PCA CASE NO. 2010-17:

IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT BETWEEN THE REPUBLIC OF AUSTRIA AND THE CZECH AND SLOVAK FEDERAL REPUBLIC CONCERNING THE PROMOTION AND PROTECTION OF INVESTMENTS, DATED 15 OCTOBER 1990

-and-

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 15 DECEMBER 1976

-between-

EUROPEAN AMERICAN INVESTMENT BANK AG (AUSTRIA)

("Claimant")

-and-

THE SLOVAK REPUBLIC

("Respondent," and together with the Claimant, the "Parties")

SECOND AWARD ON JURISDICTION

Arbitral Tribunal

Sir Christopher Greenwood (Presiding Arbitrator)
Professor Brigitte Stern
Dr. Dr. Alexander Petsche

Secretary to the Tribunal

Mr. Martin Doe

Registry

Permanent Court of Arbitration

4 JUNE 2014

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I. INTRODUCTION

A. PARTIES

1. The Claimant in this arbitration is the European American Investment Bank Aktiengesellschaft (hereinafter the "Claimant" or "Euram Bank"), a company established under the laws of Austria with its registered office at Palais Esterházy, Wallnerstrasse 4, 1010 Vienna, Austria. The Claimant is represented in these proceedings by:

   Dr. Erhard Böhm, Specht Böhm Rechtsanwalt GmbH
   Mr. Stanislav Durica, Ružička Csekes.

2. The Respondent in this arbitration is the Slovak Republic (hereinafter the "Respondent," the "Slovak Republic" or "Slovakia"). The Respondent is represented in these proceedings by:

   Ms. Andrea Holíková, Ministry of Finance of the Slovak Republic
   Mr. Mark A Clodfelter, Foley Hoag LLP
   Mr. David A Pawlak, David A Pawlak LLC
   Mr. Constantinos Salonidis, Foley Hoag LLP
   Ms. Diana Tsutieva, Foley Hoag LLP.

B. PROCEDURAL HISTORY

3. By Notice of Arbitration and Statement of Claim dated 23 November 2009, Euram Bank commenced arbitration proceedings against the Slovak Republic, pursuant to Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law, 15 December 1976 ("UNCITRAL Rules") and Article 8(2) of the Agreement between the Republic of Austria and the Czech and Slovak Federal Republic concerning the Promotion and Protection of Investments, dated 15 October 1990 (the "BIT"). The BIT entered into force on 1 October 1991. The procedural history of the case and the constitution of the Tribunal are set out in detail in the Tribunal's First Award on Jurisdiction of 22 October 2012 ("the First Award"). Accordingly, the present Award sets out the procedural history prior to 22 October only to the extent necessary for an understanding of the present phase of the proceedings. The authentic Czech and German

texts of the BIT, together with the English translations submitted by the Parties are attached to the First Award as Annexes 1-7. In paragraph 292 of the First Award, the Tribunal concluded that the differences between the translations advanced were not such as to affect the outcome of the jurisdictional objections considered then. The Tribunal affirms that the same is true with regard to the new jurisdictional objections that are the subject of this Award. The Tribunal will henceforth for convenience refer to the Respondent's translation from the German original (attached to the First Award as Annex 7) when quoting the provisions of the BIT in English.

4. In its Statement of Claim, Euram Bank claimed that changes in the law on health insurance in the Slovak Republic, adopted in 2007 and entering into force in 2008, had destroyed the value of its investment in a health insurance company called Chemická zdravotná poist'ovňa Apollo ("Apollo"). Euram Bank maintained that this action amounted to expropriation (within the meaning of Article 4(1) of the BIT), as well as to a violation of the requirement of fair and equitable treatment in Article 2 of the BIT and of the provisions of Article 5 of the BIT regarding transfers. The factual background and the claim are set out in detail in the First Award.

5. On 5 November 2010, the Respondent filed its Statement of Defence, which raised four objections ("the original jurisdictional objections") to the jurisdiction of the Tribunal:

   (1) that the arbitration provision of the BIT was no longer valid, because Austria and the Slovak Republic were both Member States of the European Union ("EU");

   (2) that Euram Bank's claims did not arise out of a qualifying investment;

   (3) that the claims under Articles 2 and 4 of the BIT fell outside the scope of the arbitration provision of the BIT; and

   (4) that the claims for alleged breach of Article 2 of the BIT did not comply with conditions which were a prerequisite of jurisdiction.

   These objections are described in greater detail in paragraph 48 of the First Award.

6. The Tribunal ordered bifurcation of the proceedings and a hearing on the Respondent's jurisdictional objections was held on 19 and 20 December 2011. While the Tribunal was considering its decision on the jurisdictional objections, the Respondent submitted, on 26 May 2012, a Supplementary Statement of Defence in which it raised fresh

jurisdictional objections ("the new jurisdictional objections") arising out of proceedings instituted by the Claimant in the District Court of Bratislava I. Those objections are set out at paragraphs 87-89, below. After hearing the views of the Claimant, the Tribunal issued Procedural Order No. 4 on 8 June 2012, in which it stated that, as the work of drafting an award regarding the original jurisdictional objections discussed at the December 2011 hearing was already well advanced, the Tribunal would defer any consideration of the new jurisdictional objections until it had rendered an award on the original jurisdictional objections.

7. In the First Award, adopted on 22 October 2012, the Tribunal dismissed the Respondent's first and second original jurisdictional objections but allowed the third original jurisdictional objection and concluded that it therefore lacked jurisdiction over all aspects of the Claimant's claim other than the claim under Article 5 of the BIT. The Tribunal held that it was unnecessary to pronounce on the fourth original jurisdictional objection. The Tribunal stated that the Award was "without prejudice to the admissibility or the merits of the objections referred to in the Respondent's Supplementary Statement of Defence" (First Award, para. 39).

8. By letter dated 14 January 2013, the Claimant requested that the Tribunal schedule a procedural meeting for the purpose of establishing a timetable for the consideration of the new jurisdictional objections and, should the objections be rejected, the remainder of the proceedings up to the final hearing on the merits with regard to the Article 5 claim.

9. On 25 January 2013, the Claimant transmitted a joint draft procedural timetable covering the remaining jurisdictional phase and a possible merits phrase. On the same day, the Respondent confirmed its assent to the provisional timetable contained in the Claimant's letter but clarified that its participation in the proceedings was without prejudice to its continued objection to the Tribunal's jurisdiction on grounds rejected in the First Award and reserved its rights with respect to post-award remedies.

10. On 28 January 2013, the Tribunal conducted a procedural meeting with the Parties by telephone conference call.

11. On 31 January 2013, the Tribunal issued Procedural Order No. 5, which established a timetable for written submissions and a hearing on the Respondent's Supplementary Statement of Defence as follows:

> The Claimant shall file its Reply to the Supplementary Statement of Defence by 28 March 2013.
>
> The Respondent shall file its Rejoinder to the Claimant's Reply by 23 May 2013.
>
> A hearing on jurisdiction will be held at the Peace Palace in The Hague on 3 June 2013.
>
> The precise duration of the hearing will be determined at a later date but it will not last longer than one day.

12. On 28 March 2013, the Claimant filed its Reply to the Respondent's Supplementary Statement of Defence ("Reply") and accompanying documents.

13. On 15 May 2013, the Claimant submitted a statement from Mr. Per Runeland, one of the Claimant's legal experts, regarding his "past and present relations ... with any Parties, Counsel or the Members of the Tribunal" in accordance with the requirement of paragraph 5.3 of Procedural Order No. 1.

14. On 24 May 2013, the Respondent filed its Rejoinder on the Supplementary Statement of Defence ("Rejoinder") and accompanying documents.

15. By the letters dated 27 May 2013, and 28 May 2013, the Claimant objected to the scope and content of the Respondent's Rejoinder, submitted a document production request, and requested that the 3 June 2013 hearing be vacated. The Respondent opposed these applications by letter dated 28 May 2013. The Claimant responded by letter dated 29 May 2013.

16. On 30 May 2013, the Tribunal issued Procedural Order No. 6, recording the orders issued by the Presiding Arbitrator, on behalf of the Tribunal, during a 29 May 2013 telephone conference call as follows:

> 3. Having carefully considered the [Parties'] correspondence, the Tribunal has decided that the hearing scheduled for 3 June 2013 cannot proceed as planned. That hearing is hereby vacated.
>
> 4. Considering the Claimant's request for an opportunity to make an additional written submission and, in particular, to respond to the Expert Opinions of Prof. Klučka and Prof. Heuman submitted by the Respondent, the Tribunal grants the Claimant leave to submit, by 31 July 2013:
>
> (i) a brief written submission, confined to responding to issues raised in the Respondent's Rejoinder that were not expressly dealt with in the Respondent's Supplementary Statement of Defence;

(ii) an expert opinion on Slovak law, confined to responding to issues raised in the Expert Opinion of Prof. Klučka that were not expressly dealt with in the Respondent's Supplementary Statement of Defence; and

(iii) a supplementary expert opinion by Mr. Runeland, confined to responding to issues raised in the Expert Opinion of Prof. Heuman that were not expressly dealt with in the Respondent's Supplementary Statement of Defence or the prior Expert Opinion of Mr. Runeland.

5. The Tribunal considers that, to the extent that Part V of the Respondent's Rejoinder ("EURAM's Conduct Is Inconsistent With Its Duty To Arbitrate In Good Faith, And As Such Should Be Sanctioned By Dismissal For Lack Of Jurisdiction") constitutes a separate jurisdictional objection, such objection has not been raised in a timely manner according to Articles 20 and 21 of the UNCITRAL Rules and is hereby dismissed.

6. The Parties shall, by 21 August 2013, submit an agreed chronology of the steps taken in both the Slovak court proceedings and this arbitration, identifying where necessary any points of disagreement between them.

7. The Respondent shall, by 7 June 2013, either produce the "contract notice" identified in the Claimant's letter dated 28 May 2013 or, if that "contract notice" does not exist, confirm that such is the case and furnish a brief explanation.

8. By 2 September 2013, each Party shall inform the Tribunal and the other Party of the expert/s that it wishes to cross-examine at the hearing. In the absence of a request for cross-examination, such experts shall not be examined at the hearing.

9. A hearing on jurisdiction will be held at the Peace Palace in The Hague on 16 September 2013, commencing at 9:00 am and finishing no later than 5:00 pm.

17. By letter dated 3 June 2013, the Respondent explained that no "contract notice" as referred to in paragraph 7 of Procedural Order No. 6 exists. The Respondent at the same time requested that the 31 July 2013 deadline set forth in paragraph 4 of Procedural Order No. 6 for the Claimant's further submissions in response to the Respondent's Rejoinder be moved up to 15 July 2013. The Claimant opposed this application by letter dated 4 June 2013.

18. By letter dated 5 June 2013, the Claimant requested (i) an English translation of Article IV of the Representation Agreement with Mr. Vozar (Exhibit R-18) and (ii) copies and translations of certain cases on which the Respondent's expert, Prof. Heuman, relied. The Respondent opposed these applications by letter dated 7 June 2013.

19. On 11 June 2013, the Tribunal issued Procedural Order No. 7, that modified the previous Procedural Order No. 6 as follows:

> 3. Having carefully considered the [Parties' relevant correspondence], the Tribunal establishes 22 July 2013 as the new deadline for the Claimant's further submissions. Paragraph 4 of Procedural Order No. 6 is hereby amended accordingly.
>
> 4. Having carefully considered the [Parties' relevant correspondence], the Tribunal issues the following decisions:
>
> (i) The Tribunal declines to order the Respondent to furnish an English translation of Article IV of the Representation Agreement with Mr. Vozar (R-18). If the Claimant considers that this Article is of significance for the issues currently before the Tribunal, it should submit its own translation of the Article with the further submissions referred to above;
>
> (ii) In order for the Tribunal to be able to assess for itself the cases that are cited by the Parties' experts on Swedish law (namely, Mr. Runeland and Prof. Heuman), each Party is required to provide the Tribunal with copies and full English translations of all cases cited and relied upon by their respective experts;
>
> (iii) To the extent that a full translation of any given case would be unduly burdensome, the Tribunal invites the Parties to agree on the portion that must be translated and, in case of disagreement, to apply to the Tribunal for a decision;
>
> (iv) Copies and translations of the cases cited in the existing Expert Opinions of Mr. Runeland and Prof. Heuman shall be submitted by the Parties by 2 July 2013; and
>
> (v) Copies and translations of the cases cited in the Supplementary Expert Opinion of Mr. Runeland shall be submitted together with that opinion by 22 July 2013.

20. By letter dated 2 July 2013, the Respondent submitted certain updated and new exhibits and legal authorities, including new Exhibits R-33 to R-36.

21. On 22 July 2013, the Claimant submitted its Rebuttal to Respondent's Rejoinder ("Rebuttal") and accompanying documents. In its letter enclosing its Rebuttal, the Claimant also objected to the submission by the Respondent of Exhibits R-33 to R-36.

22. By letter dated 31 July 2013, the Respondent responded to the Claimant's objection to its submission of Exhibits R-33 to R-36.

23. By letter dated 6 August 2013, the Respondent registered its objections to certain sections of both the Claimant's Rebuttal and the Supplemental Opinion of Mr. Per

Runeland dated 19 July 2013 on the basis that these submissions exceeded the scope permitted by Procedural Order No. 6, and requested that these sections be excluded from the record. The Claimant opposed the Respondent's objections by letter dated 7 August 2013.

24. On 9 August 2013, the Tribunal issued Procedural Order No. 8, by which it decided as follows:

> 2. Having carefully considered the [Parties' relevant correspondence], as well as reviewed the said exhibits, the Tribunal rejects the Claimant's objection to Exhibits R-33 to R-36 and admits these documents into the record of these proceedings.
>
> 3. While the submission of Exhibits R-33 to R-36 was not specifically authorized by the Tribunal, the Tribunal nevertheless admits these documents on the exceptional basis that they were not available to the Respondent at the time that it filed its Rejoinder and that they are relevant to the issues raised at this stage of the arbitration.
>
> 4. The Tribunal considers that the Claimant would not be unduly prejudiced by the admission of these exhibits, and may address these documents at the 16 September 2013 hearing to the extent that it has not already done so in its prior written submissions.
>
> 5. In relation to the Respondent's application to exclude from the record certain sections of the Claimant's Rebuttal submission as well as certain sections of Mr. Runeland's Supplemental Expert Opinion, the Tribunal has taken note of the Respondent's letter dated 6 August 2013 and the Claimant's letter dated 7 August 2013. The Tribunal invites a substantive response by the Claimant to the Respondent's application by 16 August 2013.

25. By letter dated 14 August 2013, the Claimant responded to the Respondent's application to exclude from the record certain sections of the Claimant's Rebuttal and the Supplemental Expert Opinion of Mr. Runeland.

26. On 20 August 2013, the Tribunal issued Procedural Order No. 9, which stated as follows:

> 1. The Tribunal notes the Parties' correspondence regarding the Respondent's application to exclude from the record certain sections of the Claimant's Rebuttal submission as well as certain sections of the Supplemental Expert Opinion of Mr. Runeland, including the Respondent's letter dated 6 August 2013, the Claimant's letter dated 7 August 2013, and the Claimant's letter dated 14 August 2013.
>
> 2. The Tribunal also recalls the provisions of Procedural Order No. 6, whereby the Claimant was granted leave to make the following further written submissions beyond those foreseen in Procedural Order No. 5:

"(i) a brief written submission, confined to responding to issues raised in the Respondent's Rejoinder that were not expressly dealt with in the Respondent's Supplementary Statement of Defence;

(ii) an expert opinion on Slovak law, confined to responding to issues raised in the Expert Opinion of Prof. Klučka that were not expressly dealt with in the Respondent's Supplementary Statement of Defence; and

(iii) a supplementary expert opinion by Mr. Runeland, confined to responding to issues raised in the Expert Opinion of Prof. Heuman that were not expressly dealt with in the Respondent's Supplementary Statement of Defence or the prior Expert Opinion of Mr. Runeland."

3. Having carefully considered all of the above, the Tribunal accepts the Respondent's application in respect of paragraphs 36-49, 62-66, 105-106, and 191-200 of the Claimant's Rebuttal, which are hereby excluded from the record of this arbitration, and rejects the Respondent's application otherwise, for the following reasons:

(i) As regards paragraphs 4, 9-21, and 28-35 of the Claimant's Rebuttal, the Tribunal considers that these paragraphs respond to issues raised in the Respondent's Rejoinder that were not expressly dealt with in the Respondent's Supplementary Statement of Defence, namely the Respondent's argument that "Article 20 creates a presumption under which supplementation of defences is permitted as a matter of right" (paragraphs 189-198 of the Rejoinder). These submissions thus fall within the scope of paragraph 4(i) of Procedural Order No. 6.

(ii) As regards paragraphs 64-66, 83, and 105-106 of the Claimant's Rebuttal, the Tribunal considers that, with the exception of paragraph 83, these submissions fall outside the scope of paragraph 4(i) of Procedural Order No. 6. The issue of the sameness of the dispute before the Slovak courts and in this arbitration was expressly dealt with in the Supplementary Statement of Defence and was in any event already addressed in detail in the Claimant's Reply. On the other hand, paragraph 83 relates to expert evidence regarding the characterization of a claim as a matter of Slovak law in relation to the Claimant's argument that its action before the Slovak courts served a conservatory purpose (and the Respondent's refutation thereof in its Rejoinder), and therefore falls within the scope of paragraphs 4(i) and (ii) of Procedural Order No. 6.

(iii) As regards paragraphs 36-63 of the Claimant's Rebuttal and paragraphs 42-51 of the Supplementary Expert Opinion of Mr. Runeland, the Tribunal considers that, with the exception of paragraphs 58-59 of the Claimant's Rebuttal, these submissions fall outside the scope of paragraphs 4(i) and (iii) of Procedural Order No. 6. As the Claimant itself concedes, the issue of the Respondent's potential waiver of the right to invoke Claimant's waiver was not dealt with in the Respondent's Rejoinder and was already addressed in detail in the Claimant's Reply. Nevertheless, the Tribunal exceptionally admits paragraphs 50-61 of the

Claimant's Rebuttal and paragraphs 42-51 of the Supplementary Expert Opinion of Mr. Runeland on the basis that they relate to a relevant legal authority that was not available to the Claimant at the time that it filed its Reply.

(iv) As regards paragraphs 191-200 of the Claimant's Rebuttal, the Tribunal considers that these paragraphs raise new arguments that were not dealt with in any of the Parties' prior written submissions and consequently fall outside the scope of paragraph 4(i) of Procedural Order No. 6.

4. The above decision is issued in accordance with Article 22 (regarding further written statements) and Article 25(6) (regarding the admissibility of evidence) of the UNCITRAL Rules, as well the Tribunal's general discretion as to matters of procedure under Article 15(1) of the UNCITRAL Rules. The Tribunal is unaware of any mandatory rule applicable to the arbitration which might preclude the Tribunal's issuance of this order in accordance with the abovementioned provisions of the UNCITRAL Rules, notwithstanding any discretion or duty the Tribunal may have to consider applicable law beyond the confines of the Parties' submissions. The Parties shall in any event each have a further opportunity to develop their arguments and rebut the other Party's arguments orally at the hearing.

27. By e-mail of 21 August 2013, pursuant to paragraph 8 of Procedural Order No. 6, the Claimant submitted an agreed chronology of the steps taken in the Slovak court proceedings. The Respondent confirmed the Parties' agreement on the chronology by e-mail of the same date.

28. By letter dated 23 August 2013, the Respondent sent the Tribunal a letter on behalf of the Parties recording their agreement on the organization of the hearing set for 16 September 2013. The Claimant confirmed the Parties' agreement by later e-mail of the same date. On this day as well, the Presiding Arbitrator conducted a pre-hearing meeting with the Parties by telephone conference call.

29. On 16 September 2013, the Tribunal held a second hearing on jurisdiction at the Peace Palace, The Hague, the Netherlands. Present at the hearing were:

The Tribunal:
Sir Christopher Greenwood
Professor Brigitte Stern
Dr. Dr. Alexander Petsche

For the Claimant:
Mr. Viktor Popovic, CEO, European American Investment Bank AG
Dr. Erhard Böhm
Mr. Stanislav Durica
Ms. Martina Novylsedláková
Ms. Marie-Christine Motaabed

For the Respondent:
Ms. Andrea Holíková, Ministry of Finance of the Slovak Republic
Mr. Tomáš Jucha, Ministry of Finance of the Slovak Republic
Ms. Miriama Kiselyová, Ministry of Finance of the Slovak Republic
Mr. Mark Clodfelter
Mr. David Pawlak
Mr. Constantinos Salonidis
Ms. Diana Tsutieva
Ms. Anna Aviles-Alfaro

For the PCA:
Mr. Martin Doe
Ms. Camille Ng.

C. STATEMENT OF FACTS

30. This section sets out the factual chronology relating specifically to the proceedings in the Slovak courts, which are the basis for the new jurisdictional objections, and repeats certain parts of the procedural history of this arbitration in order to set those court proceedings in the context of the arbitration. An agreed chronology of the events in both this arbitration and the Slovak court proceedings is appended to this Award as Annex A.

Commencement of the Arbitration

31. Euram Bank commenced the arbitration proceedings on 23 November 2009. On 5 November 2010, the Respondent filed its Statement of Defence and Request for Bifurcation in the arbitration.

The Petition for the Commencement of Proceedings in the District Court Bratislava I

32. On 22 November 2010, the Claimant filed a Petition for the Commencement of Proceedings against the National Council of the Slovak Republic in the Bratislava Court.[1] The Petition referred to the same developments in the law on health insurance which form the factual basis for the claim in the arbitration. After reciting those facts, the Petition stated:

> In our opinion, the Slovak Republic breached its obligations under the relevant provisions of the Treaty between the Czech and Slovak Federative Republic and the Republic of Austria concerning the Promotion and Protection of Investments dated 15 October 1990 (hereinafter as the "Investment Protection Treaty"), which are outlined below in this Petition for the Commencement of Proceedings.[2]

[1] Exhibit RL-344 ("Petition").
[2] Exhibit RL-344, para. 11.

The Investment Protection Treaty referred to in this passage is the BIT on which the Claimant bases its case in the present arbitration proceedings. The Petition went on to allege violations of Articles 2, 4 and 5 of the BIT, which were the same provisions relied upon by the Claimant in its 2009 Notice of Arbitration and Statement of Claim. The sum claimed in the Petition, EUR 131,400,000,[3] was the same as the sum claimed in the arbitration.

33. The Petition made clear that the Claimant had also brought arbitration proceedings regarding the same facts. Thus, immediately after the passage quoted above, the Petition went on to state:

> Using the identical legal reasoning as in this Petition for the Commencement of Proceedings, on 23 November 2009 the Claimant initiated an arbitration proceedings [sic] against the Slovak Republic under Article 8 of the Investment Protection Treaty. Recently, the arbitration tribunal has been successfully set up and the matter in question is pending decision.[4]

The Claimant went on to state that it had filed the Petition in reaction to the award in *Austrian Airlines v. Slovak Republic* (9 October 2009), in which an arbitration tribunal had held that it lacked jurisdiction in respect of a claim for alleged expropriation brought under the same BIT.[5] The Claimant stated that the Respondent in the present arbitration would raise objections to jurisdiction similar to those which had succeeded in *Austrian Airlines*. The Petition continued:

> The Claimant is of the opinion that the Arbitration Tribunal does have the competence to decide on the matter, however, the session of the Arbitration Tribunal that will also deal with the issue of competence will take place as late as in August 2011. The Claimant believes that the primary forum for its claims to be raised and decided on is the Arbitration, however, the decision on the competence of the arbitration tribunal will most likely not be issued before the end of 2011. The Claimant therefore decided to file this Petition for the Commencement of Proceedings in order to protect and reserve its rights, including avoiding the possibility of its right to pecuniary performance from the Slovak Republic becoming statute-barred or extinguished.[6]

34. In addition to alleging violations of the BIT, the Petition also maintained that the change in the law on health insurance breached the provisions of the Constitution of the Slovak Republic[7] and the European Convention on Human Rights.[8]

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[3] Exhibit RL-344, paras. 12 and 122.
[4] Exhibit RL-344, para. 13.
[5] The *Austrian Airlines* award is discussed in paras. 374 and 438 of the First Award.
[6] Exhibit RL-344, para. 15.
[7] Exhibit RL-344, paras. 18-26, 46-58 and 72.
[8] Exhibit RL-344, paras. 27-9, 59-71 and 74.

