UNCITRAL Ad Hoc Arbitration

between

Mr J O

Mrs T L

Claimants

and

The Slovak Republic

Respondent

DECISION ON JURISDICTION

Rendered by the Arbitral Tribunal composed of:

Prof. Gabrielle Kaufmann-Kohler, President

Prof. Mikhail Wladimiroff, Arbitrator

Dr. Vojtěch Trapl, Arbitrator

Secretary to the Tribunal:

Ms. I K

30 April 2010

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Cs' S on J	Claimants' Submission on Jurisdiction (26 October 2009)
Cs' Reply	Claimants' Reply (13 November 2008)
Defense	Respondent's Statement of Defense (29 May 2008)
ECJ	European Court of Justice
EU	European Union
Exh. C	Claimant's Exhibit
Exh. CL	Claimant's Legal Authorities
Exh. R	Respondent's Exhibit
Exh. RL	Respondent's Legal Authorities
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
Notice	Claimant's Notice of Arbitration (8 April 2008)
Parties	Claimant and Respondent
PO 1	Procedural Order No. 1 (1 March 2007)
Respondent	The Slovak Republic
R's Rejoinder	Respondent's Rejoinder to the Reply of the Claimants (7 April 2009)
R's S on J	Respondent's Submission on Jurisdiction (4 November 2009)
R's Reply	Respondent's Reply to the Brief on Jurisdiction (28 July 2009)
SoC	Statement of Claim (6 November 2007)
SoD	Statement of Defence (29 May 2008)

Treaty *or* (Dutch-Slovak) BIT	Bilateral investment treaty; specifically "Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and Czech and Slovak Federal Republic" of 29 April 1991
Tribunal	The Arbitral Tribunal
Tr. J. [page: line]	Transcript of the Hearing on Jurisdiction (17 November 2009)
Vienna Convention	Vienna Convention on the Law of Treaties of 23 May 1969 (entered into force on 27 January 1980).

I. RELEVANT FACTS REGARDING JURISDICTION

1. This chapter summarises the factual background of this arbitration in so far as it is necessary to rule on the Respondent's objections to jurisdiction. The Tribunal will refer to other facts, as appropriate, in the discussion of the arguments of the Parties.

A. PARTIES

a. Claimants

2. The Claimants in this arbitration are:

Mr. A J O

and
Mrs. T L

(hereinafter jointly referred to as "the Claimants")

3. The Claimants are represented in this arbitration by:

Mr. J.L.M. van G
V: G & L C K

b. Respondent

4. The Respondent is the Slovak Republic, represented in this arbitration by

- Messrs. Martin Maisner, Ludovít Mičinský, Miloš Olík, and Jiří Zeman of ROWAN Legal s.r.o, Námestie Slobody 11, 811 06 Bratislava, the Slovak Republic;
- Mr. R Hr and Ms A H , Ministry of Finance of the Slovak Republic, Štefanovičova 5, 81782 Bratislava 15, the Slovak Republic.

B. THE TRIBUNAL

5. The Arbitral Tribunal is composed of

- Presiding Arbitrator: initially, Dr. Robert Briner, ') resigned on 28 July 2009; from 7 September 2009, Professor Gabrielle Kaufmann-Kohler, Lévy Kaufmann-Kohler, .
- Arbitrator appointed by the Claimants: Professor Mikhail Wladimirofi
- Arbitrator appointed by the Respondent: Dr. Vojtěch Trapl,

6. A Secretary to the Tribunal has been appointed by the Tribunal with the consent of the Parties. The Secretary is

- Ms. I K Lévy Kaufmann-Kohler,

C. BACKGROUND FACTS

7. Following a call for public tender from the National Property Fund of the Slovak Republic (the "NPF") (Exh. R-8), on 20 December 1994, Mr. O acquired 40.33% of shares of *B* ("BCT") at the price of SKK 67,500,000 (Exh. C-1). The wife of Mr. O Mrs. L , also acquired BCT shares on several occasions, and eventually owned 27.74% shares of BCT (Exh. R-137).

8. Either directly or through companies owned by them, the Claimants thus owned the majority of shares in BCT (Exh. C-4).

9. The principal aim of BCT's privatization was to attract foreign investment in view of the necessary recovery of BCT and the thread industry more generally in the Slovak

Republic. According to the Respondent, this is why the price requested from the investors was considerably lower than the actual value of the shares.

10. However, the revitalization of BCT proved to be a difficult task and a disagreement soon arose between the Parties, particularly with respect to BCT's tax and other liabilities.

11. In early 2001, BCT creditors filed the first petitions for bankruptcy of BCT.

12. On 19 June 2001, the Regional Court of Bratislava appointed Mr. P as preliminary trustee to identify BCT's assets. After the State Tax Authority joined the petitioners in the bankruptcy proceedings on 6 March 2002, the Regional Court eventually declared BCT in bankruptcy on 14 April 2003 (Exh. C-2).

13. The initiation, legitimacy and the overall conduct of the bankruptcy proceedings by the Slovak judiciary constitute one of the main points of disagreement between the Parties.

14. After the adjudication of bankruptcy, BCT creditors started to submit their claims against the bankrupt's assets. Mr. C as well as the companies A T S and T C who are allegedly controlled by Mr O submitted claims in the amount of almost SKK 400,000,000.

15. At a meeting held on 14 June 2005, the BCT asset realization plan was approved. It provided that BCT would be sold through an auction. Eventually a company by the name of P was found to have presented the best bid, and, on 9 September 2005, a contract for the BCT sale was concluded at a price of SKK 175,002,000.

16. On 9 April 2008, the Regional Court took a decision regarding the allocation of the proceeds from the liquidation of BCT. The debts of BCT creditors were then settled proportionately in line with the recommendations of the bankruptcy trustee regarding the allocation of proceeds.

17. On 12 June 2008, the Regional Court closed the bankruptcy proceedings and removed both the bankruptcy and the special trustee from their functions.

II. PROCEDURAL HISTORY

A. INITIAL PHASE

18. On 28 March 2006, the Claimants filed a Notice of Arbitration (the "Notice"), under the Arbitration Rules of the United Nations Commission on International Trade Law of 1976 (the "UNCITRAL Rules").

19. On 8 December 2006, the Claimants appointed as arbitrator Prof. Wladimiroff, who accepted the appointment the same day. Dr. Trapl was appointed as arbitrator by the Respondent on 1 December 2006, and accepted the appointment on 4 December 2006. The Party-appointed arbitrators selected Dr. Briner to act as the President of the Tribunal, who accepted his appointment on 9 February 2007.

20. On 1 March 2007, the Tribunal issued its first Procedural Order ("PO 1"). In accordance with Article 16 of UNCITRAL Rules, the Tribunal fixed Geneva as the place of arbitration. The language of the arbitration was determined to be English.

21. The Claimants requested the extension of the deadline determined in PO 1 for submitting their Statement of Claim (sometimes referred to as the "SoC") on several occasions. The Claimants cited difficulties in obtaining some documents from the Slovak authorities and in particular the bankruptcy file from the Bratislava County Court as the reason for the delay in submitting their Statement of Claim.

22. By its Procedural Orders 2, 3, 4 and 5 the Tribunal granted the Claimants' request for extension after having heard the Respondent's view.

23. On 6 November 2007, the Claimants filed their Statement of Claim, accompanied by Exhibits C-1 to C-244. In the SoC, the Claimants sought the following relief:

> *1. To declare for justice, that the Republic Slovakia the agreement between Slovakia and the Netherlands has been violated concerning the mutual protection of investments of 29 April 1991 by:*
>
> *a. providing no safeguard for an honest and fair treatment of the below mentioned and more explicit "O investments" (article 3 sub 1).*
>
> *b. hindering the operations, the management, the maintenance, the usage, the enjoyment, and the disposition of the investments by means of unreasonable and, or discriminatory measures (article 3 sub 1).*

c. providing no entire certainty and protection for the investments (article 3 sub 2).

d. providing less certainty and protection to the investments as those are provided to the investors from Slovakia (article 3 sub 2).

e. taking measures, with the consequence that investment directly or indirectly is taken away (article 5).

2. ordering the government to pay accordingly an amount of SK 7.520.335.505 and € 18.129.833,79, to be increased with the interest, as above mentioned and the interest, according to the Dutch legal system ex art 6:119a, to be calculated as from the date of 31.12.2007 until the date of complete/entire settlement, complying with this article, subsidiary to payment of a percentage of interest of 8 %, to be calculated as from 31.12.2007 until the date of complete/entire settlement, being the equivalent of the rental revenues, increased with the annual rental increases as from 14 April 2003 each year.

3. condemning the government to pay the costs of this arbitration, including the costs of the lawyers fees to be determined at 3% of the total sum, plus at this moment unknown other costs of this arbitration (translation, faxes, hotels, etc.) (SoC, Section XVI)

24. Following unsuccessful settlement discussions, on 29 May 2008 the Respondent filed its Statement of Defence (the "SoD"), including Exhibits R-1 to R-134. In its Statement of Defence, the Respondent raised objections to the Tribunal's jurisdiction, in accordance with Article 21(3) of the UNCITRAL Rules, and requested the following relief:

697. Given the above, the Respondent requires the Tribunal to decide to the below stated effect:

(a) The Tribunal dismisses the Statement of Claims submitted by Claimant 1 and Claimant 2 because it has no jurisdiction to decide on the merit of the claim.

(b) Claimant 1 and Claimant 2 shall pay the costs of this arbitration proceeding including the costs of the Tribunal as well as the legal and other costs incurred by the Respondent, on a full indemnity basis.

