

**IN THE HIGH COURT OF JUSTICE**

**QUEEN'S BENCH DIVISION**

**Commercial Court**

**And in the matter of the Arbitration Act 1996**

Royal Courts of Justice

Strand, London, WC2A 2LL

Sitting at Sheffield Combined Court Centre

Date: 5 December 2007

**Before: The Hon Mr Justice Simon**

**Between :**

**The Czech Republic**

**Claimant**

**and**

**European Media Ventures SA**

**Defendant**

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**Lord Brennan QC and Mr Zachary Douglas** (instructed by **Linklaters LLP**) for  
the Claimant

**Mr Toby Landau** (instructed by **Salans**) for the Defendant

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Hearing date: 6 September 2007

Further written submissions received on: 7 September, 5 and 18 October 2007

**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE SIMON

**Mr Justice Simon:**

**Introduction**

1. In this claim the Czech Republic applies to set aside an Award on Jurisdiction dated 15 May 2007 pursuant to section 67(1)(a) of the Arbitration Act 1996, on the grounds that the arbitral tribunal lacked substantive jurisdiction. The Award was made in arbitration proceedings between a Luxembourg company, European Media Ventures S.A. ('EMV'), which is the claimant in the arbitration, and the Czech Republic, which is the respondent.
2. The arbitration was begun by EMV against the Czech Republic under the arbitration provision (Article 8) of a Bilateral Investment Treaty<sup>1</sup> ('the Treaty') between the Czechoslovak Socialist Republic and the Belgian-Luxembourg Economic Union. The full title of the Treaty is, '*Agreement Between the Belgian-Luxembourg Economic Union and the Czechoslovak Socialist Republic Concerning the Reciprocal Promotion and Protection of Investments*'. The Treaty was concluded on 24 April 1989; and, in accordance with its terms, came into force on 13 February 1992. From 1 January 1993 the Czech Republic succeeded to the rights and obligations of the Czechoslovak Socialist Republic and became a Contracting Party.
3. The arbitration is governed by the UNCITRAL Arbitration Rules and the seat of the arbitration is London. The arbitral tribunal comprises Lord Mustill (Chairman), Dr Julian Lew QC, and Professor Christopher Greenwood QC, CMG.
4. In the arbitration EMV claims for loss and damage against the Czech Republic arising out of the indirect expropriation of its investment in a Czech television station 'TV3'. The facts of the dispute are otherwise largely immaterial to this application.
5. Although a large amount of learning and authority was deployed at the hearing of the application and subsequently<sup>2</sup>, the challenge to the award raises a single and discrete question of law concerning the scope of the Tribunal's jurisdiction under Article 8 of the Treaty.

**The terms of the Treaty**

6. The relevant provisions of the Treaty for interpreting the scope of the Tribunal's jurisdiction are:

Article 3

1. Investments made by investors of one of the Contracting Parties in the territory of the other Contracting Party may not be expropriated or subjected to other measures of direct or indirect dispossession, total or partial, having a similar effect, unless such measures are:

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<sup>1</sup> For a brief explanation of BITs, see *Republic of Ecuador v. Occidental Exploration (No.2)* [2006] 1 Lloyd's Rep 773 at §8 [B/3]. For a fuller study, see Rubins & Kinsella, *International Investment, Political Risk and Dispute Resolution* (2006) [G/9]

<sup>2</sup> 19 bundles of authorities and interpretive materials were deployed by the parties.

(a) taken in accordance with a lawful procedure and are not discriminatory;

(b) accompanied by provisions for the payment of compensation, which shall be paid to the investors in convertible currency and without delay. The amount shall correspond to the real value of the investments on the day before the measures were taken or made public.

...

3. The provisions of paragraphs 1 and 2 are applicable to investors of each Contracting Party, holding any form of participation in any company whatsoever in the territory of the other Contracting Party.

#### Article 7

1. Any dispute relating to the interpretation or the application of the present Agreement shall be settled, as much as possible, between the Contracting Parties by means of diplomatic channels.

2. Failing settlement by such means, the dispute shall be submitted to a mixed Commission, composed of representatives from the Contracting Parties. This commission shall meet without delay, at the request of one or other of the Contracting Parties.

3. If the dispute cannot be settled in this manner within a period of six months from the date of the start of negotiations, it shall be submitted to an arbitral tribunal, at the request of one of the Contracting Parties.

...

#### Article 8

1. Disputes between one of the Contracting Parties and an investor of the other Contracting Party concerning compensation due by virtue of Article 3 Paragraphs (1) and (3), shall be the subject of a written notification, accompanied by a detailed memorandum, addressed by the investor to the concerned Contracting Party. To the extent possible, such disputes shall be settled amicably.

2. If the dispute is not resolved within six months from the date of the written notification specified in Paragraph (1), and in the absence of any other form of settlement agreed between the parties to the dispute, it shall be submitted to arbitration before an ad hoc tribunal.

...

7. The Preamble of the Treaty records that the Contracting States desired, among other things:

... to strengthen their economic cooperation by creating conditions favourable for the making of investments by the investors of one of the Contracting Parties in the territory of the other Contracting Party ...