35. The Petition concluded with a Petition for the Suspension of Proceedings.[9] This Petition had two parts. First, the Claimant requested the suspension of proceedings under Section 109(1)(b) of the Code of Civil Procedure, "due to the referral of the case to the Constitutional Court to deliver an opinion whether the generally binding law which is connected with the merits of the dispute is in contradiction with the Slovak Constitution and/or with an international treaty binding for the Slovak Republic."[10] Secondly, the Claimant sought suspension of the proceedings, under Section 109(2)(c) of the Code of Civil Procedure, pending a decision from the Tribunal. This second request was couched in the following terms:

> If the District Court Bratislava I will come to the conclusion that the conditions stated in Section 109(1)(b) of the CCP are not met, we propose that the District Court Bratislava I will, due to grounds described in paragraphs 13 to 15 hereof adopt a resolution pursuant to section 109(2)(c) of the CCP and issue the suspension of this proceedings [sic] until the proceedings described in paragraphs 13 to 15 hereof will be completed.[11]
>
> The proceedings described in paragraphs 13 to 15 deal with a question which may have relevance for the decision of the Court, namely the question of expropriation or forced restriction of ownership rights of the Claimant by the interference of the Slovak Republic in the form of adoption of the [Slovak legislation on health insurance], as well as the question concerning the obligation of the Slovak Republic to pay to the Claimant compensation for the breach of certain provisions of the Investment Protection Treaty.[12]

Developments between the Filing of the Petition in the District Court and the December 2011 Jurisdiction Hearing of the Tribunal

36. The Claimant did not inform the Tribunal or the Respondent that it had filed the Petition. In its Reply to the Respondent's Supplementary Statement of Defence, the Claimant stated that:

> The Claimant saw no reason to inform the Tribunal of the Petition, a petition in which it had informed the Court that the Tribunal, and not the Court, had jurisdiction. In November 2011 Claimant considered the Petition as irrelevant to the Tribunal's jurisdiction as it considers it irrelevant today.[13]

Counsel for the Claimant repeated this position at the hearing on 16 September 2013.[14]

37. In accordance with Slovak procedural law, it was for the District Court to serve the Petition upon the National Council. As explained below, that was not done for several

[9] Exhibit RL-344, paras. 91-121.
[10] Exhibit RL-344, para.116.
[11] Exhibit RL-344, para. 120. The translation renders the last clause as "until the proceedings described in paragraphs 13 to 15 hereof will not be completed." The word "not" is clearly an error in the translation or the typing of the document.
[12] Exhibit RL-344, para. 121.
[13] Reply, para. 39.
[14] Second Jurisdictional Hearing, Transcript (16 September 2013), p. 187.

months. As a result, at the time that the next steps were taken in the arbitration proceedings, neither the Tribunal, nor the Respondent was aware of the existence of the Petition.

38. Before the Respondent became aware of the proceedings in the District Court, the following steps were taken in the arbitration proceedings:

- On 30 November 2010, i.e. one week after the filing of the Petition, the Claimant agreed to the bifurcation of the proceedings.

- On 2 December 2010, the Tribunal issued Procedural Order No. 2, which provided for bifurcation and laid down a timetable for the jurisdictional phase of the proceedings.

- On 22 February 2011, the Respondent submitted, in accordance with Procedural Order No. 2, its Memorial on Jurisdiction and accompanying documents.

39. On 13 May 2011, the Bratislava Court served the Petition on National Council of the Slovak Republic, the body designated as the defendant in the Petition. The Petition was accompanied by the Court Resolution dated 6 May 2011, and requested that the National Council respond to the Petition within 15 days.[15]

40. On 14 May 2011, the Claimant filed its Counter-Memorial on Jurisdiction in the arbitration.

41. On 20 May 2011, the National Council submitted its First Time Extension Request to the Bratislava Court asking for more time to reply to the Petition, owing to its "seriousness and extent."[16] On 14 June 2011, the Bratislava Court granted the First Time Extension Request and gave the National Council until 14 July 2011 to reply to the Petition.[17]

42. On 16 June 2011, the Respondent filed its Reply on Jurisdiction in the arbitration. In that Reply, the Respondent informed the Tribunal that the Claimant had commenced proceedings in the District Court of Bratislava I and complained that this conduct was at

[15] Exhibit RL-399.
[16] Exhibit CL-201.
[17] Exhibit R-15.

odds with the Claimant's position in the arbitration that it had no remedies open to it in the courts of Slovakia.[18]

43. On 7 July 2011, the National Council presented its Second Time Extension Request to the Bratislava Court asking for another extension of time in order to conduct a tender for legal services.[19] The Bratislava Court granted this request on 14 July 2011 and set a new deadline of 14 October 2011 for the reply.

44. On 18 July 2011, the Claimant filed its Rejoinder on Jurisdiction in the arbitration. In response to the passages in the Reply regarding its action in the Slovak courts, the Claimant stated that it had initiated the proceedings in the District Court as a precautionary measure and had informed the Court that it considered the arbitration to be the primary forum.[20] It added:

> Furthermore, in view of the pending arbitration, Euram Bank asked the district court to suspend its proceedings until the Tribunal's award on jurisdiction. Almost eight months have passed now and the district court has not yet decided on Euram Bank's request. The case is in a state of de facto suspension. Euram Bank's Statement of Claim was served on the National Council acting on behalf of the Slovak Republic on 13 May 2011. Interestingly, the Slovak Republic requested an extension of the time for filing the Statement in Defence until 14 July 2011 which, coincidentally or not, is the time by which Euram Bank must file his Rejoinder on Jurisdiction.[21]

45. On 3 August 2011, the Claimant responded to the Second Time Extension Request and requested that the Bratislava Court reconsider its 14 July 2011 decision and set a shorter deadline for the reply.[22] The Claimant argued that the extension of time breached its rights in the Slovak proceedings and was contrary to the principle of procedural economy. The Claimant referred to the hearing which was due to take place before the Tribunal on 24-28 August 2011. It did not, however, mention the fact that on 12 July 2011 the Claimant had filed its second challenge to Professor Stern. That challenge was still under consideration by the Secretary-General of the PCA, as the appointing authority, on 3 August 2011. While the challenge was subsequently rejected (on 15 August 2011), at the time that it filed its opposition to the Second Time Extension Request, the Claimant was actively pursuing a challenge which, had it succeeded, would inevitably have resulted in a significant postponement of the jurisdictional hearing

[18] Reply of 16 June 2011, paras. 5 and 363-366.
[19] Exhibit CL-203.
[20] Rejoinder of 18 July 2011, paras. 202-3.
[21] Rejoinder of 18 July 2011, para. 205.
[22] Exhibit R-14.

before the Tribunal, as the Tribunal would have had to be reconstituted and a new member given time to read the substantial pleadings and more than 1,000 exhibits and legal authorities already filed by the Parties. The Tribunal has not been informed of any response by the District Court to this submission by the Claimant.

46. The jurisdictional hearing was later postponed (by decision of the Presiding Arbitrator notified to the Parties on 10 August 2011) and re-scheduled for 19-20 December 2011. That postponement had been requested by the Respondent on 4 August 2011, i.e. the day after the Claimant filed its opposition to the request for extension of time with the District Court, on account of the delay occasioned by the challenge proceedings. The Claimant opposed that request by letter of 8 August 2011.[23]

47. On 2 September 2011, the Tribunal issued Procedural Order No. 3 in the arbitration and subsequently invited Austria, the Czech Republic and the European Commission to file *amicus curiae* briefs on the Intra-EU BIT Issue.

48. On 12 October 2011, the National Council submitted a Third Time Extension Request to the Bratislava Court.[24] On 20 October 2011, the Bratislava Court granted this request and set a new deadline of 29 February 2012 for the reply.[25]

49. On 13 October 2011, 28 October 2011, and 1 November 2011, respectively, the European Commission, the Republic of Austria, and the Czech Republic submitted their observations on the Intra-EU BIT Issue in the arbitration.

50. On 21 November 2011, a pre-hearing telephone conference call was held between the Tribunal and the Parties in preparation for the jurisdictional hearing in the arbitration. At this conference call:

> The Respondent informed the Tribunal and the Claimant of the possibility that certain developments in connection with Claimant's lawsuit in the Slovak courts might lead the Respondent to raise further jurisdictional objections related to those new developments.[26]

51. On 30 November 2011, the Parties submitted their comments on the *amici curiae* submissions in the arbitration.

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[23] See the First Award, paras. 17-22.
[24] Exhibit R-16.
[25] Exhibit R-17.
[26] Minutes of Pre-Hearing Conference, para. 12.

52. On 19-20 December 2011, the first jurisdictional hearing in the arbitration took place. In response to a question from the Presiding Arbitrator, counsel for the Respondent said, at the outset of the hearing:

> we alluded in our pre-hearing conference call with you to the possibility that facts would emerge which would give rise to a possible objection to jurisdiction. All we can say right now is that those facts have not yet emerged and so we really have nothing more to say on that issue at this point. If they do and when they do, we will promptly inform the Tribunal and of course the Claimant.[27]

53. The hearing then proceeded without reference to any implications which the Slovak proceedings might have for the jurisdiction of the Tribunal.

Developments following the December 2011 Jurisdiction Hearing

54. On 20 January 2012, the National Council of the Slovak Republic and JUDr. Vozár entered into a Contract for Legal Representation and Legal Services for the representation of the Respondent in the Bratislava Court.[28] On 27 January 2012, the National Council granted JUDr. Vozár Power of Attorney.[29]

55. On 29 February 2012, the National Council filed its Reply in the Slovak court proceedings, which was delivered to the Bratislava Court on 1 March 2012.[30] In this document, the National Council maintained that it was not the proper defendant in the proceedings, that the Court could not designate a different defendant and that "this logical contradiction can be eliminated only by the Claimant designating an authority having legal personality as the authority to act on behalf of the Slovak Republic."[31] The National Council also maintained that the BIT was invalid because it was contrary to European Union law and asserted that this was a matter which could not be decided by the District Court but which should be made the subject of a reference to the Court of Justice of the European Union (the "CJEU") for a preliminary ruling, pursuant to Article 234 of the Treaty on the Functioning of the European Union (the "TFEU"). The Respondent therefore requested that the District Court suspend the proceedings pending a ruling from the CJEU.

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[27] First Jurisdictional Hearing, Transcript (19 December 2011), pp. 4-5.
[28] Exhibit R-18.
[29] Exhibit R-19.
[30] Exhibit R-20.
[31] Exhibit R-20, p. 2.

56. On 5 March 2012, the National Council made an additional submission to the Bratislava Court concerning the views of the Commission of the European Union regarding the compatibility of BITs with EU law.[32]

57. By letter dated 3 April 2012, the Respondent informed the Tribunal in the arbitration of the filing of the National Council's Reply in the Bratislava Court. In that letter, the Respondent stated as follows:

> The National Council objected to the jurisdiction of the national court on grounds of the incompatibility between the provisions of the treaty and EU law. According to the National Council's submission, that incompatibility affects the validity of the legal basis of the alleged obligation of the Slovak Republic and hence has a preliminary character vis-à-vis the determination of the latter's liability.

58. By letter dated 4 April 2012, the Claimant informed the Tribunal of the Slovak Republic's action to set aside the *Eureko B.V. v. The Slovak Republic* award in the Frankfurt Court.

59. By letters dated 13 April 2012, the Parties submitted further comments on the matters raised in the Parties' letters dated 3 April 2012 and 4 April 2012. The Respondent's letter of 13 April contained the following statement:

> As announced, the reply statement [see para. 55, above] defends on grounds of the incompatibility between the provisions of the Treaty and EU law, and requested that the national court refer to the Court of Justice of the European Communities ... the question whether provisions of the Treaty on the Functioning of the EU ... prevent the application of the Treaty.

60. On 18 April 2012, the Claimant formally accepted service of the Reply in the Bratislava Court proceedings by obtaining a copy of it from the court file. Prior to that date, it had not seen the text of the Reply.

61. On 25 May 2012, the Respondent filed its Supplementary Statement of Defence, in which it raised the new jurisdictional objections. In that Statement, the Respondent referred to the Reply in the Bratislava District Court and stated that "in its Reply, the National Council also objected to the jurisdiction of the Bratislava Court on grounds of the incompatibility between the provisions of the Treaty and EU law".[33] However, it

[32] Exhibit R-21.
[33] Supplementary Statement of Defence, para. 6.

went on to refer to "the National Council's Reply, in which the Slovak Republic submits to the Bratislava Court's jurisdiction over the dispute".[34]

62. On 6 June 2012, the Respondent submitted additional evidence to the Bratislava Court relating to the motion to stay proceedings.

63. On 8 June 2012, the Tribunal issued Procedural Order No. 4 in which it stated that, as the work of drafting an award regarding the original jurisdictional objections discussed at the December 2011 hearing was already well advanced, the Tribunal would defer any consideration of the new jurisdictional objections until it had rendered an award on the original jurisdictional objections.

64. On 16 July 2012, the Claimant submitted a statement to the Bratislava District Court addressing the National Council's statement that was delivered to the Court on 1 March 2012.[36] In this statement, the Claimant maintained that the defendant in the proceedings in the District Court was the Slovak Republic itself (i.e. the Respondent in this arbitration) and that it was not seeking to argue that the National Council was itself liable. It also contended that there was no case for a preliminary reference to the CJEU. The statement concluded:

> It appears to us that we have provided sufficient evidence that the Investment Protection Agreement applies to the legal relation involved in these proceedings, and there is no contradiction between this Investment Protection Agreement and EU law, and therefore we request the District Court of Bratislava to dismiss Respondent's request to suspend the proceedings and award a decision on the dispute in accordance with the provisions of the Investment Protection Agreement, which governs the legal relationship between Claimant and Respondent, as well as the claim brought by Claimant against Respondent in these proceedings.[37]

65. On 8 August 2012, the Claimant submitted a statement to the Bratislava Court addressing the further evidence produced by the National Council in relation to the request to suspend proceedings.[38]

66. On 18 September 2012, the National Council submitted to the Bratislava Court a notice of change of legal representation along with a request for 30 days to review the file.

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[34] Supplementary Statement of Defence, para. 12.

[36] Exhibit R-23.
[37] Exhibit R-23, p. 10.
[38] Exhibit R-24.

67. On 18 October 2012, the National Council requested the Bratislava Court to issue a decision on the requested suspension of the proceedings.

68. On 22 October 2012, the Tribunal issued its First Award on Jurisdiction.

69. On 31 October 2012, the Bratislava Court issued a request to the Claimant to inform the Court within 10 days whether it maintained its application for a stay of proceedings under Section 109(1)(b) of the Code of Civil Procedure[39] in view of the finding of the Constitutional Court in its judgment delivered on 24 March 2011.[40] The request made no mention of the other motion for suspension of the proceedings, which had been made under Section 109(2)(c) of the Code of Civil Procedure and asked the District Court to suspend the proceedings pending the outcome of the arbitration (see paragraph 35, above).

70. On 16 November 2012, the Claimant replied to the 31 October 2012 request of the Bratislava Court.[41] Its reply confirmed that it still sought suspension of the proceedings under Section 109(1)(b). It did not mention the Section 109(2)(c) motion, nor did it refer to the arbitration proceedings or to the First Award on Jurisdiction.

71. On 7 January 2013, the Bratislava Court issued a ruling that (i) rejected the motion of the Claimant under Section 109(1)(b) of the Code of Civil Procedure for the suspension of proceedings and the referral of the action to the Constitutional Court of the Slovak Republic; (ii) rejected the motion of the Respondent for the suspension of the proceedings and submission of a preliminary reference to the Court of Justice of the European Union; (iii) rejected the motion of the Respondent for the suspension of the proceedings pursuant to Section 109(1)(b) of the Code of Civil Procedure; and (iv) rejected the motion of the Respondent for the suspension of the proceedings pursuant to Section 109(2)(c) of the Code of Civil Procedure.[42]

72. In its Judgment, the District Court recited the statement made by the Claimant in its Petition (see paragraph 35, above) regarding the arbitration proceedings but made no mention of the Claimant's motion for suspension of the proceedings pending the

[39] Exhibit R-31.
[40] This judgment is reviewed in paras. 389-406 of the First Award.
[41] Exhibit R-32.
[42] Exhibit R-25.

outcome of the arbitration. The Court noted that "the decision on jurisdiction [of the arbitration tribunal] was not yet issued at the time of filing the motion".[43]

73. On 14 January 2013, the Claimant submitted a motion for evidence and the disclosure of information.[44] This motion sought disclosure of the award of the arbitration tribunal in *Achmea BV v. Slovak Republic* (7 December 2012), which was the merits phase of the proceedings originally known as *Eureko BV v. Slovak Republic,* on the ground that it might be used as evidence in the Bratislava proceedings.

74. On the same day, 14 January 2013, the Claimant also wrote to the Tribunal requesting that the Tribunal determine a schedule for addressing the Respondent's Supplementary Statement of Defence. Having ascertained the views of the Parties, on 31 January 2013, the Tribunal issued Procedural Order No. 5 by which it fixed a schedule for the submission of written arguments regarding the new jurisdictional objections.

75. On 31 January 2013, both the Claimant and the Respondent submitted appeals against the 7 January 2013 Ruling of the Bratislava Court.[45] Neither appeal mentioned the arbitration proceedings or the First Award. The Claimant's appeal made no mention of the failure of the District Court to address its motion for the suspension of proceedings pending the outcome of the arbitration.

76. On 22 February 2013, the Bratislava Court served the Respondent's appeal on the Claimant, and afforded it an opportunity to submit a response to this appeal within 10 days.

77. On 28 February 2013, the Claimant requested an extension of time to submit a response to the Respondent's appeal.[46]

78. On 4 March 2013, the Respondent submitted a response to the Claimant's appeal of the ruling of the Bratislava Court, which was delivered to the Court on 6 March 2013.[47]

[43] Exhibit R-25, p. 2.
[44] Exhibit R-26.
[45] Exhibit R-27; Exhibit R-28.
[46] Exhibit R-33.
[47] Exhibit R-29.

79. On 18 March 2013, the Respondent submitted a constitutional complaint to the Constitutional Court of the Slovak Republic.[48]

80. On 28 March 2013, the Claimant submitted its Reply to the Supplementary Statement of Defence in the arbitration proceedings.

81. On 3 April 2013, the Claimant submitted a response to the Respondent's appeal of 1 February 2013.[49] The response referred to the award on jurisdiction in *Eureko BV v. Slovak Republic* but not to the First Award in the present proceedings.[50]

82. On 16 April 2013, the Constitutional Court issued a ruling on the constitutional complaint submitted by the Respondent in which it dismissed the Respondent's application.[51]

83. On 24 May 2013, the Respondent submitted its Rejoinder on the Supplementary Statement of Defence.

84. On 28 June 2013, the Respondent submitted its Supplementary Response to the Claimant's Appeal against the ruling of the Bratislava Court of 7 January 2013.[52]

85. On 13 September 2013, the Regional Court of Bratislava dismissed the appeals by the Claimant and the Respondent against the District Court's judgment of 7 January 2013.[53] The judgment of the Regional Court recited the statement in the Claimant's 2010 Petition that it regarded the arbitration proceedings as the primary forum and noted that, at the time the Petition was filed, the Arbitral Tribunal had not decided upon its jurisdiction. It did not refer to the First Award.

86. On 16 September 2013, the second hearing on jurisdiction was held in the arbitration proceedings.

[48] Exhibit R-30.
[49] Exhibit R-34.
[50] Exhibit R-34, p. 4 and fn. 8.
[51] Exhibit R-35.
[52] Exhibit R-36.
[53] Exhibit R-37.

II. THE ISSUES CONSIDERED IN THE PRESENT AWARD

87. The Respondent raises two jurisdictional objections in the present phase of the proceedings.

88. First, the Respondent maintains that the Claimant's act of commencing the proceedings in the District Court Bratislava I and the Respondent's filing of its substantive defence in that case gave rise to an agreement between the Parties that the case should henceforth be resolved in the Slovak courts, not in the arbitration proceedings. According to the Respondent, the result was that the Tribunal was deprived of jurisdiction, since Article 8(2) of the BIT, which is the basis for the jurisdiction of the Tribunal, provides that "the dispute shall, *unless otherwise agreed,* be decided ... by way of arbitral proceedings" (emphasis added). The Respondent maintains that this agreement was concluded on 18 April 2012 when the Claimant received the Reply which the Respondent had filed with the District Court in response to the Claimant's Petition (see paragraphs 32-35, 38, 55 and 60, above).

89. Secondly, the Respondent contends that, irrespective of whether any agreement was concluded between the Parties, the Claimant's acts constitute a waiver of the right to arbitrate. This second objection is put in two ways: (a) that the filing of the Petition to Commence Proceedings in the District Court was itself sufficient to amount to a waiver; and (b) that the Claimant's conduct, taken as a whole, constitutes a waiver.

90. The Respondent requests that the Tribunal render an award:

    i. in favour of the Slovak Republic and against the Claimant, dismissing the Claimant's claims for lack of jurisdiction in their entirety and with prejudice; and

    ii. pursuant to paragraphs 1 and 2 of Article 40 of the UNCITRAL Rules, ordering that the Claimant bear all the costs of the arbitration, including the Respondent's costs for legal representation and assistance, together with interest thereon.[54]

[54] Respondent's Supplementary Statement of Defence, para. 24; Rejoinder, para. 216.

91. The Claimant maintains that the Respondent's objections were raised too late. It contends that there is no right for a party to raise jurisdictional objections after it has filed its Statement of Defence and that, even if there were such a right, the Respondent delayed for too long, after becoming aware of the Petition in the District Court and thus waived its right to object.

92. In the event that the Tribunal should reject its submission that the new jurisdictional objections were raised too late, the Claimant maintains that the objections should be dismissed. It contends that no agreement to resolve the dispute in the Slovak courts was concluded and that its conduct, whether confined to the filing of the Petition or taken as a whole, did not amount to a waiver of its right to arbitrate the dispute.

93. The Claimant requests that the Tribunal render an award:

i. in favour of the Claimant and against the Respondent, dismissing the Respondent's jurisdictional objections raised in the Supplementary Statement of Defence in their entirety and with prejudice; and

ii. ordering that the Respondent bear all the costs of this arbitration, including the Claimant's costs for legal representation and assistance, together with interest.[55]

94. The Tribunal will address these issues in the following order. First, the Tribunal will examine the Claimant's argument that the Respondent's new jurisdictional objections have been raised too late and thus cannot be entertained (Part III of the Award). Secondly, the Tribunal will consider the first objection, namely that the Parties have "agreed otherwise", within the meaning of Article 8(2) of the BIT (Part IV of the Award). Thirdly, the Tribunal will turn to the Respondent's waiver objection (Part V of the Award). The Tribunal's conclusions and order are set out in Part VI.

[55] Reply, para. 110; Rebuttal, para. 202.

