

INVESTMENT AD HOC ARBITRATION

between

CLAIMANT

v/

THE SLOVAK REPUBLIC

RESPONDENT

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AWARD

March 5, 2011

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Rendered by the Arbitral Tribunal composed of:

Hans Stuber (Arbitrator)

Bohuslav Klein (Arbitrator)

Antonio Crivellaro (Chairman)

Place of Arbitration: Vienna

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I. INTRODUCTION: THE DISPUTE IN BRIEF

1. The dispute concerns an alleged “investment” made in the Slovak Republic by the Swiss Claimant. According to the Claimant, the Slovak Republic has breached its duties under the “*Agreement between the Czech and Slovak Federal Republic and the Swiss Confederation on the promotion and reciprocal protection of investments*” concluded at Berne on October 5, 1990 and entered into force on August 7, 1991 (the “BIT”). When the BIT was concluded, the Respondent was not yet a sovereign State. This occurred on January 1, 1993, following its separation from the Czech Republic. Since such a date, the Slovak Republic succeeded to the BIT as the legal successor of the previous (united) Federal Republic.
2. The Claimant contends that the Respondent has failed to protect its “investment” consisting of the acquisition of certain “receivables” from a private Slovak company. The receivables consisted of sums payable to the assignor by a debtor, who at the time of the assignment of the receivables had been declared bankrupt. In the Claimant’s view, the Slovak judiciary, particularly the Regional Court of Bratislava by its decision dated September 5, 2007, made the Claimant definitively unable to enforce the credits (claims) it had acquired towards the debtor. By this wrong and unrevised decision, the Slovak Republic has failed to accord fair and equitable treatment and full protection and security to the Swiss investor, and expropriated its investment.
3. Therefore, the Claimant has initiated an arbitration under Article 9 of the BIT seeking redress of the treaty breaches and an award ordering the Slovak Republic to compensate the Claimant for the value of its entire financial loss, corresponding to the value of the non-enforced receivables, plus interest and legal costs.
4. The Respondent, the Slovak Republic, objects that the conditions for the applicability of the BIT are not met, arguing that the Claimant is not an “investor” in the terms of Article 1(1) of the BIT and that the acquisition of the receivables is not an “investment” in the meaning of Article 1(2) of the same BIT. It therefore contends that the BIT has been arbitrarily invoked by the Claimant and that the present Tribunal lacks jurisdiction to decide on the Claimant’s claims.

5. Moreover, the Respondent argues that even if jurisdiction could be established the Claimant's claims are without merits. In essence, it observes that, at most, what the Claimant complains of could be viewed as — but in reality is not — an error in law made by a Slovak court and thus reproaches the Claimant for equating the Tribunal established under the BIT to a sort of “court of appeal” having the power to correct such an error: this is inadmissible because the Tribunal has no such power.
6. In conclusion, the Respondent requests the Tribunal to dismiss the entirety of the Claimant's claims for lack of jurisdiction and to order the Claimant to bear its own arbitration costs and to refund to the Respondent the amount of its arbitration costs.

## II. THE PARTIES

### II.A The Claimant

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### II.B The Respondent

9. The Respondent is the Slovak Republic (“Slovak Republic” or “Respondent”), represented by: (i) Ms. \_\_\_\_\_, managing employees at the Ministry of Finance of the Slovak Republic; (ii) \_\_\_\_\_, employees at the same Ministry of Finance, Štefanovicova 5, 81782 Bratislava, the Slovak Republic; (iii) Mr. David Pawlak, David A. Pawlak LLC, c/o Soltysinsky Kawecki & Szlezak, ul. Wawelska 15B, 02-034 Warsaw, Poland with registration at 1661 Crescent Pl. NW, Ste 304, Washington, D.C. 20009, USA and RLR, P.C. 369 Lexington Avenue, 16th Floor, New York, NY 10017, USA.
10. Proper powers of attorney were issued to the above empowered representatives

by the Minister of Finance of the Slovak Republic, copy of which was given to the Tribunal.

### III. THE ARBITRAL TRIBUNAL

11. As a result of the appointments recorded in the file (see Section V.D below), the Arbitral Tribunal is composed of:
  - Professor Antonio Crivellaro, Studio Legale Bonelli Erede Pappalardo, via Michele Barozzi 1, 20122, Milan, Italy, Chairman, appointed by the Chairman of the ICC Court of Arbitration; and
  - Mr. Hans Stuber, Frieriep Renggli, Grafenastrasse 5, CH-6304, Zug, Switzerland, arbitrator appointed by the Claimant; and
  - Mr. Bohuslav Klein, Kralupská 14, Prague 6, 161 00, Czech Republic, arbitrator appointed by the Respondent.
12. At the organizational meeting held in Milan on November 5, 2009 (see subsection VI.B), the three arbitrators confirmed the acceptance of their appointment and the Parties acknowledged that they had “*no objections as to the constitution and composition of the Tribunal*” (§ 1 of the minutes of the meeting, referred to as the “*Milan Minutes*”).
13. A Secretary to the Tribunal has been appointed by the Tribunal with the consent of the Parties. The Secretary is Mr. Francesco Perillo, Studio Legale Bonelli Erede Pappalardo, via Michele Barozzi 1, 20122, Milan, Italy.

### IV. JURISDICTION – VENUE – LANGUAGE – APPLICABLE LAW

#### IV.A Jurisdiction

14. The jurisdiction of this Tribunal is based on Article 9 of the BIT, which reads as follows:
  - (1). For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and [without] prejudice to Article 10 of this Agreement (Disputes between Contracting Parties), consultations will take place between the parties concerned.
  - (2). If these consultations do not result in a solution within six months,

the dispute shall upon request of the investor be submitted to an arbitral tribunal. Such arbitral tribunal shall be established as follows:

- (a) The arbitral tribunal shall be constituted for each individual case. Unless the parties to the dispute have agreed otherwise, each of them shall appoint one arbitrator and these two arbitrators shall nominate a chairman who shall be a national of a third State. The arbitrators are to be appointed within two months of the receipt of the request for arbitration and the chairman is to be nominated within further two months.
  - (b) If the periods specified in paragraph (a) of this Article have not been observed, either party to the dispute may, in the absence of any other arrangements, invite the President of the Court of Arbitration of the International Chamber of Commerce in Paris, to make the necessary appointments. If the President is prevented from carrying out the said function or if he is a national of a Contracting Party the provisions in paragraph (5) of Article 10 of this Agreement shall be applied *mutatis mutandis*.
  - (c) Unless the parties to the dispute have agreed otherwise, the tribunal shall determine its procedure. Its decisions are final and binding. Each Contracting Party shall ensure the recognition and execution of the arbitral award.
  - (d) Each party to the dispute shall bear the costs of its own member of the tribunal and of the chairman and the remaining cost shall be borne in equal parts by both parties to the dispute. The tribunal may, however, in its award decide on a different proportion of costs to be borne by the parties and this award shall be binding on both parties.
- (3). In event of both Contracting Parties having become members of the Convention of Washington of March 18, 1965 on the Settlement of Investment Disputes between States and Nationals of other States, disputes under this article may, upon request of the investor, as an alternative to the procedure mentioned in paragraph 2 of this article, be submitted to the International Center for Settlement of Investment Disputes.
  - (4). The Contracting State which is a party to the dispute shall at no time whatever during a procedure specified in paragraphs (2) and (3) of this Article or during the execution of the respective sentence assert as a defence the fact that the investor has received compensation under an insurance contract covering the whole or part of incurred damage.
  - (5). Neither Contracting State shall pursue through diplomatic channels a dispute submitted to arbitration, unless the other Contracting State

does not abide by or comply with the award rendered by an arbitral tribunal.

15. At the Milan organizational meeting of November 5, 2009, the Parties and the arbitrators have mutually acknowledged that the Tribunal was constituted pursuant to the above quoted Article 9(2) of the BIT (§ 1 of the Milan Minutes).

#### IV.B Venue

16. As agreed in § 5 of the Milan Minutes, the place of the arbitration is Vienna, Austria, where the hearing of October 11, 2010 was held.

#### IV.C Language

17. The language of the arbitration is English (see § 6 of the Milan Minutes). Evidence drawn up in a different language was translated into English. Oral and written pleadings were submitted in English.

#### IV.D Applicable law

##### *IV.D.1 The law governing the merits*

18. The matter was discussed at the Milan organizational meeting. No agreement was reached between the Parties on the law applicable to the substance of the dispute. Therefore, each Party was invited to address the issue in its first written submission. In the event that the Parties would still disagree, the selection of the rules of law to be applied to the substance of the dispute would be made by the Tribunal in its award. In their respective submissions, the Parties reached divergent conclusions, the Claimant giving prevalence to domestic (Slovak) law and the Respondent giving prevalence to international law, particularly investment law, as better specified in Section VII below.
19. Given the Parties' disagreement, this is an issue that the Tribunal must itself resolve as a preliminary matter. The Tribunal will discuss and resolve this matter in Section VIII.A below.

##### *IV.D.2 The law governing the procedure*

20. Although Article 9(2)(c) confers to the Tribunal the power to "*determine its procedure*", at the Milan organizational meeting it was agreed that the present proceedings would be governed by the Uncitral Arbitration Rules in force in

November 2009 (“Uncitral Rules”). Moreover, it was agreed that: “*Where these rules are silent or incomplete, the Parties jointly or, failing their agreement, the Tribunal may establish the rules of procedure which are needed in any specific case*” (see § 6 of the Milan Minutes).

21. As a matter of fact, whenever needed to resolve procedural issues, the Uncitral Rules were indeed applied during the proceedings either in addition to or as an inspiration for the specific procedural directions issued by the Tribunal.

## V. THE FACTS PRECEDING THE ARBITRATION

22. Whereas the factual evidence provided by the Claimant was somehow incomplete and disordered, an exhaustive chronology of events, with an ordered exhibition of the relevant documents, was made by the Respondent.

### V.A The assignment of receivables

23. On June 15, 2007, the Claimant entered into a contract for the assignment of receivables with the Slovak company (the “Assignment Contract”).<sup>1</sup>

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<sup>1</sup> The document was produced by the Respondent as R-51.

V.B The bankruptcy proceedings and the court decisions

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<sup>2</sup> See the Extract from the Slovak Commercial Registry relating to exhibits enclosed to the Claimant's Statement of Claim.

, listed among the

<sup>3</sup> *Id.*

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V.C The origins of the arbitral dispute

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#### **V.D Appointment of the Members of the Tribunal**

40. As seen above, Mr. Hans Stuber was appointed as first arbitrator by the Claimant on May 19, 2008.

41. On July 18, 2008, the Respondent appointed Prof. Boeckstiegel as second arbitrator. Between October 2008 and February 2009, Mr. Stuber and Mr. Boeckstiegel exchanged mutual proposals for the appointment of the Chairman of the Tribunal, but failed to reach an agreement. On February 5, 2009, the Claimant requested the Chairman of the ICC Court of Arbitration (appointing authority) to make this appointment under Article 9(2)(b) of the BIT.

42. On March 3, 2009, the Respondent informed the Claimant that Prof. Boeckstiegel had resigned and that the Slovak Prime Minister had appointed Mr. Bohuslav Klein on March 16, 2009. Mr. Stuber and Mr. Klein consulted each other with regard to the appointment of the Chairman and, considering that the appointing authority had been already approached, agreed to let it proceed to such an appointment.

43. On request made by the Claimant under Article 9(2)(b) of the BIT, on June 23, 2009 the President of the ICC Court of Arbitration appointed Prof. Antonio Crivellaro as Chairman of the Arbitral Tribunal.

#### **VI. PROCEDURAL HISTORY**

##### **VI.A The preparatory phase**

44. On July 3, 2009, the Chairman informed the Parties of the full constitution of

the Tribunal pursuant to Article 9(2)(b) of the BIT and suggested that an organizational hearing be held in Milan between September and October 2009 in order to establish, *inter alia*, the seat of the arbitration, the language of the proceedings, the procedural law and the law applicable to the merits of the dispute. Considering that the Tribunal was unacquainted with the object of the dispute, the Chairman invited both Parties to provide the Tribunal with a summary presentation of their respective cases, to be submitted by July 31, 2009 (Claimant) and August 31, 2009 (Respondent). Both Parties accepted the above invitation.

45. On July 20, 2009, the Claimant submitted a short presentation of its case. It summarized the facts that led to the arbitration highlighting the provisions of Slovak law that it considered breached by the Regional Court's decision of September 5, 2007 and the alleged breach of the BIT's provisions.
46. On August 24, 2009, the Ministry of Finance of the Slovak Republic submitted a short presentation of the arguments it intended to rely upon to defend its case. After reserving the right to further review its defences and after briefly describing the factual background, the Slovak Republic raised an objection to the Tribunal's jurisdiction, arguing that the Claimant did not qualify as a *bona fide* investor under the BIT, that there was no investment within the meaning of the BIT, and that there was no link between the domestic court decisions and the damages complained of by the Claimant.
47. On September 24, 2009, the Claimant, although not requested, replied to the Respondent's submission of August 24, 2009, exhibiting a statement made on September 16, 2009 by the (first) bankruptcy Trustee appointed by the District Court. On September 29, 2009, following the Claimant's unauthorized submission of September 24, 2009, the Chairman informed the Parties that the Respondent would have the opportunity to counter-reply thereto and that, *pro futuro*, any party-submission had to be made in strict accordance with the schedule set forth by the Tribunal.
48. The Chairman further advised the Parties that a preliminary meeting would be held in Milan, at his office, on November 5, 2009 and that the Parties would be provided in advance with the agenda of the meeting. On October 2, 2009, the Slovak Republic confirmed that five persons would attend the preliminary meeting in Milan on its behalf. Moreover, it replied to the statement by [redacted] enclosed to the Claimant's correspondence of September 24, 2009 by

submitting a letter signed by a . . . t the Slovak Ministry of Finance

1. On October 23, 2009, the Tribunal solicited the Claimant to specify by October 29, 2009 whether it would attend the meeting scheduled on November 5, 2009 and circulated a list of matters to be discussed and decided at the forthcoming meeting.

49. On October 25, 2009, the Claimant confirmed that it would attend the meeting of November 5, 2009 and that it would be represented by its counsel,

. On November 2, 2009, the Respondent informed the Tribunal and the Claimant that  
from the Ministry of Finance as well as Mr. David A. Pawlak from David A. Pawlak LLC would attend the November 5 meeting.

#### **VI.B The Milan meeting of November 5, 2009**

50. The meeting took place on November 5, 2009 in the office of the Chairman (Studio Legale Bonelli Erede Pappalardo), in via M. Barozzi 1, 20122, Milan, Italy. In addition to the Members of the Tribunal and its Secretary, the following persons attended the meeting: . . . representing the Claimant; . . . and Mr. David A. Pawlak representing the Respondent.

51. The Parties and the Tribunal discussed the issues referred to in the agenda proposed by the Chairman on October 23, 2009. The procedural agreements were recorded and signed by the Parties and the Arbitrators (see the Milan Minutes). The most important  
the language, the applicable law, fees and expenses of the Tribunal and the timetable for the subsequent written pleadings.

52. Accordingly, it was agreed that the Claimant was to file a fully exhaustive Statement of Claim by January 15, 2010 (the "SOC") and the Respondent a fully exhaustive Statement of Defence by March 31, 2010 (the "SOD"). It was further agreed that, should the Respondent raise jurisdictional objections and request the proceedings' bifurcation, the Claimant was to reply on the bifurcation by April 30, 2010 and the Respondent was to file a rejoinder by May 31, 2010.

#### VI.C The exchange of written pleadings

53. On January, 15, 2010, the Claimant submitted its SOC, together with 30 “enclosures” which, however, were not accompanied by English translations as required in § 6 of the Milan Minutes.
54. By unrequested submission of February 4, 2010, the Respondent reacted to the SOC and raised the following objections:
- (i) under the Uncitral Rules, the SOC should amount to a “Notice of Arbitration”, but the Claimant’s SOC was grossly deficient in several respects; in particular, it did not include the supporting documents showing compliance with the requirement in Article 1(1)(b) of the BIT nor any witness statement (contrary to § 14 of the Milan Minutes);
  - (ii) the SOC did not include English translations of the exhibits, contrary to § 6 of the Milan Minutes and the Uncitral Rules;
  - (iii) many of the documentary materials invoked by the Claimant in support to its arguments were not produced;
  - (iv) the SOC did not contain the essential elements capable of identifying the Respondent, contrary to Section 18(2) of the Uncitral Rules.

Consequently, the Respondent requested the Tribunal to “terminate” the proceedings under Section 28 of the Uncitral Rules due to the Claimant’s “*failure to communicate its claim*”, and to show sufficient cause for such failure, within the period of time fixed by the Tribunal.

55. In addition, the Respondent produced certain letters exchanged between the Counsel for the Claimant and the Ministry of Finance of the Slovak Republic in December 2009 and January 2010. The letters concerned the issue of whether the Slovak Republic had properly empowered its counsel to represent it in the present arbitration. According to the Respondent, the above correspondence showed an improper interference by the Claimant against the arbitration proceedings and an attempt to obstruct the Respondent’s right to choose its counsel.
56. Finally, in the same above letter, the Respondent suggested that, given the inadequacy of the “Notice of Arbitration” filed by the Claimant on January 15, 2010 and its evident misunderstanding on the remedies provided under the BIT

for settling investment disputes, it would be convenient for the Tribunal to convene the Parties to a “conciliation” of the dispute, as contemplated in § 16 of the Milan Minutes, by warning the Claimant on the fundamental deficiencies in its case and the likely consequences thereof should the dispute be resolved by arbitration. In order to favour this outcome, the Respondent declared to be available to renounce to claim the recovery of the arbitration’s costs incurred up to then in the case that the Claimant would withdraw the arbitration claim.

57. On February 8, 2010, the Tribunal invited the Claimant to comment on Respondent’s submission of February 4, 2010. The Claimant gave its comments on February 10, 2010, when it filed a submission accompanied by 38 “enclosures” (30 of which coincided with those produced on January 15, 2010) each of them coupled with the relevant English translation. In respect of the Respondent’s protests, the Claimant rebutted as follows:

- (i) the powers of attorney granted to the Respondent’s Counsel were not in accordance with Slovak law, which, in the Claimant’s view, is exclusively competent to govern the matter, in particular with a certain Act of 2001 ruling the organization of the State central bodies and the roles of the Ministers and their delegates. Thus, the Claimant had written the above letters to the Ministry for the purpose of stressing that the representatives appointed by the Respondent had not been properly instructed under the above law provisions;
- (ii) this did not amount to an improper interference of the arbitration proceedings. If any delay would result from the improper procedures followed by the Slovak Republic in designating its representatives in the arbitration, only the Slovak Republic would be liable thereof;
- (iii) the Claimant had not failed to demonstrate its real economic activities in Switzerland. What the Claimant had to say in this respect had been amply argued in the SOC, to which the Claimant had attached the documents that it deemed relevant and useful;
- (iv) it was true that the Claimant had failed to produce the required English translations, but this was made for limiting the translation costs to specific documents that the Tribunal would request to be translated;
- (v) the Respondent had been properly identified in accordance with Section



– must be adopted.

The Tribunal acknowledges that [redacted] has now cured this defect. On the assumption that the delay will cause no harm to the Respondent, the Tribunal admits the late translations, but reminds the Claimant that a similar defect must not be repeated.

#### **4. The failure to produce documents invoked in the statement of claim**

A tribunal cannot teach one party as to how it should present its case. If an argument is raised upon reliance on certain documentary evidence which however is not produced, the party runs the risk that the tribunal be bound to disregard the argument for lack of proof.

However, this is once again a complaint that the Respondent should have raised at the proper time and place, i.e. in its next statement of defence, where it has the right to argue that the Claimant does not meet its burden of proof.

#### **5. “Improper Interference”**

The Tribunal is of the view that there is no need for it to take position in respect of this matter. The complaint refers to an internal exchange of correspondence between parties. The Tribunal sees no reason why the exchange could obstruct or interfere against the arbitration proceedings.