8. The issue in the case is the extent of the Tribunal's jurisdiction under Art.8(1). This involves the meaning of the words:

[d]isputes between the Contracting Parties and an Investor of the other Contracting Party concerning compensation due by virtue of Art.3 paragraph (1) and (3) of the Treaty'. (emphasis added).

In short summary, the Czech Republic contends that the Tribunal's jurisdiction is limited to disputes as to the amount of compensation to be paid to an investor following expropriation; in other words, it is limited to issues of quantification. EMV contends that the Tribunal is conferred with jurisdiction to make an award of compensation following expropriation; in other words, the jurisdiction extends not simply to the amount of compensation, but to whether compensation should be paid to the investor.

9. The Tribunal found, in relation to the words of Art.8(1), that the phrase '*concerning compensation*' was clearly intended to limit the jurisdiction of a tribunal established under Art.8.<sup>3</sup> Having found that this phrase operated so as to limit the jurisdiction of an arbitral tribunal, it was necessary to identify the proper scope of that limitation. The Tribunal provided its interpretation of that limitation as follows:

It would seem to exclude from that jurisdiction any claim for relief other than compensation (e.g. a claim for restitution or a declaration that a contract was still in force).

The Czech Republic criticises this conclusion as short on reasoning and unsupported by authority. EMV submits that the Tribunal's conclusion was correct and fully justified both on analysis and authority.

### **The parties' submissions on the issue, in summary**

10. Each side submitted that its interpretation:
- i) accorded with the rules on interpretation of treaties contained in the Vienna Convention and customary International law; and
  - ii) gave effect to the ordinary meaning of the words of Article 8.
11. The Czech Republic further submitted as follows.

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<sup>3</sup> Award §52 [G/1]

- i) The Treaty was signed by the Czechoslovak Socialist Republic in 1989 before the political changes which brought about democratic elections and market reforms. It was the policy of Communist States at the time to agree to arbitration with private investors in relation to disputes as to the amount of compensation following expropriation. The wider agreements to arbitrate with investors, which are now usual in modern Bilateral Investment Treaties ('BITs') were avoided by Communist States as impermissible intrusions on their sovereignty. During sessions of the Belgian Parliament dealing with the incorporation of the Treaty into Belgian law, the policy of the Czechoslovak Socialist Republic was expressly acknowledged on behalf of the Belgian Government; and the fact that it was reflected in the terms of Art.8 of the Treaty was recognised by the Belgian Senate. Following the political changes which led to the ending of Communist power in Czechoslovakia, the Czech Republic adopted consent to arbitration in wide terms: for example, consent regarding '*any disputes arising out of an investment*' and '*all investment disputes*'.<sup>4</sup>
- ii) The circumstances in which the Treaty was concluded show an intention to confine the right to arbitrate in Art.8 to disputes about the level of compensation to be awarded.
- iii) The terms of Art.7 of the Treaty provide the mechanism for dispute resolution and were intended to apply to the determination of liability in a case of expropriation of the investment. The usual considerations of diplomatic protection would apply to any resort to Art.7 and, for this reason, was more acceptable to the Czechoslovak Socialist Republic at the relevant time. It is unnecessary for liability for an expropriation under Art.3 to be actionable before an arbitral tribunal constituted pursuant to Art.8 in order to give effect to Article 3. First, Art.3 is actionable before an arbitral tribunal constituted pursuant to Article 7. Secondly, since the Treaty has direct effect in the municipal law of the Czech Republic, an investor can challenge the legality of any State expropriation in the municipal courts.
- iv) The terms of Art.8(1) of the Treaty confirm the limited scope of the Contracting Parties' consent to arbitration. If the Contracting Parties had intended that an arbitral tribunal constituted under Art.8 should have jurisdiction to determine the liability of a Contracting Party for an expropriation, the words '*compensation due by virtue of*' would have been omitted.

12. EMV submitted in answer.

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<sup>4</sup> Agreement between the Czech and Slovak Federal Republic and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments dated 5 October 1990 ("disputes with respect to investments") [D2/12]; Czechoslovakia and Sweden Agreement on the Promotion and Reciprocal Protection of Investments dated 13 November 1990 ("disputes ... concerning the interpretation or application of this Agreement") [D2/15]; Agreement between the French Republic and the Czech and Slovak Federal Republic for the Encouragement and the Reciprocal Protection of Investments dated 13 September 1990 ("disputes relating to investments") [D2/11]; Agreement between the Government of the Republic of Finland and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investment dated 6 November 1990 ("Any legal dispute ... concerning an investment") [D2/14].

- i) The object of the BIT was the promotion and protection of investments. This was achieved by providing direct rights between investors and host States. A key element of effective protection was the provision of a direct and effective right to arbitrate.
- ii) There was no immutable policy of the Czechoslovak Socialist Republic to confine Arbitration Agreements to the amount of compensation to be paid. This may have been the position from which negotiations began; but it was not always the position where negotiations ended. The background material relied on by the Czech Republic did not throw any significant light on the proper interpretation of Art.8.
- iii) Art.7 did not assist in the interpretation of Art.8 since it was concerned with different issues: disputes which might arise between the Contracting Parties. Such issues were susceptible to settlement by customary diplomatic means, whereas Art.8 was expressly concerned with disputes between a Contracting Party and investors from the other Contracting Party. There was no reason to approach the construction of Arts.3, 7 and 8 on the basis that the primary route to settlement of a dispute was intended to be by diplomatic means. On the contrary, the underlying commercial intent was that BITs were intended to provide directly enforceable rights to investors.
- iv) Although it was common ground that the terms of Art.8(1) of the Treaty confined the agreement to arbitration, the Contracting Parties had used a phrase '*concerning compensation due by virtue of the expropriation provisions contained in Art.3(1) and (3)*' which was very much wider in ambit than was found in other BITs. As a matter of ordinary meaning the phrase encompassed direct and indirect expropriation, both as to the nature and amount of compensation and whether any compensation was due pursuant to Art.3(1) and/or (3).

