DISSENTING OPINION

1. I join the majority in concluding that Respondent has failed to demonstrate that the commencement of the arbitration was an abuse of rights or an abuse of process by virtue of either the 2006 or 2014 reorganizations. I also agree that no bad faith or malfeasance may be attributed to Claimants from the fact that [redacted] is, and was at all relevant times, the sole ultimate (indirect) owner of the investment at issue, i.e., the Claimants' shares in the Czech Operating Companies, Synot W, a.s. and Synot TIP, a.s.

2. Regrettably, I cannot join my colleagues in holding that Claimants qualify as investors under the Treaty. I am not persuaded that that they had either the required connection to the Republic of Cyprus or the required detachment from the Czech Republic. That is, they have not demonstrated that, at the relevant time, they had permanent seats in the Republic of Cyprus or that, with respect to the shares, they, as opposed to their ultimate owner, have invested in the Czech Republic, within the meaning of the Treaty.

3. I concur with the Interim Award's conclusions on the fork-in-the-road and multiparty objections, with brief explanations.

PERMANENT SEAT

4. Article 1(2) of the Treaty provides:

> *The term 'investor' shall mean any natural or legal person who invests in the territory of the other Contracting Party, and for the purpose of this definition;*
>
> *[…]*
>
> *(b) The term "legal person" shall mean with respect to either Contracting Party, any entity incorporated or constituted in accordance with, and recognized as legal person by its laws, having the permanent seat in the territory of that Contracting Party.*

5. On the question of whether Claimants meet the condition of Article 1(2)(b) of the Treaty that they have their permanent seats in Cyprus, I reach the same conclusion that was reached by the tribunals in the *Tenaris I*[1] and *Tenaris II*[2] awards, with regard to similar terms, that, paraphrasing the words of the latter, "regardless of the terminology used … , the reference[] to ["permanent seat"] contained in the BIT[] must be taken to

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[1] *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal Lda. V Bolivarian Republic of Venezuela* (ICSID Case No ARB/11/26), Award, 29 January 2016, CL-108 ("*Tenaris I*").

[2] *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal Lda. v Bolivarian Republic of Venezuela* (ICSID Case No ARB/12/23), Ruling, 12 December 2016, CL-177 ("*Tenaris II*").

mean the Effective Seat[] of the investing companies, the places where *de facto* the company's business is managed."[3]

A. Relationship to the content of municipal law.

6. I agree that Article 1(2)(b) of the Treaty does not provide for a *renvoi* to municipal law for determining permanent seat. The concept must have a meaning for purposes of the treaty (though not necessarily in international law generally), autonomous of municipal law; there is no single meaning under international law. Finding such a meaning under international law principles of treaty interpretation is our task.

7. I also agree that, in doing so, consideration has to be given to the municipal law of treaty parties. But this does not mean that the term must be one that is actually used in municipal company law. The main function of considering municipal law is to exclude possible meanings that conflict with the law of one or both parties and therefore not likely to have been intended. Absent a more clear definition, those treaty terms would likely refer to legal or economic concepts understood in both countries.

8. Here, both sides' interpretations involve concepts that are familiar in both countries;[4] clearly, both countries have concepts of "registered offices," but they also have concepts of "seat" and of "central management and control." Therefore, the notions of both "seat," both formal and real, and "management and control" are part of the backdrop to the Contracting Parties' mutual agreement to use the term "permanent seat" in the treaty, and neither can be said to be in conflict with the law of either.

Czech Law

9. During the 1990s, before the amendments that took effect in 2001, Article 2(3) of the Czech Commercial Code defined "seat" as "an address, which is registered as the seat … in the Commercial Register." While this certainly could be understood, as the Interim Award does, to refer to the formal, statutory seat, this view was not universally shared and some commentaries considered this definition to imply that that registered address had to be that of the "real" seat of the company. One noted commentary refers to "*schizophrenic concept of Art. 2 para. 3* of the Commercial Code *prior to its amendment by Act No. 501/2001 Coll.*, which stipulated the same principle [that anyone may invoke the seat where the management of the legal person is located], but also stated that only the address registered in the Commercial Register is considered the seat, which sometimes led to the conclusion that real seats that were not registered

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[3] *Tenaris II*, CL-177 , para. 190 ("In summary, the Tribunal concludes that, regardless of the terminology used and the imperfections in the translation of the concepts, the references to 'seat' (or '*siege social*') contained in the BITs must be taken to mean the Effective Seats of the investing companies, the places where *de facto* the company's business is managed.") (English translation supplied by Claimants). *See also*, *Tenaris I*, CL-108, para. 154 ("In conclusion, in order to make sense of each provision, and ensure that each term is given meaning, the Tribunal determines that both '*siège social*' and '*sede*' in the Treaties in issue in this case mean the place of actual or effective management.").