Concerning the request for disclosure of documents – which seems to be one of the matters addressed in the exchange of letters between Mr. [redacted] and the Ministry of Finance – the parties are reminded that they have the right, if they so wish, to request the Tribunal to order exhibition of documents provided that the request identifies the specific document, shows its relevance, justifies why the requesting party is not in the possession of the document and is not incompatible with confidentiality or privilege restrictions. This would not be an “interference” but, on the contrary, quite a usual procedural matter.

For the above reasons, unless and until the parties will submit a specific application on whether and how the Tribunal should make use of the exchange of letters exhibited by Mr. Pawlak, the Tribunal will totally disregard such an exchange.<sup>4</sup>

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<sup>4</sup> It is worth noting that, at this stage, the Claimant had not yet requested the Tribunal to expunge from the procedure all Respondent’s defences for lack of valid representation (absence of proper powers of attorney) and consequently render a “default judgment”. At the time of its response dated February 10, the Claimant was still treating the letters to the Slovak Ministry of Finance as an internal exchange. The formal request to the Tribunal to make a default judgment was raised by the Claimant at a later date, i.e. on April 23, 2010 (see § 61).

## 6. Request for Conciliation

The Tribunal considers that application of Item 16 ("Conciliation") of the Milan Minutes is highly premature. The Tribunal must, at least, receive a proper statement of defence and probably organize a hearing before taking a similar step. If, at that stage, the Tribunal will reach the conclusion that it would be convenient in terms of saving costs and time to present its provisional views for a quicker and less costly disposal of the case, it will not miss such an opportunity. However, mutual consent by the parties should be shown before the Tribunal may take such a crucial decision. For the time being, mutual consent is absent: [redacted] does not endorse this proposal in his recent letter.

59. On March 31, 2010, the Respondent filed two submissions: the *Statement of Defence and Objections to Jurisdiction* and the *Request for Bifurcation* of the proceedings. The first submission was accompanied by: an Expert Opinion rendered by [redacted] the bankruptcy procedures under Slovak law; two appendixes, one relating to the dispute's key persons and entities, the other highlighting the chronology of events; the legal authorities relied on by the Respondent (from RL-1 to RL-119); three binders of exhibits (from R-1 to R-86) and a CD-ROM containing the electronic version of all pleadings and exhibits.
60. On April 7, 2010, the Tribunal issued *Procedural Order No. 1*, whereby it invited the Claimant to take position by April 23, 2010 on the Respondent's Request for Bifurcation.
61. On April 23, 2010, the Claimant expressed its written consent to the requested bifurcation. It took this opportunity for further addressing other questions raised in the Respondent's SOD, for instance the question of whether the consultation procedure established in the BIT as a pre-arbitral attempt to amicably resolve the dispute had been validly exhausted or not, and the question of whether the Claimant was an investor and its transactions in the Slovak territory amounted to an investment in the meaning of the BIT. Finally the Claimant formally raised the objection that, due to lack of valid representation in the proceedings since their start, the Respondent had "*failed to appear at the hearing*" and "*failed to submit its Statement of Defence*". It thus requested the Tribunal to render a "*default judgment*" on the above ground. The request was *inter alia* based on Section 28(3) of the Uncitral Rules, according to which: "*If one of the parties fails to produce the documentary evidence requested by the tribunal or by the other party and fails to show sufficient cause for such failure, the arbitral tribunal may make the award on*

*the evidence before it*".

62. By *Procedural Order No. 2* dated April 28, 2010, the Tribunal acknowledged the Parties' agreement on the separation of jurisdiction from merits and consequently invited the Claimant to file a fully exhaustive Memorial on Jurisdiction by May 31, 2010 (the "CMJ") and the Respondent to file a Reply on Jurisdiction by June 30, 2010 (the "RRJ"). Moreover, in the same Order the Tribunal invited the Respondent to submit new powers of attorney to its representatives, containing the express ratification by the Respondent of all defences made by them since the start of the proceedings.
63. By letter of May 7, 2010, the Respondent addressed two matters. First, it submitted the new powers of attorney granted by the Slovak Republic to its representatives and requested the Tribunal to issue an Order definitively accepting such powers and to dismiss the Claimant's call for a default judgment. Second, it highlighted that, following the Claimant's consent to the proceedings' bifurcation, the Tribunal's *Procedural Order No. 2* extended the original deadline fixed for the Claimant's Memorial on Jurisdiction (referred to in § 14 of the Milan Minutes) from April 30 until May 31, 2010, thus granting the Claimant a total of two months, while it maintained the original one month period for the submission of the Respondent's Reply on Jurisdiction (June 30, 2010). Hence, the Respondent requested an extension for the filing of its Reply until July 16, 2010.
64. On May 11, 2010, the Tribunal issued *Procedural Order No. 3*. With regard to the powers of attorney recently re-issued by the Respondent, the Tribunal declared that it was fully satisfied with the powers received on May 7, 2010, which *inter alia* endorsed and ratified any action and defence made by the Respondent's Counsel up to that date. The Tribunal pointed out that it had accepted as valid and exhaustive, pursuant to international arbitration practice, also the powers originally issued by the Respondent, however asking it to renew them through an express ratification clause in order to overcome the doubts raised by the Claimant. It therefore dismissed the Claimant's request for a default judgment, clarifying that *Procedural Order No. 3* "*puts an end to the issue of Respondent's representation and the proceedings shall continue in order to resolve the outstanding issues involved in the dispute*".
65. With regard to the time-extension requested by the Respondent the Tribunal fixed July 30, 2010 as the extended deadline for the filing of the RRJ. On May

31, 2010, the Claimant submitted a “*Statement to the Objections to Jurisdiction*” raised by the Respondent in SOD, accompanied by 5 exhibits duly translated. On July 16, 2010, the Respondent submitted the RRJ, accompanied by new exhibits (R-87 to R-92), additional legal authorities (RL-120 to RL-139) and a CD-ROM containing an electronic version of the above documents. The Respondent pointed out that it reserved its right to request a hearing under Section 15(2) of the Uncitral Rules. It further invited the Tribunal to specify the matters that it intended to resolve at the jurisdictional phase and to inform the Parties whether it planned to convene a hearing on such preliminary matters.

66. On August 9, 2010, the Chairman informed the Parties that the Tribunal intended to convene a hearing on jurisdiction. Pursuant to Section 15(2) of the Uncitral Rules, the Tribunal had an autonomous power to convene the Parties to a hearing irrespective of the Parties’ request. In the present case, the hearing was necessary in the light of the divergent positions held by the Parties with respect to the preliminary matters.
67. Concerning the place and date of the hearing, by letter of September 1, 2010, the Chairman advised the Parties that the hearing would take place in Vienna (Austria), at the Hilton Plaza Hotel, on October 11 and 12, 2010 (the “**October Hearing**”). With regard to the issues to be discussed at the hearing, in the letter the Chairman clarified the following:

“in principle all issues of whatever kind are admissible to debate, provided they were addressed in the briefs filed by the parties so far. In this respect, the arbitrators have unanimously agreed that, before the hearing date, the Tribunal will provide the parties by a sufficient advance notice a questionnaire listing the matters in relation to which they intend to raise questions during the hearing”.

#### **VI.D The oral argument**

68. As anticipated in the Chairman’s letter of September 1, 2010 on September 9 the Tribunal issued *Procedural Order No. 4* which included a list of the issues that the Tribunal intended to resolve in the upcoming decision on jurisdiction and of the questions on which the Tribunal wished to receive clarifications from the Parties at the October Hearing. *Procedural Order No. 4* contained, therefore, the following procedural directions:

{...}

**4. Issues which will form the object of the award on jurisdiction**

After examination of the Parties' pleadings on the bifurcated issues and in the exercise of its discretion to determine the scope of any preliminary or partial award (Article 32(1) of the UNCITRAL Rules), the Tribunal notifies the Parties that in its forthcoming award on jurisdiction it will decide the following issues:

(i) *whether the Claimant has satisfied the conditions precedent to the start of the arbitration (proper notice of claim; proper request of consultations);*

(ii) *whether the Claimant qualifies as an investor under the applicable treaty (including, in particular, whether the Claimant is an investor in the meaning of Article 1(b) of the treaty);*

(iii) *whether the Claimant's transaction(s) in the Slovak Republic qualifies as an investment under the treaty and applicable international law (which includes the question of whether the acquisition of receivables is per se an investment and whether the requirements in Article 2(i) of the treaty are satisfied).*

In substance, the Tribunal considers that it is ready to resolve all three issues indicated by the Respondent at p. 3 of its Request for Bifurcation dated 31 March 2010

In the same request (p. 5), the Respondent suggested two possible additional matters to be resolved at the preliminary stage, namely: (a) whether the acts of the trustee may be attributed to the Slovak Republic under the international law principles on State responsibility; and (b) whether further recourses were available before the Slovak judiciary in relation to the defense of the Claimant's rights in the bankruptcy proceedings. After reflection, the Tribunal is of the view that both such issues need further pleadings and evidence.

Indeed, in investment arbitrations the common practice shows that attribution and exhaustion of local remedies are ruled in the merits decision.

The same applies, in the present case, to the issue of whether the Claimant's investment was made in good faith and in accordance with the laws of the host State, especially considering that it is unclear whether the Respondent applies the *bona fide* test against the investment as such, or against the manner and timing of the Claimant's commencement of this arbitration.

On the contrary, jurisdiction may be readily assessed in respect of the first three requirements, which are in essence strictly jurisdictional and exhaustively pleaded.

#### **5. A possible 4<sup>th</sup> preliminary issue**

The Claimant challenges the appellate court decision of 5 September 2007 and the rejection of the claims by the second trustee.

It is unclear whether our Tribunal is requested to rule that these measures are erred in domestic (Slovak) law and should be revised by our Tribunal under this law, or whether the Claimant's case is that – by misapplying

Slovak law on bankruptcy proceedings – the appellate court and the trustee have (automatically?) rendered the Slovak Republic responsible for a treaty breach, i.e. for expropriation and violation of the duty to accord fair and equitable treatment and due protection to the foreign investor.

The Claimant is requested to clarify its position on this point at the October hearing. The Tribunal's *questionnaire* herebelow includes specific questions to the Claimant also in this respect. The Claimant is obviously at liberty not to confine its argument to the Tribunal's questions and to base its case also on additional or different arguments.

Depending on the clarifications received at the hearing, the Tribunal reserves to decide whether or not to address in the preliminary award also the so-called "*prima facie* test" on the existence of a plausible treaty claim. This is a question that directly affects the jurisdiction of a treaty based tribunal and is commonly addressed in the jurisdictional decision, provided that the Tribunal considers that it has received all needed information.

#### **6. Tribunal's *questionnaire* to the Parties**

At the hearing, the Tribunal wishes to receive from the Parties the following clarifications:

##### *Preliminary issue (i)*

##### Questions to the Respondent

Would the Respondent better clarify why it considers that the set of correspondence between the Parties in the file (Claimant's submission of 31 May 2010, § 138, which describes the letters exchanged between the Parties from November 2007 through July 2008) is insufficient to satisfy the conditions precedent set forth in Article 9(1) and (2) of the applicable investment treaty?

Did the Respondent also consider the precedents where investment tribunals have adopted a non-formalistic approach in respect of the present matter? Is its position that these precedents are here irrelevant? If so, why?

##### *Preliminary issue (ii)*

##### Questions to the Claimant

Would the Claimant clarify whether the documentary evidence it has produced to establish its "*seat*" and "*real economic activities*" in Switzerland constitutes the entirety of the proof that it may offer in this respect?

How does the Claimant comment the critiques expressed by the Respondent against the evidential weight of the above documents?

##### *Preliminary issue (iii)*

##### Questions to both Parties

In order to resolve the present issue, should the Tribunal exclusively consider the contract by which the Claimant acquired the receivables or

also the defensive activities in which the Claimant was involved during the bankruptcy proceedings?

Does it make a difference, in the Parties' view, to treat the assignment agreement as a single isolated transaction as opposed to treating it in conjunction with the overall involvement of the Claimant between 2007 and 2008? Would the value and duration of the "contribution" remain the same in either case?

Are the Parties of the view that a principle or practice exists in international investment law requiring that a business transaction must have a minimum value in order to qualify as a protected investment? In the affirmative, what would the minimum amount be?

#### Questions to the Claimant

Does the monetary value of the alleged investment correspond to the price paid to [redacted] for the acquisition of the receivables? Is this the amount invested, or is it the acquisition price plus other expenses? Are the additional expenses exclusively those required to attend the judicial and trustee proceedings?

If the investment value coincides with the price of acquisition of the "receivables", why does the Claimant claim the, much higher, value of the "receivables" as quantified between assignor and assignee in the assignment contract? Was the value of the receivables, at the assignment's date, estimated by some third party, or agreed between assignor and assignee, or declared by the assignor?

Had the Claimant checked the accuracy of the amount when it agreed on the assignment?

What was the precise legal nature of the "receivables" at the time of their assignment from [redacted] to the Claimant? Were they unilateral and still pending *claims* raised by [redacted] towards [redacted], or rather definitive *credits* (or liquidated claims) legally enforceable by the assignor against the debtor?

Would the Claimant elaborate on the business reasons for which it acquired the receivables in the amount of approximately [redacted] from [redacted] towards the bankrupt debtor [redacted] against a cash payment of approximately [redacted]? Would it elaborate on the circumstances surrounding the above acquisition?

Does the Claimant confirm that the validity of the agreement between itself and [redacted] for the assignment of receivables is an issue which is still pending before some Slovak forums, as contended by the Respondent (Statement of Defence of 31 March 2010, §§ 97 to 102 and last submission dated 16 July 2010, §§ 86--87, p. 35)?

Article 2(c) of the investment treaty requires that, in order for a claim or a right to qualify as an investment, its object must consist in a "*performance having an economic value*"; what was the "performance" in respect of which

the Claimant became a creditor by virtue of the assignment of receivables? By whom was the Claimant entitled to expect the “performance”? The assignor? The debtor? The bankruptcy supervisory authorities?

To what extent the quotations extracted by the Claimant from internet (Claimant’s submission of 31 May 2010, §§ 177 to 180) are relevant to the definition of investment in the meaning of customary or treaty international law rules?

*Potential preliminary issue (iv)*

Questions to the Claimant

Was the appellate court decision of 5 September 2007 rendered towards all creditors of [redacted] did it affect the Claimant individually and exclusively?

If the court decision injured a plurality of creditors in the same manner, could the Claimant better explain why it considers that it amounted to a discriminatory expropriation affecting the Claimant alone?

The Respondent objects that the authority of this Tribunal exclusively concerns decisions on treaty breaches committed by States and that the present Tribunal has no power to cure possible errors in (internal) law made by domestic courts (Statement of Defence, §§ 103 ff.): how does the Claimant comment on the said objection?

Does the Claimant assume that international – customary or treaty – law prohibits wrong judiciary decisions as such, or that it prohibits “denial of justice”, that is a system of justice which falls below a certain standard? Is the Claimant’s case that the Slovak judicial system does not meet the standards required by international law?

#### **7. The Parties’ liberty to plead**

The Tribunal wishes to clarify that, by submitting the above questions to the Parties, it simply indicated the matters in respect of which it considers that it needs to receive clarifications.

The Tribunal does not intend to limit the Parties’ rights to plead as they deem fit to their respective case. They are at liberty to argue at the hearing on whatever other basis.

69. The hearing on jurisdiction took place on October 11, 2010 at the Hilton Plaza in Vienna (Austria), starting at 9.30 am and ending at 6.30 pm. In addition to the Members of the Tribunal, its Secretary and [redacted] (who took care of the transcription services), the following persons attended the meeting:

*Representing the Claimant:* [redacted] and [redacted]

*Representing the Respondent:* [redacted]

at the

Ministry of Finance of the Slovak Republic).

70. During the October Hearing, [redacted] and Mr. Pawlak made oral pleadings on behalf of the Respondent and [redacted] on behalf of the Claimant. Both counsel made use of power-point presentations (copy of which was circulated to the Members of the Tribunal and the opposing Party) and based their respective pleadings on the *questionnaire* prepared by the Tribunal in Procedural Order No. 4. Several questions were raised to the Parties' representatives by the Members of the Tribunal, to which each Party gave its own answers. A transcript (the "OHT") recorded the debate and was distributed to the Members of the Tribunal and the Parties.
71. At the end of the hearing, the Tribunal accepted Claimant's request to produce, by October 18, 2010, a statement by [redacted] and allowed the Respondent to submit its comments on the said statement by October 29, 2010. The Tribunal further directed that both Parties had to submit their respective Statement of Costs by November 30, 2010.

#### VI.E Post-hearing submissions

72. The Claimant submitted [redacted] statement on October 15, 2010. On October 29, 2010, the Respondent submitted its comments and an excerpt of a Swiss company's internet website. In brief, it requested the Tribunal to exercise its discretion under Section 25(6) of the Uncitral Rules and "*give no weight*" to [redacted].
73. On November 30, 2010, the Claimant submitted the "*Cost Statement*", accompanied by an "*advance invoice*" issued by [redacted]. [redacted] has a breakdown ("Narratives") of the global amount. On the same date, the Respondent submitted its Statement of Costs, accompanied by: (i) an affidavit by [redacted] which describes and justifies the costs sustained by the Ministry of Finance and attaches their detailed spreadsheet; (ii) the invoices issued to the Ministry and a backup of the expenses incurred during the proceedings by David A. Pawlak LLC; (iii) a spreadsheet referring to the Respondent's further expenses and (iv) a backup of the Respondent's further expenses. Globally, the Respondent claims € [redacted] and asks the Tribunal to put the entirety of this amount at the charge of the Claimant based on the legal authorities and on the arguments discussed in its "Submission on Costs".

## VII. THE PARTIES' RESPECTIVE CASES

### VII.A Applicable law

#### VII.A.1 Claimant

74. In the SOC, the Claimant states that the BIT has no choice-of-law clause and “*the Slovak law should be applicable to the case including the Treaty as part of the Slovak legal system*”. It further specifies that, under the Slovak legislation and Constitution, disputes arising from the misconduct of State organs or entities (such as courts) can only be governed by the same “*legislation and Constitution*”.<sup>5</sup>
75. No other explanation was given by the Claimant on this point, either in its subsequent memorials or at the October hearing.

#### VII.A.2 Respondent

76. A more thorough analysis was made by the Respondent in its SOD.<sup>6</sup> It refers to abundant case-law and authorities which distinguish the respective role of domestic and international law in the resolution of investment disputes. The Respondent emphasizes that the Claimant’s claim and the ensuing dispute arise from an international treaty. Therefore, the sources of law which “*supply the rule of decision*” that the Tribunal must apply in the present arbitration are the treaty itself – the BIT – plus the relevant rules of international law. International law is inevitably applicable, since it is the law that necessarily governs all basic elements of any decision, such as the interpretation of the investment treaty in question; the definition of the terms used in the treaty, e.g. “investment”, “investor”, “expropriation”, “fair and equitable treatment” and so on; the determination of whether an investor has discharged the burden of proving its rights under a given treaty and the State’s breaches thereof; and the definition of the damages that may be indemnified to an investor in case the host State is liable for treaty violations.
77. In the Respondent’s view, Slovak law remains relevant, but merely in the sense that a possible breach by the host State of municipal law provisions constitute a

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<sup>5</sup> SOC, § 153.

<sup>6</sup> SOD, §§ 103-129.

“fact” that may, or may not, amount to a violation of a treaty provision or to a breach of any other relevant rule of international law applying to the protection of foreign investors.