III. WHETHER THE NEW JURISDICTIONAL OBJECTIONS HAVE BEEN RAISED TOO LATE

A. THE POSITIONS OF THE PARTIES

1. The Claimant

95. Article 21(3) of the UNCITRAL Rules provides that jurisdictional objections must be raised "not later than in the Statement of Defence".[56] The Claimant contends that, while Article 21(3) does not specify when a jurisdictional objection which only arises after the Statement of Defence must be raised, it implicitly requires such objections to be raised at the earliest possible opportunity.[57] This applies with special force to an arbitration that is already at an advanced stage and in which the tribunal has bifurcated the proceedings so as to treat jurisdictional objections as preliminary questions.[58]

96. The Claimant discusses three cases in support of this proposition: first, the tribunal in *CME Czech Republic BV v. The Czech Republic* found that Article 21(3) of the UNCITRAL Rules deemed waived a jurisdictional objection based on a point that had been raised for the first time at the hearing;[59] secondly, the *Alucoal* tribunal noted that Article 5(1)(i) of the Stockholm Chamber of Commerce Arbitration Rules, which is substantially similar to Article 21(3) of the UNCITRAL Rules, required a jurisdictional objection based on the waiver of the arbitration agreement to be raised in the Statement of Defence at the latest;[60] and thirdly, the tribunal in *Chevron Research Co. v. National Iranian Oil Co.* found a jurisdictional objection to have been raised too late under Article 21(3) of the Iran-US Claims Tribunal Rules on the basis that it had only been raised during a pre-hearing conference some months after the Statement of Defence.[61]

97. In this case, the Claimant notes that the Supplementary Statement of Defence was filed over a year after the Respondent had notice of the allegedly new facts.[62] The Claimant rejects the suggestion that what it describes as the Respondent's "cryptical allusions"

[56] Claimant's Rebuttal, para. 28.
[57] Claimant's Rebuttal, para. 29.
[58] Claimant's Rebuttal, para. 30.
[59] Claimant's Rebuttal, para. 31, citing Exhibit RL-134, paras. 378-380.
[60] Claimant's Rebuttal, para. 32, citing CL-223.
[61] Claimant's Rebuttal, para. 33, citing CL-224, p. 464.
[62] Claimant's Rebuttal, para. 34.

made in the pre-hearing conference call and at the December 2011 jurisdictional hearing were sufficient to preserve its later ability to object.[63]

98. The Claimant asserts that Article 20 of the UNCITRAL Rules only provides for amendments to the Statement of Claim or Defence in respect of substantive claims and defences and that it does not apply to jurisdictional objections.[64] According to the Claimant, none of the cases or other legal materials cited by the Respondent provide otherwise. The Claimant also contends that prejudice to the opposing party is likely to be caused not by amendments that modify arguments but by those that modify either the factual circumstances of the argument or the relief sought.[65]

99. But even were Article 20 of the UNCITRAL Rules applicable to this issue, the Claimant argues that the Supplementary Statement of Defence should be dismissed because of the undue delay of the Respondent in raising its jurisdictional objections.[66]

100. The Claimant rejects the Respondent's explanation for this delay – which is that the Petition was complex and required a lengthy process of procuring Slovak counsel which culminated in the engagement of Mr. Vozár on 20 January 2012 – and alleges that there was, in fact, no public procurement process at all.[67] First, the Claimant points out that there is no evidence that the Respondent did anything at all between 13 May 2011, when the Petition was served on the Respondent, and 7 July 2011, which is when the Respondent filed its second time extension request in order to conduct a public procurement process for legal counsel.[68] Secondly, the Claimant notes that when the Respondent filed its third extension request on 12 October 2011 (152 days after the service of the Petition), the Respondent still had not commenced a formal public

[63] Claimant's Rebuttal, paras. 34-35; Claimant's Reply, para. 104.
[64] Claimant's Rebuttal, paras. 9-14, citing David Caron *et al.*, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford 2006), pp. 470-477 (Exhibit RL-451) ("Caron (2006)") (stating that "the first sentence of Article 20 regulates situations where the amendment alters the subject matter of the original claim as defined in the statement of claim"). Article 20 UNCITRAL Arbitration Rules (1976) reads as follows: "During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement."
[65] Claimant's Rebuttal, paras. 15-21, referring to *Ethyl Corporation v. Canada*, *Riahi v. Iran*, *Malek v. Iran*, *Himpurna California Energy Ltd. v. Indonesia*, and *UPS v. Canada*.
[66] Claimant's Rebuttal, para. 22.
[67] Claimant's Rebuttal, paras. 23-24; Claimant's Reply paras. 6-8, 106, citing Request for Extension of Time of 20 May 2011, Exhibit CL-201 (referring to the fact that Respondent considered the Petition complex) and Request for Extension of Time of 7 July 2011, Exhibit CL-203 (referring to its alleged need to tender for legal services).
[68] Claimant's Rebuttal, paras. 148-150.

procurement process, but "made the Court believe it had" when it said that it had "dispatched" a "preliminary notice of publication of tender."[69]

101. The Claimant submits that a Slovak public procurement process commences with the publication of a "contract notice," which the Respondent admits was never published.[70] Instead, the Respondent proceeded to award the contract to Mr. Vozár to represent the Respondent in the Slovak court proceedings as well as seven other cases directly by way of the small contract exception under Article 102 PPA which is not subject to any of the procedures, statutory periods, or revision periods invoked in support of its extension requests.[71] According to the Claimant, the Respondent could have directly hired Mr. Vozár within a few days of the Petition being served in May 2011.[72]

102. The Claimant further contends that the Respondent did not in fact need to engage Mr. Vozár or any Slovak counsel to assess whether the Petition of the Claimant amounted to a waiver of its right to arbitration.[73] The Claimant argues that the Respondent admitted as much in its Rejoinder.[74] Moreover, the Claimant submits that no Slovak lawyer was necessary in respect of the Respondent's arguments that the *lex arbitri* characterizes the mere filing of the Petition to be a waiver of the right to arbitration or that the Parties had agreed that the dispute would be settled otherwise than by arbitration, within the meaning of Article 8(2) of the BIT.[75] The Claimant adds that it is inconceivable that the Respondent would have taken a different view on EU law and the validity of the BIT in the Bratislava Court proceedings from the position it had already extensively argued in the arbitration, and these arguments constituted the totality of the Respondent's eventual Reply to the Petition.[76]

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[69] Claimant's Rebuttal, paras. 151-153.
[70] Claimant's Rebuttal, para. 154, citing the Claimant's Letter dated 28 May 2013, p. 2 and the Respondent's Letter dated 3 June 2013, p. 1. The Claimant rejects the explanation of the Respondent that there was no contract notice because the newly elected government had opted against a formal tender process as a method for procuring counsel by explaining that the new government of Prime Minister Fico took office on 4 April 2012, which was two and a half months after the contract with Mr Vozár was signed. *Id.*
[71] Claimant's Rebuttal, paras. 155-158, citing Rejoinder, para. 26; Articles 2, 101, Exhibit R-18; Act No 25/2006 Coll. on Public Procurement and on the Amendment of Certain Acts, as in force until 31 December 2011, Exhibit CL-229.
[72] Claimant's Rebuttal, para. 159.
[73] Claimant's Rebuttal, paras. 25-26.
[74] Claimant's Rebuttal, paras. 25-27, citing Respondent's Rejoinder, paras. 199-201.
[75] Claimant's Rebuttal, paras. 188-190; Claimant's Reply, para. 106.
[76] Claimant's Rebuttal, paras. 186-187; Claimant's Reply, paras. 106-107; Second Jurisdictional Hearing, Transcript (16 September 2013), pp. 205:2-11.

103. On the basis of the above, the Claimant asserts that the Respondent demonstrated its intent to waive any jurisdictional objections based on the Petition by foregoing various opportunities to raise them: (a) after the Petition had been served (13 May 2011); (b) when the Respondent filed its Reply on Jurisdiction in the arbitration proceedings (16 June 2011); (c) between the filing of the Reply on Jurisdiction and the filing of the Claimant's Rejoinder on Jurisdiction (on 18 July 2011); and (d) between the filing of the Claimant's Rejoinder on Jurisdiction and the jurisdictional hearing (on 19 and 20 December 2011).[77] In fact, the Claimant notes that the Respondent itself made vague allusions at the pre-hearing conference call on 21 November 2011 and at the hearing in December 2011 to new developments in the Bratislava Court proceedings (which would eventually form the basis of its Supplementary Statement of Defence) and yet did not raise any jurisdictional objections, despite seven months having passed since it received the Petition.[78] The Claimant further points to the Respondent's letters of 3 and 13 April 2012 where the Respondent again alludes to supposed new developments including the Respondent's Reply in the Bratislava Court, but fails to assert any clear jurisdictional objection.[79]

104. Finally, the Claimant refers to the recent Swedish Supreme Court decision in *Technopromexport v. Mir's Ltd*, where the Court found that Technopromexport had waived its jurisdictional objection on the basis of the invalidity of the arbitration agreement, as it had failed diligently to investigate and then assert a clear and specific jurisdictional objection at the earliest possible time.[80] The Claimant argues that the Respondent has similarly failed to show diligence in assessing and asserting any alleged effect of the Bratislava Court proceedings on this Tribunal's jurisdiction and that the Respondent is thereby precluded from now asserting its new jurisdictional objections.[81]

2. The Respondent

105. The Respondent contends that Article 20 of the UNCITRAL Rules permits amendments to claims and defences as of right, and authorizes tribunals to reject these amendments only if these were excessively delayed and have caused prejudice to the opposing

[77] Claimant's Reply, paras. 101-104.
[78] Claimant's Reply, paras. 14-16, 104.
[79] Claimant's Reply, paras. 17-22, 105.
[80] Claimant's Rebuttal, paras. 50-54, citing *Technopromexport v. Mir's Ltd.*, Judgment dated 14 June 2013, Case No. T2104-12, Swedish Supreme Court, pp. 5, 10 (Exhibit CL-226).
[81] Claimant's Rebuttal, paras. 55-61, citing Runeland Supplemental Opinion, p. 5; Claimant's Reply, paras. 107-108.

party.[82] According to the Respondent, the *travaux préparatoires* of Article 20 support this interpretation,[83] as do the decisions of international tribunals in *Ethyl Corporation v. Canada*,[84] *Riahi v. Iran*,[85] *Malek v. Iran*,[86] *Himpurna California Energy Ltd.*,[87] and *UPS v. Canada*.[88] In addition, the Respondent notes that the 2010 version of the UNCITRAL Rules has now explicitly clarified that a tribunal may admit jurisdictional objections later than the Statement of Defence if "it considers the delay justified."[89] Accordingly, the Respondent contends that the Tribunal can disallow the jurisdictional objections in the Supplementary Statement of Defence only if it finds (i) undue delay, (ii) prejudice to

[82] Respondent's Rejoinder, paras. 190-191, citing UNCITRAL Arbitration Rules (1976), Article 20 and Caron (2006), *supra* note 64, pp. 467-475.

[83] Respondent's Rejoinder, para. 192, citing Report of the UNCITRAL on the Work of its Ninth Session, UN GAOR, 31st Sess., Supp No. 17, UN Doc. A/31/17, pp. 73-74, para. 94 (1976), reprinted in (1976) VII UNCITRAL Ybk. 66 (Exhibit RL-481) and Summary Record of the 7th Meeting of the Committee of the Whole (II), UNCITRAL, 9th Sess., UN Doc. A/CN.9/9/C.2/SR.7, pp. 4-7 (19 April 1976) (Exhibit RL-484).

[84] The Respondent notes that, in *Ethyl Corporation v. Canada*, the tribunal took note of "Article 20's presumption of amendability," and allowed the amended claim because the arbitration schedule allowed ample time for briefing and a hearing and the amendment did not otherwise cause prejudice to the other party. Respondent's Rejoinder, para. 193 citing *Ethyl Corp. v. Canada*, UNCITRAL, NAFTA Ch. 11, Award on Jurisdiction (24 June 1998), pp. 11-12, 47, 47 n 37, *reprinted in* 38 I.L.M. 708, 730 (1999) citing Stewart A. Baker & Mark D. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* (Kluwer 1992), pp. 91-92 (Exhibit RL-459).

[85] In *Riahi v. Iran*, the tribunal relied on Article 20 of the UNCITRAL Rules to allow the claimant to amend her claim to effect a substantial increase in damages – of which the final figure was presented in a post-Hearing submission – on the basis that the respondent had been afforded with "ample opportunity to respond" and was therefore not prejudiced by the amendment. Respondent's Rejoinder, para. 194, citing Caron (2006), *supra* note 64, pp. 490-491, in turn citing *Frederica Lincoln Riahi v. Iran*, Award No. 600-485-1 (27 February 2003), para. 61.

[86] In *Malek v. Iran*, the tribunal aligned itself with the so-called liberal approach towards Article 20 and allowed an amendment filed a month before the Statement of Defence was due on the basis that there was no unreasonable delay that would prejudice the respondent in this case. Respondent's Rejoinder, para. 195 citing *Reza Said Malek v. Iran*, Award (23 June 1988), Iran-U.S. Cl. Trib. Case No. 193 (ITL 68-193-3), 19 IRAN-U.S.C.T.R 48, para. 19 (Exhibit RL-482).

[87] In *Himpurna v. Indonesia*, the tribunal stated that Article 20 of the UNCITRAL Rules requires only that amendments as of right fall within the scope of the arbitration agreement and that considerations of "the fair and efficient administration of arbitral justice" favoured a liberal approach towards claim amendment and procedural rules that would guard against "maximalist and confrontational positions." Respondent's Rejoinder, para. 196 citing *Himpurna California Energy Ltd. and PT. (Persero) Perusahaan Listruik Negara*, UNCITRAL, Final Award (4 May 1999), paras. 112-113 *reprinted in* 14 Mealey's International Arbitration Report No. 12, 12/99 (Exhibit RL-469).

[88] In *UPS v. Canada*, the tribunal allowed the amended statement of claim, and interpreted Article 20 (which it also characterized as allowing amendments as of right) in view of both Article 22, which gives the tribunal discretion to require further written statements from the parties, and Article 15, which gives the tribunal discretion to conduct the arbitration so as to treat parties equally and to allow each a full opportunity to present their cases. Respondent's Rejoinder, para. 197 citing *UPS Inc. v. Canada*, NAFTA, UNCITRAL, Award on Jurisdiction (22 November 2002), paras. 131-132 (Exhibit RL-491).

[89] UNCITRAL Arbitration Rules (2010), Article 23(2); Second Jurisdictional Hearing, Transcript (16 September 2013), pp. 16:8-17:22, citing David D. Caron & Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed., Oxford 2012), pp. 455-456 (Exhibit CL-224) ("Caron (2012)").

the Claimant, or (iii) other serious circumstances justifying a denial.[90] The Respondent contends that none of these are present in this case.

106. The Respondent identifies the conduct of the Claimant in not notifying the Respondent or the Tribunal of its Petition for six months as the true source of any "undue" delay.[91] The Respondent contends that it was entitled to examine the sincerity of the Claimant's alleged conservatory purpose in filing the Petition[92] and to coordinate with its counsel and the relevant government entities in order to determine what position it would take in respect of this development.[93] It also notes that the State had to retain counsel in accordance with Slovak and EU procurement laws, which only occurred once the National Council engaged Mr. Vozár on 20 January 2012 and issued his power of attorney shortly thereafter.[94]

107. The Respondent alleges that it had repeatedly objected to the conduct of the Claimant.[95] In its Reply on Jurisdiction, for example, the Respondent informed the Tribunal of the Bratislava Court action and, noting that this was inconsistent with the Claimant's position in the arbitration, stated that its own actions were without prejudice to its position in the court proceeding.[96] The Respondent further notes that it apprised the Tribunal of its concerns with the Claimant's court action, during the pre-hearing teleconference and at the jurisdictional hearing and warned that the court action might lead to further jurisdictional objections on its part.[97]

108. The Respondent notes that it filed its Reply in the Slovak court proceedings barely a month after engaging its Slovak counsel, and its Supplementary Statement of Defence

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[90] Respondent's Rejoinder, para. 198.
[91] Respondent's Rejoinder, para. 199.
[92] Respondent's Rejoinder, para. 214; Second Jurisdictional Hearing, Transcript (16 September 2013), pp. 162:5-166:15.
[93] Respondent's Rejoinder, para. 200; Second Jurisdictional Hearing, Transcript (16 September 2013), pp. 159:2-161:2.
[94] Respondent's Rejoinder, para. 200, citing Representation Agreement concluded between the National Council and JUDr. Vozár, dated 20 January 2012, p. 4 (Exhibit R-18) and Power of Attorney granted by the National Council to JUDr. Vozár, dated 27 January 2012 (Exhibit R-19).
[95] Respondent's Rejoinder, para. 201, citing Respondent's second request for an extension dated 7 July 2013 (Exhibit CL-203); Respondent's third request for an extension (excerpt), dated 12 October 2011, p. 2 (Exhibit R-16).
[96] Respondent's Rejoinder, para. 201, citing Reply on Jurisdiction of Respondent Slovak Republic, 16 June 2011, paras. 5, 366.
[97] Respondent's Rejoinder, para. 202, citing Minutes of Telephone Conference of 21 November 2011, para. 12; First Hearing on Jurisdiction, Transcript (19 December 2011), pp. 4:14-5:2; Second Jurisdictional Hearing, Transcript (16 September 2013), pp. 159:10-166:15.

less than three months after filing that Reply.[98] As Article 8 of the BIT grants the Respondent "six months from the date of a written notice containing sufficiently specified claims" to file its defence in the arbitration, the Respondent notes that the Supplementary Statement of Defence should therefore be considered timely under Article 20 of the UNCITRAL Rules.[99]

109. The Respondent notes that the Claimant waited three months to request that the Tribunal continue the arbitration after the Tribunal issued its Jurisdictional Award on 22 October 2012, even though it faced none of the challenges that the Respondent did.[100]

110. The Respondent once again highlights that, in addition to delay, in order to disallow an amendment to a defence under Article 20 of the UNCITRAL Rules, it must be shown that the opposing party will suffer undue prejudice in being denied an adequate opportunity to defend itself.[101] The Respondent asserts that the Claimant cannot show any such prejudice since it agreed to the schedule established by the Tribunal, which granted the Claimant ample opportunity to respond to the Respondent's Supplementary Statement of Defence.[102] Nor can the Respondent's jurisdictional objections be said to be "*per se* prejudicial to orderly proceedings," given that the Parties agreed on a procedure for addressing the Supplementary Statement of Defence.[103]

111. The Respondent contends that it would suffer serious prejudice if it were not allowed to amend its defence, especially in view of the undue delay, burden, and expense that it considers to have been caused by the failure of the Claimant to inform the Respondent or the Tribunal that it had filed its Petition.[104] This would also deprive the Respondent of "the opportunity to advance a potentially dispositive defence, and would unjustly enrich EURAM by giving it two *fora* for the simultaneous advancement of its Treaty claims, in contravention of the BIT, the UNCITRAL Rules, and Swedish law," as well as principles of efficiency and fairness.[105]

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[98] Respondent's Rejoinder, para. 203.
[99] Respondent's Rejoinder, paras. 203-204.
[100] Respondent's Rejoinder, para. 205.
[101] Respondent's Rejoinder, para. 207, citing Caron (2006), *supra* note 64, p. 471, in turn citing *Malek v. Iran*.
[102] Respondent's Rejoinder, paras. 208-209, referring to Procedural Order No. 5 (31 January 2013).
[103] Respondent's Rejoinder, para. 210, citing Caron (2006), *supra* note 64, p. 473.
[104] Respondent's Rejoinder, para. 211.
[105] Respondent's Rejoinder, para. 212 citing *Himpurna v. Indonesia*, *supra* note 87, para. 113; *UPS Inc. v. Canada*, NAFTA, UNCITRAL, Award on Jurisdiction (22 November 2002), para. 131 (Exhibit RL-491).

112. Finally, the Respondent rejects the Claimant's reliance on *Technopromexport v. Mir's Ltd.* According to the Respondent, the case is irrelevant to the one at hand, given that it only concerned the narrow issue of whether a party is deemed to have waived a jurisdictional objection based on the invalidity of the arbitration agreement if it participates in the arbitration without raising this objection.[106]

B. THE TRIBUNAL'S ANALYSIS

113. The Tribunal considers that this issue is governed primarily by the provisions of the 1976 UNCITRAL Rules, which the Parties have agreed should govern the conduct of the arbitration.[107] The Tribunal has also considered Swedish law, as the *lex arbitri*, and general principles of law pertaining to the good conduct of arbitral and adjudicative processes. All three adopt what might be described as an approach based upon "common sense" and fairness, rather than the application of technical or formalistic rules.

114. Article 21(3) of the 1976 UNCITRAL Rules states:

> A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.

Unlike the corresponding provision in the 2010 Rules (Article 23(2)), Article 21(3) of the 1976 Rules does not expressly confer upon a tribunal the power to allow a later plea.[108] The Respondent maintains, however, that such a power is implicit, because Article 20 of the 1976 Rules permits a respondent to amend its defence, although the tribunal may disallow such amendment if it "considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances." The Claimant denies that Article 20 is applicable to jurisdictional objections.

115. The Tribunal considers that what is now explicit in Article 23(2) of the 2010 Rules was implicit in the 1976 Rules. To preclude a respondent from making a jurisdictional objection after it submitted its statement of defence when that objection concerned facts

[106] Second Jurisdictional Hearing, Transcript (16 September 2013), p. 77:10-23.
[107] Article 8(2) BIT; Terms of Appointment, para. 4.1.
[108] Article 23(2) of the 2010 Rules states that "the arbitral tribunal may ... admit a later plea if it considers the delay justified".

which arose only after the date on which that statement was filed would involve a grave injustice. That injustice would be particularly grave where, as here, the new facts involve conduct on the part of the Claimant which the Claimant chose not to notify to the Respondent or the Tribunal. The Tribunal notes that the leading commentary on the UNCITRAL Rules points out that the Conference which adopted the 1976 Rules considered that the inclusion of a provision in what became Article 21(3) of the 1976 Rules expressly permitting a tribunal to allow a late jurisdictional plea was unnecessary, because the provision on amendment in Article 20 and the broad general power of the tribunal "to conduct the arbitration in such manner as it considers appropriate" were sufficient. The commentary concludes:

> The last sentence of Article 23(2) [of the 2010 Rules] thus expressly states what was previously only implicit under the 1976 UNCITRAL Rules: that the arbitral tribunal has discretion in limited circumstances to admit justifiably late pleas, such as due to the discovery of new evidence.[109]

116. In consequence, the Tribunal finds that the 1976 UNCITRAL Rules do not bar a party from raising a jurisdictional objection based upon facts which came into existence, or which it could have discovered by reasonable inquiry, only after the filing of a statement of defence.

117. That is manifestly the case here. The new jurisdictional objections are based upon the action of the Claimant in commencing proceedings in the Slovak courts. Its Petition for the Commencement of Proceedings was only lodged with the District Court on 22 November 2010. That was a little more than two weeks after the Respondent had filed its Statement of Defence in the arbitration and while the Tribunal was considering the request for bifurcation so as to create a separate jurisdiction phase. Moreover, the Petition was only served upon the Respondent on 13 May 2011, which was when the Respondent first became aware of its existence.

118. Nevertheless, the Tribunal does not consider that a respondent has an unlimited power to add new jurisdictional objections after the statement of defence has been filed. The Caron commentary quoted above makes plain that the Tribunal has discretion to admit "justifiably late pleas". That conclusion follows from the general principles of fairness and procedural economy, as well as from the fact that Article 20 of the UNCITRAL Rules allows an amendment "unless the arbitral tribunal considers it inappropriate to

[109] Caron (2012), *supra* note 89, p. 456.

allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances". In deciding whether a plea is "justifiably late", the Tribunal must therefore have regard to whether there has been undue delay by the Respondent once it became aware of the facts and to whether there will be undue prejudice to the Claimant if the plea is admitted.[110] The Tribunal notes that the judgment of the Supreme Court of Sweden in *Technopromexport v. Mir's Limited,* 14 June 2013, discussed by the Claimant's Swedish law expert, Professor Runeland, also requires that a jurisdictional objection must be raised without undue delay once the facts are – or could reasonably have been – known.

119. In the present case, the first new fact was the filing of the Petition in the District Court on 22 November 2010 but that fact did not become known to the Respondent until the Petition was served upon it by the Court on 13 May 2011. The Claimant is not, of course, to blame for the delay of almost six months between the filing of its Petition and the service by the District Court of that Petition. Nevertheless, the Claimant chose to inform neither the Respondent nor the Tribunal of its actions. At the time that it filed its Petition, it had just requested an extension of time in which to respond to the Respondent's request to the Tribunal for bifurcation of the proceedings.[111] It agreed to bifurcation on 30 November 2010, eight days after it had filed its Petition. At that point, the Claimant knew what jurisdictional objections were then being raised by the Respondent and the schedule for pleading in respect of those objections. It chose, however, not to mention to either the Tribunal or the Respondent the fact that it had just commenced proceedings in the Slovak courts. The Claimant maintains that "it saw no reason to inform the Tribunal"[112] of its action in commencing a case the purpose of which it describes as purely conservatory. The Tribunal will say more on this point later. For now, it is sufficient to say that, even accepting for the moment the Claimant's

[110] In the light of its findings below, the Tribunal need not expressly decide the point raised by the Respondent, disputed by the Claimant, that precluding the Respondent from raising its new jurisdictional objections would require a cumulative finding of "undue delay" and "undue prejudice to the other party" in spite of the text of Article 20 of the UNCITRAL Arbitration Rules providing that a tribunal may disallow an amendment to the statement of defence on the alternative bases of "the delay in making it or prejudice to the other party or any other circumstances." In any event, the determination of whether the delay is "undue" may naturally take into account whether such delay has caused prejudice to the other side, and a tribunal may have regard to both factors in the more global determination of whether a late plea is "justified". For the same reasons, the Tribunal need not decide whether Article 20 establishes a presumption of "amendability" of defences or a presumption of waiver of jurisdictional objections made after the statement of defence, with the corresponding shift of the burden as to the demonstration of the (non)-justification of the late plea.

[111] The Claimant's request for an extension of time was made by letter of 16 November 2010, six days before it filed its Petition with the District Court; First Award, para. 12.

[112] Para. 36, above.

characterization of the proceedings as purely conservatory, the Claimant must have realized that there was a possibility that its action in the Slovak courts would be relied upon by the Respondent in support of its position that the Tribunal lacked jurisdiction. Had the Claimant been frank about its conduct, the Respondent would have had the opportunity to amend its Statement of Defence, had it wanted to do so, very soon after that Statement was deposited. The schedule for the proceedings could have been amended so as to bring this new jurisdictional issue within the scope of the jurisdiction phase and the Claimant would have been able to point to its reference in the Petition to arbitration as the primary forum as a response to any objection taken by the Respondent. The Tribunal considers that the Respondent could not have been expected to inquire into whether any proceedings had been commenced in the Slovak courts.

