

Nova Scotia Power Incorporated (Canada) v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/11/1)

Excerpts of the Award of April 30, 2014 made pursuant to Article 53(3) of the ICSID Arbitration (Additional Facility) Rules of 2006

Claimant

Nova Scotia Power Incorporated Limited (“NSPI”, a Canadian corporation)

Respondent

Bolivarian Republic of Venezuela (“Venezuela”)

Tribunal

Hans Van Houtte (President of the Tribunal, Belgian), appointed by the Parties

David A.R. Williams (New Zealand), appointed by the Claimant

Raúl Emilio Vinuesa (Argentine/Spanish), appointed by the Respondent

Award

Award of April 30, 2014

Instrument relied on for consent to ICSID arbitration

Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments dated July 1, 1996, which entered into force on January 28, 1998 (“Canada-Venezuela BIT”)

Procedure

Applicable Arbitration Rules: ICSID Arbitration (Additional Facility) (“AF”) Rules of 2006

Place of Proceedings: Paris, France

Procedural Languages: English and Spanish

Full procedural details: Available at <https://www.worldbank.org/icsid>

Factual Background

Between 1999 and 2007, the Claimant received a supply of coal from a mine in the Zulia region of Venezuela pursuant to a supply agreement and confirmation letters entered into with a company incorporated in Aruba (“company X”) that was in turn controlled by Venezuelan state-owned entities. At the end of 2007, the Claimant was informed by company X that it would be indefinitely suspending all shipments of coal to NSPI. After further exchanges of correspondence and meetings between NSPI and company X in the first half of 2008, company X confirmed that it was required to suspend coal shipments to NSPI because of a government directive, which in its view constituted a *force majeure* event under the supply agreement.

In 2008, NSPI commenced a commercial arbitration proceeding in Halifax, Nova Scotia, against company X, and subsequently commenced another arbitration proceeding against Venezuela under the UNCITRAL Arbitration Rules on the basis of the Canada-Venezuela BIT. The Halifax arbitration was later suspended and in 2010, a tribunal in the UNCITRAL arbitration ruled that it did not have jurisdiction over NSPI’s claims.

The Claimant filed a request for arbitration against Venezuela with the Additional Facility (“AF”) in 2011, alleging breach of the Canada-Venezuela BIT. According to the Claimant, the dispute related to Venezuela’s unilateral termination of the Claimant’s right to receive supplies of coal at fixed prices from company X. Venezuela objected to the jurisdiction of the AF Tribunal.

On April 30, 2014, the AF Tribunal rendered an award unanimously declining jurisdiction on the basis that the dispute did not arise out of an “investment” within the meaning of the Canada-Venezuela BIT.

EXCERPTS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

NOVA SCOTIA POWER INCORPORATED (CANADA)

Claimant

and

BOLIVARIAN REPUBLIC OF VENEZUELA

Respondent

ICSID Case No. ARB(AF)/11/1

AWARD

Members of the Tribunal

Professor Hans Van Houtte, President
Professor David A.R. Williams, QC, Arbitrator
Professor Raúl Emilio Vinuesa, Arbitrator

Secretary of the Tribunal

Mr. Paul-Jean Le Cannu

Date of dispatch to the Parties: April 30, 2014

REPRESENTATION OF THE PARTIES

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and

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Mr. Thomas Bevilacqua
Ms. Melida Hodgson
Ms. Alexandra Meise Bay
Mr. Ivan Urzhumov
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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

BIT or Treaty	Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments dated July 1, 1996
Cl. Mem.	Memorial of Nova Scotia Power Incorporated dated May 14, 2012
Cl. C-Mem. Jur.	Counter-Memorial on Jurisdiction of Nova Scotia Power Incorporated dated December 10, 2012
Cl. Rej.	Rejoinder on Jurisdiction of Nova Scotia Power Incorporated dated April 22, 2013
[...]	[...]
[...]	[...]
2007 Confirmation Letters	Confirmation Letter 3 (coal supply for 2008-2011) and Confirmation Letter 4 (coal supply for 2008), both dated July 13, 2007
[...]	[...]
Coal Supply Agreement	Coal Supply Agreement dated October 18, 2005 between [company X] and NSPI
E [CE] [RE]	Exhibit [Claimant] [Respondent]
[company X]	[company X]
ICSID Additional Facility Rules	Rules Governing the Additional Facility as amended effective April 10, 2006
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
LA [CLA] [RLA]	Legal Authority [Claimant] [Respondent]
NSPI or Claimant	Nova Scotia Power Incorporated
Request or RFA	Request for Arbitration of Nova Scotia Power Incorporated dated November 2, 2010
Resp. Mem. Jur.	Memorial on Jurisdiction of the Bolivarian Republic of Venezuela dated August 27, 2012

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Resp. Reply	Reply on Jurisdiction of the Bolivarian Republic of Venezuela dated February 19, 2013
Schedule C to the ICSID Additional Facility Rules	Arbitration (Additional Facility) Rules (Schedule C), as amended effective April 10, 2006
Tr. [Day #], [page/line]	Transcripts of the hearing on jurisdiction held from June 19 through 21, 2013
UK–Venezuela BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Venezuela for the Promotion and Protection of Investments dated March 15, 1995
VCLT	Vienna Convention on the Law of Treaties concluded at Vienna on May 23, 1969
Venezuela or Respondent	Bolivarian Republic of Venezuela

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of the Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments dated July 1, 1996 (the “BIT” or “Treaty”), which entered into force on January 28, 1998, and the Rules Governing the Additional Facility (the “ICSID Additional Facility Rules”) and Schedule C to the ICSID Additional Facility Rules, as amended and in effect from April 10, 2006.¹ The dispute relates to the Bolivarian Republic of Venezuela’s termination of Nova Scotia Power Incorporated’s right to receive up to 1.7 million metric tonnes of coal at fixed prices from the Paso Diablo coal mine in Venezuela.²
2. The Claimant is Nova Scotia Power Incorporated, a company incorporated under the laws of Canada,³ hereinafter referred to as “NSPI” or the “Claimant.”
3. The Respondent is the Bolivarian Republic of Venezuela, hereinafter referred to as “Venezuela” or the “Respondent.”
4. The Claimant and the Respondent are hereinafter collectively referred to as the “Parties.” The Parties’ respective representatives and their addresses are listed above on page (i).⁴

¹ This arbitration has been brought under Article 2(a) and (alternatively) (b) of the ICSID Additional Facility Rules, which provide as follows:

The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State, falling within the following categories:

(a) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State; and

(b) conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State.

² The Claimant has valued its losses in excess of US\$ [...] (See Claimant’s Memorial (“Cl. Mem.”), ¶¶ 145-148).

³ See Request for Arbitration (“RFA”), ¶ 5 (CE-Schedule C).