78. The same concepts were re-stated by the Respondent in its Reply of July 16, 2010, where it *inter alia* emphasized that in its submission of May 31, 2010 the Claimant had not denied the application of mandatory rules of treaty interpretation and other international law rules relevant to the resolution of investment disputes.<sup>7</sup> At the hearing, the Respondent focused again on the decisive role of the international rules on treaty interpretation when it must be determined whether a certain person qualifies as an “investor” or a given business transaction qualifies as an “investment”; in addition, it drew the Tribunal’s attention on the need not to depart from the above rules in the interpretation of the specific BIT here in question and of the requirements established therein for its applicability to certain Swiss investors.<sup>8</sup>

## VII.B Admissibility

### VII.B.1 Respondent

79. The Respondent objects that the Claimant failed to satisfy the condition precedent to submit its claim to arbitration, which is here represented by the duty of the Claimant to activate “*consultations between the parties concerned*” before referring the matter to arbitration, as required by Article 9(1) of the BIT. Article 9(2) clarifies that the investor may refer a dispute to arbitration “*if these consultations do not result in a solution within six months*”, meaning that – absent any consultation – arbitration cannot be resorted to.
80. The Respondent infers that the Claimant’s referral to arbitration was made in the absence of any proper consultation and before expiry of the six-month period provided for in the BIT. In fact, no claim had been notified by the Claimant to the Respondent in 2007 or 2008. None of the letters of November 5, 2007, April 2, 2008 and even May 19, 2008 (appointing J. ) did amount to a proper notice of claim, or notice of dispute or, even less, to a “request for arbitration” in the terms of the BIT. Properly speaking, the

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<sup>7</sup> RJJ, §§ 14-26

<sup>8</sup> OHT, p. 19 ff. and pp. 34-35

Respondent has never received a “request for arbitration” by the Claimant and no consultation were ever engaged in connection with this dispute. The letter of July 14, 2008 by the Ministry of Finance had in fact clarified that the dispute was still pending before the domestic judiciary pursuant to national law.

81. Consequently, the precondition to submission of a claim to arbitration was never met. This means that the consent to arbitration by the Slovak Republic is missing and that the Tribunal lacks jurisdiction to hear the case.<sup>9</sup> The same objections were repeated by the Respondent in its Reply of July 16, 2010<sup>10</sup> and at the October Hearing.<sup>11</sup>

#### VII.B.2 *Claimant*

82. Contrary to the above Respondent's allegations, the Claimant contends that the condition precedent to validly commence the BIT arbitration has been met. The Claimant repeatedly requested the Slovak Government to open-up consultations to amicably settle the dispute under Article 9 of the BIT (by letters of November 5, 2007, April 2, 2008 and May 19, 2008).<sup>12</sup> However, the Government “*did not accept the request of the Claimant*” and “*failed to set any date for consultations*”, thereby showing no interest in addressing or pursuing the Claimant's proposals and rather hindering the proper course of the pre-arbitral stage.<sup>13</sup>
83. Having actively attempted to consult with the Ministry of Finance and unsuccessfully waited for over six months the Ministry's reaction, the Claimant validly proceeded to the appointment of the first arbitrator in accordance with Article 9(2)(b) of the BIT.<sup>14</sup>
84. At the October Hearing the Claimant underlined that the BIT does not provide for “*any particular form of notice of a request to begin consultation, nor the solution of*

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<sup>9</sup> SOD, §§ 135-148.

<sup>10</sup> RRJ, §§ 89-97.

<sup>11</sup> OHT, p. 32, p. 98 and ff. and p. 173 and ff.

<sup>12</sup> OHT, pp. 113-115, where the Claimant clarifies that “*the BIT does prescribe neither [a] particular form of notice of a request to begin consultation, nor the solution of [situations] where one party is constantly refusing to [hold] any consultation*”.

<sup>13</sup> CMJ, § 138; OHT, pp. 114-115.

<sup>14</sup> CMJ, §§ 135-140. The matter has been also referred to by the Claimant in the SOC, §§ 149-150.

situation where one party is constantly refusing to hold any consultation” and that the “reluctance” by one party to proceed with consultations may not alone prevent the other from legitimately seizing an arbitral tribunal under Article 9 of the BIT. Hence, while it made all reasonable efforts to abide by the BIT provision, the Respondent’s reluctant conduct amounted to a mere dilatory tactic.<sup>15</sup>

## VII.C Jurisdiction

### VII.C.1 Respondent

85. The Respondent submits that the Tribunal lacks jurisdiction to hear the dispute on the following independent grounds.

(i) is not an “investor”

86. The Respondent relies on Article 1(1)(b) of the BIT, which defines the term “investor” as follows:

“The term “investor” refers, with regard to either Contracting Party, to [...] (b) legal entities [...] which are constituted or otherwise duly organized under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of that same Contracting Party” [emphasis added].

87. The Respondent’s case is that [redacted] is not an “investor” under the above provision. In fact, the mere incorporation of [redacted] in Switzerland – resulting from the Extract from the [redacted] Commercial Registry enclosed to the Claimant’s SOC – is alone insufficient to establish its *status* as a BIT “investor”. Rather, in addition to its incorporation under Swiss law, the Claimant was bound to prove to have both a “seat” and “real economic activities” in Switzerland, which it failed to.<sup>16</sup>

(i)(a) [redacted] failed to establish that it has its “seat” in Switzerland

88. The Respondent argues that the Claimant follows a wrong legal approach when claiming that it has a Swiss “seat” upon the mere assertion that it is domiciled at [redacted]. “Seat” has a precise meaning under the BIT, namely the

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<sup>15</sup> Claimant’s Power Point presentation at the October Hearing, pp. 1-2 and OI-IT, pp. 113-115, pp. 163-165 and pp. 187-188.

<sup>16</sup> SOD, §§ 149-173; RRJ, §§ 27-72; OHT, pp. 42-63.

principal place of an actual business.

89. First, the Claimant cannot rely on a Slovak commercial code provision in order to find that it has a “seat” in the territory of a Contracting Party.<sup>17</sup> The meaning that the key-term “seat” might have under national law of the Contracting Parties (either Slovak or Swiss) is irrelevant in the context of the BIT interpretation, which is governed by the international rules of treaty interpretation exclusively.<sup>18</sup> Secondly, a mere domicile in \_\_\_\_\_, in the Respondent’s words, “is not a sufficient basis to establish that \_\_\_\_\_ [\_\_\_\_\_] is an investor under the Treaty”.<sup>19</sup>
90. To prove that \_\_\_\_\_ is \_\_\_\_\_ “nerve center” (as \_\_\_\_\_ contends<sup>20</sup>), the Claimant had the burden to produce telephone records, rental agreements and rental payments, invoices, purchase orders, banking records, contracts for sale and services, utility bills or even witness statements.<sup>21</sup> However, \_\_\_\_\_ did not.<sup>22</sup> There is no evidence in the record that \_\_\_\_\_ principal place of business, its headquarter or the address at which it “genuinely administers its business”.<sup>23</sup>
91. On the one hand, \_\_\_\_\_ confirmed that (a) approximately 80 other companies have their offices at the same address in \_\_\_\_\_ (as showed by the Respondent in the SOD<sup>25</sup>); (b) it has no own fixed telephone line;<sup>26</sup> and (c) it has

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<sup>17</sup> CMJ, §§ 155-156.

<sup>18</sup> SOD, §§ 125-126; RRJ, §§ 37-38; OHT, pp. 34 and 55.

<sup>19</sup> SOD, § 154.

<sup>20</sup> SOC, § 1.

<sup>21</sup> SOD, § 155; RRJ § 31; OHT, pp. 49 and 51.

<sup>22</sup> See OI-IT p. 51, where Counsel for the Respondent emphasises: “We don’t have anything of this in the record. Nothing” and p. 52, where he concludes on the issue by stating that: “Given these facts that have already been reviewed, the proper conclusion is obvious \_\_\_\_\_ has not proven and cannot prove its compliance with the treaty’s requirement for bringing a claim”.

<sup>23</sup> SOD, § 162.

<sup>24</sup> CMJ, § 154; RRJ, § 35; OHT, p. 52.

<sup>25</sup> SOD, fn. 185.

<sup>26</sup> CMJ, § 172, where the Claimant clarifies that “In the 21 Century [...] mobile phones are used as a common tool”; OHT, p. 52 and 58-59, where the Counsel for the Respondent rebuts that “We have absolutely no evidence of cell phone usage”.

no employees.<sup>27</sup> On the other hand, the Respondent criticises the Claimant for having submitted wholly inadequate evidence which fatally undermines its claim.<sup>28</sup> In fact:

- (i) the reference to a purported “oral rental agreement”<sup>29</sup> is devoid of evidentiary support and may not be credited (there is no evidence of the agreement itself, its parties, the term, the price, the payment records, the receipts, a witness statement from the counterparty, etc.);<sup>30</sup>
- (ii) with regard to the Swiss bank account relied upon by the Claimant to support a finding of a Swiss seat,<sup>31</sup> there is no evidence as to the names of the account holders, the authorized account signatories, the branch of the Swiss bank where the account is held and of bank statements presumably sent by the bank to  
in any event, the mere opening of a Swiss bank account does not *per se* entitle the holder to claim treaty-protection as an “investor”; and
- (iii) even though the Claimant refers to “proper bookkeeping” as a basis for asserting the existence of a Swiss seat,<sup>32</sup> it actually provides no bookkeeping records or testimony of where those records are made or maintained, or by whom; moreover, the alleged “bookkeeping” is certainly not “proper”, given that the 2007 tax return provided by  
demonstrates that in books there is no trace of the receivables allegedly acquired from <sup>14</sup>

92. In the light of the above, the Respondent concludes that the Claimant has not met the burden of proving that it has a Swiss “seat”. Consequently, the Respondent requests the Tribunal to reject the allegation that

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<sup>27</sup> CMJ, § 167; OHT, pp. 52 and 56-58.

<sup>28</sup> OHT, p. 52-53.

<sup>29</sup> CMJ, § 157.

<sup>30</sup> RRJ, §§ 39-40; OHT, pp. 55-56

<sup>31</sup> CMJ, § 157.

<sup>32</sup> RRJ, §§ 41-42; OHT, pp. 59-60

<sup>33</sup> CMJ, § 157

<sup>34</sup> 2007 tax return is referred to as R-80. See also RRJ, §§ 43-44; OHT, pp. 60-62.

principal place of business (or “seat”) and to dismiss the entire claim because of [redacted]: lack of standing under Article 1(1)(b) of the BIT.<sup>35</sup>

(i)(b) [redacted] failed to establish “real economic activities” in Switzerland

93. The Respondent objects that the Claimant has failed to establish that it performs “*real economic activities*” in Switzerland as provided under Article 1(1)(b) of the BIT.<sup>36</sup>
94. In the Respondent’s view: (a) the “real economic activities” requirement is an exceptional treaty clause which reflects the Contracting Parties’ intention to deny protection to “mailbox” or “shell” companies<sup>37</sup> and (b) the “real economic activities” clause, given the mandatory application of the rules of treaty interpretation of the Vienna Convention, shall be interpreted in accordance with the “ordinary meaning” of the terms used in the treaty’s text.<sup>38</sup>
95. The Respondent emphasises that treaty protection is granted to companies which have an effective link with the State which they claim to be a national of, meaning that they must run – in the territory of that State – an actual, independent and verifiable activity, produce or sale visible and tangible goods or services, earn profits and eventually “*foster economic prosperity*” for the States which are party to the treaty.<sup>39</sup>
96. In other words, to prove its “real economic activities”, a company would provide factual and documented descriptions of the business it runs in its own State or the products or services it offers, websites’ screenshots, notes of management meetings and decisions, annual reports and balance sheets, a list of customers, vendors, suppliers, lenders or borrowers etc.<sup>40</sup>

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<sup>35</sup> SOD, §§ 149, 152 and 155; RRJ, § 31; OHT, p. 63.

<sup>36</sup> SOD, §§ 157-173; RRJ, 45-72; OHT, pp. 71-80.

<sup>37</sup> SOD, § 157; OHT, p. 47.

<sup>38</sup> SOD, §§ 125 and 158, where the Respondent points out that relevance must be given to “*the treaty’s text, its preamble and annexes and any related agreements or instruments*”; RRJ, § 45.

<sup>39</sup> SOD, §§ 159-162; RRJ, § 45.

<sup>40</sup> SOD, § 170.

97. ... however, presents no such proof whatsoever.<sup>41</sup> On the contrary, the poor information which the Claimant provides and the only document on which it relies upon to prove “real economic activities” in Switzerland – i.e. a copy of its tax filing for 2007 (Claimant’s exhibit 38 or R-80) – “only raise further doubts about ... status and its conduct in prosecuting this treaty claim”.<sup>42</sup>
98. The Respondent further highlights the following. The Claimant merely declares, but does not prove, that it has been active mainly in the field of financial services, collection of debts, sale of goods, interests in companies, acquisition and sale of property.<sup>43</sup> The Claimant’s reference to the Sixth Council Directive of 1977 on the harmonization of the EU Member States taxation laws and to a decision by the European Court of Justice of 1996 has no relevance.<sup>44</sup> With reference to its alleged “contracts” made in Switzerland, the Claimant refrains from exhibiting any of them because they would be subject to “business secrecy”, which is not believable.<sup>45</sup> The unsupported allegation of the existence of a daughter company in Slovakia<sup>46</sup> is irrelevant and insufficient to establish “real economic activities” in Switzerland.<sup>47</sup>
99. Finally, the contents of the un-translated 2007 tax return offered by ...<sup>48</sup> only confirm that ... is nothing more than a “mailbox” company.<sup>49</sup>

<sup>41</sup> SOD, §§ 167-173, referring *inter alia* to SOC, §§ 125 and 149.

<sup>42</sup> RRJ, § 46. See also RRJ, § 70, where the Respondent concludes that: “On the record, ... is, at most, mailbox company with a formal registry address (and no more) in ...”.

<sup>43</sup> SOC, § 3.

<sup>44</sup> CMJ, §§ 150-153 (where the Claimant cites § 3 of its letter dated April 23, 2010); RRJ, § 47; OHT, pp. 71-72.

<sup>45</sup> CMJ, §§ 168-171, RRJ, § 48; OHT, p. 73.

<sup>46</sup> CMJ, § 172; RRJ, §§ 59-60; OHT, p.80.

<sup>47</sup> OHT, pp. 71 and 73.

<sup>48</sup> Claimant’s letter of February 10, 2010; CMJ, §§ 150-153, 158-161 and 162.

<sup>49</sup> SOD, § 172, where the Respondent points out that the tax filing suggests that ... has no telephone number on its own, no employees and that the majority of its shareholders do not maintain a Swiss residence; RRJ, §§ 49-58 and fn. 47, where the Respondent dissects the Claimant’s 2007 tax return and concludes that the Claimant’s vague references to selected figures thereof (such as: payment of bank fees, payment of taxes and existence of a loan agreement) do not suffice to prove its compliance with the BIT Article 1(1)(b); OHT, pp. 73-79 (in particular p. 74-75, where the Respondent’s Counsel clarifies that the proof that ... has not shown “real economic activities” in Switzerland is given by the utter absence of evidence of activities during 2008 and by

100. In the light of the above, the Respondent contends that the Claimant has not met the burden of proving its “real economic activities” in Switzerland and, on this independent basis, requests the Tribunal to dismiss the Claimant’s claim for lack of standing under Article 1(1)(b) of the BIT.<sup>50</sup>

(ii) acquisition of receivables is not a qualifying “investment”

101. The Respondent refers to Article 1(2)(c) of the BIT, providing as follows:

“The term “investment” shall include every kind of assets and particularly [...] (c) claims and rights to any performance having an economic value”.

102. The Respondent denies that the Claimant’s purported acquisition of receivables might qualify as an “investment” entitled to treaty protection, both in general terms, i.e. under customary international law, and under the applicable BIT provision. In fact: (i) such acquisition lacks the characteristics of an “investment”; (ii) the Claimant cannot show a claim for performance having an economic value at the time of the challenged appellate Court decision and (iii) the acquisition of receivables was not made in good faith and in accordance with host-State law.<sup>51</sup>

(ii)(a) acquisition of receivables is a transaction that lacks the characteristics of an “investment”

103. The Respondent argues that, pursuant to common principles of international law, in order to enjoy treaty protection, an investment must: (i) entail a contribution to the economy of the host State; (ii) extend over a certain period of time, and (iii) involve some risk.<sup>52</sup> More specifically, the Respondent clarifies that:

(i) “contribution” includes contributions in cash, kind or labour that involve a significant flow of capital, resources or activities into the host State’s economy;<sup>53</sup>

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the fact that the mere holding of a bank account cannot alone entitle to treaty protection, otherwise 18,000 mailbox companies in [...] with a bank account could legitimately claim it).

<sup>50</sup> SOD, § 173; RRJ, §§ 45 and 72; OHT, pp. 79-80.

<sup>51</sup> SOD, §§ 174 and 218; RRJ, §§ 73-88; OHT, pp. 81-97.

<sup>52</sup> SOD, § 179.

<sup>53</sup> SOD, §§ 180-181.

(ii) "duration" is to be analyzed in light of all surrounding circumstances and of the investor's overall commitment and must refer to an established economic relationship;<sup>54</sup>

(iii) "risk" means that the investment must entail a risk which goes beyond the risk of doing business generally and which leaves the investor in a situation where he does not know the amount he will end up spending.<sup>55</sup>

104. In addition, the Respondent points out that Article 1(2) of the BIT does not extend its protection to "returns" (i.e. expected or future returns), which thus cannot equate to "investments".<sup>56</sup>

105. The Claimant, however, failed to show that its acquisition of receivables from satisfied the above requirements and thus failed to establish an "investment" under the BIT and under international law. In particular:

(i) the receivable's acquisition from was a mere commercial transaction involving a (modest) cash payment in exchange for the assignment, which ultimately reflected an extraction of resources from Slovakia rather than a "contribution" fostering the host State's economy;<sup>57</sup>

(ii) recorded activities in Slovakia are limited to a one-off transaction pursuant to a four-page contract of assignment and thus had no "duration";<sup>58</sup>

(iii) the exposure was limited to the price of the assignment (approx. € ) which constitutes an ordinary commercial risk assumed by all those who enter into this kind of business speculations;<sup>59</sup> and

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<sup>54</sup> SOD, § 182.

<sup>55</sup> SOD, § 183.

<sup>56</sup> RRJ, §§ 78-81 (in particular fn. 56, where the Respondent indicates that, under the BIT, "returns" are payment relating to investments, but are not investments in themselves).

<sup>57</sup> SOD, § 181; RRJ, § 45.

<sup>58</sup> SOD, § 182; RRJ, §§ 76-77, where the Respondent highlights that sole basis for contending that it met the duration requirement is a vague reference to a purported daughter company in Slovakia, which however is not shown as being actually connected with

<sup>59</sup> SOD, § 183.

(iv) the turnover proceeds which the alleged “investment” may have generated (or would have been expected to generate) are not included within the protection granted under Articles 1(2) or 1(3) of the BIT<sup>60</sup>

106. For the foregoing reasons, the Respondent maintains that [redacted] failed to prove that it made an “investment” in the territory of the Slovak Republic when acquiring the receivables from [redacted]. Hence, the Respondent requests the Tribunal to reject the allegation that [redacted] made an “investment” within the meaning of Article 1(2) and to dismiss the claim for lack of jurisdiction.<sup>61</sup>

(ii)(b) [redacted] has not shown a “claim to performance having an economic value”

107. The Respondent argues that the Claimant has not shown a “claim or right to performance” that fits within the terms of Article 1(2)(c) of the BIT<sup>62</sup> In order to satisfy the definition referred to in the aforementioned BIT clause, “claims and rights to any performance” must be rights conferred by the law that are (i) specific; (ii) clear; (iii) enforceable and that (iv) have a value.<sup>63</sup>

108. However [redacted] acquisition of receivables does not meet the above tests, since:<sup>64</sup>

- (i) no performance was due from [redacted] to [redacted] under the Assignment Contract; it was a “one-off” transaction, without any ongoing “performance”;<sup>65</sup>
- (ii) in the SOC, the Claimant defines “claim” the claim acquired against the bankrupt debtor [redacted],<sup>66</sup> which, however, was far from being “clear” or “specific”;<sup>67</sup>

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<sup>60</sup> RRJ, §§ 78-81 (in particular § 81, where the Respondent explains that Article 1(3) of the BIT defines “returns” as “amounts yielded”, thus using the past tense and therefore excluding expected or future returns).

