(b) it involved a high degree of "risk", because there was no certainty as to the expected revenues nor as to the future outcome of the bankruptcy procedure;[91]

(c) it was not a "one-off transaction", the Claimant having a strong connection with the Slovak market (proved *inter alia* by the existence of a Slovak daughter company since 2004);[92]

(d) it was made in compliance with Slovak law, including the relevant provisions of Slovak Civil Code and was formally acknowledged by both the Slovak courts and the bankruptcy Trustee as being enforceable under Slovak bankruptcy law;[93] and

(e) it was made in good faith, as it was an investment made for the mere purpose of generating proceeds and not with the intent to "*create international jurisdiction where none existed*"; in fact, the Claimant made the investment before the issuance of the decision by the Regional Court, thus it could not be aware of its harmful contents beforehand; moreover, is an independent person who was appointed through a random selection and following the procedure set forth in the Bankruptcy Act.[94]

118. For the above reasons, the Claimant requests the Tribunal to ascertain that it has jurisdiction over the case.[95]

VII.D Merits

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

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[91] CMJ, § 180.

[92] CMJ, § 182.

[93] CMJ, §§ 193-196.

[94] CMJ, §§ 198-218.

[95] SOC, §§ 146, 148 and 150.

120. The Claimant's principal contention is that the judgment by the Regional Court of September 5, 2007 – which is considered in blatant violation of the laws of the Slovak Republic[96] – resulted in the utter collapse of the "investment" it made in the Slovak territory.[97]

121. Given that the Slovak courts are *"official bodies"* of the Slovak Republic and that the latter is responsible for the formers' wrongful conducts, the Claimant invokes the BIT to seek full compensation from the Slovak Republic of the damages it suffered as a result of the aforementioned judgment.[98]

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

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

[96] SOC, § 55 and ff., where the Claimant defines the Regional Court decision as being *"illegal"*, OHT, p. 160 and ff.

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

[98] SOC, § 145.

[99] SOC, §§ 93-94 and 122. See also *supra* § 23 of this Award.

[100] SOC, §§ 95 and 123.

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

remanded the case to the District Court for further action.[102]

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

124. Hence was *"deprived of fully-fledged ownership rights"* and its property *"destructed"*.[106] The legal nature of its receivables indeed inevitably changed, the latter becoming judicially unenforceable.[107]

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

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

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[102] SOC, § 32.

[103] SOC, §§ 33, 35 and ff. and 115.

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

[106] SOC, §§ 34, 96, 116 and 124.

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

[108] SOC, §§ 55 and ff. and §§ 110 and ff.

[109] SOC, § 56.

(i) failed to examine whether l - was entitled to appeal the decision of the District Court dated June 7, 2007, even though the Claimant had proven that solely was entitled to act on behalf of the bankrupt.[110] Thus, the Regional Court had to reject ; appeal in accordance with Section 218(1) of the Slovak Code of Civil Procedure;[111]

(ii) failed to examine whether the appeal against the District Court decision was indeed admissible pursuant to Section 22(3) of the Bankruptcy Act.[112] Given that in this case the petitioner was actually the debtor, the Regional Court had to reject , appeal on the grounds of inadmissibility;[113]

(iii) failed to apply the relevant provisions of the Bankruptcy Act (*lex specialis*), when deciding on the appeal, and instead applied the merely supplemental provisions of the Slovak Code of Civil Procedure;[114]

(iv) issued a decision 60 days after the appeal was filed, thus losing its authority to decide on the matter as prescribed in Section 22(3) of the Bankruptcy Act, according to which, in pertinent part: "[...] [t]*he court of appeal shall resolve on the appeal within 30 days from delivery of the petition*";[115]

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[110] The Claimant relies upon the excerpt from the Slovak Commercial Registry relating to (enclosed to the Claimant's SOC), listing , recutive from May 27, 2004 to April 6, 2009.

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

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

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

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

[115] SOC, §§ 62, 67 and 112.

(v) failed to consider that there was a lawsuit already pending on the issue of whether the appellant (,) was entitled to act on behalf of the bankruptcy petitioner [116]

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

> "The court shall decide during the proceedings according to this Act. Appeal against the resolution is admissible only if provided herein. No extraordinary appeal against resolution rendered hereunder shall be admissible".[117]

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

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

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

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[116] SOC, § 72.