⁴ By letter of September 14, 2011, the Centre transmitted to the Parties a letter dated September 8, 2011 from the Respondent and a letter from ICSID to the Respondent of September 14, 2011. The Respondent indicated in its letter that Dr. Carlos Miguel Escarrá Malavé had been designated as Procurador General de la República de

II. PROCEDURAL HISTORY

5. On November 2, 2010, ICSID received a request for arbitration dated November 2, 2010 from NSPI against Venezuela (the “Request”).
6. On January 26, 2011, the Secretary-General of ICSID approved access to the Additional Facility and registered the Request in accordance with Articles 4 and 5 of Schedule C to the ICSID Additional Facility Rules and notified the Parties of the registration. In the Notice of Registration, and pursuant to Article 5(c) and (e) of Schedule C to the ICSID Additional Facility Rules, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Chapter III of Schedule C to the ICSID Additional Facility Rules.
7. The Parties agreed that the Tribunal would consist of three arbitrators, one to be appointed by each party, the third arbitrator and President of the Tribunal to be appointed by agreement of the Parties.
8. The Claimant appointed Professor David A.R. Williams QC, a national of New Zealand, as arbitrator on April 13, 2011 and on April 18, 2011 Professor Williams accepted the appointment and signed a declaration in accordance with Article 13(2) of Schedule C to the ICSID Additional Facility Rules.

Venezuela on August 30, 2011 and that he and Dra. Ana Maria De Stefano Lo Piano were the only individuals to be copied on all ICSID correspondence. The Centre confirmed in its letter to the Respondent that it would copy Dr. Malavé and Dra. De Stefano on all future correspondence and, unless otherwise instructed, would continue copying the law firm designated by the Republic (Foley Hoag LLP). By letter of February 15, 2012, the Centre transmitted to the Parties correspondence from the Respondent dated February 13, 2012 and correspondence from the Centre dated February 14, 2012. In the Respondent’s letter, Dra. Cilia Flores informed the Centre that she had been designated as Procuradora General de la República on February 1, 2012. Dr. Flores requested that she and Dra. Magaly Gutiérrez be copied on future ICSID correspondence. In its letter of February 14, 2012, the Centre confirmed that it would do so. On May 14, 2013, the Centre transmitted to the Parties a letter from the Respondent informing the Secretary-General of ICSID that Dra. De Stefano had ceased to perform her functions and that the following individuals should now receive all future communications from the Centre: Dr. Manuel Enrique Galindo, Procurador General Encargado; Dra. Magaly Gutiérrez Viña, Coordinadora Integral del Despacho; y Dra. Yarubith Escobar, Asistente del Procurador. By email of April 7, 2014, the Centre transmitted to the Parties a letter from the Respondent informing the Secretary-General of ICSID that Dra. Escobar had ceased to perform her functions and that the following individuals should now receive future communications from the Centre: Dr. Manuel Enrique Galindo, Procurador General Encargado; Dra. Magaly Gutiérrez Viña, Coordinadora Integral del Despacho Encargado; y Dra. Julisbeth Carolina Castillo Yelamo, Coordinadora Integral Legal.

9. The Respondent appointed Professor Raúl Emilio Vinuesa, a national of Argentina and Spain, on May 11, 2011 and on May 12, 2011 Professor Vinuesa accepted the appointment and signed a declaration in accordance with Article 13(2) of Schedule C to the ICSID Additional Facility Rules.
10. The Parties agreed to appoint Professor Hans van Houtte, a national of Belgium, as President of the Tribunal on September 13, 2011.
11. On September 16, 2011, Professor van Houtte accepted the appointment and signed a declaration in accordance with Article 13(2) of Schedule C to the ICSID Additional Facility Rules. On the same date, the Secretary-General, in accordance with Article 13(1) of Schedule C to the ICSID Additional Facility Rules, notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Mr. Paul-Jean Le Cannu, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
12. The Tribunal held its first session with the Parties on November 20, 2011 in Paris, France. The Parties confirmed that the Members of the Tribunal had been validly appointed. It was agreed, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 10, 2006,⁵ that the procedural languages would be English and Spanish, with written pleadings to be translated into the other language,⁶ and that the place of proceeding would be Paris, France.⁷ The Parties agreed on, and the Tribunal approved, a schedule for the jurisdictional phase of the proceedings in the event that the Respondent were to confirm its intention to raise objections to jurisdiction.⁸ The results of the first session were reflected in minutes, which were duly conveyed to the Parties (“Minutes of the First Session”).⁹
13. On April 9, 2012, the Claimant filed a request for the Tribunal to take a decision on the Parties’ document production requests and objections, to which the Respondent replied on

⁵ See Minutes of First Session dated December 23, 2011, ¶ 1.1.

⁶ See Minutes of First Session dated December 23, 2011, ¶ 10.1.

⁷ See Minutes of First Session dated December 23, 2011, ¶ 9.1.

⁸ See Minutes of First Session dated December 23, 2011, ¶ 13.1.

⁹ See ICSID letter to Parties dated December 23, 2011.

April 19, 2012. By letter of April 23, 2012, the Claimant withdrew its request, in light of clarifications provided by the Respondent.

14. On May 14, 2012, the Claimant filed its Memorial along with supporting documents, including witness statements and an expert report, in accordance with paragraph 13 of the Minutes of the First Session. The Claimant also filed Spanish translations of its Witness Statements and Expert Report on May 25, 2012 and of its Memorial on June 4, 2012.
15. Also in accordance with paragraph 13 of the Minutes of the First Session, the Respondent confirmed its intention to raise jurisdictional objections on May 25, 2012 and submitted its Memorial on Jurisdiction along with supporting documents on August 27, 2012. The Respondent filed a Spanish translation of its Memorial on September 17, 2012.
16. The Claimant filed its Counter-Memorial on Jurisdiction on December 10, 2012 (including supporting documents), with the Spanish translation following on December 23, 2012.
17. The Respondent's Reply on Jurisdiction was subsequently filed on February 19, 2013, and the Spanish translation followed on March 11, 2013, and the Claimant's Rejoinder on Jurisdiction was filed on April 22, 2013, with the Spanish translation following on May 10, 2013.
18. A hearing on jurisdiction took place at the World Bank's office in Paris from June 19 to 21, 2013. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the hearing were:

For the Claimant:

Mr. John Terry	Torys LLP
Mr. Stuart Svonkin	Torys LLP
Mr. Geoff Watt	Torys LLP
Professor Rudolf Dolzer	
Mr. David Landrigan	NSPI
Mr. Mark Sidebottom	NSPI

For the Respondent:

Dr. Ronald E.M. Goodman	Foley Hoag LLP
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Mr. Thomas Bevilacqua	Foley Hoag LLP
Ms. Melida Hodgson	Foley Hoag LLP
Ms. Alexandra Meise Bay	Foley Hoag LLP
Mr. Ivan Urzhumov	Foley Hoag LLP
Ms. Angelynn Meya	Foley Hoag LLP
Mr. Carlos Arrue Montenegro	Foley Hoag LLP
Mr. Diego Cadena	Foley Hoag LLP
Mr. Rodrigo Tranamil	Foley Hoag LLP
Ms. Angélica Villagrán	Foley Hoag LLP
Mr. Peter Hakim	Foley Hoag LLP
Dr. Yarubith Escobar	Procuraduría General, Venezuela (on June 19, 2013)
Ms. Mariana Arenas	Procuraduría General, Venezuela (on June 19, 2013)

19. On July 2 and 3, 2013, the Parties filed jointly a chronology of events.
20. The Parties filed their submissions on costs on August 16, 2013.
21. The proceeding was declared closed on April 5, 2014, in accordance with Article 44(1) of Schedule C to the ICSID Additional Facility Rules.¹⁰

III. FACTUAL BACKGROUND

A. Subject matter of this dispute

22. [...]

B. Prior proceedings

36. [...]

