Annex C

Preliminary redacted version of the Award

dated March 5, 2011

INVESTMENT *AD HOC* ARBITRATION

between

CLAIMANT

v/

THE SLOVAK REPUBLIC

RESPONDENT

AWARD

March 5, 2011

Rendered by the Arbitral Tribunal composed of:

Hans Stuber (Arbitrator)

Bohuslav Klein (Arbitrator)

Antonio Crivellaro (Chairman)

Place of Arbitration: Vienna

CONTENTS

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

7.

8.

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 Kawecky & Szelzak, 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, Froriep Renggli, Grafenaustrasse 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 sub-section 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**").[1]

24.

25.

[1] The document was produced by the Respondent as R-51.

V.B The bankruptcy proceedings and the court decisions

26

27.

28.

29.

---

[2] See the Extract from the Slovak Commercial Registry relating to , listed among the exhibits enclosed to the Claimant's Statement of Claim.

[3] *Id.*

30.

31.

32.

33.

34.

V.C The origins of the arbitral dispute

35.

36.

37.

38

39.

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 [illegible] 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 [illegible] enclosed to the Claimant's correspondence of September 24, 2009 by

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

18(2)(a) of the Uncitral Rules, which simply requires that a statement of claim must include the names and addresses of the parties; and

(vi) the alleged failure to produce all invoked documents had no ground because any Party had the right to supplement or amend its case during the course of the proceedings, either spontaneously or on the Tribunal's request.

58. Given the above procedural dispute, on February 18, 2010, the Tribunal issued the following directions:

> **1. Termination of the proceedings**
>
> Article 28(1) of Uncitral Rules applies to the case in which a party "fails to communicate his claim [or his defence] without showing sufficient cause for such a failure". It thus applies to a case of default or *absentia*. Here, a "Notice of Arbitration" has been filed. It has the form and substance of a statement of claim. If it is deficient or unmeritorious, as contested by the Respondent, this concerns the merits of the Claimant's case, which the Respondent has the right to rebut in its next statement of defence (31 March 2010). The words "without showing sufficient cause" do not refer to the merits, as implied in Mr. Pawlak's letter, but rather refer to the "cause for such failure", i.e. to the possible justification for the failure, for instance an impediment or delay justifying an extension of the time-limit for filing the claim.
>
> The Claimant has met the requirements established in Article 28(1) and also in Article 18(2) of Uncitral Rules and termination of the proceedings at this stage would be arbitrary. Obviously, this is without prejudice to the Respondent's right to submit whatever defence against the claim and its merits.
>
> **2. The evidence of "real economic activities"**
>
> This matter should have been raised at the proper time and place, i.e. in the next statement of defence. rejects the critique. The Tribunal reserves its decision on this point after exhaustion of the pleadings.
>
> **3. Exhibits without translation**
>
> In this respect, the Tribunal fully shares the Respondent's complaint. It must be clear that the language of this arbitration is English, as agreed. This obviously applies also to documents relied on by the parties, irrespective of whether the other party is familiar with the original language of the document. The documents must be understood by the arbitrators much more than by the other party and this is why in international arbitration a third language – common to all people involved

– 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 the 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.[4]

---

[4] 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: 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 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(2) 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 4th 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 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 to the Claimant? Were they unilateral and still pending *claims* raised by towards , 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 from towards the bankrupt debtor , against a cash payment of approximately ? Would it elaborate on the circumstances surrounding the above acquisition?

Does the Claimant confirm that the validity of the agreement between itself and 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 lid 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 (who took care of the transcription services), the following persons attended the meeting:

Representing the Claimant: and

Representing the Respondent:

at the

Ministry of Finance of the Slovak Republic).

70. During the October Hearing, nd Mr. Pawlak made oral pleadings on behalf of the Respondent and 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 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 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

73. On November 30, 2010, the Claimant submitted the "*Cost Statement*", accompanied by an "*advance invoice*" issued by has a breakdown ("Naratives") of the global amount. On the same date, the Respondent submitted its Statement of Costs, accompanied by: (i) an affidavit by 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 € 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*".[5]

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.[6] 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

---

[5] SOC, § 153.