698. In case the Tribunal comes to a conclusion it has jurisdiction to decide on the merit of the claim, the Respondent requires the Tribunal to dismiss all the claims stated in the Statement of Claim and to render Arbitration Award to the below stated effect:

(a) The Respondent has not breached the BIT.

(b) The Respondent has ensured the Claimants' investment fair and equitable treatment.

(c) The Respondent has not impaired the operation, management, maintenance, use, enjoyment or disposal of the Claimants' investment and that it has not taken any unreasonable or discriminatory measures with regard to the Claimants' investment.

(d) The Respondent has accorded to the Claimants' investments full security and protection.

(e) The Respondent has observed obligations it entered into with regard to the Claimants' investment.

(f) The Respondent has not taken any illegal or unreasonable measures depriving, directly or indirectly, the Claimants of their investment

(g) Claimant 1 and Claimant 2 shall pay the costs of this arbitration proceeding including the costs of the Tribunal as well as the legal and other costs incurred by the Respondent, on a full indemnity basis.

25. The Claimants' Reply to the Respondent's Statement of Defence was submitted on 13 November 2008. The Reply included Claimants' Exhibits C-245 to C-308, as well as witness statements of E P , D V and D L

26. On 7 April 2009, the Respondent filed its Rejoinder to the Reply of the Claimants, including Exhibits R-135 to R-145. On the same date, the Respondent requested the Tribunal to issue a procedural order determining that there be a separate jurisdictional phase.

27. In its Procedural Order 14 of 11 May 2009, in light of the Respondent's jurisdictional objections and in accordance with Article 21(4) of the UNCITRAL Rules, the Tribunal decided to bifurcate the proceedings and determine first the issue of its jurisdiction before dealing with the merits of the case.

28. Following the resignation of the President of the Tribunal, Dr. Briner, on 28 July 2009, the Party-appointed arbitrators nominated Prof. Kaufmann-Kohler to act as the President of the Tribunal. On 7 September 2009, Professor Kaufmann-Kohler advised the Parties that she had accepted her appointment as President of the Tribunal.

B. PHASE ON JURISDICTION

29. On 19 June 2009, the Claimants submitted their Brief on Jurisdiction, along with Exhibits C-309 to C-315.

30. On 28 July 2009, the Respondent submitted its Reply to the Claimants' Brief on Jurisdiction, along with Exhibits R-146 to R-155 and witness statements of Mr. P and Mr. Č.

31. A pre-hearing telephone conference was held on 14 October 2009 in order to discuss outstanding issues with respect to the organization of the hearing. On 19 October 2009, the Tribunal issued Procedural Order No. 15, summarizing the matters decided during the telephone conference and confirming the procedural schedule for the Parties' subsequent submissions.

32. Pursuant to PO No. 15, on 25 October 2009 the Claimants filed an additional submission on jurisdiction (the "Cs' S on J"), accompanied by Exhibits C-316 (A, B, C, D) to C-321.

33. The Respondent's Reply to the Claimants' Submission on Jurisdiction (the "R's S on J") was filed on 4 November 2009.

34. Following Respondent's objections about the presence at the hearing on jurisdiction of certain persons on behalf of the Claimants, on 13 November 2009 the Tribunal ruled that such persons may only attend the hearing if they were designated as party representatives, because the hearings are held *in camera* under the UNCITRAL Rules.

35. The Tribunal held the hearing on 17 November 2009, at Swissôtel Métropole, 34 Quai Général-Guisan, Geneva, Switzerland. The hearing started at 9:00 a.m. and ended at approximately 2:30 p.m. In addition to the Members and the Secretary of the Tribunal, the following persons attended the hearing:

(i) For the Claimants:

- Mr. J L. M. v : G GLSK.
- Mr. and Mrs. C -L.
- Mr. W. H. R. B

(ii) For the Respondent:

- Mr. Martin Maisner, ROWAN Legal s.r.o
- Mr. Ludovít Mičinský, ROWAN Legal s.r.o
- Mr. Miloš Olík, ROWAN Legal s.r.o
- Mr. Jiří Zeman, ROWAN Legal s.r.o

- Ms. A H , Slovak Ministry of Finance
- Mr. R H Slovak Ministry of Finance

36. During the hearing, Mr. v G and Mr. O l addressed the Tribunal on behalf of the Claimants, and Mr. Maisner addressed the Tribunal on behalf of the Respondent.

37. A *verbatim* transcript was taken at the hearing and later distributed to the Parties.

38. Pursuant to the Parties' agreement and in accordance with Procedural Order No. 15 of 19 October 2009, there were no post-hearing briefs.

* * *

39. The Tribunal has deliberated and considered the Parties' written and oral arguments. To the extent that these arguments are not referred to expressly, they must be deemed to be subsumed into the analysis. Before reaching a conclusion on the question of jurisdiction (V), the Tribunal will summarise the positions of the Parties (III), and analyse the issues raised by the jurisdictional objections (IV).

III. POSITIONS OF THE PARTIES

A. RESPONDENT'S OBJECTIONS TO JURISDICTION

40. In its Reply to the Claimants' Brief on Jurisdiction, the Respondent puts forward the following objections to the Tribunal's jurisdiction.

41. First, the Respondent argues that no arbitral agreement exists in the present case due to the Dutch-Slovak BIT's invalidity as a result of its incompatibility with EC law.

42. Second, the Respondent raises objections *ratione personae* and contends that the Claimants have not proved the effectiveness of their Dutch nationality and are therefore not entitled to protection of their investment under the Dutch-Slovak BIT. It is the Respondent's opinion that, if any at all, the Belgian BIT would be applicable, since Belgium has been the place of Claimants' habitual residence for the past 40 years. However, since these arbitral proceedings have been started on the basis of

the Dutch BIT, the Tribunal cannot at this point decide the case on the basis of another BIT.

43. Third, the Respondent also argues that the Tribunal has no jurisdiction to consider the claims of the Claimants' alleged companies, such as A T. ', T and S on the grounds that they do not qualify as investors under the Dutch-Slovak BIT.

44. Fourth, the Respondent raises objections *ratione materiae* and asserts that the investment made by the Claimants does not qualify as such under the applicable BIT, particularly since the Claimants have failed to specify and substantiate the loans allegedly made to BCT, either directly or through their alleged companies. Moreover, the investments do not meet the criteria established by the *Salini* test, such as duration and contribution of the investment to the development of the host State. Nor have the Claimants complied with the requirement to observe the laws of the host State in establishing and managing the investment.

45. Fifth, the Respondent is of the view that the activities of its authorities as identified by the Claimants do not qualify for a breach of the BIT, in particular since the Claimants have failed to demonstrate that any state official actions were in fact unlawful. The Respondent also notes that the Claimants wrongfully attribute to the State activities of certain natural persons entirely unrelated to the Respondent (R's Rejoinder, para. 90 *et seq.*).

46. On the basis of these arguments, the Respondent requests the Tribunal to decide that:

> (a) The dispute brought by the Claimants is not within the jurisdiction and the competence of the Arbitral Tribunal;
>
> (b) Claimants shall jointly and severally pay the costs of this arbitration proceeding including the costs of the Arbitral Tribunal as well as the legal and other costs incurred by the Respondent, on a full indemnity basis. (R's Reply, para. 294)

B. CLAIMANTS' POSITION

47. In its Procedural Order No. 14, the Tribunal invited the Claimants to clarify certain aspects relating to the issue of jurisdiction, such as the applicable BIT, the

identification of each claim, the persons responsible for the alleged damage, as well as evidence proving the Respondent's responsibility under the applicable BIT.

48. In response to the Tribunal's inquiries, the Claimants made the following arguments in their Brief on Jurisdiction. First, the Tribunal's jurisdiction should be "primarily based" on the Dutch-Slovak BIT because both Claimants have uninterruptedly held the Dutch nationality (C's Brief, p. 2). According to the Claimants, nationality and not the place of residence is the decisive factor when determining the applicability of a BIT. Similarly, when deciding one's nationality, citizenship as opposed to residence is the main criterion. However, in the Claimants' opinion the Belgian-Slovak BIT could be "applied alternatively", if the Tribunal were to find that the Claimants' residence in Belgium called for the application of the Belgian BIT (C's Brief, p. 6).[1]

49. Second, the Claimants argue that their investment meets the *ratione materiae* requirement, since it involved *inter alia* a certain duration, regularity and risk.

50. Third, the Claimants also contend that the State's actions resulted in the annihilation of their investment, contrary to the treatment guaranteed by the applicable BIT.

51. Fourth, as to the determination of *prima facie* attribution of any alleged illegal behaviour to the State, it is the Claimants' case that (i) the illegal behaviour of "various government services and persons", including judges, and (ii) the lack of intervention by the State to stop these illegalities, all together caused the loss of the Claimants' investment.

52. On the basis of these arguments, the Claimants conclude that:

- The Tribunal is competent *ratione temporis, personae* and *materiae*;
- The Claimants' claims should be admitted;
- The State is responsible for the damage suffered by the Claimants and
- The State should be sentenced to pay the costs of this pre-procedure.

(C's Brief, p. 9)

[1] The Claimants appear to have slightly modified their position on this issue in the Cs' S on J, where at Section 5 they note that if their investments via other companies cannot be addressed under the Dutch BIT, "further arbitration boards", on the basis of *inter alia* the Belgian and UK BIT, will have to be appointed.

IV. ANALYSIS

53. Before turning to the discussion of the Respondent's objections to jurisdiction (B), the Tribunal will first address certain preliminary issues (A), i.e., the applicable law (a and b), some uncontroversial matters (c), and the relevance of previous arbitral awards and decisions (d).