IV. SUMMARY OF THE PARTIES' CLAIMS ON JURISDICTION AND TRIBUNAL'S ANALYSIS

40. What follows is a summary of the positions of the Parties, without prejudice to the Parties' full arguments as submitted in their written and oral pleadings, including supporting documents, which the Tribunal has taken into consideration in making its determinations.

¹⁰ See Letter from ICSID dated April 30, 2014.

A. Overview of the Parties' Positions

1. Respondent's Position

41. [...]

2. Claimant's Position

42. [...]

3. Tribunal's Analysis of a Preliminary Issue

44. The Tribunal finds it convenient to deal here with a preliminary issue. The Claimant has argued that the Tribunal has jurisdiction because the Respondent has stated in the UNCITRAL Arbitration that the present arbitration is the proper forum for the Parties' dispute (presuming that the dispute resolution mechanism under the BIT is available to the Claimant generally). The Tribunal is not convinced that the Respondent's assertion before the UNCITRAL Arbitration that the dispute could not be submitted under the UNCITRAL Arbitration Rules under the tiered dispute resolution mechanism provisions of Article XII (4) of the BIT because arbitration under the Additional Facility was *available*,⁴⁹ determines the jurisdiction of this Tribunal in any way. For the Tribunal, it is clear that the Respondent, in objecting to the UNCITRAL Arbitration as the correct *forum*, on the basis that the ICSID Additional Facility was *available*, reserved its rights to object to jurisdiction in this arbitration.⁵⁰ The indication of availability did not represent a concession to jurisdiction.[...]

B. Burden and Standard of Proof

1. Overview of the Parties' Positions

45. [...]

a. Respondent's Position

46. [...]

b. Claimant's Position

47. [...]

2. Tribunal's Analysis

49. As a preliminary matter, the Tribunal notes that there appears to be little dispute between the Parties as to the *existence* of the facts. Rather, the dispute centres on the *interpretation* of those facts and whether or not they support jurisdiction. As such, discussion of burden or standard of proof, and the Parties' positions thereon, is of limited relevance and somewhat academic.
50. Nonetheless, the Tribunal is of the view that in considering questions of burden and standard of proof it is appropriate to distinguish in this jurisdictional phase between facts required to support jurisdiction, and facts which go to the merits. The Tribunal agrees with this "double approach," as it was termed by the tribunal in *Phoenix Action, Ltd. v. Czech Republic*,⁶⁴ which requires the Claimant to positively establish key jurisdictional facts⁶⁵ whilst allowing for facts which go to the merits to be provisionally "accepted at face value."⁶⁶ The Tribunal now turns to examine the first limb of the Respondent's first jurisdictional objection,⁶⁷ namely that the dispute submitted to this Tribunal does not arise out of an "investment."

⁶⁴ *Phoenix Action*, *supra* note 61, ¶ 62.

⁶⁵ *E.g.* those said to establish that an investment has been made in the territory of a host State.

⁶⁶ *Phoenix Action*, *supra* note 61, ¶ 64.

⁶⁷ *See supra* ¶ 43 a).

C. The dispute does not arise out of an “investment”

1. Interpretive Approach

a. Respondent’s Position

51. [...]

b. Claimant’s Position

63. [...]

c. Tribunal’s Analysis

75. To ascertain whether there is an investment, the Tribunal must look to the terms of the BIT. For the Tribunal, this is the focus of its enquiries, and is unaltered by what forum the dispute is before. The relevant provisions of the BIT are the following:

ARTICLE I

Definitions

For the purpose of this Agreement: [...]

(f) “investment” means any kind of asset owned or controlled by an investor of one Contracting Party either directly or indirectly, including through an investor of a third State, in the territory of the other Contracting Party in accordance with the latter’s laws. In particular, though not exclusively, “investment” includes:

(i) movable and immovable property and any related property rights, such as mortgages, liens or pledges;

(ii) shares, stock, bonds and debentures or any other form of participation in a company, business enterprise or joint venture;

(iii) money, claims to money, and claims to performance under contract having a financial value;

(iv) goodwill;

(v) intellectual property rights;

(vi) *rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources.*

but does not mean real estate or other property, tangible or intangible, not acquired in the expectation or used for the purpose of economic benefit or other business purposes.

Any change in the form of an investment does not affect its character as an investment.

(g) *“investor” means*

in the case of Canada:

(i) *any natural person possessing the citizenship of Canada in accordance with its laws; or*

(ii) *any enterprise incorporated or duly constituted in accordance with applicable laws of Canada,*

who makes the investment in the territory of Venezuela and who does not possess the citizenship of Venezuela; and

in the case of Venezuela:

(i) *any natural person possessing the citizenship of Venezuela in accordance with its laws; or*

(ii) *any enterprise incorporated or duly constituted in accordance with applicable laws of Venezuela,*

who makes the investment in the territory of Canada and who does not possess the citizenship of Canada;

[...]

ARTICLE XII

Settlement of Disputes between an Investor and the Host Contracting Party

1. Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the fanner Contracting Party is in breach of this Agreement, and that the investor or an enterprise owned or controlled directly or indirectly by the investor has incurred loss or damage by

reason of, or arising out of, that breach, shall, to the extent possible, be settled amicably between them.

2. If a dispute has not been settled amicably within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with paragraph (4). [...]

4. The dispute may, by the investor concerned, be submitted to arbitration under:

(a) The International Centre for the Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington 18 March, 1965 (ICSID Convention), provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention;

or

(b) the Additional Facility Rules of ICSID, provided that either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention; or

*In case neither of the procedures mentioned above is available, the investor may submit the dispute to an international arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). [...]*¹²⁵

76. The Tribunal notes that the Parties agree that in so far as there is a dispute regarding the meaning of investment in the BIT, Article 31 of the VCLT should be followed. Article 31 of the VCLT provides that “[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.” Thus, the starting point for the application of the VCLT is the “ordinary meaning” of the term investment. Article 32 of the VCLT sets forth supplementary means of interpretation which, given the Tribunal’s findings below, have not come into play.

77. The Tribunal is of the view that in examining whether or not an investment is present, the definition of “investment” in the BIT cannot be considered self-sufficient. Indeed, one

¹²⁵ Schedule A to the RFA; RLA-80.

might query if the language attached to “investment” in the BIT can even be properly described as a definition¹²⁶ (i.e. a term which offers an exact description of the item in question); this also indicates its limitations. In ascertaining the ordinary meaning of “investment”, the Tribunal must do more than simply look to the list of examples offered in Article I(f) of the BIT. The reasons for this are threefold.¹²⁷

78. First, the list of examples in Article I(f) is clearly non-exhaustive on its own terms.¹²⁸ The open-ended nature of this part of the purported definition of investment calls for recourse to inherent features. The Tribunal refers here to the awards in *Joy Mining* and *Romak*. Whilst this Tribunal does not find it necessary to invoke Article 32(b) of the VCLT as the *Romak* tribunal did, it finds the problems highlighted by the *Romak* tribunal to be relevant considerations for ascertaining the ordinary meaning of the term “investment” in “context and in the light of its object and purpose.”¹²⁹ In *Romak*, the tribunal said (citing *Joy Mining*):

184. In addition, for a number of reasons the Arbitral Tribunal finds that a mechanical application of the categories listed in Article 1(2) of the BIT would produce “a result which is manifestly absurd or unreasonable.” Such an outcome is contrary to Article 32(b) of the Vienna Convention.