### **The Court's Approach to the Tribunal's award**

13. Both sides agreed that the correct approach to the Tribunal's decision on substantive jurisdiction was correctly summarised by Aikens J in *Republic of Ecuador v Occidental Exploration & Production Co (No 2)* at §7 (see above)

It is now well-established that a challenge to the jurisdiction of an arbitration panel under section 67 proceeds by way of a re-hearing of the matters before the arbitrators. The test for the court is: was the tribunal correct in its decision on jurisdiction? The test is not: was the tribunal entitled to reach the decision that it did.

### **The rules of interpretation of Treaties**

14. A Treaty is governed by International law, which includes the rules on interpretation. The international rules on treaty interpretation are set out in Articles 31 and 32 of the Vienna Convention.

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

It will be necessary to consider the terms, '*ordinary meaning*' and '*object and purpose*' later in this judgment.

#### Article 32 Supplementary means of interpretation

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

- (a) leaves the meaning ambiguous or obscure; or
  - (b) leads to a result which is manifestly absurd or unreasonable.
15. The rules set out in Articles 31 and 32 of the Vienna Convention have been accepted by the International Court of Justice as being an accurate statement of customary

International law<sup>5</sup>; and English courts have applied the rules on the basis that they represent customary International law and are therefore part of English law.<sup>6</sup>

16. It is clear that the proper approach to the interpretation of Treaty wording is to identify what the words mean in their context (the textual method), rather than attempting to identify what may have been the underlying purpose in the use of the words (the teleological method). The disadvantages of this latter approach have been described by Sir Gerald Fitzmaurice KCMG QC (former Legal Adviser to HM Foreign and Commonwealth Office, Judge of the International Court of Justice and Judge of the European Court of Human Rights) as follows,<sup>7</sup>

One method (and perhaps the one that has the most direct natural appeal) is to ask the question, ‘What did the parties intend by the clause?’ This approach has, however, been felt to be unsatisfactory, if not actually unsound and illogical, for a number of reasons ...

One of the reasons that the approach is unsatisfactory is that,

It ignores the fact 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.

Another reason is that

... the aim of giving effect to the intentions of the parties means, and can only mean, their *joint* or *common* intentions ... This means that, faced with a disputed interpretation, and different professions of intention, the tribunal cannot in fact give effect to any intention which both or all the parties will recognise as representing their common mind.

17. The search for a common intention is likely to be both elusive and unnecessary. Elusive, because the contracting parties may never have had a common intention: only an agreement as to a form of words. Unnecessary, because the rules for the interpretation of international treaties focus on the words and meaning and not the intention of one or other contracting party, unless that intention can be derived from the object and purpose of the treaty [Art.31 of the Vienna Convention], its context [Art.31.1 and 31.2] or a subsequent agreement as to interpretation [Art.31.3(a)] or

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<sup>5</sup> *Territorial Dispute* (Libyan Arab Jamahiriya/Chad). Judgment, I.C.J. Reports 1994, p. 6 at § 41 [C1/6].

<sup>6</sup> See for example, *R v Secretary of State for the Home Department, ex p Adam* [2001] 2 AC 477, 516D-E, per Lord Steyn [B/2]; *Republic of Ecuador v Occidental Exploration & Production Co (No 2)* [2006] EWHC 345 (Comm), [2006] 1 Lloyd’s Rep 773, 788 (para. 90) per Aikens J [B/3]; *Republic of Ecuador v Occidental Exploration & Production Co* [2007] EWCA Civ 656, (para. 25) [B/4].

<sup>7</sup> Fitzmaurice, *The Treaty and Procedure of the International Court of Justice 1951-4 : Treaty Interpretation and Other Treaty Points* (1957) 33 BYBIL 203 at 204-5 [E1/1 at internal page 204]



practice which establishes an agreement as to its interpretation [Art.31.3(b)]. As Professor O'Connell has noted,<sup>8</sup>

... the 'intentions' of the parties may never have crystallised or been formulated beyond a certain point. Every lawyer knows that the parties to a contract contemplate only performance; they enter into the transaction with optimism, and do not ordinarily advert to the problems raised by, for example, frustration. The courts pretend that the parties intended what they, the court, believe they would have intended had they reflected on the matter. It is clear, then that 'intention' is very often a fiction, and even when there was a conscious intention the words designed to be expressive of it may not be particularly helpful for this purpose. The same is true of treaty interpretation with the added difficulty that the parties may never really have wanted to come to an agreement and may have deliberately left the area of operation of the treaty opaque.

