Dutch Explanatory Notes in fact describe the definition of "investor" under Article 1(b) of the Agreement, rather than anything relating to the definition of "investment" in Article 1(a).[76] In the Respondent's view, the limited definition of investor so as to exclude a non-Dutch claimant and the exclusion of indirectly-held investments – to address a concern regarding sub-subsidiaries – are complementary and form "a single effort by the Parties to limit the scope of the Treaty".[77] Simply limiting the definition of investor in Article 1(b), the Respondent argues, would not have accomplished the Parties' objective: "a substantive limitation on investment and on the money flowing out of the country" requires a "focus on the definition of 'investment' itself".[78]

The Claimant's Position

72. In the event that the Dutch Explanatory Notes are deemed admissible under the Vienna Convention, the Claimant argues that the Notes do nothing to circumscribe the definition of "investment". Rather, the Claimant is of the view that, properly understood, the Notes (which do not differentiate between the subsections of the Article) address the term "investor" under Article 1(b) of the Agreement.

73. According to the Claimant, Czechoslovakia's main concern in preparing this portion of the Agreement was to "control the outflow of capital in hard currency from the country".[79] As the Dutch Explanatory Notes make clear, the Claimant submits, this included the concern that Czechoslovak-incorporated subsidiaries would be entitled to transfer rights under the Agreement in respect of their own subsidiary entities (sub-subsidiaries from the point of view of the Agreement).[80] Addressing this concern, however, would be effected by removing

---

74 Hearing Tr., 21 July 2010, at 178:7-8.

75 Hearing Tr., 21 July 2010, at 177:1-11.

76 Hearing Tr., 20 July 2010, at 40:9 to 45:23.

77 Hearing Tr., 20 July 2010, at 45:20-23.

78 Hearing Tr., 21 July 2010, at 180:3-6.

79 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 50. The Claimant points in particular to the testimony of Mr. Bakšay and Mr. Novický in support of this objective. *See* Witness Statement of Jozef Bakšay, para. 7 (**Exhibit CWS-8**); Witness Statement of Pavel Novický, para. 6 (**Exhibit CWS-11**).

80 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 57.

subsidiaries from the set of "investors" entitled to claim transfer rights under the Agreement. As the Claimant points out, the scope of the definition of "investors" in the Dutch Model BITs at the time was broader than that ultimately included in the Agreement, in that subsidiaries established in the host country themselves qualified as investors.[81] The fact that the Notes also detail the Czechoslovak concern that the term "investor" be used in place of "national" further indicates, in the Claimant's view, that "Article 1 of the Notes focuses on who is an 'investor,' rather than what is considered an 'investment'".[82]

(b) The Meaning and Relevance of the Agreed Minutes

The Respondent's Position

74. The Respondent submits that its proposed interpretation of the Agreement's text is corroborated by the Agreed Minutes. These Minutes were the result of official consultations between the Czech Republic and the Netherlands, conducted in 2002 under Article 9 of the Agreement in response to the interpretation of the Agreement in the Partial Award[83] of the arbitral tribunal constituted in the *CME v. Czech Republic* arbitration.[84] In the Respondent's view, the Agreed Minutes of these consultations should be considered a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" under Article 31(3)(a) of the Vienna Convention.[85]

75. In the Respondent's view, the relevant portion of the Agreed Minutes consists of the confirmation of the Czech Republic and the Netherlands understanding of Article 1(a) as follows:

> The investments covered by the [Agreement] are invested either directly or through an investor of a third State. Investors and investments not falling within these categories are not protected by the [Agreement].

In the Respondent's view, the Agreed Minutes clearly "presuppose that some form of investments are not protected under the treaty".[86] Yet the interpretation advocated by the Claimant, the Respondent argues, is essentially unlimited and acknowledges no such class of uncovered investments, to which the Agreed Minutes might refer.

---

81 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 57.

82 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 59.

83 *CME v. Czech Republic*, UNCITRAL, Partial Award of 13 September 2001 (**Exhibit CLA-14**).

84 Respondent's Memorial on the Treaty Interpretation Issue, para. 15. *See also CME v. Czech Republic*, UNCITRAL, Final Award of 14 March 2003, paras. 437, 504 (**Exhibit RLA-20**).

85 Respondent's Memorial on the Treaty Interpretation Issue, para. 15.

86 Hearing Tr., 21 July 2010, at 177:11-23.

The Claimant's Position

76. As an initial matter, the Claimant points out that the Agreed Minutes were "made between the Netherlands and the Czech Republic, not the Netherlands and the Slovak Republic".[87] As the Minutes unequivocally pertain to a non-party (the Czech Republic), they cannot represent a "subsequent agreement between the parties" within the meaning of the Vienna Convention.[88]

77. Even if the Agreed Minutes were relevant and admissible, however, the Claimant asserts that they shed no light on the meaning of Article 1(a). The Minutes simply restate the language of the Agreement and do not, the Claimant emphasizes, state that "sub-subsidiaries" are excluded from the scope of the Agreement.[89] Finally, the Claimant observes that the Agreed Minutes in fact tend toward the opposite conclusion, insofar as the *CME* arbitration that prompted consultations between the States parties to the Agreement extended the Agreement's protection to sub-subsidiaries. Neither during the arbitration itself, nor during the consultations specifically called to address the Czech Government's dissatisfaction with the *CME* tribunal's partial award, did the Czech Government ever challenge the inclusion of sub-subsidiaries within the Agreement's class of protected investments.[90]

(c) The Agreement's Object and Purpose

The Respondent's Position

78. The Respondent submits that a limited definition of "investment" – in the Respondent's view, the ordinary meaning of Article 1(a) – is consistent with the Agreement's object and purpose. In the Respondent's view, the Preamble to the Agreement[91] evidences a nuanced understanding of the underlying goals, and commands a balanced application of the Agreement's protection, so as to avoid dissuading the host State – by means of exaggerated protection – from admitting investors in the first place. In this respect, the Respondent relies in particular on the prior interpretation of the object and purpose of the Agreement by the tribunal constituted in the *Saluka* arbitration under this very Agreement.[92] The Respondent also points to the inclusion of careful jurisdictional language (the formula "investments of investors") in the Preamble as evidence that jurisdictional limits were central to the

---

87 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 77.

88 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 77.

89 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 78.

90 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 79.

91 Respondent's Memorial on the Treaty Interpretation Issue, para. 24.

92 Respondent's Memorial on the Treaty Interpretation Issue, paras. 25-26; *Saluka v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, para. 300 (**Exhibit RLA-22**).

Agreement's object and purpose and a focus on the "flow of capital and technology".[93] Finally, the Respondent argues, pointing to the Tribunal's reasoning in the *Berschader v. Russia* arbitration, that even the objective of promoting investment is logically distinct from the question of whether indirect investments will be covered under a treaty.[94]

79. In light of the nuanced object and purpose of the Agreement, the Respondent contends that it would be entirely consistent for Article 1(a) to exclude HICEE's claimed "investment", given its domestic nature. First, the Respondent points out that the acquisition of Dôvera and Apollo was made by Dôvera Holding, not the Claimant.[95] Second, the Respondent argues that there is no evidence of any net "flow" of capital or technology from the Netherlands to Slovakia, as the Preamble envisaged and the Agreement sought to encourage, nor of any contribution of funds from HICEE to Dôvera and Apollo. While the Respondent makes it clear that it does not take the view that an inflow of foreign capital is an inherent requirement for an investment to exist,[96] the Respondent does submit that a treaty structure excluding the investments of domestic subsidiaries would be consistent with the Agreement's focus on stimulating the flow for foreign capital.[97]

The Claimant's Position

80. The Claimant asserts that the Respondent's interpretation is unreasonable in light of the object and purpose of the Agreement, which in the Claimant's view is for the Agreement to be "broad and inclusive" in scope.[98] In support of this position, the Claimant points to the text of the Agreement's Preamble and to the testimony of former Czechoslovak Government officials who (the Claimant contends) negotiated or oversaw the negotiation of Czechoslovak BITs at the time and who were unaware of any policy of limiting, in the manner claimed by the Respondent, the protections accorded to foreign investors.[99]

81. Given the manner in which foreign investors typically structure their investments – i.e., through holding companies – the Claimant asserts that a treaty interpretation that excluded

---

93 Respondent's Memorial on the Treaty Interpretation Issue, para. 27.

94 Respondent's Memorial on the Treaty Interpretation Issue, para. 28; *see also Berschader v. Russia,* SCC Case No. 080/2004, Award of 21 April 2006 (**Exhibit RLA-23**).

95 Respondent's Memorial on the Treaty Interpretation Issue, para. 35.

96 Hearing Tr., 20 July 2010, at 54:12-16

97 Respondent's Memorial on the Treaty Interpretation Issue, para. 39.

98 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 16.

99 Hearing Tr., 21 July 2010, at 12:24 to 13:8; *see also* Witness Statement of Jozef Bakšay, 15 June 2010, para. 7 (**Exhibit CWS-8**); Witness Statement of Jiří Brabec, 15 June 2010, para. 7 (**Exhibit CWS-9**); Witness Statement of Pavel Novický, 15 June 2010, para. 5 (**Exhibit CWS-11**).

this common form would be inconsistent with the Agreement's object of promoting investment.[100] Similarly, the Claimant argues, there can be no justification in the Agreement's object and purpose for a situation in which the sub-subsidiaries of investments made through a third State are entitled to protection while those made directly are not. Yet this is precisely the result, in the Claimant's view, that the Respondent's interpretation would produce, and no textual measure exists to reconcile this perceived absurdity.[101]

82. Finally, the Claimant argues that the allegedly domestic nature of its investments in Dôvera and Apollo is irrelevant, insofar as the origin of capital (rather than foreign control) is not a requirement for an investment to exist under the Agreement.[102] Equally, the Claimant distinguishes the reasoning of the *Berschader* tribunal, insofar as that arbitration involved the question of indirect investments made through an intermediary in the Claimant's home State, rather than multiple layers of investment within the host State.[103]

(d) Contemporaneous and Subsequent Treaty Practice

The Respondent's Position

83. The Respondent submits that the Parties deliberately elected to exclude from the treaty text any language that would have had the effect of extending the Agreement's protection over indirect investments held by a Slovak subsidiary. Had the Parties wished to do so, they clearly understood how to draft language providing for the protection of indirect shareholding, Czechoslovakia having expressly done so in previously negotiated BITs.[104] The Netherlands equally had experience in drafting treaties to include or exclude indirect investments. In the Respondent's view, "the only logical inference to be drawn from the context of Article 1(a) is that its wording . . . was carefully and deliberately chosen" in order to exclude the very investment structure at issue here.[105]

84. The Respondent further discounts the relevance of a Czechoslovak transmittal document that describes contemporaneously-negotiated BITs with Denmark, Greece, and Norway – which unequivocally cover indirect investments – as "not materially differ[ing]" from the instant treaty. First, the Respondent observes that the document is brief and its discussion of four

---

100 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 22.

101 Claimant's Counter-Memorial on the Treaty Interpretation Issue, paras. 32-33.

102 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 106-107; Schreuer Legal Opinion, paras. 51-55 (**Exhibit CER-3**).

103 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 35; Schreuer Legal Opinion, para. 21 (**Exhibit CER-3**).

104 Respondent's Memorial on the Treaty Interpretation Issue, para. 20.

105 Respondent's Memorial on the Treaty Interpretation Issue, para. 23.

separately-negotiated treaties is very generic in nature. The Respondent further points to significant differences among the treaties, including the substantive protections offered and the applicable dispute resolution mechanisms, which the transmittal document overlooks. These observations, in the Respondent's view, "underscore how little weight one can really attach to [the] document".[106] In a like manner, the transmittal document's reference to the draft OECD Convention merely demonstrates the Parties' familiarity with different approaches to investment treaties and the informed nature of the decision of the final wording of the Agreement.[107]

85. Finally, the Respondent addresses the Claimant's argument that the Netherlands-USSR BIT contains the identical terms "directly or through an investor of a third State" while the Netherlands explanatory notes for that treaty indicate that it was intended to cover investors already "established" in the Soviet Union. First, the Respondent asserts that the Netherlands-USSR notes do not purport to qualify the meaning of the term "directly" and cannot alter its ordinary meaning.[108] Second, the Respondent observes, the Netherlands-USSR notes provide no indication of the negotiations relating to the Czechoslovak BIT.[109] In any event, the Respondent submits, the instant jurisdictional objection could be made under the Netherlands-USSR BIT with equal effect.[110]

The Claimant's Position

86. The Claimant points to three issues of contemporary Dutch and Czechoslovak treaty practice that, in the Claimant's view, undercut the Respondent's interpretation of Article 1(a) of the Agreement.

87. First, the Claimant argues that, if limiting the grant of transfer rights to Czechoslovak-incorporated sub-subsidiaries represented a deliberate policy, similar language should be found in other Czechoslovak BITs negotiated around the same time. In fact, the Claimant observes, no other Czechoslovak BIT contains the same language and the only similar treaties (the Czechoslovak treaties with France and Canada) include differences that unequivocally indicate a broad definition of investment.[111]

---

[106] Hearing Tr., 20 July 2010, at 60:1-21.

[107] Hearing Tr., 20 July 2010, at 61:24 to 62:2.

[108] Hearing Tr., 21 July 2010, at 181:23 to 182:1.

[109] Hearing Tr., 21 July 2010, at 182:2-7.

[110] Hearing Tr., 21 July 2010, at 182:21 to 183:2.

[111] Claimant's Counter-Memorial on the Treaty Interpretation Issue, paras. 67-69.

88. Second, the Claimant highlights three other Czechoslovak BITs – concluded with Greece, Norway and Denmark – which do not employ the term "directly" in defining "investment" and cannot, in the Claimant's view, be interpreted as excluding investments structured on a sub-subsidiary basis.[112] These treaties were submitted to the Czechoslovak Parliament for ratification along with the instant Agreement and were accompanied by an Explanatory Report covering all four treaties, which provides that "[t]he investment promotion and protection treaties being submitted do not materially differ".[113] Were the Agreement in fact intended to bear the interpretation the Respondent now submits, the Claimant is of the view that such a difference in the scope of protected investments would have been noted. As a further point, the transmittal documents indicate that "the submitted Agreements" are "based on the OECD model agreement".[114] This reference, in the Claimant's view, indicates the Czechoslovak Government's view that the Agreement did not differ materially from the OECD Draft Convention, which, the Claimant argues, provides for a broad definition of investment.[115]

89. Third, the Claimant highlights the Netherlands-USSR BIT and the explanatory notes accompanying its submission to the Netherlands parliament. The Claimant observes that that treaty contains the same wording – "directly or through an investor of a third State" – as the instant Agreement. Despite this similarity, the Netherlands-USSR explanatory notes provide that

> [t]he definition of 'investments' (b) does not only include investments made from the Netherlands in the Soviet Union and investments of a Dutch investor already established in the Soviet Union, but also investments by a Dutch subsidiary established in [a] third country.[116]

---

112 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 64.

113 Government Bill Submitting the Investment Promotion and Protection Treaty between the CSFR and the Kingdom of Denmark, done at Prague on 6 March 1991; the Investment Promotion and Protection Treaty between the CSFR and the Kingdom of the Netherlands, done at Prague on 29 April 1991; the Investment Promotion and Protection Treaty between the CSFR and the Kingdom of Norway, done at Oslo on 21 May 1991; and the Investment Promotion and Protection Treaty between the Government of the CSFR and Government of the Hellenic Republic, done at Prague on 3 June 1991, to the Federal Assembly of the CSFR for Approval, Explanatory Report for the Federal Assembly ("Explanatory Report for the Federal Assembly"), § II (**Exhibit C-178**).

114 Excerpts of Letter to the Government of the Czech and Slovak Republics from the Minister of Finance, the Minister of Foreign Trade, and the Deputy Prime Minister/Minister of Foreign Affairs, Reasoned Statement, 22 July 1991, § I (**Exhibit C-179**).

115 Claimant's Counter-Memorial on the Treaty Interpretation Issue, paras. 65-66; *see also* OECD Draft Convention on the Protection of Foreign Property, 12 October 1967, 7 I.L.M. at 137 and 139 (1968) (**Exhibit C-170**).

116 Netherlands-USSR Explanatory Notes, Art. 1 (**Exhibit C-175**).

In the Claimant's view, the Netherlands-USSR explanatory notes provide clear evidence of how the Netherlands understood and interpreted the specific terms at issue here.[117] The Claimant further points to witness testimony indicating no intention on the part of the Soviet Union to exclude investments made through a holding company structure.[118]

C. Application of the More Favourable Treatment by Virtue of Article 3(2) and 3(5) of the Agreement

The Respondent's Position

90. The Respondent rejects the possibility that the most-favoured nation (hereinafter "MFN") provisions of Article 3 of the Agreement may serve to extend the operable definition of "investment" to accord with certain – allegedly broader – definitions in other Czechoslovak BITs. First, pointing to the basic logic of MFN clauses and to the decisions of the tribunals in the *Société Générale v. Dominican Republic* and *Tecmed v. Mexico* arbitrations, the Respondent asserts that, unless specifically provided for, an MFN clause will alter the substantive protections of a treaty, but not the gateway issue of the definitions of "investor" or "investment".[119] Second, the Respondent argues that the MFN provisions of the Agreement are limited by their own terms. Article 3(2) is explicitly linked – and limited – to the substantive promise of full protection and security.[120] Article 3(5) applies only to the domestic legal provisions of the contracting Parties or to subsequent agreements between them, not to separate treaties concluded with third States.[121] Finally, the Respondent observes that, were the definition of "investment" extendable by operation of the Agreement's MFN provisions, it would have been immediately pathological: other Czechoslovak BITs with, in the Respondent's view, a broader definition of "investment" predated the instant Agreement.[122]

The Claimant's Position

91. Should the Tribunal interpret the definition of investment in Article 1(a) of the Agreement in such a manner as to exclude claims based on injury to the Claimant's interests in Dôvera and

---

[117] Claimant's Counter-Memorial on the Treaty Interpretation Issue, paras. 72-73.