185. First, said interpretation would eliminate any practical limitation to the scope of the concept of “investment.” In particular, it would render meaningless the distinction between investments, on the one hand, and purely commercial transactions, on the other. As the Joy Mining tribunal explained:

[...] if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an investment. International contracts are today a central feature of international trade and have stimulated far reaching developments in the

¹²⁶ *The Oxford English Dictionary* (Oxford, 2010) defines definition as “a statement of the *exact* meaning of a word [...] an *exact* statement or description of the nature, scope, or meaning of something.” (emphasis added)

¹²⁷ See *Romak*, *supra* note 86, ¶ 180: “The term ‘investment’ has a meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the BIT.”

¹²⁸ The introductory language for the list of examples in Article I(f) reads “In particular, though not exclusively, ‘investment’ includes” (see *Romak*, *supra* note 86, ¶¶ 174, 180).

¹²⁹ Article 31(1) of VCLT.

*governing law, among them the United Nations Convention on Contracts for the International Sale of Goods, and significant conceptual contributions. Yet, those contracts are not investment contracts, except in exceptional circumstances, and are to be kept separate and distinct for the sake of a stable legal order. Otherwise, what difference would there be with the many State contracts that are submitted every day to international arbitration in connection with contractual performance, at such bodies as the International Chamber of Commerce and the London Court of International Arbitration?*¹³⁰

This Tribunal considers that the “mechanical application” of the list of examples in Article I(f) here would not suffice for the purposes of Article 31(1) of the VCLT.

79. Second, the interplay between Article I(f) and Article I(g) of the BIT, and the terms “investment” and “investor” generally, support the necessity of recourse to inherent features. “Investor” operates as a gateway for “investment.” The “investor” “make[s] the investment.”¹³¹ Moreover, Article XII has as its focus the “investor.” The Tribunal does not see the terms “investor” and “investment” as separate and pertaining only to *ratione personae* and *ratione materiae* respectively. By its plain meaning, the language in the BIT makes it necessary to address the question of what it is to “make” an investment. This question in turn requires recourse to the inherent features of an investment.
80. Third, the Tribunal is not convinced by the Claimant’s argument that because Article 2(a) of the ICSID Additional Facility Rules does not impose additional requirement to establish an “investment” beyond that contained in the BIT (in contrast to Article 25 of the ICSID Convention),¹³² the Tribunal should not look any further than the (self-contained) definition of investment in Article I(f) of the BIT.¹³³ As the Tribunal has already indicated, the BIT itself calls for the consideration of inherent features. What the ICSID Additional Facility Rules or the ICSID Convention do or do not impose is not relevant in this regard. It cannot be the case that the scope of “investment” in a bilateral investment

¹³⁰ Romak, *supra* note 86, RLA-67, ¶¶ 184-185, citing *Joy Mining*, *supra* note 86, ¶ 58.

¹³¹ Article I(g) of the BIT.

¹³² Cl. C-Mem. Jur., ¶ 11.

¹³³ *I.e.* look only to the list set forth in Article I(f) of the BIT.

treaty changes depending on the arbitral forum.¹³⁴ No matter what the forum, the ordinary meaning of investment in the relevant bilateral investment treaty derives from something more than a list of examples and calls for an examination of the inherent features of an investment.

81. Discussing the task of defining the term investment in the ICSID Convention, the General Counsel of the World Bank who shepherded the ICSID Convention into existence, stated that “investment” is difficult to define but yet readily recognisable.¹³⁵ The Tribunal finds this an apt view for the present circumstances (albeit that the comment was made in relation to “investment” in the ICSID Convention), as well as one which speaks against merely looking to a list of examples provided in the BIT. The term investment carries inherent features as part of its ordinary meaning and these must be taken into account by the Tribunal.
82. Before discussing what these inherent features are and whether they are present here, the Tribunal must deal with two further issues. Firstly, object and purpose:¹³⁶ the Claimant has argued that as the purpose of the BIT is to promote and protect investments, the protection of those investments via the dispute resolution mechanisms in the BIT should not be too

¹³⁴ See *Romak*, *supra* note 86:

194. *The Arbitral Tribunal does not share this view, which could lead to “unreasonable” results. This view would imply that the substantive protection offered by the BIT would be narrowed or widened, as the case may be, merely by virtue of a choice between the various dispute resolution mechanisms sponsored by the Treaty. This would be both absurd and unreasonable. Naturally, there are specific jurisdictional restrictions imposed by the ICSID Convention (for example, the limitation with respect to physical persons who are dual nationals, or to the existence of a “legal dispute”). However, said restrictions do not bear on the definition of “investment”. There is no dispute that the ICSID Convention’s drafters offered no definition for the term “investment.” There is no basis to suppose that this word had a different meaning in the context of the ICSID Convention than it bears in relation to the BIT. Indeed, the drafters appear to have excluded any specific definition from the ICSID Convention precisely to accord contracting parties a great deal of flexibility in their designation of transactions or disputes as investment-related in their instruments of consent.*

195. *On this basis, it would be unreasonable to conclude that the Contracting Parties contemplated a definition of the term “investments” which would effectively exclude recourse to the ICSID Convention and therefore render meaningless – or without effet utile – the provision granting the investor a choice between ICSID or UNCITRAL Arbitration. As already noted, this would run counter to the rule of construction requiring the interpreter to infer that a State party to two or more treaties which employ the same term in the same (or a similar) context intended to give said term the same (or at least a compatible) meaning in all the treaties.*

¹³⁵ See C. Schreuer, *The ICSID Convention: A Commentary*, 2nd. ed. (Cambridge: Cambridge University Press, 2009), CLA-91, ¶ 118.

¹³⁶ See Article 31 of VCLT.

hastily withdrawn by a narrow reading of “investment.” The Tribunal disagrees with this. The dispute resolution mechanisms provided for under Article XII of the BIT are exceptional. An untenable situation would result were this not so. Neither the definition of investment, nor the BIT, should function as a Midas touch for every commercial operator doing business in a foreign state who finds himself in a dispute. None of the dispute resolution mechanisms provided for in Article XII could bear the over-proliferation of claims that would result from boundless interpretations of the term “investment.”

83. Secondly, the Claimant has argued that the prior treaty making practice of both Canada and Venezuela supports its reading of the term investment because in other instances these two States have excluded certain types of commercial activity from the definition of investment. Because this has not occurred in the BIT, it should be presumed that NSPI’s alleged investment is included. The Tribunal does not find this argument persuasive. Whilst it is accepted that other tribunals have had recourse to prior treaty making practice, the Tribunal is not convinced that this avenue is open based on the interpretive framework provided for in the VCLT, and thus whether it is appropriate.¹³⁷ The Tribunal notes that were prior treaty making practice to be examined as a factual matter,¹³⁸ there would need to be substantial prior treaty practice and complete symmetry with regard to the particular treaty provision between Canada and Venezuela’s practice, sufficient to evidence a “meeting of the minds” and a common and continuous understanding. This *may* justifiably shed light on a bilateral investment treaty. The Tribunal has not been presented with the kind of comprehensive review of Canada and Venezuela’s prior substantial treaty-making practice which would enable it to discern such symmetry. In fact, very few treaties were referred to. The Tribunal further notes that even were such symmetry established looking at prior treaty-making practice requires caution. Each treaty or international agreement is a different bargain struck and based on different sets of circumstances.