18. A similar point is made by Sir Ian Sinclair KCMG QC (former Legal Advisor to HM Foreign and Commonwealth Office)<sup>9</sup>,

... a dispute as to treaty interpretation arises only when two or more parties place differing constructions upon the text; by doing so they are in reality professing differing intentions in regard to that text and, of necessity, professing to have had differing intentions from the very start. If this is the case, there can be no common intentions of the parties aside or apart from the text they have agreed upon. The text is the expression of the intention of the parties; and it is to that expression of intent that one must first look.

19. The proper approach is to interpret the agreed form of words which, objectively and in their proper context, bear an ascertainable meaning. This approach, no doubt reflecting the experience of centuries of diplomacy, leaves open the possibility that the parties might have dissimilar intentions and might wish to put different interpretations on what they had agreed<sup>10</sup>. When considering the object and purpose of a Treaty a Court should be cautious about taking into account material which extends beyond what the Contracting Parties have agreed in the Preamble or other common expressions of intent, see Art 31.2(a) and (b).

### **Object and Purpose**

20. EMV submitted that, in evaluating a treaty's context, a court or tribunal may be guided by the treaty's preamble<sup>11</sup>. In the present case the preamble recorded the desire of the Contracting Parties to create favourable conditions for investment. EMV argued that an important feature of investor protection is the availability of recourse to international arbitration as a safeguard for the investor; and that, in so far as the objective of a BIT is to provide effective protection for investors, it is permissible to

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<sup>8</sup> O'Connell, *International Law* (1970) at 252 [E1/2]

<sup>9</sup> Sinclair, *The Vienna Convention on the Law of Treaties* 2<sup>nd</sup> Ed (1981) at p.131[E1/4]

<sup>10</sup> Mr Landau referred to the subversive epigram: a Treaty is a disagreement reduced into writing.

<sup>11</sup> See Art.31(2) of the Vienna Convention and *Siemens AG v. Argentine Republic* (Decision on Jurisdiction) ICSID Case No. ARB/02/8 at §81.

resolve uncertainties in the interpretation of a BIT in favour of the investor. Mr Landau relied on decisions of Arbitration tribunals in BIT cases which have approached the issue of interpretation by referring to the preamble of the BIT and have adopted interpretations that ensure its effectiveness: an approach exemplified by the award in *SGS Société Générale de Surveillance SA v Republic of the Philippines* (2004) 8 ICSID Reports 515 at §116 [C5/20], where the Tribunal said:

The object and purpose of the BIT supports an effective interpretation of Article X(2) [the “umbrella clause” of the Philippines-Switzerland BIT]. The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended ‘to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other’. It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments

21. Mr Landau also relied on the decision of the Court of Appeal in *Ecuador v. Occidental (No.2)* [2007] 1 Lloyd’s Rep 64 at §28 [B/4]:

We accept Mr Greenwood's submission that the object and purpose of a BIT (including this BIT) is to provide effective protection for investors of one state (here OEPC) in the territory of another state (here Ecuador) and that an important feature of that protection is the availability of recourse to international arbitration as a safeguard for the investor. In these circumstances it is permissible to resolve uncertainties in its interpretation in favour of the investor: see eg the views of the arbitrators in para 116 of their award in *SGS Société Générale de Surveillance SA v Republic of the Philippines* (2004) 8 ICSID Reports 515.

22. The Czech Republic submitted that the Court should be careful in identifying object and purpose and avoid giving too much weight to them (the ‘teleological approach’). Reference was made to a passage in Sinclair:

There is ... the risk that the placing of undue emphasis on the object and purpose of the treaty will encourage teleological methods of interpretation. The teleological approach ... in effect is based on the concept that, whatever the intentions of the parties may have been, the convention as framed has a certain object and purpose, and the task of the interpreter is to ascertain that object and purpose and then interpret the treaty so as to give effect to it.<sup>12</sup>

23. The Court of Appeal in *Ecuador v. Occidental (No.1)* [2006] QB 432 at §§14-20 and 32-35 described the nature of the legal relationship created and the rights generated by BITs. Under these treaties investors are given substantive and procedural rights, which may be pursued in their own right rather than by the State on their behalf. BITs give rise to consensual agreements to arbitrate between an investor and a State, arising out of (but distinct from) the treaty itself. In these circumstances it seems to me plain

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<sup>12</sup> I Sinclair, *The Vienna Convention on the Law of Treaties* (1981, 2<sup>nd</sup> edn) 131 [E/4]

that in interpreting a BIT the Court is entitled to take into account that one of the objects of the treaty was to confer rights on an investor, including a valuable right to arbitrate. If the suggestion made in *Ecuador v. Occidental (No.2)* at §28, that it is permissible to resolve uncertainties in the interpretation of a BIT in favour of an investor, who is not a party to the treaty, is said to amount to a rule of interpretation, the suggestion goes rather further than appears to be justified in International law.