[4] *Cf. Tenaris I*, CL-108, para. 171 ("In particular, the Tribunal notes that notions of 'effective seat', and the use of a substantive test for corporate nationality in certain circumstances, are entirely familiar to both Luxembourg and Portuguese law (being the municipal systems of most relevance to the issues of nationality in this case).").

could not be invoked, because according to the first sentence of former Art. 2 para. 3 of the Commercial Code it was not a seat in the legal sense."[5]

10. This view that "seat" meant "real seat" was criticized by other commentators. For example, one commentator notes that "we cannot approve *the attempts of some commentaries* to install in the Act something that is not there and derive that the seat of a company (or another legal entity) is the address, from which the activities of the legal entity are organized and administrated."[6]

11. But, regardless of whether a real seat requirement was already implied in Czech law before the 2001 amendments, it is clear that there was much debate about it and that the "central management and control" concept was well-understood in Czech Republic legal discussions. For example, an earlier version of the first commentary mentioned above describes what is meant by the "material seat" before noting that the tendency of Czech law toward the formal, statutory, seat approach had been heavily criticized prior to the 2001 amendments:

> First of all, the seat can be understood in material or formal sense of the word. If the essential criterion is the material aspect it is proceeded from the concept that *the seat of the legal person is the location of its centre, i.e. usually the location from which it is managed and controlled, where its statutory body is usually located and where it truly operates and where its other main bodies usually meet*. For economically active legal persons, the seat can be often understood as the location of their main enterprise. . . *Our legislation has inclined for a long time to a formal concept of the seat; the seat is then understood the location defined as the seat in relevant documents or registered as the seat of the legal person in relevant public legal registers.* Therefore before 2001, it was generally sufficient in the Czech Republic to provide an address as the seat of the legal person which could be the seat as a matter of fact (i.e. particularly the address of an existing building) irrespective of whether such specified location was in fact the seat. If the registered address is not the material seat of the legal person (i.e. if a contact with the legal person cannot be reached at such address) the seat is called fictive. Fictive seats were significantly used in practice in early 90's particularly in the context of establishing trading companies. *This practice* which was not prevented even by relevant state authorities *was repeatedly criticised in literature*. Because of that the legislation has been gradually made more accurate.[7]

12. Similarly, the second commentary mentioned above argued that the material approach was the preferable approach: "In my opinion, it is necessary to prefer the [material]

[5] Švestka/Spácil//Škárová *et al.*, *Civil Code Commentary*, RL-130 (2008), third page of Respondent's translation (emphasis added). *See also* Article 19c(3) of the Czech Civil Code of 26 February 1964, Act No. 40/1964 Coll., as amended by Act No. 215/2009 Coll, RL-127.

[6] K. Eliáš, "Seat of Business Corporations," *Legal practice and business,* C-288 (1993), first page of Claimant's expanded translation (emphasis added).

[7] O Jehlička, J Švestka, M Škárová, and others, *The Civil Code Commentary,* CL-148 (2002), second page of Claimant's translation (emphasis added).

approach and to understand the concept of seat as a place where the statutory body of the business company resides, as *a place from where the decisive directives for the company's business are coming*."[8]

13. The change or clarification provided by the 2001 amendments to the law was the fruit of such views by commentators. As amended, the Article 2(3) of the Commercial Code expressly stated that "seat" meant "real seat," defined as "the address of the place from which the legal person is managed by its statutory body."[9]

14. Thus, even though Commercial Code did not expressly adopt the "real seat" approach (at least for companies incorporated in the Czech Republic) until the amendments effective on 1 January 2001, after the actual negotiation of the treaty, it was openly contended to imply that approach by some and urged to be changed to do so by others. Either way, the "real seat" approach could well have informed the Czech Republic's position in negotiations, which could even have consciously anticipated the 2001 amendments. Thus, the intended meaning of "permanent seat" cannot be considered as limited by reference to Czech municipal law to the formal approach to seat, as the Interim Award suggests.