120. Moreover, by commencing proceedings in the Slovak courts, the Claimant was advancing a position in those courts (that the BIT was directly effective in the law of the Slovak Republic and enforceable in its courts) that was directly at odds with the argument it was advancing before the Tribunal (where it maintained that the BIT had no effect in Slovak law and denied the possibility of any remedy in the Slovak courts). Again, the Claimant had an explanation it could offer, namely that it had little hope of success in the Slovak courts.[113] The Tribunal makes no comment on the merits of that explanation but it has no hesitation in saying that the Claimant should have admitted to what it was doing.

121. Accordingly, the Tribunal finds that the Respondent had no opportunity to raise the points made in the new jurisdictional objections at the time that it submitted its Statement of Defence or when the Tribunal ordered bifurcation and fixed a schedule of pleading for the jurisdiction phase. In deciding whether there was undue delay by the Respondent the Tribunal must, therefore, consider only the period between the service of the Petition on the Respondent on 13 May 2011 and the filing of the Supplementary Statement of Defence on 25 May 2012. The fact that just over a year elapsed between the two dates is inevitably a matter of concern when considering whether a delay was "undue".

[113] As its counsel explained at the Second Jurisdictional Hearing, Transcript (16 September 2013), pp. 104:25-107:25.

122. In this context, it is necessary to distinguish between the two new jurisdictional objections. The first objection – that the Parties have agreed that the dispute will be decided otherwise than by arbitration – is dependent upon two facts:

(a) the service upon the Respondent of the Claimant's petition (on 13 May 2011) and

(b) the service upon the Claimant of the Respondent's Reply (on 18 April 2012)

The first event is said to constitute the making of the offer and the second the acceptance of that offer.[114] Since it is not alleged that any agreement to resolve the dispute otherwise than by arbitration can have come into existence before the occurrence of the second event, the question is whether the Respondent was guilty of undue delay in not raising its objection until some five weeks after that event occurred.

123. The Tribunal considers that this cannot be regarded as an undue delay. At that time the arbitral proceedings were quiet, in the sense that the Parties were awaiting the decision of the Tribunal on the original jurisdictional objections. There was thus no particular urgency and the situation was markedly different from that which existed in November 2010, when the Claimant knew that the Tribunal was in the process of fixing a schedule for dealing with the issue of jurisdiction, yet chose not to disclose that it had commenced proceedings in the Slovak courts. Nor does the Tribunal consider that there was any prejudice to the Claimant as a result of the fact that the Respondent waited until 25 May 2012, rather than filing its Supplementary Statement of Defence in late April or early May.

124. The Tribunal notes the Claimant's argument that, even though the act which the Respondent alleges was the acceptance of the Claimant's offer to settle the dispute otherwise than through arbitration had not yet taken place, the Respondent must have known what position it would take in the Slovak proceedings before the jurisdictional hearing in December 2011. It has also noted the Claimant's argument that the Respondent obtained extensions of time in the Slovak proceedings on the basis of representations that it had to engage in a tendering process before appointing counsel but actually (according to the Claimant) engaged in no such process.

[114] Second Jurisdictional Hearing, Transcript (16 September 2013), pp. 21:1-12, 90:8-9, 196:15-23.

125. The Tribunal does not consider these arguments persuasive. Whatever criticism may be made of the time that it took the Respondent to make up its mind what to do about the proceedings in the Slovak courts, the fact is that the argument that there was an agreement depends upon an acceptance of the offer said to have been made by the Claimant and nothing which could be interpreted as such an acceptance occurred before the Claimant received the Respondent's Reply in the Slovak proceedings on 18 April 2012. The Claimant accepts that, if there was a contract between the Parties, it was concluded on 18 April 2012.[115] There cannot be undue delay in raising an objection if the facts which are the essential basis for that objection had not yet taken place. Nor does the allegation that the Respondent misled the Slovak court (and the Tribunal expresses no view as to whether that was in fact the case) affect the position before the Tribunal.

126. Finally, the Tribunal considers that there is no basis for refusing to admit the first new jurisdictional objection on the basis of prejudice to the Claimant. If the Claimant has been prejudiced by the fact that this objection was not raised ahead of the 2011 jurisdictional hearing, that is largely its own fault. Had it acted with greater candour in November 2010 and informed the Tribunal of the action it had taken in the Slovak courts, the significance of that action for the jurisdiction of the Tribunal could have been considered at the 2011 hearing.

127. Accordingly, the Tribunal rejects the Claimant's submission that the first new jurisdictional objection was raised too late and decides to admit that objection.

128. The position with regard to the second new jurisdictional objection, which is based not on an alleged agreement between the Parties but upon an allegation of waiver by unilateral act of the Claimant, is more complicated. As has already been explained, that objection is put in two different ways. The first is that the act of filing the Petition to commence proceedings in the District Court was, in and of itself, sufficient to constitute a waiver of the right to arbitrate. The second is that the alleged waiver came about as a result of the whole course of conduct of the Claimant, including its subsequent actions in the Slovak proceedings.

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[115] Counsel for the Claimant, Dr Böhm, told the Tribunal that "the contract, if there was one, was made on 18th April", Second Jurisdictional Hearing, Transcript (16 September 2013), p. 136:21-22.

129. With regard to the first aspect of the waiver objection, the Tribunal considers that there has been a clear case of undue delay. The Respondent was aware of the Petition commencing the Slovak proceedings in May 2011. If it thought that the Claimant's action in filing that Petition amounted to a waiver of the right to arbitrate, it could and should have taken action within no more than a few weeks (a period more than sufficient for its experienced counsel to have realized the significance of the action). Instead, it not only stayed its hand, it stated to the Tribunal, at the opening of the jurisdictional hearing on 19 December 2011 (more than six months after it became aware of the Petition) that no basis for objecting to the Tribunal's jurisdiction had yet arisen:

> we alluded in our pre-hearing conference call with you to the possibility that facts would emerge which would give rise to a possible objection to jurisdiction. All we can say right now is that those facts have not yet emerged and so we really have nothing more to say on that issue at this point. If they do and when they do, we will promptly inform the Tribunal and of course the Claimant.[116]

130. The Tribunal thus concludes that the waiver objection, in its first manifestation, has been raised out of time.

131. That, however, does not conclude the matter. The Respondent's second way of framing its waiver objection depends not just upon the Petition but upon the subsequent conduct of the Claimant, in particular the following events:-

- the Claimant's opposition to the Respondent's request for an extension of time in the District Court (3 August 2011; para. 45, above);
- the Claimant's response to the Respondent's defence in the District Court (16 July 2012; para. 64, above);
- the Claimant's response to the District Court's enquiry regarding its motion for suspension of the proceedings (16 November 2012; para. 70, above);
- the Claimant's request for disclosure of the *Achmea* award (14 January 2013; para. 73, above);
- the Claimant's appeal against the judgment of the District Court (31 January 2013; para. 75, above); and

[116] First Jurisdictional Hearing, Transcript (19 December 2011), pp. 4-5.

- the Claimant's response to the Respondent's appeal against that judgment (3 April 2013; para. 81, above).

132. All of these events occurred long after the Respondent became aware of the Petition in May 2011. To the extent that the waiver objection is based upon the cumulative effect of these acts, it cannot be considered to have been made too late.

133. Indeed, if there is a question about timing, it is that all but one of the events mentioned in the preceding paragraph occurred after the filing of the Supplementary Statement of Defence and all but two after the issue of the First Award. Although the point was not raised by the Claimant, it could therefore be argued that the Tribunal should not take them into account since, if the Tribunal had addressed the points raised in the Supplementary Statement of Defence at once and then decided on them in the First Award, the last four of these events on which the Respondent now relies would not have taken place when the Tribunal decided the matter. The Tribunal considers, however, that an objection of waiver by conduct has to be considered on the facts as they stand at the date that the decision is taken, not at the date the objection is filed or at the earliest date when a decision could have been taken. The Tribunal does not consider that a respondent must further amend its defence for every new fact which arises in order for these to be taken into account when deciding upon the objection.

134. Accordingly, the Tribunal accepts the Claimant's argument regarding undue delay with regard to the waiver objection in so far as that objection is based upon the Petition alone but rejects it in so far as the objection concerns waiver by a course of conduct.

III. WHETHER THE PARTIES HAVE AGREED UNDER ARTICLE 8(2) OF THE BIT TO SUBMIT THE DISPUTE TO THE SLOVAK COURTS INSTEAD OF ARBITRATION

A. THE POSITIONS OF THE PARTIES

1. The Respondent

135. The Respondent contends that, according to the phrase "unless otherwise agreed" in Article 8(2) of the BIT, the availability of international arbitration is foreclosed once the Parties agree on an alternative mechanism for settling their dispute.[117] Article 8(2) thus operates to prevent "multiple proceedings in multiple fora in relation to the same investment dispute."[118]

136. The Respondent argues that the ordinary meaning of the phrase "unless otherwise agreed" – in the original Czech and German as well as in English – refers to agreement that the dispute be resolved in a forum other than treaty arbitration, including litigation in domestic courts.[119] Moreover, the ordinary meaning of Article 8(2) does not impose any particular requirements or formalities for such agreement: the Parties may agree on court jurisdiction tacitly or through their conduct alone.[120]

137. According to the Respondent, this is consistent with international law and practice, as demonstrated by the principle of *forum prorogatum* and the *Corfu Channel* case, where the International Court of Justice ("ICJ") stated that "[w]hile the consent of the parties confers jurisdiction on the Court, neither the Statute nor the Rules require that this consent should be expressed in any particular form."[121] The Respondent further alleges that the notion that agreements can be arrived at implicitly (or via documents, oral

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[117] Respondent's Supplementary Statement of Defence, paras. 9-12, citing BIT, Art. 8(2), Exhibits RL-40A, RL-40B.

[118] Respondent's Supplementary Statement of Defence, para. 11.

[119] Respondent's Rejoinder, paras. 44-48, citing *Webster's Unabridged Dictionary* (2nd edition, 1997), pp. 40, 1372, 2080 (Exhibit RL-493) and P. Peters, *The Cambridge Guide to English Usage* (2004), p. 558 (Exhibit RL-476)

[120] Respondent's Rejoinder, para. 49, citing Expert Opinion of Jan Klučka on Selected Legal Questions Arising in the Dispute, 22 May 2013 ("Klučka Opinion"), paras. 43-44.

[121] Respondent's Rejoinder, paras. 50-57, citing *Corfu Channel (United Kingdom v. Albania)*, Preliminary Objection, Judgment (25 Mar. 1948), I.C.J. Reports 1947-1948, p. 27 (Exhibit RL-454); *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Preliminary Objection, Judgment (22 July 1952), I.C.J. Reports 1952, p. 114 (Exhibit RL-18); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 18 (Exhibit RL-290); *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 117, paras. 60-62 (Exhibit RL-329).

statements, or conduct) forms a general principle of law,[122] as evinced by Articles 1.2, 2.11, and 3.12 of the UNIDROIT Principles of International Commercial Contracts ("UNIDROIT Principles").[123] In particular, the Respondent highlights the *Haya de la Torre Case*, in which the ICJ found that the parties had consented to its jurisdiction because neither had objected to a decision on the merits.[124]

138. Additionally, in the specific context of investment arbitration, the Respondent notes that the investor's acceptance of the State's offer of arbitration is made through the filing of a request for arbitration and/or giving notice of the existence of a dispute – that is, via conduct.[125] The filing of an identical claim before a State court should thus be understood as an offer to litigate the dispute made by the Claimant and which the Respondent can accept by refraining from contesting the jurisdiction of the State court.[126]

139. Lastly, the Respondent points to general principles of private international law under which a jurisdictional agreement can be inferred from the conduct of the Parties. This principle is codified, for example, in the Brussels I Regulation,[127] which is in force in the European Union generally and is therefore fully integrated in the legal systems of the Slovak Republic, Austria, and Sweden,[128] as well as the Bustamante Code of Private International Law of 1928, which recognize tacit submission when a plaintiff files a lawsuit and the defendant makes an appearance without contesting the court's jurisdiction.[129]

140. The Respondent further contends that any agreement by the Parties that their dispute would be decided by means other than treaty arbitration automatically supersedes the provision for treaty arbitration in Article 8(2) of the BIT.[130] The Respondent submits

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[122] Respondent's Rejoinder, para. 54.
[123] Respondent's Rejoinder, para. 55, citing UNIDROIT Principles of International Commercial Contracts (2010), Articles 1.2, 2.11, and 3.1.2 (Exhibit RL-490).
[124] Respondent's Rejoinder, para. 58, citing *Haya de la Torre Case (Colombia v. Peru)* Judgment (13 June 1951), I.C.J. Reports 1951, p. 78 (Exhibit RL-468).
[125] Respondent's Rejoinder, para. 60, citing J. Paulsson, "Arbitration without Privity", 10 (2) ICSID Rev.—FILJ 232 (Fall 1995) (Exhibit RL-471) and C. Schreuer, *et al.*, *The ICSID Convention: A Commentary* (2nd ed., Cambridge 2009), p. 464, para. 29 (Exhibit RL-449).
[126] Respondent's Rejoinder, para. 61.
[127] Council Regulation (EC) No 44/2001 of 22 December 2000.
[128] Respondent's Rejoinder, paras. 63-65; Respondent's Rejoinder, para. 67 citing Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12/1, 16.1.2001, Preamble, para. 6 (Exhibit RL-455).
[129] Respondent's Rejoinder, para. 66, citing Bustamante Code of Private International Law of 1928, Articles 318-322, pp. 48-49 (Exhibit RL-447).
[130] Respondent's Rejoinder, para. 103; Second Jurisdictional Hearing, Transcript (16 September 2013), pp. 45:20-47:9, 146:17-150:9.

that most private international law systems, as well as Article 3(b) of the 2005 Hague Convention and Article 23 of the Brussels I Regulation, presume that an agreement between the Parties designating a dispute resolution forum excludes other dispute resolution fora.[131] The Respondent also notes that classic contract law theory mandates that "in the case of successive agreements on the same matter, the new agreement supersedes the previous agreement" – which principle is also codified in Article 30(3) of the VCLT and applies to jurisdictional agreements.[132]

141. Were this issue to be governed by municipal law instead of international law, the Respondent argues that the same result would obtain.[133] Referring to the 2005 Hague Convention on Choice of Court Agreements and the general principle of *lex fori regit processum*, the Respondent asserts that "the laws of the chosen court govern the validity of the choice of court agreement," thereby leading to the application of Slovak law in this case.[134] The applicability of Slovak law to this case in turn leads to the direct applicability of the previously discussed *forum prorogatum* principle and Brussels I Regulation, as both are part of the Slovak legal order.[135] The Respondent adds that any writing requirements which may be applicable to jurisdictional agreements under the Slovak Act of Private International Law are either superseded by the terms of the BIT or fulfilled by way of the Parties' written court pleadings.[136]

142. Turning to the particular facts of this case, the Respondent contends that the Parties have entered into an agreement pursuant to Article 8(2) of the BIT that the Bratislava Court would decide the Claimant's claims under Article 5 of the BIT by virtue of (a) the Claimant filing a claim containing the same causes of action and relief sought as in the

[131] Respondent's Rejoinder, paras. 105-109, citing Hague Convention of 30 June 2005 on Choice of Court Agreements, Article 3(b) (Exhibit RL-455); Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12/1, 16.1.2001, Article 23 (Exhibit RL-455); U. Magnus & P. Mankowski (ed.), *Brussels I Regulation* (2nd revised edition, 2011), p. 524 (Exhibit RL-487) (discussing Article 24(1) of the Brussels I Regulation) and H. Gaudemet-Tallon, *Compétence et Exécution des Jugements En Europe* (4th ed., 2010), p. 154 (Exhibit RL-466).
[132] Respondent's Rejoinder, para. 110.
[133] Respondent's Rejoinder, paras. 68-69.
[134] Respondent's Rejoinder, paras. 70-72, citing Hague Convention of 30 June 2005 on Choice of Court Agreements (Exhibit RL-467); *Case Concerning the Payment of Various Serbian Loans Issued in France (France v. Kingdom of Serbs, Croats, and Slovenes)*, Judgment No. 14 (12 July 1929), P.C.I.J. Series A (No. 20/21), p. 41 (Exhibit RL-452).
[135] Respondent's Rejoinder, para. 73, citing Klučka Opinion, para. 44.
[136] Second Jurisdictional Hearing, Transcript (16 September 2013), pp. 27:22-29:7

claim in the present arbitration and (b) the Respondent appearing before the Bratislava Court without challenging its jurisdiction.[137]

143. Applying by analogy the jurisprudence on fork in the road clauses, the Respondent identifies the following criteria for determining whether there is agreement on an alternative forum to arbitration: (a) that the Parties are identical; (b) that the claims relate to the same dispute; and (c) that the causes of action are identical.[138]

144. The Respondent contends that the claim initiated by the Petition meets the aforementioned criteria. It is uncontested that there is an identity of Parties in the arbitration and the court case.[139] Both the Statement of Claim in the arbitration and the Petition in the Slovak court proceedings are premised on legislative amendments to the Health Insurance Company Act of 2004, which allegedly breached the Treaty, and this too is uncontested.[140] Finally, the causes of action listed in the Notice of Arbitration are duplicated in the Petition,[141] and the relief sought is the same for both proceedings.[142]

145. As regards the last point, the Respondent points out that both the Statement of Claim and the Petition involve allegations of breach of Articles 2, 4, and 5 of the BIT,[143] which are directly applicable within the Slovak legal order through the joint operation of Article 154c(2) of the Slovak Constitution – under which qualified international treaties are incorporated into domestic law "if so provided by a law" – and Section 756 of the

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[137] Respondent's Rejoinder, para. 90; Second Jurisdictional Hearing, Transcript (16 September 2013), pp. 20:21-21:12, 29:25-30:11.

[138] Respondent's Supplementary Statement of Defence, paras. 12-13 citing *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467 (US/Ecuador BIT), Award, July 1, 2004, para. 52 (Exhibit RL-444); *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award on Jurisdiction, July 17, 2003, paras. 77-81 (RL-442); *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2 (US/Estonia BIT), Award, June 25, 2001 paras. 330-332 (Exhibit RL-15); *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13 Decision on Preliminary Objections, July 27, 2006, paras. 155-157 (Exhibit RL-445); *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12 (US/Argentine BIT), Decision on Jurisdiction, Dec. 8, 2003, paras. 88-89 (RL-440); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (US/Argentine BIT), Decision on Jurisdiction, Jan. 14, 2004, paras. 95-98 (Exhibit RL-154).

[139] Respondent's Supplementary Statement of Defence, para. 13; Respondent's Rejoinder, para. 77.

[140] Respondent's Supplementary Statement of Defence, para. 16, comparing the Statement of Claim, para. 22, the Notice of Arbitration, p. 5 and the Petition, paras. 6, 9; Respondent's Rejoinder, para. 77.

[141] Respondent's Supplementary Statement of Defence, para. 14, citing the Notice of Arbitration, para. 35 and the Petition, paras. 76, 82-83.

[142] Respondent's Supplementary Statement of Defence, para. 15, citing the Notice of Arbitration, para. 46 and the Petition, para. 122.

[143] Respondent's Rejoinder, para. 78, citing Claimant's Statement of Claim in accordance with Article 18 UNCITRAL Rules, 23 November 2009, para. 46 and EURAM's Petition for the commencement of proceedings for the payment of EUR 131,400,000 with accessions, dated 22 November 2010, paras. 13, 30-37, 76, 82-83 (Exhibit RL-344).

Slovak Commercial Code – which states that the Slovak Commercial Code shall apply "only if an international treaty which is binding on the Slovak Republic and was published in the Collection of Acts does not contain any different regulation."[144] The Respondent further highlights that the Claimant maintained – and still maintains – its Article 5 claim before the Bratislava Court even after the Tribunal found that it had jurisdiction over this claim in its First Jurisdictional Award.[145]

146. The Respondent rejects the justifications proffered by the Claimant for maintaining its Article 5 claim in two different fora. The Respondent first points out that the Petition belies the Claimant's argument that its BIT claims were made in the alternative to Slovak and European law causes of action when it says at paragraph 76 of its Petition that "[b]esides the above-stated grounds we believe that the Slovak Republic has breached the Investment Protection Treaty, in particular its Articles 2, 4, and 5."[146] The Respondent also highlights the Claimant's 16 July 2012 submission to the Bratislava Court in response to the Reply of the Slovak Republic, where the Claimant allegedly clarified that it was claiming damages for the breach of BIT obligations and sought relief on the merits of its Treaty claims.[147]

147. Secondly, the Respondent dismisses the Claimant's allegation that its causes of action in the arbitration are not duplicated in the Petition. In particular, the Respondent notes that the Claimant has still not withdrawn its Article 5 claim from the Slovak court proceedings.[148] It emphasizes that, on 14 January 2013, the same day that the Claimant asked the Tribunal to continue the arbitration with regard to its Article 5 claim, the Claimant submitted a motion to the Bratislava Court to have the Respondent produce a copy of the award in the *Achmea B.V. v. The Slovak Republic* arbitration.[149] The Respondent argues that, given that the tribunal in *Achmea B.V. v. The Slovak Republic* upheld the claimant's claim for breach of the Netherlands-CSFR BIT's equivalent to Article 5 in a dispute that shares the same factual background, this motion must be

[144] Respondent's Rejoinder, paras. 99-100, citing Klučka Opinion, para. 24; Constitution of the Slovak Republic, Article 154c(2) (Exhibit CL-46); excerpt from the Act. No. 513/1991 Coll., the Commercial Code of 5 November 1991, Section 756 (Exhibit RL-462).
[145] Respondent's Rejoinder, para. 79, citing First Jurisdictional Award, para. 459 and Klučka Opinion, paras. 11-14.
[146] Respondent's Rejoinder, para. 80, citing Petition, paras. 45, 76, 82-83.
[147] Respondent's Rejoinder, para. 81, citing EURAM's Statement to Respondent's Statement delivered to the Court on the 1st day of March 2012, dated 16 July 2012, pp. 1-3, 10 (Exhibit R-23).
[148] Respondent's Rejoinder, paras. 82-83, citing Petition, para. 83 and Klučka Opinion, para. 7.
[149] Respondent's Rejoinder, para. 84, citing EURAM's Motion for Evidence and Disclosure of Information, 14 January 2013 (Exhibit R-26).

presumed to be made in support of the Article 5 claim in the Slovak court proceedings.[150]

148. Thirdly, the Respondent stresses that the claims in the court proceedings are not only based on the same BIT causes of action, but also seek exactly the same relief: EUR 131,400,000 plus interest claimed from this Tribunal and EUR 131,400,000 with accessions that is claimed from the Bratislava Court.[151]

149. The Respondent addresses the Claimant's objections to this argument in turn. First, and in response to the Claimant's contention that the Petition clearly prioritizes arbitration as the forum for the resolution of its claims, the Respondent highlights the failure of the Claimant to condition its Petition on the Tribunal's decision on its own jurisdiction, which was then forthcoming.[152] Moreover, the Claimant not only actively pursued its claims before the Bratislava Court[153] but also failed to withdraw its Article 5 claim when the Tribunal held that it had jurisdiction over it.[154] The Respondent also points out that the Claimant's second motion to suspend the court proceedings in favour of arbitration was made in the alternative and was conditioned on the result of its first motion.[155]

150. Secondly, the Respondent labels as "absurd" the argument of the Claimant that its offer to the Respondent could only produce a jurisdictional agreement that was premised on the primacy of arbitration.[156] The Respondent stresses that its jurisdictional objections in this arbitration – both its prior ones and its present one – belie its acceptance of such an "offer" in favour of arbitration.[157] The Respondent highlights, moreover, that it is not contesting, and has not contested, the jurisdiction of the Bratislava Court *ratione materiae* or *ratione personae*.[158] It clarifies that the objection to the designation of the National Council as defendant in the Bratislava Court proceedings does not qualify as

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[150] Respondent's Rejoinder, para. 84, citing *Achmea B.V. (formerly known as "Eureko B.V.") v. The Slovak Republic*, PCA Case No. 2008-13, Final Award (7 December 2012) (Lowe, van den Berg, Veeder), paras. 286-295 (Exhibit RL-446).
[151] Respondent's Rejoinder, para. 85-86, citing Statement of Claim, para. 46 and Petition, paras. 11-12.
[152] Respondent's Rejoinder, para. 92; Second Jurisdictional Hearing, Transcript (16 September 2013), p. 34:7-24.
[153] Respondent's Rejoinder, para. 92, citing Claimant's Statement to Respondent's Statement delivered to the Court on the 1st day of March 2012, dated 16 July 2012, p. 10 (Exhibit R-23) and EURAM's Statement to the Further Evidence Produced by Respondent, dated 8 August 2012, p. 3 (Exhibit R-24)
[154] Respondent's Rejoinder, para. 92, citing Klučka Opinion, paras. 11-14.
[155] Respondent's Rejoinder, para. 93, citing Petition, para. 120.
[156] Respondent's Rejoinder, para. 94.
[157] Respondent's Rejoinder, para. 94, citing Expert Legal Opinion of Professor Lars Heuman, 23 May 2013, para. 38 ("Heuman Opinion").
[158] Respondent's Rejoinder, paras. 94-95.