A. PRELIMINARY ISSUES

a. Law applicable to the merits

54. On 29 April 1991, a treaty concerning the promotion and protection of investments was concluded between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (the "BIT") (Exh. C-245).

55. Article 8 of the BIT reads as follows:

> 1) All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if possible, be settled amicably.
>
> 2) Each Contracting Party hereby consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement.
>
> 3) The arbitral tribunal referred to in paragraph (2) of this Article will be constituted for each individual case in the following way: each party to the dispute appoints one member of the tribunal and the two members thus appointed shall select a national of a third State as Chairman of the tribunal. Each party to the dispute shall appoint its member of the tribunal within two months, and the Chairman shall be appointed within three months from the date on which the investor has notified the other Contracting Party of his decision to submit the dispute to the arbitral tribunal.
>
> 4) If the appointments have not been made in the above mentioned periods, either party to the dispute may invite the President of the Arbitration Institute of the Chamber of Commerce of Stockholm to make the necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the most senior member of the Arbitration Institute who is not a national of either Contracting Party shall be invited to make the necessary appointments.

5) The arbitration tribunal shall determine its own procedure applying the arbitration rules of the United Nations Commission for International Trade Law (UNCITRAL).

6) The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:

- the law in force of the Contracting Party concerned;
- the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;
- the provisions of special agreements relating to the investment;
- the general principles of international law.

7) The tribunal takes its decision by majority of votes; such decision shall be final and binding upon the parties to the dispute.

56. On 1 January 1993 the Czech and Slovak Federal Republic separated into two separate sovereign states. The Slovak Republic succeeded the former State's international obligations, including those arising under the BIT.

57. In accordance with Article 8(6) of the Dutch-Slovak BIT, the arbitral tribunal must decide the dispute on the basis of the law, taking into account in particular though not exclusively:

- The law in force of the place of the Contracting Party concerned, i.e. here Slovak law;
- The provisions of the BIT and other relevant agreements between the Parties, i.e. here the BIT;
- The provisions of special agreements relating to the investment;
- The general principles of international law.

b. Law and rules applicable to the procedure

58. These proceedings are governed by the arbitration law of the seat, i.e. Chapter 12 of the Swiss Private International Law Act.

59. In addition, as provided in Article 8(5) of the BIT and recalled in Section 3 of PO 1, this is an arbitration governed by the UNCITRAL Arbitration Rules and any rules which the Tribunal may settle within the framework of the UNCITRAL Rules:

> Pursuant to Article 8(5) of the Bilateral Investment Treaty between the Netherlands and the State of Slovakia of 24 April 1989, the Arbitral Tribunal shall determine its own procedure applying the arbitration rules of UNCITRAL (the Rules).

> The Tribunal will issue procedural orders on specific procedural issues if and when needed. Procedural orders will be signed by the Presiding Arbitrator alone, following consultation with his co-arbitrators. (Section 3 of PO 1)

c. Uncontroversial matters

60. There is no dispute as to the jurisdiction of this Tribunal to decide the jurisdictional challenges brought by the Respondent, other than those expressly identified by the Tribunal in the analysis that follows.

d. Relevance of previous awards and decisions of other tribunals

61. In support of their positions, both Parties rely on previous decisions or awards, either to conclude that the same solution should be adopted in the present case or in an effort to explain why this Tribunal should depart from that solution.

62. The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law[2].

B. OBJECTIONS TO JURISDICTION

63. The Respondent's first jurisdictional objection is based on the alleged non-existence or invalidity of an arbitration agreement. The Slovak Republic also contests the jurisdiction of the Tribunal *ratione personae* and *ratione materiae*, and to a limited extent also *ratione temporis*[3].

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[2] See *e.g.*, *Saipem SpA v The People's Republic of Bangladesh*, ICSID Case No. ARC/05/07, 30 June 2009, para. 90. On the precedential value of ICSID decisions, see Gabrielle Kaufmann-Kohler, Arbitral Precedent: Dream, Necessity or Excuse?, Freshfields Lecture 2006, *Arbitration International* 2007, pp. 368 et seq.

[3] The Respondent raises its *ratione temporis* objection in the context of the requirement *ratione personae* regarding the existence of the Claimants' Dutch nationality in the SoD (at para. 15); and in the context of the duration of the Claimants' investment in its Reply to the Brief on Jurisdiction (at para 248, footnote 146). To the extent relied upon by the Respondent in its submissions on jurisdiction, both instances are addressed below.

64. The Tribunal will start its analysis by addressing the Respondent's argument that any applicable BIT has been terminated upon the Slovak Republic's accession to the EU (a). The Tribunal will then assess its jurisdiction *ratione personae*, focusing on the Respondent's challenges raised with respect to the Claimants' nationality and with respect to the Tribunal's jurisdiction over the Claimants' investments made through certain companies owned by them (b). The Tribunal will pursue its analysis with the questions whether the Claimants have made an investment protected by the Treaty and whether the Claimants' allegations as to the Respondent's breach of the Treaty provisions on investment protection are *prima facie* well-founded. Similarly, the Tribunal will also assess the attribution of the alleged illegalities to the Respondent, to the extent necessary to reach a decision on jurisdiction (c).

a. Invalidity of the Dutch-Slovak BIT

i. Respondent's position

65. The Respondent's first objection to the Tribunal's jurisdiction is based on the invalidity of the arbitral clause in accordance with the BIT on the ground of its incompatibility with EC law.

66. The Slovak Republic contends that since the BIT shares the same subject matter as the EC Treaty (R's Reply, paras. 44 *et seq.*), the former has been terminated pursuant to Article 59 of the Vienna Convention on the Law of Treaties (the "Vienna Convention") upon the Slovak Republic's accession to the EU on 1 May 2004 (R's Reply, paras. 56 *et seq.*).

67. Alternatively, the Respondent argues that even if this Tribunal were to find that the BIT has not been terminated, EC law should nonetheless be applied to the present dispute as a result of the EC Treaty's prevalence over the BIT and in line with Article 30 of the Vienna Convention, providing that the earlier of two consecutive treaties continues to apply only to the extent that its provisions are compatible with those of the latter treaty, which, according to the Respondent, is not the case here (R's Reply, paras. 69-79).

68. Finally, the Respondent observes that since arbitral tribunals are not authorized to request the ECJ to interpret the EC Treaty, this Tribunal should ask a national court of jurisdiction to file a preliminary reference with the ECJ asking it to determine the question of the competence of arbitral tribunals to decide investment disputes

between Slovakia and the Netherlands pursuant to the BIT, as well as determine the applicable law to such disputes (R's Reply, para. 82).

ii. Claimants' position

69. The Claimants argue that there is no incompatibility between the BIT and the EC Treaty due to the simple fact that the Respondent's wrongful acts and, more specifically, the bankruptcy of BCT dates back to 14 April 2003, whereas Slovakia joined the EU only on 1 May 2004. In accordance with Article 28 of the Vienna Convention, the EC Treaty has no retroactive effect (Tr. J., 16:4 *et seq.*).

70. The Claimants further refer to Article 307 of the EC Treaty which provides that agreements concluded before the community treaties came into force remain effective and are not overridden by the Treaty's terms (Tr. J., 16:7-16). The Claimants also disagree with the Respondent's contention that the applicable BIT and the EC Treaty cover the same subject matter: in the Claimants' opinion the objectives of the two treaties are "totally different" (Tr. J., 17:2).

71. Finally, the Claimants see no contradiction posed by Article 30 of the Vienna Convention as argued by the Respondent, since in their view the BIT is entirely reconcilable with the EC Treaty.

iii. Analysis

72. The essence of the Respondent's argument regarding the invalidity of the arbitration clause is that, since the BIT and the EC Treaty have the same subject matter, the BIT was terminated upon Slovakia's accession to the EU pursuant to Article 59 of the Vienna Convention. Such provision reads as follows:

> 1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to *the same subject matter* and:
>
> (*a*) it appears from the later treaty or is otherwise established that the *parties intended* that the matter should be governed by that treaty; or
>
> (*b*) the provisions of the later treaty are so far incompatible with those of the earlier one that *the two treaties are not capable of being applied at the same time* (emphasis added).

73. The Tribunal is not persuaded by the Respondent's argument that the Dutch-Slovak BIT has been terminated in accordance with Article 59 of the Vienna Convention.

74. *First*, the Tribunal does not consider that the two treaties cover the same subject matter. *Second*, there is no indication that the Parties would have intended for the BIT to be superseded by the EC Treaty. *Third*, the Tribunal does not see any direct conflict between the BIT and the relevant EU law provisions that would impede it from applying the two sets of legal norms simultaneously, should such a need arise.

75. As to the *first* condition, the Tribunal agrees with the argument advanced by the Claimants that the EC Treaty's objective to create a common market between all EU Member States is different from the objectives of a BIT, which provides for specific guarantees for the investor's investment in the host country pursuant to a bilateral agreement made between two countries (Tr. J., pp. 16-17). The EC Treaty provisions on the fundamental freedoms are aimed at all types of cross-border economic activity. The BIT, on the other hand, is mostly concerned with providing a set of guarantees for protection of a long-term investment in the host state.

76. Furthermore, it is at least questionable whether the substantive protection afforded to the foreign investor under the BIT is indeed comparable to the safeguards found under the EC Treaty.[4] In other words, irrespective of a certain degree of overlap between the two regimes in terms of substantive provisions applicable to any potential investment disputes, this Tribunal is not convinced that the safeguards offered by the two are identical.