¹³⁷ *I.e.* the prior treaty making practice of two States does not fit within the “context” outlined in Article 31(2) of the VCLT, and, in the event that supplementary means of interpretation under Article 32 of the VCLT are to be employed, nor does it fit within those enumerated.

¹³⁸ *I.e.* not as a supplementary means of interpretation (VCLT, Article 32) or as a contextual matter (VCLT, Article 31).

84. The Tribunal considers that an investment can be said to be present when a contribution has been made for a sufficient duration with the hope of receiving a benefit (including the inherent risk that one will not result). Or, to put it in more traditional terms, an investment requires *contribution, duration and risk*. These well-established features have been recognized by many an investment arbitration tribunal as the triad representing the minimum requirements for an investment.¹³⁹ The Tribunal deals with each of these in turn but notes that as suggested by the “triad” moniker, these elements are by nature interrelated: the type of alleged contribution will often affect the measurement of risk, as does duration (e.g. the longer the duration potentially the greater the risk); duration and risk can only be measured by the term of any contribution that has been made; and so on.

2. Contribution

a. Respondent’s Position

85. [...]

b. Claimant’s Position

88. [...]

c. Tribunal’s Analysis

90. As an initial matter, it is important that the subject matter and focus of the Tribunal’s enquiry be clarified. The Claimant describes the alleged investment at issue in these proceedings as its “contractual rights to coal from the Paso Diablo mine.”¹⁵¹ For the Tribunal, these rights are not in place until the 2007 Confirmation Letters have been

¹³⁹ See *Romak*, *supra* note 86, ¶ 207; *Italy v. Cuba*, *supra* note 86, ¶ 81; *Alps Finance*, *supra* note 86, ¶¶ 231-241; *Saba*, *supra* note 88, ¶ 110; *Caratube*, *supra* note 81, ¶ 360; *Quiborax*, *supra* note 81, ¶ 219; *LESI, S.p.A. and Astaldi S.p.A. v. People’s Democratic Republic of Algeria* (ICSID Case No. ARB/05/3), Decision of July 12, 2006 (“*LESI-Astaldi v. Algeria*”), ¶ 72(iv), RLA-47; see also *Antoine Abou Lahoud and Leila Bounafteh-Abou Lahoud v. Democratic Republic of the Congo* (ICSID Case No. ARB/10/4), Award of February 7, 2014, ¶¶ 313, 325; *M. Meerapfel Söhne AG v. Central African Republic* (ICSID Case No. ARB/07/10), Award of May 12, 2011, ¶ 183, excerpts available on the ICSID website; *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Award of May 8, 2008, ¶ 232; *Consortium Groupement L.E.S.I. - DIPENTA v. People’s Democratic Republic of Algeria* (ICSID Case No. ARB/03/08), Award of January 10, 2005, ¶ 13(iv).

¹⁵¹ Cl. Mem., ¶ 7.

entered into.¹⁵² Thus, it is the 2007 Confirmation Letters (and the contractual rights provided for therein, in combination with the incorporated terms of the Coal Supply Agreement) under which [company X] defaulted, which is the alleged investment at issue in these proceedings.

91. The Claimant has argued at several junctures¹⁵³ that its overall relationship with [company X], including the purchase of coal under previous Confirmation Letters, as well as the Coal Supply Agreement and its predecessor, the Framework Agreement, is relevant and indeed perhaps part of the investment at stake. The Tribunal is not convinced by this. Certainly the previous Confirmation Letters, under which performance has already occurred, are not part of the alleged investment for present purposes. Whilst the 2007 Confirmation Letters are expressed to be part of the Coal Supply Agreement,¹⁵⁴ and the Coal Supply Agreement offers a framework for the 2007 Confirmation Letters, it is important that without the 2007 Confirmation Letters, there is no contractual right to coal. In essence, the “investment” at issue here, if any, is the right to pay for and receive coal under the 2007 Confirmation Letters. Following on from this, and more specifically, it is the actual sales and receipt of coal that the 2007 Confirmation Letters provided for, and which had still to be specified in terms of specific quantities, delivery dates and shipping modalities, that is at the heart of the alleged investment.
92. Under the Coal Supply Agreement and the 2007 Confirmation Letters, the Claimant was to make no payment to [company X] until title to the coal had passed to it and it had been invoiced.¹⁵⁵ Thus, the only contribution that is in question here is a *commitment* to make a contribution. The Claimant has alleged that a commitment to make a contribution can constitute an investment. The Tribunal accepts that an investment may be constituted by a

¹⁵² The Tribunal notes that even then, several details regarding the sale and receipt of the coal remained to be determined, such as the exact quantity (*i.e.* if the options under the Confirmation Letters were exercised then the quantity might fluctuate) and the delivery date.

¹⁵³ See *supra* ¶ 89; see also Cl. C-Mem. Jur., ¶¶ 93, 109-114; Cl. Rej., ¶¶ 56-63.

¹⁵⁴ See, *e.g.*, the penultimate paragraph of CE-83.

¹⁵⁵ Under clauses 8.1 and 11.2 of the Coal Supply Agreement, title to the coal was to pass when coal left the loader/unloader. Thereafter [company X] would invoice NSPI and NSPI was to effect payment within ten days. The 2007 Confirmation Letters provided that title would pass when the coal “leaves the *loader*” (CE-82, CE-83).

commitment to make a payment in some circumstances, as indicated by the tribunals in *Deutsche Bank v. Sri Lanka* and *Malicorp v. Egypt*, but finds that the circumstances discussed in these cases are not present here.

93. In *Deutsche Bank*, which involved a hedging contract, a fundamentally different type of transaction was at issue. In the *Deutsche Bank* scenario, the tribunal identified the contribution that the Respondent received as, *inter alia*, a reduction in exposure to market volatility and the immediate ability to purchase oil at prices substantially below the prevailing market price. The tribunal also emphasized other non-monetary “contributions,” such as the commitment of resources made by Deutsche Bank both before and after the conclusion of the hedging agreement.¹⁵⁶ These commitments are very different from the alleged commitment in the present scenario. At its heart, this transaction involves payment for goods received. NSPI knew how much it had committed to pay, and how much coal it would get in return, because they had agreed upon and stipulated it. It was essentially value for value. While some benefit may have been gained by the Respondent regarding certainty of future income, it lacks the immediacy of the benefit found in *Deutsche Bank* where the hedging party was able to take a course of action that would otherwise have cost it considerably more.
94. The nature of the commitment in *Deutsche Bank* was also characterized by far greater risk than is the case here. The Tribunal discusses the notion of risk separately and more extensively below,¹⁵⁷ but it is at play here in distinguishing the type of commitment that can found an investment (as in *Deutsche Bank*) and the type that cannot (the present scenario). Deutsche Bank hoped that its investment in hedging commitments would bear a good return, but it could not be sure. NSPI on the other hand, could be sure what they were getting: the quantity of coal they negotiated for at the agreed price. The resulting commitment made by NSPI is therefore quite different.

¹⁵⁶ See *Deutsche Bank v. Sri Lanka*, *supra* note 98, ¶¶ 298-300.

¹⁵⁷ See *infra* ¶¶ 104-111.