an objection to the jurisdiction, but rather a procedural question.[159] According to the Respondent, the fact that the National Council has requested that the compatibility of the BIT with EU law be referred to the CJEU and that it has submitted other procedural motions in the Slovak court proceedings presupposes the jurisdiction of the Bratislava Court.[160] As regards this point, the Respondent further clarifies that its reference to this argument as a jurisdictional objection in its 2 April 2012 letter to the Tribunal and at one point in its Supplementary Statement of Defense were "misstatements".[161]

2. The Claimant

151. The Claimant first clarifies that it does not dispute that Article 8(2) of the BIT allows the Parties tacitly to "agree otherwise" on a dispute resolution mechanism other than arbitration.[162] Nevertheless, the Claimant emphasizes that Slovak law – and not just Article 8(2) of the BIT – applies to this issue, and that Section 37(e)(3) of the Slovak Act of International Private Law, which governs agreements on jurisdiction, requires jurisdictional agreements to be in writing.[163] The Claimant also disputes the applicability of the Brussels I Regulation to this arbitration on the ground that the scope of Brussels I allegedly expressly excludes arbitration, and, moreover, Brussels I applies only in civil and commercial matters.[164]

152. The Claimant further clarifies that the jurisdiction of the Slovak courts derives exclusively from the Slovak Code of Civil Procedure, that jurisdiction must be determined by those courts at any stage of the proceedings, and that the Slovak courts' jurisdiction cannot be enlarged by agreement of the Parties.[165] As such, "[i]f the court has no jurisdiction, Respondent's 'acceptance' is irrelevant."[166]

153. In any event, the Claimant maintains that the Parties did not agree, in writing or otherwise, to any dispute resolution method other than international arbitration or to confer jurisdiction on the Bratislava Court.[167] The Claimant highlights that both Parties

[159] Respondent's Rejoinder, para. 97, citing Klučka Opinion, para. 20.
[160] Respondent's Rejoinder, para. 96, citing Klučka Opinion, para. 21; Second Jurisdictional Hearing, Transcript (16 September 2013), pp. 157:19-158:9.
[161] Second Jurisdictional Hearing, Transcript (16 September 2013), pp. 43:19-45:12, 153:21- 154:2.
[162] Claimant's Rebuttal, para. 160.
[163] Claimant's Rebuttal, para. 161.
[164] Claimant's Rebuttal, para. 162, citing Article 1(1)(2)(d) of Exhibit RL-455.
[165] Claimant's Reply, paras. 52-54, citing Section 103 of the Slovak Civil Procedure Code (Exhibit CL-206/1); Claimant's Rebuttal, paras. 166-167.
[166] Claimant's Reply, para. 52.
[167] Claimant's Reply, para. 42; Claimant's Rebuttal, para. 160.

have challenged the jurisdiction of the Court[168] and that the Claimant had asked the Court to suspend the court proceedings pursuant to Article 106(3) of the Slovak Code of Civil Procedure in view of its prior initiation of the arbitration.[169] The Claimant also points out that the Petition expressly states that it considers arbitration to be the primary forum for resolving its dispute.[170]

154. On the basis of the above, the Claimant asserts that its Petition cannot be considered an offer to agree to litigate rather than arbitrate its Treaty claims. Under Swedish law – applicable to these proceedings as *lex arbitri* – the intention of the parties at the time of the conclusion of the contract is the starting point of contractual interpretation.[171] Absent other factors, the written agreement serves as a key indicator of this intention.[172]

155. Similarly, under general principles, contractual interpretation under the UNIDROIT Principles is based on the common intention of the parties, or if such common intention cannot be established, on the "meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances" (Article 4.1).[173] Unilateral statements or conduct must also be interpreted "according to that Party's intention if the other party knew or could not have been unaware of that intention," or if that intention cannot be established, according to the "meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances."[174]

156. The Claimant explains that under Swedish law, an agreement arises upon a "meeting of the minds" or when an offeree accepts the offer of an offeror.[175] The law defines neither "offer" nor "acceptance."[176] In contrast, Article 2.1.2 of the UNIDROIT Principles defines an offer as a "proposal for concluding a contract ... [that] is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance."[177]

157. Applying Swedish law to the present case, the Claimant argues that the Petition plainly discloses its intention to pursue the arbitration of its claims and explains that the

[168] Claimant's Reply, para. 55.
[169] Claimant's Reply, para. 56, citing Section 106(3) of the Slovak Civil Procedure Code (Exhibit CL-206/1).
[170] Claimant's Reply, para. 57.
[171] Claimant's Reply, para. 58.
[172] Claimant's Reply, para. 58, citing Runeland Opinion, CL-207.
[173] Claimant's Reply, para. 59.
[174] Claimant's Reply, para. 60.
[175] Claimant's Reply, paras. 45-46.
[176] Claimant's Reply, para. 47.
[177] Claimant's Reply, para. 48.

Claimant filed the Petition out of necessity (in order to prevent the potential prescription of its claims).[178] If the Claimant made any offer in its Petition which the Respondent thereafter accepted, then this offer necessarily includes the designation of arbitration as the primary forum for the resolution of its claims.[179]

158. According to the Claimant, the application of Articles 4.1 and 4.2 of the UNIDROIT Principles leads to the same result. The Petition makes clear that the Claimant intended to pursue the arbitration of its claims and only filed the Petition to prevent its claims from becoming time-barred.[180] A contrary interpretation would be unreasonable.[181]

159. The Claimant argues moreover that the Petition cannot constitute an offer by the Claimant to litigate its claims in the Bratislava Court or to submit to the jurisdiction of the Bratislava Court, nor can the Reply constitute acceptance, because both contest the jurisdiction of the Bratislava Court.[182] According to the Claimant, it objected by stating in its Petition that arbitration was the primary forum for its claims and the Respondent objected by arguing the invalidity of the BIT and requesting a referral of the matter to the CJEU.[183]

160. However, even if the Respondent's motion to refer the matter to the CJEU technically constitutes an acknowledgment of the Bratislava Court's jurisdiction over the claim, the Claimant argues that the Respondent is actively trying to prevent the claims of the Claimant from being heard on the merits, since it is still attempting to get to a CJEU ruling which would void the jurisdiction of the Bratislava Court.[184] According to the Claimant, given such a *de facto* denial of the Bratislava Court's jurisdiction and the Petition's statements as to the arbitration being the primary forum for the Claimant's claims, no reasonable person would construe this as an acceptance that the Bratislava Court should decide Claimant's case.[185]

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[178] Claimant's Reply, para. 61.
[179] Claimant's Reply, para. 62, citing Runeland Opinion, para. 34 (Exhibit CL-207).
[180] Claimant's Reply, para. 63
[181] Claimant's Reply, para. 63
[182] Claimant's Reply, para. 66.
[183] Claimant's Reply, paras. 64-66; Claimant's Rebuttal, paras. 163-164, 180, citing p. 3, para. 1 (Exhibit CL-204).
[184] Claimant's Rebuttal, para. 166, citing Bröstl Opinion, para. 30; Second Jurisdictional Hearing, Transcript (16 September 2013), pp. 193:16-196:9.
[185] Claimant's Rebuttal, paras. 166-168, citing Bröstl Opinion, paras. 28, 30.

161. The Claimant further highlights the difference between the causes of action and the relief sought in the arbitration and the court proceedings.[186] The Claimant first points out that its primary cause of action in the Bratislava Court proceedings is a *sui generis* claim based on Slovak constitutional law that is not arbitrable.[187] As this claim is distinct from that brought by the Claimant in the arbitration[188] – and indeed, tribunals in numerous cases have found this distinction significant[189] – the operation of the alleged fork in the road clause is precluded.[190]

162. The Claimant also asserts that the BIT may not enjoy direct effect in the Slovak legal system, arguing that "(i) the BIT lacks direct effect and that (ii) even if it did have direct effect, Slovak courts of general jurisdiction lacked jurisdiction and (iii) even if the courts had jurisdiction, no remedy was available for an investor."[192] The Claimant argues that the analyses of the Respondent's two experts on Slovak law – in addition to contradicting one other – are erroneously premised on the idea that the Claimant's treaty claims are civil and commercial in nature or that parties to Slovak court litigation can by agreement

[186] Claimant's Reply, para. 75.
[187] Claimant's Reply, paras. 76, 80; Claimant's Rebuttal, para. 82, citing Bröstl Opinion, para. 36.
[188] Claimant's Reply, para. 80.
[189] Claimant's Reply, para. 83, referring to *Occidental v. Ecuador*, *supra* note 148, paras. 57-58 (where the tribunal allegedly distinguished between treaty-based issues that had come to arbitration and non-contractual domestic law questions) [Claimant's Reply, para. 83, fn. 50]; *CMS Gas Transmission Company v. the Argentine Republic* (Exhibit RL-442), paras. 78-80 (in which the tribunal allegedly distinguished between claims concerning contractual rights under a licence and treaty claims) [Claimant's Reply, para. 83, fn. 51]; *Alex Genin v. the Republic of Estonia* (Exhibit RL-15), para. 332 (where the tribunal allegedly distinguished between the investment dispute itself and the revocation of a banking license dispute that could only be resolved in domestic courts) [Claimant's Reply, para. 83, fn. 52]; *Pan American Energy LLC and PP Argentina Exploration Company v. the Argentine Republic* (Exhibit RL-445), para. 157 (where the tribunal allegedly found that a local claim was not based on a BIT violation even if the BIT was mentioned in passing) [Claimant's Reply, para. 83, fn. 53]; and *Enron Corporation and Ponderosa Assets LP v. Argentine Republic* (Exhibit RL-154) (where the tribunal allegedly distinguished between the claims made in local courts and those made in the arbitration) [Claimant's Reply, para. 83, fn. 54].
[190] Claimant's Reply, para. 82, citing Christoph Schreuer, "Travelling the BIT Route – Of Waiting Periods, Umbrella Clauses and Forks in the Road", Journal of World Investment and Trade, April 2004, Vol. 5, No. 2, p. 248 (Exhibit CL-209-1).
[191] Claimant's Reply, para. 77 citing the Respondent's Reply to the Petition, para. 8.1.
[192] Claimant's Reply, paras. 78-79; Claimant's Rebuttal, paras. 169-172, both citing Claimant's Counter-Memorial on Jurisdiction, paras. 337-353.

create causes of action and confer jurisdiction on the court in contravention of the applicable procedural rules on subject matter jurisdiction.[193]

163. The Claimant also dismisses the Respondent's reliance on awards dealing with fork in the road clauses in BITs. First, the Treaty does not contain a fork in the road clause.[194] Secondly, according to scholars and cases cited by the Claimant, a fork in the road clause forecloses the option of international arbitration in favour of domestic courts only when the domestic proceedings were instituted before the arbitration, which is not the case here.[195] Thirdly, the Claimant argues that tribunals do not "assume lightly" that a claimant has chosen the domestic court system over international arbitration,[196] and cites *Occidental* for the proposition that only a choice that is entirely free and not under any form of duress can trigger the operation of the fork in the road clause.[197]

164. In that case, the tribunal found that the claimant had brought its claim to the courts under duress because the law required a taxpayer to protest a resolution in court in order to prevent that resolution from becoming final and binding.[198] Likening its case to that in *Occidental*, the Claimant alleges that it was forced to file the Petition in order to halt the limitation period and protect its rights in case the Tribunal dismissed its claims for lack of jurisdiction.[199]

B. THE TRIBUNAL'S ANALYSIS

165. The Tribunal must begin by considering what is the applicable law. The Parties both made submissions about the interpretation of Article 8(2) of the BIT, but they also submitted expert evidence on both Swedish and Slovak law. The Tribunal considers that the first jurisdictional objection depends upon the construction of the phrase "otherwise agreed" in Article 8(2) of the BIT. That issue must be decided in accordance with the principles of treaty interpretation under international law. Slovak law is also

[193] Claimant's Rebuttal, paras. 173-182, citing p. 52 (with reference to the CJEU judgments in *LTU v. EUROCONTROL* and *Netherlands State v. Rueffer* (Exhibit CL-230); Klūcka Opinion, para. 45; Bröstl Opinion, para. 47).
[194] Claimant's Reply, para. 74.
[195] Claimant's Reply, paras. 80-81, citing Christoph Schreuer, "Travelling the BIT Route – Of Waiting Periods, Umbrella Clauses and Forks in the Road", Journal of World Investment and Trade, April 2004, Vol. 5, No. 2, p. 248 (Exhibit CL-209-1).
[196] Claimant's Reply, paras. 82-84, citing *Pan American Energy LLC and PP Argentina Exploration Company v. Argentine Republic* (Exhibit RL-445), para. 155.
[197] Claimant's Reply, para. 85, citing *Occidental v. Ecuador*, *supra* note 148, paras. 60-61.
[198] Claimant's Reply, para. 85.
[199] Claimant's Reply, paras. 67-72, 86, citing Section 101 of the Slovak Civil Code (Exhibit CL-208).

relevant, however, in that an analysis of the steps taken by the Parties in the Slovak proceedings can be made only in the light of that law. In addition, Slovak law is applicable to the extent that the objection is subsidiarily cast as the conclusion of a choice of forum agreement submitting the dispute to the Slovak courts which supersedes and implicitly terminates the prior arbitration agreement arising under the BIT. As argued by the Respondent, such agreements are presumptively governed by the law of the State to whose courts the dispute is submitted, unless another law is specifically chosen by the parties. Finally, the exact effect of any tacit agreement on the Tribunal's jurisdiction may also fall to be determined in accordance with Swedish law – as the *lex arbitri* in these proceedings by virtue of the Tribunal's designation of Stockholm as the legal place (seat) of the arbitration.

166. The Tribunal's view is that the objection is best characterized as an application of the phrase "otherwise agreed" under Article 8(2), which corresponds to the way in which it was first raised by the Respondent in its Supplementary Statement of Defence. Nevertheless, in view of the submissions made by the Parties and the very full and helpful reports of their experts, the Tribunal has also considered whether there was an agreement to decide the dispute otherwise than by arbitration as a matter of Swedish law or Slovak law.

167. Accordingly, the next step is to determine what the phrase "otherwise agreed" in Article 8(2) means. The Tribunal has no doubt that it means what it says. The Tribunal has jurisdiction over a dispute falling within Article 8(2) (in the present case, the dispute under Article 5) unless the Parties have concluded an agreement to settle that dispute by other means. In international law, an agreement need not be contained in a single document – treaties, for example, are frequently concluded by an exchange of notes between two parties – nor is any particular form required. However, the concept of an "agreement" requires that the parties do actually agree, in other words that there is a meeting of minds. The natural meaning of the phrase "otherwise agreed" in a treaty is thus that there should be an agreement in the sense of a meeting of minds between the parties. There is nothing in the text of the BIT – and the Tribunal has been shown nothing which might fall within the other aids to interpretation recognized by international law – that would point to a different interpretation.

168. The Respondent argued, in its Rejoinder and again at the hearing, that "a strict offer and acceptance analysis" was not required. It pointed to a number of judgments of the International Court of Justice regarding the establishment of jurisdiction by means of *forum prorogatum*. It also referred extensively to the case law on fork in the road clauses in other BITs. In so far as these arguments were advanced in support of a theory that an agreement could be found without a meeting of minds manifested in an offer and an acceptance, the Tribunal does not find them persuasive. The establishment of jurisdiction by means of *forum prorogatum* is still based upon the acceptance by a respondent of jurisdiction over the claim brought by an applicant and thus requires an analysis of the terms of that claim and any caveats which might be included therein. The fork in the road cases, though interesting, are of only indirect relevance. There is no fork in the road clause in the present BIT. Moreover, fork in the road clauses deal with unilateral acts and do not require an agreement between the parties for their operation, while the question here is whether or not the Parties have reached an agreement to proceed otherwise than by arbitration.

169. Accordingly, the Tribunal considers that, as a matter of interpretation of Article 8(2) of the BIT, what is required is an agreement, in the sense of a meeting of minds. No formalities are required and the agreement may be derived from more than one document. But there must be an analysis of the offer (in this case the Petition) and the supposed acceptance (in this case the Reply of the Respondent in the Slovak proceedings) in order to determine whether the Parties agreed to proceed otherwise than by arbitration.

170. The position under Swedish law appears to be the same. Thus, Professor Runeland, the expert relied upon by the Claimant, states in his first opinion that "under Swedish law, an agreement to amend or suspend or terminate an agreement to arbitrate is made in the same way as any other agreement".[200] He goes on to state that there are no requirements as to form. The Respondent's expert, Professor Heuman does not disagree.

171. As to Slovak law, the Respondent's expert, Dr Klučka, considers that there are no formal requirements for making an agreement. For him, the test is whether the "acts or conduct of the parties ... confirm without doubt their communal will (basis) to choose judicial 'forum' different from arbitration" and this consent "should be manifested with

[200] Runeland First Opinion, para. 33.

sufficient certainty and indisputability preventing any doubt of the real intention of parties".[201] Professor Bröstl, the expert on Slovak law relied upon by the Claimant, differs from this view only in that he maintains that there is a greater degree of formality required and that tacit agreements are not recognized. For the reasons stated below, the Tribunal considers that it does not have to resolve this one difference regarding Slovak law on the formation of a jurisdictional agreement.

172. The Tribunal will, therefore, analyse the precise nature of the two critical steps taken by the Parties in the Slovak proceedings, namely the Petition filed by the Claimant on 22 November 2010 and served on the Respondent on 11 May 2011 and the Reply filed by the Respondent on 29 February 2012 and received by the Claimant on 18 April 2012.

173. The principal features of the Petition are described in paras. 32-35 above. In the present proceedings, the Claimant has sought to minimize the relationship between the proceedings which it commenced in the Slovak courts and its claim in the arbitration. Thus, in its Reply of 28 March 2013 in the arbitration proceedings, it said:

> Claimant's primary cause of action in the Petition is based on the Slovak Constitution, the European Convention for the Protection of Human Rights ("ECHR", a convention that is directly applicable in Slovakia pursuant to Article 154c (1) of the Slovak Constitution) and on the Additional Protocol to the Convention ("Additional Protocol"). Claimant devotes 44 paragraphs of its Petition to its primary cause of action based on Slovak law and 28 paragraphs to its alternative treaty based cause of action. Even this alternative cause of action does not duplicate Claimants claims in the arbitration. It neither includes the FET [fair and equitable treatment] claim nor the claim for a breach of Article 5 of the Treaty over which the Tribunal has found it has jurisdiction.[202]

The Claimant later added:

> Moreover, to the extent Claimant's claim in the Slovak proceedings is alternatively based on the Treaty, it is formulated as an expropriation claim. It is neither formulated as an FET claim nor is it formulated as a claim for breach of Article 5 of the Treaty, a claim over which the Tribunal has found that it has jurisdiction.[203]

174. The Tribunal does not accept this analysis of the Petition. While the Petition undoubtedly raises claims under the Slovak Constitution and the ECHR, it states at the outset (before it considers the claim under the Constitution or the ECHR) that:

> ... the Slovak Republic breached its obligations under *the relevant provisions* of the Treaty between the Czech and Slovak Federative Republic and the Republic of Austria concerning

[201] Klučka Opinion, para. 45.
[202] Claimant's Reply, para. 26.
[203] Claimant's Reply, para. 77.

> the Promotion and Protection of Investments dated 15 October 1990 ... *which are outlined below in this Petition for Commencement of Proceedings.* (Emphasis added.)[204]

Two paragraphs later, the Petition stated that the Claimant had instituted the present arbitration proceedings "using *identical legal reasoning as in this Petition*" (emphasis added).[205] Later, the Petition stated that "the Slovak Republic has breached the Investment Protection Treaty, in particular its Articles 2, 4 and 5".[206]

175. The Tribunal has had difficulty in reconciling the different statements which the Claimant has made regarding Article 5 of the BIT. As shown above, Article 5 is expressly mentioned in the Petition as one of the provisions of the BIT which the Slovak Republic has breached. Yet in its Reply in the present phase of the arbitration proceedings, the Claimant twice denies that it has brought a claim under Article 5 in the Slovak courts. However, its expert witness on Slovak law, Dr Bröstl, stated that "Article 5 is by no means determinative and is explicitly only of tertiary relevance"[207] and then stated:

> ... EURAM within the support of its claim otherwise also relies upon the wording of the respective BIT Article 5, but it only subsidiarily argues by its violation, not directly requesting any compensation for it.[208]

At the hearing in September 2013, counsel for the Claimant responded in rather colourful terms to the Respondent's argument that the Claimant was "trying to have its cake and eat it!" Counsel for the Claimant showed the Tribunal a slide of what he described as the relevant slice of cake after the First Award, i.e. the Article 5 claim, being covered by a protective action in the Slovak court. He explained the position in the following terms:

> Before the [first] jurisdictional award, the cake was whole. After the jurisdictional award, what the Tribunal had left of it was a slice, the Article 5 slice.
>
> Now, what happens to the slice? First of all, it lies in the hands of the Tribunal, but that slice may run a risk of being destroyed pending the decision. In the meantime, Claimant had to set up a protective bell jar in the form of the Bratislava proceedings under which it can bring the slice, if the Tribunal grants the jurisdictional objections.[209]

The Tribunal reads this passage as an acknowledgment that the Claimant did bring an Article 5 claim in the Slovak proceedings.

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[204] Petition, para. 11.
[205] Petition, para. 13.
[206] Petition, para. 76.
[207] Bröstl Opinion, para 13.
[208] Bröstl Opinion, para 26.
[209] Second Jurisdictional Hearing, Transcript (16 September 2013), p. 116:11-21.

176. The Tribunal therefore concludes that, in its Petition, the Claimant is claiming for breaches of the same provisions of the BIT, including Article 5, on which it relied in its Statement of Claim in the arbitration. Moreover, it is claiming exactly the same amount, 131,400,000 euros, in both sets of proceedings.

177.

178.

The question whether it will succeed – either on jurisdiction or on the merits – before the Slovak courts is not a matter which the Tribunal can or need decide. The only point which is relevant for the Tribunal is that the Claimant has commenced proceedings before the Slovak courts in respect of a claim for violations of the BIT, including Article 5. Although it has described this claim as "hypothetical" and "theoretical,"[211] it accepts that its position before the Slovak courts is that those courts have jurisdiction to find in its favour on the merits.

179. The Tribunal accepts, however, that the Petition was filed in order to protect the Claimant against being time-barred in the event that the Tribunal found that it lacked jurisdiction with regard to its claim in the arbitration proceedings. That is explicitly stated in paragraph 15 of the Petition (which is quoted in full at paragraph 33, above), in which the Claimant, having informed the Court about the existence of the arbitration proceedings and the jurisdictional challenge therein, stated that "the Claimant believes that the primary forum for its claims to be raised and decided on is the arbitration". The Petition also includes a request that the Court suspend the proceedings pending the decision of the Tribunal (see paragraph 35, above).

180. The Respondent argues that the Claimant's fears about being time-barred are exaggerated and even the Claimant's expert, Professor Bröstl, considered that the Claimant had taken the "strictest interpretation" of the Slovak law relating to time

[211] Second Jurisdictional Hearing, Transcript (16 September 2013), p. 105.

limits. The Tribunal considers, however, that this is precisely what any prudent claimant would do, and what this Claimant was entitled to do.

181. The Respondent also argues (and both experts on Slovak law accept) that it is not possible to bring a conditional claim in a Slovak court. The Tribunal accepts that this is the case but the critical question, for the purposes of the jurisdictional objection in the present proceedings, is whether the Claimant made clear that it wanted the dispute settled otherwise than in the arbitration. It is the nature of the offer to agree, not the precise position in Slovak law, which determines whether or not the Petition could give rise to an agreement that the dispute be settled otherwise than by arbitration. In view of the statements made in the Petition about the "primary forum" and the request for a suspension of proceedings, the Tribunal can only conclude that the Claimant's Petition did not amount to an offer to settle the dispute otherwise than by arbitration.

182. The Tribunal then turns to the Respondent's Reply to the Petition. That Reply contended, inter alia, that the BIT is invalid, because it conflicts with EU law. That position is entirely consistent with the position adopted by the Respondent before the Tribunal and considered in the First Award. The Respondent maintained that the District Court is not empowered to rule on whether the BIT is contrary to EU law and that it should refer the matter to the CJEU for a preliminary ruling under Article 234 of the TFEU.

183. The Claimant maintains that this request is a challenge to the jurisdiction of the District Court. That initially appeared to be the view of the Respondent as well. In a letter to the Tribunal, dated 3 April 2013, the Respondent referred to the Reply which had been filed in the District Court (but which the Claimant had not then seen) and stated that "the National Council objected to the jurisdiction of the national court on grounds of incompatibility between the provisions of the treaty and EU law". That statement is repeated, in what the Respondent describes as a "cut and paste mistake,"[212] in the Supplementary Statement of Defence, although the Supplementary Statement of Defence goes on to state that the Reply involved a submission to the jurisdiction of the Slovak courts.

