

In an UNCITRAL ad hoc arbitration between

Claimant

and

THE SLOVAK REPUBLIC

Respondent

SEPARATE OPINION OF CHARLES N. BROWER

1. I concur in the Final Award insofar as it denies jurisdiction under Article 8 of the Treaty, read in conjunction with Article 4(4) and (5) thereof (Paragraphs 96-108). I diverge from the Final Award (Paragraphs 117-140), however, in that I would have confirmed jurisdiction pursuant to Article 3 of the Treaty ("Treatment of Investments"), i.e., its MFN clause. In doing so, I wish to express my deep and sincere respect for the President of our Tribunal, as well as for my colleague co-arbitrator, with whom I reluctantly differ to the extent indicated. In my view, Article 3(1) of the Treaty broadens the Tribunal's jurisdiction by incorporating into the Treaty the broader consent given by Respondent to Danish investors under Article 9(2) of the Danish-Slovakian BIT, thus allowing Claimant to arbitrate, as stated by the Danish treaty, "any dispute between an investor of one Contracting Party and the other Contracting Party." I believe that this interpretation as regards the MFN clause would better have "contribute[d] to the harmonious development of investment law and thereby . . . [met] the legitimate expectations of the community of States and investors towards certainty of the rule of law," a goal which we are united in furthering (Final Award, Paragraph 84).

2. With respect to the Final Award's interpretation of Article 3(1) of the Treaty, I underscore, at the outset, my wholehearted concurrence in the Final Award's clear rejection of the so-called "Plama principle" (Paragraphs 119-121), a misapplication of the Vienna Convention on the Law of Treaties ("Vienna Convention") against which I have

inveighed elsewhere at length.¹ I disagree, however, with the majority in so far as it considers that Article 3(1) of the Austrian-Slovakian BIT does not constitute a general, or, as expressed by the Final Award, “neutral” (Paragraph 138) MFN clause. In my view, Article 3(1) of the Treaty, in according to Austrian investors treatment equal to that granted to investors under any third-State treaty of the Slovak Republic, covers both substantive and procedural treatment, including the consent to international arbitration given by Slovakia under any of its other BITs. Furthermore, Article 3(1) of the Austrian-Slovakian BIT is expressly limited only by Article 3(2), an aspect militating against assuming further limitations by implication based on Articles 8, 4(4) and (5), as is done by the Final Award (Paragraphs 132-135).

3. Article 3(1) on its face, without any evident restriction whatsoever, provides that:

Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment that is no less favorable than that which it accords to its own investors or to investors of any third states and their investments.

Express exceptions to such more favorable treatment are made in Article 3(2) only for

present or future benefits and privileges granted by one Contracting Party to investors of a third state or their investments in connection with

- a) any membership in an economic or customs union, a common market, a free trade zone or an economic community;
- b) an international agreement or a bilateral arrangement or national laws and regulations concerning matters of taxation;
- c) a regulation to facilitate border traffic.

¹ *Renta 4 S.V.S.A. et al v. The Russian Federation*, SCC Case No. 024/2007, Award on Preliminary Objections of 20 March 2009, Separate Opinion of Charles N. Brower, paras. 1-6, available at <http://ita.law.uvic.ca/documents/Renta.pdf>.

It should suffice to say, as other tribunals have ruled², that the presence of such *express* exceptions to MFN treatment normally should preclude the *implication* of further exceptions from other provisions of the Treaty, as the Final Award has done by reading Articles 8, 4(4) and 4(5) as implicit exceptions to the operation of Article 3(1) of the Treaty. In plain language: the negotiating States Parties to the Treaty carefully defined limits to the otherwise open-ended MFN clause (Article 3(1)) by attaching to it the exceptions expressly stated in Article 3(2). Application of the principle *expressio unius est exclusio alterius* should have ended the matter, as clearly the “benefits” invoked by Claimant, i.e., arbitrating “any dispute” under the Austrian-Slovakian Treaty against Respondent, do not fall under the mentioned exceptions.

4. I see no “ambiguity” resulting from the use of the term “treatment” in Article 3(1) of the Treaty, as stated by the Final Award (Paragraph 126), as to whether this term covers procedural as well as substantive rights. It is true that Article 3(1) of the Treaty is “unspecific” (Final Award, Paragraph 135) in that it does not stipulate that it covers both substantive and procedural matters. Yet, such lack of specificity in a broadly stated provision does not, in my view, equate with “ambiguity” in the sense of Article 32(a) of the Vienna Convention. This, in my view, precludes recourse to the *travaux préparatoires* as is done in the Final Award (Paragraphs 134-137). Furthermore, since none of the *travaux* presented to the Tribunal relate to Article 3 and the scope the States Parties intended or may have intended to give

² *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. Arb. VO79/2005, Award on Jurisdiction of October 2007, paras. 124-129, available at http://ita.law.uvic.ca/documents/RosInvest_jurisdiction_decision_2007_10_000.pdf and *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction of 20 June 2006, para. 82, available at http://ita.law.uvic.ca/documents/National_Grid-Jurisdiction-En.pdf.

to that clause, no weight can be attributed to those *travaux*.³

5. Instead, I consider, unlike the Final Award (Paragraph 129-131), that Article 3(2) of the Treaty clarifies that “treatment” encompasses both substantive and procedural matters, including access to the host State’s broader consent to arbitration. This is because Article 3(2) of the Treaty would encompass “benefits and privileges,” including access to more favorable arbitration, stemming from the international agreements mentioned in Articles 3(2)(a) and 3(2)(b) of the Treaty. Clearly the European Union, which involves a common market, embodies specific dispute settlement mechanisms, most prominently including the European Court of Justice. The Treaty concept of a “free trade zone” presumably includes the North American Free Trade Agreement, whose Chapters 11 and 20 have given rise to a series of high-profile arbitrations. Double taxation conventions – the principal target of Article 3(2)(b) – universally provide for dispute resolution through the respective “Competent Authorities” of the States Parties to such conventions and may even provide for arbitration of issues that remain unresolved following completion of proceedings between the respective “Competent Authorities”. Article 3(2) of the Treaty, therefore, makes clear that the term “treatment” in Article 3(1) of the Treaty covers both substantive and procedural rights. In consequence, the application of the principle *expressio unius est exclusio alterius* should have led to the conclusion that Article 3(1) has the effect of incorporating Respondent’s broader consent to arbitration under the investment treaty with Denmark.

³ Be that as it may, the ultimate question in any case is not the scope of a treaty’s dispute settlement provision, but rather what is the breadth of its MFN clause. It is noteworthy that the Czechoslovak BITs surveyed also display a wide array of MFN clauses (see Final Award, Paragraph 134), some quite broad and others seemingly limited to fair and equitable treatment or full safety and protection. The fact is that treaties are individually negotiated with different countries, and States negotiate what they decide to agree to at the time and under the circumstances prevailing as between the two Contracting Parties. Doubtless it is for this reason that treaties with third countries are not referred to in VCLT Article 31 as part of a treaty’s context, nor in Article 32 as a “supplementary means of interpretation.” Admittedly, international courts and tribunals do nonetheless from time to time refer to third-State treaties in interpreting a treaty, though in general such use is, as in this Final Award, neither extensive nor dispositive. A recent example is *ADC Affiliate Limited et al v The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of 2 October 2006, paras. 345 and 359, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC648_En&caseId=C231 (concluding that a State’s failure to include a certain term in one treaty that it employed in a previous or contemporaneous treaty is evidence supporting the conclusion that the treaty being interpreted cannot be construed to have the same meaning as it would have had had the omitted term been included).

6. I take issue also with the Final Award's interpreting the scope of the subject matter of Article 3(1) of the Treaty, more particularly the term "treatment," by reading it together with the provisions in Articles 8, 4(4) and (5). The Final Award justifies this by stating that "[a]s a result of these contextual considerations, the specific intent expressed in Articles 8, 4(4) and 4(5) informs the scope of the general intent expressed in Article 3(1), with the result that the former prevails over the latter" (Paragraph 135). This argument, in my opinion, is based on a problematic view of what is the relevant context for interpreting a broad MFN clause in an investment treaty.

7. The fact that the text of a treaty is part of its "context" pursuant to Article 31(1) and (2) of the Vienna Convention does not mean that each article of a treaty necessarily is to be read against every other article in the treaty, irrespective of the substance of the respective articles. It is appropriate, for example, to read Article 8 of the Treaty alongside Article 4(4) and (5) when interpreting the scope of Article 8, as these provisions address the same subject, namely dispute resolution in relation to expropriation claims by an investor. By contrast, it is not appropriate to consider provisions as "context" for interpreting an MFN clause that are less favorable than provisions in third-State treaties to which Claimant claims access. If every time an MFN clause were invoked it were to be read together with the treaty provision which the MFN clause is alleged to circumvent, such a clause might never be given any effect; it would be largely vitiated by that which it seeks to void, modify or expand by importing more favorable treatment from Respondent's third-State treaties. The treatment under a BIT that is possibly less favorable than that provided in third-State treaties is simply not the relevant "context" for interpreting the subject matter of the MFN clause. In consequence, the scope of the jurisdictional provisions in the Treaty is irrelevant for interpreting the subject matter of Article 3(1), in particular the meaning of the word "treatment."

This does not suggest an exception to Articles 31 and 32 of the Vienna Convention; indeed, it is a confirmation of their application.⁴

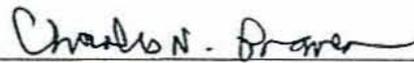
8. The jurisdictional provisions in Articles 8, 4(4) and (5), also cannot be read as implicit exceptions to the operation of the general MFN clause in Article 3(1) of the Treaty. While it is true that the jurisdictional provisions were specifically negotiated and deliberately narrowly tailored, thus indicating a deliberate choice to limit the jurisdiction under the Austrian-Slovakian Treaty (see Final Award, Paragraph 137), it does not preclude the circumvention of such specifically negotiated clauses by means of a general MFN clause to the extent that either of the States Parties extends more favorable access to international arbitration to investors that are covered by an investment treaty with a third State.⁵ That would contradict the general intent of the States Parties to guarantee treatment to investors of the other Contacting Party equal to that granted to investors from third States by including a broad MFN clause in their treaty relations whose explicit exceptions do not cover access to arbitration under third-State investment treaties.

9. Furthermore, I remain unpersuaded that one may conclude from the existence of other Czechoslovak BITs at the time of the Treaty's conclusion which contain "broader dispute settlement provisions" that Article 3 was not intended as written (again read alongside Articles 8, 4(4) and (5)) (Final Award, Paragraph 134). Many reasons could explain Czechoslovakia's actions in concluding the Treaty as it did. The simple answer is that to achieve the result that Respondent has urged, and the Final Award accepts, Czechoslovakia would only have had to expand the list of express exceptions in Article 3(2).

⁴ Here it is timely to note that the majority's decision in the *Renta 4 S.V.S.A. et al v. The Russian Federation*, SCC Case No. 024/2007, Award on Preliminary Objections of 20 March 2009, available at <http://ita.law.uvic.ca/documents/Renta.pdf>) not to import a dispute resolution provision from another treaty for the arbitration of a claim of expropriation was due to its interpretation of the MFN clause in question alone, and not to reading it alongside the treaty provision in that case that was roughly comparable (although interpreted differently) to Article 8 of the present Treaty. In that case the treaty article in question provided in its first paragraph that "Each Party guarantees to investments made within its territory fair and equitable treatment," and in its second paragraph that "The treatment referred to in the previous paragraph shall be no less favorable than is accorded by a Party to investments made in its territory by investors of a third State." The majority, looking solely at this article, interpreted it as limiting MFN to fair and equitable treatment. It did not lay that article aside any other article for interpretive purposes. It followed the correct method; hence to that extent it lends no support to the Final Award here.

⁵ See STEPHAN SCHILL, *THE MULTILATERIZATION OF INTERNATIONAL INVESTMENT LAW*, pp. 145-147 (Cambridge University Press 2009).

10. In sum, as regards the Final Award's disposition of the MFN issue, it (1) transforms lack of specificity in Article 3(1) of the Treaty into "ambiguity" as regards "procedure" versus "substance" that prima facie did not exist; (2) fails to resolve that supposed "ambiguity" in favor of Article 3(1) addressing both "procedure" and "substance" in that the express exceptions to Article 3(1) set forth in Article 3(2) undeniably encompass both procedural and substantive aspects of "treatment"; and (3), instead of relying in those patently unambiguous circumstances on the principle of *expressio unius est exclusio alterius*, (4) implies from the narrow dispute resolution provisions of the Treaty that the MFN clause cannot import the broader arbitration provision of a third treaty. Accordingly, I reluctantly, and most respectfully, dissent from my colleagues on the MFN issue.⁶



Charles N. Brower

The Hague, 9 October 2009

⁶ A note is pertinent here regarding Claimant's claims other than expropriation. I concur that the Final Award's interpretation (Paragraph 139) of Article 8 together with Article 4(4) and (5), in which I have indicated my concurrence, necessarily bars arbitration under the Treaty (excluding of course the application of Article 3) of the claims of lack of fair and equitable treatment and failure to provide "full protection," as provided, respectively, by Paragraphs (1) and (2) of Article 2. The same would hold true were we to have interpreted, as Claimant urged, Article 7(2) as an "umbrella clause." Were we, however, not to so interpret that Article, the question arises as to whether in importing the "umbrella clause" from another treaty, as Claimant had urged, we could, even under the Final Award's interpretation of Article 3, acquire with it the broad arbitration provision of the treaty containing the imported "umbrella clause." While we need not decide the point, as it has not been put before us, I pose the question whether, even if the Treaty is interpreted as barring arbitration of all claims for violation of substantive provisions of the Treaty itself, it properly can be construed as precluding a clearly importable "new" substantive provision from bringing with it an associated right to arbitration.