95. Finally, in *Deutsche Bank* the payments committed to were predicated on events that were not within the parties' control (the price of oil). Here the payments were predicated on events that could be controlled by the parties (the delivery and collection of coal).
96. Similarly, the Tribunal does not find the decision in *Malicorp* of utility. *Malicorp* involved a very long term and significant "build, operate, transfer" concession contract.¹⁵⁸ The Tribunal notes that in contrast to the scenario here the nature of the contributions *Malicorp* had started making (such as increasing share capital and setting up an Egyptian company) and was to make in the future, involved not only massive outlays of funds but also non-monetary (though not without value) contributions.¹⁵⁹ These contributions were to be made over a long period of time.¹⁶⁰ Such contributions, or the commitment to make them, are the type that properly constitute an investment. These are far more profound and involved contributions that went beyond the simple transfer of funds after the delivery of coal contemplated by NSPI.
97. Thus, whilst the Tribunal accepts in principle that a commitment to contribute can satisfy the "contribution" criteria, given the fundamentally different nature of the contribution contemplated by NSPI, compared to those in the cases where a commitment to contribute has been accepted, the Tribunal is not convinced that NSPI made a similar commitment to make a contribution. A commitment to simply pay money in the future after delivery of goods is inadequate to be considered as the contribution which forms the basis of an investment.

3. Duration

a. Respondent's Position

98. [...]

¹⁵⁸ *Malicorp*, *supra* note 148, ¶ 4.

¹⁵⁹ *Malicorp*, *supra* note 148, ¶¶ 3-33, 111-114.

¹⁶⁰ "Nevertheless, there is nothing per se to prevent the view that the *long-term contractual commitment* of a party to thereafter perform services fulfilling traditional criteria also amounts to a contribution. It was envisaged that the construction alone would entail costs in excess of 200 million dollars, that the work and most of all the operation of the airport would continue for *several years*" (emphasis added, *Malicorp*, *supra* note 148, ¶ 111).

b. Claimant's Position

99. [...]

c. Tribunal's Analysis

100. As the Tribunal has already found that in the circumstances at hand, the commitment to buy coal is not adequate to satisfy the criterion of contribution, in seeking to apply the criterion of (certain) duration, the Tribunal does so only for the sake of completeness.¹⁶⁷ The Parties dispute which aspect of the relationship between NSPI and [company X] is relevant for the question of duration. The Tribunal has clarified that it is the Confirmation Letters that are relevant for its enquiries; the much longer relationship between NSPI and [company X] is not relevant.¹⁶⁸ Thus, in applying the criterion of duration, there are two possible time periods for examination: 1) the duration of NSPI's *commitment* to make purchases of coal, and 2) the actual transaction constituted by each delivery of and payment for coal.

101. The Tribunal finds that were the "commitment" at hand sufficient to go on with an inquiry as to duration, it is the duration of the commitment that would be relevant, rather than the one-off transactions that took place each time coal was delivered and paid for. The Tribunal notes that one of the relevant Confirmation Letters provided for the delivery of coal "from 2008 to 2011 (inclusive)"¹⁶⁹ but dealt with "Contract Quantity" on an annual basis (*i.e.* there was a one year commitment over the course of 2008 to buy [...] MT at [...] per MT, and so on, for 2009 to 2011¹⁷⁰). Thus, the relevant duration, which would likely suffice were other criteria met, is an amalgamation of several time periods under the Confirmation Letters.

¹⁶⁷ See Resp. Mem. Jur., ¶ 54.

¹⁶⁸ See *supra* ¶ 91.

¹⁶⁹ CE-82.

¹⁷⁰ CE-82.

4. Risk

a. Respondent's Position

102. [...]

b. Claimant's Position

103. [...]

c. Tribunal's Analysis

105. It has been said by other tribunals that risk for the purposes of “investment” is relatively easy to establish, and that the very existence of a dispute shows that a risk was present.¹⁷⁹ The Tribunal does not find such analysis helpful. It may be that any transaction involves a risk, but what is required for an investment is a risk that is distinguishable from the type of risk that arises in an ordinary commercial transaction. Furthermore, the relevant risk is that which is specific to the investment which did take place, not the lost opportunity to make a different investment or commercial decision.

106. The risk alleged by the Claimant is, in essence, that NSPI would be paying more for coal than it had contracted for, or more than the market price. The Claimant has also argued that there was a risk to its supply. However, the latter is also in essence the risk that NSPI would be paying more for coal than they had contracted to with [company X], for if it had to go to the market to cover its shortfall then the market would likely demand more than its contracted price with [company X].

107. The Claimant also argues that it was exposed to the risk inherent in the notion of investment - that a contribution,¹⁸⁰ of long duration, would be reduced in value or affected, such that the investment would not yield the benefit expected. The risk the Claimant refers to is, however, the far more simple risk of exposure to a higher price for a product - for the Tribunal, this is not a risk that is inherent to an investment. The Tribunal also notes that it

¹⁷⁹ See *Fedax*, *supra* note 122, ¶ 40; Cl. Rej., ¶ 158.

¹⁸⁰ See *supra* ¶¶ 90-96.

appears it is not uncommon or extraordinary to commit in a coal supply contract to the purchase of goods over a mid-long term period.¹⁸¹ Thus, the type of risk involved here appears to be, for the coal industry, “normal commercial terms.”¹⁸²

108. Additionally, here, the risk is not one that affects the contribution and the alleged investment, but rather is the risk that NSPI would have to go to the market for coal at potentially higher prices. The Tribunal finds these to be risks that any coal buyer could be exposed to in any coal purchase arrangement. This is therefore only a coal market-related risk and not a risk inherent in the more involved notion of investment. Furthermore, the Tribunal notes that this risk was mitigated by clause 16.1 of the Coal Supply Agreement, which gave the Claimant protection against the higher price it might have to pay on the market if there was non-delivery.
109. The Tribunal turns briefly to the cases which the Claimant relies upon to argue that a commercial risk is adequate to satisfy the inherent criteria for an investment.¹⁸³ In this regard, the Claimant relies on *Toto v. Lebanon* and *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*.¹⁸⁴
110. Both *Toto* and *Salini* involved long term construction contracts. Thus, whilst there was what may broadly be termed “commercial risk” involved, it was a particular type and scope of commercial risk that is not only characterized by the duration of the investment but also by the nature of the contribution. In *Salini*, a veritable litany of risks was recognised by the Tribunal, compared to the very limited commercial risk at issue here.¹⁸⁵ In *Toto*, the

¹⁸¹ See RE-21.

¹⁸² *Joy Mining*, *supra* note 86, ¶ 56.

¹⁸³ To a lesser extent the Claimant also referred to *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16), Award of March 31, 2011, RLA-30. The Tribunal does not find this case to be apposite or useful in considering the criteria of risk. In *GEA*, the claimant had provided a product to its commercial partner (Oriana) in advance of payment. Whilst the transaction involved the sale of goods, as is the scenario here, the positions of the claimants are reversed and the risk for the claimant in *GEA* was far more palpable. *GEA Group Aktiengesellschaft* had advanced tangible property on a delayed payment basis. The risk of non-payment was substantial and tangible property and the loss of value from it because of non-payment was involved.

¹⁸⁴ See Cl. C-Mem. ¶¶ 94-95, citing *Toto Costruzioni. v. Lebanon*, *supra* note 174; *Salini v. Morocco*, *supra* note 117.