<sup>61</sup> SOD, § 185.

<sup>62</sup> SOD, §§ 186-192; RRJ, §§ 82-88.

<sup>63</sup> SOD, § 187

<sup>64</sup> *Id.*

<sup>65</sup> SOD, § 188.

<sup>66</sup> SOC, §§ 6 and 108.

<sup>67</sup> SOD, § 189.

- (iii) [redacted] could not legitimately enforce its alleged claim, given that the party having a claim to performance was [redacted];<sup>68</sup> and
- (iv) the claim against the debtor [redacted] was deprived of “economic value” prior to adjudication by the competent authorities of all creditors’ claims and distribution of the bankrupt’s assets; eventually [redacted] failed to gain admission as a creditor to the bankruptcy.<sup>69</sup>

109. In the light of the above, [redacted] has never had any claim or right to performance satisfying the criteria of specificity, clarity and enforceability or a claim having an economic value at the time of the alleged violations of the BIT (nor subsequently). Therefore, the Respondent requests the Tribunal to state that the Claimant failed to show a “qualifying investment” under Article 1(2)(c) BIT and to dismiss its claim.

(ii)(c) The BIT denies protection of investments which are not made in accordance with the host State law

110. According to Article 2(1) of the BIT, “investments” made in the territory of one Contracting Party by “investors” of the other Contracting Party must be made:

“[...] in accordance with the laws and regulations of the former Contracting Party”.

111. Although this Article reflects the Contracting Parties’ intention to exclude from the BIT’s application and substantive protection the “investments” which are contrary to host State law,<sup>70</sup> [redacted] was not established compliance with Slovak anti money laundering law in force on the date of the Assignment Contract, which provided that unusual business operations, characterized by cash payments in excess of € [redacted] be reported to the financial police without undue delay.<sup>71</sup> [redacted]’ cash payment of approx. [redacted] was certainly

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<sup>68</sup> *Id.* See also SOD, § 191, where the Respondent, relying upon the expert opinion referred to in Exhibit R-1, explains that [redacted] had no standing to claim for the receivables until the issuance of a decree by the court approving [redacted] joinder as a party to the bankruptcy proceedings. At the time of the challenged decision, however, (September 5, 2007) [redacted] had not yet registered its claim with the bankruptcy court; RRJ, § 83.

<sup>69</sup> *Id.*

<sup>70</sup> SOD, § 195.

<sup>71</sup> SOD, § 200.

an unusual business operation, but was not reported to the competent authorities.<sup>72</sup>

112. Hence, the Respondent requests the Tribunal to ascertain that Claimant's acquisition of receivables is contrary to the host State law in effect at the relevant date, and must also for that reason be disqualified from the protection accorded by the BIT pursuant to Article 2(1) of the BIT.<sup>73</sup>

(ii)(d) has not established a bona fide investment

113. Finally, the Respondent emphasises that, in addition to comply with the host State law, "investments" deserve treaty-protection only if made in compliance with the international principle of good faith.<sup>74</sup> In order to correctly proceed to the *bona fide* test, several factors should be examined, such as the timing of the investment; the timing of the request for arbitration; the timing of the claim; the substance of the transaction and the nature of the operation.<sup>75</sup>

114. The Respondent argues that "*the timeline of events and surrounding circumstances deny bona fide*",<sup>76</sup> given *inter alia* that:<sup>77</sup> (i) when realised that satisfaction of the receivables in the Slovak courts via claim was in jeopardy, it sought to create international jurisdiction where none existed; (ii) Counsel for the Claimant in the present proceedings, acted both on behalf of and starting from June 15, 2007 onwards; (iii) several persons and entities issued criminal complaints against the conduct of the first bankruptcy Trustee ( ), complaining that he was somehow personally connected with ; (iv) activities seemed to be controlled by the company which is legally represented by : or at least related thereto; and (v) had a favourable approach towards as opposed to other creditors (he proceeded, for instance, to acknowledge proof of debt as first and "*despite its numerous defects*").

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> SOD, § 202.

<sup>75</sup> SOD, § 204.

<sup>76</sup> SOD, § 205.

<sup>77</sup> SOD, §§ 205-217.

115. Further to the above, it is the Respondent's position that the above outlined circumstances do not qualify acquisition of receivables as a *bona fide* investment and therefore prevent it from enjoying the protection granted by the BIT.<sup>78</sup>

#### VII.C.2 Claimant

116. The Claimant argues that the Tribunal has jurisdiction to hear the present dispute as the Slovak Republic interfered and failed to protect the investment that the Claimant made in its territory.<sup>79</sup> In the Claimant's reasoning, the Slovak Republic is responsible for any wrongful conduct of Slovak courts – which “*are to be viewed as agencies of the State acting in the name and on behalf of the State*” – and thus “*has an obligation under international law*” to remedy any treaty violation that such courts should cause.<sup>80</sup>

117. With regard to the reasons why the Tribunal has jurisdiction to hear the case, it is the Claimant's position that:

- (i) the “Extract from the Commercial Registry” attached to the SOC demonstrates that it has a “seat” in Switzerland, from where it administers its business, it holds its headquarters, keeps proper books, rents its office and opens a bank account.<sup>81</sup> Moreover, reference is made to the definition of “seat” given under Slovak law<sup>82</sup> and to the contents of the ECJ judgment in Case C-110/94.<sup>83</sup> In brief, the Claimant asserts

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<sup>78</sup> SOD, §§ 201 and 218.

<sup>79</sup> SOC, § 148

<sup>80</sup> SOC, §§ 146 and 148.

<sup>81</sup> The Extract is commented upon in Claimant's letter of April 23, 2010, § 2 and in CMJ, §§ 150-156. See also OHT, p. 118 and the Claimant's Power Point presentation at the October Hearing, p. 2, where the Claimant asserts that the Commercial Registry shows that “*the Claimant is performing several types of business activities*” in the Swiss territory.

<sup>82</sup> CMJ, § 156, where the Claimant mentions Article 2(3) of Law no. 513/1991, according to which “*a registered office of a legal entity shall be the address [...] which is registered in the business registry as the registered office*”; OHT, §

<sup>83</sup> Claimant's letter of April 23, 2010, § 3, where the Claimant indicates that the ECJ had ruled that: “*Even the first investment expenditure incurred for the purposes of a business may be regarded as an economic activity within the meaning of Article 4 of the Sixth Directive 77/388 on the harmonization of the laws of the Member States relating to turnover taxes, and, in that context, the tax authority must take into account the declared intention of the business to engage in an activity subject to value added tax*”. See also CMJ, §§ 150-153 and OHT, pp. 119-120, where the Claimant relies upon the relevant provisions of EC Regulation No. 44/2001

that, given the above evidence, it has met the burden of proving that it maintains a “seat” in Switzerland;<sup>84</sup>

- (ii) the 2007 tax return (showing the company’s turnover, its profit and loss statement, the bank fees charged for the company’s transactions, etc.) clearly demonstrates that [redacted] has real economic activities in Switzerland and is not a “mailbox company”;<sup>85</sup> in addition, the Claimant’s real economic activity is shown by the various contracts it entered into which, however, are under business secrecy and cannot be disclosed;<sup>86</sup>
- (iii) the fact that the Claimant has no employees or a telephone line does not allow the Respondent to conclude that it is not an “investor” deserving BIT protection: nowadays many businessmen are sole entrepreneurs and work through mobile phones;<sup>87</sup>
- (iv) [redacted] was active in the Slovak Republic through its daughter company (established in 2004), meaning that its economic activities in the Slovak territory were not limited to the acquisition of receivables;<sup>88</sup>
- (v) the receivables acquisition from [redacted] is an “investment”<sup>89</sup> because:
  - (a) it implied a “right to a performance having an economic value”, as it was expected to generate revenues after a certain period of time;<sup>90</sup>

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and the Lugano Convention on recognition and enforcement of judgments in civil and commercial matters of 1988 to show it has a Swiss domicile.

<sup>84</sup> SOC, § 149.

<sup>85</sup> OHT, pp. 120, 129 and 150, where the Claimant’s Counsel clarifies that the Claimant’s operations are effectively run in Switzerland by a Swiss national ([redacted]) residing in Switzerland, that being “sufficient”, in his view, to prove real economic activities.

<sup>86</sup> Claimant’s letter of April 23, 2010, § 3; CMJ, §§ 157-165; OHT, p. 121 and ff. where the Claimant’s Counsel, in order to demonstrate that the Claimant holds real economic activities in Switzerland, advances a formal request to submit a witness statement by [redacted] current executive.

<sup>87</sup> CMJ, §§ 167-172; OHT, p. 129.

<sup>88</sup> CMJ, §§ 175-176.

<sup>89</sup> OHT, p. 136 ff., where the Claimant’s Counsel clarifies the definition of “investment”.

<sup>90</sup> CMJ, §§ 177-180.

- (b) it involved a high degree of “risk”, because there was no certainty as to the expected revenues nor as to the future outcome of the bankruptcy procedure;<sup>91</sup>
- (c) it was not a “one-off transaction”, the Claimant having a strong connection with the Slovak market (proved *inter alia* by the existence of a Slovak daughter company since 2004);<sup>92</sup>
- (d) it was made in compliance with Slovak law, including the relevant provisions of Slovak Civil Code and was formally acknowledged by both the Slovak courts and the bankruptcy Trustee as being enforceable under Slovak bankruptcy law;<sup>93</sup> and
- (e) it was made in good faith, as it was an investment made for the mere purpose of generating proceeds and not with the intent to “create international jurisdiction where none existed”; in fact, the Claimant made the investment before the issuance of the decision by the Regional Court, thus it could not be aware of its harmful contents beforehand; moreover, is an independent person who was appointed through a random selection and following the procedure set forth in the Bankruptcy Act.<sup>94</sup>

118. For the above reasons, the Claimant requests the Tribunal to ascertain that it has jurisdiction over the case.<sup>95</sup>

#### VII.D Merits

119. Although the present award focuses on jurisdiction, the Tribunal is of the view that it should summarize the position that the Parties took on the merits, both for the sake of completeness and for the frequent overlap between procedural and substantive issues.

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<sup>91</sup> CMJ, § 180.

<sup>92</sup> CMJ, § 182.

<sup>93</sup> CMJ, §§ 193-196.

<sup>94</sup> CMJ, §§ 198-218.

<sup>95</sup> SOC, §§ 146, 148 and 150.

VII.D.1 Claimant

120. The Claimant's principal contention is that the judgment by the Regional Court of September 5, 2007 – which is considered in blatant violation of the laws of the Slovak Republic<sup>96</sup> – resulted in the utter collapse of the “investment” it made in the Slovak territory.<sup>97</sup>
121. Given that the Slovak courts are “official bodies” of the Slovak Republic and that the latter is responsible for the formers’ wrongful conducts, the Claimant invokes the BIT to seek full compensation from the Slovak Republic of the damages it suffered as a result of the aforementioned judgment.<sup>98</sup>

(i) “investment” in the Slovak Republic collapsed because of the judgment by the Regional Court of September 5, 2007

122. On June 15, 2007 – when [redacted] bankruptcy had already been declared – [redacted] entered into the Assignment Contract with [redacted], in the context of a regular business transaction which complied fully with the laws of Slovakia.<sup>99</sup> The Claimant, however, observes that “[I]ad there been any doubts about the stability of the judicial system of the Slovak Republic [it] would not have made such investment”.<sup>100</sup> In fact, after the declaration of [redacted] bankruptcy by the District Court on June 7, 2007, [redacted] claims against the bankrupt [redacted] were acknowledged by the bankruptcy Trustee ([redacted]) in an amount of [redacted].<sup>101</sup> On September 5, 2007, however – after filing of the appeal to the June 7 decision by [redacted] former executive manager ([redacted]) – the Regional Court overruled the first instance judgment and

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<sup>96</sup> SOC, § 55 and ff, where the Claimant defines the Regional Court decision as being “illegal”, OHT, p. 160 and ff.

<sup>97</sup> SOC, § 92; OHT, p. 152, where the Claimant's Counsel clarifies that, contrary to the Respondent's allegations, the Claimant has never contested the second trustee's actions and that the Slovak Republic's international liability arises from the Court's actions exclusively. See *infra* §§ 142 and ff. of this Award.

<sup>98</sup> SOC, § 145.

<sup>99</sup> SOC, §§ 93-94 and 122. See also *supra* § 23 of this Award.

<sup>100</sup> SOC, §§ 95 and 123.

<sup>101</sup> SOC, §§ 22 and 108. See also SOC, § 25, where the Claimant explains that the bankruptcy trustee acknowledged the creditors' petitions for an overall amount of [redacted] which, compared to the value of the bankrupt's assets ([redacted]), would have allowed satisfaction of all creditors.

remanded the case to the District Court for further action.<sup>102</sup>

123. The Claimant complains that, as a consequence of the above decision, both the recovery petition filed by [redacted] with the District Court of Bratislava on June 15, 2007 (R-33) and the subsequent claims' acknowledgment by the bankruptcy Trustee ceased to be effective.<sup>103</sup> Consequently, the claims that [redacted] had against [redacted] (which were meanwhile transferred to [redacted], became statute-barred, given that the statute of limitation period – running from the date on which [redacted] invoices were to be settled by [redacted] under the contract for works<sup>104</sup> – lasted four years by operation of law.<sup>105</sup>

124. Hence [redacted] was “deprived of fully-fledged ownership rights” and its property “destroyed”.<sup>106</sup> The legal nature of its receivables indeed inevitably changed, the latter becoming judicially unenforceable.<sup>107</sup>

(ii) The Regional Court judgment of September 5, 2007 violates Slovak law

125. The Claimant argues that the Regional Court decision of September 5, 2007 is in violation of several provisions of Slovak law.<sup>108</sup> In particular, the Regional Court:<sup>109</sup>

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<sup>102</sup> SOC, § 32.

<sup>103</sup> SOC, §§ 33, 35 and ff. and 115.

<sup>105</sup> *Id.*, where the Claimant further lists a series of Slovak law provisions, among which Section 392(1) (“In relation to rights to discharge, the statute of limitations shall start on the day the obligation was breached, save for certain rights with different statute of limitations regulation set out in the law”); Section 397 (“Unless set out otherwise, the term of the statute of limitations shall be four years”) and Section 402 of the Slovak Commercial Code (“The statute of limitations shall cease to run, when the creditor, in order to satisfy or determine his rights, takes any legal action which, according to regulations on judicial proceedings, is regarded as the commencement of judicial proceedings, or claiming of his rights in an already ongoing proceeding”).

<sup>106</sup> SOC, §§ 34, 96, 116 and 124.

<sup>107</sup> SOC, § 54, where the Claimant explains that, by virtue of the Regional Court decision, enforcement of the receivables was no more possible because, in the further phase of the bankruptcy proceedings before the District Court, the trustee would have raised the statute of limitations' objection and thus rejected the Claimant's recovery petition.

<sup>108</sup> SOC, §§ 55 and ff. and §§ 110 and ff.

<sup>109</sup> SOC, § 56.

- (i) failed to examine whether [redacted] was entitled to appeal the decision of the District Court dated June 7, 2007, even though the Claimant had proven that solely [redacted] was entitled to act on behalf of the bankrupt.<sup>110</sup> Thus, the Regional Court had to reject [redacted] appeal in accordance with Section 218(1) of the Slovak Code of Civil Procedure;<sup>111</sup>
- (ii) failed to examine whether the appeal against the District Court decision was indeed admissible pursuant to Section 22(3) of the Bankruptcy Act.<sup>112</sup> Given that in this case the petitioner was actually the debtor, the Regional Court had to reject [redacted] appeal on the grounds of inadmissibility;<sup>113</sup>
- (iii) failed to apply the relevant provisions of the Bankruptcy Act (*lex specialis*), when deciding on the appeal, and instead applied the merely supplemental provisions of the Slovak Code of Civil Procedure;<sup>114</sup>
- (iv) issued a decision 60 days after the appeal was filed, thus losing its authority to decide on the matter as prescribed in Section 22(3) of the Bankruptcy Act, according to which, in pertinent part: “[...] [t]he court of appeal shall resolve on the appeal within 30 days from delivery of the petition”;<sup>115</sup>

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<sup>110</sup> The Claimant relies upon the excerpt from the Slovak Commercial Registry relating to [redacted] (enclosed to the Claimant’s SOC), listing [redacted] executive from May 27, 2004 to April 6, 2009.

<sup>111</sup> SOC, §§ 60, where the Claimant indicates that Section 218(1) of the Slovak Code of Civil Procedure provides *inter alia* that: “The court of Appeal shall reject appeal which [...] was filed by a person who is not entitled to do so”. See also SOC, § 111.

<sup>112</sup> According to Section 22(3) of the Bankruptcy Act: “Against the resolution on declaration of bankruptcy the appeal can be filed by the debtor provided that he is not the petitioner. Where the court of appeal learns that the court of first instance resolved on declaration of bankruptcy in contradiction with the law, the court of appeal shall modify the decision of the court of first instance so that the bankruptcy proceedings shall be ceased otherwise it shall confirm the decision of the first instance court”. See SOC, §§ 62 and 110.

<sup>113</sup> SOC, §§ 61 and 63, where the Claimant indicates that Section 218(1) of the Slovak Code of Civil Procedure provides *inter alia* that: “The court of Appeal shall reject appeal which [...] is directed towards a decision against which the appeal is not admissible”.

<sup>114</sup> SOC, §§ 64-66, where the Claimant explains that according to Section 22(3) of the Bankruptcy Act, should the court of first instance’s decision on bankruptcy be challenged, then the court of appeal shall either directly amend the decision (if wrong) or confirm it but has no power to quash it. See also SOC, § 112.

<sup>115</sup> SOC, §§ 62, 67 and 112.

(v) failed to consider that there was a lawsuit already pending on the issue of whether the appellant ( ) was entitled to act on behalf of the bankruptcy petitioner.<sup>116</sup>

126. The Claimant had no means to challenge the judgment of the Regional Court, given that Section 198(1) of the Bankruptcy Act provides that:

“The court shall decide during the proceedings according to this Act. Appeal against the resolution is admissible only if provided herein. No extraordinary appeal against resolution rendered hereunder shall be admissible.”<sup>117</sup>

127. Notwithstanding the above provision, executive manager and the bankruptcy Trustee filed an extraordinary appeal before the Supreme Court of the Slovak Republic, which however was denied by a decision of April 23, 2008.<sup>118</sup> Hence, following the remand by the Regional Court to the lower courts for resuming bankruptcy, on May 29, 2008 the District Court again declared bankrupt, appointed a new Trustee and invited the creditors to submit their petition within a 45-day time.<sup>119</sup>

128. The Claimant duly filed its petition with the (second) bankruptcy Trustee on June 23, 2008.<sup>120</sup> The bankruptcy Trustee, however, rejected the petition “*due to expiration of the four year statute of limitations*”, thus definitively preventing the Claimant from satisfying its claims.<sup>121</sup>

129. After a further appeal by against the District Court decision dated May 29, 2008, the Regional Court, by judgment dated July 16, 2008, applied Sections s 22(3) of the Bankruptcy Act and 218(1) of the Slovak Code of Civil Procedure (see *supra* fn. 111 and 112) and rejected the appeal on the grounds

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<sup>116</sup> SOC, § 72.

<sup>117</sup> SOC, §§ 73-74.

<sup>118</sup> SOC, § 73 and copy of the Commercial Bulletin No. 94/2008 where the decision was published, enclosed to the SOC. See also R-62.

<sup>119</sup> SOC, § 75.

<sup>120</sup> SOC, § 76. petition is enclosed to the SOC and also referred to in R-69.