[117] SOC, §§ 73-74.

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

[119] SOC, § 75.

[120] SOC, § 76. petition is enclosed to the SOC and also referred to in R-69.

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

that , was not entitled to act on behalf of the debtor.[122]

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

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

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

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

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

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

[122] SOC, §§ 78-82.

[123] SOC, §§ 83-84.

[124] *Id.*

[125] SOC, §§ 34 and 84.

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

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

(iii)(a) The Slovak Republic failed to "protect" and to ensure a "fair and equitable treatment" to the Claimant's investment

134. According to the Claimant, the notion of "fair and equitable treatment" (referred to in Article 4(2) of the BIT[131]) must be interpreted broadly, meaning that this clause *"imposes obligations beyond customary international requirements of good faith treatment"*, thus comprising such principles as *pacta sunt servanda*, protection of acquired rights and protection of property.[132]

135. To establish whether a State breached the "fair and equitable treatment" clause, both the factual context and the actions it (or its bodies) carried out, acquire

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

[127] SOC, §§ 87-89, 98-102 and 118-119.

[128] SOC, §§ 93-95, 121 and *supra* Section VII.C.2.

[129] SOC, §§ 96 and 103-107, where the Claimant lists the various Slovak law provisions breached by the Regional Court and finally concludes that the Regional Court should have *"dismissed"* the appeal.

[130] SOC, § 89.

[131] The relevant clause of Article 4(2) of the BIT reads as follows: *"Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party.* [...]".

[132] SOC, §§ 134 and 136.

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

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

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

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

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

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[133] SOC, § 135.

[134] SOC, § 137.

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

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

[137] SOC, §§ 135 and 143-144.

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

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

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

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

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

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[138] SOC, § 128.

[139] SOC, §§ 129 and 131-132.

[140] SOC, § 130.

[141] SOC, § 116.

[142] SOC, §§ 119 and 130.

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

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

VII.D.2 Respondent

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

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

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

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

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

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

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

a State organ, nor can he be said to be acting under the direction or control of the State.[146] In any event, the only challenged actions which occurred after

· party-petition to join the bankruptcy on November 6, 2007 are those of the Trustee, which, taken alone, can certainly not form the valid basis of a treaty-claim.[147]

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

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

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

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

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

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

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

[146] SOD, § 223.

[147] SOD, § 228.

[148] SOD, §§ 227-228.

[149] SOD, §§ 232-233.

[150] SOD, § 234.

[151] SOD, § 238, where the Respondent states that despite it addressed claim for a

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

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

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

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

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

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

[152] SOD, § 235.

[153] SOD, § 239.

[154] SOD, §§ 242-263.

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

would have started to run in June 2007 and not expired before June 2011.[156]

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

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

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

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

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

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[156] SOD, § 248.

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

[158] SOD, §§ 251-252.

[159] SOD, fn. 52.

[160] SOD, §§ 255-256.

[161] SOD, § 257.

period had expired on all of them: the Trustee was, however, incorrect, and could have contested such wrong decision.[162]

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

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

C. Further recourses were available to under Slovak law

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

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

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

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

[165] SOD, §§ 248 and 257.

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

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

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

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

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

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

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

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

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

[168] SOD, § 261, where reference to SOC, § 18 is made.

[169] SOD, § 262.

[170] SOD, § 263.

[171] SOD, § 265, referring to SOC, §§ 56 and ff. See also *supra* Section VII.D.1(ii).

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

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

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

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

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

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

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

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

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[173] SOD, § 276.

[174] SOD, § 277.

[175] SOD, §§ 278-280.

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

[177] SOD, § 282.

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

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

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

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

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

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

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

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[178] SOD, § 283.

[179] SOD, § 285.

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

[181] SOD, § 290.

[182] SOD, §§ 291-293

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

(i) under Section 197 of the Bankruptcy Act, the Regional Court could not interrupt the proceeding to await the result of the ongoing litigation between and regarding the control over [183]

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

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

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

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

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

[184] SOD, § 298.