### **‘Contextual’ Material**

24. As already indicated the parties’ researches were extensive.
25. The Czech Republic deployed much material relating to the politico-economic background to the BIT. Some of this material was relatively uncontroversial, although the conclusions which might properly be drawn were disputed. The material demonstrated as follows.
  - i) At the time the Treaty was signed by Czechoslovakia (on 24 April 1989) the Communist Government was still in power. The Czechoslovak Socialist Republic (like other Communist States) objected to any interference by Capitalist States in its internal affairs. The preference of Western States for binding third party dispute settlement procedures was seen as intrinsically linked to such interference; and Communist States insisted that disputes with foreign parties were submitted to domestic courts<sup>13</sup>. BITs between Communist and non-Communist States very frequently, if not invariably, limited the ambit of the arbitration clause. Thus in the period 1989-1990 the arbitration provisions in BITs to which the USSR was a party were limited to disputes concerning the amount or method of calculating compensation to be paid following an expropriating act<sup>14</sup>.
  - ii) After the fall of Communist power in Czechoslovakia, the successor States, the Czech and Slovak Federal Republics, reversed the policy and signed BITs which did not limit the jurisdiction of independent arbitration tribunals. From this time the consent to arbitration between the investor and the State was generally expressed in the widest possible terms such as ‘any dispute arising out of an investment’ or ‘all investment disputes’. Thus, of the 68 BITs signed by the Czech and Slovak Federal Republic and then the Czech Republic after the fall of Communism, 65 of them record the Contracting State Parties’ consent to investor/State arbitration in broad terms.
26. Mr Landau did not dispute this historic analysis in so far as it described the doctrinal position of Communist States. However he noted that there were a number of BITs to which Communist States were parties where the doctrinal position had ceded to the requirement of promoting international trade. He pointed out that before the fall of Communism in Eastern Europe, the majority of BITs specifically restricted the arbitral jurisdiction to ‘the amount’ and ‘method’ of compensation due with respect to an expropriation. He pointed out that no such delimiting words appeared in the present Treaty.

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<sup>13</sup> See K. Gryzybowski, *Soviet Public International Law: Doctrine and Diplomatic Practice* (1970) 473 and 510 [E1/3].

<sup>14</sup> See the Tribunal decision in *Vladimir Berschader and Moïse Berschader v Russian Federation*, (Award, 21 April 2006) SCC Case No. 080/2004 [C/14], especially at §155.

27. The Czech Republic initially relied on 3 matters in support of its interpretation.

- i) The Explanatory Statement dated 2 April 1990 in the Belgian Parliamentary Record<sup>15</sup>. For international treaties to have effect under Belgian municipal law, they must be approved and adopted as law by the Belgian Parliament (House of Representatives and Senate). A contemporaneous official record of the sessions of the Belgian Parliament on the ratification of the Treaty stated that the Czechoslovak Socialist Republic had succeeded in extracting concessions from the Belgian-Luxembourg Economic Union to reflect its Socialist policy at the time. One of the concessions related to a departure from the Model BIT of the Belgian-Luxembourg Economic Union,<sup>16</sup> in relation to the dispute resolution mechanism in the Treaty. The Record of the Session of the Chamber of Deputies of the Belgium Parliament, dated 2 April 1990, noted that

At the beginning of the negotiations however, three specific points had revealed some divergences of opinion between the two delegations.<sup>17</sup>

The third divergence of opinion was as to the ‘scope’ of the submission to arbitration and the ‘procedure’ for arbitration in Article 8 of the Treaty. On this the Record of the Session notes:

There exists a divergence of opinion between the delegations more with regards to the field of applications than as to the procedure. The Czechoslovaks were not accepting at the beginning of the negotiations the idea that ‘the State’ should be subject to an international arbitration. Nevertheless, after examining similar agreements with other countries from the East, the concept of an ‘ad hoc’ arbitration has been accepted.<sup>18</sup>

- ii) The 6 December 1990 Belgian Parliamentary Record<sup>19</sup>. The relevant record of the Belgian Parliament reads:

The Minister calls the Bill under discussion as the confirmation of a typical bilateral investment treaty. It

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<sup>15</sup> [F/2]

<sup>16</sup> This, as its name suggests, was a draft agreement between the Belgo-Luxembourg Economic Union, on the one hand, and another state (whose name was left blank) on the other hand, on the Reciprocal Promotion and Protection of Investments [F/9]. Art.10 provides

- (1) Any investment dispute ... shall be notified in writing
- (2) In the absence of an amicable settlement ... the dispute shall be submitted at the option of the investor, either to the competent jurisdiction of the State where the investment was made, or international arbitration.

<sup>17</sup> Explanatory Statement to the DRAFT BILL seeking approval of the agreement between the Belgium-Luxembourg Economic Union and the Socialist Republic of Czechoslovakia concerning the promotion and mutual protection of investments and Protocol, signed in Brussels on 24 April 1989, House of Representatives of Belgium, Ordinary Sitting 1989-1990, 2 April 1990 [F/2].

<sup>18</sup> *Ibid.*

<sup>19</sup> [F/3]

is true that the treaty itself was concluded with Czechoslovak Republic, which was at the time 'Socialist'. The qualifying adjective 'Socialist' has in the meantime been replaced by 'Federal' and 'Czechoslovak' by 'Czech-Slovak'. A certain continuity is however necessary in interstate relations.