<sup>121</sup> SOC, §§ 77, 113 and 115. Moreover, the Claimant asserts (SOC, § 108) that the illegitimate judgment by the Regional Court deprived it of its right to “*file an incident action against the decision of the [second] trustee and was not able to demonstrate legitimacy of his claim [...]*”.

that [redacted] was not entitled to act on behalf of the debtor.<sup>122</sup>

130. Faced with the above situation, the Claimant emphasizes the impropriety of the judiciary's behaviour on the overall issue of [redacted] bankruptcy and the contradictory outcome of the two decisions.<sup>123</sup> In particular, the Claimant complains that:

(i) on September 5, 2007, the Regional Court decided on an appeal: (a) which was filed by an individual who lacked standing ([redacted]); (b) which overruled a decision that could not be appealed (the District Court decision of June 7, 2007); (c) ignoring the pending lawsuit on the *status* of the appellant as the debtor's legal representative; and (d) without abiding by the 30-day period set under the Slovak law for the issuance of such a judgment;

(ii) on July 16, 2007, the Regional Court decided on the same appeal as under (i) above, however rejecting it -- within the prescribed time-limit -- on the unique grounds that the appellant ([redacted] again) was not entitled to challenge the first instance decision of May 29, 2008 because he lacked standing.<sup>124</sup>

131. In brief, the Claimant underlines both the non compliance of the Regional Court's decisions with the applicable Slovak laws and the resulting deprivation of the ownership rights it acquired over the receivables by virtue of the Assignment Contract.<sup>125</sup>

(iii) *In failing to take remedy against the wrong judiciary decisions, the Slovak Republic left the investment unprotected and thus breached its obligations under the BIT*

132. In the light of the above, the Claimant contends that the Slovak Republic, which has an obligation under the BIT to protect Swiss investments made in its territory, "failed to secure" enforcement of the Slovak laws by its judiciary, thus

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<sup>122</sup> SOC, §§ 78-82.

<sup>123</sup> SOC, §§ 83-84.

<sup>124</sup> *Id.*

<sup>125</sup> SOC, §§ 34 and 84.

causing severe damages to the Claimant.<sup>126</sup> In particular, the Claimant argues that the Regional Court – when deciding on the appeal filed against the bankruptcy declaration by the District Court – breached the Slovak Constitution, the Bankruptcy Act, the Commercial Code and the Code of Civil Procedure. Notwithstanding the above law-infringements, the Slovak Republic did nothing to prevent the Regional Court from acting in such a way or actively protecting the Claimant’s investment, thereby breaching Articles 4 and 6 of the BIT.<sup>127</sup>

133. Given that the Claimant demonstrated that the acquisition of receivables is an investment under Article 1(1)(b) of the BIT which complies with the laws of the Slovak Republic<sup>128</sup> and that the “*illegal*” decision of the Regional Court destroyed its investment in Slovakia,<sup>129</sup> the Slovak Republic is liable towards the Claimant for compensating the corresponding value of the statute-barred receivables, plus connected damages, under the aforementioned BIT provisions.<sup>130</sup>

(iii)(a) The Slovak Republic failed to “protect” and to ensure a “fair and equitable treatment” to the Claimant’s investment

134. According to the Claimant, the notion of “fair and equitable treatment” (referred to in Article 4(2) of the BIT<sup>131</sup>) must be interpreted broadly, meaning that this clause “*imposes obligations beyond customary international requirements of good faith treatment*”, thus comprising such principles as *pacta sunt servanda*, protection of acquired rights and protection of property.<sup>132</sup>
135. To establish whether a State breached the “fair and equitable treatment” clause, both the factual context and the actions it (or its bodies) carried out, acquire

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<sup>126</sup> SOC, §§ 85-86; OHT, p. 158, where the Claimant’s Counsel states that, as a result of the actions by the Regional Court, “*the [C]laimant lost judicial protection of its investment*”.

<sup>127</sup> SOC, §§ 87-89, 98-102 and 118-119.

<sup>128</sup> SOC, §§ 93-95, 121 and *supra* Section VII.C.2.

<sup>129</sup> SOC, §§ 96 and 103-107, where the Claimant lists the various Slovak law provisions breached by the Regional Court and finally concludes that the Regional Court should have “*dismissed*” the appeal.

<sup>130</sup> SOC, § 89.

<sup>131</sup> The relevant clause of Article 4(2) of the BIT reads as follows: “*Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party. {..}*”.

<sup>132</sup> SOC, §§ 134 and 136.

relevance.<sup>133</sup> In the present case, the Slovak Republic breached the aforementioned BIT clause when the Regional Court illegally quashed the District Court decision on bankruptcy (instead of merely amending or confirming it) and ordered to re-open the bankruptcy proceedings. In so doing, the Slovak Republic indirectly undermined the Claimant's right to enforce the receivables within the bankruptcy, although the same right had been previously acknowledged by the same Slovak judiciary (decision of the District Court dated June 7, 2007).<sup>134</sup>

136. Moreover, the Claimant argues that "*the Slovak Republic took unreasonable and discriminatory measures*" when the Court ordered that a new stage of bankruptcy was to initiate, given that its "Swiss" investment was not treated (or "protected", in the sense of Article 4(1) of the BIT<sup>135</sup>) the same way as the Slovak ones: in fact, the principal consequence of the second bankruptcy declaration by the District Court was that the Claimant was the only creditor to be excluded from the list of those admitted to recovery.<sup>136</sup> Hence, the above resulted in a violation of both Articles 4(1) and 4(2) of the BIT, the Slovak Republic having failed to take the appropriate and non-discriminatory measures in order to accord full protection to the Claimant's investment and ensure it a fair and equitable treatment.<sup>137</sup>

(iii)(b) The measures adopted by the Slovak Republic amount to expropriation

137. Article 6 of the BIT (which is headed "*Dispossession, compensation*"), provides in the first paragraph that:

"Neither of the Contracting parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments of investors of the

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<sup>133</sup> SOC, § 135.

<sup>134</sup> SOC, § 137.

<sup>135</sup> Article 4(1) of the BIT provides, in the first part, that: "*Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and liquidation of such investments [...]*".

<sup>136</sup> SOC, §§ 138-140; OHT, p. 153, where the Claimant's Counsel observes that "[T]he discriminatory approach is to be seen in that the other creditors had different deadlines and their claims had not been expired, meaning [that they] did not become statute barred due to the decisions of the court dated 5 September 2007".

<sup>137</sup> SOC, §§ 135 and 143-144.

other Contracting party, unless the measures are taken in the public interest, on a non discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation”.

138. According to the Claimant, the notion of “expropriation” set forth in the aforementioned provision must be interpreted broadly. An expropriation thus takes place “*whenever the State takes steps that effectively neutralize the benefit of the property, assets, for the foreign owner [...] regardless of the form that the interference takes*”.<sup>138</sup> It also takes place as the “*indirect*” result of a measure adopted by the State, which does not *per se* affect the investor’s property but ultimately interferes with its use or with the enjoyment of its results.<sup>139</sup> In this case, the Slovak Republic (through the action of the judicial bodies) unlawfully quashed the bankruptcy declaration which, after acknowledgment by the first Trustee, formally entitled the Claimant to exercise its recovery rights.<sup>140</sup>

139. As a result of the Claimant’s exclusion from the second stage of the bankruptcy proceedings, the Claimant indeed “*ended up in a situation where its ownership right lost its fundamental attributes*”, and thus suffered a loss which “*is to be considered as an expropriation*”.<sup>141</sup> In fact, there is no doubt as to the causal link between the breaches of Slovak laws by the Slovak judiciary and the damages suffered by the Claimant (ultimately resulting in the expropriation of its investment), which the Slovak Republic must now be held liable to compensate.<sup>142</sup>

(iv) *The Claimant is entitled to the compensation of damages deriving from the wrongful decision by the Regional Court*

140. As a consequence of the breaches by the Slovak Republic of its obligations under the BIT, the Claimant suffered damages for which it now claims compensation as follows:<sup>143</sup>

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<sup>138</sup> SOC, § 128.

<sup>139</sup> SOC, §§ 129 and 131-132.

<sup>140</sup> SOC, § 130.

<sup>141</sup> SOC, § 116.

<sup>142</sup> SOC, §§ 119 and 130.

<sup>143</sup> SOC, §§ 108 and 154; OHT, pp. 138 and ff., where the Claimant’s Counsel clarifies that the Claimant “*claims the reparation for the injury caused by the court’s wrongful decision*” and the “*fair market value of the receivables*”, corresponding to the receivables’ value “*if the wrongful act of the Slovak court would not have been committed*” given that, as confirmed by the first trustee, “*the [C]laimant would have collected [the]*

- € , namely the amount that the first Trustee had acknowledged as being due to the Claimant by the bankrupt, plus contractual penalty corresponding to 0,1% of the owed sums for each day of late payment and, after calculation as at the fourteenth day, a contractual penalty corresponding to 0,5% for each day of late payment;
- € , namely the amount that the first Trustee had considered as not being due by the bankrupt to the Claimant, but that had anyway to pay to the Claimant on the basis of issued under the contract for works between , plus contractual penalty corresponding to 0,1% of the owed sums for each day of late payment and, after calculation as at the fourteenth day, a contractual penalty corresponding to 0,5% for each day of late payment;
- costs and expenses associated with the present arbitration, including the counsel's fees and expenses.

#### VII.D.2 Respondent

141. The Respondent contends that, should the Tribunal find it has jurisdiction to hear the case, fail on the merits. The Claimant indeed misapprehends the Slovak Republic's obligations and the standards applicable under the BIT and in any event fails utterly to meet its burden of proof.

##### (i) The acts of the Trustee may not be attributed to the Slovak Republic

142. In the Respondent's view, the main act of which the Claimant seems to complain in the SOC, is the decision by the second Trustee of September 18, 2008, which allegedly resulted in the illegitimate exclusion of the receivables from the second phase of bankruptcy.<sup>144</sup>

143. The Respondent points out that, under both Slovak and international law, the actions of a trustee cannot be attributed to the State.<sup>145</sup> In fact, the trustee is not

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*whole value of the receivables, not only [the] invested amount, if the bankruptcy proceedings would have not been cancelled by the decision of the Slovak court*'.

<sup>144</sup> SOD, §§ 220-221 referring to SOC, §§ 117 and 115. See, however, OHT, p. 170 and ff., where the Respondent's Counsel points out that "aid that the acts of the trustee are not the subject of its claim", which is a concession very much welcomed by the Respondent, given that "it has quite serious consequences for claims".

<sup>145</sup> SOD, §§ 223-227, in particular § 223, where the Respondent refers to Act No. 8/2005 on

a State organ, nor can he be said to be acting under the direction or control of the State.<sup>146</sup> In any event, the only challenged actions which occurred after party-petition to join the bankruptcy on November 6, 2007 are those of the Trustee, which, taken alone, can certainly not form the valid basis of a treaty-claim.<sup>147</sup>

144. Hence, there is no basis for a finding of State's international responsibility for the actions of the Slovak Trustee and the Respondent requests the Tribunal to dismiss all of [...] claims solely on this grounds.<sup>148</sup>

(ii) claim for breach by the Slovak Republic of the "fair and equitable treatment" standard is meritless

145. Notwithstanding the above, the Respondent anyway rebuts each of the grounds sustained by the Claimant to defend its treaty-claims.

(ii)(a) "Denial of justice" as the relevant standard to establish the Respondent's liability

146. Preliminarily, the Respondent asserts that [...] claims raise the question of whether the system of justice provided by the Slovak Republic complied with the standard of justice required by international law, which means whether the Slovak Republic committed a "denial of justice".<sup>149</sup> It clarifies that "to establish a denial of justice, [...] must show a manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety" and which is "clearly improper and discreditable".<sup>150</sup>

147. Given that [...] has *prima facie* failed to establish the occurrence of a "denial of justice", its claim should be dismissed on this basis alone.<sup>151</sup>

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Trustees (R-20), which, at § 12.3, "clearly states that they are directly responsible for damages caused by their acts, and that the State is not responsible for any such damage". See also § 224, where the Respondent, in order to further show that the trustee's actions may not be attributed to the State under Slovak law, explains that "the trustee derives its remuneration not from the State's court but as a percentage of the proceeds of the sale of the bankruptcy estate".

<sup>146</sup> SOD, § 223.

<sup>147</sup> SOD, § 228.

<sup>148</sup> SOD, §§ 227-228.

<sup>149</sup> SOD, §§ 232-233.

<sup>150</sup> SOD, § 234.

<sup>151</sup> SOD, § 238, where the Respondent states that despite it addressed [...] claim for a

(ii)(b) Further recourses were available to . . . in connection with the  
bankruptcy proceedings

148. The Respondent points out that, in international law: “[n]o denial of justice may be established where there is a reasonably available national mechanism to correct the challenged action”.<sup>152</sup> In fact, in evaluating how a State performs its international obligation to provide an adequate system of justice, a tribunal must consider the system’s ability to correct inevitable errors and the mechanisms of recourse that the State’s system makes effectively available.<sup>153</sup> In the circumstance, there is no doubt that the Respondent’s judicial system unquestionably provided  
with sufficiently adequate recourses to address, before the domestic courts, the complaint it now raises before the Tribunal.<sup>154</sup>

149. The Claimant is indeed incorrect when it asserts that, as a result of the remand by the Regional Court, the statute of limitations of its purported claims had expired.

*A. The receivables’ Statute of Limitations had not expired: the Claimant wrongly interpreted the applicable law*

150. The relevant provisions of Slovak law are Sections 392 and 397 of the Commercial Code and Section 46 of the Bankruptcy Act.<sup>155</sup> Assuming that  
was authorized to assign the receivables and given that the last issued invoice (No. ) was dated June 15, 2007, the Statute of Limitations

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denial of justice under its “merits defences”, the Tribunal should dismiss it as a jurisdictional matter. In fact, having the Claimant failed to establish a *prima facie* case, “international jurisdiction is lacking because the allegations, even if accepted as true, are not capable of establishing the claim for a denial of justice”.

<sup>152</sup> SOD, § 235.

<sup>153</sup> SOD, § 239.

<sup>154</sup> SOD, §§ 242-263.

<sup>155</sup> SOD, §§ 246-248. Section 392 of the Commercial Code provides that: “Concerning a right to performance, the Statute of Limitations begins to run on the day the performance should have taken place or performance should have started (due date). [...] For a right to partial performance, the Statute of Limitations runs for each partial performance separately”. Section 397 of the same Code stipulates that: “Unless otherwise stated by law for specific rights, the Statute of Limitation runs for each partial performance separately”. Finally, according to Section 46 of the Bankruptcy Act “Any debts receivable and payable by the bankrupt debtor, which are not yet due for payment, which accrued prior to the passing of the bankruptcy order, and which are pertinent to the property liable to the bankruptcy, shall be regarded as due and payable after the passing of the bankruptcy order”.

would have started to run in June 2007 and not expired before June 2011.<sup>156</sup>

151. is incorrect when asserting that, upon remand by the Regional Court, the effects of the June 7, 2007 order (and, consequently, of the timely application for recovery of the claims covered *inter alia* by the above invoice) ceased to exist. Applying Section 405(2) of the Commercial Code,<sup>157</sup> and considering that the date of publication of the Regional Court's order was September 24, 2007, the Statute of Limitations would have extended *ex lege* on all timely claimed receivables until September 24, 2008. Moreover, the second order in the bankruptcy proceedings was published on June 3, 2008 and filed its petition on June 23, 2008, thus well within the Statute of Limitations.<sup>158</sup>

152. In any event, given the provision of Section 402 of the Commercial Code (according to which the Statute of Limitations is interrupted for the duration of applicable court proceedings<sup>159</sup>) – and provided that the proceedings in which claimed its right are the bankruptcy proceedings – the Statute of Limitations appears to be still interrupted to this day, such proceedings having not yet terminated.<sup>160</sup>

153. Hence, pursuant to Sections 402 and 405(2) of the Slovak Commercial Code, the Statute of Limitations has not expired and has not lost its right over the receivables as a result of the remand by the Regional Court.<sup>161</sup>

B. *The second Trustee decision to exclude claims was not final*

154. In the second stage of the bankruptcy proceedings, one of the two reasons why the Trustee refused admission of claims was that the limitations'

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<sup>156</sup> SOD, § 248.

<sup>157</sup> SOD, § 250. According to Section 405 of the Commercial Code: "1. If a right is asserted prior to the expiration of the statute of limitations in accordance with Sections 402 through 404 above, but no ruling was adopted in the matter of the said right, the Statute of Limitations shall be treated as if it had never been tolled. 2. If at the conclusion of the judicial or arbitration proceedings stated in subsection 1 above the Statute of Limitations expired, or there is less than a year prior to its expiry, the Statute of Limitations shall be extended so that it shall not expire earlier than one year from the day that the judicial or arbitration proceedings conclude".

<sup>158</sup> SOD, §§ 251-252.

<sup>159</sup> SOD, fn. 52.

<sup>160</sup> SOD, §§ 255-256.

<sup>161</sup> SOD, § 257.

period had expired on all of them: the Trustee was, however, incorrect, and  
could have contested such wrong decision.<sup>162</sup>

155. Under Section 32(6) of the Bankruptcy Act, the creditor holding a contested debt (i.e. a claim contested by the Trustee) may petition a court to determine its status within 30 days from the date on which the Trustee's deadline to contest claims has expired.<sup>163</sup> had thus until at least October 19, 2008 to contest the Trustee's determination before the supervising court, but failed to.

156. itself acknowledged that a determination of a trustee is not final.<sup>164</sup> Hence, lost its right to recovery because it failed to timely assert its right to the claims' admission before the supervising court.<sup>165</sup>

C. Further recourses were available to under Slovak law

157. Under the Slovak Constitution, anyone has the right to a public hearing before an impartial tribunal without undue delay.<sup>166</sup> Slovak law provides means of recourse in the event that a court fails to act or acts without any objective reason.<sup>167</sup>

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<sup>162</sup> SOD, § 253, where the Respondent highlights that the other reason for refusal of admission by the second trustee was the invalidity of the Assignment Contract between and but that in any event, even if the second trustee also erred with regard to that assignment's invalidity, such venial error would "not even come close to establishing a treaty violation".

<sup>163</sup> SOD §§ 254 and 62, where the Respondent refers to Section 32(8) of the Bankruptcy Act, according to which the contested debts held by a creditor who fails to timely petition the court must be disregarded for the purposes of the bankruptcy.

<sup>164</sup> SOD, §§ 254 and 258, where reference to letter to the Ministry of Finance of September 24, 2009 is made, in which stated that: "All the creditors whose receivables were rejected by the former trustee also had a right to file the so-called incidental complaint against such rejection" and also that: "The Claimant did not file an incidental complaint because the fact that the receivable was already statute-barred was irrefutable".

<sup>165</sup> SOD, §§ 248 and 257.

<sup>166</sup> SOD, § 259, where the Respondent emphasizes the contents of Article 46(2) of the Slovak Constitution (referred to in R-6), pursuant to which: "Anyone who claims to have been deprived of his rights by a decision of a public administration body may turn to the court to have the lawfulness of such decision reexamined, unless laid down otherwise by law. The reexamination of decisions concerning basic rights and freedoms may not, however, be excluded from the court's authority". The Respondent further refers to Section 49 of Act No. 38/1993, to Article 46(3) and to Article 9(2) of Act No. 514/2003 Coll. on liability for damages caused by exercise of public authority (as amended), which confirm the aforementioned provision and provide the injured party with a right to adequate compensation.

<sup>167</sup> SOD, § 260, where reference to Act No. 757/2004 Coll. on Courts is made (R-21), which enables an aggrieved party to complain to the Chairman of the court in the event of a complaint to court procedures. Should the aggrieved party not be satisfied with the action taken on his

158. Prior to the issuance of a bankruptcy order, new civil cases may be brought, e.g. to eliminate any perceived Statute of Limitations risk (as also confirmed by [redacted], indeed, only the bankruptcy order, and not the bankruptcy's commencement, precludes commencement of a proceedings related to the debtor's property).<sup>168</sup> Consequently, after quashing of the first bankruptcy order by the Regional Court, [redacted] was able to commence ordinary civil action against [redacted] to claim the receivables and thus interrupt the receivables' Statute of Limitations.<sup>169</sup>

159. [redacted] failed to avail itself of the above available recourses, thus failing to adequately protect its alleged investment.<sup>170</sup>

(ii)(c) The bankruptcy proceedings did not result in a denial of justice

160. [redacted] lodged five complaints against the September 5, 2007 decision by the Regional Court.<sup>171</sup> None of those, however (either independently or taken together), amounts to a denial of justice.