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

[186] *Id.*

under Article 4(1) of the BIT is meritless

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

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

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

(i) the Regional Court gave the Claimant's nationality no significance whatsoever (and could not actually give a significance thereto, - not being a party to the proceedings pending before it);

(ii) the Regional Court decision was in accord with Slovak law, and the Claimant anyway failed to demonstrate why its "investment" was treated differently from the others and thus "discriminated";

(iii) the Regional Court decision affected all the creditors in the bankruptcy in precisely the same manner.

177. Moreover, the Claimant failed to demonstrate that the Regional Court decision impaired the *"management, maintenance, use, enjoyment, extension, sale and liquidation"* of its receivables.[190]

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[187] SOD, §§ 303 and ff., where reference to SOC, §§ 138 to 154 is made.

[188] SOD, § 305.

[189] SOD, § 306.

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

178. In brief, the Claimant has not met the burden to establish that the Respondent impaired its receivables through "*unreasonable or discriminatory measures*" in the meaning of Article 4(1) of the BIT.[191]

(iv) ... claim for "expropriation" has no ground

179. The Respondent is of the view that the Claimant's case is simply not one of "expropriation".[192] Article 6(1) of the BIT provides that:

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

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

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

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

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[191] SOD, § 308.

[192] SOD, §§ 309 and ff.

[193] SOD, § 310.

[194] SOD, § 311.

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

[196] *Id.*

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

(i) at the time of the Regional Court decision (September 5, 2007), lacked standing to claim the receivables' recovery in the bankruptcy proceedings (its petition to join the proceedings is dated June 23, 2008) and therefore could not possess a "vested" right capable of being "expropriated" within such a context (which circumstance would alone suffice to reject claim under Article 6(1) of the BIT);[197]

(ii) the finding of an "expropriation" requires that the investor be in the position to establish that it was deprived of a reasonably expected economic benefit of its investment.[198] ., however, undertook an investment which was *"speculative or, in the best of circumstances, imprudent"*. When it acquired the receivables, the Claimant was indeed aware of the complexity and uncertainty of obtaining a full satisfaction in the context of bankruptcy. In addition, the wording itself of the Assignment Contract warned of both rights under the first assignment contract with and of the pending bankruptcy proceedings. Therefore, cannot be said to have had reasonable investment-backed expectations, nor to having been illegitimately deprived thereof.[199]

(v) ***request for compensation shall be rejected***

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

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

[198] SOD, § 319.

[199] SOD, §§ 320-323.

resulting from the measure complained of.[200]

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

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

> "provisions be made for effective and adequate compensation".

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

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

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

187. In the Respondent's view, it is unquestionable that "compensation will only be awarded if there is a sufficient causal link between the breach of the treaty and the loss sustained".[203]

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

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[200] SOD, § 324.

[201] SOD, §§ 326-327.

[202] *Id.*

[203] SOD, § 329.

limitless number of unbearable aggressions.[204]

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

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

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

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

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

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[204] SOD, § 330.

[205] SOD, § 331.

[206] SOD, § 339.

[207] See *supra* Section VII.D.1(iv).

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

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

return on investment of over 1600%;[210]

(ii) it rests upon the assumption that would have collected 100% of its claims at the bankruptcy's outcome;[211]

(iii) it refers to certain contractual penalties which arose from an invoice issued on June 15, 2007, thus after the debtor's declaration of bankruptcy (dated June 7, 2007) and which were therefore unqualified for a settlement in the first phase of the bankruptcy proceedings;[212]

(iv) although the amount was not denied by the first Trustee "*may not recover any alleged damage corresponding to the receivables covered by the invoice n. as a result of the cancellation of the bankruptcy order by the regional court*".[213]

192. To conclude, the Respondent requests the Tribunal to reject the claim for compensation, as unsupported, improper and excessive.[214]

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

VIII.A Applicable law

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

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

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[210] SOD, §§ 337 and 339, where the Respondent defines such a return rate as ever "*unheard of*".

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

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

[213] SOD, § 345.

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

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

195. The above understanding is in itself sufficient to guide the Tribunal towards the application of international rather than domestic law. The *"international case-law on investment disputes"* does indeed show that the rules of international law, be they treaty or customary rules, cannot be disregarded in the resolution of investor-to-State disputes that arise from an alleged breach of an investment treaty by the host State.