77. Without going into further detail in determining the exact differences between the substantive safeguards provided to foreign investors under the two regimes, there is at least one fundamental distinction between the two, which renders them incomparable: the EC Treaty provides no equivalent to one of, if not the most important feature of the BIT regime, namely, the dispute settlement mechanism providing for investor-State arbitration.

78. The Claimants have invoked *Eastern Sugar*[5] in support of their argument that the BIT is applicable and has not been superseded by the EC Treaty (Tr. J., 19:22). In that case, the Tribunal made the following finding:

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[4] Michele Potestà, Bilateral Investment Treaties and the European Union. Recent Developments in Arbitration and before the ECJ, *The Law and Practice of International Courts and Tribunals* 8 (2009), 225-245, at 232.

[5] *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007.

> From the point of view of the promotion and protection of investments, *the arbitration clause is in practice the most essential provision of Bilateral Investment Treaties*. Whereas general principles such as fair and equitable treatment or full security and protection of the investment are found in many international, regional and national systems, the investor's right arising from the *BIT's dispute settlement clause* to address an international arbitral tribunal independent from the host state *is the best guarantee* that the investment will be protected against undue infringements by the host state. *EU law does not provide such a guarantee* (emphasis added).[6]

79. The Tribunal is of the opinion that, as EU law stands today, the EC Treaty does not exhaust the field of investment protection. That is especially so considering that the EU's role in the area of foreign investment has so far been very limited.[7] Rather, the requirement of Article 59 of the Vienna Convention that the two treaties relate to the "same subject matter" has to be construed in line with the dominant view expressed in scholarly writings to the effect that two treaties can be considered to relate to the "same subject matter" only if the overall objective of these treaties is identical and they share a degree of general comparability.[8]

80. As to the *second* condition identified by Article 59 of the Vienna Convention, i.e., the Parties' intention to substitute one treaty with another, the Tribunal notes that the Respondent has neither argued nor proven that any agreement relevant to the Slovak Republic's accession to the EU, such as, for example, the Accession Treaty, contained any provision that could have caused the termination of the BIT. Nor does the BIT itself contain any wording to this effect.

81. On the contrary, Article 3(3) of the BIT, which outlines the Contracting Party's obligations towards the foreign investor, specifically provides that:

> The provisions of this Article shall not be construed so as to oblige either Contracting Party to accord preferences and advantages to investors of the other Contracting Party similar to those accorded to investors of a third State

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[6] *Ibid.*, at para. 165.

[7] Prior to the entry into force of the Lisbon Treaty on 1 December 2009, the Community has lacked competence to regulate direct foreign investment. See Söderlund, C., "Intra-EU BIT Investment Protection and the EC Treaty", 4(5) Transnational Dispute Management, September 2007; Maydell, N., "The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence", *in* Reinisch, A., Knahr, C. (eds.), International Investment Law in Context (2008), pp. 73-93.

[8] This interpretation is accepted by all the main authorities in the field. See, among others, Olivier Corten, Pierre Klein, *Les Conventions de Vienne sur le droit des Traités* (2006), Volume III, p. 2107 (for further references see footnote 62 on the same page). See also Anthony Aust, Modern Treaty Law and Practice (2007), p. 229.

> (a) *by virtue of membership of the former of any existing or future customs union or economic union, or similar institutions*; or
>
> (b) on the basis of an agreement for the avoidance of double taxation, or on the basis of reciprocity with a third State (emphasis added).

82. The Respondent merely states, without providing any further proof or explanation, that "[...] it was the intention of the contracting parties to have the subject matter governed by the Treaty of EC" (R's Reply, para. 58).

83. To be clear, it can hardly be disputed that by acceding to the EU both Parties have expressed their general consent to be bound by the EC Treaty. This, however, is without prejudice to the continuing application and validity of the existent BITs.

84. The Respondent has not implied that at any point in time there had been an effort on either part of Slovakia or the Netherlands to terminate or re-negotiate the BIT, or, as a matter of fact, that the Parties had intended the EC Treaty to supersede the BIT.

85. By the same token, the Respondent's consent to submit any investment dispute to arbitration in accordance with Article 8 of the BIT is also unconditional, namely, the Contracting Parties have not chosen to limit it in any manner in view of Slovakia's accession to the EC or any other treaty, either at the moment when the BIT was concluded or at any later point in time.

86. As to the *third* condition, the Tribunal does not believe that there are any convincing reasons to consider free movement of capital under the EC Treaty and protection of investment under the BIT to be incompatible or conflicting with any fundamental EU law principles, such as the principle of prohibition of discrimination, as argued by the Respondent (R's Reply, para. 60).

87. The Tribunal tends to agree with the tribunal in *Eastern Sugar* that "the BIT and the EU Treaty are not incompatible"[9] *inter alia* because:

> [i]f the EU Treaty gives more rights than does the BIT, then all EU parties, including the Netherlands and Dutch investors, may claim those rights. If the BIT gives rights to the Netherlands and to Dutch investors that it does not give other EU countries and investors, it will be for those other countries and

[9] *Eastern Sugar*, op. cit. para. 168.

investors to claim their equal rights. *But the fact that these rights are unequal does not make them incompatible*[10] (emphasis added).

88. Accordingly, the Tribunal concludes that in the present case the BIT has not been terminated in accordance with Article 59 of the Vienna Convention. This said, while for the sake of completeness the Tribunal has considered the Parties' arguments on the application of Article 59, it must nonetheless be underlined that a scrupulous analysis of this Article is in fact unnecessary in the present case. This is so because there exists one fundamental reason which provides sufficient proof by itself that the BIT in question has remained in force and is applicable to the present dispute: the lack of retroactive effect of the EC Treaty.

89. As argued by the Claimants at the hearing without being rebutted by the Respondent, the Respondent began to engage in its allegedly wrongful conduct with respect to the Claimants' investment before the Slovak Republic's accession to the EU (Tr. J., p. 15-16).

90. Therefore, since the dispute between the Parties arose before Slovakia's accession to the EU, the Claimants' rights under the BIT have remained unchanged, in line with Article 70 (1)(b) of the Vienna Convention:

> 1. *Unless the treaty otherwise provides or the parties otherwise agree*, the termination of a treaty under its provisions or in accordance with the present Convention:
>
> (a) [...];
>
> (b) *does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination* (emphasis added).

91. As noted above, the Tribunal has no reason to believe that the Parties intended for the EC Treaty to substitute or supersede the BIT. However, even if it were so, no evidence has been presented to the Tribunal permitting it to conclude that the Parties have agreed to a retroactive application of the EC Treaty.

92. Article 28 of the Vienna Convention, on which the Claimants relied at the hearing (Tr. J., 16:4 *et seq.*) also provides that:

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[10] *Ibid.*, at para 170.

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

93. The EC Commission has adopted the same approach on the question of the EC Treaty's retroactive effect:

> [T]he effective prevalence of the EU *acquis* does not entail, at the same time, the automatic termination of the concerned BITs or, necessarily, the non-application of all their provisions. Without prejudice to the primacy of Community law, to terminate these agreements, Member States would have to *strictly follow the relevant procedure* provided [...] *in the agreements* themselves. *Such termination cannot have a retroactive effect*[11] (emphasis added).

94. To be clear, the views expressed by the EC Commission in other arbitral cases are by no means binding on this Tribunal; the EC Commission's opinion can at most provide some guidance to the Tribunal in adjudicating this case. This said, it is not irrelevant that the EC Commission itself has never suggested that the accession to the EU of a new member State would result in an automatic termination of the BITs between such State and all the other EU members.

95. Similarly, there is no doubt that a state cannot unilaterally withdraw its offer to submit an investment dispute to arbitration after the investor has made its investment in reliance on this promise, as this would result in a complete violation of the investor's legitimate expectations.[12]

96. Rather, had the Slovak Republic really intended to terminate the BIT in question upon its accession to the EU – an intent that, as noted above, has not been proven by the Respondent – it should have done so in accordance with the procedure set out in the BIT. This has not been the case however, and therefore Slovakia's offer must remain in force for the duration of the BIT in accordance with its terms.

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[11] Opinion of Mr. A S e then Director General of the Directorate General of EC Internal Market and Services. The opinion was given to a member of the Czech Republic's government on 13 January 2006 and quoted in *Eastern Sugar*, *op.cit.* at para. 119.

[12] For an overview of the legitimate expectations doctrine as developed by arbitral tribunals, see Elizabeth Snodgrass, "Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle", 21 ICSID Review – Foreign Investment Law Journal (2006) 1, with references to cases.

97. In fact, if recourse is taken to the provisions of the BIT, it becomes apparent that the investor's rights thereunder are secured for another fifteen years after the termination of the BIT, since Article 13 (3) provides that:

> In respect of investments made before the date of the termination of the present Agreement the foregoing Articles thereof shall continue to be effective for a further period of fifteen years from that date.

98. For all the foregoing reasons, the Tribunal concludes that the BIT was not terminated upon the Slovak Republic's accession to the EU. Accordingly, Respondent's jurisdictional challenge on this ground must fail.

99. This said, the fact that this Tribunal has not found EC law to constitute an obstacle to its jurisdiction under the BIT is without prejudice to the application of any relevant provisions of EC law as part of Slovak domestic law. It shall be recalled that the dispute settlement clause contained in Article 8 (6) of the BIT stipulates the following choice of law provision:

> The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:
>
> - *the law in force of the Contracting Party concerned*; [...] (emphasis added).

100. It is undisputable that Slovak domestic law includes EU law following Slovakia's accession to the EU. Therefore, if EU law must be applied, this Tribunal will seek to interpret both the BIT and applicable EU law in a manner that minimises conflict and enhances consistency.