A. *Alleged failure of the Regional Court to examine whether [redacted] was entitled to appeal to the District Court's bankruptcy order*

161. In order to show that the Regional Court did not fail to examine whether the person who filed the appeal was authorized to do so, the Respondent notes that more than a year prior to the initiation of the bankruptcy proceedings, the Regional Court resolved, in a final way, that the resolutions of the general meeting held on April 20, 2005 were invalid: it therefore established that [redacted] never formally became [redacted] executive and consequently that [redacted] had not been recalled from his function as executive of [redacted], thus continuing to be entitled to act in its name and on its behalf, including in the context of a bankruptcy.<sup>172</sup>

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complaint, it may eventually invoke Article 48 of the Constitution and refer the matter to the Constitutional Court.

<sup>168</sup> SOD, § 261, where reference to SOC, § 18 is made.

<sup>169</sup> SOD, § 262.

<sup>170</sup> SOD, § 263.

<sup>171</sup> SOD, § 265, referring to SOC, §§ 56 and ff. See also *supra* Section VII.D.1(ii).

<sup>172</sup> SOD, § 273 and R-24 namely the decision by the Regional Court of February 14, 2006 on the resolutions of [redacted], general meeting of April 20, 2005.

162. Moreover, in its decision of September 5, 2007, the Regional Court indeed examined the question of admissibility of [redacted], [redacted] authorization to appeal the bankruptcy order, and followed the determination of the February 14, 2006 judgment referred to in the foregoing paragraph.<sup>173</sup> Anyway, if [redacted] would not have been authorized to act on behalf of [redacted] and thus to file appeal to the bankruptcy order in its name, the Regional Court would have had a further reason to quash the wrongful District Court decision and remand the case to the first instance courts.<sup>174</sup>

B. *Alleged failure of the Regional Court to examine whether an appeal filed by the debtor, while the debtor had already petitioned for bankruptcy, is admissible*

163. [redacted] is wholly incorrect when it asserts that [redacted] was not authorised to file appeal and that the Regional Court did not examine the appeal's admissibility.

164. In fact, the bankruptcy petition was filed by [redacted] as individual and not as [redacted] representative, given that he was not entitled to act in its name and on its behalf.<sup>175</sup> [redacted] s debtor, was thus entitled to file an appeal against the bankruptcy order under Section 22(3) of the Bankruptcy Act, and the Regional Court resolved such issue basing itself upon this very assumption.<sup>176</sup>

165. The Claimant anyway utterly fails to show an "extreme misapplication of law", as required for a finding of denial of justice.<sup>177</sup>

C. *Alleged mistake by the Regional Court to apply the Code of Civil Procedure instead of the Bankruptcy Act as lex specialis*

166. The Respondent contends that the Regional Court did not err when applying the Code of Civil Procedure to resolve the issue and that, as a consequence, [redacted] complaints thereon should be fully disregarded.

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<sup>173</sup> SOD, § 276.

<sup>174</sup> SOD, § 277.

<sup>175</sup> SOD, §§ 278-280.

<sup>176</sup> SOD, § 281. According to Section 22(3) of the Bankruptcy Act: "*An appeal may be filed against the bankruptcy order by the debtor, unless the petition in bankruptcy has been filed thereby*". The Respondent points out that the Regional Court remanded the question of who was entitled to act for [redacted] to the district court, which is the "*primary finder of fact*".

<sup>177</sup> SOD, § 282.

167. According to Section 196 of the Bankruptcy Act, the provisions of the Code of Civil Procedure shall apply *mutatis mutandis* to bankruptcy proceedings, unless the same Act expressly provides otherwise.<sup>178</sup> The Bankruptcy Act, however, does not contain a provision regulating the procedure of the appeals Court in the event that the decision of the first instance Court has a specific defect.<sup>179</sup>

168. The Regional Court thus correctly applied Section 221 of the Code of Civil Procedure, which permits the appeals court to cancel the decision of the court of first instance where it suffers from one of the defects exhaustively listed therein.<sup>180</sup>

*D. Alleged incompetence of the Regional Court to decide, having failed to resolve the appeal within the 30-day statutory deadline*

169. According to the Respondent, the issuance by the Regional Court of a decision after the prescribed 30-day period does not result in a loss of competence to decide.

170. Preliminarily, the Claimant's assertion that resolving a dispute within 60 days instead of 30 constitutes a treaty violation is in itself absurd, which suffices to reject its complaint.<sup>181</sup>

171. In any event, the mere breach of the period within which courts of appeal should decide does not *per se* amount to a violation of the right to a fair trial; moreover, even if the entitled party (in this case [redacted] and not [redacted]) might theoretically have sought sanctions against late decisions by the court under the applicable legislation, the Court of appeal would never have lost its competence to decide on the appeal against the bankruptcy order.<sup>182</sup>

*E. Alleged failure of the Regional Court to consider a pending lawsuit between Messrs. [redacted] and [redacted] on the position of [redacted] manager*

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<sup>178</sup> SOD, § 283.

<sup>179</sup> SOD, § 285.

<sup>180</sup> SOD, §§ 286-287, where the Respondent explains that the Regional Court found that the District Court: (i) wrongly denied a party to the proceedings an opportunity to act before the court; (ii) made an incorrect legal evaluation; and (iii) did not investigate and evaluate other proposed evidence. Therefore, it cancelled the first instance decision pursuant to Section 221(1)(f) and (h).

<sup>181</sup> SOD, § 290.

<sup>182</sup> SOD, §§ 291-293

172. With the purpose of showing that the Claimant's allegation that the Regional Court failed to consider [redacted] pending lawsuit is false and that anyway it does not provide a basis for a valid complaint the Respondent clarifies that:

(i) under Section 197 of the Bankruptcy Act, the Regional Court could not interrupt the proceeding to await the result of the ongoing litigation between [redacted] and [redacted] regarding the control over [redacted]

<sup>183</sup>

(ii) anyway, the mere fact that the Regional Court did not elaborate on the absence of a final result in the ongoing disputes between [redacted] and [redacted] does not establish that the Court did not take such ongoing proceedings into account. On the contrary, these litigations are acknowledged several times in the Regional Court's decision.<sup>184</sup>

173. Finally, the Respondent points out that Slovak law provides an additional mechanism for adequately reviewing decisions and conduct of judges.<sup>185</sup> [redacted] however, again failed to invoke it.

174. To sum up, given that "denial of justice" is the relevant standard to be considered in order to establish whether a violation of the "fair and equitable treatment" indeed occurred, the Respondent requests the Tribunal to dismiss the Claimant's claim for breach of Article 4(2) of the BIT because of its utter failures to provide sufficient elements to satisfy the "extreme test" of an "extreme misapplication of law", as customarily required for a finding of a denial of justice.<sup>186</sup>

(iii) [redacted] claim for breach by the Slovak Republic of the obligations

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<sup>183</sup> SOD, § 296 and R-18. The Respondent further explains that the bankruptcy proceedings before the Regional Court were not interrupted for reasons of procedural celerity and that, under normal circumstances, the Code of Civil Procedure allows interruption pending a connected lawsuit.

<sup>184</sup> SOD, § 298.

<sup>185</sup> SOD, §§ 300-301, where the Respondent, to describe such additional mechanism, illustrates that [redacted] seized the Judicial Council (established under the Constitution) to initiate disciplinary proceedings against a judge regarding the Regional Court decision of September 5, 2007. On February 5-6, 2008, the Judicial Council unanimously agreed that "*there was nothing unfair*" in that decision. The Respondent thus concludes that this issue cannot be resolved differently by the present Tribunal.

<sup>186</sup> *Id.*

under Article 4(1) of the BIT is meritless

175. Under Article 4(1) of the BIT:

“Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, sale and liquidation of such investments [...]”.

176. The Claimant’s claims that the Slovak Republic failed to afford “full protection and security” and that it “took unreasonable and discriminatory measures when the [Regional Court] stopped the bankruptcy” are meritless.<sup>187</sup> Moreover, the Respondent contends that the Claimant “failed to establish impairment by unreasonable or discriminatory measures”, meaning that it failed to demonstrate that the Regional Court decision was directed specifically against it, to harm it, on the grounds of its nationality.<sup>188</sup> Not only the Claimant failed to present evidence to support such a showing, but, as demonstrated by the Respondent:<sup>189</sup>

- (i) the Regional Court gave the Claimant’s nationality no significance whatsoever (and could not actually give a significance thereto, not being a party to the proceedings pending before it);
- (ii) the Regional Court decision was in accord with Slovak law, and the Claimant anyway failed to demonstrate why its “investment” was treated differently from the others and thus “discriminated”;
- (iii) the Regional Court decision affected all the creditors in the bankruptcy in precisely the same manner.

177. Moreover, the Claimant failed to demonstrate that the Regional Court decision impaired the “management, maintenance, use, enjoyment, extension, sale and liquidation” of its receivables.<sup>190</sup>

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<sup>187</sup> SOD, §§ 303 and ff, where reference to SOC, §§ 138 to 154 is made.

<sup>188</sup> SOD, § 305.

<sup>189</sup> SOD, § 306.

<sup>190</sup> SOD, § 307, where the Respondent clarifies that the Claimant should have further proven that the alleged discriminatory measure reduced the actual possibilities for the exercise of the right in question.

178. In brief, the Claimant has not met the burden to establish that the Respondent impaired its receivables through “unreasonable or discriminatory measures” in the meaning of Article 4(1) of the BIT.<sup>191</sup>

(iv) — Jain for “expropriation” has no ground

179. The Respondent is of the view that the Claimant’s case is simply not one of “expropriation”.<sup>192</sup> Article 6(1) of the BIT provides that:

“Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments of investors of the other Contracting Party [...]”

180. The Regional Court decision, which the Claimant treats as the main source of the damages complained of, did not expropriate or nationalize alleged receivables in the meaning of Article 6(1) of the BIT.<sup>193</sup> still today retains hold of its receivables and the Slovak authorities do not seem to pursue (or to have ever pursued) any action amounting to an indirect expropriation of receivables under international law or to a measure otherwise depriving it of their possession.<sup>194</sup> Moreover, conduct itself clearly shows that the Respondent could not have compulsorily dispossessed it of its receivables.<sup>195</sup>

181. Hence, given that neither the State nor other creditors acquired control over property or fruits, no actual or effective seizure of receivables could have ever taken place. Its “expropriation” claim should therefore be dismissed.<sup>196</sup>

182. In any event, the Respondent further argues that even if an attempt to

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<sup>191</sup> SOD, § 308.

<sup>192</sup> SOD, §§ 309 and ff.

<sup>193</sup> SOD, § 310.

<sup>194</sup> SOD, § 311.

<sup>195</sup> SOD, §§ 312-313, where the Respondent explains that well after the alleged expropriatory decision by the Regional Court, the Claimant: (i) entered into an amendment of the Assignment Contract with (November 5, 2007, R-51); and (ii) considered itself entitled to claim for the receivables’ recovery in the second phase of bankruptcy proceedings (June 23, 2008, R-68 and R-69).

<sup>196</sup> *Id.*

“expropriate” . . . alleged investment would have actually taken place in the Slovak territory, it could not have amounted to an “expropriation” in the meaning of Article 6(1) of the BIT, given that:

- (i) at the time of the Regional Court decision (September 5, 2007), . . . lacked standing to claim the receivables’ recovery in the bankruptcy proceedings (its petition to join the proceedings is dated June 23, 2008) and therefore could not possess a “vested” right capable of being “expropriated” within such a context (which circumstance would alone suffice to reject . . . claim under Article 6(1) of the BIT);<sup>197</sup>
- (ii) the finding of an “expropriation” requires that the investor be in the position to establish that it was deprived of a reasonably expected economic benefit of its investment.<sup>198</sup> . . . , however, undertook an investment which was “speculative or, in the best of circumstances, imprudent”. When it acquired the receivables, the Claimant was indeed aware of the complexity and uncertainty of obtaining a full satisfaction in the context of . . . bankruptcy. In addition, the wording itself of the Assignment Contract warned . . . of both . . . rights under the first assignment contract with . . . and of the pending bankruptcy proceedings. Therefore, . . . cannot be said to have had reasonable investment-backed expectations, nor to having been illegitimately deprived thereof.<sup>199</sup>

(v) request for compensation shall be rejected

183. The Claimant fails to identify the standard according to which the Tribunal must assess the compensation it claims and to adequately show any loss

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<sup>197</sup> SOD, §§ 314-318. where the Respondent argues that it is unconceivable that “all those persons or entities to whom . . . had contractually obligated itself are entitled to obtain compensation for expropriation from the Slovak State for the conduct of its courts”, as the Claimant wishes it were. To legitimately collect the receivables through the bankruptcy proceedings, . . . should indeed have had a “vested” right. The fact that . . . could have registered as a party to the bankruptcy proceedings at the relevant time, but failed to, has no relevance whatsoever.

<sup>198</sup> SOD, § 319.

<sup>199</sup> SOD, §§ 320-323.

resulting from the measure complained of.<sup>200</sup>

(v)(a) The standards for compensation under the BIT

184. According to the Respondent, the only reference to amounts of compensation under the BIT is found in Article 6(1), providing that, in case of measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments of investors of the other Contracting Party:

“provisions be made for effective and adequate compensation”.

185. However, while the above standard may be the appropriate one in case of compensation for claims of “expropriation” (i.e. where the commission of a wrongful act is followed by the obligation for the party to repair the injury it caused), it cannot be considered as being applicable to “*non-expropriation claims*”, such as those raised by \_\_\_\_\_ in the present arbitration.<sup>201</sup>

186. The Respondent thus emphasizes that, under international law, “*only direct damages caused by the breach can be taken into account in the calculation of compensation. Indirect, remote or speculative damages are not permitted*” and finally concludes that, as a matter of fact, \_\_\_\_\_ “*has not even attempted to establish the measure of damages that should apply to its non-expropriation claims*”.<sup>202</sup>

(v)(b) \_\_\_\_\_ failed to prove that the Respondent was the cause of its loss

187. In the Respondent’s view, it is unquestionable that “compensation will only be awarded if there is a sufficient causal link between the breach of the treaty and the loss sustained”.<sup>203</sup>

188. In this case, even assuming liability for the Regional Court decision, the affected party – if there has to be one – is \_\_\_\_\_. In fact, \_\_\_\_\_ has invoked a “*far-reaching theory of causation*” which is not objectively tenable and should therefore be dismissed outright. An opposite decision would indeed result in an indefinite number of potential claimants, and thus expose the Respondent to a

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<sup>200</sup> SOD, § 324.

<sup>201</sup> SOD, §§ 326-327.

<sup>202</sup> *Id.*

<sup>203</sup> SOD, § 329.

limitless number of unbearable aggressions.<sup>204</sup>

(v)(c) is in any event not entitled to the losses it claims

189. In the light of the above reasoning on the standards to be applied for establishing the damages' extent, the Claimant "*should receive nothing, and cannot sustain its claim for full satisfaction*".<sup>205</sup> In fact, the amounts claimed by are out of all proportions with reality, and cannot be seriously sustained before the Tribunal.<sup>206</sup>

190. paid approximately SKK (€ ) to acquire receivables against . As of the date of the Assignment Contract, however (which is the same day on which issued invoice No. to , claiming payment of the liquidated damages), the claims' value purportedly amounted to SKK (i.e. € ), 87% of which (approx. SKK , i.e. € ) in liquidated damages. presently claims € as compensation for the allegedly suffered damages.<sup>207</sup> However, it fails to document the actual or expected damages deriving from the Respondent's alleged treaty breach and relies upon an incorrect "*satisfaction rate*" when calculating the above amount.<sup>208</sup>

191. The Respondent thus suggests the "*fair market value*" as a reliable guide to be adopted while assessing the damages sustained by the Claimant.<sup>209</sup> Based upon such line of reasoning, however, the amount claimed by results absurd and anyway unsustainable, given that:

(i) the claimed amount is almost seventeen times greater than the price paid by to acquire the receivables, thus implying an expected

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<sup>204</sup> SOD, § 330.

<sup>205</sup> SOD, § 331.

<sup>206</sup> SOD, § 339.

<sup>207</sup> See *supra* Section VII.D.1(iv).

<sup>208</sup> SOD, § 335, referring to SOC, § 6, where asserts that the "*satisfaction rate of the Claimant*" shall be established having regard to the publication of the number of votes of all creditors in the Commercial Bulletin, where one vote equates SKK .

<sup>209</sup> SOD, § 336, where the "*fair market value*" is defined as "*the price that a willing buyer would have paid to a willing seller for the asset on the date of the taking in circumstances in which each had a good information, each desired to maximize his financial gain, and neither was under duress or threat*".

return on investment of over 1600%;<sup>210</sup>

- (ii) it rests upon the assumption that [redacted] would have collected 100% of its claims at the bankruptcy's outcome;<sup>211</sup>
- (iii) it refers to certain contractual penalties which arose from an invoice issued on June 15, 2007, thus after the debtor's declaration of bankruptcy (dated June 7, 2007) and which were therefore unqualified for a settlement in the first phase of the bankruptcy proceedings;<sup>212</sup>
- (iv) although the amount was not denied by the first Trustee "[redacted] may not recover any alleged damage corresponding to the receivables covered by the invoice n. [redacted] as a result of the cancellation of the bankruptcy order by the regional court".<sup>213</sup>

192. To conclude, the Respondent requests the Tribunal to reject the claim for compensation, as unsupported, improper and excessive.<sup>214</sup>

## VIII. THE ISSUES TO BE DECIDED: THE TRIBUNAL'S ANALYSIS

### VIII.A Applicable law

193. The Parties have an opposite view as to the law governing the merits: the Claimant requests the Tribunal to apply Slovak law, whereas the Respondent considers that the dispute should be decided under international – customary or treaty – law rules governing State-protection of foreign investors and foreign investments.

194. At the Milan Meeting, Parties and Arbitrators agreed that, if the present issue

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<sup>210</sup> SOD, §§ 337 and 339, where the Respondent defines such a return rate as ever "unheard of".

<sup>211</sup> SOD, § 338, where the Respondent clarifies that average rates for receivables' recovery in the context of Slovak bankruptcy proceedings are between 5 and 10% of the claims' value.

<sup>212</sup> SOD, § 343, where reference to Section 100(2)(c) of the Bankruptcy Act is made, which excludes contractual penalties from satisfaction in the bankruptcy if the right to them was established, or the contractual penalty was impose, after the bankruptcy declaration.

<sup>213</sup> SOD, § 345.

<sup>214</sup> SOD, § 347, where the Respondent points out that: "[redacted] should not be permitted to avoid taxes that [it] would have been required to pay on any income accrued as a result of the difference between the value of the assigned claim and income from distribution from the bankruptcy estate on the basis of the value of the acknowledged claim".

was to be resolved by the Tribunal, it would do so “*taking into account both the Parties’ arguments and international case law on investment disputes*” (§ 8 of the Milan Minutes).

195. The above understanding is in itself sufficient to guide the Tribunal towards the application of international rather than domestic law. The “*international case-law on investment disputes*” does indeed show that the rules of international law, be they treaty or customary rules, cannot be disregarded in the resolution of investor-to-State disputes that arise from an alleged breach of an investment treaty by the host State.
196. The main issues before this Tribunal are whether the Claimant qualifies as an investor, whether its operations in Slovakia qualify as an investment and whether it is plausible, at the present jurisdictional phase, that Slovakia breached its international duties for the reasons and in the circumstances alleged by the Claimant. No such issue might be resolved if the Tribunal would only be guided by Slovak law provisions. The notions of investor or investment protected by a BIT are exclusively governed by the BIT itself and by international customary rules implicitly or explicitly referred to in the BIT.<sup>215</sup> In turn, whenever the Tribunal needs to interpret the BIT, the only source of law to which it must refer are the interpretative criteria established in Article 31 of the Vienna Convention on the Law of Treaties.<sup>216</sup>
197. This does not imply that the Tribunal is allowed to disregard Slovak law or the manner in which it has been applied by Slovak judiciary in the bankruptcy proceedings which, according to the Claimant, were prejudicial to its business in Slovakia. Unquestionably, the Tribunal has the duty to also consider these “domestic” aspects of the dispute. However, two caveats must be kept in mind:
- (i) In respect of jurisdiction, it is not Slovak law which determines the prerequisites that an investor and an investment should meet in order to be

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<sup>215</sup> See, for instance, ICSID Case No. ARB/03/16, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, Award of 27 September 2006, ¶¶ 288 to 293; ICSID Case No. ARB/02/1, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. The Argentine Republic*, Decision on Liability, ¶ 89.