196. The main issues before this Tribunal are whether the Claimant qualifies as an investor, whether its operations in Slovakia qualify as an investment and whether it is plausible, at the present jurisdictional phase, that Slovakia breached its international duties for the reasons and in the circumstances alleged by the Claimant. No such issue might be resolved if the Tribunal would only be guided by Slovak law provisions. The notions of investor or investment protected by a BIT are exclusively governed by the BIT itself and by international customary rules implicitly or explicitly referred to in the BIT.[215] In turn, whenever the Tribunal needs to interpret the BIT, the only source of law to which it must refer are the interpretative criteria established in Article 31 of the Vienna Convention on the Law of Treaties.[216]

197. This does not imply that the Tribunal is allowed to disregard Slovak law or the manner in which it has been applied by Slovak judiciary in the bankruptcy proceedings which, according to the Claimant, were prejudicial to its business in Slovakia. Unquestionably, the Tribunal has the duty to also consider these "domestic" aspects of the dispute. However, two caveats must be kept in mind:

(i) In respect of jurisdiction, it is not Slovak law which determines the pre-requisites that an investor and an investment should meet in order to be

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

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

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

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

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

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

VIII.B Admissibility

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

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

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

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

202. A similar approach was followed in *SGS v. Pakistan*, *Bayindir v. Pakistan* and *Occidental v. Ecuador*, either because the consultation period was not found to be mandatory and the parties' behaviour did not show any actual willingness to

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[218] NAFTA Arbitration, *Ethyl Corporation v. The Government of Canada*, Award on Jurisdiction, 24 June 1998, ¶¶ 84 to 88.

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

[220] UNCITRAL Arbitration, *Ronald S. Lauder v. the Czech Republic*, Final Award, 3 September 2001, ¶¶ 187 to 191.

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

203. It seems that the only tribunal which did not share the above view is the tribunal constituted in *Enron v. Argentina* under the Argentina-United States BIT, which – in an *obiter dictum* (the requirement was indeed found as having been met in the given case) – defined the requirement of a six-month negotiation period as jurisdictional in nature, so that "*A failure to comply with that requirement would result in a determination of lack of jurisdiction*"[224].

204. However, as observed by the most prominent commentator of the ICSID Convention "[*T*]*he question of whether a mandatory waiting period is jurisdictional or procedural is of secondary importance. What matters is whether or not there was a promising opportunity for a settlement. There would be little point in declining jurisdiction and sending the parties back to the negotiating table if these negotiations are obviously futile. Negotiations remain possible while the arbitration proceedings are pending. Even if the institution of arbitration was premature, compelling the claimant to start the proceedings anew would be a highly uneconomical solution*"[225].

205. The cases relied on by the Respondent (*Eureko v. Poland* and *Burlington v. Ecuador*) do not contradict the above jurisprudential trend. The passage quoted from *Eureko* decision – according to which every treaty clause must be interpreted "*as meaningful rather than meaningless*" – first did not relate to the six-month provision,

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

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

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

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

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

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

206. To the knowledge of the Tribunal, at least another ICSID tribunal has recently sided with *Burlington* tribunal, declining jurisdiction on the finding that the claimant gave notice of the dispute to the respondent only three days before filing the request for arbitration to ICSID, thus impeding the respondent State to be made aware of the existence of the dispute and possibly settle the matter by negotiation during the six-month "*cooling-off period*", as provided in the relevant treaty.[228] As seen before, the present case is different, since Slovakia was given sufficient time to consider the possibility of negotiating the matter in dispute.

207. Comparing the above jurisprudential trend with the facts of the present case (see *supra* Section V.C), the Tribunal is of the view that the Claimant satisfactorily complied with Articles 9(1) and 9(2) of the BIT. They require that "*consultations will take place*" and that if they "*do not result in a solution within six months*" the dispute becomes arbitrable. All what is required is that consultations be at least attempted and that the six months lapse without any resulting solution. This is precisely what has occurred.

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[226] *Ad hoc* arbitration under the Netherlands-Poland BIT, *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, ¶ 248.