Cypriot Law

15. The concepts of "registered office," "seat" and place of "central management and control" were also known in Cypriot law. For example, the term "seat" was used in the Merchant Shipping Law until it was changed to "registered office," literally translated, only in 2005.[10]

16. And, with respect to "management and control," while the parties here mostly discussed "domicile," they also discussed the term "residence" under Cypriot law, which, reliant as it is on United Kingdom law, means "*where [a company's] central management and control is exercised*."[11] In addition, Article 24(2) of the Recast Brussels Regulation provides that, on questions involving the validity of various aspects of the company, the "the courts of the Member State in which the company, legal person or association *has its seat*" shall have exclusive jurisdiction, regardless of the domicile of the parties, as determined by that State's private international rules.[12]

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[8] Eliáš, *op. cit.*, fn. 6, C-288 (emphasis added).

[9] Czech Republic, Act No 370/2000 Coll., amendment to Commercial Code, RL-124 (emphasis added).

[10] Expert Report of [redacted] para. 10.10 ("I must note however that the Claimants have not addressed the fact that the requirement of having a registered office in Cyprus was only added to the Merchant Shipping Law by an amending law in 2005. Prior to that amendment, the obligation was for a legal person to have been incorporated under the laws of Cyprus and have its '*seat*' («*έδρα*») in Cyprus. The replacement in 2005 of the word '*seat*' («*έδρα*») with the words '*registered office*' («*εγγεγραμμένο γραφείο*») clearly shows that the two are distinct and separate concepts.")

[11] *Id.*, Exhibit 27, Dicey, Morris & Collins, *Conflict of Laws* (15th ed. 2012), Volume 2, para. 30R-001 (emphasis added). *See also*, Hearing transcript, Day 3, p. 154:11-12, Mr. Petrochilos ("a company's residence in Cypriot law, which may refer to the actual location of management and control … ").

[12] Council Regulation (EC) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1, CL-128, Article 24(2), p. L351/10.

As pointed out by Arbitrator Parks in his separate opinion in *CEAC Holding v. Montenegro*, "[i]n the English tradition of Cyprus, those rules look to either (i) place of incorporation and registered office or some other official address, or (ii) *central management and control*."[13]

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17. Therefore, it is clear that the notions of both "seat," both formal and real, and "management and control" are part of the backdrop to the Contracting Parties' mutual agreement to use the term "permanent seat" in the treaty. For this reason, Czech Republic and Cyprus company law cannot be seen as determinative, even if both were "incorporation theory," rather than "real seat theory," jurisdictions, as the Interim Award contends.[14] The Czech Republic's interpretation cannot be excluded as it is in the Interim Award on the basis that it is inconsistent with Czech municipal law at the time the treaty was negotiated.

B. **Principle of Effectiveness.**

18. I also cannot agree that Claimants' interpretation – "actual and functioning registered office" – does not render the requirement of "permanent seat" ineffective. The *maintenance* of an actual registered office, as both sides agree is required in Cypriot law, is necessarily implied in the requirement that the company of a Contracting Party be "incorporated or constituted *in accordance with … its laws*." In other words, merely stating an address at the time of incorporation is insufficient to *being* incorporated in accordance with Cypriot law, in light of the continuing legal obligation to have an "actual and functioning registered office," and whether or not the company has been stricken from the corporate registry as a result of non-compliance.

19. *Tenaris I* supports this reasoning, since it does to appear to have been contested there that the companies had functioning registered offices, which was sufficient for the tribunal to conclude that the "in accordance with" requirement (as opposed to the"*siège social*"/"*sede*" requirements) had thereby been met, and leading the tribunal to conclude that the rule of effectiveness required that the treaty terms at issue could only mean "the place of actual or effective management."[15] (It appears that the issue

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[13] *Central European Aluminium Company (CEAC) v. Montenegro*, ICSID Case No. ARB/14/8, RL-64, Separate Opinion (4 July 2016) para. 15, *citing* Dicey, Morris & Collins, *Conflict of Laws*, (15th ed. 2012), para. 11-079 (emphasis added).

[14] The fact that, in the Czech Republic, foreign-incorporated companies may become recognized as Czech companies by establishing their seats there while maintaining their foreign incorporation status suggests that the Czech Republic is no less a "real seat" jurisdiction than Luxembourg was considered to be by the *Tenaris I* tribunal, which derived the "real seat" requirement from provisions of Luxembourg law applicable to companies incorporated in other countries. *Cf. Tenaris I*, CL-108, paras. 176-177, and Czech Republic, Act No 513/1991 Coll., The Commercial Code, 1 January 1992, C-249, section 26.