101. Finally, although not necessary for the Tribunal's finding, for the sake of completeness the Tribunal will now briefly address some additional arguments made by the Parties.

102. The Tribunal first observes that both Parties have relied on Article 30 of the Vienna Convention in their respective submissions, albeit in order to reach different conclusions. Article 30 provides as follows:

> 1.[...] the rights and obligations of States Parties to *successive treaties relating to the same subject matter* shall be determined in accordance with the following paragraphs. [...]
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under

article 59, *the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty* (emphasis added).

103. Essentially, the Respondent contends that Article 30 cannot be applied to the resolution of the dispute between the Parties since the two treaties in question do not relate to the same subject matter (R's Reply, para 69 et seq.), while the Claimants argue that it does, considering that "all BIT stipulations are absolutely reconcilable with the EC Treaty" (Tr. J., 17:23-24).

104. As explained above, the Tribunal sees no incompatibility between the BIT and the EC Treaty, which could pose an obstacle for the Tribunal to decide the present dispute. That said, in light of the Tribunal's finding that the EC Treaty and the BIT do not cover the same subject matter, they cannot be considered successive treaties pursuant to Article 30. Therefore, Article 30 of the Vienna Convention bears no relevance to the present case.

105. As a last subsidiary claim, the Slovak Republic requests that the Tribunal ask a national court to make a referral to the ECJ in order to decide all questions relating to the application of the Dutch-Slovak BIT in the present dispute. Considering that the Tribunal has encountered no difficulty in deciding the issues raised by the Parties, the Tribunal sees no need to discuss this request.

106. To conclude with one general observation, it is certain that the intra-EU BIT compatibility with EC law has recently become a much debated topic. There are approximately 190 intra-EU BITs in force today,[13] and at least four other arbitration cases based on intra-EU BITs have been recently brought before arbitral tribunals.[14]

107. It is also true that the EU has expressed some concern about the impact of intra-EU BITs on the integrity of the Community's legal order. Nonetheless, it has recognized that the security of the investors must prevail and therefore has never failed to

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[13] *Report to the Commission and the Council on the Movement of Capital and Freedom of Payments*, Council's document of 17 December 2008, no. 17363/08, *2008 EFC*, para. 16.

[14] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19; *AES Summit Generation Ltd v. Republic of Hungary*, ICSID Case No. ARB/07/22; *Vattenfall AB v. the Federal Republic of Germany* ICSID Case No. ARB/09/6; *Mercuria v. Republic of Poland* (SCC case, not public, see I.A. Reporter, No. 8, 2008).

emphasize the importance of observing the correct procedures for terminating the BITs, thereby excluding any retroactive effect.[15]

108. It is also pertinent to note, in light of the Respondent's jurisdictional objections on grounds of EU law, that while initially the EU had strongly encouraged the Member States to review the need for intra-EU BITs in the common market, in its last report the EC Economic and Financial Committee seems to adopt a more indulgent view on the intra-EU BIT phenomenon. The Committee notes that most Member States have not shared the Commission's concern in respect of arbitration risks and discriminatory treatment of investors and have preferred maintaining the existing agreements without either terminating or re-negotiating them.[16] Nor has the EC Commission so far initiated infringement proceedings against any EU Member State on grounds of a failure to terminate an intra-EU BIT.

109. In light of these considerations, the Tribunal concludes that the Dutch-Slovak BIT was not terminated upon Respondent's accession to the EU and therefore the EC Treaty is not an obstacle for this Tribunal to settle the present dispute under the applicable BIT. This is especially so considering the absence of any conclusive position of the EC or the ECJ on this question.

b. Jurisdiction *ratione personae*

i. Respondent's position

110. The Respondent argues that the Claimants have not proved their Dutch nationality as the primary condition for the protection of their investment under the Dutch-Slovak BIT. According to the Respondent, the Claimants have effective nationality of Belgium as opposed to the Netherlands (SoD, Part A.3.; R's Reply, paras. 83 et seq.; Tr. J., 10:1 et seq.).

111. More specifically, the Respondent puts forward the argument that the relevant documentation presented by the Claimants is insufficient to prove their nationality; on the contrary, several documents in the record demonstrate that the Claimants have dominant nationality of Belgium (R-146, R-147, C-47, see R's Reply, paras. 92-96, 126-128).

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[15] Bruno Poulain, "Développements Récents Du Droit Communautaire Des Investissements Internationaux", 113 *Revue générale de droit international public* 4 (2009), pp. 873-895, at 880.

[16] *Report to the Commission, op.cit.* paras. 16–18.

112. In support of its argument that the existence of a genuine link may prevail over the formal nationality of a person the Respondent relies, *inter alia*, on *Nottebohm*[17], *Champion Trading v Egypt*[18] and *Siag v Egypt*[19] (R's Reply, paras. 97-107).

113. Finally, the Respondent contends that the Claimants' alleged companies such as A T ', S and T. cannot be considered investors under the Dutch-Slovak BIT as they do not satisfy the terms of Article 1(a) of the BIT, nor have they been incorporated in the Netherlands in order to be able to claim protection under the Dutch BIT (R's Reply, paras. 169-181, Tr. J., p. 72-73).

ii. Claimants' position

114. The Claimants argue that they have fully demonstrated that they both hold Dutch nationality. As a result, their investment must be covered by the Dutch-Slovak BIT. The Claimants note specifically that not only they "from their birth onwards, have uninterruptedly had the Dutch nationality" (Cs' Brief, p. 2, Exh. C-247, C-316 A, B, C, D), but also emphasize that the Dutch nationality is and has always been their only nationality (Tr. J., p. 28:5).

115. As a result, in the Claimants' opinion the arguments advanced by the Respondent on grounds of the principle of effective nationality have to be put aside, as the Claimants are not dual citizens of both the Netherlands and Belgium.

116. The Claimants also argue that the investments made via their companies must be afforded protection under the Dutch-Slovak BIT, since they are 100% owners and shareholders in these companies (Cs' Brief, p. 2; Cs' S on J, p. 5-7). It is also the Claimants' position that Mr. C companies were nothing but a "bank... to keep his money there" (Tr. J., p. 14:10-11). The Claimants thus deny that the Deed of Transfer of Claims (Exh. C-322) could have as its effect that the companies are obliged to make any claims in their own right (Tr. J., p. 84-87).

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[17] *Nottebohm (Liechtenstein v. Guatemala)*, 18 November 1953, [1955] ICJ Reports 111.

[18] *Champion Trading Company, Ameritrade International, Inc, James T Wahba, John B Wahba and Timothy T Wahba v. Arab Republic of Egypt* (ICSID Case No. ARB/02/9), Decision on Jurisdiction of 21 October 2003, p. 17.

[19] *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt* (ICSID Case No ARB/05/15), Decision on Jurisdiction of 11 April 2007, para 143 and 146.

iii. Analysis

1. Nationality of Messrs. O and L

117. In order to assess the Respondent's challenge regarding the Claimants' nationality, the Tribunal must first determine the applicable rules pursuant to which the existence of Claimants' nationality must be examined.

118. In accordance with Article 1(b), the term "investors" comprises:

> (i) natural persons having the nationality of one of the Contracting Parties *in accordance with its law;* (emphasis added)

119. It follows that the applicable rules in light of which the Claimants' nationality needs to be assessed are the Dutch-Slovak BIT and Dutch law. Indeed, it is a well-established principle of international law that each State is entitled to determine the body of its nationals in accordance with its national law.[20]

120. The Respondent has advanced two arguments in support of its claim that the Claimants lack Dutch nationality and therefore cannot invoke protection under the Dutch-Slovak BIT.

121. First, the Respondent contends that the Dutch nationality of the Claimants as proved by their Dutch passports and other documents (Exh. C-316 A, B, C, D) is merely *prima facie* evidence which has little relevance if an individual's nationality is found to be ineffective due to the lack of a genuine link between such an individual and the State (R's Reply, paras. 89-90).

122. Second, the Respondent argues that some documentary evidence in the record indicates that the Claimants' dominant nationality is in fact Belgian, and that in any event their permanent residence in Belgium has caused them to lose their Dutch nationality (R's Reply, paras. 125-131).

123. It is correct, as asserted by the Respondent, that the Claimants have been permanent residents of Belgium for many years (Tr. J., 27:13). However, the

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[20] *See* International Law Commission, *Draft Articles on Diplomatic Protection with commentaries*, 2006, Yearbook of the International Law Commission, 2006, vol. II, Part Two, under Article 4, p. 31 [hereinafter *Draft Articles on Diplomatic Protection*]. In the ICSID context, tribunals have also consistently held that it is the domestic law of each contracting state that determines nationality.

Respondent has not demonstrated that Dutch law requires an effective link such as permanent residence for the continuation of citizenship and that therefore the Claimants would have lost their Dutch nationality as a result of their permanent residence elsewhere.

124. Similarly, while the Respondent correctly relies on Dutch nationality legislation providing that in certain specific cases Dutch citizenship is lost at the moment of a voluntary acquisition of the citizenship of another country (SoD, para. 19), the Respondent has not shown that the Claimants have acquired Belgian nationality as a result of their permanent residence in Belgium or otherwise. In other words, there is no evidence that Belgium would in fact recognize the Claimants as Belgian citizens.

125. Consequently, the Tribunal has no reason to doubt that the Claimants have acquired Dutch citizenship by birth and have not lost it ever since (Tr. J., p. 21).