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

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

208. Between November 2007 and July 2008, the Claimant wrote five letters to the Government of Slovakia (three to the Ministry of Justice, two to the Ministry of Finance) in which the matter in dispute was identified and the Claimant expressed its availability to settle it out-of-court with clarity. The Government replied three times, in February, May and July 2008. In the last (July) letter, the Minister of Finance accepted the idea of entering into "*meaningful discussions on the dispute*". While it is true that in May 2008 (more than six months after the first letter of November 2007) the Claimant had already appointed the first arbitrator, it made clear that it was not abandoning the attempt of settlement. Availability to the settlement was once again offered by the Claimant in its (last) letter of July 2008.

209. The above set of correspondence abundantly fulfils the BIT requirement. Articles 9(1) and 9(2) do not impose specified formalities for the consultations. Nor do they require that the Claimant should at this stage submit a formal and detailed "notice of claim" or "notice of arbitration" to the Respondent. The Claimant unambiguously referred to alleged breaches of the BIT and made reference to a possible BIT arbitration. Slovakia was unquestionably given the opportunity to redress the matter before the start of arbitration. This is precisely the rationale of the BIT requirement, i.e. avoiding that a State be brought before an international investment tribunal all of a sudden, without being given the opportunity to discuss the matter with the other party.[229]

210. Slovakia could also enter into negotiations with the Claimant after appointment of the first arbitrator or after full constitution of the Tribunal, if it so wished. It failed to do so, most likely because it considered that the dispute was unmeritorious and any negotiation pointless. It is perfectly legitimate for a State to refrain from making concessions to an investor in order to avoid arbitration when it thinks that the investor is wrong: in such cases, there is simply nothing to negotiate from the State's viewpoint.

211. Be it as it may, the Respondent cannot however treat the institution of the arbitration as invalid. If the Claimant's insistence in having the dispute arbitrated after expiry of the six months proves to be unmeritorious, a remedy remains available to the Respondent, i.e. asking the Tribunal to charge the arbitration costs on the Claimant, as Slovakia has indeed requested.

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[229] As occurred in the *Burlington* case referred to by the Respondent.

212. The Respondent's objection is therefore dismissed.

VIII.C Jurisdiction

VIII.C.1 Is the Claimant an investor?

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

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

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

(ii) ***The Swiss seat***

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

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

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

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

217. Proof of a "business seat", in the meaning of an effective center of administration of the business operations, requires additional elements, such as the proof that: the place where the company board of directors regularly meets or the shareholders' meetings are held is in Swiss territory; there is a management at the top of the company sitting in Switzerland; the company has a certain number of employees working at the seat; an address with phone and fax numbers are offered to third parties entering in contact with the company; certain general expenses or overhead costs are incurred for the maintenance of the physical location of the seat and related services, which would be a clear indication that a business entity is effectively organized at a given Swiss place.

218. However, none of these requirements were satisfied by the Claimant. The Respondent requested the Claimant to provide its Swiss phone number, and the reply was that there was none. The Claimant was also requested to disclose the office rental agreement, and the reply was that there is just an "oral" rental agreement, the parties and terms of which remained unknown. Even the existence of a bank account opened in the name of is doubtful: the UBS list of prices is a standard document created for the clients, but has failed to prove that it is one of them.

(iii) ***Real economic activities***

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

220. The Claimant has exclusively produced, after the Vienna October Hearing and

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

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

221. Neither the Respondent nor the Tribunal had invited to breach the confidentiality of its contracts with third parties. It could at least provide a descriptive list of contracts and some samples concealing the names and whatever datum identifying the parties, or witness statements or affidavits issued by clients, banks or public officers testifying the existence and nature of the activities conducted by in Switzerland. Consequently, the letter of the director has no evidential weight in these proceedings, where the Claimant had the burden to substantiate its proper standing in the clear meaning of Article 1(1) of the BIT, as specifically required since the Milan meeting.

222. In contrast with such a burden, and despite the repeated reminders by the Respondent and the Tribunal itself, during the proceedings the Claimant was constantly unable to produce anything but its own assertions or the assertion of its own (sole) official. It was at a very late stage of the proceedings and upon insistence by the Tribunal that it made a (non-spontaneous) offer to produce affidavit. What instead needed was a documentary evidence formed at the time when the activities were conducted, rather than an isolated statement created for the purpose of the *litis*. Even the powers of are unknown and not documented, notwithstanding at the October Hearing the Tribunal invited the Claimant to exhibit the powers of the company organ issuing the statement.