[15] *Tenaris I*, CL-108, para. 148 ("Given this context, it is immediately apparent – as Venezuela has argued – that neither '*siège social*' nor '*sede*' can mean simply 'registered office' or 'statutory seat' in a purely narrow and formal sense, since neither term would then have any effective meaning. For a company to be 'constituted in accordance with the laws of … the Grand Duchy of Luxembourg', it must have its registered office or statutory seat in Luxembourg. And for a company to be 'constituted pursuant to and function in accordance with the Laws of' Portugal, it must have its registered office or statutory

was not specifically addressed by the parties in the *Tenaris II* case, which concluded nonetheless that the terms "*siège social*" and "*sede*" meant "Effective Seat," i.e., "where the company's business activity is centralized."[16])[17]

20. The award in *CEAC v. Montenegro* does not contradict this view since it never actually addressed respondent's *effet utile* argument and, instead, affirmatively stated that the tribunal did not have to determine the meaning of "seat" since the claimant could not satisfy the requirement under either party's test.[18]

21. Finally, on effectiveness, Claimants' interpretation does not give a plausible effect to the treaty language. While Claimants argued that the Parties' intent was to screen out "paper companies," they have not explained why the Parties would be any less concerned with "mailbox companies," i.e., companies which are maintained by service

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seat in Portugal."), para. 150 ("So if '*siège social*' and '*sede*' are to have any meaning, and not be entirely superfluous, each must connote something different to, or over and above, the purely formal matter of the address of a registered office or statutory seat. And this leads one to apply the other well-accepted meaning of both terms, namely 'effective management', or some sort of actual or genuine corporate activity."), and para. 154 ("In conclusion, in order to make sense of each provision, and ensure that each term is given meaning, the Tribunal determines that both '*siège social*' and '*sede*' in the Treaties in issue in this case mean the place of actual or effective management.") (emphasis omitted).

[16] *Tenaris II*, CL-177, para. 177 ("No Party has questioned whether or not Tenaris is incorporated in accordance with Luxembourg legislation, and Talta with Portuguese legislation. The requirement is therefore deemed fulfilled."), and para. 189 ("By applying the latter two hermeneutic principles, and in the light of the rules of international law concerning the concept of seat, stated earlier, the conclusion has to be that the concept of 'seat' used in the BITs cannot refer simply to Statutory Seat, in the formal sense, but must refer to Effective Seat, where the company's business activity is centralized. If this interpretation is not adopted, the requirement of the BITs, of a 'seat' in addition to the 'incorporation' requirement, would become superfluous: every company incorporated in Luxembourg or in Portugal is legally bound to declare in its Articles of Association that its Statutory Seat is situated in the jurisdiction concerned. The term 'seat' only acquires a meaning of its own if it is accepted that the BITs are referring to the Effective Seat of the investing company.").

[17] While the Interim Award states that the construction arrived at by both of the *Tenaris* tribunals was impacted by the fact that they were construing the terms "*siège social*" and "*sede*" as used in the two treaty Parties where the "real seat" theory is prevalent, as noted earlier, *op. cit.* fn. 14, this would seem to be no more true for Luxembourg than it is for the Czech Republic which, like Luxembourg as described by the *Tenaris I* tribunal, accords Czech nationality to companies incorporated abroad but whose "seats" are located in the Czech Republic. In any event, the *Tenaris I* tribunal consulted the law of the treaty Parties only to "confirm the interpretation" it had reached independently under an interpretation of the text, *see* paras. 169-170. Similarly, the *Tenaris II* tribunal turned to the treaty Parties' own law only after it had first "established the conclusion that the BITs, when referring to 'seat', are referring to Effective Seat," and then only as legal systems of "special relevance" in the consideration of "rules generally accepted by the different municipal legal systems." *See* paras. 191-192.

[18] *Central European Aluminium Company (CEAC) v. Montenegro*, *op. cit.* fn. 13, RL-64, Award (26 July 2016), paras. 113, 148. Indeed, in his separate opinion, Arbitrator Parks, *op. cit.* fn. 13, RL-64, Separate Opinion (4 July 2016), para. 19, identified the Claimants' interpretation here as one of three tests discussed in the case ("The second [test] imposes multiple criteria in determining registered office, and presupposes that an office ceases to be registered in the event of defective compliance with corporate formalities."). But, in his view, *id.* at para. 21, "[this] test finds no support in either domestic or international law. The test defines registered office according to six criteria, and posits that non-observance of these factors leads to disregard of the office. Adoption of that standard would require arbitrators to assume a policy-making mission in excess of their authority."

companies and share the same services/offices with many other, unrelated companies. The former are not in any real sense less substantial, or more fictive, than the latter. That would leave the purpose of the term to be merely to supplement enforcement of the Parties' own company law requirements, an unlikely motivation for the requirement. Indeed, it would have been far easier, if this is what the Parties intended, simply to indicate expressly some requirement for continued compliance with registered office regulations.