126. As far as ambiguous documentary evidence concerning the Claimants' nationality is concerned, the Respondent was right to raise some concern about Mr. O 's application for an extract from the Criminal Record filed with the General Attorney's Office (Exh. R-146), which referred to him as Belgian, rather than Dutch. However, following a question from the Tribunal at the hearing, it was explained that this must have been a mistake on the part of the Slovak authorities, as the same document also includes Mr. C Dutch passport number (Tr. J., pages 77-78).

127. The Tribunal is satisfied with the explanations provided by the Claimants at the hearing regarding their Dutch citizenship (Tr. J. 76:1 – 79:12). This is especially so considering that the Tribunal has no reason to doubt that the Claimants have not lost their Dutch citizenship, nor that it is in fact the Claimants' only citizenship.

128. The Respondent has relied on *Siag* in support of its argument that an investor's certificate of nationality constitutes merely *prima facie* evidence (R's Reply, para. 90). However, in *Siag* this remark was made in the context of emphasizing the importance of national law in determining an investor's nationality. The *Siag* tribunal observed that while documents evidencing the claimants' nationality are relevant,

"they do not alleviate the requirement on the Tribunal to apply the Egyptian nationality law, which is the only means of determining Egyptian nationality"[21].

129. In the present case, the Respondent has not succeeded in establishing that the Claimants have either lost their Dutch citizenship pursuant to Dutch nationality law, or that they are dual citizens of both the Netherlands and Belgium. As a result, the Respondent's reliance on *Champion Trading* is also misplaced (R's Reply, para. 105), since in that case the claimants had two nationalities and hence the tribunal applied the effective nationality principle in order to determine which one of the two was the claimants' dominant nationality.

130. The Tribunal further observes that the BIT merely requires an investor to have "nationality of one of the Contracting Parties", which is moreover conferred upon such investor in accordance with the Contracting Party's national law. The BIT does not require such nationality to be "effective" or imposes any further conditions such as the existence of a genuine link to the respective Contracting Party. Nor, as a matter of fact, does the BIT require that the investor hold only one nationality.

131. The Claimants rely on *Micula v. Romania*[22] to question the application of effective nationality principle in cases of a single, as opposed to dual citizenship. The Tribunal agrees with the rationale adopted in *Micula* where the tribunal, after having examined the Draft Articles on Diplomatic Protection and the ILC Special Rapporteur's report on Diplomatic Protection concluded that:

> There is thus a *clear reluctance* in public international law to apply the *genuine link* test where *only a single nationality* is at issue, such as the case at hand. (para. 94, emphasis added)

The tribunal concluded its analysis by noting that:

> [W]hen dealing with a single nationality, the threshold for the Respondent State to show that the test is applicable is higher than in the cases of dual nationality and the use of the test should be limited to exceptional circumstances. (*Ibid.*, para. 104, emphasis added)

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[21] *Siag, op. cit.*, para. 153.

[22] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008.

132. Indeed, the Nottebohm case where the principle of effective nationality was applied in a case of a single nationality certainly represents such "exceptional circumstances". In that case the claimant had held German nationality from his birth, had genuine ties to Germany, and had in addition been living in Guatemala for 34 years. Shortly after the Second World War broke out, the claimant renounced his German nationality and became a naturalized citizen of Liechtenstein. The ICJ found that the only reason for his naturalization was the substitution of his status as a national of a belligerent State as opposed to that of a neutral State. The ICJ's conclusion was that since Mr Nottebohm's nationality was not effective, Guatemala had no obligation to recognize a nationality granted in such circumstances.

133. It is self-evident that no such "exceptional circumstances" exist in the present case for this Tribunal to doubt the authenticity of the Claimants' Dutch nationality. To sum up, contrary to the Respondent's allegations (R's Reply, para. 125 et seq.), the record does not establish that the Claimants have either acquired Belgian nationality or lost their genuine link to the Netherlands only as a result of their permanent residence in Belgium.

134. Consequently there is no need for the Tribunal to consider the Parties' argument as to whether the Claimants could alternatively have brought their claims under the Belgian-Slovak BIT. However, the Tribunal notes in passing that, in the absence of the Belgian nationality of the Claimants, the answer to this question would necessarily have been negative.

135. In light of all of the above, the Tribunal concludes that Mr O and Mrs O – L hold and have continuously held the Dutch nationality at all time periods that are relevant to this Tribunal's jurisdiction in the present case.

2. Investments made through Claimants' companies

136. As noted above, the Respondent challenges the Tribunal's jurisdiction over the Claimants' investments made through companies such as T A , T. and S ("the Companies") on the grounds that Article 1(b) of the Dutch-Slovak BIT limits the term "investor" to natural persons having the nationality of one of the contracting parties and legal persons constituted under the law of one of the contracting parties.

137. Both Parties have advanced arguments as to whether the claims of these companies can be considered under different BITs, i.e., under BITs concluded between the Slovak Republic and the State where each of these companies is incorporated. In this context, the relevance of the definition of "investment" in Article 1(a) of the Dutch-Slovak BIT, covering "every kind of asset invested either directly or through an investor of a third State" has also been discussed.

138. Evidence presented to the Tribunal demonstrates that Mr. O is the owner of the Companies (Exh. C – 248 A, B, C; Exh. C-309; Tr. J., p. 87-88). Hence, subject to the observations made below about the timing of Mr. O 's acquisition of the BCT shares, an issue which may require further examination at the merits stage, the Tribunal is satisfied that Mr. O. is the owner and shareholder of the Companies through which the acquisition of the BCT shares was made.

139. In this context, it is important to note that the nationality of the Companies and Mr. O right to claim investment protection under the Dutch-Slovak BIT as a natural person and owner of the Companies are two issues which should be kept separate from the legal point of view. For purposes of jurisdiction, only the second one matters here.

140. This said, for the sake of completeness in view of the Parties' argumentation, the Tribunal notes that the Claimants expressly admit that only T is Dutch[23], while A is incorporated under UK laws and S , and T are Belgian (Cs' S on J, p. 3). In other words, they accept that the Companies, but for T , do not hold Dutch nationality, namely, that they have not been constituted under the laws of the Netherlands pursuant to Article 1(b) of the applicable BIT.

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[23] For the sake of clarity, the Tribunal notes that while T is indeed Dutch (Exh. C-309 A), in their last submission on jurisdiction of 26 October 2009 (page 5), the Claimants claim damages to their investment made through T which is a company with its registered seat in Slovakia (Exh. C-309 B, Exh. R-138). On the other hand, the Respondent has alleged that T does not qualify as an investor under the Dutch-Slovak BIT, as it is not established under Dutch law; nor can it be considered as an investor of a third state (R's S on J, para. 53). The Tribunal notes that the record on the exact identity of T is indeed unclear. Regrettably, the Claimants have failed to explain the relationship, if any, between T and T However, considering that the Tribunal has no reason to doubt Mr. O interest in T as a shareholder and consequently his status as an investor, the Tribunal will determine the issue of T 's identity, as well as the question relating to the precise amount of shares currently owned by Mr O (R's Reply, para. 264, fn 153) if necessary to resolve the dispute at the merits stage.

141. This, however, is without prejudice to the investor's rights as a natural person. Therefore, the Tribunal is inclined to follow the Claimants' reasoning that the Companies were nothing more than a vehicle through which Mr. O being the owner of the Companies (Tr. J., 87:11), transferred his personal capital for investment in the Slovak Republic. As explained by the Claimants at the hearing with respect to one of the Companies in question:

> [It] was nothing else than a Dutchman's money deposit, not unlike a savings bank. There is essentially no difference. (Tr. J., 34: 7-9)

142. The Tribunal also notes in this context that it is nowadays by no means uncommon to set up sometimes complex corporate structures to make investments abroad and that arbitral tribunals have often been required to assess investments made through corporate vehicles under bilateral investment treaties.[24]

143. The question before this Tribunal is therefore whether, through his control and ownership of the Companies, Mr. O can be considered as an investor. In order to answer this question, recourse must first be had to the text of the BIT. The Tribunal observes that there is nothing in the BIT that precludes such an interpretation. Quite to the contrary, the text of the Treaty with respect to the protection of investments is quite broad.

144. Indeed, the term investment as defined in Article 1(a) is phrased in particularly broad terms, extending the protection of the Treaty to "every kind of asset invested either directly or through an investor of a third state". It is thus clear that the BIT does not need to be construed narrowly.

145. The Tribunal believes its interpretation to be in line with the approach adopted by other tribunals. Generally speaking, even in cases where investors had chosen much more complex corporate structures for their investment than in the present case, tribunals have nonetheless found that the corporate structure does not change the nature of the investment, nor disqualify the claimant from invoking the protection of the treaty.

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[24] See, among others, *Aguas del Tunari, S. A. v. Republic of Bolivia,* ICSID Case No. ARB/02/3, Decision on Jurisdiction of 21 October 2005; *Autopista Concesionada de Venezuela, C.A. [Aucoven] v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/00/5, Decision on Jurisdiction of 27 September 2001; *Saluka Investments BV v. The Czech Republic,* UNCITRAL, Partial Award of 17 March 2006; *Tokios Tokeles v. Ukraine,* ICSID Case No. ARB/02/18, Decision on Jurisdiction of 29 April 2004.