223. affirmation that holds accounts in Swiss banks is immaterial: to substantiate "real economic activities" he should have attached the bank account documents relating to the time of the events giving rise to the dispute, i.e. relating to the time when the receivables were acquired in Slovakia and the acquisition was followed by the bankruptcy proceedings. These or other similar documents would have established that, at that time, was actually conducting real economic activities in Switzerland. Even the telephone

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

224. Under the foregoing circumstances, the Claimant is far from meeting the standard imposed under the BIT. The Tribunal sides with the Respondent in that the BIT requires more than the mere incorporation in one of the contracting parties, and that Article 1(1) is a special (and rather uncommon) clause by which the two contracting States intended to exclude from treaty-protection "mailbox" or "paper" companies.[231]

225. The Tribunal is persuaded that the above interpretation coincides with the authentic expression of the intention of the Parties to the BIT. It must therefore give effect to such an intention. Pursuant to Article 31 of the Vienna Convention on the Law of Treaties, any treaty clause must be interpreted *"in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objective and purpose"* (Article 31(1)). Article 31(2) specifies that the context and purpose comprise the treaty *"preamble"*.

226. Now, the good faith ordinary meaning of the word "real" cannot but be "actual", or "effective", or "genuine", or "verifiable", or "visible", or "tangible", or "objective". The BIT preamble underlines that the purpose pursued by the two Contracting States was intensifying the economic cooperation to the mutual benefit of both States and fostering their economic prosperity. It is illogic to assume that the above goals could be achieved by giving treaty protection or by attracting into the host country "shell" companies which are unable to establish the kind and level of activities that they conduct in their own State. No State is anxious to promise special guarantees, privileges and protections to investors which bring no benefit to its economy.

227. Concluding on this matter, the Tribunal is of the view that is not an "investor" in the meaning of Article 1(1) of the BIT. This is *per se* sufficient to oblige the Tribunal to decline jurisdiction over the Claimant's claims.

228. However, since also the two jurisdictional requirements addressed in Section

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

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

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

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

(i) *Under the BIT*

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

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

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

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

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

234. In the practice of investment arbitrations, an investment was found to exist under the category of "claims or rights to money or to performance" in the case of contracts for public works or infrastructures, or concessions of public services, or long-term loans or similar financing instruments, made by the investor with a State or State-entities. The object of the dispute was the alleged non-performance or defective performance of the contract obligations by the host-country or its own agencies.[232] In such cases, the underlying contracts were long-term contracts having a significant importance for the economy of the host-State.

235. No such pre-requisite is satisfied by the Assignment Contract. The Claimant does not complain that it was entitled to any performance by the Republic of Slovakia under the Assignment Contract as such and that the Republic failed to perform it. On the contrary, the Republic was completely extraneous to the transaction and its economy received no benefit whatsoever therefrom.

236. According to Article 31(1) of the Vienna Convention, the treaty must be interpreted not only pursuant to its "ordinary meaning", but also taking into account the general context, the object and the purpose of the treaty. As seen before, the object and purpose of the BIT, as reflected in its preamble, is to intensify the economic cooperation to the mutual benefit of both States and attract foreign investments with the aim to foster their economic prosperity. It is hard to see how the Assignment Contract might have contributed to either the mutual economic cooperation between States or to the growth of Slovak economic prosperity. It was rather a private, neutral and speculative business, having no impact on the State economy.

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[232] Several examples are given by the cases mentioned in footnote 234 hereunder.

237. The interpretative criterion set forth by Article 31(1) of the Vienna Convention must also apply to the terms of the list contained in Article 1(2) of the BIT. Doing otherwise would be inconsistent with the BIT-context and ignore its object and purpose. More than that, a merely literal application of category (c) of Article 1(2) would lead, in the present case, to what Article 32(2)(b) of the Vienna Convention defines as a "*manifestly absurd or unreasonable result*", i.e. an outcome to be necessarily avoided.