22. On the other hand, Respondent's interpretation, which equates "permanent seat" with place of effective management, establishes a required link that goes beyond what appears to have been sufficient to establish compliance with incorporation regulations in municipal law. Reading "permanent seat" to mean "real seat" gives effect to the term while reading it to mean merely "real registered office" does not.[19]

C. Evidence and Circumstances of the Negotiations.

23. Care must be taken with the materials relied upon by the parties purportedly as supplementary means of interpretation under Article 32 of the Vienna Convention on the Law of Treaties. The most reliable of such materials are the alternative proposed texts exchanged by the parties, but even these shed only limited light in the absence of explanations for counter-proposed terms also shared between the parties, of which we have none. But we do know from the exchanged texts, as recounted in the Interim Award, that formulations that rested upon "registered office," and even of "seat," unadorned, were rejected, twice in fact in the case of the term "registered office."

24. But the biggest difficulty arises from the same reasoning underlying the *effet utile* analysis. Since the proposals for "registered office" were made by Cyprus as a requirement cumulative to that of "incorporation," it would seem to apply to any conception based on "registered office," including one beyond the requirements already covered by the "incorporation in accordance with" language. Thus, even if having "an actual and functioning registered office," as required by Cypriot law, was not already covered by the "in accordance with … its laws" requirement, it appears to have been rejected in favor of the term "permanent seat."

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[19] All of the indicia of a functioning registered office cited in the Interim Award are requirements of law necessary to remain validly incorporated in Cyprus, except for the fact that their books were audited in Cyprus, which is immaterial, and that they were tax residents of Cyprus, a requirement of tax law. *See* Expert Report of [redacted] para. 10.6 ("There are certain minimum requirements that an office should fulfil if it is to be considered to be a company's registered office within the meaning of the Companies Law, including: (a) It must consist of a physical premises – a vacant plot will not do; (b) The company must have some right (by way of ownership, lease or license) to use the property or part thereof – it cannot be a trespasser (although the premises may be shared with any number of other persons – whether legal or natural); (c) The premises must be accessible to the public (for at least two hours on each business day) for inspection of the various books and registers and for service of documents and notices upon the company; (d) The books and registers that a company must by law maintain in its registered office should actually be held there; and (e) The relevant company's name should be painted or affixed on the outside of the office, in a conspicuous position, in letters easily legible. If an 'address' does not comply with the above minimum requirements, I do not see how such address can qualify as the registered office of any company.") (footnotes omitted).

25. In light of this evidence, the other materials submitted, which probably do not qualify as Article 32 supplementary means, are of less use. We simply do not know the full content of the discussions between the Parties, or even within the two governments, on issues raised in their non-shared internal papers, and I think it is very dangerous to attempt to imagine or assume how they unfolded over the years.

26. At the same time, I cannot see any ground for allocating to the State party in treaty arbitration the burden of affirmatively proving what it meant by its own proposals for treaty language, on some assumption that they must have access to relevant documentation. First, here, the Czech Republic has stated that it made all of the *travaux* for this treaty available to Claimants pursuant to a request under Czech law. We have no basis to question this; partial and fragmented *travaux* seem more the rule than the exception. Secondly, there are many terms in BITs for which there is no record of stated intent, much less of an agreed intent. We cannot properly assume that such statements exist and draw conclusions from their absence in the record.

27. Finally, I do not think that that the Czech Republic-Ireland BIT, whether it constitutes supplementary means or not, shows that "permanent seat" cannot mean place of effective management and control. That treaty does define qualifying legal persons as Irish incorporated companies having their "central management and control" in Ireland and Czech incorporated companies having their "permanent seats" in the Czech Republic.[20] We are not privy to the reasons for this language differentiation. The inclusion of different terminology may just as likely reflect the Parties' agreement on a common meaning using the different terms with which each respectively is more familiar (as the Czech Republic was in its BITs). Indeed, it is highly unlikely that the Parties to that BIT intended that radically different criteria for BIT protection would apply to Irish as opposed to Czech companies, as would result from reading the "permanent seat" requirement applicable to Czech companies as something less than the place of central management and control requirement applicable to Irish companies. Indeed, given the express object stated in the preamble of that BIT of achieving *reciprocal* protection of investments (as in the title of the BIT),[21] the BIT is more properly read as supporting the interpretation of "permanent seat" as place of effective management.[22]