[212] Second Jurisdictional Hearing, Transcript (16 September 2013), p. 157.

184. The Tribunal considers that, notwithstanding the way in which the Respondent initially characterised the Reply, it does not entail a challenge to the jurisdiction of the Bratislava District Court. The Reply repeats a point made by the Respondent in the arbitration proceedings, that the BIT is invalid because of what it maintains is a conflict with EU law. In the context of the arbitration proceedings, that argument was plainly a challenge to the jurisdiction of the Tribunal. The Tribunal derives its jurisdiction from the BIT; accordingly if the BIT is invalid, then it necessarily follows that the Tribunal has no jurisdiction. The argument has a different character before the District Court. The District Court does not derive its jurisdiction from the BIT but from Slovak law. The EU law argument of the Respondent in the Slovak proceedings was coupled with a request for a preliminary reference to the CJEU. For a national court to make a reference to the CJEU is an exercise of jurisdiction. Moreover, a ruling given under TFEU Article 234 in response to such a reference must then be applied to the facts of the individual case by the national court which made the reference, thus involving yet another exercise of that court's jurisdiction. As a matter of principle, therefore, the Tribunal cannot view the Reply as a challenge to the jurisdiction of the District Court.

185. The Tribunal has also carefully considered the expert evidence submitted by the Parties on Slovak law. Dr Bröstl, the Claimant's expert, considered that the Respondent's EU law argument in its Reply "de facto denies the jurisdiction of the District Court".[213] The Respondent's expert, Dr Klučka, on the other hand, concluded that "the request by the Respondent for referral to the CJEU presupposes the jurisdiction of the Bratislava Court. Otherwise, such legal act would have no sense and no legal effects."[214] The Tribunal is not sure that there is any real difference between the two experts as to the law; it notes the important qualifying term "de facto" in Dr Bröstl's opinion. However, to the extent that there is a difference between them, the Tribunal prefers the evidence of Dr Klučka on this point, since it seems more logical and more in accord with the principles regarding the relationship between national courts and the CJEU under Article 234 of the TFEU.

186. Nor does the Tribunal consider that the Respondent challenged the jurisdiction of the District Court by contesting the designation of the National Council as the correct defendant in the action. That challenge is couched in terms that expressly invited the

[213] Bröstl Opinion, para. 30.
[214] Klučka Opinion, para. 21.

designation of a different defendant and accepted that proceedings could be continued once this had been done.[215]

187. Nevertheless, the Tribunal cannot simply ignore the fact that the Respondent itself initially characterized its position as a challenge to the jurisdiction of the District Court and even repeated that characterization in its Supplementary Statement of Defence, even though it contradicted itself only a page later. The Tribunal accepts counsel's explanation that this was a misstatement but, at the very least, it demonstrates considerable confusion on the part of the Respondent's representatives about precisely what steps the Respondent had taken. If the Respondent's own experienced counsel could be confused on this important point, it is easy to see how the Claimant (or a reasonable person in the same position as the Claimant) could suffer from similar confusion.

188. Thus the Tribunal is faced with deciding whether an agreement to determine the dispute otherwise than by arbitration was concluded on the basis of an offer, contained in the Petition, which expressly stated that the primary forum was arbitration and requested suspension of the proceedings pending the decision of the Arbitration Tribunal, and an acceptance in terms which confused the Respondent's own legal team about whether the Respondent was accepting or rejecting the jurisdiction of the Slovak courts. The Tribunal has no hesitation in concluding that no such agreement to have the dispute determined by the Slovak court could be, or was, concluded on that basis. The conclusion that no agreement was made renders it unnecessary for the tribunal to consider the difference between the Parties' experts on Slovak law regarding the degree of formality which would be required for an agreement.

[215] Exhibit R-20, p. 2.

IV. WHETHER THE CLAIMANT HAS WAIVED ITS RIGHT TO ARBITRATE

A. THE POSITIONS OF THE PARTIES

1. The Respondent

189. Under Swedish law as *lex arbitri*, the Respondent contends that the Claimant has irrevocably waived its right to arbitration by filing the Petition in the Bratislava Court.[216] The Respondent maintains that the right to arbitrate a dispute is not absolute[217] and that the initiation of a court action constitutes a waiver of "the right to invoke an arbitration agreement with respect to the legal relationship to which the claim refers."[218]

190. The Respondent argues that Swedish law – applicable by virtue of the Tribunal's designation of Stockholm as the place of the arbitration[219] – deems that the commencement of court proceedings constitutes a unilateral waiver of the right to arbitration. According to Professor Heuman, the Respondent's expert on Swedish law,

> ... under applicable Swedish law, upon submitting its Petition to the Bratislava Court, EURAM appears to have waived its right to arbitrate; at least it is clear that EURAM has done so by pursuing the Court proceedings during a long period of time. Thus, even assuming *arguendo* that EURAM's Petition did not itself constitute a waiver, EURAM thereafter waived its right to arbitrate by virtue of its conduct in the litigation, including given that EURAM's conduct was inconsistent with its stated conservatory intent upon the filing of its Petition.[220]

191. In evidence adopted in argument by the Respondent, Professor Heuman maintains that, under the Swedish Arbitration Act ("SAA"), a party who commences court proceedings "commits a fundamental breach of the [arbitration] agreement entitling the other party to terminate the arbitration agreement."[221] Furthermore, a declaration by the litigant that it wishes to maintain a parallel arbitration proceeding does not avoid such a waiver, since this declaration is irreconcilable with the instigation of litigation, and an act prevails over a statement when there is a conflict between the two.[222] The Respondent notes that this principle is also recognized by many leading arbitration jurisdictions,

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[216] Respondent's Supplementary Statement of Defence, paras. 18, 20 citing L. Heuman, *Arbitration Law of Sweden: Practice and Procedure* (2003), pp. 127-128 (Exhibit RL-443).
[217] Respondent's Supplementary Statement of Defence, para. 19.
[218] Respondent's Supplementary Statement of Defence, para. 20 citing L. Heuman, *Arbitration Law of Sweden: Practice and Procedure* (2003), pp. 116-117 (Exhibit RL-443).
[219] Respondent's Rejoinder, para. 119, citing Swedish Arbitration Act, Section 48, available at http://www.chamber.se/?id=23746 (Exhibit RL-485); Heuman Opinion, para. 23.
[220] Heuman Opinion, para. 7.
[221] Respondent's Rejoinder, paras. 120-122, citing Heuman Opinion, para. 24.
[222] Respondent's Rejoinder, paras. 121, 144-146, citing Heuman Opinion, paras. 25-26, 33-34.

such as Switzerland, France, England, and Germany, as well as prominent international arbitration scholars such as Fouchard, Gaillard & Goldman and Poudret & Besson.[223]

192. The Respondent relies upon the award in *Alucoal v. NKAZ*, where a Stockholm Chamber of Commerce tribunal found that Alucoal had irrevocably waived its right to arbitrate by bringing a court action against NKAZ in New York in order to claim damages based on the same contracts and facts as in the arbitration.[224] In so finding, the tribunal distinguished Alucoal's court action from a court action seeking interim measures, which Sections 4(2) and (3) of the SAA do not consider a waiver of the right to arbitrate.[225]

193. The Respondent asserts that Article 26(3) of the UNCITRAL Rules – which states that "[a] request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or a waiver of that agreement" – implies that "[i]n a context *other than* a request for interim measures, a petition to a judicial authority regarding matters falling squarely within the scope of the parties' arbitration agreement is [...] an outright waiver of [the arbitration] agreement" (emphasis in the original).[226] The *travaux préparatoires* of this article, as well as the Explanatory Note to the equivalent provisions of the UNCITRAL Model Law on International Commercial Arbitration, explicitly acknowledge this possibility.[227] The Respondent adds that the Petition is, by definition, not equivalent to a request for interim measures since it seeks a judgment on the merits which could be incompatible with this Tribunal's own Award.[228]

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[223] Respondent's Rejoinder, paras. 123-125, citing E. Gaillard and J. Savage (eds.), *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer, 1999), para. 736 (Exhibit RL-456) and J. Poudret and S. Besson, *Droit Comparé de l'Arbitrage International* (2nd ed., 2007), para. 379 (Exhibit RL-472).

[224] Respondent's Supplementary Statement of Defence, para. 21, citing B.A. Johnsson, *Waiving the Right to Arbitrate by Initiating Court Proceedings*, Arbitration Institute of the Stockholm Chamber of Commerce, pp. 10-12 (Exhibit RL-441).

[225] Respondent's Supplementary Statement of Defence, para. 21 citing B.A. Johnsson, *Waiving the Right to Arbitrate by Initiating Court Proceedings*, Arbitration Institute of the Stockholm Chamber of Commerce, pp. 10-12 (Exhibit RL-441).

[226] Respondent's Rejoinder, paras. 126-127, citing UNCITRAL Arbitration Rules (1976), Article 26(3) and UNCITRAL Arbitral Rules (2010), Article 26(9).

[227] Respondent's Rejoinder, paras. 126-134 citing Report of the Secretary-General: revised draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade (UNCITRAL Arbitration Rules), U.N. Doc. A/CN.9/112 (with Commentary) (7 November 1975), UNCITRAL Yearbook, Vol. VII (1976), pp. 159-165, 178 (Exhibit RL-480); UNCITRAL Model Law on International Commercial Arbitration, Part Two, Explanatory Note by the UNCITRAL Secretariat (1985), p. 29 (Exhibit RL-488).

[228] Respondent's Rejoinder, para. 128 citing N. Blackaby, *et al.*, *Redfern and Hunter on International Arbitration* (Sweet and Maxwell, 2009), p. 451, paragraph 7.32 (Exhibit RL-475).

194. Applying the above principles to the facts of this case, the Respondent argues that the Claimant must be deemed to have waived its right to arbitration by filing its Petition before the Bratislava Court.

195. First, the Respondent asserts that the Petition itself confirms the Claimant's waiver. Contrary to the position that the Claimant advanced before this Tribunal, the Claimant invoked the jurisdiction of the Bratislava Court based on the direct applicability of the Treaty in the Slovak legal order.[229] Moreover, according to the Respondent, the claims made in the Petition are also identical to the claims made in this arbitration, including the Claimant's claims arising under Article 5 of the Treaty.[230] In addition, as expressed by Professor Klůcka, the Respondent's expert on Slovak law, the Petition cannot be characterized as a request for interim measures because it seeks to have the Claimant's Treaty claims resolved on the merits.[231]

196. The Respondent adds that the Petition is not conditioned on the absence of arbitral jurisdiction to decide the Treaty claims. According to the Respondent, the only condition expressed in the Petition was a request for suspension in deference to the arbitration if a referral to the Constitutional Court was not forthcoming.[232] The Respondent also points out that the Claimant persisted with its Article 5 Treaty claim before the Bratislava Court even after the Tribunal had found that it had jurisdiction to adjudicate this claim.[233] The Respondent further asserts that it did not contest the jurisdiction of the Bratislava Court and in fact promptly accepted its jurisdiction upon the National Council's procurement of legal counsel.[234]

197. Secondly, the Claimant cannot justify its commencement of the Bratislava Court proceedings by reference to an alleged conservatory purpose, since its claim was not in danger of being prescribed, and even if the Tribunal adopted the reasoning of the

[229] Respondent's Rejoinder, para. 136, citing First Hearing on Jurisdiction, Transcript (19 December 2011), pp. 211:12 to 212:3.
[230] Respondent's Rejoinder, para. 137 citing Petition, paras. 76, 83 and Klučka Opinion, para. 7; Respondent's Supplementary Statement of Defence, para. 22.
[231] Respondent's Rejoinder, para. 138 citing Klučka Opinion, paras. 18, 27.
[232] Respondent's Rejoinder, para. 139 citing Petition, paras. 118, 120.
[233] Respondent's Rejoinder, para. 140.
[234] Respondent's Rejoinder, para. 141.

Austrian Airlines tribunal and dismissed the Claimant's other claims, this would not oust the Article 5 claims.[235]

198. The Respondent argues that the four-year statute of limitations of the Commercial Code would apply to this dispute instead of the three-year limitations period under Section 583 of the Civil Code on which the Claimant relied.[236] The Respondent also contends that the limitations period would not have started running upon publication of the HICA on 24 November 2007 (as the Claimant had alleged), but only once the HICA took effect (January 2008) or actually prevented the Claimant from carrying out a transfer from Slovakia outwards (April or May 2009).[237] Even if the Claimant were correct about when the limitation period began running, however, the Respondent insists that the Claimant filed the Petition "one year sooner than necessary to avoid [the] time-bar."[238] The Respondent further points out that the Claimant could have invoked the present arbitration to extend the limitation period under either Commercial Code Section 405(2) – or under Article 10.6(1) of the UNIDROIT Principles, which can be used to interpret and supplement the Slovak Commercial Code – until after the Tribunal had ruled on its jurisdiction.[239]

199. According to the Respondent, the Claimant's subsequent conduct confirms that its Petition was not merely conservatory. Rather than seeking agreement to defer the Bratislava Court proceedings, the Claimant in fact strongly opposed the Respondent's requests that the court proceedings be adjourned or extended to give the Respondent the opportunity to seek proper representation.[240] The Claimant also failed to embrace two out of the three grounds for suspension of the court proceedings advanced by the Respondent in its 29 February 2012 Reply to the Bratislava Court, whereas the Respondent argues that had the Claimant's object in filing the Petition genuinely been

[235] Respondent's Rejoinder, paras. 148-149 citing *Austrian Airlines AG v. Slovak Republic*, UNCITRAL, Final Award (9 October 2009) (G. Kaufmann-Kohler, C. Brower, V. Trapl), para. 136 (Exhibit RL-23).
[236] Respondent's Rejoinder, paras. 152-153 citing Klučka Opinion, para. 28.
[237] Respondent's Rejoinder, paras. 154-155, citing Klučka Opinion, para. 30.
[238] Respondent's Rejoinder, para. 154, citing Klučka Opinion, para. 31.
[239] Respondent's Rejoinder, paras. 156-161, citing Klučka Opinion, para. 37; UNIDROIT Principles of International Commercial Contracts (2010), Art. 10.6 (Exhibit RL-490).
[240] Respondent's Rejoinder, paras. 164-165 citing (*c.f.*) *Bayindir Insaat Turizm Ticaret ve Sanayi A S v Pakistan*, Decision on Jurisdiction on 14 November 2005, ICSID Case No. ARB/03/29 (G. Kaufmann-Kohler, K-H Böckstiegel, F. Berman), para. 34 (Exhibit CL-9) and EURAM's letter to the District Court Bratislava I, dated 3 August 2011, pp. 3, 5 (Exhibit R-14).

purely conservatory, it would have supported any request for the suspension of proceedings.[241]

200. The Respondent also argues, in the alternative, that even if the initial act of commencing proceedings in the Bratislava Court did not amount to waiver, its subsequent conduct must be taken to have waived the right to arbitrate. In this context, the Respondent maintains that the Claimant never advanced its request for the suspension of the court proceedings in favour of arbitration, nor reiterated that its "primary forum" for dispute resolution was arbitration.[242] Instead, the Claimant continued pushing its Treaty claims before the Bratislava Court.[243] In particular, the Claimant's 16 July 2012 and 8 August 2012 Statements requested that the Bratislava Court dismiss the Respondent's suspension request and proceed to a judgment on the merits of the Claimant's Treaty claims, including its Article 5 claim.[244] The Respondent also notes that, on 14 January 2013, three months after the Tribunal had held that it had jurisdiction to decide the Article 5 claim and the very same day that the Claimant asked this Tribunal to resume the arbitration proceedings,[245] the Claimant filed a motion in the Bratislava Court seeking the production by the Respondent of the *Achmea v. Slovak Republic I* Final Award.[246] According to the Respondent, given that the *Achmea I* tribunal found that the Respondent had violated the transfers provision of the Dutch-Slovak BIT, this request must have been made in order to use the *Achmea I* award in support of the Article 5 claims in the court proceedings.[247]

201. Lastly, the Respondent submits that, even if the Tribunal accepts that the Claimant's original purpose for the Petition was conservatory in nature, the Claimant's subsequent conduct comprises an independent basis for the Tribunal to find that the Claimant has waived its right to arbitration.[248] The Respondent cites Prof. Heuman, who explains that the Claimant "is not allowed under the arbitration agreement to take substantially more extensive procedural actions in the court proceedings than are needed to prevent its

[241] Respondent's Rejoinder, para. 167.
[242] Respondent's Rejoinder, para. 167.
[243] Respondent's Rejoinder, para. 168.
[244] Respondent's Rejoinder, paras. 169-171, citing EURAM's response to Respondent's Statement delivered to the Court on 1 March 2012, dated 16 July 2012, pp. 2, 7, 10 (Exhibit R-23) and EURAM's Statement to the Further Evidence Produced by Respondent, dated 8 August 2012, p. 3 (Exhibit R-24).
[245] Respondent's Rejoinder, para. 173, citing EURAM's Letter to the Tribunal, dated 14 January 2013, p. 1.
[246] Respondent's Rejoinder, para. 172, citing EURAM's Motion for Evidence and Disclosure of Information, dated 14 January 2013, p. 2 (Exhibit R-26).
[247] Respondent's Rejoinder, para. 173.
[248] Respondent's Rejoinder, paras. 178-180, citing Heuman Opinion, para. 35.

claim from becoming statute-barred. A claimant resisting a stay of the court proceedings or the respondent's application for a respite demonstrates claimant's intention and decision to litigate the dispute."[249] The Respondent highlights various actions by the Claimant subsequent to the filing of the Petition that it argues can have no conservatory purpose: (i) refusing to stay or defer the court proceedings; (ii) asking the Court to review its Treaty claims on the merits and attempting to accelerate such review; (iii) maintaining its Article 5 claim in the court proceedings even after the Tribunal upheld jurisdiction over that claim; and (iv) requesting the production of evidence in the court proceeding seemingly in support of its Article 5 claim.[250]

2. The Claimant

202. The Claimant disputes the Respondent's exposition of the applicable legal principles. The Claimant initially notes that the present case does not fall under Section 5 of the SAA.[251] According to the Claimant, this section comprehensively lists the situations under which a party is deemed to have forfeited its right to invoke the arbitration agreement. Apart from these instances, the initiation of litigation does not constitute a waiver of the right to arbitration unless a traditional contract law analysis evinces an agreement between the Parties to that effect.[252] As such, a unilateral statement must be clear and unequivocal in order to be construed as a waiver; otherwise, "a nuanced approach based on the interpretation of the words used or action taken by a party" is required, rather than resort to "unreflected self-serving truism[s] that ignore[] the facts of the case."[253] An analysis according to general principles such as Article 4.2 of the UNIDROIT Principles would not differ in substance.[254]

203. The Claimant adds that the sources relied on by the Respondent do not address the situation in which the court proceedings were initiated after and parallel to the commencement of the arbitration.[255] Whereas a waiver of the arbitration agreement may result when a defendant files a defence on the merits and does not challenge the jurisdiction of the court, in this case, the Respondent did not file a defence on the

[249] Respondent's Rejoinder, para. 176, citing Heuman Opinion, para. 36.
[250] Respondent's Rejoinder, paras. 177-178, citing Heuman Opinion, para. 36.
[251] Claimant's Reply, para. 88, citing Runeland Opinion, para. 35.
[252] Claimant's Reply, para. 89. citing Runeland Opinion, para. 36.
[253] Claimant's Reply, paras. 91-92, citing L. Heuman, *Arbitration Law of Sweden: Practice and Procedure* (2003), p. 124 and Runeland Opinion, para. 38; Claimant's Rebuttal, paras. 115-118.
[254] Claimant's Reply, para. 95.
[255] Claimant's Reply, paras. 90-91, referring to the Respondent's Supplementary Statement of Defence, para. para. 19-20, citing Heuman, pp. 127-128; Runeland Opinion, para. 38.

merits, but in fact objected to the jurisdiction of the Bratislava Court on the basis of the alleged invalidity of the BIT.[256] Moreover, the Petition preserved the Claimant's right to arbitration because it clearly explained the limited purpose of the Petition and affirmed the Claimant's choice of arbitration over litigation.[257]

204. The Claimant posits that the above factors all distinguish the present case from *Alucoal v. NKAZ*.[258] The Claimant states that *Alucoal* initiated court proceedings two months before it commenced an arbitration seeking the same relief under the contracts and argued strongly in favour of the jurisdiction of the court while at the same time hiding the existence of the arbitration clauses covering the dispute.[259] By contrast, in the present case, not only did both Parties contest the jurisdiction of the Bratislava Court, but the Claimant also affirmed its preference for arbitration as the primary means of resolving its claims and expressly reserved its rights in that regard.[260] In the present case, the cause of action in the litigation is based on domestic law and alternatively formulated as an expropriation claim, which the present arbitration does not concern.[261]

205. The Claimant also distinguishes the other Swedish cases cited by the Respondent and its Swedish law expert, Professor Heuman, on the same basis.[262] The Claimant points out that in all three cases – namely, *Lebam v. Hans Schröder*,[263] *Hytten v. Lennart Hultenberger*,[264] and *Svealand Kanal v. Norska Postverket*[265] – the claimants, despite having the option of commencing arbitration under the contract, deliberately chose to pursue their claims through summary court proceedings based on the bills of exchange without making any reservation with regard to the arbitration agreement or having any other compelling reason for doing so.[266]

206. According to the Claimant, the Swedish Court of Appeal further affirmed these principles in the matter of *Arkhangelskoe Geologodobychnoe Predpriyatie v. Archangel*

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[256] Claimant's Rebuttal, paras. 108-109, citing E. Gaillard & J. Savage (eds.), *Fouchard, Gaillard & Goldman on International Commercial Arbitration* (Kluwer, 1999), para. 736 (Exhibit RL-456) and J. Poudret & S. Besson, *Droit Comparé de l'Arbitrage International* (2nd ed., 2007), para. 379 (Exhibit RL-472).
[257] Claimant's Reply, paras. 93-94 citing Runeland Opinion, para. 41; Claimant's Rebuttal, paras. 116-118.
[258] *Alucoal v NKAZ*, Second Interim Award, dated 14 April 2004, Case No. 022/2001 (Exhibit CL-210).
[259] Claimant's Reply, paras. 96-99 citing *Alucoal*, paras. 10-11, 45, 55, 65.
[260] Claimant's Reply, para. 98.
[261] Claimant's Reply, para. 99.
[262] Claimant's Rebuttal, paras. 134-135.
[263] Claimant's Rebuttal, para. 135, citing (Exhibit LH-5).
[264] Claimant's Rebuttal, para. 135, citing (Exhibit LH-6).
[265] Claimant's Rebuttal, para. 135, citing (Exhibit LH-7).
[266] Claimant's Rebuttal, paras. 136-140.