238. Conclusively, even though Article 1(2) of the BIT provides for a very broad definition of the term "*investment*", the Assignment Contract cannot be classified as an investment under the BIT and therefore the Tribunal lacks jurisdiction over the case.

(ii) Under international law rules

239. The Tribunal is aware that the multitude of bilateral and multilateral investment treaties – although containing different definitions (either narrow or broad) of what constitutes an "investment" – explicitly or implicitly refers to an "objective" definition given by international law, as applied by other treaty-based tribunals. Tribunals must therefore be cautious to enforce the true intention of the Contracting Parties to the specific treaty forming the basis of their jurisdiction, which cannot grossly depart from the "objective" case-law definition. The caution is even more necessary in the present case, considering that the BIT here in question also provides for an alternative dispute mechanism (as soon as available) allowing the investor to also opt for submitting the dispute to ICSID arbitration (see Article 9(3) of the BIT). This means that, although the BIT gives a broad "investment" definition, the two Contracting States must have inevitably intended to refer to what constitutes "investment" under the ICSID Convention as concretely applied in the relevant case-law.

240. Now, when determining whether a given contractual transaction qualifies as an investment, investment tribunals constituted under the ICSID Convention tend to make a double check, both under the applicable bilateral treaty and under the ICSID Convention. The present Tribunal is not an ICSID tribunal and its conclusion under the BIT could be viewed as sufficient for denying jurisdiction. However, as earlier observed, the BIT definition of investment is not an entirely self-standing concept, but refers to a more general concept given by international law rules. Moreover, the Parties have abundantly pleaded also this

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

241. A more than abundant number of cases have contributed to elucidate the notion of investment under the ICSID Convention and, more in general, international customary law. It is now common ground that the necessary conditions or characteristics to be satisfied for attributing the quality of "investment" to a contractual relationship include: *(a)* a capital contribution to the host-State by the private contracting party, *(b)* a significant duration over which the project is implemented and *(c)* a sharing of operational risks inherent to the contribution together with long-term commitments.[234] This is not the case here, the Assignment Contract being far from satisfying, even in part, the above characteristics.

242. Trade or financial operations unquestionably more substantive than a modest assignment of receivables were not accepted by international tribunals as amounting to an "investment": this was for instance the case of a temporary transfer of a company's shares which failed to satisfy the pre-requisites of duration and substantial contribution to the State's economy[235], of the acquisition of certain fiscal credits by the State, which also did not meet the

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

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

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

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

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

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

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

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

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

[239] *Ibidem*, ¶ 96.

[240] SOD, ¶ 181.

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

245. The constant jurisprudential trend has led the most prominent doctrine to exclude in categorical terms that a mere one-off sale transaction might qualify as an investment.[242] The Tribunal cannot ignore the general consensus formed around the above doctrine.

246. In conclusion, the Tribunal is further comforted that did not "invest" in the Republic of Slovakia in the proper technical meaning, which confirms that it lacks jurisdiction over the case.

247. Having so determined, the Tribunal does not need to address two additional objections raised by the Respondent, according to which the Claimant's alleged investment was not made in accordance with Slovak law or was not made in *bona fide*. Having decided that it is incompetent to decide on the case, it is not necessary to establish whether these additional objections are grounded or not.

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

248. After having denied jurisdiction on the above firm grounds, the Tribunal does not need to expand on the merits of the Claimant's claim for breach of treaty. It will limit itself to the *prima facie* test, which is typically conducted by an international investment tribunal at the jurisdictional phase. The *prima facie* standard is meant to determine whether the claims are sufficiently plausible under the BIT. In other words, the Tribunal should be satisfied that, if the facts or contentions alleged by the Claimant are ultimately proven true, they would be capable of constituting a violation of the BIT.[243] Few considerations will suffice to dispose of this matter.