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[20] Agreement between the Czech Republic and Ireland for the Promotion and Reciprocal Protection of Investments (entered into force 1 August 1997, terminated 1 December 2011), C-254, Article 1(2)(b) ("The term 'investor' shall mean any natural or legal person who invests in the territory of the other Contracting Party … b) The term 'legal person' shall mean, (i) with respect to Ireland, any entity incorporated, registered, or constituted in accordance with, and recognised as a legal person by its laws *and having its central management and control* in the territory of Ireland, (ii) with respect to the Czech Republic, any entity incorporated or constituted in accordance with, and recognised as a legal person by, its laws *and having its permanent seat* in the territory of the Czech Republic.") (emphasis added).

[21] *Id.*, C-254, Preamble ("Recognising that the encouragement and *reciprocal protection* under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both Contracting Parties.") (emphasis added).

[22] I do not find the recent Partial Award in *Natland Investment Group NV et al v. The Czech Republic* (20 December 2017) to be helpful on the meaning of "permanent seat," even though it considered the same term in the same treaty as is at issue here. That decision states in para. 279, "The provision merely requires that an investor be a legal person 'having the permanent seat in the territory' of the relevant Contracting Party; it does not require that the place of actual or effective management be located in that

D. Conclusion: Claimants Did Not Have Their Permanent Seats in Cyprus at the Relevant Time.

28. The Parties have advanced different views as to when the Claimants must have had their permanent seats in Cyprus in order to qualify as "investors" under the treaty. Claimants argue that the commencement of arbitration is the key time,[23] while Respondent argues that Claimants are required to have had permanent seats in Cyprus from the time the investments were made.[24] (The Interim Award did not need to dispose of this issue because it held that Claimants had registered offices "having substance" since 2006.) But it is self-evident that the treaty only applies to legal persons who are "investors" within the meaning of the treaty, and therefore not to legal persons incorporated in the territory of the relevant Contracting Party until they have "permanent seats" in that territory. The actual relevant time, thus, falls between two events cited by the parties, and is, at latest, the date of the alleged breach.

29. Here, the evidence shows that Cyprus was not the place of Claimants' central management and control until, at the earliest if ever, the 2014 organizational changes,[25] well after the breaches are alleged to have occurred. Therefore, I do not believe that Claimants have established that they were investors within the meaning of the treaty and that, on this ground, the claims should be dismissed for lack of jurisdiction.

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jurisdiction. In this connection, the Tribunal notes that, while Cypriot law, which has apparently been influenced by English law, requires that every company incorporated in Cyprus maintain a registered office in Cyprus, it does not use the term 'real seat' or *siège réel*."

On the first of these points, the *Natland* decision does not explain why, without a process of interpretation, the absence of an express reference to management and control excludes such a meaning. (This mirrors the Interim Award's criticism of the *Alps Finance* decision which held, under the Swiss-Czechoslovak BIT, that, independently of the additional requirement to have "real economic activities" in the host State, the term "seat" meant the "effective center of administration of the business operations," *See, Alps Finance and Trade AG v. Slovak Republic*, Award (5 March 2011), paras 216-217.) On the second point, as discussed above, Cypriot law is indeed familiar with the concept.

[23] Hearing transcript, Day 3, p. 131: 3-23.

[24] Hearing transcript, Day 3, pp. 67: 20-25.

[25] The question was posed at the hearing, If not in Cyprus, where was the place of the Claimants' effective management? This question need not be answered, but it is worth noting that the Regulation 2 of Claimant WCV's internal regulations provides that "(c) For as long as the company functions as a private company limited by shares with one sole member: … (ii) The one sole member exercises all the powers of the general meeting, by virtue of the Law, provided always that the decisions, which will be taken by this member in general meetings, will be recorded in minutes, or be drawn up in writing.... (v) The provisions of these Regulations must be read, interpreted and applied on the basis that the Company is private with a single Member and accordingly any provisions that are inconsistent with the nature of the Company as a private single-member company shall be adapted accordingly or shall be deemed as non-existent and shall be ignored." *See*, Memorandum and Articles of Association of WCV World Capital Ventures Ltd, 22 November 2006, C-238, Interpretation, Regulation 2(c).