146. The conclusion which the Tribunal reaches is further supported by authors such as McLachlan, Shore and Weiniger, who state that "where the corporation is controlled by nationals of another State and the corporation has no substantial business activities and no management seat in the State of incorporation, the corporation may be regarded as the national of the State where control and management is located"[25]. This is so especially in the case where the shareholder is claiming direct injury to its own rights as opposed to injury to the corporation.[26]

147. The Tribunal's conclusion is also supported by a reference to *Sedelmayer v Russia*[27]. That case bears striking similarity to the present one. The claimant, a German citizen, sought protection under the German-Russian BIT as a natural person for the investments he had made through his wholly owned American company. The tribunal found that since the claimant's company was "only a vehicle through which he transferred his own personal capital into Russia"[28], in light of the object and purpose of the applicable treaty, Mr. Sedelmayer had to be "regarded as an investor under the Treaty, even with respect to investments formally made by SGC International or the other companies"[29].

148. For the sake of completeness the Tribunal notes that the deed of transfer of claims (the "Deed"), dated 5 October 2006 (Exh. C-322), does not impact the Tribunal's findings on the present issue. In light of the Tribunal's finding that the Companies were merely vehicles for the Claimants to transfer their personal funds for an eventual investment in the Slovak Republic, the Tribunal is of the opinion that the Deed cannot have as its effect that the Companies are considered as making these claims in their own right, especially considering the Claimants' ownership of these companies and the lack of any substantial business activity by the Companies independently from the Claimants.

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[25] McLachlan, Shore, Weiniger, *International Investment Arbitration* (2007), at 5.88 (5).

[26] See *Lauder v. Czech Republic*, UNCITRAL arbitration, Final Award of 3 September 2001, para. 153-155. In this case, too, the claims were brought by Mr Lauder in his personal capacity under the US-Czech BIT. The Tribunal accepted jurisdiction on the grounds that Mr Lauder was the ultimate beneficiary in the corporate chain. See also McLachlan, Shore and Weiniger according to whom "[t]he relaxed attitude to piercing the corporate veil demonstrated by investment tribunals also extends to allowing claims to be asserted by the ultimate beneficial owner in a corporate structure" (McLachlan *et al.*, *op. cit.*, at 6.92).

[27] *Mr. Franz Sedelmayer v. The Russian Federation*, SCC, Award of 7 July 1998.

[28] *Ibid.*, page 57. The Sedelmayer tribunal thus accepted the claimant's argument that "[i]n modern international law the so-called "control theory" is widely accepted. This theory is based on the idea that the decisive factor is who *de facto* controls the entity, which has, for example, made investments in a foreign country. Consequently, the control theory leads to the piercing of SGC International's corporate veil and to putting the de facto investor – i.e. the Claimant – in the focus", *ibid.*, page 27.

[29] *Ibid.*, page 59.

149. At the hearing, in an answer to the Tribunal's question about the purpose of the Deed, the Claimants' Counsel responded as follows:

> To do with the deed of transfer, it is a pity that we acted in this way, because it is a little bit disturbing, the force. The deed itself, the meaning of this deed was only to give O[redacted] the possibility, if necessary, to collect also and to act also as a Claimant for the other companies. This procedure is the only purpose of the deed. (emphasis added, Tr. J., 84:6-13)

The Tribunal has no reasons to doubt the sincerity of the Claimants' explanation.

150. The Tribunal thus concludes that irrespective of the corporate structure chosen for the investment by the Claimants, their investment is entitled to protection under the BIT. The Respondent's jurisdictional objections on this ground are therefore rejected.

c. Jurisdiction *ratione materiae*

i. Respondent's position

151. The Respondent's third jurisdictional objection relates to the alleged lack of the Tribunal's jurisdiction *ratione materiae*. It is the Respondent's view that the claimed investments do not comply with the standard criteria of investment, such as the so-called *Salini* test (R's Reply, para. 186 *et seq.*).

152. Moreover, the Respondent argues that the Claimants' investment was "executed and managed" contrary to the laws of the Slovak Republic (R's Reply, para. 226 *et seq*).

153. Finally, the Respondent contends that the Claimants have failed to sufficiently identify the alleged breach of the BIT, "as they have failed to identify the acts the Respondent was obliged to perform to prevent the conduct of individuals filing the BCT bankruptcy petition" (R's S on J, para. 2 et seq.).

ii. Claimants' position

154. It is the Claimants' position that they have made an investment pursuant to the applicable BIT. The Claimants challenge the Respondent's reliance on the *Salini* test and question the adequacy of several elements encompassed in the *Salini* formula (Tr. J., p. 44-49).

155. The Claimants also hold the view that they have fully proven that the allegedly illegal acts by the State judiciary, tax authorities and others, as well as the State's failure to act when in fact intervention was required, amount to the Slovak Republic's breaches of its obligations under the BIT (Tr. J., p. 53-62).

iii. Analysis

1. Existence of an investment

156. It is common ground between the Parties that the Tribunal's jurisdiction is contingent upon the Claimants' having made an investment within the meaning of the BIT. Article 1(a) of the BIT defines the term "investment" broadly and non-exhaustively:

> [T]he term 'investments' shall comprise *every kind of asset* invested either directly or through an investor of a third State and more particularly, though not exclusively:
>
> i. movable and immovable property and all related property rights;
>
> ii. *shares, bonds and other kinds of interests in companies and joint ventures, as well as rights derived there from*;
>
> *iii. title to money and other assets and to any performance having an economic value*;
>
> iv. rights in the field of intellectual property, also including technical processes, goodwill and know-how;
>
> v. concessions conferred by law or under contract, including concessions to prospect, explore, extract and win natural resources. (emphasis added)

157. The Tribunal first observes that before providing the non-exhaustive list of the types of investment, Article 1(a) first notes that the term "investment" comprises "every kind of asset". There can thus be little doubt that the Parties had intended the definition of the investment to be very broad. In fact, it has been suggested that the reference to "every kind of asset" is "[p]ossibly the broadest" among similar general definitions contained in BITs.[30]

158. Consequently, had the Parties wished to limit the definition of investment to particular types of assets or, to exclude certain assets such as loans[31], they could have embodied such restriction in this provision.

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[30] N. Rubins, The Notion of 'Investment' in International Investment Arbitration, in: N. Horn (ed), *Arbitrating Foreign Disputes*, The Hague, 2004, p. 292.

[31] For findings by arbitral tribunals that loans constitute a form of investment, see *Fedax v Venezuela*, ICSID case number ARB/96/3, Decision on Jurisdiction, 11 June 1997; *CSOB v Slovakia*, ICSID case number ARB/97/4, Decision on Jurisdiction, 24 May 1999; (Tr. J., 43:7-11).

159. The Tribunal thus concludes that since the Claimants' investment meets the definition of investment under the BIT, it is sufficient for the Tribunal's determination of an existence of an investment in the present case. However, considering that in their discussion of the existence of an investment both Parties have relied on *Salini v. Morocco*[32] (R's Reply, para. 186 et seq., Tr. J., p. 43 et seq.), the Tribunal will verify that this test is fulfilled as well.

160. As is well known, the tribunal in *Salini* held that the notion of investment presupposes: (a) a contribution, (b) a certain duration over which the project is implemented, (c) an element of risk, and (d) a contribution to the host State's development, being understood that these elements may be closely interrelated, should be examined in their totality, and will normally depend on the circumstances of each case[33].

161. Before examining whether the *Salini* test has been met in the present case, the Tribunal wishes to make two observations. *First*, it is important to note that the *Salini* test was developed in the context of Article 25 of the ICSID Convention, while this Tribunal has been constituted under the UNCITRAL Rules.

162. *Second*, as emphasized by the Claimants at the hearing, the *Salini* test has recently come under a fair amount of scrutiny both in the doctrine and the jurisprudence (Tr. J., p. 43-48). For example, in *Biwater v Tanzania*[34] the tribunal explicitly noted that:

> In the Tribunal's view, there is no basis for a rote or overly strict, application of the five *Salini* criteria in every case. *These criteria are not fixed or mandatory as a matter of law.* They do not appear in the ICSID Convention. (at para. 312, emphasis added)

The tribunal went on to conclude that:

> Given that the Convention was not drafted with a strict, objective, definition of "investment", it is doubtful that arbitral tribunals sitting in individual cases

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[32] *Salini Construtori S.p.A. and Italstrade S.p.A. v Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 50 et seq.

[33] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006 para. 91; *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on jurisdiction of 6 August 2004, para 53 *et seq.*

[34] *Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 312 *et seq.* Several other tribunals have been resistant in following the rigid standard set out by the Salini test: see, among others, *Philippe Gruslin v. Malaysia* (ICSID Case No. ARB/99/3), Award of 27 November 2000, 5 ICSID Rep. 484 (2002); *AES Corporation v. Argentine Republic* (ICSID Case No. ARB/02/17), Decision on Jurisdiction of 26 April 2005.

should impose one such definition, which would be applicable in all cases and for all purposes. (at para. 313)

163. With these two caveats in mind, the Tribunal will now proceed to briefly examine the *Salini* conditions as applied to the circumstances of the present case.

164. First, an investment presupposes a contribution on the side of the investor. In the case at hand, the Tribunal is persuaded that the purchase of shares by the Claimants, especially given the purpose consisting in revitalizing BCT, represents a contribution of money and assets of economic value.

165. Second, to qualify as an investment, a project must have a certain duration. In this respect, the Tribunal has taken note of the fact that, as argued by the Claimants at the hearing, Mr O and his wife visited the BCT on a regular basis for eight or nine years (Tr. J., 49:21).

166. This said, there is a disagreement between the Parties regarding the timing of Mr. O acquisition of BCT shares (R's Reply, para. 248), in particular with respect to investments made through A and T l (R's Reply, para. 264 et seq.). The Respondent has argued that the Claimants have failed to produce evidence proving their ownership of A "at the decisive period of time", and that the Claimants' acquisition of BCT shares was not made in good faith, since at the time of acquisition BCT was already over-indebted (R's S on J, para. 38; R's Reply, para. 268). The Respondent has also raised some concerns regarding Mr. O ownership interest in T at different times (R's Reply, para. 264).