[6] 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.[7] 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.[8]

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 [illegible]) 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

---

[7] RRJ, §§ 14-26

[8] 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.[9] The same objections were repeated by the Respondent in its Reply of July 16, 2010[10] and at the October Hearing.[11]

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).[12] 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.[13]

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.[14]

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*

---

[9] SOD, §§ 135-148.

[10] RRJ, §§ 89-97.

[11] OHT, p. 32, p. 98 and ff. and p. 173 and ff.

[12] 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*".

[13] CMJ, § 138; OHT, pp. 114-115.

[14] CMJ, §§ 135-140. The matter has been also refered 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.[15]

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 is not an "investor" under the above provision. In fact, the mere incorporation of in Switzerland – resulting from the Excerpt from the 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.[16]

(i)(a) 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 'Seat" has a precise meaning under the BIT, namely the

---

[15] 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.

[16] 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:[17] 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.[18] Secondly, a mere domicile in , in the Respondent's words, "*is not a sufficient basis to establish that* [*is an investor under the Treaty*".[19]

90 To prove that is "*nerve center*" (as contends[20]), 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.[21] However, did not.[22] There is no evidence in the record that principal place of business, its headquarter or the address at which it "*genuinely administers its business*".[23]

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[25]); *(b)* it has no own fixed telephone line;[26] and *(c)* it has

---

[17] CMJ, §§ 155-156.

[18] SOD, §§ 125-126; RRJ, §§ 37-38; OHT, pp. 34 and 55.

[19] SOD, § 154.

[20] SOC, § 1.

[21] SOD, § 155; RRJ § 31; OHT, pp. 49 and 51.

[22] See OHT 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*".

[23] SOD, § 162.

[24] CMJ, § 154; RRJ, § 35; OHT, p. 52.

[25] SOD, fn. 185.

[26] 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.[27] On the other hand, the Respondent criticises the Claimant for having submitted wholly inadequate evidence which fatally undermine its claim.[28] In fact:

(i) the reference to a purported "oral rental agreement"[29] 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.);[30]

(ii) with regard to the Swiss bank account relied upon by the Claimant to support a finding of a Swiss seat,[31] 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,[33] 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 [34]

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 tha

---

[27] CMJ, § 167; OHT, pp. 52 and 56-58.

[28] OHT, p. 52-53.

[29] CMJ, § 157.

[30] RRJ, §§ 39-40; OHT, pp. 55-56

[31] CMJ, § 157.

[32] RRJ, §§ 41-42; OHT, pp. 59-60

[33] CMJ, § 157

[34] 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 : lack of standing under Article 1(1)(b) of the BIT.[35]

(i)(b) 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.[36]

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[37] 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.[38]

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.[39]

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.[40]

---

[35] SOD, §§ 149, 152 and 155; RRJ, § 31; OHT, p. 63.

[36] SOD, §§ 157-173; RRJ, 45-72; OHT, pp. 71-80.

[37] SOD, § 157; OHT, p. 47.

[38] SOD, §§ 125 and 158, were 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.

[39] SOD, §§ 159-162; RRJ, § 45.

[40] SOD, § 170.

97. however, presents no such proof whatsoever.[41] 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*".[42]

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 debs, sale of goods, interests in companies, acquisition and sale of property.[43] The Claimant's reference to the Sixth Council Directive of 1977 on the harmonization of the EU Member Sates taxation laws and to a decision by the European Court of Justice of 1996 has no relevance.[44] 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.[45] The unsupported allegation of the existence of a daughter company in Slovakia[46] is irrelevant and insufficient to establish "real economic activities" in Switzerland.[47]

99. Finally, the contents of the un-translated 2007 tax return offered by [48] only confirm that is nothing more than a "mailbox" company.[49]

---

[41] SOD, §§ 167-173, referring *inter alia* to SOC, §§ 125 and 149.