Diamond Corporation, where it held that Diamond had not waived its right to arbitrate the dispute by commencing proceedings in the Colorado courts while it sought to set aside an arbitral tribunal dismissal of its claims for lack of jurisdiction.[267] The Swedish Court of Appeal held that the waiver of the right to arbitrate must be considered on a case-by-case basis and that there was no waiver because Diamond was merely "seeking different navigable roads in order [to] press its claims", had consistently upheld the validity of the arbitration agreement, and had not otherwise agreed with Arkhangelskoe that the arbitration agreement would cease to apply.[268] Thus, in the Claimant's view, "even a pursuit of the litigation that is much more active than Claimant's conservatory approach in the Slovak proceedings does not *per se* imply a waiver of the arbitration agreement," as long as the actions of a party cannot be understood as a clear waiver or offer to contract out of an arbitration agreement. [269]

207. In the Claimant's view, the other two Swedish cases cited by the Respondent and Professor Heuman – namely, *Baladi v. Scania-Vabis*[270] and *Anna Stina H. v. Yngve L. Anna Stina H* [271] – are simply inapposite, as they concern situations involving extensive negotiations between the parties.[272]

208. Turning to the facts of this case, the Claimant rejects the contention that its commencement of court proceedings was inconsistent with the fact of maintaining and pursuing its claims in the arbitration at the same time.[273]

209. First, the Claimant identifies two facts that would preclude the Respondent from having reasonably understood that the Claimant had intended to litigate rather than arbitrate its claims: (a) the Petition, which was coupled with a request to suspend the proceedings, indicated that arbitration was the primary forum for the Claimant's claims and that the Petition itself was filed merely to prevent the Claimant's claims from becoming time-

[267] Claimant's Rebuttal, para. 126, citing *Arkhangelskoe Geologodobychnoe Predpriyatie v. Archangel Diamond Corporation*, Judgment of 20 February 2004, Case No. T2277-04, Swedish Court of Appeal (Exhibit CL-228).
[268] Claimant's Rebuttal, paras. 126-127, citing *Arkhangelskoe Geologodobychnoe Predpriyatie v. Archangel Diamond Corporation, id.*, pp. 6-7.
[269] Claimant's Rebuttal, paras. 128-129, citing Supplemental Opinion Per Runeland, paras. 37-38, 56.
[270] Claimant's Rebuttal, para. 142, citing *Baladi*, NJA 1977, Nr.19 (Exhibit LH-16).
[271] Claimant's Rebuttal, para. 142, citing *Stina-H*, NJA 1992, Nr.38 (Exhibit LH-17).
[272] Claimant's Rebuttal, paras. 141-146.
[273] Claimant's Rebuttal, para. 110, citing Heuman Opinion, para. 25.

barred; and (b) the fact that the Claimant maintained its opposition to the full range of the Respondent's jurisdictional objections within the arbitration.[274]

210. However, even if the Respondent could have understood that the Claimant intended to abandon the arbitration, the Claimant contends that the Respondent did not in fact rely on this understanding, as it objected to the jurisdiction of the Bratislava Court and did not reply to the Petition on the merits.[275] Nor did the Respondent suffer any detriment, or alter its position in reliance on the Slovak court proceedings.[276]

211. Secondly, the Claimant insists that the Slovak proceedings have a purely conservatory purpose consistent with maintaining its claims in the arbitration.[277] According to the Claimant, since the Respondent did not make any statement rejecting the Claimant's statements regarding the primacy of arbitration for the dispute resolution or the conservatory purpose of the Petition, any offer made by the Claimant through the Petition – and accepted by the Respondent in its Reply to the Petition – necessarily included agreement that the arbitration was the primary forum for resolution of the dispute and that the Petition was merely conservatory in nature.[278] This is, in the Claimant's view, bolstered by the fact that the Respondent objected to the jurisdiction of the Bratislava Court.[279]

212. The Claimant clarifies that the conservatory purpose for its Petition is not only based on the *Austrian Airlines* case and also covers its Article 5 claim before the Bratislava Court.[280] The Claimant alleges that it did not and could not know the full range of jurisdictional objections that the Respondent would raise in the arbitration, which could potentially lead to the dismissal of its Article 5 claim in addition to its other claims.[281] That remains the case, since even "[a]fter the issue of the jurisdictional award, [the] Claimant's Article 5 claim is still under risk of being dismissed on jurisdictional grounds as much as it was before simply because Respondent's remaining jurisdictional objections are not yet dismissed."[282] The Claimant thus explains that it did not and

[274] Claimant's Rebuttal, para. 111.
[275] Claimant's Rebuttal, para. 113.
[276] Claimant's Rebuttal, para. 114.
[277] Claimant's Rebuttal, para. 123.
[278] Claimant's Rebuttal, paras. 123-125, citing Heuman Opinion, paras. 36-38.
[279] Claimant's Rebuttal, para. 125.
[280] Claimant's Rebuttal, para. 69, citing (Exhibit RL-23).
[281] Claimant's Rebuttal, para. 69.
[282] Claimant's Rebuttal, para. 68.

cannot withdraw its Article 5 claim from the Bratislava Court proceeding even after the Tribunal had found jurisdiction over this claim without defeating the conservatory purpose of the Petition.[283]

213. Thirdly, the Claimant rejects the Respondent's argument that the four-year limitation period under the Commercial Code is applicable instead of the three-year period under the Slovak Civil Code.[284] The Claimant contends that the Commercial Code is inapplicable as a whole to this case because "a dispute arising from the abuse of sovereign power or a violation of constitutional rights and guaranties by the State is not a commercial matter."[285] This would also render impossible an application for extension of the applicable period under Article 405(2) of the Commercial Code.[286] The Claimant notes that Professor Klučka, the Respondent's expert on Slovak law, bases his analysis on comparing the Claimant's activity in the Slovak Republic and the relationship between the Claimant and Respondent as one between a joint stock company and its shareholders when, in reality, "the Claimant's claims are not claims against its subsidiary for dividends but claims against the State for the violation of its right to obtain dividends by the abuse of legislative power and/or the violation of constitutional rights and guarantees."[287]

214. In any event, the Claimant notes that it was required to take a precautionary approach and could not rule out the possibility that the Bratislava Court might apply the shorter three-year limitation period under the Slovak Civil Code rather than the four-year limitation period under the Commercial Code.[288] The Claimant further argues that it must be assumed that the Respondent would have raised and strongly asserted such defences.[289] The Claimant also cites and dismisses the suggestion that the UNIDROIT Principles could be read into the Slovak Civil Code.[290]

215. Fourthly, as to the Respondent's argument regarding Article 26(3) of the UNCITRAL Rules, the Claimant argues that, although not technically a request for interim measures, its Petition is similar in nature given the uncertainty regarding the jurisdictional phase of

[283] Claimant's Rebuttal, para. 68.
[284] Claimant's Rebuttal, para. 70.
[285] Claimant's Rebuttal, para. 71.
[286] Claimant's Rebuttal, para. 72.
[287] Claimant's Rebuttal, paras. 73-74, citing Klůcka Opinion, para. 28 and Bröstl Opinion, para. 35.
[288] Claimant's Rebuttal, paras. 75.
[289] Claimant's Rebuttal, para. 76.
[290] Claimant's Rebuttal, paras. 77-78.

the arbitration.[291] Moreover, the Claimant also emphasizes that this provision envisages one key situation where parallel court proceedings are not incompatible with arbitration, but it does not purport to exclude other instances where a party to an arbitration agreement may be forced to commence court proceedings.[292] The Claimant likens its case to that of the investor in the *Occidental v. Ecuador* case, where the investor was forced to make an application before the local courts in order to protect its rights under the Ecuadorian Tax law.[293] In the present case, the Claimant submits that it had to file the Petition in order to prevent its claims from being time-barred, and that it requested that the Bratislava Court suspend the proceedings until the Tribunal had issued its first jurisdictional Award.[294]

216. Lastly, the Claimant also explains that its Petition is not conditioned on the absence of arbitral jurisdiction because the Slovak legal system does not allow conditional lawsuits.[295] The fact that the Claimant filed an unconditional lawsuit cannot therefore support the waiver theory of the Respondent.[296]

217. The Claimant further argues that its subsequent conduct in the court proceedings is fully consistent with its conservatory purpose and also does not establish any intention to waive its right to arbitration.

218. First, the Claimant disputes the relevance of the duration or complexity of the litigation or the number of submissions filed, because it encompasses lapsed time and other factors over which the Claimant had no control and the Claimant also points to various submissions filed by both Parties consistent with its position in favour of this arbitration.[297]

219. Secondly, the Claimant also disputes the relevance of its opposition to the Respondent's requests for time extensions or to stay the court proceedings, noting that its own request for a stay of the proceedings had been before the Bratislava Court since the filing of its

[291] Claimant's Rebuttal, para. 131.
[292] Claimant's Rebuttal, paras. 132-133.
[293] Claimant's Rebuttal, para. 133, citing *Occidental v. Ecuador*, *supra* note 148, paras. 57-58.
[294] Claimant's Rebuttal, para. 133.
[295] Claimant's Rebuttal, para. 82, citing Bröstl Opinion, para. 35.
[296] Claimant's Rebuttal, para. 82.
[297] Claimant's Rebuttal, paras. 119-122, citing Heuman Opinion, paras. 35-36 and Exhibits R-21, R-22, R-23, R-29, and R-30.

Petition.[298] The Claimant further explains that it opposed the Respondent's extension request in its 3 August 2011 letter to the Bratislava Court because of its concern that these requests were a form of tactical manoeuvring on false pretence of a public procurement process that had not been conducted for two other similar cases (which the Respondent has now admitted was never conducted in this case either).[299] It also highlights that this letter informed the Bratislava Court of the August 2011 jurisdictional hearing in this arbitration, which was later rescheduled.[300] The Claimant also rejects the Respondent's insinuation, based on the ICSID case of *Bayindir v. Pakistan*, that the Claimant should have sought an agreement with the Respondent to defer the Slovak court proceedings under Section 110 of the Slovak Civil Procedure Code. The Claimant explains that, in that case, the Parties simply traded a stay of the parallel contract arbitration for a deferral that had the same effect.[301] Moreover, the Claimant states that "it would be fair enough to say that we have not asked Respondent to agree on a suspension as it would be fair to say that Respondent has not asked us to agree on a suspension"[302] and asserts that seeking such an agreement would not have made sense given the discrepancy in the Parties' positions underlying their respective requests for suspension.[303]

220. Thirdly, the Claimant rejects the idea that it was required to push its request for the suspension of the Bratislava Court proceedings or otherwise reiterate that arbitration was its desired primary forum for its claims. According to the Claimant, in Slovak civil litigation, once a request is made it remains on record until resolved and need not be constantly renewed.[304] To illustrate this point, the Claimant points to the 7 January 2013 Bratislava Court resolution dismissing all of the Respondent's pending suspension requests, as well as one of the Claimant's, and expressly mentioned the Claimant's stated conservatory purpose and position on the arbitration.[305] The Claimant also points to the Bratislava Court's 31 October 2012 notice asking whether the Claimant

[298] Claimant's Rebuttal, para. 121, citing Heuman Opinion, para. 36.
[299] Claimant's Rebuttal, paras. 86-89, citing Respondent's Rejoinder, paras. 164-165 and Exhibit R-14, pp. 2-3.
[300] Claimant's Rebuttal, para. 91.
[301] Claimant's Rebuttal, para. 92, citing Exhibit CL-9, pp. 1-2, 12-13.
[302] Transcript (16 September 2013), 180:10-16.
[303] Transcript (16 September 2013), 181:8-182:11.
[304] Claimant's Rebuttal, para. 93 citing Exhibit CL-9, pp. 1-2, 12-13.
[305] Claimant's Rebuttal, para. 95 citing Exhibit R-25.

maintained its application to suspend the proceedings to which the Claimant responded on 16 November 2012, indicating that it maintained that request.[306]

221. Fourthly, the Claimant rejects the Respondent's suggestion that it should have joined the Respondent's suspension requests. According to the Claimant, all three requests were equally premised on the invalidity of the BIT, and so it could not agree to them.[307] Moreover, the Claimant had already made its own suspension requests under some of the same provisions of the Code of Civil Procedure.[308]

222. Lastly, the Claimant rejects the Respondent's contention that the Claimant actively pushed its treaty claims, including its Article 5 claim, before the Bratislava Court. The Claimant notes that the evidence the Respondent relies on – namely, the Claimant's 16 July 2012 and 8 August 2012 statements – both predate the Tribunal's Award on Jurisdiction issued on 22 October 2012.[309] In addition, both statements also merely defend its position on EU law and the validity of the BIT and partially repeat what was in the Petition, which remained subject to the proviso that the arbitration remains the primary forum.[310] The Claimant insists that even litigation based on a solely conservatory purpose must make a request from the court.[311]

B. THE TRIBUNAL'S ANALYSIS

223. The waiver objection is based upon arguments of Swedish law and both Parties have submitted expert reports from experts on Swedish law. The Respondent has relied upon an opinion from Professor Lars Heuman, while the Claimant has relied upon two opinions by Mr. Per Runeland. The Tribunal approaches this objection on the basis that the law applicable to the question whether or not there has been a waiver is Swedish law. The Tribunal will also refer, where appropriate, to Slovak law, as the law which governs the procedure of the Bratislava Court, in assessing the various steps taken by the Parties in the Slovak proceedings.

[306] Claimant's Rebuttal, para. 94 citing Exhibits R-31 and R-32.
[307] Claimant's Rebuttal, paras. 96-99.
[308] Claimant's Rebuttal, para. 99.
[309] Claimant's Rebuttal, para. 100.
[310] Claimant's Rebuttal, paras. 101-103.
[311] Claimant's Rebuttal, para. 101.

(1) The Standard under Swedish Law

224. The two Swedish law experts, whose opinions the Tribunal has found of great assistance,[312] agree that under Swedish law the right to arbitrate can be lost by waiver. They also agree that a party does not waive its right to arbitrate by going to a national court for interim measures of protection, though both necessarily accept that this was not what the Claimant did in commencing the Bratislava Court proceedings. Beyond that, they disagree about the circumstances in which commencing court proceedings constitutes waiver. Both consider that, in order to amount to a waiver, an action must be clear. However, Professor Heuman considers that "a party who starts court proceedings has made a clear waiver"[313] and that "[i]n light of the principle in Swedish law that instigating litigation means a waiver, it cannot unilaterally be made ineffective by the claimant [...] declaring that the claimant wants to keep its right to arbitration in a case where it has acted contrary to the arbitration agreement".[314] By contrast, Mr. Runeland considers that Swedish law does not altogether exclude the possibility of a party simultaneously litigating and arbitrating the same issue.[315] He urges a "nuanced approach".[316]

225. In fact, there is less difference between the two experts than might at first sight appear. Professor Heuman maintains that, where a party has behaved inconsistently, it is necessary to look at its conduct taken as a whole.[317] He notes the Claimant's statement in the Petition that "the venue was purely hypothetical and a placeholder to guard against a statute of limitation bar under Slovak law in the event the arbitral tribunal would deny jurisdiction" and considers that "this may possibly be an acceptable reason for starting court proceedings in spite of the existence of an arbitration agreement".[318] He concludes:

> However, EURAM is not allowed under the arbitration agreement to take *substantially more extensive procedural actions in the court proceedings than are needed to prevent its claim from becoming statute-barred.* A claimant resisting a stay of the court proceedings

[312] It is clear from Mr. Runeland's Second Opinion, para. 1 that Mr. Runeland's First Opinion was written without his having seen many of the documents on which the waiver by conduct argument is based and that certain significant papers were shown him only when he was preparing his Second Opinion. It is therefore to that Second Opinion that the Tribunal will chiefly refer.
[313] Heuman Opinion, para. 26.
[314] Heuman Opinion, para. 33.
[315] Runeland Second Opinion, para. 16.
[316] Runeland Second Opinion, para. 16.
[317] Heuman Opinion, para. 26.
[318] Heuman Opinion, para. 36.

> or the respondent's application for a respite demonstrates claimant's intention and decision to litigate the dispute. Such resolution may also be evident from claimant's submissions and evidence presented in the case. The number of claimant's filings and their extensiveness and complexity may be factors speaking in favour of a waiver as well as the duration of the litigation.[319] (Emphasis added.)

226. Mr. Runeland's "nuanced approach" led him to the conclusion that

> ... because EURAM Bank clearly described the background to the Bratislava court action, stating that the arbitral tribunal was the primary forum, brought a broader action in Bratislava, *and did just what was necessary to keep it alive as a precautionary measure*, EURAM Bank did not waive the arbitration agreement.[320] (Emphasis added.)

227. The passages which the Tribunal has highlighted in the above quotations suggest that, while the two experts drew different conclusions on the basis of the record of the Bratislava proceedings (to the extent that they had been shown all the relevant documents), the standard which they applied was essentially the same, namely whether the Claimant had gone beyond what was necessary to prevent its claim in Slovakia from becoming statute-barred. The Tribunal will, therefore, apply that standard to the facts before it.

228. Before doing so, however, there are a number of other points concerning Swedish law which the Tribunal wishes to emphasise. First, Mr. Runeland referred, in his First Opinion, to the award of the Swedish arbitration tribunal in *Alucoal v. NKAZ*, which was also much discussed by the Parties. He considered that "the essential difference between *Alucoal* and the case before us is that Alucoal, but not Euram Bank, brought the court action before instigating the arbitration, and did it without any reservation concerning the action under the agreement to arbitrate".[321] The Tribunal has studied the *Alucoal* award with care and is not persuaded that the first difference noted by Mr. Runeland can be regarded as significant. Although the *Alucoal* tribunal referred, in paragraph 55 of the award, to the fact that Alucoal had initiated proceedings in New York before commencing arbitration, there is nothing in the award to suggest that this fact was considered in any way decisive; on the contrary, the reference in paragraph 55 of the *Alucoal* award appears to be descriptive and nothing more. The Tribunal notes that Mr. Runeland did not return to this point in his Second Opinion, even though it was obvious that Professor Heuman considered that litigation commenced after arbitration proceedings had started could constitute a waiver under Swedish law. The Tribunal is

[319] Heuman Opinion, para. 36.
[320] Runeland Second Opinion, para. 38
[321] Runeland First Opinion, para. 44.

not persuaded that Swedish law confines waiver to the initiation of court proceedings before an arbitration has been commenced.[322]

229. Secondly, the Tribunal notes two other aspects of *Alucoal* which are relevant to the present case. The tribunal there was clear that the commencement of court proceedings in a State other than the seat of the arbitration was capable of constituting waiver. Moreover, the *Alucoal* tribunal considered that in order to amount to waiver, the court proceedings did not have to be identical to the arbitration but that it was sufficient that they included the arbitral cause of action. The Tribunal agrees with both points.

230. Lastly, the Tribunal has carefully considered the judgments of the Swedish courts in the case of *Arkhangelskoe Geologodobychnoe Predpriyatie v. Archangel Diamond Corporation* (paragraph 206, above). While these judgments are of considerable interest, the Tribunal considers that the facts of the *Arkhangelskoe* case are sufficiently different from those of the present case that they afford little guidance. In particular, Arkhangelskoe had actively contested the jurisdiction of the Colorado courts, whereas the Tribunal has already found (see paragraph 184, above) that the Slovak Republic did not contest the jurisdiction of the Bratislava Court.

(2) Application of Swedish Law to the Facts

231. There is an inevitable degree of overlap between the submissions of the Parties regarding the issue of waiver and those on the Respondent's argument that there was an agreement. It is appropriate, therefore, for the Tribunal to begin by recalling that, in its decision on the latter issue it has already settled a number of the points in issue between the Parties as regards the waiver argument.

232. First, the Tribunal has accepted that, in filing its Petition with the Bratislava Court, the Claimant made clear that it considered that the arbitration was the primary forum for the determination of its BIT claims (paragraph 179, above).

233. Secondly, the Tribunal has accepted that the Claimant commenced proceedings in the Bratislava Court in order to guard against the possibility that, if the Tribunal ruled that it lacked jurisdiction over the BIT claims, the Claimant would be unable to pursue an action in the Bratislava Court because it would be time barred (paragraph 179, above).

[322] Mr Runeland's second ground for distinguishing *Alucoal* from the present case is considered below.

In that context, the Tribunal notes the Respondent's argument that the Claimant would in fact have benefitted from a longer period in which to bring proceedings than the one which the Claimant considered to be applicable but repeats that the Claimant was entitled to take a conservative view on this point since its whole purpose was to insure against a risk of being time barred (see paragraph 180, above).

234. Thirdly, the Tribunal does not agree with the Claimant's analysis of the Respondent's response to the Petition as a challenge to the jurisdiction of the Bratislava Court. While the Respondent has at times made contradictory and confused remarks about the nature of that response, for the reasons already given, the Tribunal considers that – far from challenging the jurisdiction of the Bratislava Court – the Respondent invoked that jurisdiction by asking the Court to make a preliminary reference to the CJEU (see paragraphs 183 to 184, above).

235. It is in the light of these earlier conclusions that the Tribunal will approach the issue of the waiver.

236. As the Tribunal has explained, the Respondent puts its waiver objection in two ways (as encapsulated in the passage from Professor Heuman's Opinion quoted in paragraph 190, above), namely that the very act of filing the Petition amounts to a waiver and that, even if (*arguendo*) the Claimant did not waive its right to arbitrate by that act, its subsequent conduct has to be regarded as a waiver. The Tribunal has already held that the Respondent was not entitled to raise a jurisdictional objection on the first basis, because it had delayed for too long after it became aware of the Petition before raising its waiver objection (see paragraphs 129-130, above). The Tribunal will therefore consider only the argument that the Claimant's subsequent conduct amounted to a waiver.

237. That does not, of course, mean that the Petition becomes irrelevant. It is the background against which all the subsequent procedural steps were taken and thus requires careful consideration. For that reason, and because the Parties and their respective experts have considered the matter in great detail, the Tribunal will begin with an analysis of that Petition.

238. The Tribunal has already noted that the claim advanced by the Claimant in the Petition is substantially the same as the claim advanced in the arbitration; indeed, the Claimant itself, at paragraph 13 of the Petition, described its Treaty claim advanced in the Petition

as based upon "identical legal reasoning" to that put forward in support of its claim in the arbitration. While the Petition also relied upon the Constitution of the Slovak Republic and the European Convention on Human Rights, it undoubtedly included (to use the terms of the *Alucoal* award) the entirety of the claim in the arbitration proceedings.

239. However, the Tribunal considers that the Claimant made clear, when filing the Petition, that its action was merely "a placeholder to guard against a statute of limitation bar under Slovak law in the event the arbitral tribunal would deny jurisdiction" (paragraph 225, above). The Tribunal agrees that such an action would not constitute a waiver under Swedish law. Moreover, it notes that the Respondent did not appear to treat it as such at the time (see paragraph 129, above). Accordingly, had the Tribunal not already determined that the Respondent's objection that the act of filing the Petition was, in and of itself, a waiver, was submitted too late, it would in any event have dismissed that objection on the merits.

240. That leaves the question whether the Claimant's conduct subsequent to the filing of the Petition constitutes a waiver. In that regard, the following acts require consideration:

(1) the Claimant's opposition to the Respondent's requests for an extension of time in the District Court (3 August 2011; see paragraph 45, above);[323]

(2) the Claimant's response to the Respondent's defence in the District Court (16 July 2012; see paragraph 64, above);[324]

(3) the Claimant's response to the District Court's enquiry regarding its motion for suspension of the proceedings (16 November 2012; see paragraph 70, above);[325]

(4) the Claimant's request for disclosure of the *Achmea* award (14 January 2013; see paragraph 73, above);[326]

(5) the Claimant's appeal against the judgment of the District Court of 7 January 2013 (31 January 2013; see paragraph 75, above);[327] and

[323] Exhibit R-14.
[324] Exhibit R-23.
[325] Exhibit R-32.
[326] Exhibit R-26.

(6) the Claimant's response to the Respondent's appeal against the judgment of the District Court (3 April 2013; see paragraph 81 above).

Each of these will be considered in turn, although it is necessary to bear in mind that it is their cumulative effect, rather than the significance of any one step taken in isolation, which has to be evaluated.

(1) the Claimant's opposition to the Respondent's requests for an extension of time in the District Court (3 August 2011)

241. The first of these events is significant in that the Claimant, having assured the Bratislava Court in the Petition, that it considered the arbitration to be the primary forum and having requested (on two different grounds) suspension of the proceedings before the Bratislava Court, nevertheless opposed a request by the Respondent which, if not bringing about a suspension as such, would have had a similar effect in that the next step in the proceedings would have been delayed. By itself, that opposition does not amount to much and the Claimant has explained that it was concerned that the Respondent was seeking to delay the proceedings for tactical reasons of its own. Nevertheless, the Claimant's action on this occasion – when it took the initiative of requesting the District Court to revoke an extension of time that the Court had already granted the Respondent – is the first indication that the Claimant was not determined to take all steps open to it to ensure that the timetable in the Bratislava proceedings did not clash with that in the arbitration. It is also significant that, while the document by which the Claimant opposed the extension of time referred to the arbitration proceedings and mentioned (as was the case) that a hearing on the jurisdictional issues was then scheduled to take place three weeks later, it neglected to mention that the Claimant had filed a challenge to Professor Stern which, had it been successful, would certainly have led to a substantial postponement of the hearing (see paragraph 45, above).

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[327] Exhibit R-28; the judgment of the District Court is Exhibit R-25.

(2) the Claimant's response to the Respondent's defence in the District Court (16 July 2012)

242. In this document, the Claimant opposed the Respondent's motion for a preliminary reference to the CJEU under Article 234 of the TFEU. That was, of course, entirely consistent with the stance taken by the Claimant in the arbitration, since the Claimant has consistently argued that the BIT remains valid and binding upon Austria and the Slovak Republic, notwithstanding any provisions of EU law. The Claimant cannot, therefore, be criticised for not acceding to the Respondent's request, particularly since at the time that it filed its response (in accordance with the timetable set by the Bratislava Court), the Respondent expected the Tribunal's award on the original jurisdictional objections within a short time-frame.

243. However, the response concludes with the following request to the Bratislava Court:

> ... we request the District Court of Bratislava I to dismiss Respondent's request to suspend these proceedings and *award a decision in accordance with the provisions of the Investment Protection Agreement* [i.e. the BIT], which governs the legal relationship between Claimant and Respondent, as well as the claim brought by Claimant against Respondent in these proceedings.[328] (Emphasis added.)