167. Having considered the Parties' positions on this issue, including Exhibit R-140 and R-153, the Tribunal finds that the record is unclear on these matters which have not been sufficiently discussed by the Parties yet. That said, there is no evidence putting in doubt Mr. O ownership of BCT shares which could deprive him of his status of an investor. In other words, for the purposes of determining its jurisdiction, the Tribunal is satisfied that the Claimants' investment meets the duration requirement. The Claimants' changing ownership of BCT shares at different moments in time, and the consequences thereof will have to be dealt with at the merits phase.

168. The third requirement, namely the fact that the project in question involves an element of risk, has not been seriously contested by the Respondent. Indeed, the

fact that the purchase price of the BCT shares paid by the Claimants may have been lower than the actual value of the shares does not preclude the fact that the Claimants' investment involved a degree of risk. As observed by the tribunal in *Société Générale*[35]:

> (t)he purchase of property for a nominal price is a normal kind of transaction the world over when there are other interests and risks entailed in the business. (at para. 36)

169. Finally, the Respondent argues that the Claimants have failed to demonstrate any contribution to the Slovak Republic's development through their investment. According to the Respondent, the Claimants' decision to invest in BCT was guided by pure self-interest, especially considering the allegedly low price paid for the shares.

170. According to the Claimants, they have been actively involved in the management of BCT for many years: they have contributed their know-how and sales contacts with customers in the industry, bought the machinery needed for sewing thread, obtained financing for BCT thanks to their personal relations with certain banks and introduced a number of important changes in BCT's management that were necessary to modernize the business and render it competitive and attractive to Western European customers.

171. While the extent and effect of Claimants' activities will have to be examined in further detail at the merits stage, at this juncture the Tribunal is satisfied that the Claimants have made a contribution to the Slovak Republic's development as mandated by the *Salini* test.

172. For all the foregoing reasons, the Tribunal concludes that the Claimants made an investment within the definition of Article 1(a) of the BIT. Because the Parties have also referred to the *Salini* test, the Tribunal further notes that this test is met as well. Accordingly, the Slovak Republic's jurisdictional challenge that there is no investment fails.

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[35] *Société Générale v. Dominican Republic*, UNCITRAL, LCIA Case No. UN7927, Preliminary Objections to Jurisdiction, September 19, 2008, para. 36.

2. An investment made in accordance with the host State's laws

173. It is the Respondent's position that besides the four conditions outlined above under the *Salini* formula, there is a yet another condition, "ensuing from international law and the established practises in investment disputes" that foreign investors have to observe (R's Reply, para. 188 *et seq.*).

174. The Respondent argues that the Claimants have not managed their investment in accordance with the Slovak Republic's laws and that they have, *inter alia*, failed to pay taxes as well as to observe other obligations under the Slovak Commercial Code (R's Reply, para. 226 *et seq.*).

175. The Tribunal first observes that, although the Respondent contends that the Claimants' investment was "executed and/or managed" contrary to the Slovak Republic's laws, its complaints relate primarily to the Claimants' conduct *after* the investment had been made, i.e., the Respondent argues that "BCT in the long run breached its duty to pay taxes", that the Claimants did not respect their "obligations resulting from their financial situation" but rather "intentionally misled the tax authority" and thus breached their obligation to manage BCT with due care as required by the Respondent's Commercial Code.

176. These allegations relating to the management of the investment during the course of the project are matters for the merits. They have no impact on the Tribunal's jurisdiction, which merely requires the investment to be legal. The rationale behind this requirement is that illegal investments, made contrary to the applicable local laws or, for example, through the exercise of fraud, have to be disqualified from the protection of the BIT already at the jurisdictional stage. As discussed in further detail below, this is not the case here. Nor has the Respondent alleged the contrary.

177. Rather, the only reference to this effect is contained in Article 2 of the BIT providing that:

> Each Contracting Party shall in its territory promote investments by investors of the other Contracting Party and shall *admit such investments in accordance with its provisions of law.* (emphasis added)

178. Another question is whether the investment was made, as opposed to managed, in the breach of the host State's laws, with the consequence that the investor would be

deprived of the right to resort to arbitration. Some BITs provide so expressly. The present one does not. However, this silence does not mean that fraud or abuse in the making of an investment may not preclude the investor from obtaining protection by way of arbitration.

179. In this respect, the Respondent further relies on *Plama v Bulgaria*[36] and *Inceysa v El Salvador*[37] in support of its argument that "[i]nvestments, which have been made contrary to the laws of the host State, naturally cannot enjoy any legal protection" (R's Reply, para. 191). From a general point of view, the Respondent's affirmation is correct. However, the arbitral awards invoked by the Respondent in support of its position contain significant differences to the present case.

180. In *Plama* the tribunal found that the claimant would have never obtained the investment approval had it not been for its deceitful conduct, in violation of Bulgarian national law.[38] As opposed to *Plama*, in the present case there is no issue of the Claimants failing to provide relevant and material information as to their identity as investors, nor have the Claimants mislead the State on any similar grounds, merely for the purposes of obtaining the State's approval of the investment.

181. By the same token, in *Inceysa* the claimant had committed a wide range of illegalities at the time of making its investment in El Salvador. Among others, the Claimant had presented false financial information as part of its tender, had made false representations during the bidding process, had falsified documents, and had hidden its relationships with certain entities that were directly pertinent in the circumstances of the case.[39]

182. It does not appear to the Tribunal that in the present case any equivalent conduct has taken place at the time when the Claimants made their investment in the Slovak Republic.

183. Consequently, at this stage in the proceedings it suffices to note that the Respondent has not shown that the Claimants' investment was made contrary to the host state's laws at the time of admission and that any aspects relating to the

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[36] *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24 (ECT), Award, 27 August 2008, at para 143.
[37] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 231, 240 et seq.
[38] *Plama*, *op. cit.* para. 143.
[39] *Inceysa*, *op. cit.* para. 236 et seq.

Claimants' behaviour in managing the investment are questions that belong to the merits. In sum, the transaction giving rise to the Claimants' investment pursued a legitimate business purpose and did not involve any fraud or illegality, which could have barred the investment from the protection afforded by the Treaty.

184. Lastly, the Tribunal should address *Phoenix v Czech Republic*[40], a case in which the tribunal applied what might be considered as a sixth *Salini* test requirement, i.e., the obligation that the investment be made in good faith. The requirement to act in good faith is a general principle of law that applies in all circumstances.[41] It is not an element of the definition of investment. This said, there are no indications in the record that may lead one to doubt the *bona fide* nature of the Claimant's investment.

3. *Prima facie* treaty breach and attribution

185. To assess its jurisdiction *ratione materiae*, the Tribunal must further determine whether, if they are later established, the facts alleged by the Claimants "fall within [the treaty] provisions or are capable, if proved, of constituting breaches of the obligations they refer to".[42] At the jurisdictional stage, the Tribunal merely examines whether the alleged wrongful acts may constitute treaty breaches, assuming they are established in the merits phase.

186. In the Statement of Claim, the Claimants argue that the Respondent has breached Article 3(1) of the BIT, failing to provide fair and equitable treatment to their investment; Article 3(2), failing to accord the Claimants' investments full security and protection; and Article 5, avoiding to take measures resulting in the investment being directly or indirectly taken away.

187. *Prima facie* it appears to the Tribunal that if all the facts alleged by the Claimants were indeed proven to be true, they could lead to the Respondent's liability under the BIT. More specifically, if proven, the alleged facts put forward by the Claimants (Exh. C-45, Cs' S on J, § 1) could amount to expropriation pursuant to Article 5 of the BIT. They could also result in a breach of Article 3(1) providing that foreign

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[40] *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para 135 et seq.

[41] Dolzer, R., Schreuer, C., *Principles of International Investment Law* (2008), pp. 5-6; Panizzon, M., *Good Faith in the Jurisprudence of the WTO* (2006), pp. 11-35, with extensive references to sources of good faith and the scope of the principle under international law.

[42] *Bayindir Insaat Turzim Ticaret Ve Sanayi A.S.*, v. *Islamic Republic of Pakistan*, Decision on Jurisdiction, ICSID Case No. ARB/03/29, November 15, 2005, para. 197.

investors are to be afforded fair and equitable treatment, or of Article 3(2) guaranteeing that investor's investment shall be granted full security and protection.

188. Similarly, it cannot be excluded at this preliminary stage that, if proven, the acts of the judiciary alleged by the Claimants could constitute a breach of the BIT. The Claimants argued at the hearing that they were deprived of an effective possibility to appeal the bankruptcy decision because of the national legislation rendering any such attempt entirely futile (T. Jr., pages 80-81). Whether this was indeed the case will need to be examined at the merits stage.

189. It will equally have to be established at the merits stage whether the acts alleged are attributable to the Respondent. At this juncture, it is sufficient to observe that the acts of state officials and judges, which are challenged, appear *prima facie* attributable.

V. DECISION

190. For the reasons set forth above, the Tribunal makes the following decision:

(i) The Respondent's jurisdictional objections are denied;

(ii) The Tribunal has jurisdiction over the dispute submitted to it in this arbitration;

(iii) The decision regarding the costs of arbitration is deferred to the second phase of the arbitration on the merits.

Place of arbitration: Geneva

Prof. Mikhail Wladimiroff

Date: 24 April 2010

Dr. Vojtěch Trapl

Date: 28 April 2010

Prof. Gabrielle Kaufmann-Kohler

Date: 30 April 2010