¹⁸⁵ The risks identified in *Salini v. Morocco* included (*inter alia*) “the risk associated with the prerogatives of the Owner permitting him to prematurely put an end to the contract, to impose variations within certain limits without

particular type of contribution, in addition to duration and risk was central to the Tribunal's reasoning, and is thus distinguishable here.¹⁸⁶

111. Turning now to the Claimant's assertion of political risk, the Tribunal does not find that, in this specific context, the type of risk required for an investment is present either. The political risk, in view of the type and duration of the commitment by NSPI, is minimal. Had NSPI established lasting infrastructure in Venezuela that was at the mercy of the government, political risk may be more determinative. Here however, if at any point NSPI felt that perceived political risks had become untenable, it had options to manage this: it could have sought to terminate the Coal Supply Agreement on its terms or (attempted to) invoke the *force majeure* clause, for example.

112. The Tribunal has not found that the risks alleged are of the sort that is inherent in the notion of investment. Moreover, the Tribunal notes that NSPI's reference to the alleged risk to its supply is somewhat at odds with the measures that NSPI took to protect itself against this risk.¹⁸⁷

5. Tribunal's Conclusion on "investment"

113. For all of the foregoing reasons, the Claimant has not shown that its alleged investment met the established criteria of contribution, risk, and duration. The Tribunal also notes that, taking a simpler approach, commentary and many arbitral awards positively state that

changing the manner of fixing prices; the risk consisting of the potential increase in the cost of labour in case of modification of Moroccan law; any accident or damage caused to property during the performance of the works; those risks relating to problems of co-ordination possibly arising from the simultaneous performance of other projects; any unforeseeable incident that could not be considered as force majeure and which, therefore, would not give rise to a right to compensation; and finally those risks related to the absence of any compensation in case of increase or decrease in volume of the work load not exceeding 20% of the total contract price" (*Salini v. Morocco*, *supra* note 117, ¶ 55).

¹⁸⁶ "A construction contract in which the execution of the works extends over a substantial period of time involves by definition an element of risk" (*Toto Costruzioni v. Lebanon*, *supra* note 174, ¶ 78).

¹⁸⁷ Clause 16.1 of the Coal Supply Agreement provides that if [company X] fails to deliver coal, it will pay NSPI the difference between the contracted price for the coal and the market price. Clause 9.3 supports this provision, permitting NSPI to call a letter of credit to be put in place to secure compliance with clause 16.1. *See supra* ¶ 27.

a contract for the sale of goods cannot usually be an investment.¹⁸⁸ As a general proposition, sale of goods agreements have been repeatedly rejected as investments by commentators and tribunals alike.¹⁸⁹ In this particular case, the question merits the deeper analysis that has been attempted here, as to say that no sale of goods contract could ever be an investment would be to engage in simplistic labeling, but these findings and commentary are at least indicative. The Tribunal has analyzed whether the ‘commitment’ involved here is an investment, as this is how the argument was put by the Claimant. However, the Tribunal notes that if one examines the transactions that would have resulted from the commitment, one is left with an arrangement that is essentially still a sale and purchase of coal, even if it was more complicated in genesis and composition. None of the particular features of the supply agreement were enough, taking into account the overall factual circumstances, to transform the agreement into an investment. There being no “investment” within the meaning of the BIT, the Tribunal upholds the Respondent’s jurisdictional objection that this dispute does not arise out of an “investment.” For the sake of completeness, the Tribunal will now briefly turn to the Respondent’s objection that the alleged investment has not been made “in the territory” of the Respondent.

¹⁸⁸ See *Joy Mining*, *supra* note 86, ¶ 58; *Global Trading*, *supra* note 140, ¶ 55 (quoting *MHS v. Malaysia*, *supra* note 98, ¶¶ 69, 72) (concluding that whatever may be the limits inherent in the ICSID Convention’s definition of “investment,” the definition does not mean “sale” and excludes “a simple sale and like transient commercial transactions”); I. Shihata & A. Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL (1999), 299, RLA-35, at 308); see also F. Yala, *The Notion of ‘Investment’ in ICSID Case Law; A Drifting Jurisdictional Requirement?*, 22(2) J. INT’L ARB. (2005) 105, RLA-28, at 119 (“[S]tand alone contracts for the sale of services should not qualify as an investment for purposes of the ICSID jurisdiction. However, when these [sic] contracts entail a form of capital commitment associated with a transfer of technology, know-how, or manufacturing processes, they could be considered to constitute investments, provided that other criteria are fulfilled (such as duration or risk).”); see also R. D. Bishop, et al., *FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY* (2005), RLA-65, p. 9.

¹⁸⁹ E.g., *MHS v. Malaysia*, *supra* note 98, ¶¶ 69-72 (referring to Aron Broche’s different observations made during and following the travaux préparatoires about the meaning of the term “investment” and noting, at ¶ 69, “It appears to have been assumed by the Convention’s drafters that use of the term ‘investment’ excluded a simple sale and like transient commercial transactions from the jurisdiction of the Centre.”), RLA-49; *Phoenix Action*, *supra* note 61, ¶ 82 (“There are indeed some basic criteria and parties are not free to decide in BITs that anything – like a sale of goods or a dowry for example – is an investment.”), RLA-64.

D. The Tribunal lacks jurisdiction under the BIT because the dispute does not arise out of an investment made “in the territory” of Venezuela

1. Parties’ Positions

a. Respondent’s Position

114. [...]

b. Claimant’s Position

122. [...]

2. Tribunal’s Analysis

129. Given the Tribunal’s findings above on whether or not the Claimant has made an “investment,” discussion of the territoriality requirement is somewhat redundant. Nonetheless, the Tribunal will briefly deal with this requirement to a limited extent here.

130. The Tribunal finds that the contractual rights to coal under the Confirmation Letters are properly characterized as an intangible asset. The coal to be purchased was located in Venezuela, but NSPI carried out no physical in-country activities in connection with this and had no established, physical, in-country presence. By the Claimant’s own account, what is at issue here are contractual rights. A contractual right by its very nature has no fixed abode in the physical sense, for it is intangible. However, a lack of physical presence is not *per se* fatal to meeting the territoriality requirement; intangible assets, with no accompanying physical in-country activities, have been accepted as investments for the purposes of bilateral investment treaties by many tribunals. The awards of those tribunals are therefore apposite and instructive. Further, the Tribunal agrees with the approach taken in several such cases, whereby tribunals have looked to whether the host State received a benefit.²²⁵ However, this “benefit” does not necessarily have to be economic development,

²²⁵ See, e.g. *Abaclat v. Argentina*, *supra* note 81, ¶ 374: “The Tribunal finds that the determination of the place of the investment firstly depends on the nature of such investment. With regard to an investment of a purely financial nature, the relevant criteria cannot be the same as those applying to an investment consisting of business operations and/or involving manpower and property. With regard to investments of a purely financial nature, the relevant

a highly subjective element. As has been noted in connection with economic development as an inherent economic feature of “investment,” incorporating this criterion may run the risk of using hindsight improperly; it is the alleged investment at the time of its inception that should be considered, not the impact that the investment has ultimately had.²²⁶ However, the Tribunal recognises that in cases where the intangible asset at issue is a financial instrument, a further enquiry regarding economic development may be appropriate as these instruments are frequently aligned with economic development (*e.g.* fund raising) by a host State.