30. I join the majority in concluding that Respondent has failed to demonstrate that the commencement of the arbitration was an abuse of rights or an abuse of process by virtue of either the 2006 or 2014 reorganizations. I also agree that no bad faith or malfeasance may be attributed to Claimants from the fact that [redacted] is, and was at all relevant times, the sole ultimate (indirect) owner of the investment at issue, i.e., the Claimants' shares in the Czech Operating Companies, Synot W, a.s. and Synot TIP, a.s.[26]

31. Finally, I share the majority's appreciation that this case presents the problem of circularity at its most radical – does a bilateral investment treaty apply when the sole ultimate investor is conceded to be, and to have always been, a national only of (and indeed an elected official of) the host State?

32. But I do not agree that this Treaty may be properly interpreted to apply in this circumstance.

33. This is in part because any such interpretation would be inconsistent with the obvious purpose of the Treaty, namely to offer protection to, and thus to entice, investment from nationals of the one Contracting State (i.e., foreign investors) into the territory of the other Contracting State. Extending Treaty application in the circumstances of this case clearly flies in the face of this purpose. But this conclusion is not based *de lege ferenda* solely upon the policy objectives of the Contracting States. Rather, it is based upon the meaning of terms of the Treaty in the context of the rest of the Treaty and in light of, and infused, by the Treaty's object and purpose.

34. The majority considers that, *de lege lata*, [redacted] ownership interest is irrelevant to the Tribunal's jurisdiction because the Claimants are legal persons incorporated in, and having their permanent seats in, Cyprus pursuant to Article 1(2)(b) of the Treaty. But, although Article 1(2)(b) of the Treaty sets forth a two-part test for what constitutes a legal person of one of the Contracting States, the leading clause of Article 2(1) provides that, in order to be considered as an "investor" of a Contracting State, that legal person must be a "legal person of one Contracting Party *who invests in* the territory of the other Contracting Party …"

35. There is an issue, then, of whether the Claimants may be said with respect to the investment at issue to have "*invest[ed] in the territory of the*" Czech Republic within the meaning of the treaty.[27]

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[26] There has been no objection raised based upon the fact that Claimants' ownership interests in Synot TIP were indirect.

[27] As part of what the Interim Award organizes under the rubric of the Bad Faith Objection, Respondent has approached the circularity issue from a number of angles, one of which is the argument that neither Claimant is "legal person of one Contracting Party who invests in the territory of the other Contracting Party." *See* Respondent's Memorial on Jurisdiction and Request for Bifurcation, 5 August 2016, paras. 279-280 ("[T]he dispute resolution provision in Article 8 provides for resolution of specifically international disputes … In addition, Article 1(2) of the Treaty extends international investment protection only to a person from one Contracting Party who invests in a different Contracting Party. It does not extend protection to a person from one Contracting Party who invests in his or her State: *'The*

36. It is undisputed that [redacted] was the original shareholder of virtually all of the shares in Synot W and that ownership of those shares moved from him, first, to a Netherlands company which he owned, successively through Caymans Islands, Cypriot and Netherlands Antilles companies all of which he owned,[28] and, eventually, to Claimant WVC of Cyprus, all before the claims arose. This structure was the result of tax minimization strategies and these transfers, as well as additional share subscriptions, were all conducted among [redacted] and these companies by means of [redacted] funds, inter-company transfers or via assignments of inter-company receivables.

37. It is also undisputed that Synot Holding s.r.o., a Czech Republic company virtually wholly-owned by [redacted] successively through Caymans Islands, Cypriot, Netherlands Antilles and Czech companies which he also owned, and eventually

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term "investor" shall mean any natural or legal person of one Contracting Party who invests in the territory of the other Contracting Party'[.]"), and para. 290 ("In other words, from the start, two Czechs established the supposed international investment in the Czech Republic with economic resources also drawn from the Czech Republic. These economic truths have not changed."); Respondent's Reply on Bifurcated Objections, 18 November 2016, para. 53. ("In all events, the evidence on the record demonstrates that Claimants … in this regard, did not actively make, fund, or control their nominal investments."), para. 56 ("WCV and CCL could not possibly have made or funded their nominal investment because SYNOT W and SYNOT TIP existed long before WCV or CCL came to own interests in those companies."), para. 214 ("As *Standard Chartered Bank* explained, an economically active relationship exists when 'the investment was made at the claimant's direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner'. Although Claimants argue that there is 'no reason to graft additional requirements on to the Treaty', the terms of the Treaty itself require that the investor actually invest. Just as *Standard Chartered Bank* found for its treaty, the Treaty in Article 1(2) defines an investor as one 'who invests in the territory of the other Contracting Party'."), and para. 220 ("These are, however, the exact circumstances of this case. As discussed in Section 2.2.1 above, Claimants are the corporate alter ego of [redacted] and WCV and CCL lacked an economically active relationship with their nominal investments in SYNOT W and SYNOT TIP per Standard Chartered Bank because they did not direct the making of the investment, did not fund the investment, and did not actively control the investment."); Hearing transcript, Day 1, p. 91:20-24 ("The fact of the matter is simple: WCV and CCL have not invested in the Czech Republic; [redacted] invested in the Czech Republic and controls those investments at his will through Claimants. In light of this, the Tribunal cannot hear this case."); Hearing transcript, Day 3, p. 103:6-14 ("[T]he transfer of capital is the very essence of foreign investment, which is meant to spur the economic development of the host state. In fact, our treaty puts particular emphasis on the element of contribution, as Article 1(2) clearly defines an 'investor' as: '... one ... who invests in the territory of the other Contracting Party ....'"), and p. 103:15-23 ("What contribution exactly did WCV and CCL make to the Czech Republic? … Such a contribution would normally be of capital. But as we've already seen, not a single penny was invested from Cyprus into the Czech Republic through WCV and CCL. This is because the capital in question was already there, in the form of the [redacted] amily's long-standing business. In this sense, WCV and CCL never actively invested in the Czech Republic; only [redacted] did."); Hearing transcript, Day 4, p. 31:2-14 ("WCV never invested anything, it is not an investor, and the assets it possesses are not investments. There was no capital flow from WCV and CCL to the Czech Republic. So, simply put, WCV and CCL are not protected investors. They hold no protected investment. The reality is that the value, if you will, originates with [redacted] with his father; they are Czech citizens, and the value was made in the Czech Republic when they built the SYNOT Group. But to state the obvious, the treaty doesn't protect Czech investors in the Czech Republic and there is no jurisdiction over those claims.").

[28] Including, for a period, Claimant CCL.

Claimant WCV, was the majority incorporator of Synot TIP, along with [redacted] brother, who soon transferred his shares to Synot Holding, all before the claims arose. Again, this structure was the result of tax minimization strategies, and Synot Holding's original shareholding and its acquisition of the remaining shares were conducted by means of funds of [redacted] or his companies.

38. The question is, may whom is considered to be an investor within the meaning of the Treaty change by virtue of ownership reshuffling done merely for tax reasons? In other words, with respect to the investment at issue, may Claimants be said to have invested in the territory of the Czech Republic when the shares were originally issued or transferred to a Czech investor, pre-claim, and have ever since always been ultimately owned by that same Czech investor, having merely been transferred at various times between various other companies that were created merely for tax minimization purposes and that he also ultimately owns and controls?

39. The Treaty does not define the term "invests in the territory of the other Contracting Party." However, in context, "invests in" the territory of the other Contracting Party necessarily implies "invests from without" that territory. The "otherness" of the territory from which the act of investing must emanate excludes acts of investing by persons within the dominion of the host State under circumstances such as those present here.

FORK-IN-THE-ROAD

40. I join the majority in concluding that the court actions commenced by Synot TIP in the Czech courts do not bar their claims in arbitration here, but for somewhat different reasons. I agree with Respondent that the appropriate test is one that looks at the fundamental basis of the municipal law claims to determine whether they share the same normative source and essence as the claims in arbitration. Thus, I agree with the Interim Award's departure from the so-called "triple identity test" in not finding as decisive the fact that the Claimants are not themselves parties to the municipal court actions. Indeed, I think that similar reasoning informs the issue of circularity discussed above; the factors cited – that WCV is indirectly the sole shareholder of Synot TIP and that filing of the court cases must have been approved by and will ultimately benefit the WCV – would seem to be equally applicable in assessing whether the Claimants themselves have actually "invested in" the Czech Republic.

41. We have very little information about the many specific cases presented in the Czech courts. As a result, I do not believe that Respondent has established that the cases were not, as argued by Claimants, brought merely "to test *the extent to which* the decisions of the Constitutional Court in 2011 and 2013, and the amendments to the Lotteries Act in 2011, *applied in certain circumstances*."[29] As such, it has not been proven that the cases share the same fundamental basis, normative source and essence as the claims here.

[29] C II, para. 14.

MULTIPARTY ARBITRATION

42. I also join the majority in concluding that, in the circumstances here where the Claimants have indirect interests in the shares of Synot TIP that were, for the period of CCL's involvement, identical in nature, and allege identical breaches of the same treaty with respect to those shares, the term "investor" in Article 8 of the Treaty can properly be read to include the plural form of the noun.

24 April 2018

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Mark Clodfelter