

DISSENTING OPINION OF JUDGE CHARLES N. BROWER

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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 Preamble¹² 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 See 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-subsiidiary.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-subsiidiaries) 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 préparatoires* 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 See 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 Minutes⁴⁵ 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 Notes⁴⁷ and, conversely, the insignificance of the testimony of Mr. Nagapetians, 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 préparatoires*, 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* award⁶⁵ 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 Slovakia⁷³ 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 préparatoires* 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* Mahnouch 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 BIT⁷⁹ 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 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. I"), 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>.