131. The Tribunal notes that no matter its ultimate beneficial ownership, [company X], to whom NSPI would pay money for Paso Diablo coal, is a non-Venezuelan company. Moreover, [...], the operator of Paso Diablo, was partly owned by two foreign entities, [...] and [...], who were paid dividends, financed by the sale of Paso Diablo coal.²²⁷ It is thus clear that at least some of the proceeds of Paso Diablo coal may have ultimately benefited non-Venezuelan companies. The Tribunal finds that these facts make it unclear to what extent cash flows terminated in Venezuela and thus the extent to which the host State received benefit.

E. The dispute arises out of an ordinary commercial transaction

132. This jurisdictional objection is in response to the Claimant’s alternative argument that jurisdiction subsists under Article 2(b) of the ICSID Additional Facility Rules, read in connection with Article 4(3).²²⁸
133. Article 2(b) of the ICSID Additional Facility Rules provides that:

The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceedings between a State (or a

criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred”. See also *Inmaris*, *supra* note 98, ¶ 124.

²²⁶ See *Deutsche Bank v. Sri Lanka*, *supra* note 98, ¶ 295.

²²⁷ See Resp. Mem. Jur., ¶¶ 103-105.

²²⁸ See Resp. Mem. Jur., ¶¶ 87-88, 94; Resp. Reply, ¶ 11.

constituent subdivision or agency of a State) and a national of another State, falling within the following categories:

[...]

(b) conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State; [...].

134. Article 2(b) is subject to Article 4(3) of the ICSID Additional Facility Rules, which provides that:

In the case of an application based on Article 2(b), the Secretary-General shall give his approval only if he is satisfied (a) that the requirements of that provision are fulfilled, and (b) that the underlying transaction has features which distinguish it from an ordinary commercial transaction.

135. In this proceeding, the Secretary General issued a Notice of Registration in the following terms:

*Registration of this Request is without prejudice to the powers and functions of the tribunal with regard to jurisdiction, competence and the merits, as provided by Article 5(d) of the Arbitration (Additional Facility) Rules.*²²⁹

1. Parties' Positions

a. Respondent's Position

136. [...]

b. Claimant's Position

140. [...]

²²⁹ Resp. Mem. Jur., ¶ 14 citing the Notice of Registration. Article 5(d) of Schedule C to the ICSID Additional Facility Rules requires that the Secretary General "remind the parties that the registration of the request is without prejudice to the powers and functions of the Arbitral Tribunal in regard to competence and the merits." Thus, no issue arises as to the impact of the Secretary General's "approval" under Article 4(3) of the ICSID Additional Facility Rules on this Tribunal.

2. Tribunal's Analysis

143. The Tribunal observes that the interaction between the BIT and the ICSID Additional Facility Rules in the scenario at hand poses novel questions.
144. In line with its conclusions on the existence of investment above, the Tribunal notes first that the BIT is paramount.²⁴⁵ The BIT (and consequently the dispute mechanisms thereunder, as well as the consent to same) hinges upon the existence of an investment. This cannot be overridden by Article 2(b). It is the BIT which defines the outer boundaries of the contracting parties' consent under the BIT²⁴⁶ and which provides a gateway to dispute resolution under the ICSID Additional Facility Rules. The Tribunal recognises that this means that the ostensibly unqualified reference in the BIT to arbitration under the Additional Facility is in fact implicitly limited, in so far as Article 2(b) permits recourse to the ICSID Additional Facility for a dispute that arises out of an economic transaction that is not an investment.
145. For the Tribunal, this construction is clear from the text of Article XII, which states that a “dispute may, by the *investor* concerned, be submitted to arbitration under [...] the Additional Facility Rules of ICSID [...].” As it is explicitly stated, this provision is available to an *investor*; someone who is not an investor (*i.e.* who has not “made” an “investment”) cannot, under the clear terms of the BIT, gain access to the Additional Facility.²⁴⁷
146. The Tribunal's conclusion on the interaction of Article XII of the BIT with Article 2(b) of the ICSID Additional Facility Rules is definitive. If there is no investment within the meaning of the BIT, as has been determined here, there is no “alternative” basis for jurisdiction under Article 2(b). The Tribunal has therefore not deemed it necessary to

²⁴⁵ See *supra* ¶¶ 75, 80.

²⁴⁶ See Resp. Reply, ¶ 10.

²⁴⁷ See *supra* ¶ 79.

consider whether “the underlying transaction has features which distinguish it from an ordinary commercial transaction.”²⁴⁸

F. The Tribunal lacks jurisdiction over the claim asserted under the umbrella clause of the UK-Venezuela BIT

1. Parties’ Positions

a. Respondent’s Position

147. [...]

b. Claimant’s Position

148. [...]

2. Tribunal’s Analysis

150. Given its conclusions on the existence of an investment, the Tribunal does not find it necessary to consider the question of whether it has jurisdiction over a claim under the most favoured nation clause (incorporating an umbrella clause) in the BIT. On any construction, even that of the Claimant,²⁶⁰ it would be necessary for an investment to be present for the most favoured nation clause to be exercised in the way that the Claimant alleges. As the Tribunal has found that no investment is present, this argument is redundant.

V. COSTS

151. This arbitration involved novel issues of investment law. Much case law was discussed, and the Tribunal has found much of it useful, but there were no “bright line” or clear-cut cases upon which to rely. Both Parties raised arguments worthy of consideration, and conducted themselves fairly and professionally. There were no exceptional circumstances or procedural incidents that would have bearing on the allocation of costs.

²⁴⁸ Article 4(3) of the ICSID Additional Facility Rules.

²⁶⁰ See Cl. C-Mem., ¶ 134; Cl. Rej., ¶¶ 175-176.

152. Having considered all the circumstances of this arbitration, in the exercise of its discretion, the Tribunal has concluded that it is fair and appropriate that both sides bear the arbitration costs²⁶¹ in equal shares and that each side bears its own legal and other costs. However, the Tribunal notes that while the Claimant paid its share of the third and last advance payment requested by the Centre,²⁶² the Respondent failed to do so. Since the Claimant's third and last advance payment has not been used in this arbitration, it shall be reimbursed in full to the Claimant.

²⁶¹ *I.e.* the fees and expenses of the Members of the Tribunal, and the expenses and charges of the ICSID Secretariat. The ICSID Secretariat will provide the Parties with a detailed financial statement of the case account as soon as the account has been finalized.

²⁶² By letter dated January 10, 2014, the Centre requested that each party make an additional advance payment in the amount of US\$ 75,000. The Centre confirmed receipt of the Claimant's payment by letter of January 24, 2014.

VI. AWARD

153. For the reasons set forth above, the Tribunal has decided that:

- a) The Tribunal does not have jurisdiction over the dispute submitted to it in this arbitration.
- b) The Parties shall bear in equal shares the costs of these proceedings comprising the fees and expenses of the Members of the Tribunal and the expenses and charges of the Secretariat, the exact amount of which shall be subsequently notified by the Secretariat. Since the Claimant's third and last advance payment has not been used in this arbitration, it shall be reimbursed in full to the Claimant.
- c) Each Party shall bear its own expenses.

Made at Paris, France, in English and Spanish, both versions being equally authentic.

Nova Scotia Power Incorporated (Canada) v. Bolivarian Republic of Venezuela
Excerpts of Award

_____[signed]_____
Professor David A.R. Williams, QC,
Arbitrator
Date:

_____[signed]_____
Professor Raúl Emilio Vinuesa
Arbitrator
Date:

_____[signed]_____
Professor Hans Van Houtte
President
Date: