School of International Arbitration, Queen Mary,
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International Arbitration Case Law

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HICEE B.V.
v.
THE SLOVAK REPUBLIC
(PCA CASE NO. 2009-11),
PARTIAL AWARD

Case Report by Stephanie Early and Heather Clark[**]
Edited by Ignacio Torterola[***]

In a Partial Award rendered on 23 May 2011, the Tribunal held that it did not have jurisdiction to hear a Dutch company's claim, which concerned its interests in two Slovak companies held through a Slovak corporate intermediary, under the bilateral investment treaty between the Netherlands and the Slovak Republic. The Tribunal admitted supplementary interpretive materials which did not fit within the categories of material listed in Articles 31 or 32 of the Vienna Convention on the Law of Treaties.

Tribunal:	Sir Franklin Berman KCMG QC (Chairman), Judge Charles Brower and Judge Peter Tomka.
Claimant's Counsel:	Mr. Pieter de Kok of HICEE B.V.; Mr. Stanimir Alexandrov; Mr. Daniel M. Price; Ms. Jennifer Haworth McCandless; Ms. Marinn Carlson of Sidley Austin LLP; Judge Stephen M. Schwebel.
Respondent's Counsel:	Ministry of Finance of the Slovak Republic; Mr. David Kavanaugh; Mr. Rainer Wachter; Mr. David Herlihy of Skadden, Arps, Slate, Meagher & Flom LLP.

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1. Facts of the Case

On December 17, 2008, HICEE B.V. ("Claimant" or "HICEE"), a Dutch company, commenced arbitration at the Permanent Court of Arbitration ("PCA") against the Slovak Republic pursuant to Article 8 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic dated October 1, 1992 (the "BIT") and Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law adopted on December 15, 1976 (the "UNCITRAL Rules").

HICEE complained of the enactment of a Slovak law by which health insurance companies were prohibited from distributing profits and made subject to a cap on their permissible administrative expenses. HICEE wholly owns DÔVERA Holding, a.s. ("Dôvera Holding"), which in turn owns two health insurance companies, DÔVERA dravotná poist'ovňa a.s. ("Dôvera") and APOLLO zdravotná poist'ovňa a.s. ("Apollo").[1] Dôvera Holding, Dôvera, and Apollo are all incorporated in the Slovak Republic.

Respondent argued that the Tribunal lacked jurisdiction to hear the claim under the BIT because Claimant's interests in Dôvera and Apollo did not meet the definition of "investment" under Article 1(a) of the BIT, which limited investments to asset "invested either directly or through an investor of a third State." Respondent contended that HICEE's interests in Dôvera and Apollo, as "sub-subsidiaries" of HICEE, were not protected under the BIT.

The Tribunal was constituted on 26 May 2009 and held a Preliminary Procedural Meeting in The Hague, the Netherlands, on 8 October 2009. On 29 March 2010, the parties submitted a joint letter to the Tribunal indicating their agreement that the so-called "Treaty Interpretation Issue" be decided as a preliminary matter. According to the Tribunal, the "Treaty Interpretation Issue" consisted of two questions: (1) whether Dôvera Holding's shareholdings in Dôvera and Apollo could be considered "investments" under Article 1 of the BIT; and (2) whether Claimant could frame its interest in some other way that would bring it within the scope of the BIT. The parties exchanged a single Memorial and Counter-Memorial. A hearing on the "Treaty Interpretation Issue" took place in The Hague on 20 and 21 July 2009.

[1] On 28 October 2010, Claimant informed the Tribunal that Apollo had acquired Dôvera, which was placed in liquidation under a new name. Apollo was renamed Dôvera.

2. *Legal Issues Discussed in the Decision*

(a) Interpretation of Article 1(a) of the BIT in accordance with Article 31 of the Vienna Convention on the Law of Treaties

The principal issue before the Tribunal was the interpretation of "either directly or through an investor of a third State" (the "key phrase") and, in particular, the meaning of the word "directly."

Claimant's position was that 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 protection under the BIT. (¶ 51) Relying on a legal opinion by Prof. Christoph Schreuer, Claimant contended that the juxtaposition of "directly" with "not through a third state" meant that the two terms could not be synonymous and the involvement of Dôvera Holding should have no effect on whether Claimant's investment is covered. (¶ 52) Claimant argued that Respondent's interpretation would produce a result that was "manifestly unreasonable" because it would require a Dutch investor to hold all of its Slovak assets in its own name, significantly limiting the scope of the BIT because of *inter alia* foreign ownership restrictions in place when the BIT came into force. (¶¶ 58-59) Respondent's interpretation, in Claimant's view, would also result in a nonsensical distinction between investments through shares, bonds, and other company interests, and other forms on investment, and would protect investments made by Slovak sub-subsidiaries with some third-State interest in the ownership chain. (¶ 60)

Respondent's position was that the key phrase meant that the investment in the recipient country must be that of the foreign investor itself, and not made through any intermediary (unless that intermediary is in a third country). (¶ 114) Respondent argued that the ordinary meaning of the key phrase limits the scope of protection to investments made "directly", *i.e.* without intervening subsidiary owners, the only exception being when investments are channelled through an intermediary entity in a third state. (¶¶ 48-49) Respondent also argued that a good faith interpretation of Article 1(a) could not "permit the extension of protection under the [BIT] to any number of sub-subsidiaries, no matter how far removed." (¶ 54)

The Tribunal characterized the wording of Article 1 of the BIT as evincing an "intention … to create a wide coverage", noting that the disagreement between the parties revolved around the way in which investments were made. (¶ 111) In the Tribunal's view, the key phrase was, as a matter of ordinary meaning, "capable … of bearing two meanings." (¶ 116) The Tribunal also observed that the various substantive provisions of the BIT required an "organic link" between "investment" and "investor" and that this formed part of the context for the purposes of the VCLT. (¶ 112) However, the Tribunal felt that this

context "offer[ed] virtually nothing by way of authentic guidance as to which of [the] two 'ordinary meanings' [was] to be preferred." (¶ 116). The Tribunal was tempted but not convinced by Claimant's argument regarding the juxtaposition of "directly" and "a third State". Similarly, the Tribunal found nothing dispositive in the object and purpose of the BIT, characterizing the Preamble as "studiously neutral" as to the BIT's coverage and scope. (¶ 116) In sum, the Tribunal found itself faced with two interpretations, but no available means under VCLT Article 31 to decide which of the two was appropriate. (¶ 119)

(b) Admissibility of Explanatory Notes Submitted by the Netherlands During Ratification of the BIT

Respondent relied heavily on certain Explanatory Notes submitted by the Netherlands as part of its domestic ratification of the BIT (the "Explanatory Notes"). These notes explained that "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."[2] Claimant disputed their admissibility.

The Tribunal began by explaining that while it was not uncommon when faced with an issue of treaty interpretation for a party to "invok[e] the terms in which the treaty was submitted internally for approval," the Explanatory Notes were unusual because: (1) the Netherlands was not setting down its own interpretation, but rather that of Czechoslovakia; (2) the statements were reasoned; (3) there is an express confirmation that Czechoslovakia's intentions were agreed to; and (4) there is a "precise indication of the recipe for avoiding the exclusionary effect of the restriction." (¶ 127) The Tribunal found it significant that the Explanatory Notes were being invoked not by the Netherlands but by the Slovak Republic.[3] (¶ 127) It rejected Claimant's position the Explanatory Notes related to the definition of "investor" under 1(b), not "investment" under 1(a). (¶ 128)

However, the Tribunal found the parties' response to its request for a joint production of any agreed minutes or reports of either delegation on the negotiation of Article 1, in order to substantiate or corroborate the Explanatory Notes, to be unsatisfactory. In fact, the only conclusion the Tribunal was able to draw was that the Explanatory Notes had been obtained from government files

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[2] A complete quote from the relevant part of the Explanatory Notes can be found at ¶126 of the Partial Award.

[3] The Tribunal dismissed witness evidence tendered by the Claimant as having little value because it constituted "*ex post facto* expressions of opinion" about the negotiation of the BIT. (¶124) The Tribunal also found little value in the "Agreed Minutes" from consultations on the BIT which took place between the Netherlands and the Czech Republic, pointing to the specific difficulty that the consultations were with the other 'successor State' to the BIT , which cast doubt on the significance of this consultation as 'subsequent conduct.' (¶¶ 75, 125)

in Prague, with the result that "it must treat the Explanatory Notes as having an essentially unilateral character." (¶ 131-132)

The Tribunal then examined the suitability of the Explanatory notes for analysis under any of the categories listed in VCLT Articles 31 and 32. In the Tribunal's view, they were not the kind of "agreement" envisaged by VCLT Article 31(2) or (3). Further, Article 31(2)(b), in the Tribunal's view, was unlikely to have been intended to cover a document composed for purely internal purposes , *i.e.* the approval process in the Netherlands, and there was no 'acceptance' by Czechoslovakia of this document as "an instrument related to the treaty." (¶ 134) With respect to VCLT Article 32, the Tribunal found it self-evident that the Explanatory Notes did not form part of the *travaux préparatoires* of the treaty since they post-dated the completion of negotiations. (¶ 135)

The Tribunal thus concluded that the Explanatory Notes did not fit within the categories of extraneous material set out in VCLT Article 31 or 32. (¶ 135) However, in the Tribunal's view, the terms of VCLT Article 32 make it plain that the "supplementary means of interpretation" listed therein "are merely examples, with the necessary implication that the category of admissible supplementary means is not a closed one." (¶ 117) The Tribunal also explained that supplementary means of interpretation are open not only in cases of ambiguity or obscurity, but also when interpretation in accordance with Article 31 leads to a meaning which is "manifestly absurd or unreasonable." (¶ 118) Accordingly, the Tribunal "consider[ed] 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 [BIT]." (¶ 121) To leave the Explanatory Notes out of the Interpretive Process, in the Tribunal's view, would "fly in the face of logic and good sense" and "would not … be reconcilable with the requirement that a treaty is to be interpreted 'in good faith'." (¶ 136) Thus, the Tribunal decided to take into account the terms and content of the Explanatory Notes, along with the viewpoint adopted in relation thereto in the proceedings by Respondent. (¶ 136)

The Tribunal also dismissed Claimant's reliance on parallel treaty practice. In particular, the Tribunal found that it was unable to derive anything of value from similar Explanatory Notes with respect to the Netherlands-USSR BIT, put forward by Claimant, which also contains the key phrase. (¶¶ 142-143) With respect to other Czechoslovak BIT's ratified at the same time as the BIT, the Czechoslovak government document on which Claimant relied, that stated that the various BITs "did not materially differ," was "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." (¶ 144)

(c) HICEE's Claims "as a shareholder in Dôvera Holdings"

The Tribunal rejected Claimant's attempt to reformulate its claims as injuries to Dôvera Holding. It was plain to the Tribunal that while Dôvera Holding was an investment in its own right, the losses would have to have been sustained as a result of the treatment of Dôvera Holding by the Respondent. (¶ 147)

(d) Most-Favoured Nation

The Tribunal rejected Claimant's proposal that it was entitled to the broader definitions of investment found in other Slovak BITs through operation of the most-favoured nation ("MFN") provisions of Articles 3(2) and 3(5) of the BIT. Although it endorsed the approach adopted by other tribunals that each MFN clause is to be interpreted according to its own terms, the clear purpose of these Articles for the Tribunal was to "broaden the scope of the substantive protection granted to the eligible investments of eligible investors," and not "the definition of the investors or the investments themselves." (emphasis in original) (¶ 149)

3. Decision

The Tribunal found that HICEE's interests in Dôvera and Apollo could not be considered "investments of investors of the other Contracting Party." Therefore, the Tribunal decided that the terms of the BIT did not protect the investments made by Dôvera Holding in Dôvera and Apollo and held that it did not have jurisdiction to hear HICEE's claim. (¶ 152)

4. Dissent

Judge Brower dissented from the Partial Award because, in his view, the majority misapplied the VCLT, did not "follow faithfully [its] text," and "assign[ed] outcome determinative significance to a single document of dubious qualification, if any, as an interpretive aid under the VCLT." (¶ 1)[4]

First, Judge Brower took issue with the way the majority had applied Article 31 of the VCLT, explaining that a Tribunal must look first to the plain language of the text being interpreted while also considering the rest of the BIT's text. Although Judge Brower agreed with the majority's finding that "viewed in isolation, the word 'directly' is ambiguous," he emphasized that the term "ceases to be ambiguous when it is considered within its immediate and natural context – the text in which it is embedded." (¶¶ 6-7) He would have adopted the position that "directly" can be interpreted in opposition to its alternative posed in the text of Article 1(a), namely 'through an investor of a third State.' (¶ 7) This, in his view, "produces the obvious inference that investing 'directly'

[4] Paragraph references in this section are made to the Dissenting Opinion.

simply means investing without the involvement of a third State, without further qualification."(¶ 7)

Considering the overall object and purpose of the BIT, Judge Brower explained that the majority's interpretation produced "unjustifiable incongruities," such as the qualification of a pharmacy chain owned by Dôvera Holding as an 'investment' to the exclusion of its Slovak corporate subsidiaries. (¶ 14) In Judge Brower's view, the majority's interpretation is inconsistent with the historical realities that existed when the BIT was made; foreign investors in Czechoslovakia were by and large prohibited from purchasing immovable property, which "essentially would have precluded a Dutch investor from owning 'directly' [as interpreted by the majority] several of the types of 'investment' envisioned in Article 1(a) of the Treaty, resulting in a breach of the Treaty." (¶ 16) In response to the majority's explanation that the BIT was drafted with future reforms in mind, Judge Brower pointed out that the Czechoslovak Government never offered "specific guarantees as to the timing or the nature of such future reforms," and that the *travaux preparatoires* of Article 1 of the BIT do not show that the scope of the term "investments" was thoroughly debated. (¶ 18)

Judge Brower also opined that the majority offered no rationale for its conclusion that in order to qualify for protection under the BIT, the investment in the host State must be that of the foreign investor itself and not through any intermediary (unless the intermediary is in a third country). In his view, the interpretation adopted by the majority "meets the 'manifest absurdity' standard," whereas "the interpretation of 'directly' as the opposite of 'through an investor of a third State' [did not lead] to similarly illogical or impossible results." (¶¶ 19, 21)

Next, Judge Brower turned to the majority's decision to admit the Explanatory Notes. According to Judge Brower, these materials should have served to either "'confirm the meaning resulting from the application of article 31' or cure persistent ambiguity or 'manifest absurdity' in the interpretation under Article 31," but accomplished neither of those purposes. (¶ 24) In Judge Brower's view, the Explanatory Notes do not warrant the weight they were given because they merely reveal the Dutch delegation's understanding that the Czechoslovak delegation was attempting to restrict currency transfers made by the sub-subsidiary to its immediate parent company (also a Czechoslovak entity). He contended that "ample evidence on the record renders this 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." (¶ 28)

Judge Brower strongly disagreed with the majority's conclusion that the Explanatory Notes represented a "concordance of views between the two Contracting Parties to the treaty obligation in question – albeit in an attenuated

form." He argued that it is not enough to characterize "as merely 'attenuated' an asynchronous agreement" as to the meaning of a certain term therein when one of the parties "professes such agreement only in support of its position in a specific investment dispute arbitration." (¶ 35)

Finally, although Judge Brower concurred with the majority's finding that the most-favored-nation clause of the BIT could not be used to "alter the scope of the definition of 'investments' in the Treaty," he was not convinced that the case should have been dismissed without giving Claimant an opportunity to amend its Notice of Arbitration in accordance with the majority's interpretation of the BIT. (¶ 43)

5. Supplementary and Final Award

The Tribunal issued a Supplementary and Final Award on 17 October 2011, fixing costs incurred as a result of a challenge to Judge Tomka. The challenge, which Claimant initiated within fifteen days of the Tribunal's issuance of the Partial Award, was dismissed by the Arbitration Institute of the Stockholm Chamber of Commerce. The Tribunal allocated all costs and expenses relating to the challenge to Claimant. The basis for Claimant's challenge was not described in the Supplementary and Final Award. However, subsequent publications indicated that Claimant's challenge was related to Judge Tomka's bid for re-nomination to the International Court of Justice.