[118] Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 71; Witness Statement of Rafael Nagapetiants, 4 June 2010, paras. 6, 9 (**Exhibit CWS-10**).

[119] Hearing Tr., 20 July 2010, at 99:13 to 102:19.

[120] Hearing Tr., 20 July 2010, at 102:20 to 103:2.

[121] Hearing Tr., 20 July 2010, at 104:23 to 105:10.

[122] Hearing Tr., 20 July 2010, at 98:22 to 99:10.

Apollo, the Claimant argues that it is entitled to invoke the broader definitions of investment in other Slovak BITs through the operation of the MFN provisions of Articles 3(2) and 3(5).[123]

92. Article 3(2) of the Agreement, the Claimant observes, provides "protection" to investments "not less than that accorded either to investments of its own investors or investments of any third State, whichever is more favourable". The Claimant contests that the MFN provisions of Article 3(2) of the Agreement may be limited to the substantive provision of full protection and security. In the Claimant's view, "far from being actually unusual, the language in the Czechoslovakia-Netherlands treaty merely reflects the way in which the Netherlands placed the MFN provision in its treaties. It does not indicate a limitation on the scope of the MFN provision".[124]

93. The Claimant further submits that it may draw upon MFN treatment by virtue of Article 3(5) of the Agreement, which provides as follows:

> [i]f the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the Present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present agreement, such rules shall to the extent that they are more favourable prevail over the present agreement.

The Claimant disputes that Article 3(5) is textually limited to further agreements between the same Parties, arguing that the terms "between the Contracting Parties" apply only to the words "established hereafter".[125] Other BITs with more favourable definitions of "investment", the Claimant submits, were already in force with third States at the time the Agreement was concluded.[126] In support of this interpretation, the Claimant points to the *CME* arbitration, in which a tribunal constituted under the same Agreement employed Article 3(5) to import the definition of "damages" from the United States–Czechoslovakia BIT.[127]

D. Claims by HICEE as a Shareholder in Dôvera Holding

The Respondent's Position

94. The Respondent accepted that Article 1(a) of the Agreement covers direct shareholdings and therefore the Claimant's interest in Dôvera Holding. The Respondent disputes however, that

---

123 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 94.

124 Hearing Tr., 21 July 2010, at 67:8-12.

125 Hearing Tr., 21 July 2010, at 69:5-12.

126 Hearing Tr., 21 July 2010, at 69:20 to 70:13.

127 Hearing Tr., 21 July 2010, at 68:6-14; *CME v. Czech Republic,* UNCITRAL, Final Award of 14 March 2003, para. 500 (**Exhibit CLA-13**).

this shareholding gives "an admissible right to recover damages for losses suffered by Dôvera and Apollo (for example by seeking to re-plead its damages claim as a loss in the capital value of Dôvera Holding)".[128]

95. The Respondent reconciles this position by distinguishing between the Claimant's capacity to bring a claim by virtue of its interest in Dôvera Holding and the actual scope of the protection offered by the Agreement (and thus the admissibility of the Claimant's claims).[129] In light of what are, in the Respondent's view, the express exclusions of Article 1(a) and the balanced object and purpose of the Agreement, "claims in respect of measures or legislation directed at Dôvera and Apollo are inadmissible".[130] Once Dôvera and Apollo are excluded from the Agreement's protection as investments, the "income streams" from those entities to Dôvera Holding are also excluded and "no treaty right to transfer profit or dividends to their Slovak parent company" could be said to exist.[131] Any contrary interpretation would render this "specifically-negotiated exclusion" effectively meaningless and frustrate the intention of the Contracting Parties.[132] An interpretation that would produce such a result would, in the Respondent's view, be contrary to the principle of effectiveness and to the Parties' intention in negotiating the Agreement insofar as it would render the limitations in Article 1(a) meaningless.[133] As further evidence of the Parties' intention, the Respondent observes that the Dutch Explanatory Notes state that an investor could overcome the restriction "by incorporating a new company directly from the Netherlands" – a step that would be wholly unnecessary if the same claims could simply be recast in terms of harm to the value of the holding company.[134]

96. "By forming a series of limited liability companies to hold varying levels of interest in Dôvera and Apollo", the Respondent argues, citing the decisions of the International Court of Justice (hereinafter the "ICJ") in *Barcelona Traction, Light and Power Co. Ltd.*, and of Chambers of the ICJ in the *Elettronica Sicula S.p.A.* and *Ahmadou Diallo* cases, "HICEE must accept the corresponding limitations to the extent of its protected property interests".[135] Although the Respondent concedes that direct injury to Dôvera Holding would present a claim under the

---

128 Respondent's Memorial on the Treaty Interpretation Issue, para. 47.

129 Respondent's Memorial on the Treaty Interpretation Issue, para. 49.

130 Respondent's Memorial on the Treaty Interpretation Issue, para. 50.

131 Hearing Tr., 20 July 2010, at 72:20-25.

132 Respondent's Memorial on the Treaty Interpretation Issue, paras. 52-53.

133 Respondent's Memorial on the Treaty Interpretation Issue, para. 53.

134 Respondent's Memorial on the Treaty Interpretation Issue, para. 54.

135 Respondent's Memorial on the Treaty Interpretation Issue, para. 57.

Agreement, the Claimant has not articulated such a claim. The Respondent notes that the Claimant appears to equate the value of Dôvera Holding entirely with its interest in Dôvera and Apollo.[136] Further, in the Respondent's view, the subject matter of this arbitration involves legislation that, by definition, can apply only to a specific class of public health insurance companies and could not provide a basis for a claim directly against Dôvera Holding.[137]

The Claimant's Position

97. The Claimant asserts (and the Respondent does not contest) that its interest in Dôvera Holding is direct, and covered by the Agreement. As a matter of international law, the Claimant submits, "[t]here is no question . . . that a shareholder has standing to bring a case based on adverse government measures that have affected the value of the company in which the shareholder owns shares".[138] Actions that "adversely impact the ability of Dôvera Holding to receive . . . profits", the Claimant argues, "have a direct impact on the rights of Dôvera Holding itself".[139]

98. In support of this position, the Claimant cites numerous arbitrations under investment treaties, in which arbitral tribunals have upheld standing for shareholders.[140] In addition, the Claimant points to the *CME* arbitration, wherein the tribunal found the present Agreement applicable to assets held indirectly by CME's subsidiaries.[141] In the Claimant's view, the Respondent's argument amounts to nothing more than good faith, in light of which the Respondent would have the Dutch Explanatory Notes "debar[] an interpretation that permits Dôvera Holding to recover for injuries to [its] sub-subsidiaries".[142] Nevertheless, the Claimant argues, "[t]he text of the Treaty governs, not the counter-textual argument that Respondent constructs out of the Dutch note".[143]

99. In respect of the ICJ precedents invoked by the Respondent, the Claimant distinguishes *Barcelona Traction* and *Diallo* on the grounds that both concerned the availability of

---

136 Respondent's Memorial on the Treaty Interpretation Issue, paras. 56-57.

137 Respondent's Memorial on the Treaty Interpretation Issue, para. 56.

138 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 84.

139 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 81.

140 In particular, the Claimant refers to the awards in *Berschader v. Russia,* SCC Case No. 080/2004, Award of 21 April 2006, paras. 127-128 (**Exhibit CLA-79**) and *Compañía de Aguas del Aconquija and Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005, paras. 40-41 (**Exhibit CLA-90**).

141 Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 88.

142 Hearing Tr., 21 July 2010, at 74:17-21.

143 Hearing Tr., 21 July 2010, at 75:16-18.

diplomatic protection, rather than shareholder rights under a specific agreement. With respect to the *Elettronica Sicula* case, in the context of such an agreement, the Claimant notes that the ICJ [Chamber] found that it had jurisdiction to hear the claims based on shareholding.[144]

VI. THE TRIBUNAL'S ANALYSIS

100. The Tribunal begins by recalling that the complaint brought by the Claimant is directed at measures taken by the Respondent (or for which the Respondent is said to be answerable) against the private companies which, since 1994, had begun to operate within the health insurance sector in Slovakia. Specifically, the Claimant complains about the enactment of Act No. 530/2007 Coll. of 25 October 2007, Amending and Supplementing Act No. 581/2004 Coll. on Health Insurance Companies and Healthcare Supervision, and Amending and Supplementing Certain Acts as Amended,[145] by which health insurance companies were prohibited from distributing profits and made subject to a cap on their permissible administrative expenses. As the Claimant summarizes the matter in its Statement of Claim:[146]

> Individually and collectively, these legislative changes have destroyed the value of HICEE's investments in Apollo and Dôvera. Fundamentally, HICEE is prohibited from earning a return on its investments in the two companies. If shareholders cannot receive any financial benefits from their investments and cannot sell them, the investments have no value. In addition, HICEE is not able to exit the market by selling its investments, or its principal assets—the portfolios of insurees—for fair market value. Furthermore, to the extent that Apollo and Dôvera have continued to operate in Slovakia, their ability to earn profits has been adversely affected by the cumulative effect of the measures.

101. Similarly, in its prayer for relief,[147] the Claimant seeks an order from the Tribunal requiring the Respondent to "reinstate the legal status quo with respect to health insurance companies that existed before 1 January 2008" (with damages to compensate for harm suffered in the meanwhile); or in the alternative to make a monetary award equivalent to "restitution of the full value of [HICEE's] investments lost as a result of Respondent's wrongful acts".

102. In short, therefore, the central focus of the Claimant's claims is on measures directed at the operation of the health insurance sector in Slovakia. It is however an admitted fact, not in dispute, that HICEE does not itself operate in the health insurance sector in Slovakia, whereas Dôvera and Apollo do. It is equally admitted that HICEE does not own shares in Dôvera and

---

144 Claimant's Counter-Memorial on the Treaty Interpretation Issue, paras. 92-93.

145 Act No. 530/2007 Coll. of 25 October 2007, Amending and Supplementing Act No. 581/2004 Coll. on Health Insurance Companies and Healthcare Supervision, and Amending and Supplementing Certain Acts as Amended (**Exhibit C-19**).

146 Claimant's Statement of Claim, para. 177.

147 Claimant's Statement of Claim, para. 303.

Apollo; the sole shareholder[148] in these Slovak corporate entities is Dôvera Holding, itself a Slovak incorporated company wholly owned by HICEE. The question is thus immediately raised whether HICEE's indirect interest in Dôvera and Apollo represents an investment that benefits from the various kinds of protection provided for in the Agreement, including specifically the right to commence arbitral proceedings before the present Tribunal.

103. To put the matter another way, HICEE's investment in the Slovak health insurance market is a structured one.[149] This is not unusual, nor is there anything in the least reprehensible about it; structured investments are commonplace. The purpose is to secure advantages from incorporation or operation in a particular jurisdiction; the specific motives behind the incorporation of HICEE in the Netherlands are explained in the Claimant's Statement of Claim.[150] The advantages anticipated often include the protection of particular bilateral (or other) treaties covering foreign investment. If that is the intention in a particular case, the question will always arise whether the intended purpose has been achieved through the structuring chosen for the given investment. In these proceedings, the Parties are in dispute, *inter alia*, over whether it has. Hence their agreement at an early stage that what was termed the "Treaty Interpretation Issue" should be argued on its own as a preliminary objection, on an expedited basis. This proposal was put to the Tribunal in a joint letter of 29 March 2010 and approved by the Tribunal by letter on 31 March 2010.[151] The present constitutes the Tribunal's Decision on that preliminary issue.

104. It must however first be determined exactly what the Treaty Interpretation Issue is. According to the joint letter of 29 March 2010, ". . . the parties agree to address initially only Respondent's jurisdictional objection regarding whether Claimant's 'interest in Dôvera and Apollo falls within the scope of Article 1(a)' of the Netherlands-Slovak BIT because Claimant's investment in Dôvera and Apollo as described in the Notice of Arbitration and the

---

[148] The stages by which Dôvera Holding acquired complete ownership of Dôvera and Apollo is set out in the pleadings and correspondence, and is not in dispute. For convenience, the Tribunal will continue, despite the subsequent events recited in paragraph 27 above, with the construction of the present Award as if Dôvera and Apollo both continued to exist as at the time the oral argument was closed; the events in question appear to the Tribunal to sound only at the level of potential damages, but do not affect the legal considerations which determine the Treaty Interpretation Issue.

[149] An authentic description of its structure is given in Section II.C of the Claimant's Statement of Claim, paras. 83-90.

[150] Claimant's Statement of Claim, para. 85; Witness Statement of Pieter de Kok, 15 February 2010, at paras. 15-16 (**Exhibit CWS-1**).

[151] *See* paragraph 11 above.

Statement of Claim 'was made through its Slovak subsidiary' Dôvera Holding ('Treaty Interpretation Issue')".[152]

105. Procedurally, the agreement between the Parties foresaw that this issue would be addressed in one simple exchange of Memorial and Counter-Memorial. In its Memorial, the Respondent expressed itself in the following terms:

> Because HICEE's interests in the Slovak health insurance system are not "investments of investors" within the meaning of Article 1 of the BIT, the Respondent's consent to arbitration in Article 8 of the BIT provides no basis for the claims which HICEE seeks to advance.[153]

and:

> In Article 8(2) of the BIT, the Netherlands and the Slovak Republic consented to submit disputes to international arbitration only if they concern "*investments of investors*" that are protected under the BIT. ... The entire substance of the arbitration claims is directed at measures taken against two domestic health insurers – Dôvera and Apollo – which expressly are not "investments" of a Dutch "investor". It follows that the Tribunal cannot adjudicate under Article 8 disputes concerning those excluded investments.[154]

106. For its part, the Claimant expressed itself as follows in the Counter-Memorial:

> Respondent's jurisdictional objection with respect to the Treaty Interpretation Issue is that the phrase "invested either directly or through an investor of a third State" in Article 1(a) of the Treaty excludes from the definition of "investment," and thus from the protection of the Treaty, assets that are held by subsidiaries of the investor that are located in the host state. In particular, Respondent argues that ownership interests of a Dutch company's Slovak subsidiary in other Slovak companies ... are excluded from the definition of "investment" under the BIT. Thus, according to Respondent, because Claimant's shares in Dôvera and Apollo are held through a Slovak holding company, Dôvera Holding, they are excluded from the definition of "investment" under the Treaty.[155]

107. The Tribunal detects in these various iterations slight variations in the description of the issue for decision, which may or may not in the event prove significant. To avoid possible difficulties on this score, the Tribunal therefore thinks it better to stipulate in precise terms of its own how it understands the Treaty Interpretation Issue, before proceeding to its Decision on that issue. It does so on the basis of its understanding that the Parties are in agreement that the present Decision should serve as the definitive gateway to any further proceedings in the

---

[152] There follows a footnote reference to an earlier Counsel-to-Counsel letter in which Respondent's Counsel had put the matter in very slightly different terms: "The question of whether or not HICEE's indirect shareholding interest in Dôvera and Apollo falls within the scope of Article 1(a) of the BIT is a discrete point of treaty interpretation. . . . Article 1(a) of the BIT expressly excludes from the treaty's coverage investments made by HICEE's Slovak subsidiary, Dôvera Holding, in any further Slovak sub-subsidiaries such as Dôvera or Apollo (the 'Treaty Interpretation Issue')".

[153] Respondent's Memorial on the Treaty Interpretation Issue, para. 1.

[154] Respondent's Memorial on the Treaty Interpretation Issue, para. 60 (emphasis in original).

[155] Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 10.

case, whether proceedings on the merits or on the further preliminary issues signalled by the Respondent in its filing pursuant to paragraph 3.2 of Procedural Order No. 1. In other words, in the event that the Tribunal decides the Treaty Interpretation Issue in the Claimant's favour, the arbitration will proceed to further consideration of the merits and of such issues of jurisdiction or admissibility as remain, in accordance with the procedure laid down in Section 3 of Procedural Order No. 1, read in the light of the joint letter of 29 March 2010. Conversely, should the Tribunal decide the Treaty Interpretation Issue in favour of the Respondent, that will bring the arbitration to an end.

108. In the light of the above, the Tribunal determines that the issue to be decided by it at this stage of the proceedings, under the description "the Treaty Interpretation Issue", divides into two sub-issues, namely:-

(a) can Dôvera Holding's shareholdings in the companies Dôvera and Apollo be considered to be "investments" of HICEE, a Dutch investor, within the meaning of Article 1 of the Agreement, and thus entitled to the protection provided for in the substantive Articles of the Agreement, including the right to arbitration under Article 8?

(b) even if not, is it open to HICEE to frame its losses sustained via its holdings in Dôvera and Apollo (assuming that such losses can be established) in some other way that would bring them within the protection of the Agreement?

109. The Tribunal will approach its Decision on these two sub-issues as follows: A. The terms of the Agreement; B. The meaning of "direct"; C. The extraneous materials; D. The most favoured nation clause; E. Conclusion.

A. The Terms of the Agreement

110. The analysis of the terms of the Agreement begins naturally with Article 1, around which much of the argument has centred. The Agreement is concluded in the Dutch, Czech and English languages, all three being equally authentic. In case of "difference of interpretation" the English text is to prevail. In response to a question raised by the Tribunal at the Hearing,[156] the Parties confirmed that, in their view, all three language texts had the same meaning in respect of the issues before the Tribunal, which could therefore safely rely on the English text alone. All subsequent references in this Decision will therefore be to the English text.