[42] 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* ?".

[43] SOC, § 3.

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

[45] CMJ, §§ 168-171, RRJ, § 48; OHT, p. 73.

[46] CMJ, § 172; RRJ, §§ 59-60; OHT, p.80.

[47] OHT, pp. 71 and 73.

[48] Claimant's letter of February 10, 2010; CMJ, §§ 150-153, 158-161 and 162.

[49] 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 claim for lack of standing under Article 1(1)(b) of the BIT.[50]

(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 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)* 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.[51]

(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.[52] 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;[53]

---

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).

[50] SOD, § 173; RRJ, §§ 45 and 72; OHT, pp. 79-80.

[51] SOD, §§ 174 and 218; RRJ, §§ 73-88; OHT, pp. 81-97.

[52] SOD, § 179.

[53] 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;[54]

(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.[55]

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".[56]

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;[57]

(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";[58]

(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;[59] and

---

[54] SOD, § 182.

[55] SOD, § 183.

[56] 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).

[57] SOD, § 181; RRJ, § 45.

[58] 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 .

[59] 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[60]

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

(ii)(b) 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.[62] 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.[63]

108. However acquisition of receivables does not meet the above tests, since:[64]

(i) no performance was due from to under the Assignment Contract; it was a "one-off" transaction, without any ongoing "performance";[65]

(ii) in the SOC, the Claimant defines "claim" the claim acquired against the bankrupt debtor ,[66] which, however, was far from being "clear" or "specific";[67]

---

[60] 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).

[61] SOD, § 185.

[62] SOD, §§ 186-192; RRJ, §§ 82-88.

[63] SOD, § 187

[64] *Id.*

[65] SOD, § 188.

[66] SOC, §§ 6 and 108.

[67] SOD, § 189.

(iii) could not legitimately enforce its alleged claim, given that the party having a claim to performance was ;[68] and

(iv) the claim against the debtor was deprived of "economic value" prior to adjudication by the competent authorities of all creditors' claims and distribution of the bankrupt's assets; eventually failed to gain admission as a creditor to the bankruptcy.[69]

109. In the light of the above, 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,[70] as 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 € be reported to the financial police without undue delay.[71] cash payment of approx. was certainly

---

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

[69] *Id.*

[70] SOD, § 195.

[71] SOD, § 200.

an unusual business operation, but was not reported to the competent authorities.[72]

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.[73]

(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.[74] 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.[75]

114. The Respondent argues that "*the timeline of events and surrounding circumstances deny* bona fide",[76] given *inter alia* that:[77] *(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*").

---

[72] *Id.*

[73] *Id.*

[74] SOD, § 202.

[75] SOD, § 204.

[76] SOD, § 205.

[77] SOD, §§ 205-217.

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

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.[79] 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.[80]

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.[81] Moreover, reference is made to the definition of "seat" given under Slovak law[82] and to the contents of the ECJ judgment in Case C–110/94.[83] In brief, the Claimant asserts

---

[78] SOD, §§ 201 and 218.

[79] SOC, § 148

[80] SOC, §§ 146 and 148.

[81] 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.

[82] 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, §

[83] 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;[84]

(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 has real economic activities in Switzerland and is not a "mailbox company";[85] 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;[86]

(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;[87]

(iv) 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;[88]

(v) the receivables acquisition from is an "investment"[89] 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;[90]

---

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

[84] SOC, § 149.

[85] 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 ( ) residing in Switzerland, that being "*sufficient*", in his view, to prove real economic activities.

[86] 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 current executive.

[87] CMJ, §§ 167-172; OHT, p. 129.

[88] CMJ, §§ 175-176.

[89] OHT, p. 136 ff., where the Claimant's Counsel clarifies the definition of "investment".

[90] CMJ, §§ 177-180.