The commissioner notes that the treaty under discussion contains a certain amount of exceptions to the normal provisions generally found in these types of treaties. According to the explanatory report, these exceptions are due to the objections from the Czechoslovak side, which were in turn attributable to the regime which at that time was still communist. Since then, the Czech and Slovak Republic is no longer a communist regime. The petitioner asks whether in the circumstances such exceptions still make sense.

The Minister states that the derogations to the usual protection are minimal. They are limited to the following:

(1) Recourse to international arbitration is limited to disputes relating to compensation due in the event of expropriation (Article 8)<sup>20</sup>;

...

... The petitioner ends the discussion by asking if it would not be desirable to remedy the imperfections existing in the treaty under discussion and a few others concluded with previously communist States by an additional treaty which would this time correspond perfectly to normal practice on this point as between Western countries.

The Minister considers that it is indeed desirable.

Lord Brennan QC submitted that this passage shows that Article 8(1) of the Treaty was recognised as a departure from the Model BIT of the Belgian-Luxembourg Economic Union Model which was insisted upon by the Communist Regime in power in Czechoslovakia when the Treaty was signed. Mr Landau submitted that while the Minister is reported to have stated that the derogations from the usual protections were 'minimal', the derogations for

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<sup>20</sup> le recours à l'arbitrage international est limité aux différends relatifs aux indemnités dues en cas d'expropriation (article. 8)

which the Czech Republic contends were significant given the impact on the effectiveness of Art.3.

- iii) The Record of the Federal Assembly of the Czech and Slovak Federative Assembly on 18 September 1990<sup>21</sup>. This shows that the Minister was advising the Assembly that the Treaty was similar to other BITs entered into under the Communist Regime. There had been suggestions that the Treaty was too narrow in the light of political developments since the negotiations and that it should be cancelled prior to ratification.

However, the Belgian party is interested in immediate ratification of the Agreement as it was concluded, it does not want to reopen the whole complex process of internal (sic) negotiations ...

28. Following the conclusion of the hearing a number of additional documents were deployed by the Czech Republic. These had been discovered in the National Archive. No objection was made to the reference to these documents by EMV. Four of these documents are potentially relevant: (a) Government Resolution 328 of 1988, dated 8 December 1988 [Doc.9]; (b) The Joint Report of the Minister of Finance and the Minister of Trade, dated 31 October 1988 [Doc.10]; (c) Draft Explanatory Note by the Ministry of Finance for the Government, dated sometime in 1989 [Doc.4]; and (d) Letter from the Minister of Finance to the Deputy Prime Minister, dated 3 May 1989 [Doc.7]
29. The documents which pre-date the signing of the Treaty on 24 April 1989 [Docs 9 and 10] show an intention on the part of Czechoslovakia to restrict the ambit of Art 8 as far as it could.

Upon considering all circumstances, it has been proposed that the Czechoslovak side agrees with implementing the issues of diagonal disputes in the agreement. However, it is necessary to enforce that the relevant article is of the agreement is formulated in such manner so that this agreement does not interfere with the fundamental rights of a sovereign country (namely the right of a country to limit or to interfere with assets located within its sovereign territory in compliance with the law)<sup>22</sup>.

30. However, the new documentation viewed overall is equivocal. For example Doc 4, refers to part of Art 8 in terms which are different to the Treaty:

In the event of any dispute between the investor and the State pertaining to the amount of compensation for intervention with property rights [emphasis added].

The same document also shows that the negotiations in relation to Art 8 were difficult and that Czechoslovakia had been unable to maintain its intended position.

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<sup>21</sup> [F/4]

<sup>22</sup> Doc 10 p.10

Czechoslovakia had to take a more flexible approach to so-called diagonal disputes, i.e. disputes between an investor and the State on whose territory the investment was made.

### **Conclusion on the contextual material**

31. 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 of Art.8, according to the principles set out in Art.31 and Art.32 of the Vienna Convention. The most that can be said is that, at the time the Treaty was negotiated, certain Communist States showed reluctance, for ideological reasons, to agree to international arbitration as the forum for dispute resolution. However, the practice between states (and on the part of individual states) has varied, and seems to have depended on individual negotiations. In some cases identified by EMV, Communist States were prepared to concede the issue<sup>23</sup>. In other cases they plainly have not. In each case the issue was likely to depend on the relative negotiating strength of each Contracting State and its doctrinal interest in the issue. As Paulsson has noted<sup>24</sup>:

... the contents of BITs vary greatly: as much as any individual country might like to impose its own idea of a standard BIT, the varying negotiating strength of the other side has the effect of rendering most countries' portfolios of BITs quite heterogeneous ... in particular, the scope of and nature of third party access to international arbitration through BIT mechanisms are so different from one BIT to the next that one cannot speak of a dominant practice: each BIT must be examined on its own.

32. In the present case each side appears to have adopted opposing negotiating positions, and there was a degree of compromise. In my view the arbitration provision of this Treaty fell into a further category, in which the width of the arbitration clause was left unclear: possibly to the satisfaction of both sides. I would add that I did not find material in which commentators sought to describe and explain the terms of the Treaty, by way of précis, to be of any significant assistance in the task of interpretation.