<sup>216</sup> See, *inter alia*, UNCITRAL Arbitration, *Romak SA v. The Republic of Uzbekistan*, Award of 26 November 2009; UNCITRAL Arbitration, *Ronald S. Lauder v. the Czech Republic*, Final Award, 3 September 2001; ICSID Case No. ARB/04/13, *Jan De Nul NV and Dredging International NV v. Arab Republic of Egypt*, Award on Jurisdiction, 16 June 2006.

admitted to treaty protection; this determination can only be made applying the rules of international law, the BIT being the primary source

- (ii) By contrast, municipal law and the way it is enforced by State organs may well be relevant to the merits. Even in such a contest municipal law is not the “governing” law, but it constitutes a factual circumstance to be considered for ascertaining whether the host State committed a breach of its international duties in the enforcement of its own law.<sup>217</sup> This may for instance be the case of a miscarriage or denial of justice committed in patent disregard of the investor’s procedural or substantive rights under domestic law, or of an intolerable abuse in the administration of a public contract between the investor and a State entity governed by municipal law, or of any other behaviour of State organs amounting to an intolerable impropriety in the way they apply internal law provisions against a foreign investor. In all above cases, reference to internal law is necessary to establish whether the host State is also liable for a violation of an international obligation under the applicable treaty or general international law.

198. Hence, a possible breach by the State of its own law is not *per se* sufficient to constitute a breach of its international law duties, which only occurs in the specific cases where the former gives inevitably rise to the latter. This means that an investment tribunal cannot avoid applying international law, either independently or as a means to establish whether the violation of a domestic rule of law – or any other State measure – engages the international responsibility of the State.

199. This being the approach adopted, the Tribunal resolves the present issue by deciding to give prevalence to international law.

### VIII.B Admissibility

200. Pursuant to Article 9(1) and (2) of the BIT (entirely quoted at § 14 *supra*), in case

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<sup>217</sup> The case in which the most clear distinction has been elucidated between the role of international and municipal law in matters of international responsibility is ICSID Case No. ARB/97/3, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. The Argentine Republic*, Decision on Annulment, 3 July 2002, ¶¶ 94 and ff, where the Annulment Committee has *inter alia* quoted and commented Article 3 of the International Law Commission Articles on State Responsibility.

of dispute the parties should first try to settle it by consultations and the investor may activate the arbitral proceedings if the dispute is not settled within six months following the investor's first request for opening consultations. The Tribunal is of the view that the Claimant sufficiently complied with this requirement. It is quite possible that the Claimant did not employ the most perfect forms when it firstly notified the State of the outbreak of the dispute and proposed an attempt of pre-arbitral settlement. However, the Tribunal does not see these perfectible defects as a deficiency which renders the State's consent to arbitral jurisdiction ineffective, as alleged by the Respondent, whose objection is excessively severe.

201. The relevant case-law endorses a less formalistic view. For instance, the tribunal in *Ethyl v. Canada* dismissed the objection based on the six-month provision because, in the circumstances of the case, any further negotiation would have been pointless or "futile"<sup>218</sup>. In *Salini v. Morocco* the tribunal was satisfied that an attempt to reach an amicable settlement had been made, which merely implies "the existence of grounds for complaint and the desire to resolve these matters out-of-court"<sup>219</sup>. According to the tribunal in *Lauder v. The Czech Republic*, the requirement of a six-month waiting period is not a jurisdictional provision, i.e. is not a limit set to the authority of the tribunal to decide on the merits of the dispute, but "a procedural rule that must be satisfied by the Claimant". Since, on the evidence available, it was unlikely that the respondent would have accepted to enter into negotiations with the claimant, the tribunal held that "To insist that the arbitration proceedings cannot be commenced until six months after the Notice of Arbitration would, in the circumstances of this case, amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties". It concluded that it had "jurisdiction in the present proceedings"<sup>220</sup>.
202. A similar approach was followed in *SGS v. Pakistan*, *Bayindir v. Pakistan* and *Occidental v. Ecuador*, either because the consultation period was not found to be mandatory and the parties' behaviour did not show any actual willingness to

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<sup>218</sup> NAFTA Arbitration, *Ethyl Corporation v. The Government of Canada*, Award on Jurisdiction, 24 June 1998, ¶¶ 84 to 88.

<sup>219</sup> ICSID Case No. ARB/00/4, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, Decision on Jurisdiction, 23 July 2001, ¶ 20.

<sup>220</sup> UNCITRAL Arbitration, *Ronald S. Lauder v. the Czech Republic*, Final Award, 3 September 2001, ¶¶ 187 to 191.

enter into negotiations<sup>221</sup>; or because some kind of pre-arbitration notice, although not perfectly framed, had been served on Pakistan and this was sufficient to provoke its reaction in favour of negotiation; Pakistan failed to reply and was thus foreclosed from relying on the defectiveness in the claimant's notice as a jurisdictional impediment<sup>222</sup>; or because the requirement does not need to be respected if attempts at a negotiated solution proven futile<sup>223</sup>.

203. It seems that the only tribunal which did not share the above view is the tribunal constituted in *Enron v. Argentina* under the Argentina-United States BIT, which – in an *obiter dictum* (the requirement was indeed found as having been met in the given case) – defined the requirement of a six-month negotiation period as jurisdictional in nature, so that “*A failure to comply with that requirement would result in a determination of lack of jurisdiction*”<sup>224</sup>.
204. However, as observed by the most prominent commentator of the ICSID Convention “[T]he question of whether a mandatory waiting period is jurisdictional or procedural is of secondary importance. What matters is whether or not there was a promising opportunity for a settlement. There would be little point in declining jurisdiction and sending the parties back to the negotiating table if these negotiations are obviously futile. Negotiations remain possible while the arbitration proceedings are pending. Even if the institution of arbitration was premature, compelling the claimant to start the proceedings anew would be a highly uneconomical solution”<sup>225</sup>.
205. The cases relied on by the Respondent (*Eureko v. Poland* and *Burlington v. Ecuador*) do not contradict the above jurisprudential trend. The passage quoted from *Eureko* decision – according to which every treaty clause must be interpreted “*as meaningful rather than meaningless*” – first did not relate to the six-month provision,

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<sup>221</sup> ICSID Case No. ARB/01/13, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, Decision on Jurisdiction, 6 August 2003, ¶ 184.

<sup>222</sup> ICSID Case No. ARB/03/29, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Decision on Jurisdiction, 14 November 2005, ¶¶ 88 to 102.

<sup>223</sup> ICSID Case No. ARB/06/11, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, Decision on Jurisdiction, 9 September 2008, ¶¶ 92 to 94.

<sup>224</sup> ICSID Case No. ARB/01/3, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, Decision on Jurisdiction, 14 January 2004, ¶ 88.

<sup>225</sup> C. SCHREUER, *International Investment Law*, ed. by P. Muchlinski, F. Ortino e C. Schreuer, *Chapter 21: Consent to Arbitration*, Oxford University Press, 2008, p. 846.

but to the umbrella clause of the relevant treaty<sup>226</sup>, unquestionably more important than a consultation clause; second, does not contrast the approach of the present Tribunal, which is also keen to interpret the consultation clause as “meaningful” rather than “meaningless”. As regards *Burlington*, that tribunal shared the same view of this Tribunal, namely that “*The six-month waiting period requirement [...] is designed precisely to provide the State with an opportunity to redress the dispute before the investor decides to submit the dispute to arbitration*”. The *Burlington* tribunal declined jurisdiction over the relevant claim because the claimant firstly informed the respondent of the existence of the dispute in the request for arbitration filed to ICSID and never before, thereby depriving the respondent of the opportunity, accorded by the treaty, to redress the dispute in the pre-arbitral phase.<sup>227</sup> This is not what occurred in the present case.

206. To the knowledge of the Tribunal, at least another ICSID tribunal has recently sided with *Burlington* tribunal, declining jurisdiction on the finding that the claimant gave notice of the dispute to the respondent only three days before filing the request for arbitration to ICSID, thus impeding the respondent State to be made aware of the existence of the dispute and possibly settle the matter by negotiation during the six-month “*cooling-off period*”, as provided in the relevant treaty.<sup>228</sup> As seen before, the present case is different, since Slovakia was given sufficient time to consider the possibility of negotiating the matter in dispute.
207. Comparing the above jurisprudential trend with the facts of the present case (see *supra* Section V.C), the Tribunal is of the view that the Claimant satisfactorily complied with Articles 9(1) and 9(2) of the BIT. They require that “*consultations will take place*” and that if they “*do not result in a solution within six months*” the dispute becomes arbitrable. All what is required is that consultations be at least attempted and that the six months lapse without any resulting solution. This is precisely what has occurred.

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<sup>226</sup> *Ad hoc* arbitration under the Netherlands-Poland BIT, *Eurokeo B.V. v. Republic of Poland*, Partial Award, 19 August 2005, ¶ 248.

<sup>227</sup> ICSID Case No. ARB/08/5, *Burlington Resources Inc. v. Republic of Ecuador and PetroEcuador*, Decision on Jurisdiction, 2 June 2010, ¶¶ 311-312.

<sup>228</sup> ICSID Case No. ARB/08/4, *Murphy Exploration and production Company International v. Republic of Ecuador*, Award on Jurisdiction, 15 December 2010, ¶¶ 101 and ff.

208. Between November 2007 and July 2008, the Claimant wrote five letters to the Government of Slovakia (three to the Ministry of Justice, two to the Ministry of Finance) in which the matter in dispute was identified and the Claimant expressed its availability to settle it out-of-court with clarity. The Government replied three times, in February, May and July 2008. In the last (July) letter, the Minister of Finance accepted the idea of entering into “*meaningful discussions on the dispute*”. While it is true that in May 2008 (more than six months after the first letter of November 2007) the Claimant had already appointed the first arbitrator, it made clear that it was not abandoning the attempt of settlement. Availability to the settlement was once again offered by the Claimant in its (last) letter of July 2008.
209. The above set of correspondence abundantly fulfils the BIT requirement. Articles 9(1) and 9(2) do not impose specified formalities for the consultations. Nor do they require that the Claimant should at this stage submit a formal and detailed “notice of claim” or “notice of arbitration” to the Respondent. The Claimant unambiguously referred to alleged breaches of the BIT and made reference to a possible BIT arbitration. Slovakia was unquestionably given the opportunity to redress the matter before the start of arbitration. This is precisely the rationale of the BIT requirement, i.e. avoiding that a State be brought before an international investment tribunal all of a sudden, without being given the opportunity to discuss the matter with the other party.<sup>229</sup>
210. Slovakia could also enter into negotiations with the Claimant after appointment of the first arbitrator or after full constitution of the Tribunal, if it so wished. It failed to do so, most likely because it considered that the dispute was unmeritorious and any negotiation pointless. It is perfectly legitimate for a State to refrain from making concessions to an investor in order to avoid arbitration when it thinks that the investor is wrong: in such cases, there is simply nothing to negotiate from the State’s viewpoint.
211. Be it as it may, the Respondent cannot however treat the institution of the arbitration as invalid. If the Claimant’s insistence in having the dispute arbitrated after expiry of the six months proves to be unmeritorious, a remedy remains available to the Respondent, i.e. asking the Tribunal to charge the arbitration costs on the Claimant, as Slovakia has indeed requested.

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<sup>229</sup> As occurred in the *Burlington* case referred to by the Respondent.

212. The Respondent's objection is therefore dismissed.

### VIII.C Jurisdiction

#### VIII.C.1 *Is the Claimant an investor?*

213. In order to qualify as an investor under Article 1(1)(b) and (c) of the BIT, a Swiss claimant must establish that (i) it is "constituted or otherwise duly organized under the laws of Switzerland"; (ii) that it has its "seat" in Switzerland; and (iii) that it performs "real economic activities" in Switzerland. Whether satisfies the second and third requirement has been the subject matter of a long debate (*supra* Section VII.C).

##### (i) Constitution or other organization under the laws of Switzerland

214. The Claimant provided an excerpt from the Commercial Registry, confirming that is a corporation duly constituted and organized under Swiss law with registered office in , Switzerland. The Respondent does not contest that the Claimant meets this requirement.

##### (ii) The Swiss seat

215. All that the Claimant has offered to prove that it has a Swiss "seat" is the following: (i) the fact that it has been incorporated under the laws of Switzerland, as shown by an excerpt from the Commercial Registry; (ii) its domicile in , where it has its "headquarters"; (iii) the assertion that the company books are kept in Switzerland; (iv) a UBS price-list of the costs of handling a bank account; (v) a tax declaration relating to the fiscal year January to December 2007 showing the company's turnover, profit and/or loss; (vi) the assertion that it has a daughter company active in Slovakia; and (vii) the definition of company "seat" pursuant to the Slovak commercial code.

216. The Tribunal must agree with the Respondent that the above *indicia* are insufficient to establish the existence of a Swiss seat in the meaning of international business law.<sup>230</sup> At the most, it is established that 15

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<sup>230</sup> See E.C. SCHLEMMER, *Investment, Investor, Nationality and Shareholders*, in *International Investment Law*, ed. by P. Muchlinski, F. Ortino e C. Schreuer, *Chapter 2*, Oxford University Press, 2008, p. 49 and ff., in particular p. 75, where the author addresses the distinction between the "brass plate company" that is incorporated in one country but carries out its main operations elsewhere, on the one hand,

domiciled in Switzerland, under the laws of which it is incorporated. The fact that Article 1(1)(b) of the BIT requires a Swiss “seat” as a distinct element in addition to “constitution and organization under Swiss law” demonstrates that the mere incorporation in Switzerland is insufficient to constitute a “seat” in the terms of the BIT.

217. Proof of a “business seat”, in the meaning of an effective center of administration of the business operations, requires additional elements, such as the proof that: the place where the company board of directors regularly meets or the shareholders’ meetings are held is in Swiss territory; there is a management at the top of the company sitting in Switzerland; the company has a certain number of employees working at the seat; an address with phone and fax numbers are offered to third parties entering in contact with the company; certain general expenses or overhead costs are incurred for the maintenance of the physical location of the seat and related services, which would be a clear indication that a business entity is effectively organized at a given Swiss place.
218. However, none of these requirements were satisfied by the Claimant. The Respondent requested the Claimant to provide its Swiss phone number, and the reply was that there was none. The Claimant was also requested to disclose the office rental agreement, and the reply was that there is just an “oral” rental agreement, the parties and terms of which remained unknown. Even the existence of a bank account opened in the name of . . . is doubtful: the UBS list of prices is a standard document created for the clients, but . . . has failed to prove that it is one of them.

(iii) Real economic activities

219. Similar conclusions must be drawn in respect of the “real economic activities” of . . . in Switzerland. The 2007 tax return indicates a quite modest turnover and nothing has been exhibited for the outstanding years. The Claimant was unable to establish number and type of its clients, type of its operations, kind of contracts it enters into, quantity and type of personnel, nature and composition of its managing bodies. It even admitted that it has no employee.
220. The Claimant has exclusively produced, after the Vienna October Hearing and

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and the corporation having its “*effective seat of management*” in one given place, on the other hand.

with the Tribunal's and Respondent's consent, a "to whom it may concern" statement made by its sole director [redacted]. According to [redacted]; the company is "incorporated and existing under the laws of Switzerland"; it "conducts a real business activity"; has "valid long-term contracts with various Swiss entities re: domiciliation, financial advisory, accounting and legal services, tax services and the like"; and has "various accounts with Swiss and foreign banks". [redacted] explains that "No disclosure of the names and addresses of the business partners of the Company is made herein since such disclosure is most unusual under normal business practices in Switzerland".

221. Neither the Respondent nor the Tribunal had invited [redacted] to breach the confidentiality of its contracts with third parties. It could at least provide a descriptive list of contracts and some samples concealing the names and whatever datum identifying the parties, or witness statements or affidavits issued by clients, banks or public officers testifying the existence and nature of the activities conducted by [redacted] in Switzerland. Consequently, the letter of the director has no evidential weight in these proceedings, where the Claimant had the burden to substantiate its proper standing in the clear meaning of Article 1(1) of the BIT, as specifically required since the Milan meeting.
222. In contrast with such a burden, and despite the repeated reminders by the Respondent and the Tribunal itself, during the proceedings the Claimant was constantly unable to produce anything but its own assertions or the assertion of its own (sole) official. It was at a very late stage of the proceedings and upon insistence by the Tribunal that it made a (non-spontaneous) offer to produce [redacted] affidavit. What instead needed was a documentary evidence formed at the time when the activities were conducted, rather than an isolated statement created for the purpose of the *litis*. Even the powers of [redacted] are unknown and not documented, notwithstanding at the October Hearing the Tribunal invited the Claimant to exhibit the powers of the company organ issuing the statement.
223. [redacted] affirmation that [redacted] holds accounts in Swiss banks is immaterial: to substantiate "real economic activities" he should have attached the bank account documents relating to the time of the events giving rise to the dispute, i.e. relating to the time when the receivables were acquired in Slovakia and the acquisition was followed by the bankruptcy proceedings. These or other similar documents would have established that, at that time, [redacted] was actually conducting real economic activities in Switzerland. Even the telephone

and fax numbers presented on the letterhead of \_\_\_\_\_ are not those of \_\_\_\_\_; in its comments dated October 29, 2010, the Respondent proved that they belong to \_\_\_\_\_ a tax advisory service, a fact which was not denied by the Claimant in further correspondence.

224. Under the foregoing circumstances, the Claimant is far from meeting the standard imposed under the BIT. The Tribunal sides with the Respondent in that the BIT requires more than the mere incorporation in one of the contracting parties, and that Article 1(1) is a special (and rather uncommon) clause by which the two contracting States intended to exclude from treaty-protection “mailbox” or “paper” companies.<sup>231</sup>
225. The Tribunal is persuaded that the above interpretation coincides with the authentic expression of the intention of the Parties to the BIT. It must therefore give effect to such an intention. Pursuant to Article 31 of the Vienna Convention on the Law of Treaties, any treaty clause must be interpreted “*in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objective and purpose*” (Article 31(1)). Article 31(2) specifies that the context and purpose comprise the treaty “*preamble*”.
226. Now, the good faith ordinary meaning of the word “real” cannot but be “actual”, or “effective”, or “genuine”, or “verifiable”, or “visible”, or “tangible”, or “objective”. The BIT preamble underlines that the purpose pursued by the two Contracting States was intensifying the economic cooperation to the mutual benefit of both States and fostering their economic prosperity. It is illogic to assume that the above goals could be achieved by giving treaty protection or by attracting into the host country “shell” companies which are unable to establish the kind and level of activities that they conduct in their own State. No State is anxious to promise special guarantees, privileges and protections to investors which bring no benefit to its economy.
227. Concluding on this matter, the Tribunal is of the view that \_\_\_\_\_ is not an “investor” in the meaning of Article 1(1) of the BIT. This is *per se* sufficient to oblige the Tribunal to decline jurisdiction over the Claimant’s claims.
228. However, since also the two jurisdictional requirements addressed in Section

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<sup>231</sup> SOD, ¶ 157, *inter alia* quoting Z. DOUGLAS, *The International Law of Investment Claims*, Cambridge University Press, 2009, pp. 317 ff.

VIII.C.2 have been lengthily discussed during the proceedings, the Tribunal will discuss them as well for sake of completeness.

VIII.C.2 *Are the Claimant's businesses in Slovakia an investment?*

229. The only transaction made by [redacted] in Slovakia which gave rise to the dispute was the acquisition of receivables from [redacted]. The question of whether it qualifies as an investment must be examined both under the BIT and under international law rules.

(i) Under the BIT

230. The BIT definition of investment is given in its Article 1(2), which corresponds to the usual model for similar treaties. In abstract terms, the only category which could apply to the Claimant's case is the definition included in letter (c) of the list in Article 1(2), which refers to "every kind of assets", including in particular "(c) claims and rights to any performance having an economic value". As usual in this type of treaties, the list is not exhaustive, but simply "includes" some of the most typical categories of investments.

231. The category in question must in any case consist of an "asset" as prescribed in the opening statement of Article 1(2). According to common practice, "asset" means a right or claim having an economic value and deriving either from law or from contract, towards a given debtor, for the performance of a given obligation. This implies that, when the claim arises from a contract, the contract itself should qualify as an investment. This in turn implies that the contract satisfies certain minimum requirements, such as duration, contribution and risk.

232. However, the contract in question is the Assignment Contract, which is not a contract with an ongoing duration. It is rather a contract which exhausts its object and purpose by its sole stipulation by the parties and the effects of which – the assignment – take place immediately. In substance, it is a mere purchase-sale contract, by which one party sells to the other certain receivables globally amounting to approximately € [redacted] in exchange for the much more modest price of approximately € [redacted].

233. Moreover, the Claimant has failed to establish with clarity by whom the "performance" was due. No performance was *per se* due by [redacted], who exhaustively accomplished all it had to do by selling the claims it had towards [redacted] to [redacted] to which it transferred all relevant risks and

burdens, including the burden of taking whatever measure necessary to make the claims good. Not even [redacted] was bound to any duty of performance towards [redacted], being a third party with respect to the Assignment Contract. Finally, no “due” performance could be expected by [redacted] from the Slovak authorities – administrative or judicial – who had the power to validate or not the assigned receivables in the interest of [redacted] creditors and to supervise the correctness of the bankruptcy proceedings: these authorities were indeed bound exclusively by the bankruptcy law and by the duty to assure *par condicio* amongst all creditors.

234. In the practice of investment arbitrations, an investment was found to exist under the category of “claims or rights to money or to performance” in the case of contracts for public works or infrastructures, or concessions of public services, or long-term loans or similar financing instruments, made by the investor with a State or State-entities. The object of the dispute was the alleged non-performance or defective performance of the contract obligations by the host-country or its own agencies.<sup>232</sup> In such cases, the underlying contracts were long-term contracts having a significant importance for the economy of the host-State.
235. No such pre-requisite is satisfied by the Assignment Contract. The Claimant does not complain that it was entitled to any performance by the Republic of Slovakia under the Assignment Contract as such and that the Republic failed to perform it. On the contrary, the Republic was completely extraneous to the transaction and its economy received no benefit whatsoever therefrom.
236. According to Article 31(1) of the Vienna Convention, the treaty must be interpreted not only pursuant to its “ordinary meaning”, but also taking into account the general context, the object and the purpose of the treaty. As seen before, the object and purpose of the BIT, as reflected in its preamble, is to intensify the economic cooperation to the mutual benefit of both States and attract foreign investments with the aim to foster their economic prosperity. It is hard to see how the Assignment Contract might have contributed to either the mutual economic cooperation between States or to the growth of Slovak economic prosperity. It was rather a private, neutral and speculative business, having no impact on the State economy.

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<sup>232</sup> Several examples are given by the cases mentioned in footnote 234 hereunder.

237. The interpretative criterion set forth by Article 31(1) of the Vienna Convention must also apply to the terms of the list contained in Article 1(2) of the BIT. Doing otherwise would be inconsistent with the BIT-context and ignore its object and purpose. More than that, a merely literal application of category (c) of Article 1(2) would lead, in the present case, to what Article 32(2)(b) of the Vienna Convention defines as a “*manifestly absurd or unreasonable result*”, i.e. an outcome to be necessarily avoided.
238. Conclusively, even though Article 1(2) of the BIT provides for a very broad definition of the term “*investment*”, the Assignment Contract cannot be classified as an investment under the BIT and therefore the Tribunal lacks jurisdiction over the case.

(ii) Under international law rules

239. The Tribunal is aware that the multitude of bilateral and multilateral investment treaties – although containing different definitions (either narrow or broad) of what constitutes an “investment” – explicitly or implicitly refers to an “objective” definition given by international law, as applied by other treaty-based tribunals. Tribunals must therefore be cautious to enforce the true intention of the Contracting Parties to the specific treaty forming the basis of their jurisdiction, which cannot grossly depart from the “objective” case-law definition. The caution is even more necessary in the present case, considering that the BIT here in question also provides for an alternative dispute mechanism (as soon as available) allowing the investor to also opt for submitting the dispute to ICSID arbitration (see Article 9(3) of the BIT). This means that, although the BIT gives a broad “investment” definition, the two Contracting States must have inevitably intended to refer to what constitutes “investment” under the ICSID Convention as concretely applied in the relevant case-law.
240. Now, when determining whether a given contractual transaction qualifies as an investment, investment tribunals constituted under the ICSID Convention tend to make a double check, both under the applicable bilateral treaty and under the ICSID Convention. The present Tribunal is not an ICSID tribunal and its conclusion under the BIT could be viewed as sufficient for denying jurisdiction. However, as earlier observed, the BIT definition of investment is not an entirely self-standing concept, but refers to a more general concept given by international law rules. Moreover, the Parties have abundantly pleaded also this

aspect of the investment notion. Because of this and of the reasons given in the foregoing paragraph, a response by the Tribunal is pertinent also in this respect.<sup>233</sup>

241. A more than abundant number of cases have contributed to elucidate the notion of investment under the ICSID Convention and, more in general, international customary law. It is now common ground that the necessary conditions or characteristics to be satisfied for attributing the quality of “investment” to a contractual relationship include: (a) a capital contribution to the host-State by the private contracting party, (b) a significant duration over which the project is implemented and (c) a sharing of operational risks inherent to the contribution together with long-term commitments.<sup>234</sup> This is not the case here, the Assignment Contract being far from satisfying, even in part, the above characteristics.
242. Trade or financial operations unquestionably more substantive than a modest assignment of receivables were not accepted by international tribunals as amounting to an “investment”: this was for instance the case of a temporary transfer of a company’s shares which failed to satisfy the pre-requisites of duration and substantial contribution to the State’s economy<sup>235</sup>, of the acquisition of certain fiscal credits by the State, which also did not meet the

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<sup>233</sup> The need for an investment (also non-ICSID) tribunal to interpret the BIT definition of investment consistently with the general international law criteria and thus make a “double test” is *inter alia* admitted by E. CABROL, *Pren Neka v. Czech Republic and The Notion of Investment Under Bilateral Investment Treaties – Does “Investment” really mean “every kind of asset”?*, in *Yearbook of International Investment Law & Policy 2009-2010*, ed. by K.P. Sauvant, Oxford University Press, 2010, pp. 217 and ff, part. pp. 230 and f.

<sup>234</sup> ICSID Case No. ARB/97/4, *CSOB v. The Slovak Republic*, Decision on Jurisdiction, 24 May 1999, ¶¶ 64 and 90; ICSID Case No. ARB/00/4, *Salini Costruttori S.p.A. and Italtrade S.p.A. v. Kingdom of Morocco*, Decision on Jurisdiction, 23 July 2001, ¶¶ 52 and 54; ICSID Case No. ARB/03/29, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Decision on Jurisdiction, 14 November 2005, ¶¶ 105 to 138; ICSID Case No. ARB/04/13, *Jan De Nul NV and Dredging International NV v. Arab Republic of Egypt*, Award on Jurisdiction, 16 June 2006, ¶ 91; ICSID Case No. ARB/05/3, *LESI S.p.A. and Astaldi S.p.A. v. People’s Democratic Republic of Algeria*, Award on Jurisdiction, 12 July 2006, ¶ 72; ICSID Case No. ARB/05/07, *Saipem S.p.A. v. People’s Republic of Bangladesh*, Award on Jurisdiction, 21 March 2007, ¶ 99; ICSID Case No. ARB/03/06, *MCI Power Group, LC and New Turbine, Inc. v. Ecuador*, Award of 31 July 2007, ¶ 165; ICSID Case No. ARB/05/22, *Bivater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award of 24 July 2008, ¶¶ 312-317; ICSID Case No. ARB/05/10, *Malaysian Historical Salvors SDN v. The Government of Malaysia*, Decision of the *Ad Hoc* Committee on the application for annulment, 16 April 2009, ¶¶ 78-79; UNCTRAL Arbitration, *Romak S.A. v. The Republic of Uzbekistan*, Award of 26 November 2009.

<sup>235</sup> ICSID Case No. ARB/07/20, *Mr. Saba Fakes v. The Republic of Turkey*, Award of 14 July 2010.

abovementioned requirements<sup>236</sup>, of a services contract with the host State for the location and salvage of an ancient vessel that sank off the Malaysian coast two centuries ago, for lack of capital contribution, insufficient duration, presence of exclusively ordinary commercial risks and absence of any significant contribution to the economic development of the host State.<sup>237</sup>

243. One of the most recent cases has further contributed to clarify that a transaction undertaken “with the sole purpose of taking advantage of the rights contained in such instruments, without any significant economic activity, does not satisfy the basic pre-requisite of any investment worth of being protected by international treaties”.<sup>238</sup> The same decision further clarified that an investment treaty concluded between two States “cannot contradict” the above principle.<sup>239</sup> This ruling was given in an ICSID dispute, but this Tribunal is of the view that the same rationale may be transposed to an investment dispute different from an ICSID arbitration, the feature of which is of being based on a purely speculative transaction deprived of any significant economic activity in the host country. This is precisely the case of the dispute at stake. The Respondent did indeed rely also on such precedent<sup>240</sup>, and rightly so.

244. Another illustrative example is given by *Joy Mining* decision, in which an ICSID tribunal declined jurisdiction holding that a contract for the supply of important machinery and equipment, including significant related services (engineering, erection, maintenance, inspection, testing, commissioning, training and technical assistance) was no more than a “sale”, although a complex one, and, as such, did not amount to an investment.<sup>241</sup> If the above complex contract did not qualify as an investment, this is *a fortiori* the case for an assignment of receivables such as the one giving rise to the present dispute.

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<sup>236</sup> ICSID Case No. ARB/06/19, *Nations Energy Inc. v. The Republic of Panama*, Award of 24 November 2010.

<sup>237</sup> ICSID Case No. ARB/05/10, *Malaysian Historical Salvors SDN v. The Government of Malaysia*, Award on Jurisdiction, 17 May 2007.

<sup>238</sup> ICSID Case No. ARB/06/5, *Phoenix Action Ltd. v. The Czech Republic*, Award of 9 April 2009, ¶ 93. For an interesting comment on this important decision, see E. SILVA-ROMERO, *Observations sur la notion d'investissement après la sentence "Phoenix"*, in *The Paris Journal of International Arbitration (Les Cahiers de l'Arbitrage)*, 2010, n. 4, pp. 987 and ff.

<sup>239</sup> *Ibidem*, ¶ 96.

<sup>240</sup> SOD, ¶ 181.

<sup>241</sup> ICSID Case No. ARB/03/11, *Joy Mining Machinery Ltd. v. The Arab Republic of Egypt*, Award on Jurisdiction, 30 July 2004, ¶¶ 54 to 63.

245. The constant jurisprudential trend has led the most prominent doctrine to exclude in categorical terms that a mere one-off sale transaction might qualify as an investment.<sup>242</sup> The Tribunal cannot ignore the general consensus formed around the above doctrine.
246. In conclusion, the Tribunal is further comforted that [redacted] did not “invest” in the Republic of Slovakia in the proper technical meaning, which confirms that it lacks jurisdiction over the case.
247. Having so determined, the Tribunal does not need to address two additional objections raised by the Respondent, according to which the Claimant’s alleged investment was not made in accordance with Slovak law or was not made in *bona fide*. Having decided that it is incompetent to decide on the case, it is not necessary to establish whether these additional objections are grounded or not.

VIII.C.3 *Does the Claimant’s claim satisfy the prima facie test of a treaty claim?*

248. After having denied jurisdiction on the above firm grounds, the Tribunal does not need to expand on the merits of the Claimant’s claim for breach of treaty. It will limit itself to the *prima facie* test, which is typically conducted by an international investment tribunal at the jurisdictional phase. The *prima facie* standard is meant to determine whether the claims are sufficiently plausible under the BIT. In other words, the Tribunal should be satisfied that, if the facts or contentions alleged by the Claimant are ultimately proven true, they would be capable of constituting a violation of the BIT.<sup>243</sup> Few considerations will suffice to dispose of this matter.
249. As framed by the Claimant, its allegation that the Slovak Republic has breached the BIT in several respects is based on the assumption that the present Tribunal would have the authority to correct or cure an error in law possibly made by a Slovak court as an appeal court would do. In other words, the Claimant seems

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<sup>242</sup> C. SCHREUER, with L. MALINTOPPI, A. REINISCH and A. SINCLAIR, *The ICSID Convention: A commentary*, II ed., Cambridge University Press, 2009, pp. 128 ff.

<sup>243</sup> This approach was *inter alia* followed by the ICSID tribunals in: ICSID Case No. ARB/03/3, *Impregilo S.p.A. v. Islamic Republic of Pakistan*, Decision on Jurisdiction, 22 April 2005, ¶ 108; ICSID Case No. ARB/03/29, *Bozindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Decision on Jurisdiction, 14 November 2005, ¶ 195; and ICSID Case No. ARB/04/13, *Jan De Nul NV and Dredging International NV v. Arab Republic of Egypt*, Award on Jurisdiction, 16 June 2006, ¶¶ 69 to 71.

to assume that international law prohibits “wrong” judiciary decisions as such and that the State becomes automatically responsible in international law if one of its courts has made a decision which is (possibly) wrong under municipal law.

250. This is sufficient to conclude that the Claimant’s claims are far from meeting the *prima facie* plausibility test. What international law prohibits is not a possible error in law, but a system of justice which falls below a minimum standard so as to lead to an inevitable denial of justice. However, the Claimant did not dare to assert that the Slovak judicial system belongs to such a category, which would be obviously unsustainable. And it was also scarcely convincing when it criticized the judicial decisions as wrong in municipal law
251. It has been clarified during the proceedings that the impugned judiciary decisions concerned all creditors to the same degree, and were not exclusively pronounced towards or on request of the Claimant, nor were they meant to harm the Claimant alone. In addition, the Respondent has convincingly objected that other remedies were still available to the Claimant in internal law in order to try to obtain revision of the judgment that it considered prejudicial to its interest. The non-exhaustion of local remedies is *per se* sufficient to exclude the States’ responsibility in international law for actions or omissions of its judiciary.
252. In conclusion, the *prima facie* test of a plausible treaty-claim is far from being met. This inevitably implies that, even in the (remote) case that the Tribunal would retain jurisdiction over the case, it would be highly unlikely that the Claimant’s claims could successfully overcome the merits’ examination. In other words, the denial of jurisdiction leads to no substantial injustice to the detriment of the Claimant.

## IX. COSTS

253. Pursuant to Article 38 of the UNCITRAL Rules, the term “costs” includes the fees and expenses of the Tribunal, i.e. those of its members and the costs of any service required by the Tribunal, here the transcription services. They also include the costs for legal representation of the parties as claimed during the proceedings “only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable” (Article 38(e)).
254. Article 38 of the UNCITRAL Rules requires the Tribunal to “fix the costs of arbitration

*in its award*?. This is done here-below.

#### IX.A Fees and expenses of the Tribunal

255. At the Milan meeting, the Parties and the Arbitrators agreed that the global amount of € . . . . . would suffice to cover the fees and expenses of the Tribunal and that the Secretary implied no additional cost. Each Party paid half of the sum on an *ad hoc* bank account opened by the Chairman as agreed (§ 9 of the Milan Minutes). Under the above agreement, the Tribunal had the right to fix additional advance payments if the duration and complexity of the case exceeded the original expectations. However, the Tribunal considers that the advance payments made by the Parties remain sufficient.

256. . . . .

257. Each Arbitrator will address a pre-paid invoice of its own fees and costs reimbursement to the Party responsible for payment. Pursuant to the Tribunal's apportionment of costs decided here-below, this Party is . . . . .

#### IX.B The costs for legal representation

258. As indicated in § 73 here-above, the Claimant has claimed € . . . . . without detailed explanations. The Respondent has claimed € . . . . . with abundant explanations and evidence.

259. Exercising the discretion given to it by Article 38(e) of the Uncitral Rules, the Tribunal considers that the Respondent's claim is much more reasonable and substantiated than the Claimant's claim.

IX.C The Tribunal's ruling on the apportionment of costs

260. The Tribunal's jurisdiction is founded on the BIT, Article 9(2)(d) of which addresses the matter of costs, as follows:

Each party to the dispute shall bear the costs of its own member of the tribunal and of the chairman and the remaining cost shall be borne in equal parts by both parties to the dispute. The tribunal may, however, in its award decide on a different proportion of costs to be borne by the parties and this award shall be binding on both parties [emphasis added].

261. The present proceedings are governed by the Uncitral Rules, Articles 40(1) and (2) of which govern the matter of costs as follows:

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case [emphasis added].

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable [emphasis added].

262. Both Article 9(2)(d) of the BIT and Articles 40(1) and (2) of the Uncitral Rules confer broad powers to the Tribunal in determining the costs issue. This is in line with the general tendency in international arbitration law, whereby the tribunals have an inevitable discretion in giving weight to the specific circumstances of the case when making any such apportionment.

263. In the present case, there is a winner, the Respondent, and a loser, the Claimant, who failed to meet the basic jurisdictional requirements and also failed to satisfy the *prima facie* test of a treaty-claim. Therefore, by exercising its discretion, the Tribunal deems it justified to depart from the general rule in Article 9(2)(d) of the BIT and to apply its second part empowering the Tribunal "to decide on a *different proportion*". Accordingly, the Tribunal applies the general principle according to which "*costs follow the event*", implying that each Party should bear a share of costs proportional to its own loss. Since the Tribunal is here accepting all preliminary objections raised by the Respondent, the Tribunal considers it fair to leave the Respondent totally harmless and indemnified of the entirety of the arbitration costs.



and – in addition – is bound to reimburse to the Republic of Slovakia both the 50% share of the costs advanced to the Tribunal and 100% of the costs for defence and representation claimed by the Republic of Slovakia.

270. The Tribunal has attentively checked the correctness and adequacy of the sum claimed by the Respondent for its own legal defence. It amounts to €                      thus being slightly higher than the legal costs claimed by the Claimant, who therefore may not reject them as excessive. Moreover, the claim was accompanied by convincing explanations given by the Ministry, satisfactory substantiation of all relevant expenditures and clear evidence. They are therefore fully admissible to compensation.

**X. DISPOSITIVE SECTION**

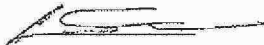
For the reasons set forth above, the Tribunal unanimously orders and awards as follows:

- (a) the Tribunal lacks jurisdiction over the present dispute;
- (b) the Claimant shall bear the entirety of its own legal and other costs;
- (c) the Claimant shall pay to the Respondent the amount of €                      as reimbursement of half of the Tribunal's costs advanced by the Respondent plus €                      as Respondent's legal costs;
- (d) all other claims and objections are dismissed.

Done in Vienna, place of the arbitration, on March 5, 2011, in five originals.

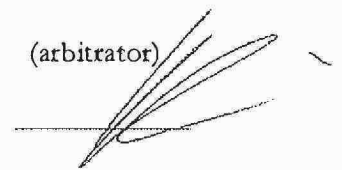
Hans Stuber

(arbitrator)



Bohuslav Klein

(arbitrator)



Antonio Crivellaro

(Chairman)