[156] Hearing Tr., 20 July 2010, at 96:14-97:9.

111. Article 1 sets out the applicable definitions for the purposes of the Agreement, beginning with the term "investments".[157] Investments are defined in Article 1(a) to comprise "every kind of asset invested either directly or through an investor of a third State", and there follows an extended illustrative (though not exhaustive) list of types of investment, including (in sub-paragraph (ii)) "shares, bonds and other kinds of interests in companies and joint ventures, as well as rights derived therefrom". Paragraphs (b) and (c) of the Article complete the picture with definitions of "investors" and of "territory". Specifically, the term "investors" is defined to comprise, on the one hand, "(i) natural persons having the nationality of one of the Contracting Parties in accordance with its law", and on the other hand "(ii) legal persons constituted under the law of one of the Contracting Parties". Many elements of these definitions, notably the definition of "investments", are familiar from bilateral investment treaties in general. In particular, it may readily be seen from the wording chosen that, so far as the types of investment are concerned, the intention was to create a wide coverage. The argument for present purposes, however, and the disagreement between the Parties, revolves around the way in which such investments may be made, as encapsulated in the phrase "invested either directly or through an investor of a third State", subsequently referred to in this Decision as "the key phrase". This phrase, by its placing, is plainly designed to govern all of the wide types of investment that fall in principle within the terms of Article 1, and therefore of the Agreement. It seems to the Tribunal plain as well that the qualification introduced by this phrase (whatever its scope may be) applies to the investment and the form in which it is made, not to the investor.

112. Before proceeding, however, to an analysis of the meaning of the key phrase, the Tribunal thinks it well to recall that the substantive protections conferred by subsequent Articles of the Agreement (specifically Articles 2, 3, and 7) are granted to "investments of investors of the other Contracting Party".[158] In other Articles the protection is conferred directly on the investor as such.[159] Finally, Article 4 takes as its focus "payments relating to an investment". Of these provisions, Articles 3, 4, and 5 are specifically invoked by the Claimant in support of its claim for relief.[160] These provisions, the general effect of which is to require an organic link between "investment" and "investor" for treaty protection purposes, undoubtedly form

---

[157] The full text of Article 1 is reproduced in paragraph 34 above.

[158] In Article 2, owing to the different syntax, the preposition is "by" not "of".

[159] *See e.g.* Articles 5 and 6 of the Agreement.

[160] Claimant's Statement of Claim, Section III.

part of the "context" for the application to the key phrase of the rules of interpretation laid down in the Vienna Convention on the Law of Treaties of 1969 ("the Vienna Convention").[161]

113. As pointed out in paragraph 47 above, both Contracting Parties to the Agreement were Parties to the Vienna Convention at the time of conclusion of the Agreement; it follows that, pursuant to Article 4 of the Vienna Convention, the Convention applies in terms to the Agreement, including to its interpretation, a conclusion confirmed by the fact that Slovakia succeeded in due course to the Agreement as well as to the Vienna Convention.

B. The Meaning of "Direct"

114. As indicated above (paragraphs 51-53) the Claimant takes its stand on the proposition that the key phrase "invested either directly or through an investor of a third State" must be understood as having a directional meaning; that it indicates, in other words, that investments under the Agreement may be made by an investor of the other Contracting Party either itself or else via a subsidiary (or equivalent) in a third country. This, but no more than this, the Claimant says, is the natural meaning of the phrase in its context in Article 1, confirmed in addition by the consequences it has for the scope and operation of the Agreement. In further support, the Claimant proffers an Opinion by the respected commentator, Professor Christoph Schreuer. The Respondent, conversely, asserts (see paragraphs 48-50 above) that the key phrase is open to an alternative meaning, which in the circumstances is to be preferred, namely that, to qualify for protection under the Agreement, the investment in the recipient country must be that of the foreign investor itself, and not through any intermediary – unless the intermediary is in a third country.[162] In support, the Respondent refers in particular to Explanatory Notes by the Minister of Foreign Affairs of the Netherlands submitted on 31 March 1992 to the First and Second Chambers of the States-General with the request for approval for the Agreement to be ratified, as evidence of an express intention between the Contracting Parties to exclude investments made via a sub-subsidiary. This latter document has become a central item in the case, and is analyzed more fully at paragraphs 126 ff. below.

115. The Tribunal begins by recalling in full the terms of Articles 31 and 32 of the Vienna Convention on the Law of Treaties, on the basis that, quite aside from their status as a reflection of customary international law, these provisions are directly binding on the States Parties to the Agreement in respect of its interpretation and application:

---

[161] *See* paragraph 116 below.

[162] The Tribunal interpolates at this point that, once the alternative interpretation is accurately stated in this way, much of the argument advanced at the hearing and in Professor Schreuer's report, about the asserted illogicality of allowing indirect investments via a third-country intermediary, simply becomes without object, since the interpretation would exclude Slovak sub-subsidiaries by either route.

Article 31

General rule of interpretation

1. A treaty shall 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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

116. It is by now a truism that these classic provisions of the Vienna Convention require that the process of interpretation begin with the terms of the treaty itself in their ordinary meaning, as assessed in context, and in the light of the treaty's "object and purpose".[163] The context is given its own definition in paragraph 2 of Article 31. The Tribunal is in no doubt that the phrase "invested either directly or through an investor of a third State", as it appears in the Agreement in question, is capable, as a matter of ordinary meaning, of bearing two meanings: a directional meaning, in which it refers to the investment's origin, the place from which it comes; or a relational meaning, in which it refers to the connection between the investor and the investment, i.e. whether any intermediary intervenes between the one and the other. The Tribunal is equally of the view that the context as a whole, broadly defined as in Article 31 of

[163] The phrase "object and purpose" is put in quotation marks for the time being, because of the contentious issue as to how much by way of valuable guidance it offers either in general or in the present case.

the Vienna Convention, offers virtually nothing by way of authentic guidance as to which of these two "ordinary meanings" is to be preferred.[164] There is something in the Respondent's argument that, inasmuch as the principal mechanism for the conferral of treaty benefits is the linkage of the investment to the investor,[165] that may suggest reading the key phrase in a relational sense.[166] Likewise, there is something in the Claimant's argument that the juxtaposition in the key phrase of "directly" with "a third State" may suggest reading the key phrase in a directional sense. However that may be, neither of these two arguments is decisive; moreover they cancel one another out. As to the object and purpose of the Agreement, the Tribunal finds nothing in it sharp enough to cut the Gordian knot either. The title of the Agreement describes it as an agreement "on encouragement and reciprocal protection of investments". Its Preamble, the normal starting place for an attempt to gather an Agreement's object and purpose, tells us no more than that there is a mutual desire to extend and intensify the economic relations between the Contracting Parties, "particularly with respect to investments by the investors of one Contracting Party in the territory of the other Contracting Party", and that they recognize "that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties".[167] The Claimant argues that the terms used in the Preamble show that the Parties intended the scope of the Agreement to be broad and inclusive, rather than narrow.[168] But in order to make this argument the Claimant quotes a selective extract from the wording set out in full above. In the Tribunal's view, the wording chosen for the Preamble by the Parties is studiously neutral, and refers more to the goal of the stability of expectations than to any preconception as to the Agreement's coverage and scope. The Tribunal observes that, in general, the purpose of bilateral investment treaties can be taken to be the encouragement of investment, on a mutual and reciprocal basis, while balancing the interests of the investors and of the receiving State in that regard; in and of itself, however, that says nothing about where the balance has been drawn in the particular treaty in

---

[164] Professor Schreuer, in his expert opinion, expresses the view that the 'either-or' grammar of Article 1(a) will support only the Claimant's interpretation. This view is not, however, convincing, as it begs the question at issue by adopting as its starting hypothesis that the intention of the Contracting Parties was to cover the whole universe of possible investments. To say that an investment may be made 'either' in way A 'or' in way B does not of itself foreclose its being made in some other manner, only that it will not enjoy the same status if it is – which is precisely the point at issue here.

[165] Hearing Tr., 20 July 2010, at 23:5-12.

[166] Though this argument in fact fails to give full weight to the reference to an "investor" of a third State in the second limb of the 'either-or' alternative.

[167] And adds that fair and equitable treatment is "desirable" ("wenselijk" in the Dutch), a somewhat less than rousing turn of phrase.

[168] Claimant's Counter-Memorial on the Treaty Interpretation Issue, para. 16.

question.[169] The Tribunal does not therefore find anything in the object and purpose of the present Agreement that would help in any material way to determine the question of interpretation before it.

117. It may therefore be that the Tribunal is confronted, at the end of the day, with an ambiguity that falls to be resolved by the application of Article 32 of the Vienna Convention.[170] If so, the Tribunal would then be entitled (Article 32 uses the verb "may") to bring into play what are called "supplementary means of interpretation", and specifically the preparatory work of the treaty and the circumstances of its conclusion. But once again the terms of Article 32 make it plain that these are merely examples, with the necessary implication that the category of admissible supplementary means is not a closed one.

118. The above said, the Tribunal observes also that the door to the employment of supplementary means of interpretation is not opened exclusively in the case of ambiguity or obscurity. As Article 32 says, recourse may be had to the same supplementary means in the case where interpretation in accordance with Article 31 leads to a meaning which is manifestly absurd or unreasonable. But equally the same supplementary means are admissible, too, to "confirm" the meaning resulting from the application of Article 31. Each of these alternative approaches, it may be noted, takes as its starting point the application of Article 31; and that brings into play certain other elements, which paragraph (2) of the Article says "shall be taken into account, together with the context". The elements listed in Article 31(2) were the subject of extensive debate between the Parties, and are analyzed at paragraphs 133-135 below.

119. The Claimant would, to be sure, wish to assert that the interpretation for which the Respondent contends would lead to absurd and unreasonable results, and has put forward an argument to that effect.[171] Faced with the choice between two alternative interpretations, the Tribunal is unable, however, to adopt this as its starting point, given the severely prejudicial effect that this would have, since it would entail in advance the rejection of one of the two alternatives. The situation which the Vienna Convention envisages in Article 32 is one in which a textual (and contextual) analysis pursuant to Article 31 does indeed lead to a result, but one which ought to be rejected because it is found to be absurd or unreasonable. This is not the same as an outcome that leaves the interpreter with two alternatives but no available means under Article 31 to decide which of the two is the appropriate one. The Tribunal

---

[169] Cf. the assessment of this same question by the Tribunal in *Saluka v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, para. 300 (**Exhibits CLA-56 and RLA-22**).

[170] Or, at the least, with a case of obscurity as to what the Parties in fact meant, which, under Article 32(a) of the Vienna Convention, is to be resolved by the same means.

[171] Claimant's Counter-Memorial on the Treaty Interpretation Issue, paras. 21 ff. and 90.

wishes moreover to emphasize that what the Vienna Convention has expressly in mind in Article 32 is the avoidance of a result that would be "manifestly" absurd or unreasonable, which is a rather different matter.[172] The temptation will always be there for one disputing party to claim that its opponent's case leads to an absurd or unreasonable result, and the temptation may be particularly strong where the party in question is a claimant investor who was not, by definition, privy to the negotiation of the BIT under which his claim is brought. But an investment tribunal is bound by any policy aims on which the Contracting Parties may have agreed on at the time as the foundation for their treaty, and is not entitled to substitute its own extraneous opinion, arrived at after the event, as to whether that policy was a sensible one or not. A tribunal takes a BIT as it is; its task is one of interpretation, not criticism.

120. It ought in fairness to be added that the Claimant made an argument that it would have been difficult for a Dutch investor to invest effectively under Czechoslovak law as it existed at the time without the use of locally incorporated companies. In support, it filed an expert legal opinion, though that was not the subject of much detailed discussion at the Hearing, nor was the author called by the Respondent for cross-examination. The Tribunal only feels it necessary to observe that BITs are, by definition, concluded for the future not just for the present, and that there was nothing to prevent either side – i.e. the Dutch side quite as much as the Czechoslovak side – wanting to provide in advance for a more liberal economic regime that was on its way. This may indeed have been quite probable at a time of transition for the Czechoslovak State from a centrally planned socialist economy towards a market economy. But, however that may be, the fatal blow to this line of argument by the Claimant is surely delivered by the case of *Eureko BV v. Slovakia*,[173] which displays a Dutch investor operating comfortably in the Slovak health insurance sector without resorting to any form of sub-subsidiary.

121. The Tribunal accordingly considers itself to be on safer ground in bringing into the interpretative process all available material that it finds to be relevant, significant, and at the same time reliably instructive as to the meaning and intention behind the words used in the Agreement.[174] It recalls once more (paragraph 117 above) that neither the International Law

---

[172] *See* paragraph 19 of the International Law Commission's Commentary to what was then Article 28 in its Draft Articles on the Law of Treaties, Yearbook of International Law Commission, 1996, vol. II, at p. 223. *See also* the analysis of the term "manifestly", as used in the ICSID Convention and Rules, in the Decision of 12 May 2008 by the Tribunal in *Trans-Global Petroleum v. Jordan,* ICSID Case No. ARB/07/25, paras. 83 ff., which, although not directly in point, is applicable by analogy.

[173] *See* fn. 189 below.

[174] Cf. *Malaysian Historical Salvors v. Malaysia,* ICSID Case No. ARB/05/10, Decision on the Application for Annulment of 16 April 2009, at para. 57 (noting that "courts and tribunals interpreting treaties regularly review the *travaux préparatoires* whenever they are brought to their attention").

Commission nor the Vienna Conference sought to lay down an exhaustive or exclusive list of what might constitute in any given case the admissible "supplementary means of interpretation".

C. The Extraneous Materials

122. Four sets of materials come into consideration here: the negotiating records of the Agreement; the evidence tendered to the Tribunal on the Claimant's behalf by a certain number of witnesses who had occupied official positions within Czechoslovakia at the time that the Agreement was under negotiation; the Dutch Explanatory Notes; and the Agreed Minutes of formal consultations under Article 9 held on 4 and 5 April 2002 between delegations of the Netherlands and the Czech Republic.

123. As to the negotiating records, no further discussion is required of their status as interpretative material. The category itself is well recognized in international practice. Whether the records tell us anything that may be material and reliable on the question for decision is a different matter, which the Tribunal finds it more convenient to consider as part of its analysis of the Dutch Explanatory Notes (see paragraphs 128 ff.) below.

124. As to the witness evidence, on the other hand, the Tribunal finds it to have little bearing on the question for decision, and does not consider it necessary to analyze this material further. With no disrespect to the individual witnesses, none of them was directly involved in the negotiation of the Agreement in question, and none of them purported to have direct knowledge that could have cast light on the question before the Tribunal. The witness evidence, taken as a whole, fell into precisely that category against which the International Law Commission and international tribunals have warned, namely *ex post facto* expressions of opinion about what was presumed to have animated the negotiation of a treaty text. The Tribunal regards evidence of this kind as in principle of doubtful value, and found nothing in what the witnesses said before it that would bring it within the criteria laid down in paragraph 121 above.

125. Similarly, although the Agreed Minutes were the subject of some debate between the Parties, the Tribunal finds them to be of little assistance. To begin with, the Agreed Minutes exhibit the specific difficulty that (in the context of a bilateral treaty to which there are two successor States) the consultations in question were with the other successor State, the Czech Republic, not with the Slovak Republic, the Party to the present arbitration. Although of course the starting point must be that the terms of a treaty can have only one original meaning, the circumstance just mentioned nevertheless casts doubt on how far this particular piece of subsequent conduct can be treated as a decisive guide to that meaning. Even if that question

as to their status could be readily resolved, however, the consultations had been requested (as their content recites) on two specific questions,[175] neither of which corresponds to the question presently at issue in this arbitration. It follows that such bearing as the Agreed Minutes may have on the present question is purely incidental. And even then, the fact remains that the Agreed Minutes are cast in such broad and general terms, which do no more than pick up the terminology of the Agreement itself, that the Tribunal does not feel able to attribute to them any particular significance for the solution of the question before it. At most, the Minutes tend to indicate that there are some investments that are not within the scope of the Agreement, but they tell us nothing specific about where the dividing line lies.

126. The Dutch Explanatory Notes are in a different category entirely, both from the witness evidence and from the Agreed Minutes, as will appear at once from their content:

> **Explanatory notes by article**
>
> **Article 1** provides a description of various terms used in the Agreement. The Agreement covers direct investments and investments made through a company in a third country. Normally, investment protection agreements also cover investments in the host country made by a Dutch company's subsidiary which is already established in the host country ("subsidiary"- "sub-subsidiary" structure). Czechoslovakia wishes to exclude the "sub-subsidiary" from the scope of this Agreement, because this is in fact a company created by a Czechoslovakian legal entity, and Czechoslovakia does not want to grant, in particular, transfer rights to such company. This restriction can be dealt with by incorporating a new company directly from the Netherlands. As the restriction is therefore not of great practical importance, the Dutch delegation has consented to it. Czechoslovakia's request to use the term "investor" rather than "national" was granted by the Netherlands.

127. The portion of the Dutch Explanatory Notes that refers to Article 1 thus has the most direct and material bearing on the very issue which is now for decision by the Tribunal.[176] Its standing and effect as an item of interpretative material will be considered below. Certain features of the Explanatory Notes should however be noted at the outset, not least because they distinguish its place in the present proceedings from the normal run of past practice in international judicial settlement. It is by no means uncommon for a party to a dispute settlement process involving treaty interpretation to support its case by invoking the terms in which the treaty was submitted internally for approval; it typically involves a statement of some kind by the executive power to the legislature as to how the terms of the treaty should be

---

[175] The temporal reach of the Agreement in relation to pre-existing investments, and the application of the law of the host State.

[176] When the Explanatory Notes say expressly that Czechoslovakia wished to exclude sub-subsidiaries "from the scope of this Agreement" the Tribunal is unable to endorse the view put forward in Professor Schreuer's report that the reference is limited to the definition of investors and "nationals" but not the definition of "investment".

interpreted and its effect understood.[177] What that amounts to, normally, is the invocation by a State of its own contemporaneous interpretation of a treaty text when a dispute over that text comes before a tribunal later on. By contrast, what marks the present situation out as different is the following: first, that the negotiating State is not setting down its own interpretation but the intentions of its negotiating partner; second, that this is not a bare statement but one backed by reasons; third, that there follows an express confirmation that the other Party's intentions were agreed to, and why; fourth, that the Notes conclude with a precise indication of the recipe for avoiding the exclusionary effect of the restriction that was accepted into the treaty text. The final difference, which the Tribunal considers to be of some considerable significance, is that in this case the declaration is being invoked not by the declarant State itself, but from the opposite side of the treaty nexus.

128. The meaning of the relevant portion of the Explanatory Notes was however put in issue by the Claimant,[178] and the Tribunal must accordingly confront the question. It does so on the footing that its task is to interpret the Agreement, not to interpret the interpretative materials,[179] although it must be obvious that no tribunal could bring into play any of the interpretative materials mentioned in Articles 31 and 32 of the Vienna Convention without forming a view as to what the material in question indicates. The Claimant says that the meaning of the Notes can only be appreciated in the context of what was happening in Czechoslovakia at the time, notably the concern to balance the inflow and outflow of foreign capital. It says that the main anxiety of Czechoslovakia was over the definition of "investor", and that the terms of the passage in the Explanatory Notes serve to confirm that it focuses on who is an "investor" rather than what is an "investment". The Claimant concludes that the fact that Czechoslovak subsidiaries and sub-subsidiaries were not deemed to be Dutch investors did not put them outside the protection of the Agreement altogether, as both subsidiaries and sub-subsidiaries could still be Dutch investments if owned by Dutch companies. However, this reading of the Explanatory Notes lacks conviction. The Tribunal cannot accept that a Dutch investor is a more authentic exponent of Czechoslovak views and intentions in the negotiation than the Government with which Czechoslovakia was negotiating. When the passage in question says that Czechoslovakia wanted to exclude sub-subsidiaries "from the scope of this Agreement", it must be taken to mean what it says. And

---

[177] Examples can be found in the *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America),* Preliminary Objection, Judgment, I.C.J. Reports 1996, p. 803, at p. 814, para. 29 and in the arbitral decision in *Global and Globex v. Ukraine,* ICSID Case No. ARB/09/11, Award of 1 December 2010, paras. 48 ff.

[178] *See* in particular the Claimant's Counter-Memorial at paragraphs 49-61.

[179] Cf. the Judgment of Simon J in *Czech Republic v. European Media Ventures*, cited by the Claimant (**Exhibit CLA- 97**).

when the passage begins by talking (repeatedly) about "investments", that must be taken to be its subject. To bring in a single (and somewhat obscure) reference to investors in the very last sentence as a way of subverting the clear intention behind all that precedes it would be a strained and artificial form of deconstruction that the Tribunal could not endorse. The Tribunal takes the Explanatory Notes simply, and at their face value, and has no doubt that what they refer to is the exclusion of sub-subsidiaries from the scope of the Agreement entirely, both because the sub-subsidiary was not to be regarded as a covered "investment" and because the local subsidiary which created or acquired it was not itself to be regarded as a foreign "investor".

129. In this unusual set of circumstances, the twin questions immediately arise: should the Explanatory Notes be taken into consideration at all, and should their contents be accepted as accurate? It is more convenient to take the latter part first. The Claimant invited the Tribunal to disregard the Explanatory Notes entirely, largely on the ground that they were arguably inconsistent with the terms in which other, similar, BITs had been presented to the Dutch Parliament, and should therefore be regarded as an aberration. This the Tribunal feels unable to do – in part because of the categorically precise terms in which the passage in the Explanatory Notes is cast, and in part also because the Explanatory Notes are a formal, public document that engages the honesty and good faith of the Dutch Minister, and the Tribunal does not believe that it is its place to call that into question, even implicitly.

130. That said, the Tribunal did however take the view that what was said in the Explanatory Notes called for some substantiation or corroboration, if possible. Moreover, given that the Explanatory Notes say in terms that Czechoslovakia asked in negotiation for something that the Netherlands agreed to, such substantiation or corroboration ought in principle to be readily available: the one via the records of the Dutch Foreign Ministry and the other via the records of the competent Ministries of the former Czechoslovakia. The Tribunal accordingly issued a Procedural Order under Article 24(3) of the UNCITRAL Rules requiring the Parties to produce jointly any agreed minutes or reports of either delegation on the negotiating sessions on the Agreement, and any reports seeking formal approval of it, "which may throw light on the description of the negotiation of Article 1 of the Agreement contained in the letter from the Minister of Foreign Affairs of the Netherlands to the Chairm[e]n of the First and Second Chambers of the States-General dated 31 March 1992".

131. The response received jointly from the Parties on 3 September 2010 was surprising and in some respects disappointing. This was not so much because the Parties found themselves in disagreement as to which of the documents they assembled (if any) should be regarded as responsive to the Tribunal's request, as because the documents they were able to furnish to the

Tribunal threw so little further light on the question raised. To be more specific, the collection of documents on the Czechoslovak side presented an apparently careful and comprehensive picture of the discussions between the two Governmental delegations, but revealed no detail at all about the negotiation of Article 1, other than that its text was settled at a very early stage.[180] That apart, the only inference the Tribunal is able to draw from the entirety of the bundle of documentation is that nothing in it has its origin in Dutch official sources. Whatever the explanation for that might be, its consequence (taken together with the effect of the Czechoslovak documents just described) is that the Tribunal has nothing before it to illuminate or otherwise substantiate the basis on which the Dutch Foreign Minister drew up his submission to Parliament on Article 1. All that the Tribunal is able to deduce (as had indeed been indicated by Counsel for the Respondent during the oral Hearing) is that the copy of the Explanatory Notes that was tendered by the Respondent in evidence had been obtained from Governmental files in Prague, not The Hague.[181]

132. The Tribunal is bound to observe that the resulting situation is less than satisfactory. Be that as it may, its consequence is that, in the absence of corroboration of the kind the Tribunal had been seeking, it must treat the Explanatory Notes as having an essentially unilateral character, not a joint one – though subject to the point made at the end of paragraph 131 above.

133. The Tribunal comes now to the question that was most vigorously debated between the Parties, in the written submissions and orally: can the Explanatory Notes be brought within the classes of material listed in Article 31, paragraphs (2) or (3) of the Vienna Convention, and, if so, with what effect?

134. The terms of paragraphs (2) and (3) of Article 31 are set out in full in paragraph 115 above. Starting with paragraph (3), its sub-paragraph (c) can be set aside at once, since it refers to relevant rules of international law, whereas the present problem relates entirely to what took place between the Parties in the conclusion of the treaty itself. Moving then to sub-paragraphs (a) and (b), the Tribunal observes that the common feature between them is that both refer to processes that amount to a form of agreement between the treaty parties. In sub-paragraph (a) the agreement is *ex hypothesi* conscious and express, in sub-paragraph (b) it arises by implication from the parties' actions. A further common feature is that the agreement in both cases is "subsequent", which must in the context mean that it supervenes after the conclusion of the treaty itself. The relevance of both items to treaty interpretation is obvious (and is

---

[180] In fact as early as the Second Meeting, held from 31 October to 3 November 1989. *See* Agreed Minutes from Second Meeting of Expert Delegations from Czechoslovakia and the Netherlands Concerning Negotiations of the BIT, 3 November 1989, draft unsigned version (**Exhibit R-4**).

[181] Hearing Tr., 20 July 2010, at 95:14-19.

explained in full by the International Law Commission in its Commentary to the Draft Articles),[182] and the fact that it is obligatory to take them into account derives from the fact that they represent agreements between the treaty parties. The Tribunal has some difficulty with the argument that the Explanatory Notes can be brought within this category; the most that could be said is that the document was found to have been within the official archives in Prague and there was no record of its having been contested by the Czechoslovakian side. Whatever that may signify, it does not amount to the kind of "agreement" envisaged in Article 31(3). Are the Explanatory Notes nevertheless part of the "context for the purpose of . . . interpretation" in accordance with the sub-paragraphs to Article 31(2)? Sub-paragraph (a) of paragraph 2 covers "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty"; for the reasons already given in relation to paragraph 3, the Tribunal is unable to place the Explanatory Notes in the category of an agreement between the Contracting Parties to the Agreement. Accepting this logic, the Respondent asserts that the Note nevertheless qualifies under sub-paragraph 2(b), as an "instrument which was made by one or more parties in connection with the conclusion of the treaty";[183] the Claimant, for its part, denies that the Note was ever accepted, or the accuracy of its contents confirmed, by the Government of Czechoslovakia. For the Tribunal, the Claimant's argument on this point carries greater persuasive effect than that of the Respondent. The Tribunal has doubts of its own as to whether Article 31(2)(b) was intended to cover a document of this kind, composed as it was for purely internal purposes of the treaty approval process in the Netherlands. The Tribunal finds it inherently unlikely that any such internal document would ever, on its own, qualify for attention under Article 31(2)(b) in the absence of additional circumstances involving its communication by some reasonably formal means to the other contracting party (or parties). Only thus would a tribunal be able to make sense out of the second limb of the sub-paragraph, where it refers to acceptance by the other parties as an instrument related to the treaty. By definition, the burden of demonstrating that such acceptance had occurred would lie on the party invoking the document. In these proceedings, the Respondent, while producing a limited amount of circumstantial evidence tending to suggest that the document may have been communicated by the Dutch side to their Czechoslovak counterparts, could produce no concrete evidence of "acceptance" in any positive form, even *sub silentio*. That does not, however, as the Tribunal sees matters, foreclose the possible significance of the Note as an indicator of agreement, for the reasons the Tribunal will come to below.

---

[182] Draft Articles on the Law of Treaties with Commentaries, Yearbook of International Law Commission, 1966, vol. II, at p. 227.

[183] In full, "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" (see paragraph 115 above).

135. The Tribunal thus arrives at a conclusion which, on the surface, corresponds to the argument of the Claimant, namely that the Dutch Explanatory Notes do not fit within any of the categories of extraneous material specified in Article 31 or Article 32[184] of the Vienna Convention. Where the Tribunal parts company with the Claimant's argument, however, is in the consequences to be drawn from that. For the Claimant, once the Explanatory Notes find no express place in Articles 31 and 32, they must be disregarded entirely, not only for the interpretation of the Agreement, but also for its application. The Tribunal is unable to endorse so rigid an approach to the matter. In the first place, it recalls once more its conclusion at paragraph 117 that the category of admissible supplementary means for treaty interpretation is not a closed one. The Tribunal recalls also the repeated reminders woven into the International Law Commission's Commentaries on its Draft Articles that the provisions on treaty interpretation must not be misread as introducing either a rigid, or still less a hierarchical, set of rules. As the Commission says, there is in truth only one all-encompassing rule, whose elements should be combined in a logical and coherent way.[185]

136. Stepping back from a piecemeal analysis, the Tribunal will restate what it considers to be the essential and quite simple fact: that in the process of giving its consent to be bound by the Agreement the Government of the Netherlands expressed itself formally, publicly, and in writing (with reasons) as to what had been intended by the key phrase in Article 1; and that the Government of Slovakia, now appearing before this Tribunal, espouses the same meaning for the provision in question. That this represents a concordance of views between the two Contracting Parties to the treaty obligation in question – albeit in an attenuated form – cannot be denied. That the concordance of views has on the one side, not the original Contracting Party but one of its two successor States, and on the other side a State which is not a party to the present arbitral proceedings, does not seem to the Tribunal to alter, or to be capable of altering, the existence of that form of "agreement" – for whatever consequences it may have. The Tribunal has already indicated above why it does not consider that the circumstances give rise, in any exact sense, to any of the particular forms of agreement specified in Articles 31 or 32 of the Vienna Convention. But that is not by any means the same thing as to say that these highly pertinent circumstances ought on that account to be left out of the interpretative process altogether. To do so would fly in the face of logic and good sense. It would not, in the Tribunal's considered view, be reconcilable with the requirement that a treaty is to be interpreted "in good faith", which the Vienna Convention consciously placed at the very head

---

[184] For the Tribunal, it is self-evident that the Explanatory Notes do not form part of the preparatory work (*travaux préparatoires*), since they post-date the completion of the negotiations, and serve to explain what had been agreed between the negotiating States.

[185] Draft Articles on the Law of Treaties with Commentaries, Yearbook of International Law Commission, 1966, vol. II, at p. 220.

of the provisions dealing with interpretation.[186] And the Tribunal recalls once more (as set out above) that the category of supplementary materials that a tribunal is authorized to have recourse to, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure, is, on the terms of the Convention, not closed. The Tribunal is therefore in no doubt that the Dutch Explanatory Notes, given their terms and content, taken together with the viewpoint adopted in these proceedings by Slovakia, constitute valid supplementary material which the Tribunal may, and in the circumstances must, take into account in dealing with the question before it.

137. The matter can be looked at in another way. Let us suppose, as a hypothesis, that the same question of interpretation of the Agreement was in dispute between the Contracting Parties themselves, and that that dispute was in litigation. The hypothesis is by no means an unreal one, since it is precisely what might have happened under Article 10 of the Agreement, which lays down, as is common in treaties of this type, that disputes between the Contracting Parties concerning its interpretation or application, if not settled amicably, shall be submitted to binding arbitration. That the particular issue under consideration by the present Tribunal was capable, in the alternative, of being submitted to inter-State arbitration in this way is implicit in the joint decision by the present Parties to ask the Tribunal to determine it as a preliminary issue precisely because it represents a general issue of the interpretation of the Agreement which is independent of the facts of particular cases. Had the matter gone to inter-State arbitration (or indeed to the International Court of Justice) it is surely inconceivable that the Netherlands would have wished to adopt a position in the litigation materially different from its formal public position at the time of ratification; or (in the unlikely contrary event) that the court or tribunal would have permitted it to do so. As the Latin maxim has it: *nemo audietur venire contra factum suum* .

138. It may be objected against the reasoning above that the whole Treaty Interpretation Issue might never have entered anyone's mind in the first place had it not been for the Dutch Explanatory Notes, in other words that it is not admissible to introduce the Notes in order to give rise to an ambiguity. But the Tribunal is unable to follow so counterfactual a line of argument. The plain fact is that the Explanatory Notes were put in argument before it, with a provenance and a relevance that cannot be gainsaid. Whether the ambiguity in the text would otherwise have occurred to either side in this dispute, or to the Counsel representing it, is a hypothetical issue on which it would not be proper for a tribunal to speculate. Suffice it to say

[186] The Tribunal recalls also that, pursuant to the fundamental principle *pacta sunt servanda*, as enunciated in Article 26 of the Vienna Convention, treaties must also be performed by the parties to them in good faith (*see* in addition the third paragraph in the Convention's Preamble).

that the Tribunal, having been confronted with the treaty text and by the highly professional argument put before it on both sides, has registered the ambiguity in its "ordinary meaning" and is bound to note that ambiguities exist *a fortiori*; their existence does not depend on the skill of counsel in arguing how they should be resolved.

139. A further question may be raised whether the grounds the Tribunal has set out above for its preferred interpretation, depending as they do on the actions of the Dutch Government, which by definition is not itself a party to this arbitration, should properly be regarded as opposable to the Claimant. As to this, the Tribunal believes the answer to be clear: a treaty can have only one authentic meaning, which cannot on grounds of basic principle vary according to who are the parties to a particular dispute. As the Tribunal has already pointed out, the present question of interpretation could have arisen in inter-State proceedings under Article 10. If it had done so, it would have attracted the consequence that the decision of the tribunal "shall be final and binding on both Contracting Parties".[187] That cannot possibly mean that the arbitral decision would be binding on the States only, but without effect on an investor claiming derivatively through the rights procured for it by one of those States.

140. Would this result, however, be unfair on an investor? The question was not raised in direct terms by the Parties in argument, but the Tribunal thought right to give it some consideration – though always subject to the primary proposition stated in paragraph 139 above that a treaty can have only one authentic meaning – in case the circumstances suggested some need to mitigate the consequences. In deciding that there is neither need nor justification for not following the natural consequences of the interpretative result, the Tribunal was influenced principally by two factors. First among them is the fact that the Dutch Explanatory Notes are of recent date (1992), and are a formal public document, preserved on the Parliamentary record,[188] and thus accessible by any Dutch investor conducting due diligence into the status of his proposed investment. The second is the point already made in paragraph 103 above, that this is a case of a structured investment, structured, that is, to secure certain advantages. It stands to reason, as the Tribunal sees the matter, that the burden then rests on the investor to make sure that the structure chosen achieves his intended result,[189] and to undertake all necessary precautions to that end.

141. The Claimant's argument placed much reliance, understandably, on two separate but (in its view) parallel items of treaty practice, namely the BIT concluded in 1989 between the

---

[187] Article 10, paragraph 5 of the Agreement.

[188] *See* fn. 7 above.

[189] As appears indeed to have been done in the recent case *Eureko v. Slovak Republic*, PCA Case No. 2008-13, also concerning the health insurance sector.

Netherlands and the USSR, and the BITs concluded between Czechoslovakia and Greece, Norway, and Denmark in the period between March and June, 1991, which were submitted for ratification in Czechoslovakia as a group together with the Agreement under consideration in the present Arbitration.

142. The significance of the Netherlands-USSR BIT, the Claimant says, is that it contains the identical phrase as in the Czechoslovak-Netherlands Agreement, "directly or through an investor of a third State", which appears in the same position in the text, and it too was accompanied by explanatory notes on submission to the Dutch Parliament, but that the explanation given in those notes, far from being in the same terms, states the contrary, namely that the BIT was intended to cover investors already established in the Soviet Union.

143. In considering this argument, the Tribunal begins by observing that it is not its task to interpret the Netherlands-USSR BIT, nor has it been made aware that the question at issue in the present case has previously been raised and authoritatively decided under that Treaty. In the second place – and without pronouncing on whether and to what extent it is proper under the Vienna Convention to rely on parallel treaty practice of this kind – the Tribunal does not believe that the terms of the Netherlands-USSR explanatory notes can bear the weight the Claimant seeks to place on them. When the notes make mention of "investments of a Dutch investor already established in the Soviet Union", they say nothing at all about the nature of those investments, and therefore about the specific subsidiary/sub-subsidiary question presently at issue. The notes are perfectly capable of being understood as referring to foreign companies operating, for example, within a joint venture. On the mere wording of the notes, moreover, it seems equally probable that they may have been referring primarily to the temporal issue of the application of the BIT, and thus of protection under it, to investments that already existed at the time of its conclusion. The Tribunal is therefore unable to derive from the document anything of value for present purposes.

144. In the case of the Czechoslovak BITs, the Claimant makes a rather different argument, namely that the global submission of all four BITs for ratification in Czechoslovakia under the concise formula that they "do not materially differ", even though three of them do not contain any limitation on indirect investment, undermines the Respondent's attempt to attribute substantive and material effect to the key phrase. As to that, the Tribunal can only say that the submission document is far too terse and general in its terms to allow the Tribunal to extract from it any precise meaning on the particular question before it, as opposed to a general statement as to the overall similarities between all four Treaties, which are indeed undeniable. The Tribunal therefore finds itself unable to weigh this document in the scales so as to

countervail against the precise, explicit and directly pertinent remarks in the Dutch Explanatory Notes.

145. The Tribunal accordingly finds that the terms of the Agreement are so to be understood and applied that they do not protect investments made by a Slovak corporate entity (in this case Dôvera Holding) in other Slovak corporate entities (namely Dôvera and Apollo), from which it follows that HICEE's interests in the businesses of Dôvera and Apollo cannot be considered to be "investments of investors of the other Contracting Party" entitled to the protection conferred by the Agreement, including the right to bring arbitral proceedings under Article 8.

146. There was, however, a second limb to the Claimant's case on the interpretation and application of the Agreement, as summarized under the second sub-issue set out at paragraph 108 above, namely, is it open to HICEE to frame the losses it claims to have sustained via its holdings in Dôvera and Apollo in some other way that would bring them within the protection of the Agreement? As the matter was pithily put by Counsel at the oral Hearing:

> [B]ecause claimant's investment in Dôvera Holding is covered, all of claimant's claims can proceed and be pursued, whether or not Dôvera and Apollo are directly defined as "investments". This is because claimant's claims are predicated on acts by Slovakia that have injured Dôvera Holding, such as the prohibition on its receipt of profits, such as the restraint on the operations of Dôvera and Apollo. Investment treaty jurisprudence is clear to the effect that a shareholder such as HICEE has standing to pursue claims for damage to a company in which it holds shares, including damage inflicted upon the assets of such a company.[190]

The Respondent's answer (also through the mouth of Counsel at the oral Hearing) was that it was not possible under the Agreement as it stands "simply to claim the same profits down the chain by bringing the claim in the name of the Dutch company. Rather, you have to alter your investment structure. You have to incorporate a new company directly from the Netherlands".[191] The argument, as the Tribunal understands it, was simply that, if the treaty negotiators specifically wished to exclude a subsidiary/sub-subsidiary structure (as the Dutch Explanatory Notes say), then it strains the reasonable bounds of interpretation to conclude that they nevertheless intended to allow this wolf to come within the scope of the Agreement so long as it was in sheep's clothing.

147. The Tribunal reaches the same conclusion as the Respondent, but by a different route. As the Tribunal has interpreted the Agreement, it plainly admits a company like Dôvera Holding as an investment in its own right. The consequence is that a claim under the Agreement would

---

[190] Hearing Tr., 21 July 2010, at 72:19-73:6.

[191] Hearing Tr., 21 July 2010, at 180:25-181:5.

lie (in appropriate circumstances) in respect of losses sustained by Dôvera Holding. But it is equally plain that the losses would have to have been sustained as a result of treatment of Dôvera Holding by the Respondent State or its agencies that is found to be in breach of the guarantees which the Agreement establishes. Once the subsidiary/sub-subsidiary structure is found to lie outside the Agreement's field of protection, it becomes obvious that treatment meted out to Dôvera Holding's own investments through one of its local subsidiaries does not meet this requirement, whether or not treatment of that kind might otherwise fall foul of the substantive standards under the Agreement. The health insurance business of the sub-subsidiaries, Dôvera and Apollo, is covered by national law, and not by the terms of the Agreement. It is not enough for the Claimant to say that HICEE suffered a loss via the effect of national law on that business, unless the loss followed in some direct sense from a treaty breach. When the Claimant says that "investment treaty jurisprudence" gives a shareholder standing to pursue claims for damage to the assets of a company in which it holds shares, that is not a proposition that can be upheld by the Tribunal in so sweeping a form, given the default position in international law that the corporate form is recognized as legally distinct from the shareholders, and confers on the corporate entity the capacity to assert claims for damage suffered to it or its property.[192] The true position, as the Tribunal understands it, is that the admissibility of shareholder claims depends upon the provisions of the investment protection treaty in question, and that investment protection treaties very frequently make provision to allow for shareholder claims, either explicitly or by necessary implication.[193] The position, in other words, is controlled by the treaty,[194] and the Tribunal can see no justification for calling into play a supposed proposition of general law in order to change or override what the treaty itself provides.

---

[192] *Barcelona Traction Light and Power Company, Limited,* Judgment, I.C.J. Reports 1970, p. 3 (**Exhibit CLA-84**). *See also Rompetrol v. Romania,* ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008 (**Exhibits CLA-115 and RLA-28**). *Now see further* the Judgment of the International Court of Justice of 30 November 2010 (Merits) in the *Case Concerning Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), delivered after the completion of the oral Hearing in the present Arbitration (the Court's Judgment of 2007 on Preliminary Objections had been the subject of submissions by the Parties in their written pleadings, **Exhibits CLA-83 and RLA-25**).

[193] As indeed treaties of this kind sometimes make express provision for a local subsidiary to be treated on the same footing as if it were a foreign investor, on the basis of foreign control (cf. Article 25(2)(b) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"), done at Washington on 18 March 1965, entered into force on 14 October 1966, 575 *U.N.T.S.* 159).

[194] Professor Schreuer's report would appear to come to a similar view. *See* Schreuer Legal Opinion, paras. 23-24 (**Exhibit CER-3**).

D. The Most-Favoured-Nation Clause

148. The Tribunal does not, accordingly, find anything in the second of the two sub-issues that together constitute "the Treaty Interpretation Issue" which would lead it to alter its finding in paragraph 145 above. That does not, however, finally dispose of the matter, since the Claimant has put before the Tribunal a further argument relating to the interpretation of the Agreement and its application, deriving from the most-favoured-nation clause in its Article 3, which (in relevant part) reads as follows:

> *Article 3*
>
> 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 State, whichever is more favourable to the investor concerned.
>
> […]
>
> 5. If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.

The comparison with the treatment of "its own investors" in Article 3(2) self-evidently not being applicable here, the Claimant says that the reference to the security and protection accorded to investors of any third State entitles it to invoke the provisions of bilateral investment treaties concluded by Slovakia with (or in force between Slovakia and) other States; likewise for the reference to existing or future obligations under international law pursuant to article 3(5). Therefore, says the Claimant, for the event that the Tribunal does not share its view as to the correct interpretation of the present Agreement, it has in reserve an entitlement to invoke the several BITs which do not include any restriction comparable to the key phrase, "invested either directly or through an investor of a third State".

149. With all respect to the elegance with which this argument was deployed, the Tribunal does not find much merit in it. The Tribunal endorses the approach adopted by other investment tribunals that each most-favoured-nation clause is to be interpreted according to its own terms. It would therefore be a fallacy to suppose that there existed some general concept that could be called into play to determine the scope of most-favoured-nation treatment in particular cases. The clear purpose of Article 3(2), as of Article 3(5), is to broaden the scope of the substantive protection granted to the eligible investments of eligible investors; it cannot

legitimately be used to broaden the definition of the investors or the investments themselves.[195] The argument thus falls of its own weight.

E. Conclusion

150. The Tribunal accordingly arrives at the overall conclusion that the investments in respect of which the Claimant seeks to claim in the present Arbitration are not covered by the terms of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic of 29 April 1991, including the right to request arbitration under Article 8 thereof, and renders the present Award to that effect.

VII. COSTS

151. It remains for the Tribunal to decide whether it wishes to make any order for costs, pursuant to Article 40 of the 1976 UNCITRAL Rules, which reads as follows:

> *Article 40*
>
> 1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
>
> 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable. […]

The criterion to be applied by the Tribunal is accordingly that of reasonableness, taking into account the circumstances of the case. Having considered those circumstances with care, the Tribunal finds that the issues raised in the present phase of this arbitration were difficult, and in some respects novel; that the Parties were animated by a sense of practicality and economy in agreeing to hive off the Treaty Interpretation Issue for preliminary decision, and that their sound judgement in that respect has been vindicated by events; that the Parties are particularly to be commended for their cooperation with the Tribunal and for the conciseness and precision of their written and oral arguments. That being so, the Tribunal sees no justification for the blanket application of a costs rule in favour of the successful Party, as in the first sentence of Article 40(1). Exercising its discretion under the Rule, it decides instead

---

[195] *See Société Générale v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction of 19 September 2008, at paras. 40-41 (discussed by the Parties during the Hearing, Hearing Tr., 20 July 2010, at 99:11-101:4 and Hearing Tr., 21 July 2010, at 62:18-24). *See also Austrian Airlines v. Slovak Republic*, UNCITRAL, Final Award of 20 October 2009, para. 135 (**Exhibit RLA-31**); *Renta 4 and others v. Russia*, SCC Case No. 24/2007, Award on Preliminary Objections of 20 March 2009, para. 119 (**Exhibit RLA-29**).

that the Claimant will meet 6/10 of the costs of the arbitration, which the Tribunal hereby certifies as amounting to € 461,686.44,[196] but that each Party will bear the costs of the preparation and presentation of its own case.

VIII. DISPOSITIF

152. Having deliberated, the Tribunal decides that:

a) The terms of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic of 29 April 1991 are so to be understood and applied that they do not protect investments made by a Slovak corporate entity (Dôvera Holding) in other Slovak corporate entities (Dôvera and Apollo);

b) HICEE's interests in the businesses of Dôvera and Apollo cannot be considered to be "investments of investors of the other Contracting Party" entitled to the protection conferred by the Agreement, including the right to bring arbitral proceedings under Article 8;

c) Consequently, the Tribunal does not have jurisdiction over the dispute submitted to it in this arbitration;

d) The Claimant shall bear 6/10, and the Respondent shall bear 4/10 of the costs of the arbitration pursuant to Article 38(a), (b), and (c) of the UNCITRAL Rules, which the Tribunal hereby certifies as amounting to € 461,686.44; consequently, HICEE shall pay the amount of € 46,168.64 to the Slovak Republic;

e) Each Party shall bear its own costs of legal representation and assistance.

[196] The costs of the arbitration comprise the fees of the Arbitral Tribunal (Sir Franklin Berman: € 143,320; Judge Charles Brower: € 161,550; Judge Peter Tomka: € 84,625), the fees of the Registry (€ 44,465), and the expenses of the Tribunal and costs of hearings and meetings (€ 27,726.44).

Done at the place of arbitration, London, United Kingdom on 23 May 2011:

The Honorable Judge
Charles N. Brower

(Signed subject to the
attached Dissenting Opinion)

H.E. Judge Peter Tomka

Sir Franklin Berman KCMG QC
Presiding Arbitrator

DISSENTING OPINION OF JUDGE CHARLES N. BROWER

Table of Contents

I. INTRODUCTION

1. I respectfully dissent from the Award because it results from misapplication of the Vienna Convention on the Law of Treaties ("VCLT" or "Convention").[1] The Award does not follow faithfully the text of the Convention and assigns outcome-determinative significance to a single document of dubious qualification, if any, as an interpretive aid under the VCLT. Moreover, I cannot agree that the proper disposition of this case is to dismiss the claim without providing Claimant an opportunity to amend its Notice of Arbitration. It is perhaps ironic that this Tribunal, comprised of three former legal advisers to their respective governments,[2] is unable to agree on the proper application of the VCLT's rules of treaty interpretation. The reasons for my dissent, however, are compelling and stated in greater detail below with the utmost respect towards my esteemed Tribunal colleagues.

II. THE RELEVANT BIT PROVISION AND THE PARTIES' DISPUTE

2. The Article of the Netherlands-Slovakia BIT ("BIT" or "Treaty"), which gives rise to this dispute, is as follows (the particular words in dispute are italicized):

> **Article 1**
>
> For the purposes of the present Agreement:
>
> **(a)** the term 'investments' shall comprise every kind of asset invested *either directly or through an investor of a third State* and more particularly, though not exclusively:
>
> i. movable and immovable property and all related property rights;
>
> ii. shares, bonds and other kinds of interests in companies and joint ventures, as well as rights derived therefrom;
>
> iii. title to money and other assets and to any performance having an economic value;

---

[1] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

[2] Sir Franklin Berman KCMG QC served as Legal Adviser to the British Foreign and Commonwealth Office between 1991 and 1999; Judge Peter Tomka served as Legal Adviser and Director of the International Law Department and Director-General for International and Consular Affairs of the Slovak Foreign Ministry between 1997 and 1999; the author served in the Office of the Legal Adviser of the United States Department of State between 1969 and 1973, culminating in extended service as Acting Legal Adviser.

iv. rights in the field of intellectual property, also including technical processes, goodwill and know-how;

v. concessions conferred by law or under contract, including concessions to prospect, explore, extract and win natural resources.

(b) the term 'investors' shall comprise:

i. natural persons having the nationality of one of the Contracting Parties in accordance with its law;

ii. legal persons constituted under the law of one of the Contracting Parties.

(c) the term 'territory' also includes the maritime areas adjacent to the coast of the State concerned, to the extent to which that State may exercise sovereign rights or jurisdiction in those areas according to international law.

3. Respondent claims that the Tribunal lacks jurisdiction because the investment of HICEE, a Dutch corporation, in Slovakia is not made "directly" within the meaning of Article 1(a), in that it is made in the form of controlled Slovak subsidiaries of its wholly-owned Slovak holding company.[3]

4. I am in agreement with the Award's description of the Parties' respective formulations of the issues and of the Award's description of the questions to be addressed by the Tribunal.[4]

III. APPLICATION OF THE VCLT TO THE DISPUTE

A. VCLT Article 31

5. Under Article 31 of the Convention, the starting point of the inquiry is the "ordinary meaning" of the terms of the Treaty "in their context and in the light of . . . [the Treaty's] object and purpose." In other words, one must look first to the plain language while ensuring that the meaning derived from the Treaty's terms is consistent with the rest of the

[3] It is agreed that HICEE's investment was not made "through an investor of a third State." For a more thorough presentation of the underlying facts and the Parties' arguments, *see* Award ¶¶ 1-103.

[4] Award ¶ 112.

Treaty's text, including the preamble and annexes, as well as the specific materials listed under Article 31(2)(a)-(b) and 31(3)(a)-(c).[5]

6. I agree with the Award's finding that, viewed in isolation, the word "directly" is ambiguous; it "is capable, as a matter of ordinary meaning, of bearing two meanings: a directional meaning, in which it refers to the investment's origin, the place from which it comes; or a relational meaning, in which it refers to the connection between the investor and the investment, i.e. whether any intermediary intervenes between the one and the other."[6]

7. Contrary to the Award, however, I find that "directly" ceases to be ambiguous when it is considered within its immediate and natural context—the text in which it is embedded. Considered within the broader sentence, and specifically the "either . . . or" construction, the ordinary meaning of "directly" is that it is the opposite of "through an investor of a third State."[7]

---

[5] *See* International Law Commission, Draft Articles on the Law of Treaties (1966), Arts. 27-28 (from which VCLT Articles 31 and 32 emerged virtually unchanged), cmt.8 ("Once it is established . . . that the starting point of interpretation is the meaning of the text, logic indicates the 'ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' should be the first element to be mentioned. Similarly, logic suggests that the elements comprised in the 'context' should be the next to be mentioned since they form part of or are intimately related to the text. Again, it is only logic which suggests that . . . a subsequent agreement regarding the interpretation, subsequent practice establishing the understanding of the parties regarding the interpretation and relevant rules of international law applicable in relations between the parties – should follow and not precede the elements in the previous paragraphs.")

[6] Award ¶ 120.

[7] The textual analysis focuses on the English text, since the BIT at issue provides that it was done "in duplicate … in the Dutch, Czech and English languages, the three texts being equally authentic. In case of difference of interpretation the English text will prevail." BIT at 8.

The use of "either . . . or" here denotes the existence of two alternatives.[8] There is no grammatical rule or interpretive canon requiring us to assign primacy to one of the two alternatives based on the order in which it appears in the sentence. Thus, as the Award also notes,[9] one may interpret the word "directly" based on Article 1(a)'s alternative, namely "through an investor of a third State." This produces the obvious inference that investing "directly" simply means investing without the involvement of a third State, without further qualification.

8. The Award at n.162 finds Professor Schreuer's Opinion supporting this construction "not . . . convincing, as it begs the question at issue by adopting as its starting hypothesis that the intention of the Contracting Parties was to cover the whole universe of possible investments." That hypothesis, however, is necessarily implicit in the fact that the States Parties in Article 1 of their BIT have agreed that "[f]or purposes of this Agreement … (a) The term 'investments' shall comprise every kind of asset invested either directly or through an investor of a third State." It follows that the BIT's provision in Article 8 that "[a]ll disputes … concerning an investment" shall be resolved in accordance with that Article's terms is limited to assets invested either "directly" or "through an investor of a third State." In context, the "whole universe of possible investments" is by definition encompassed in "either directly or through an

---

[8] For example, according to the Cambridge Dictionary, "either . . . or" describes "a situation in which there is a choice between two different plans of action, but both together are not possible." Cambridge Dictionary, *available at* <http://dictionary.cambridge.org/dictionary/british/either-or>. Similarly, the Merriam-Webster dictionary, in discussing the usage of "either" in a conjunctive manner states that it is "used as a conjunction with two or more coordinate words, phrases, or clauses, joined usually by *or* to indicate that what immediately follows is the first of two or more alternatives." Merriam Webster, *available at* <http://www merriam-webster.com/dictionary/either> (emphasis in original). Similarly, in a usage note on "either . . . or" the Free Online Dictionary notes that "[i]n *either . . . or* constructions, the two conjunctions should be followed by parallel elements." Free Online Dictionary, *available at* < http://www.thefreedictionary.com/either> (emphasis in original); *see also SGS v. Philippines*, ICSID Case No. ARB/02/6, Declaration of Professor Antonio Crivellaro (Aug. 29, 2004) ¶ 3 (emphasizing that "the words 'either … or …' … are, in my understanding, indicative of the host State's intention to offer an additional … option….") (emphasis omitted).

[9] Award ¶ 120.

investor of a third State." Generally, no treaty covers more than its terms provide; every treaty necessarily covers all that its terms provide.[10]

9. As regards "object and purpose," I demur to the Award's conclusion that "the wording chosen for the Preamble by the Parties is studiously neutral".[11] The BIT Preamble[12] reads in its entirety as follows:

> The Government of the Kingdom of the Netherlands
>
> and
>
> the Government of the Czech and Slovak Federal Republic,
>
> (hereinafter referred to as "the Contracting Parties")
>
> Desiring to extend and intensify the economic relations between them particularly with respect to investments by the investors of one Contracting Party in the territory of the other Contracting Party,
>
> Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment is desirable,
>
> Taking note of the Final Act of the Conference on Security and Cooperation in Europe, signed on August, 1st 1975 in Helsinki,
>
> Have agreed as follows:

---

[10] The Award's further statement at n.164 thus is incorrect: "To say that an investment may be made 'either' in way A 'or' in way B does not of itself foreclose its being made in some other manner, only that it will not enjoy the same status if it is – which is precisely the point at issue here." An investment "made in some other manner" than "way A" or "way B," e.g., way C, being excluded from coverage of the BIT, obviously cannot be encompassed by its Article 1(a). Conversely, Article 1(a) necessarily does *cover* "the whole universe of possible investments" enjoying the benefits of the BIT.

[11] Award ¶ 120.

[12] A treaty's preamble is explicitly contemplated by VCLT Article 31(2) as evidence of that treaty's "object and purpose," and is treated accordingly by investor-State tribunals. *See, e.g.*, *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. AA280, Award (Nov. 26, 2009) ¶ 181 (interpreting the term "investments" in the applicable BIT by referring to the BIT's "object and purpose" as derived from the BIT's preamble), *available at* http://ita.law.uvic.ca/documents/Romak-UzbekistanAward26November2009.pdf; *Siemens AG v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2004) ¶ 81 (same), *available at* http://ita.law.uvic.ca/documents/SiemensJurisdiction-English-3August2004.pdf.

Interpreting "directly" in a manner that covers the investment by a national of one of the Contracting Parties in the other Contracting Party in the form of sub-subsidiaries established in the latter Contracting Party maximizes the possible structures of "investments by . . . investors" protected by the BIT, thereby supporting and encouraging investment. Such encouragement is consistent with the policy aims of the Treaty to "extend and intensify the economic relations ... particularly with respect to investments…."

10. Moreover, the Award's interpretation of "either directly or through an investor of a third State" leads to results that are, at the very least, incongruous. The inquiry under VCLT Article 31 contemplates an investigation into a given interpretation's legal effects, the logical consistency of which constitutes a "reality check" on the "ordinary meaning" analysis.[13] Where alternative "ordinary" interpretations in application of VCLT Article 31 yield real-world results that are as to one perfectly sensible and as to the other patently anomalous or incongruous, or even absurd, the proper result would be to exclude the latter in favor of the former.

11. The Award eschews this approach by noting that "what the Vienna Convention has expressly in mind in Article 32 is the avoidance of a result that would be 'manifestly' absurd or unreasonable, which is a rather different matter."[14] Thus, the Award appears to conclude that the incongruous, anomalous, or even absurd consequences of a possible textual interpretation cannot have interpretive effect when applying Article 31.

12. There are two problems with this argument. First, the Convention provides, only for purposes of Article 32, that "the interpretation according to article 31" be "manifestly absurd

---

[13] The inquiry into potentially absurd outcomes correctly has been adopted as an element of the "ordinary meaning" inquiry. *Asian Agricultural Prods. Ltd v. Sri Lanka*, Final Award, ICSID Case No. ARB/87/3 (June 27, 1990) ¶ 40 (adopting, as one of "the rules that should guide the Tribunal in adjudicating the interpretation issues in the present arbitration" under VCLT Art. 31 that "When a deed is worded in clear and precise terms, *when its meaning is evident and leads to no absurd conclusion*, there can be no reason for refusing to admit the meaning which such deed naturally presents.") (emphasis added) (quotations and citations omitted), *available at* www.investmentclaims.com; *see also American Mfg. & Trading Co. v. Zaire*, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997) ¶ 5.36 (diagnosing a syntactical problem, stemming from a typographical error, that yielded two competing interpretations, and rejecting one of them outright because it led to "an absurd result and an unacceptable fact"), *available at* http://ita.law.uvic.ca/documents/AmericanManufacturing.pdf; *R. v. City of London Court Judge* [1892] 1 QB 273 (Lord Esher) ("If the words of an Act admit two interpretations, and if one interpretation leads to an absurdity, and the other does not, the Court will conclude the legislature did not intend the absurdity and adopt the other interpretation.").

[14] Award ¶ 123 (citations omitted).

or unreasonable". That provision does not address the question before us, nor does it purport to establish the exclusive manner in which an interpretation's untenable results are relevant to treaty interpretation under the VCLT. In Comment 6 to Articles 27 and 28 of the Draft Articles on the Law of Treaties, which were the precursors of VCLT Articles 31 and 32, the International Law Commission noted as follows:[15]

> When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.[16]

The International Law Commission thus has recognized that there is nothing "prejudicial", much less "severely" so,[17] about determining that the analysis under Article 31 alone can yield an appropriate interpretive result once it is determined that that result is consistent with both the meaning of the relevant provision and its harmonious "real-world" application.[18] The Award thus errs in concluding that there are "no available means under Article 31 to decide which of [two alternatives] is the appropriate one."[19]

13. Second, even if the Convention required that the absurdity of one of the two competing interpretations be "manifest" as a prerequisite to its rejection in the framework of an Article 31 analysis, the Award supplies no analysis of the relevant standard, except through a reference "by analogy" to the ICSID Convention.[20] The Award's reference is inapposite, since it

---

15 *See* n.20, *infra*.

16 *See* International Law Commission, Draft Articles on the Law of Treaties, Arts. 27 and 28, cmt.6.

17 *Cf.* Award ¶ 123 ("the Tribunal is unable, however, to adopt ... [the argument regarding the absurdity of Respondent's position] as its starting point, given the severely prejudicial effect that this would have....").

18 *See* n.13, *supra*.

19 Award ¶ 123.

20 Award n.169. The Award's reference to the ILC's Draft Articles on the Law of Treaties, Arts. 27 & 28, cmt.19 does not shed light on the question of what "manifest" means in the context of rejecting one of two competing interpretations on grounds of absurdity. The cited Comment merely makes the circular observation that the requirement of "manifest" absurdity is based at least in part on "the comparative rarity" of cases in which the ICJ has discarded the ordinary meaning due to its absurd results, which rarity "suggests that it [i.e. the ICJ] regards that exception as limited to cases where the absurd or unreasonable character of the 'ordinary' meaning is manifest."

concerns an entirely different treaty scheme that does not apply to this case. By contrast, the Iran-United States Claims Tribunal has held explicitly in *Amoco* that the interpretation of a treaty provision as protecting only against the expropriation of real property and not against expropriation of contract rights "would lead to 'a manifestly absurd or unreasonable result' within the meaning of Article 32, paragraph b of the Vienna Convention. It therefore cannot be admitted."[21]

14. The unjustifiable incongruities of the Award's alternative interpretation of the critical phrase in application of Article 31 that would bar investments via Slovak sub-subsidiaries ("Tribunal's Alternative Interpretation") are exemplified by Respondent's admission that HICEE would have had a claim "if Dôvera Holding [i.e., HICEE's Slovak holding company] directly owned and operated a pharmacy chain that had been the target of acts attributable to the Slovak Republic resulting in a loss"[22] in violation of the Treaty in issue. Respondent could not explain, however, why a pharmacy chain owned by Dôvera Holding would qualify as an "investment," while its Slovak corporate subsidiaries would not. In other words, Respondent's argument makes an implicit distinction between "indirectly" held shareholdings and certain other "indirectly" owned types of investment, although no such distinction is made in the Treaty. Under *Amoco*, this result alone is sufficient to reject the interpretation underlying it as "manifestly absurd" under the Vienna Convention.[23]

15. The chain of inexplicable outcomes of the Tribunal's Alternative Interpretation does not end there, however. That interpretation also results in the Treaty's covering "indirect" investments so long as they are structured through a third State, since the phrase "through an

---

[21] *Amoco Int'l Fin. Corp. v. Government of the Islamic Republic of Iran*, Award No. 310-56-3, 15 Iran-U.S. Cl. Trib. Rep. 189, Partial Award (July 14, 1987) ¶¶ 106-09.

[22] Respondent's Mem. ¶ 55. This (ultimately unfortunate) example may have been an attempt by Respondent to anticipate a reference by analogy to the facts in *Eastern Sugar B.V. v. Czech Republic*, Partial Award, SCC Case No. 088/2004 (Mar. 27, 2007), *available at* http://ita.law.uvic.ca/documents/EasternSugar.pdf. In that case, the foreign investor acquired Czech subsidiaries that in turn had ownership interests in Czech sugar factories. Subsequently those subsidiaries were consolidated into a single subsidiary. *Id.* ¶ 12. The *Eastern Sugar* tribunal's analysis did not mention any objection by the Czech Republic to the jurisdictional implications of that claimant's corporate structure.

[23] This difficulty with the Respondent's interpretation of Article 1(a), recognized by the Respondent itself, appears not to have troubled my Tribunal colleagues, as the Award does not address it.

investor of a third State" does not specify whether the investment should be made "directly" or "indirectly" in the sense of the Tribunal's Alternative Interpretation. Such an outcome finds no support in the text of the Treaty or in that document's associated purposes and policies, however, as correctly noted by Professor Schreuer.[24] The Award dismisses this point, stating only that "much of the argument . . . in Professor Schreuer's report about the asserted illogicality of allowing indirect investments via a third-country intermediary, simply becomes without object, since *the interpretation would exclude Slovak sub-subsidiaries by either route*."[25] This conclusion of the Award raises the following question, however, which the Award never answers: On what does it base this interpretation of "through an investor of a third State"? [26]

16. A further anomaly of the Tribunal's Alternative Interpretation arises from the Czechoslovak legal restrictions on ownership of property by foreigners that existed when the Treaty was negotiated, signed, ratified and entered into force. In this case, the provisions of Czechoslovak law are relevant to determining the plain meaning under VCLT Article 31 of several terms employed in the definition of "investments," such as "property rights," "title to money," and "concessions conferred by law," the legal import of which depends on the law of the host State. According to unrebutted testimony on Czechoslovak law,[27] foreigners were significantly restricted in purchasing, for example, land, buildings, and other immovable property from citizens of Czechoslovakia in 1988-1990, when the Treaty was being negotiated. In fact, in 1991-92, when the Treaty was signed and came into force, foreign investors were prohibited from purchasing immovable property from Czechoslovak citizens, with limited exceptions. These considerable legal obstacles essentially would have precluded a Dutch investor from owning "directly" (in the sense used by the Tribunal's Alternative Interpretation) several of the types of "investment" envisioned in Article 1(a) of the Treaty, resulting in a breach of the Treaty.

---

24 Expert Legal Opinion of Professor Christoph Schreuer (June 21, 2010) ¶¶ 11-12.

25 Award n.162.

26 I address the interpretive route that appears to have been adopted by the Award in ¶ III.A.19, *infra*.

27 S*ee* Expert Opinion on Czechoslovak Law of Dr. Petr Kotáb (June 19, 2010) ¶¶ 21-24.

17. During the Hearing, these issues were brought to the attention of Respondent,[28] which did not rebut them but contended instead that the principle of good faith espoused by the VCLT permits the Tribunal to avoid the "very literal, textual interpretation of 'directly'" and to adopt an "intermediate position" that would allow "directly" to permit indirect ownership with respect to certain kinds of property, such as land, but not shares in a sub-subsidiary.[29] This position lacks any foundation in the language of the BIT. The BIT encompasses several classes of assets, among which are shares, within the definition of "investment" – which definition also contains the "either directly or through an investor of a third State" language. It follows that, to the extent one invests under the "direct" mode of investing, whatever the term "directly" means would apply to all assets that qualify as "investments." An abstract reference to the principle of good faith without support in the text is not sufficient to challenge this interpretation. Good faith is a "blanket term" that embodies well-established principles such as *effet utile*, honesty, fairness and reasonableness in interpreting a treaty, protection of legitimate expectations, and avoidance of abuse of rights.[30] It cannot be used to argue that a word that characterizes "investment" (i.e., "directly") has a certain meaning when it concerns shares (in sub-subsidiaries) and a materially different one when it concerns other types of "indirectly" held assets that explicitly fall under the same definition.[31]

18. Implicitly recognizing at least some of the flaws in the interpretation it has adopted, the Award offers an alternative explanation as to why the BIT's provisions were incompatible with Czechoslovak law at the time of the BIT's signing. According to the Award, "BITs are, by definition, concluded for the future not just for the present, and ... there was nothing to prevent either side – i.e. the Dutch side quite as much as the Czechoslovak side – wanting to provide in advance for a more liberal economic regime that was on its way."[32] In other words, the States Parties to the BIT concluded a treaty that, immediately following its entry

---

28 *See, e.g.*, H'rg Tr. 79:24-80:3.

29 H'rg Tr. 77:19-78:6.

30 MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 425-26 (2009).

31 *See* n.23, *supra*.

32 Award ¶ 124.

into force, would be partially ineffective with respect to Czechoslovakia, in breach of its express terms, and would remain so pending that country generating the legislative impetus to enact relevant domestic reforms. According to the evidence before the Tribunal, however, the Czechoslovak Government did not offer specific guarantees as to the timing or the nature of such future reforms.[33] Even if such guarantees had been offered, one would have expected the scope of "investments" to be thoroughly debated, with careful recording of each State's positions; yet, as the Award observes, the *travaux preparatoires* of Article 1 of the BIT show only "that its text was settled at a very early stage."[34] In all, I do not believe the Award has met the point it set out to address.

19. The Award adopts the interpretation advanced by the Respondent, that "to qualify for protection under the Agreement, the investment in the recipient country must be that of the foreign investor itself, and not through any intermediary – unless the intermediary is in a third country."[35] The Award, however, does not present any rationale based on the application of Article 31 to support this conclusion. In arguing for this interpretation before the Tribunal, however, the Respondent argued that "directly" is the "primary rule" governing how investments can be made under the BIT, and "through an investor of a third State" is the "exception to the rule."[36] Indeed, presenting "through an investor of a third State" as a subset of "directly" is a way to introduce the "directness" requirement in investing "through an investor of a third State."[37] If the drafters of the BIT had wished to adopt the Award's position with respect to

---

33 Joint Letter from the Parties to the Tribunal (Sept. 3, 2010), at 2.

33 As noted *infra*, the Reasoned Statement of the Czechoslovak Ministry of Finance in connection with the BIT (C-179 at 006146) states that the BIT aims to promote a business environment that "should guarantee minimum intervention by the receiving country and the obstacles associated with the previously non-market based economy should be gradually eliminated."

34 Award ¶ 135.

35 Award ¶ 118 & n. 162.

36 *See* Tr. 27:12-16 ("So the definition in 1(a) establishes a primary rule, it permits directs [sic] invests [sic]. It then creates a single exception to that rule, which is to allow investments made through an investor in a third state.") The "primary rule"-"exception" argument does not appear explicitly in Respondent's written submission on the Treaty Interpretation Issue.

37 As pointed out above, however, the "either … or" construction connecting the permissible modes of investing necessarily precludes such a reading and thereby negates the Award's position.

permissible investment structures, they could easily have avoided "either … or" and connected "directly" and "through an investor of a third State" with phrases such as "including" or "including investments made". The fact that they did not suggests that they intended "directly" and "through an investor of a third State" as alternative and distinct ways of making an investment.

20. Similarly unpersuasive is the Award's argument regarding *Eureko B.V. v. Slovakia*, which, according to the Award, delivers a "fatal blow" to any contention that the Tribunal's Alternative Interpretation should be rejected.[38] That case, the Award notes, "displays a Dutch investor operating comfortably in the health insurance sector without resorting to any form of sub-subsidiary."[39] The issue before the Tribunal, however, is not whether or not a subsidiary-sub-subsidiary structure is the only way an investor can structure its investment, but whether it can be one of such ways. The Award merely assumes what it is attempting to prove. Actually, a more pertinent example of subsequent practice concerning permissible investment structures under the BIT is provided by *Eastern Sugar v. Czech Republic*, in which the Czech Republic did not raise a jurisdictional objection under the Czech Republic – Netherlands BIT, the text of which is identical to that of the Treaty at issue here, to the claimant's ownership of sugar factories – a form of property under either treaty – in the Czech Republic through multiple Czech subsidiaries that merged into one "almost wholly owned" Czech subsidiary.[40]

21. I submit that the above evidence as to the incongruous results of interpreting "directly" as excluding sub-subsidiaries from the BIT's coverage meets the "manifest absurdity" standard—which, as noted, the Award has not shown to be the standard for rejecting a possible interpretation resulting from application of Article 31 that entails such results in favor of an alternative interpretation under the same Article that does not. By contrast, the Tribunal in this case has been provided with no evidence, nor has the Award found, that the interpretation of "directly" as the opposite of "through an investor of a third State" leads to similarly illogical or impossible results.

---

38 Award ¶ 124.

39 *Id*.

40 S*ee* n.22, *supra*.

22. Consequently, I cannot accept the Award's conclusion that rejecting a theoretically possible interpretation on the basis of absurd outcomes resulting from application of Article 31 is nothing but a "strong temptation" to be resisted for the sake of preserving "any policy aims on which the [BIT's] Contracting Parties may have agreed".[41] Aside from the fact that the record does not reflect any "agreement" of the Contracting Parties other than the BIT,[42] an arbitral tribunal's preference for one interpretation over another necessarily entails a choice among different policies—which policies, however, must be reflected within the four corners of the BIT, and not in extraneous materials or other individual proclamations of intent.[43] As explained above, the time-honored rule of avoiding untenable or absurd outcomes not only is eminently sensible, but also is inherent in the analysis under Article 31, and the Contracting Parties have consented to its application as much as to any other "policy choice" under the BIT by vesting this Tribunal with jurisdiction to interpret the BIT. Therefore, in my view, the Award has failed to draw a principled distinction between the disposition of the case based on following the structure and provisions of Article 31 on the one hand, and its own reliance on Article 32 on the other.

23. In conclusion, the above analysis demonstrates that: i) the ordinary meaning of "directly" is the opposite of "through an investor of a third State;" and ii) that meaning is entirely consistent with the Treaty's "object and purpose" and "context"; while iii) the interpretation of "directly" as prohibitive of sub-subsidiaries incorporated in the host State is inconsistent with the plain language of the relevant BIT clause; and iv) leads to illogical outcomes in the application of the BIT's provisions as a unified investment protection scheme. The "ordinary meaning"

---

41 Award ¶ 124.

42 *See* ¶¶ III.B.34-III.B.35, *infra*.

43 *RosInvestCo v. Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction (Oct. 2007) ¶ 42 ("[T]he main focus of … [the Tribunal's] attention has to be not the policies which either one or the other Contracting Party brought to the negotiating table (and which might of course have been widely different from one another) but what they agreed on, as embodied in the terms of their treaty."), *available at* http://ita.law.uvic.ca/documents/RosInvestjurisdiction_decision_2007_10_001.pdf; *see also* the discussion under Article 32, *infra*.

analysis yields a clearly preferable interpretation of the BIT text – one that "makes sense" – rendering unnecessary any (discretionary) foray into supplementary means of interpretation.[44]

B. VCLT Article 32

24. Despite the above, assuming that the Tribunal chooses to have recourse to "supplementary means of interpretation" under Article 32, any of those means would have to "confirm the meaning resulting from the application of article 31" or cure persistent ambiguity or "manifest absurdity" in the interpretation under Article 31. None of the materials considered by the Award achieves those purposes.

25. I concur with the Award's holding that the Agreed Minutes[45] are useless on their face, and therefore should not be consulted under application of Article 32 of the Convention.[46] I am not similarly inclined, however, to follow the Award's ruling regarding the meaning and significance of the Explanatory Notes[47] and, conversely, the insignificance of the testimony of Mr. Nagapetiants, who participated in the negotiation of a clause in the Netherlands-USSR BIT identical to the one at issue here.

26. The Explanatory Notes deserve close scrutiny because they constitute the cornerstone of the Award's ruling. The relevant passage from the Notes states with respect to BIT Article 1:

> Article 1 provides a description of various terms used in the Agreement. The Agreement covers direct investments and investments made through a company in a third country. Normally, investment protection agreements also cover investments in the host country made by a Dutch company's subsidiary which is

---

44 *See* International Law Commission, Draft Articles on the Law of Treaties, cmt.18 (noting that under international tribunal jurisprudence "where the ordinary meaning of the words is clear and makes sense in the context, there is no occasion to have recourse to other means of interpretation" and citing cases).

45 Consultations on the interpretation and application of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech Republic, Agreed Minutes (June 17, 2002) (Exh. R-2).

46 *See* Award ¶ 129.

47 Explanatory Notes, Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (Exh. R-1).

> already established in the host country ("subsidiary"-"sub-subsidiary" structure). Czechoslovakia wishes to exclude the "sub-subsidiary" from the scope of this Agreement, because this is in fact a company created by a Czechoslovakian legal entity, and Czechoslovakia does not want to grant, in particular, transfer rights to such company. This restriction can be dealt with by incorporating a new company directly from the Netherlands. As the restriction is therefore not of great practical importance, the Dutch delegation has consented to it. Czechoslovakia's request to use the term "investor" rather than "national" was granted by the Netherlands.

27. Reviewing this language the Award holds that "[w]hen the passage in question says that Czechoslovakia wanted to exclude sub-subsidiaries 'from the scope of this Agreement,' it must be taken to mean what it says. And when the passage begins by talking (repeatedly) about 'investments', that must be taken to be its subject."[48] The Award then proceeds to dismiss Claimant's argument to the effect that the word "investor" in the last sentence of the relevant paragraph signifies the applicability of the exclusion from BIT coverage mentioned in the Notes only to "investors" and not "investments."[49]

28. The Award fails to acknowledge, however, a significant inconsistency that is far more difficult to explain. According to the Notes, the reason Czechoslovakia wanted "to exclude the 'sub-subsidiary' from the scope of this Agreement" was because "Czechoslovakia does not want to grant, in particular, transfer rights to such company." In other words, the Notes indicate that the Dutch delegation understood the Czechoslovak delegation to be pursuing a specific policy aim: the restriction of currency transfers made by the sub-subsidiary to its immediate parent company, also a Czechoslovak entity Aside from the obvious fact that such second-hand descriptions can be inherently unreliable,[50] ample evidence on the record renders this

---

[48] Award ¶ 132.

[49] *Id*.

[50] Investment tribunals' treatment of hearsay is not fully applicable to the case at hand, since as the Award observes the Notes "engage[] the honesty and good faith of the Dutch [Foreign] Minister" (Award ¶ 133), but remains instructive nonetheless. In this regard, *see EDF (Svcs.) Ltd v. Romania*, ICSID Case No. ARB/05/13, Award (Oct. 2, 2009) ¶ 224 (holding that "[w]hile hearsay evidence is admissible in international arbitration, confirmatory evidence is normally required…."), *available at* http://ita.law.uvic.ca/documents/EDFAwardandDissent.pdf. As noted *infra*, despite having access to the document archives of former Czechoslovakia and to officials involved in the negotiations of the BIT, Respondent has been

understanding of Czechoslovakia's intentions uncertain at best, and simply wrong at worst, thereby diminishing, if not destroying, any utility the Explanatory Notes might otherwise have for purposes of Article 32.

29. Specifically, despite whatever the Dutch drafter of the Notes perceived, it is difficult to see how the exclusion of sub-subsidiaries from BIT coverage actually achieves the putative Czechoslovak aim of restricting free transfers between such sub-subsidiaries and their parent companies. Article 4 of the BIT mandates the free transfer of "payments related to an investment."[51] Repatriation of funds earned on its nationals' investments is one of the principal guarantees for which a capital-exporting State negotiates. The only qualification imposed by Article 4 is that the funds in issue must be "related to an investment." The Parties agree that Dôvera Holding constitutes such an "investment." Neither Party has disputed that a subsidiary of Dôvera Holding (and therefore a sub-subsidiary of Claimant) could transmit dividends or loan repayments in local currency to Dôvera Holding. Once in Dôvera Holding, however, such dividends or loan payments certainly would qualify as funds "related to an investment," and could be freely transferred. It follows that the Czechoslovak concerns perceived by the Dutch drafter of the Explanatory Notes actually were not as valid as the drafter thought—indeed they were directly contradicted by Article 4 of the same BIT.

---

unable to provide any witness testimony or other evidence in support of the Explanatory Notes' content, leading the Tribunal to proclaim correctly that it "must treat the Explanatory Notes as having an essentially unilateral character, not a joint one." Award ¶ 136.

[51] Article 4 of the BIT provides:

> Each Contracting Party shall guarantee that payments related to an investment may be transferred. The transfers shall be made in a freely convertible currency, without undue restriction or delay. Such transfers include in particular though not exclusively:
>
> (a) profits, interests, dividends, royalties, fees and other current income;
>
> (b) funds necessary
>
> i. for the acquisition of raw or auxiliary materials, semi-fabricated or finished products, or
>
> ii. for the development of an investment or to replace capital assets in order to safeguard the continuity of an investment;
>
> (c) funds in repayment of loans;
>
> (d) earnings of natural persons;
>
> (e) the proceeds of sale or liquidation of the investment.

30. The validity of the alleged Czechoslovak concern regarding free transfers is further undermined by the Parties' additional document production of BIT *travaux preparatoires*, which the Parties conducted at the request of the Tribunal.[52] All those additional documents came from the Czech and Slovak archives, with the assurances of the Respondent, the Slovak Government, that further document searches would have been "unlikely to yield any additional *travaux* relevant to the Treaty Interpretation Issue."[53] Yet, the voluminous Czechoslovak *travaux* in the record do not contain a single reference to a Czechoslovak negotiating position in favor of limiting free transfers by restricting the definition of "investments."[54] Nor did Respondent produce a single witness, as it should have been able to do rather easily, to corroborate the content of the Explanatory Notes. In fact, both the *travaux* and the Explanatory Notes reflect no more than the aspiration of Czechoslovakia to eliminate the regulatory restrictions, including on free currency transfers, associated with its socialist past.[55]

31. In this connection, it is worth noting that the content of the Notes is in tension with the Award's justification for the incompatibilities between the protections of the BIT under the Award's interpretation of "directly" and the provisions of Czechoslovak law when the BIT was ratified and entered into force.[56] According to the Award, those incompatibilities, which would have prohibited several types of "investment" envisioned by the Treaty from actually taking place in Czechoslovak territory, would have been resolved at an undetermined future time, after Czechoslovakia would have enacted necessary domestic legal reforms.[57] If that

---

52 Procedural Order No. 2 (July 26, 2010).

53 Joint Letter from the Parties to the Tribunal (Sept. 3, 2010), at 2.

54 *Cf.* Award ¶ 135 ("[T]he collection of documents on the Czechoslovak side presented an apparently careful and comprehensive picture of the discussions between the two Governmental delegations, but revealed no detail at all about the negotiation of Article 1, other than that its text was settled at a very early stage.")

55 For example, the Reasoned Statement of the Czechoslovak Ministry of Finance in connection with the BIT (C-179 at 006146) states that the BIT aims to promote a business environment that "should guarantee minimum intervention by the receiving country and the obstacles associated with the previously non-market based economy *should be gradually eliminated*.") (emphasis added). According to the Notes, moreover, the Czechoslovak law imposing transfer restrictions would "expire when full convertibility is introduced, which the Czechoslovakians believe should occur within five years." Explanatory Notes at 4.

56 *See supra* ¶ III.A.16 ff.

57 Award ¶ 124.

scenario held true, however, the Explanatory Notes should have clarified at length to the Dutch Parliament the highly significant ensuing limitations associated with the BIT's implementation—especially since those limitations inevitably affected Dutch investors first and foremost. The Award does not justify the absence of such clarification from the Notes.

32. Furthermore, while the Award correctly acknowledges the importance of considering as supplementary means of interpretation only such means as are "*reliably instructive*,"[58] certain questions regarding the reliability of the Explanatory Notes persist:[59] i) "the copy of the Explanatory Notes that was tendered by the Respondent in evidence had been obtained from Governmental files in Prague, not The Hague";[60] ii) nothing in [the supplemental production made jointly by the Parties] has its origin in Dutch official sources";[61] iii) the Dutch authorities did not cooperate with the Parties' requests for documentation from the Dutch Government, referring the Parties to freely accessible online sources;[62] and iv) the information on the BIT on the website of the Dutch Ministry of Foreign Affairs includes the text of the BIT and the Agreed Minutes, but no Explanatory Notes, and not even a reference to any.[63]

---

58 Award ¶ 125 (emphasis added).

59 I recognize, of course, that Claimant has not contested the authenticity of the Notes, and that the evidence required to mount such a challenge is substantial. *See Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award (July 12, 2010) ¶¶ 130-31, *available at* http://ita.law.uvic.ca/documents/Fakes_v_Turkey_Award.pdf.

60 Award ¶ 135.

61 *Id*.

62 *See* Letter from the Claimant to the Tribunal dated July 30, 2010 at 1-2 ("In preparing for this case, Claimant's local counsel from Bratislava and [T]he Netherlands requested documents from the Slovak Republic, the Czech Republic, and The Netherlands concerning the negotiations and approval processes related to the Netherlands-Czechoslovakia bilateral investment treaty …. Claimant received hundreds of pages of documents from the Governments of the Slovak Republic and the Czech Republic. With respect to The Netherlands, the [G]overnment was considerably less forthcoming, while also encouraging Claimant to turn to public sources"); Letter from the Parties to the Tribunal dated Sept. 3, 2010 at 2 ("Respondent confirms that, in light of the breadth of Claimant's prior document requests to the Czech, Slovak, and Dutch authorities, it agrees with Claimant that any further such requests are unlikely to yield any additional *travaux* relevant to the Treaty Interpretation Issue.")

63 *See* Ministerie van Buitenlandse Zaken, Verdragenbank, *available at* http://www.minbuza.nl/nl/Producten_en_Diensten/Overige_diensten/Verdragen/Zoek_in_de_Verdragenbank (last visited Apr. 4, 2011). The Award improperly assumes the accessibility of the Notes (Award ¶ 144) without clarifying sufficiently the extent of due diligence the investor reasonably would be expected to conduct under the circumstances. In fact, while the BIT and the Agreed Minutes are readily found on the Dutch Foreign Ministry

33. Given the substantial difficulties encountered by both Claimant and Respondent in obtaining *any* documents from the Dutch Government regarding the BIT, and the lack of reference to the Notes on the Dutch Foreign Ministry website, where the BIT at issue is posted, I am unable to agree with the Award's conclusion that its main holding is not "unfair to the investor" because the Explanatory Notes would be "accessible by any Dutch investor conducting due diligence into the status of his proposed investment."[64] More importantly, even if the Notes indeed had been "accessible" by an investor that somehow would manage to divine their existence and unearth them, the ambiguous content of the Notes, over which the experienced counsel and arbitrators in this case have disagreed across hundreds of pages of complex argument, and the public availability of the *Eastern Sugar* award[65] could have led that diligent investor to interpret the Notes and by extension the BIT entirely differently than does the Award.

34. Despite the above issues, the Award considers the Notes as dispositive because "in the process of giving its consent to be bound by the Agreement the Government of The Netherlands expressed itself formally, publicly, and in writing (with reasons) as to what had been intended by the key phrase in Article 1; and that the Government of Slovakia, now appearing before this Tribunal, espouses the same meaning for the provision in question."[66] According to

---

website, and while the Agreed Minutes also appear in the online version of the Dutch Treaty Series (Tractatenblad—*see* https://zoek.officielebekendmakingen nl/zoeken/tractatenblad), the Notes apparently can be found only in the digital archives of the Dutch States-General, *available at* http://www.statengeneraaldigitaal nl (last visited Apr. 4, 2011). These facts were brought to the attention of the Tribunal as a whole well before the issuance of the Award. While I generally accept the *MTD* tribunal's holding that "it is the responsibility of the investor to assure itself that it is properly advised" with respect to "the technical and legal feasibility of a project", the investor in this case would have had to infer the existence of the Notes by reference to materials beyond the BIT and the Agreed Minutes—materials that neither the Award nor Respondent has identified. *MTD Equity Sdn. Bhd. and MTD Chile S.A.* v. Chile, ICSID Case No. ARB/01/7, Award (May 25, 2004) ¶ 164.

64 Award ¶ 144. The Award's further justification for this conclusion – "[a]s appears indeed to have been done in the recent case *Eureko B.V. v. Slovakia*, also concerning the health insurance sector [PCA Case No. 2008-13]" – is without foundation. The record of the present case includes no evidence whatsoever regarding Eureko B.V.'s knowledge, conclusions or motivations in entering Slovakia without using Slovak sub-subsidiaries. Award n.189. *See also* ¶ III.A.20, *supra*.

65 *See* ¶ III.A.20, *supra*.

66 Award ¶ 140.

the Award, "[t]hat this represents a concordance of views between the two Contracting Parties to the treaty obligation in question – albeit in an attenuated form – cannot be denied."[67]

35. It is not sufficient, however, to characterize as merely "attenuated" an asynchronous agreement between the two States Parties to the BIT as to the meaning of a certain term therein, when one of those Parties professes such agreement only in support of its position in a specific investment dispute arbitration. In this regard, the Award in *Telefónica* is instructive insofar as it rejected as "not evidenc[ing] an 'agreement', a meeting of their minds or intent" two States' unilateral and asynchronous (though identical) interpretation of their BIT in the context of each defending a claim asserted against it in arbitration brought by a national of the other State.[68]

36. Besides, while estoppel can apply to governments under international law,[69] governments participating in an investment arbitration brought by an alien, including this Respondent, have argued successfully against their own previous official positions with respect to their treaty obligations.[70] The broad ambit of what is accepted as good faith legal argument in an investment dispute arbitration does not allow an international court or tribunal to accept such

---

67 *Id*.

68 *Telefónica S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision on Objections to Jurisdiction (May 25, 2006) ¶ 113, *available at* http://ita.law.uvic.ca/documents/DecisiononJurisdictionTelefonica.pdf.

69 *See, e.g.*, *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand*), Judgment (Merits), 1962 ICJ Rep. 6 (June 15) (holding that Thailand could not profess ignorance or mistake with respect to changes in its boundary with Cambodia, when it knew or should have known of such changes), *available at* http://www.icj-cij.org/docket/files/45/4871.pdf; for a review of the estoppel jurisprudence of the International Court of Justice, *see Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Separate Opinion of Judge Ajibola, 1994 ICJ Rep. 51 (Feb. 3) ¶ 96 ff, *available at* http://www.icj-cij.org/docket/files/83/6905.pdf.

70 *See, e.g., Ceskoslovenska Obchodni Banka AS v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction (May 24, 1999) ¶¶ 44-47 (holding that although Slovakia had published in its Official Gazette a notice declaring that the BIT at issue had entered into force it was not estopped to deny in a subsequent investment dispute arbitration that that BIT had ever entered into force because claimant had not previously relied on the BIT being in force), *available at* http://ita.law.uvic.ca/documents/CSOB-Jurisdiction1999_000.pdf; *see also Telefónica S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision on Objections to Jurisdiction (May 25, 2006) ¶ 112 ("[T]he Tribunal is not convinced that positions on interpretation of a treaty provision, expressed by a Contracting State in its defensive brief filed in an international direct arbitration initiated against it by an investor of the other Contracting State, amounts to 'practice' of that State, as this requirement is understood in public international law, nor does it appear relevant in order to ascertain 'how the treaty has been interpreted in practice' by the parties thereto."), *available at* http://ita.law.uvic.ca/documents/DecisiononJurisdictionTelefonica.pdf.

argument as the "real intent" of a State Party to the BIT. For this reason Sir Gerald Fitzmaurice cautioned that

> the treaty was, after all, drafted precisely in order to give expression to the intentions of the parties, and must be presumed to do so. Accordingly, this intention is, *prima facie*, to be found in the text itself, and therefore the primary question is not what the parties intended by the text, but what the text itself means: whatever it clearly means on an ordinary and natural construction of its terms, such will be deemed to be what the parties intended. [71]

Therefore, it seems inappropriate for the Award to be holding that the "Explanatory Notes, given their terms and content, taken together with the viewpoint adopted in these proceedings by Slovakia, constitute valid supplementary material"[72] determinative of jurisdiction in this case.

37. Against this background, and given the discretion a government enjoys in adopting a good faith litigation position, the Award's attempt to confirm its view as to the legal import of the Explanatory Notes by alluding to a hypothetical State-to-State action between The Netherlands and Slovakia[73] is simply too speculative to be availing.

38. In addition, the Award sets up a straw man in attempting to counter the argument that without the Explanatory Notes no ambiguity would have existed.[74] That argument is not an invitation to speculate on what counsel or the Parties would have argued in the absence of the Notes. Rather, it heeds the warning that supplementary means of interpretation should not serve as the basis for reverse-engineering ambiguity.[75] Article 31 is meant to reflect the primary

---

71 Sir Gerald Fitzmaurice, *The Treaty and Procedure of the International Court of Justice: Treaty Interpretation and Other Treaty Points*, 33 Brit. Y.B. Int'l L. 203, 204-5 (1957) (*cited in The Czech Republic v. European Media Ventures SA*, 2007 EWHC 2851 (Comm) ¶ 16).

72 Award ¶ 140. As noted *supra*, despite having access to all relevant records and persons involved in the BIT negotiations, Respondent was unable to produce either a document or a witness to corroborate the content of the Explanatory Notes.

73 Award ¶ 141.

74 Award ¶ 142.

75 Sir Ian Sinclair warns that "[r]ecourse to the *travaux préparatoires* of a Treaty must always be undertaken with caution and prudence. As has been pointed out, the obscurity of a particular text will often find its origin in the *travaux préparatoires* themselves." SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES at 142.

criteria of interpretation within the structured and logical interpretive method set up by the Vienna Convention.[76] Consequently, it is perfectly acceptable to arrive at an appropriate interpretation under Article 31 and stop there.[77]

39. All in all, the Explanatory Notes remain unsupported by the BIT's *travaux preparatoires* and raise more questions than they answer, while they do not even attempt to rationalize in any way the illogical outcomes to which the Award's Alternative Interpretation leads. Consequently, the Explanatory Notes should not have been accorded weight for purposes of Article 32 of the Convention,[78] and most definitely should not have been adopted by the Award as determinative of the jurisdictional issue in this case.

Respondent evaded the question from the Tribunal as to why the Tribunal should accept a facially absurd textual interpretation, even if it is confirmed by secondary sources consulted under Article 32. *See* H'rg Tr. 89:21-90:8.

[76] As the International Law Commission noted with respect to Articles 27 and 28 of its Draft Articles on the Law of Treaties, which were adopted, virtually unchanged, as VCLT Articles 31 and 32, "the Commission's approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation. It formulated article 27 on that basis, making the ordinary meaning of the terms, the context of the treaty, its object and purpose, and the general rules of international law, together with authentic interpretations by the parties, *the primary criteria for interpreting a treaty. . . .* [while] article 28 *does not provide for alternative, autonomous, means of interpretation but only for means to aid an interpretation governed by the principles contained in article 27*." Draft Articles on the Law of Treaties, Arts. 27 and 28 cmts.18-19 (emphasis added).

[77] *See* Mahnoush H. Arsanjani and W. Michael Reisman, *Interpreting Treaties for the Benefit of Third Parties: The "*Salvors*'Doctrine" and the Use of Legislative History in Investment Treaties*, 104 (4) Am. J. Int'l L. 597, 601 (2010) ("Certainly it would be bad faith to pretend that a text is ambiguous or obscure in order to open the door to *travaux* and then to rummage about for something to support a litigating position, when the application of the canons of Article 31 would produce an unambiguous interpretation, which is neither absurd nor unreasonable.")

[78] An analogous situation developed before the High Court of Justice of England and Wales in an action by the Czech Republic to set aside a jurisdictional award rendered against it in an arbitration against a Belgian investor under the Belgium-Czechoslovakia BIT. Confronted with evidence adduced under VCLT Article 32, including the Belgian "Explanatory Statement" on the BIT sent to the Belgian Parliament, as well as material from the Czechoslovak archives, Mr. Justice Simon opined: "It seems to me that *the court or tribunal's task is to interpret the Treaty rather than to interpret the supplementary means of interpretation*. If the material relied on is unclear or equivocal it is unlikely to confirm or determine a meaning. In this case the contextual material throws no clear light on the proper interpretation of the disputed terms … according to the principles set out in Art.31 and Art.32 of the Vienna Convention." *The Czech Republic v. European Media Ventures SA*, 2007 EWHC 2851 (Comm) ¶ 31 (emphasis added), *available at* http://law.uvic.ca/CzechRepublicvEuropeanMedia rtf. The High Court went on to analyze the plain meaning of the treaty text independently of the supplemental materials, eventually dismissing the action. *Id*. ¶¶ 33-54. The Award attempts to deny that it is "interpret[ing] the supplementary means of interpretation" by stating that "it must be obvious that no tribunal could bring into play any of the interpretative materials mentioned in Articles 31 and 32 of the Vienna Convention without forming a view as to what the materials

40. Regarding the treaty practice of the two States Parties to the BIT, I agree that the witness testimony presented by the Parties largely was not useful, but I do not accept the Award's summary dismissal of the testimony and evidence regarding Article 1(b) of the Netherlands-USSR BIT[79] that contains in identical form the phrase at issue here, namely "directly or through an investor of a third State."[80] The Award's observation in this connection that it is "not its task to interpret the Netherlands-USSR BIT" is irrelevant, as evidence of a State's interpretation of a term in treaties with third States can be used as an interpretive aid.[81] Claimant here presented a more convincing argument for its interpretation of the Netherlands-USSR BIT, based on the Soviet State's Explanatory Notes as well as the unrebutted testimony of Mr. Nagapetiants, a former Soviet official who negotiated that treaty. According to Mr. Nagapetiants, this language was intended to cover both assets invested by an investor of one of the Parties to the treaty into the other Party without going through an entity in a third State ("directly"); and assets invested through an intermediary in a third State ("indirectly").[82] The

---

in question indicate." (Award ¶ 132). The extensive debate over the meaning of the Explanatory Notes in this case, however, which *inter alia* prompted additional extensive discovery by the Parties and occupies a substantial portion of the Award itself, constitutes precisely the kind of interpretation of supplementary materials against which Mr. Justice Simon cautioned.

79 Award ¶ 147.

80 Netherlands-USSR BIT, Art. 1(b) ("[T]he term 'investment' shall comprise every kind of assets [sic] to be invested either directly or through an investor of a third State, by investors of the one Contracting Party on the territory of the other Contracting Party in accordance with the laws of the last Contracting Party including in particular, though not exclusively….").

81 *See, e.g.*, *National Grid PLC v. Argentina*, UNCITRAL, Decision on Jurisdiction (June 20, 2006) ¶ 85, *available at* http://ita.law.uvic.ca/documents/NationalGrid-Jurisdiction-En.pdf; *Siemens AG v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2004) ¶ 105, *available at* http://ita.law.uvic.ca/documents/SiemensJurisdiction-English-3August2004.pdf; *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objection to Jurisdiction (Oct. 21, 2005) ¶¶ 289-314, *available at* http://ita.law.uvic.ca/documents/AguasdelTunari-jurisdiction-eng_000.pdf. In fact, tribunals have also considered as an interpretive aid the meaning of provisions in treaties not involving any of the States Parties to the treaty they are interpreting. *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction (Jan. 25, 2000) ¶ 52, *available at* http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English_001.pdf; *see, generally*, Christoph Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, 3(2) Transnat'l Disp. Mgmt. at 7 (2006); RICHARD K. GARDINER, TREATY INTERPRETATION 345 (2008).

82 *See* Witness Statement of Rafael Nagapetiants (June 4, 2010) ¶¶ 7-10; *see also see also* H'rg Tr. 113:6-24 ("[MR. PRICE:] Does the phrase 'directly or through an investor of a third state' speak or address the structure of an investment within the Soviet Union? [MR. NAGAPETIANTS:] The answer is no, because this phrase was oriented to show the way of the investments to be initially invested, and to give as wide protection and encouragement of

Award's failure to lend weight to this testimony stands in sharp contrast to the Award's credulous stance as to the meaning of the Explanatory Notes.

41. In the end, unlike the Award, I cannot find "a concordance of views between the two Contracting Parties" that "cannot be denied"[83] solely based on the Explanatory Notes and on Respondent's position taken many years later in the context of defending against the claims asserted in this arbitration. Having set forth its intention to consider "reliably instructive" supplementary means of interpretation, the Award took "the view that what was said in the Explanatory Notes called for some substantiation or corroboration, if possible."[84] It is significant that the Award required such "substantiation or corroboration" after having noted Slovakia's position in this arbitration with respect to those Notes. No such "substantiation or corroboration" was forthcoming – on a point, be it understood, on which the Respondent bore the burden of proof and on which this case has turned – resulting in the Award understatedly observing that "the resulting situation is less than satisfactory."[85] The Award then quite correctly concludes that on this "less than satisfactory" record the Explanatory Notes cannot qualify as either "the kind of agreement envisioned in Article 31(3)" of the VCLT, or any encompassed in Article 31(2)(a) or (b).[86] Nothing daunted, however, the Award – inexplicably to me – proceeds to rule that together with Respondent's stance in defending this arbitration the Notes reflect a "concordance of views," expressly conceded to be "attenuated,"[87] of The Netherlands and the Slovak Republic

---

these investments as possible. Actually, the role and the intention of the Soviet Union at that time was to include in this agreement as many investments as possible, not being done directly from the territory of the Netherlands, but also from other countries where the investor could be --investments could be done through the investor of a third state. But it does not specify any further structuring of these investments, because our position was: the moment investment has been done, it has the full protection, whatever the further investments/reinvestments and so forth are being made.")

83 Award ¶ 140.

84 Award ¶ 134.

85 Award ¶ 136.

86 Award ¶ 139.

87 Award ¶ 140.

that defeats our jurisdiction. I find this application of the VCLT to arrive at the Award's "preferred interpretation"[88] to be distinctly "less than satisfactory."

42. To summarize: i) The successful application of the interpretive method outlined in Article 31 yields an interpretation consistent with the text of the BIT, rendering unnecessary any recourse to Article 32 materials; ii) the Explanatory Notes do not constitute a reliable source regarding the definition of "investments"; and iii) the remaining "supplementary means of interpretation" under Article 32 support Claimant's interpretation of Article 1 of the BIT.

IV. MFN CLAUSE AND FURTHER PROCEEDINGS

43. I concur with the Award's finding that Article 3 of the BIT, the MFN clause, cannot be used to alter the scope of the definition of "investments" in the Treaty.[89] Nevertheless, I am not convinced that the appropriate disposition of the case is to dismiss it without affording Claimant the opportunity to amend its Notice of Arbitration in accordance with the Award's interpretation of the BIT.[90]

---

[88] Award ¶ 143.

[89] Award ¶ 153.

[90] In allowing claimant in that case to re-file its NAFTA claim, the tribunal in *Waste Management II* cited with approval the United States' position in *Methanex* that

> "if this Tribunal were to dismiss Methanex's claim on jurisdictional grounds solely for failure to submit waivers in accordance with Article 1121, Methanex would be free to refile its claim upon the submission of complying waivers. If that were to occur, these proceedings would take longer to conclude… Recognizing this, in the interests of efficiency, if Methanex finally supplies the United States with waivers that fully comply with the requirements of Article 1121, the United States consents in advance to the reconstitution of this Tribunal to be composed of its current members — on the condition that this Tribunal issue an order deeming the arbitration to be duly commenced only as of the date that Methanex submits the effective waivers."

Waste Mgmt. v. Mexico, ICSID Case No. ARB(AF)/00/3 ("*Waste Mgmt. II*"), Decision on Mexico's Preliminary Objection Concerning the Previous Proceedings (June 26, 2002) ¶ 28 (citing *Methanex Corp. v. United States of America*, Memorial on Jurisdiction and Admissibility of Respondent United States of America (Nov. 13, 2000) at 77), *available at* www.investmentclaims.com. Notably, in *Waste Management I*, the Tribunal dismissed the case for lack of jurisdiction because claimant had failed to file in the appropriate form a "waiver of the right to initiate or continue before any tribunal or court, dispute settlement proceedings with respect to the measures taken by the Respondent that are allegedly in breach of the NAFTA." *Waste Mgmt. v. Mexico*, ICSID Case No. ARB(AF)/98/2 ("*Waste Mgmt. I*"), Award (May 26, 2000), at 26, *available at*

V. CONCLUSION

44. For the reasons stated above, I respectfully dissent from the Award.

Charles N. Brower

---

http://naftaclaims.com/Disputes/Mexico/Waste/WasteFinalAwardDismissJurisdiction.pdf. In a spirited opinion, the dissenting arbitrator observed that, by dismissing the case for what was essentially a procedural defect that affected admissibility and not jurisdiction, the *Waste Management I* tribunal had "heaved the baby, enthusiastically, out with the bath-water". *Waste Mgmt. I*, Dissenting Opinion of Keith Highet (May 8, 2000) ¶ 63, *available at* http://naftaclaims.com/Disputes/Mexico/Waste/WasteDissentJurisdiction.pdf; *see also Ethyl Corp. v. Canada*, NAFTA/UNCITRAL, Award on Jurisdiction (June 24, 1998) ¶¶ 89-92 (holding that claimant's compliance with NAFTA's requirement to waive other remedies was a matter of admissibility, not jurisdiction); *id.* ¶¶ 94-95 (holding that claimant was permitted to amend its claim under the UNCITRAL Rules, and that no delay or prejudice to respondent was caused by such amendment), *available at* http://www.naftaclaims.com/Disputes/Canada/EthylCorp/EthylCorpAwardOnJurisdiction.pdf.