### **The approach to interpretation**

33. In interpreting this Treaty the Court must have in mind a number of preliminary matters.
34. First, the importance of an 'independent' interpretation. A treaty

... must be given independent meaning derivable from the sources mentioned in articles 31 and 32 and without taking colour from distinctive features of the legal system of any

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<sup>23</sup> See e.g. France/USSR BIT of 4 July 1989 [D5/81], Canada/USSR BIT of 20 November 1989 [D5/83] and Korea/USSR BIT of 14 December 1990 [D5/87]

<sup>24</sup> Paulsson, Arbitration Without Privity ICSID Review Vol.10, No.1 (1995, 232 at 235 [E2/18])

individual contracting state. In principle therefore there can only be one true interpretation of a treaty.<sup>25</sup>

35. Secondly, it must be born in mind that, simply as a matter of the wording of Art.8, the arbitral jurisdiction is the same whether the ‘*concerned Contracting Party*’ referred to in Art.8 is the Czech Republic or Belgium/Luxemburg.
36. Thirdly, the ‘ordinary meaning’ is the meaning attributed to those terms at the time the treaty is concluded. Sir Gerald Fitzmaurice, expressed the principle (the Principle of Contemporaneity) as follows:

The terms of the treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in light of current linguistic usage, at the time when the treaty was originally concluded.<sup>26</sup>

37. Fourthly, as a normal principle of interpretation a Court or Tribunal should endeavour to give a meaning to each of the words being interpreted<sup>27</sup>.

### **Conclusions**

38. It is in the light of these factors that I approach the question of interpretation in this case.
39. Before doing so, I can deal shortly with the large amount of material which was deployed by the parties for the purpose of showing that the other side’s construction could have been (and in other BITs had been) clearly and unambiguously expressed<sup>28</sup>. In almost any dispute over interpretation or construction it is possible to postulate a form of words which is clearer or more emphatic; and to argue that the failure to use such words supports a particular construction. That does not usually assist in the task of interpretation, and it did not in the present case. The material, which was photocopied exhaustively, was mutually self-defeating.
40. So far as the Object and Purpose of the Treaty is concerned, I accept (for the reasons already stated and subject to the qualification already noted) that these included an intention to confer on the investor a valuable right to arbitrate.
41. As a matter of the language of Article 8(1) there are four preconditions to arbitral jurisdiction: (a) a ‘*dispute*’, which (b) must be ‘*concerning compensation*’, which (c) must be ‘*due by virtue of*’ something, and (d) an event under Article 3(1) and (3) must have occurred.

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<sup>25</sup> *R v. Secretary of State for the Home Department, ex p. Adam* (see above) Lord Steyn at 516H, see also Lord Hobhouse at 529.

<sup>26</sup> Fitzmaurice, ‘The Law and Practice of the International Court of Justice 1951-4: Treaty Interpretations and other Treaty Points’ (1957) 33 *BYBIL* 203 at 212 [E/1]. See also Sinclair, *The Vienna Convention on the Law of Treaties* (above) 124 and the second phase judgment of the ICJ in *The South West Africa Cases* ICJ Reports 1966 p.6 [C/7]

<sup>27</sup> The principle expressed as: *verba aliquid operari debent*

<sup>28</sup> EMV were able to point to plainly limiting words where the arbitration clause refers to disputes as to the ‘amounts’ of compensation, see the Belgium and Luxemburg/USSR BIT of 9 February 1989 [D5/78], the UK/USSR BIT dated 6 April 1989 [D5/79] and the Czech & Slovak Federal Republic/Austria in 1990 [D2/13].



42. So far as precondition (a) is concerned, there is no issue that there is a dispute<sup>29</sup> ; and that this precondition is therefore satisfied.
43. It is the ambit of precondition (b) and the phrase '*concerning compensation*' which gives rise to the most difficulty. The starting point is, in my judgment, the width of the ordinary meaning of the phrase. I am unable to accept that the phrase must be read as meaning '*relating to the amount of compensation*' as a matter of its ordinary meaning. On the other hand the phrase clearly provides some limit to the jurisdiction of the Arbitral Tribunal.
44. The use of the word '*compensation*' limits the scope of the arbitration. It may be contrasted with broad phrases such as '*any disputes*' which may be found in other BITs. Its impact is to restrict the jurisdiction of the tribunal to one aspect of expropriation. The word '*concerning*', however, is broad. The word is not linked to any particular aspect of '*compensation*'. '*Concerning*' is similar to other common expressions in arbitration clauses, for example '*relating to*' and '*arising out of*'. Its ordinary meaning is to include every aspect of its subject: in this case '*compensation due by virtue of Paragraphs (1) and (3) of Article 3*'. As a matter of ordinary meaning this covers issues of entitlement as well as quantification.
45. So far as precondition (c) is concerned, '*due by virtue of*', this connects entitlement to compensation to events specified in Articles 3(1) and (3). The Tribunal is not conferred with any jurisdiction unless the asserted right to compensation arises out of one of the specified events. In other words, in determining any claim '*concerning compensation*', the tribunal must necessarily consider whether the events in Articles 3(1) and (3) have occurred, and their precise nature.
46. As Mr Landau noted<sup>30</sup>, Article 3(1) may involve a number of considerations:
- i) whether there has been an '*expropriation*';
  - ii) whether there have been '*other measures*';
  - iii) whether such measures are '*taken in accordance with a lawful procedure and are not discriminating*';
  - iv) whether the measures are '*accompanied by provisions for the payment of compensation*';
  - v) whether the payment of compensation is '*paid to the investor in convertible currency and without delay*'; and
  - vi) whether the amount of compensation '*corresponds to the real value of the investment ...*'?

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<sup>29</sup> It is common ground that there is a dispute between the parties as to whether there was an unlawful expropriation of EMV's assets, and if so, how much (if any) compensation is payable in respect of such expropriation, see Award §§50 and 51.

<sup>30</sup> See also § 57 of the Award.

In addition, the reference to Article 3(3) may involve the question whether or not an investor holds ‘*any form of participation in any company ... in the territory of the other Contracting State*’.

47. In my view the ordinary meaning of the words of Article 8, with its specific cross-reference to the terms of Article 3(1) suggests strongly that the jurisdiction is not confined to a single issue arising under Art 3(1) (ie item vi). The cross-reference to Article 3(3) reinforces the impression that the jurisdiction relates to issues or entitlement and not simply to issues of quantification.
48. Such an interpretation both gives effect to all the words of Art.8, and ‘*creates conditions favourable to the making of investments by Investors*’ (see the preamble to the BIT).
49. As the Tribunal noted, the effect of the Czech Republic’s argument is that a tribunal is precluded from considering or making any determination on any of the elements of Art.3(1) or (3), despite what may be the need for a close examination of the nature of the conduct in question and the circumstances when considering the question of the amount of compensation. This favours an interpretation in favour of determination by the tribunal and against parallel or duplicative proceedings.
50. One of the issues between the parties was the extent of the limitation to the arbitration clause. EMV’s argument, which the Tribunal accepted<sup>31</sup>, was that the effect of the limitation is to exclude from the jurisdiction any claim for relief other than compensation (ie. a claim for restitution or a declaration that a contract was still in force). The Czech Republic argued that it is ‘highly improbable’ that the parties intended that issues as to the recovery of damages should be dealt with by the arbitral tribunal, but that the question of restitution and of declaratory judgments should not, since Restitution as a remedy in International Law is rarely ordered against a state and has never been ordered in the context of a BIT<sup>32</sup>.
51. It is clear that, despite being rare, restitution and declaratory relief are available remedies<sup>33</sup> in International Law<sup>34</sup>. I am very doubtful as to whether the Contracting Parties intended that claims for compensation fell within the jurisdiction of the tribunal and claims for restitution and declarations fell without. However that is not determinative of the issue. As already noted, the task of the Court is not to search for a notional common intention; but to give a meaning to the words used in the context in which they came to be agreed. As Mr Landau submitted, this is an unusual form of words and therefore it is not surprising that the interpretive solution may be unusual.
52. The Czech Republic also relies on the existence of Article 7 as showing that the appropriate means of resolving the Article 3 issues are either inter-state arbitration or the local courts. However, as the Tribunal noted, the promise of redress in local courts for the actions of a government which had expropriated its property does not lie easily with one of the objects of the BIT: the conferring of valuable rights to arbitrate. The material advanced by the Czech Republic as to Communist ideology on the subject of

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<sup>31</sup> See Award §52.

<sup>32</sup> See C. Gray *Judicial Remedies in International Law* (1987) 13-15 [E/6]

<sup>33</sup> The Czech Republic’s argued that declaratory relief would be of no use to an investor as stand-alone remedy, and would (in any event) logically precede an award of damages.

<sup>34</sup> See e.g. Amerasinghe, *Jurisdiction of International Tribunals* (2003) at pp.385-390 and 408-422.

foreign ownership provides good reason for the suspicions of investors who might be offered local redress. Article 7 is a means of resolving disputes '*relating to the interpretation or the application*' between the Contracting Parties. As already noted BITs were intended to confer rights on investors which were not dependant on the interest in or support for their disputes by their Governments<sup>35</sup>. The means of vindicating those rights was the direct right to arbitrate given to investors: in the present Treaty by means of Article 8.

53. For these reasons I have concluded that the Tribunal was conferred with substantive jurisdiction to determine the question whether compensation should be awarded. In coming to this view I have not overlooked the published commentaries of Willem Van de Voorde<sup>36</sup> and Paul Peters<sup>37</sup>, both of whom concluded that Article 8 was restricted to disputes as to the amount of compensation. Both of these writers are entitled to the respect due to those who carefully study these matters. However, their conclusions necessarily were based on limited material and without the benefit of the extensive argument that has been available to me.
54. The application is accordingly dismissed.

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<sup>35</sup> In Douglas, 'The Hybrid Foundation of Investment Treaties', (2003) BYIL 151 at 182, the author writes that, the investor's right to arbitrate 'may well be a response to the inadequacies of diplomatic protection.'

<sup>36</sup> W Van de Voorde, 'Belgian Bilateral Investment Treaties as a Means for Promoting and Protecting Foreign Investment' (1991) 1 *Studio Diplomatica* 87,107 [E/9]

<sup>37</sup> P Peters, 'Dispute Settlement Arrangements in Investment Treaties' (1991) 22 Netherlands Year Book of International Law 91, 118-119 and 123-4 [E/8]