249. As framed by the Claimant, its allegation that the Slovak Republic has breached the BIT in several respects is based on the assumption that the present Tribunal would have the authority to correct or cure an error in law possibly made by a Slovak court as an appeal court would do. In other words, the Claimant seems

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

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

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

250. This is sufficient to conclude that the Claimant's claims are far from meeting the *prima facie* plausibility test. What international law prohibits is not a possible error in law, but a system of justice which falls below a minimum standard so as to lead to an inevitable denial of justice. However, the Claimant did not dare to assert that the Slovak judicial system belongs to such a category, which would be obviously unsustainable. And it was also scarcely convincing when it criticized the judicial decisions as wrong in municipal law

251. It has been clarified during the proceedings that the impugned judiciary decisions concerned all creditors to the same degree, and were not exclusively pronounced towards or on request of the Claimant, nor were they meant to harm the Claimant alone. In addition, the Respondent has convincingly objected that other remedies were still available to the Claimant in internal law in order to try to obtain revision of the judgment that it considered prejudicial to its interest. The non-exhaustion of local remedies is *per se* sufficient to exclude the States' responsibility in international law for actions or omissions of its judiciary.

252. In conclusion, the *prima facie* test of a plausible treaty-claim is far from being met. This inevitably implies that, even in the (remote) case that the Tribunal would retain jurisdiction over the case, it would be highly unlikely that the Claimant's claims could successfully overcome the merits' examination. In other words, the denial of jurisdiction leads to no substantial injustice to the detriment of the Claimant.

IX. COSTS

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

254. Article 38 of the Uncitral Rules requires the Tribunal to "*fix the costs of arbitration*

in its award". This is done here-below.

IX.A Fees and expenses of the Tribunal

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

256.

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

IX.B The costs for legal representation

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

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

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

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

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

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

> 1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case [emphasis added].
>
> 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph *(e)*, the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable [emphasis added].

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

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

264. As a matter of fact, the tribunal rejected the Respondent's objection based on non-compliance with the "waiting period" provision. However, the objection was not *prima facie* frivolous: it is indeed almost constantly raised by respondent States. Second, resolving that matter took a negligible time to the arbitrators in the context of the full case and did not make any significant difference in the overall arbitration costs.

265. In some cases, the rigour of the "loser pays" rule is mitigated to take into account possible aggravation of the costs caused by the winning party, for instance by unnecessarily burdening the time and costs of the proceedings. But in the present case the Tribunal sees no such undisciplined behaviour in the Respondent's defences, which were efficient and professional. It is therefore inclined not to mitigate the severity of the 0/100 apportioning.

266. The Claimant's original claim was in itself seriously defective. It was reasonable to expect that the deficiencies would be cured during the proceedings, which however did not occur. Starting from the Milan meeting of November 2009, the Claimant was made aware of the doubts and queries raised by the Respondent concerning the jurisdictional requirements set forth in Articles 1(1) and 1(2) of the BIT. If the Claimant knew, as it should have known, that it risked to be unable to establish compliance with those requirements, it was probably more prudent for it to withdraw the claim at that stage.

267. On February 4, 2010, after analysis of the Claimant's Statement of Claim, the Respondent *inter alia* proposed to the Claimant to reconsider its position in the light of the then alleged "fundamental deficiencies" in its case, declaring that if the Claimant withdrew the claim the Respondent would renounce to claim recovery of the arbitration costs incurred up to the time. This was a second important reminder that should have induced the Claimant to reconsider its strategy. It however failed to accept this proposal, thus consciously undertaking all risks inherent to a highly problematic case.

268. In brief, the Tribunal sees no reason why the Respondent should bear any part of the arbitration costs in a case where it was bound to withstand a claim which has been wrongly brought before an incompetent *forum*.

269. Consequently, shall keep at its own charge all costs it has incurred in relation to the present arbitration, including the 50% share of the costs advanced to the Tribunal and the costs of its own defence and representation

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

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

X. DISPOSITIVE SECTION

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

(a) the Tribunal lacks jurisdiction over the present dispute;

(b) the Claimant shall bear the entirety of its own legal and other costs;

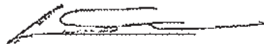
(c) the Claimant shall pay to the Respondent the amount of € as reimbursement of half of the Tribunal's costs advanced by the Respondent plus € , as Respondent's legal costs;

(d) all other claims and objections are dismissed.

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

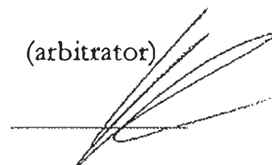
Hans Stuber

(arbitrator)



Bohuslav Klein

(arbitrator)



Antonio Crivellaro

(Chairman)