The Claimant made a similar statement in its response of 8 August 2012 to the further evidence produced by the Respondent.[329]

244. Although the Claimant denied that this passage was a "prayer for relief",[330] it is undoubtedly a request which informs the Court what the Claimant is asking it to do. That was to take a decision on the merits of the Claimant's BIT claim, something which is expressly singled out in the passage quoted. The Claimant made no mention of the timetable in the arbitration proceedings, of the fact that it had already said in the Petition that it considered the arbitration to be the primary forum or of its extant request for a stay of the proceedings pending the award of the Tribunal.

(3) the Claimant's response to the District Court's enquiry regarding its motion for suspension of the proceedings (16 November 2012)

245. On 31 October 2012, the Bratislava Court wrote to the Claimant inquiring whether the Claimant was still requesting a stay of the proceedings and referring to the

[328] Exhibit R-23, para. 10.
[329] Exhibit R-24.
[330] Second Jurisdictional hearing, Transcript (16 September 2013), p. 110:12-18.

Constitutional Court judgment of 26 January 2011. No mention was made of the arbitration.[331] The Tribunal had given its First Award on the original jurisdictional objections on 22 October 2012, although the Court was not, of course, aware of that fact. The Claimant replied on 16 November 2012.[332] The Claimant informed the Court that it was still requesting a stay of proceedings and referred to what it described as inconsistencies in the jurisprudence of the Constitutional Court.

246. While the letter from the Court referred only to the Claimant's request for a stay under Article 109(1)(b) of the Code of Civil Procedure, the Claimant did not, in its reply, remind the Court that it also had outstanding a second application for a stay. Nor did it inform the Court that the Tribunal had given its Award on the original jurisdictional objections in which it had held that the Tribunal lacked jurisdiction over the claims under Articles 2 and 4 of the BIT, leaving only the Article 5 claim and that subject to the outcome of the new jurisdictional objections.

(4) the Claimant's request for disclosure of the Achmea award (14 January 2013)

247. On 14 January 2013, the Claimant wrote on its own initiative to the Court filing a Motion for evidence and the disclosure of information. In that motion it requested that the Respondent disclose the award on the merits in *Achmea BV v. Slovak Republic* on the grounds that it might be used as evidence in the proceedings before the Bratislava Court. The Respondent maintains that this request is of great significance as the *Achmea* award would have been relevant to an Article 5 claim and shows that the Claimant had decided to pursue such a claim before the Bratislava Court. The Tribunal does not consider that the Motion can be so unequivocally linked to the Article 5 claim. The *Achmea* award[333] has broader implications for the Claimant's position on the BIT. Nevertheless, the award could have been relevant in the Bratislava proceedings only if those proceedings were to advance to the merits. Moreover, the Claimant did not take this opportunity to notify the Court of the First Award of this Tribunal or to advise the Court that, on the same day that it filed the Motion, it had notified the Tribunal that it intended to proceed with the Article 5 claim in the arbitration proceedings.

[331] Exhibit R-31.
[332] Exhibit R-33.
[333] Exhibit RL-446.

(5) the Claimant's appeal against the judgment of the District Court of 7 January 2013 (31 January 2013)

248. As recorded in paragraphs 71 to 72, above, on 7 January 2013, the Bratislava Court gave a judgment in which it dismissed the Claimant's request for a stay of the proceedings under Section 109(1)(b) of the Code of Civil Procedure and the various motions from the Respondent but said nothing about the request for a stay pending the outcome of the arbitration proceedings. On 31 January 2013, the Claimant filed an appeal against that judgment.[334] The appeal reiterated that the Claimant was "seeking satisfaction regarding a breach of the specific provisions of the Bilateral Investment Treaty". No mention was made of the fact that the judgment had not dealt with the request for a stay pending the outcome of the arbitration under Section 109(2)(c) of the Code of Civil Procedure; nor did the Claimant mention the Award of 22 October 2012 or its decision to continue with its Article 5 claim before the Tribunal.

(6) the Claimant's response to the Respondent's appeal against the judgment of the District Court (3 April 2013)

249. The Respondent also appealed against the judgment of the District Court.[335] On 3 April 2013, the Claimant filed a response to the Respondent's appeal.[336] The response contested the Respondent's argument that the District Court should have made a preliminary reference to the CJEU. In addressing that question, the Claimant referred to the award in *Eureko* but made no mention of the October 2012 Award of this Tribunal, even though it had reached the same conclusion as the *Eureko* tribunal on the EU law issue.

250. In addition to the positive steps taken by the Claimant, the Respondent also refers to what it says the Claimant did not do. In particular, it maintains that, once the Tribunal had given its Award of 22 October 2012, the Claimant should have withdrawn its Article 5 claim from the national proceedings as it was continuing to pursue that claim in the arbitration, a point also raised by Professor Heuman.[337]

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[334] Exhibit R-28.
[335] Exhibit R-27.
[336] Exhibit R-34.
[337] Heuman Opinion, para. 22.

251. In assessing the significance of these steps for the issue of waiver, the Tribunal starts with its earlier finding (paragraph 239, above) that the act of the Claimant in commencing proceedings before the Bratislava Court was not a waiver of the right to arbitrate but only because the Petition made clear that the Claimant regarded the arbitration as the primary forum and brought the Bratislava proceedings only as a safeguard. That feature of the Petition is emphasised by both Mr. Runeland and Professor Heuman (see paragraphs 224 to 227, above). The question that now has to be decided is whether, in the nearly three years between the filing of the Petition and the hearing before the Tribunal in September 2013, the Claimant undertook what Professor Heuman described as "substantially more extensive procedural actions in the court proceedings than are needed to prevent its claim from becoming statute-barred" [338] or, in Mr. Runeland's words, went beyond "what was necessary to keep it alive as a precautionary measure".[339]

252. In seeking to answer that question, it is important to be clear about the effect of the Award of 22 October 2012. In that Award, the Tribunal held that it lacked jurisdiction with regard to the claims under Articles 2 and 4 of the BIT but rejected the Respondent's original jurisdictional objections to the claim under Article 5. That did not mean, however, that the Tribunal had settled the issue of jurisdiction in respect of the Article 5 claim, as the new jurisdictional objections lodged on 22 April 2012 remained. Accordingly, the effect of the 22 October 2012 Award was that jurisdiction over the Article 5 claim remained uncertain.

253. In those circumstances, the Tribunal considers that the fact the Claimant did not withdraw its Article 5 claim before the Bratislava Court when it notified the Tribunal, on 14 January 2013, that it wished to pursue the Article 5 claim in the arbitral proceedings cannot be regarded as intrinsically incompatible with the representation that the Bratislava proceedings were intended only as a safeguard. The Claimant still faced the possibility that the Tribunal might uphold one of the new jurisdictional objections and thus put an end to the entire arbitration.

254. More problematic, however, is the overall pattern of conduct displayed by the Claimant in the period under consideration. Although it initially informed the Court, in its

[338] Heuman Opinion, para. 36.
[339] Runeland Second Opinion, para. 28.

Petition commencing proceedings, that it had brought the same claim for violation of the BIT in the arbitration and that it regarded the arbitration as the primary forum for the determination of that claim, taken as a whole its later conduct cannot be reconciled with that stance. The first sign that the Claimant might be going beyond the stance taken in the Petition was its decision, in August 2011, to take the initiative of submitting a request to the Bratislava Court asking it to reconsider its earlier decision to grant the Respondent an extension of time. While the Claimant did refer to the arbitration, it did not fully disclose what was then taking place in the arbitral proceedings. Moreover, its opposition to a request for an extension of time, when the Claimant had itself applied for a stay of proceedings pending the outcome of the arbitration, casts doubt on its earlier assurance that it did not wish to pursue the Bratislava action until the outcome of the arbitration was known.

255. More importantly, the Claimant has filed submissions in the Bratislava proceedings in which it has requested a judgment on the merits (in its response of 16 July 2012 to the Respondent's defence – paragraph 243, above – and its filing of 8 August 2012). While the Claimant has contended that the request at the end of its filings of 16 July 2012 and 8 August 2012 should not be regarded as a "prayer for relief", what is inescapable is that both documents concluded with a request that the Bratislava Court give judgment on the merits for the Claimant, notwithstanding that the Tribunal had not yet ruled on the original jurisdictional objections. The Tribunal does not see how that request can be reconciled with the Claimant's original position that the arbitration was the primary forum for determination of the BIT claims and that proceedings had been commenced in the Bratislava Court only as a safeguard against a claim being statute-barred in the event that the Tribunal were to find that it had no jurisdiction and leave the Claimant with the national courts as its only avenue of redress.

256. We come then to the Claimant's conduct after the Tribunal had given its Award of 22 October 2012. The effect of that First Award has already been explained.[340] The position in which it put the Claimant was that the Articles 2 and 4 claims could thenceforth be pursued only in the Bratislava Court, whereas the Article 5 claim *might* be capable of being pursued in the arbitration but only if the new jurisdictional

[340] Both Parties have alluded to the possibility of a challenge to the First Award but, so far as the Tribunal is aware, have taken no steps to initiate such a challenge. In the circumstances, the Tribunal must proceed on the basis that the First Award stands and is binding on both Parties.

objections were dismissed. The Tribunal appreciates that this decision placed the Claimant in a difficult position. It could still not be certain that the Tribunal would uphold jurisdiction over the Article 5 claim. Moreover, while the Article 5 claim is free-standing in that it is not dependent upon the success or failure of claims under Articles 2 or 4, it is difficult to see how the Claimant could recover damages for breach of Article 5 in addition to any damages or compensation it might be awarded for breach of Article 2 or Article 4. Both in the arbitration and in the Bratislava proceedings, the Claimant has sought a total of 131,400,000 euros in compensation/damages without attempting to apportion this total sum between the different provisions under which it has brought its claim. In this connection, the Tribunal notes that the *Achmea* tribunal, while finding that there was a breach of the provision equivalent to Article 5, considered that "the violation and the injury arising from the temporary adoption of the ban on profits are subsumed within the violation and injury arising from the breach of the 'fair and equitable treatment' obligations" and concluded that "it is not necessary to consider the question of losses arising from that breach any further".[341] While that award was not given until six weeks after the 22 October 2012 Award in the present proceedings, it is likely that the Claimant was aware that it might face difficulties in seeking to recover damages for alleged violations of Articles 2 and 4 in the Bratislava Court while simultaneously pursuing a claim – in respect of the same facts – under Article 5 before the Tribunal.

257. The Tribunal has some sympathy for the Claimant's predicament but it considers that if the Claimant were to pursue claims in both the Bratislava Court and the arbitration, it was essential that it made clear the relationship between the steps taken in the former proceedings and the position in the arbitration if those steps were not to be considered a waiver. The legal position having changed since the Petition was filed, it was incumbent upon the Claimant – if it wished to maintain both sets of proceedings – to update the reference in the Petition to the relationship between the two and to ensure that the national court action was still no more than a safeguarding measure to the extent that the two sets of proceedings still overlapped.

258. The course which the Claimant actually followed was very different. First, as the Claimant conceded at the September 2013 hearing before the Tribunal, at no time did it

[341] *Achmea v. Slovak Republic*, *supra* note 150, para. 286.

inform the Bratislava Court or the Court of Appeal of the Award of 22 October 2012.[342] The Tribunal has to say that it finds this omission quite extraordinary. The Claimant had filed its Petition avowedly to guard against the possibility of the Tribunal finding that it lacked jurisdiction; it had assured the Court and the Respondent that it regarded the Tribunal as the primary forum for the resolution of the BIT dispute and it had made a request for a stay of proceedings pending the outcome of the arbitration (a request on which the Court had not ruled by the time the Award was delivered). In the summer of 2011, it had taken the opportunity of a submission on a different matter to draw the Court's attention to what was then the expected timetable for the arbitration (see paragraph 241, above). Yet when it received the Award which dealt with most of the jurisdictional issues in the arbitration, it made no mention of that fact to the Bratislava Court.

259. On the contrary, the Claimant took several active steps in the Bratislava proceedings after it had received the Award without saying anything about the Award. Thus, on 16 November 2012, it responded to the District Court's request for clarification of whether it was still seeking a stay under Section 109(1)(b) of the Code of Civil Procedure. While the letter from the District Court – perhaps surprisingly – did not refer to the Claimant's other request, under Section 109(2)(c) for a stay pending the outcome of the arbitration (the request that is relevant for present purposes), the Claimant did not take the opportunity, in responding to the request from the Court, either to inform the Court of the changed position brought about by the Award or to remind the Court of its other outstanding request for a stay. In response to a question about that at the September 2013 hearing before the Tribunal, counsel for the Claimant replied that:

> All I can say here, not being a Slovak lawyer, that's just not the practice, that's just not the way it's done in Slovak litigation. That's the only explanation I can give you. I mean, when I say it's not done in Slovak litigation, or that's not the practice, I mean, to come back to the court and say "Please decide on the other application as well."[343]

However, counsel offered no explanation as to which provision of Slovak law might preclude a party from volunteering relevant information to the court, nor is any such impediment mentioned by the Claimant's Slovak law expert, Dr Bröstl. Moreover, the Claimant had shown no hesitation in volunteering information regarding the arbitration proceedings in earlier submissions to the Bratislava Court.

[342] Second Jurisdictional hearing, Transcript (16 September 2013), p. 183.
[343] Second Jurisdictional hearing, Transcript (16 September 2013), p. 190.

260. On 14 January 2013, after the District Court had given its judgment on the Section 109(1)(b) request for a stay but before it lodged its appeal against that judgment, the Claimant requested an order for the disclosure of the *Achmea* award on the ground that it might be relevant evidence in the proceedings. However, that award could be relevant evidence only in relation to the merits of the Claimant's BIT claim. In seeking that evidence, the Claimant did not mention either the Award or its, still unanswered, request for a stay under Section 109(2)(c). The same was true of the Claimant's appeal on 31 January 2013 and its response, on 3 April 2013, to the Respondent's appeal against the judgment of the District Court.

261. Taking these various steps as a whole, the Tribunal concludes that the Claimant's conduct of the Bratislava litigation went well beyond what could reasonably be regarded, to borrow Mr. Runeland's expression, as "what was necessary to keep it alive as a precautionary measure". In none of the Claimant's communications with the Court after the summer of 2011 was the precautionary element so much as mentioned. The Claimant took no steps to progress its application for a stay pending the outcome of the arbitration and, even more significantly, never informed the Court of what the Tribunal had decided regarding jurisdiction in its Award of 22 October 2012, thus leaving before the Court a record that was incomplete and, in certain respects, actually misleading. Even if the Claimant was not in a position to take the initiative and call upon the Court to address its Section 109(2)(c) request for a stay, there was nothing to prevent it from informing the Court of the developments in the arbitration and every reason to expect that it would, and should, do so. Its failure is all the more extraordinary since it referred to the proceedings in *Eureko/Achmea* before the Court and the Court of Appeal but not to the proceedings in the arbitration to which it was itself a party.

262. It is true that the Respondent also made no mention of the Award in its communications with the Bratislava Court and the Court of Appeal. However, the request for a stay was the Claimant's request, the earlier information about the arbitration had been given by the Claimant and it is the Claimant whose conduct of the litigation which it had initiated has to be reconciled with the arbitration claim it is pursuing in such a way as to ensure that it is not seen as a waiver.

263. It must also be pointed out that, at the hearing before the Tribunal in September 2013, counsel for the Claimant stated that the Claimant's application for a stay of proceedings

under Section 109(2)(c) pending the outcome of the arbitration is still outstanding and that the Claimant still wishes to obtain such a stay.[344] However, the Claimant has taken active steps in the proceedings without any reference to that application.

264. The Tribunal considers that, after the Award of October 2012 was delivered, the procedural steps taken by the Claimant in the Slovak courts, discussed in the preceding paragraphs, went beyond what was necessary to protect the Claimant's position pending the outcome of the challenges to the jurisdiction of the Arbitration Tribunal. Even though the Tribunal accepts that the Slovak litigation was originally commenced as a precautionary measure, the Claimant's subsequent conduct of the litigation in the Slovak courts was such that a reasonable person would have concluded that it was no longer treating that litigation as a mere safeguard but was actively pursuing it with a view to obtaining a judgment in its favour irrespective of whatever might happen in the arbitration. On the basis of the evidence of Swedish law put before it by the Parties and considered above, the Tribunal concludes that this conduct amounts to a waiver of the right to arbitrate. Accordingly, the Tribunal finds that it is without jurisdiction in respect of the claim under Article 5, which is the only claim outstanding after the Award of 22 October 2012.

265. The Tribunal adds two comments for the avoidance of doubt. First, it has reached the conclusion set out above on the basis of the Claimant's conduct taken as a whole and not on the basis that any one incident is decisive in and of itself. Secondly, while the Tribunal is not persuaded that there was no course open to the Claimant by which it could have sought to advance a ruling on its request for a stay under Section 109(2)(c), its decision does not rest upon the Claimant's failure to take such action. Even if the Tribunal had found that there was indeed no means under Slovak law by which the Claimant could have pressed the District Court for a ruling on that request for a stay, the Tribunal would still have concluded that the active steps that were taken by the Claimant, together with the Claimant's failure to inform the Court of the changed circumstances in the arbitration justified the conclusion which the Tribunal has reached.

[344] Second Jurisdictional hearing, Transcript (16 September 2013), pp. 187-188.

V. COSTS

266. In paragraph 459 of the First Award, the Tribunal reserved the question of costs for the next phase of the proceedings. Article 40 of the 1976 UNCITRAL Rules provides in relevant part:

> 1. Except as provided in paragraph 2, the costs of the 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.
>
> 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.

This provision gives the Tribunal considerable discretion regarding costs. In exercising that discretion, the Tribunal considers it appropriate to take account of the following considerations:

(a) the Respondent has been successful in the second phase of the proceedings, with the result that there is no jurisdiction over any part of the claim;

(b) the Respondent was successful in the first phase of the proceedings in establishing that there was no jurisdiction regarding the claim under Articles 2 and 4 of the BIT;

(c) the Claimant was successful in the first phase of the proceedings in defeating the Respondent's first jurisdictional objection (incompatibility of the BIT with EU law) and second jurisdictional objection (indirect investment).

Before taking a decision, however, the Tribunal wishes to receive details of the costs of legal representation and assistance borne by each Party and to receive brief submissions from each Party regarding the apportionment of costs. Accordingly, the Tribunal decides that:

(a) each Party shall submit a detailed statement of the costs it has incurred, stated separately for each of the two phases of the proceedings, together with submissions of not more than five typed pages, not later than 27 June 2014;

(b) each Party shall submit a response of not more than five typed pages to the other Party's filing under sub-paragraph (a), above, not later than 4 July.

VI. THE TRIBUNAL'S DECISION

267. For the reasons stated above, the Tribunal upholds the Respondent's objection that the Claimant, by its conduct in relation to the proceedings which it instituted before the Bratislava District Court I, has waived its right to arbitrate, with the result that the Tribunal lacks jurisdiction over the claim under Article 5. Costs will be dealt with in a subsequent award as specified in paragraph 266 above.

Done this 4th day of June 2014.

Place of Arbitration: Stockholm, Sweden.

Dr. Dr. Alexander Petsche

Professor Brigitte Stern

Sir Christopher Greenwood CMG QC
Presiding Arbitrator

AGREED CHRONOLOGY (Sect. 6 of Procedural Order No. 6)

Nr.	DATE	ARBITRAL PROCEEDINGS	DATE	SLOVAK COURT PROCEEDINGS	
1.	23 Nov	Claimant's Notice of Arbitration (NoA) and Statement of Claim			
2.	8 December	Respondent's challenge to Judge Brower			
2010					
3.	28 January	Claimant's first challenge to Prof. Stern			
4.	21 September	Preliminary Procedural Meeting			
5.	27 September	Procedural Order No.1 (issued)			
6.	12 October	Procedural Order No.1 (circulation of signed version)			
7.	5 Nov	Respondent's Statement of Defense (SoD) Respondent's Request for Bifurcation (RfB)			
8.			22 Nov	Claimant's Petition for Commencement of Proceedings ("Petition")	RL-344
9.	30 Nov	Claimant's Letter agreeing to bifurcation of proceedings			
10.	2 Dec	Procedural Order No. 2			

AGREED CHRONOLOGY (Sect. 6 of Procedural Order No. 6)

Nr.	DATE	ARBITRAL PROCEEDINGS	DATE	SLOVAK COURT PROCEEDINGS	
2011					
11.	22 February	Respondent's Memorial on Jurisdiction (MoJ)			
12.			13 May	Court serves Claimant's Petition on the National Council of the Slovak Republic accompanied by Court Resolution dated 6 May 2011	RL-399
13.	14 May	Claimant's Counter Memorial on Jurisdiction (CRoJ)			
14.			20 May	Respondent's First Time Extension Request	CL-201/1
15.			14 June	Resolution by Court granting first time extension until 14 July 2011	R-15
16.	16 June	Respondent's Reply on Jurisdiction (RoJ)			
17.			7 July	Respondent's Second Time Extension Request	CL-203/1
18.	12 July	Claimant's request to invite Republic of Austria to submit an *amicus curiae* brief			
19.	12 July	Claimant's second challenge to Prof. Stern			
20.	13 July	PCA letter informing that the Tribunal received a request from Claimant that the Republic of Austria be invited to submit an *amicus curiae* brief			

AGREED CHRONOLOGY (Sect. 6 of Procedural Order No. 6)

Nr.	DATE	ARBITRAL PROCEEDINGS	DATE	SLOVAK COURT PROCEEDINGS	
21.			14 July	Resolution by Court granting second time extension until 14 October 2011	CL-202/1
22.	18 July	Claimant's Rejoinder on Jurisdiction (CRoJ)			
23.			3 August	Claimant's Reply to proposal of Respondent in the proceedings	R-14
24.	10 August	PCA letter cancelling jurisdictional hearing scheduled for 24-26 August 2011			
25.	15 August	Decision rejecting second challenge to Prof. Stern			
26.			12 October	Respondent's Third Time Extension Request	R-16
27.			20 October	Resolution by Court granting third time extension until 29 February 2012	R-17
28.	2 Sept	Procedural Order No. 3			
29.	20 Oct	*Amicus* submission of European Commission and Austria			
30.	1 Nov	*Amicus* submission of Czech Republic			
31.	21 Nov	Pre-Hearing Conference Call			
32.	30 Nov	Parties' Observations on *amicus* submission			
33.	19-20 Dec	Jurisdictional Hearing			

AGREED CHRONOLOGY (Sect. 6 of Procedural Order No. 6)

Nr.	DATE	ARBITRAL PROCEEDINGS	DATE	SLOVAK COURT PROCEEDINGS	
2012					
34.			20 January	Contract for Legal Representation and Legal Services between National Council and JUDr. Vozár to represent Respondent in Court	R-18
35.			27 January	Power of Attorney granted by the National Council to JUDr.Vozár	R-19
36.			29 February	Respondent's Reply in the Slovak proceedings (delivered to Court March 1, 2012) (Reply)	R-20 CL-204/1
37.			5 March	Respondent's additional submission to Court	R-21
38.	3 April	Respondent's letter to Tribunal			
39.	4 April	Claimant's letter to Tribunal			
40.	13 April	Respondent's letter to Tribunal			
41.	13 April	Claimant's letter to Tribunal			
42.			18 April	Respondent's Reply in the Slovak proceedings formally received by Claimant	
43.	25 May	Respondent's Supplementary Statement of Defense (SSD)			
44.	28 May	Claimant's letter to Tribunal			

AGREED CHRONOLOGY (Sect. 6 of Procedural Order No. 6)

Nr.	DATE	ARBITRAL PROCEEDINGS	DATE	SLOVAK COURT PROCEEDINGS	
45.			6 June	Respondent's additional evidence relating to the motion to stay proceedings	R-22
46.	8 June	Procedural Order No. 4			
47.			16 July	Claimant's Statement to Respondent's Statement Delivered to the Court on the 1st Day of March 2012	R-23
48.			8 August	Claimant's Statement to Further Evidence Produced by Respondent in Relation to the Request to Suspend Proceedings	R-24
49.			18 Sept	Respondent's Notice of change of Legal Representation (Rowan Legal) and Request for 30 days to review the file	
50.			18 October	Respondent's request to the Court to issue a decision on the suspension of the proceedings	
51.	22 October	Award on Jurisdiction			
52.			31 October	Request of the District Court Bratislava I to Claimant	R-31
53.			16 Nov	Claimant's Reply to the Request of the District Court Bratislava I of 31 October 2012	R-32
2013					
54.			7 January	Ruling of the District Court of Bratislava	R-25

AGREED CHRONOLOGY (Sect. 6 of Procedural Order No. 6)

Nr.	DATE	ARBITRAL PROCEEDINGS	DATE	SLOVAK COURT PROCEEDINGS	
55.	14 January	Claimant's letter to Tribunal	14 January	Claimant's Motion for evidence and disclosure of information	R-26
56.	31 January	Procedural Order No. 5	31 January	Respondent's Appeal against the Ruling of the District Court of Bratislava I of 7 January 2013 (delivered to Court on 1 February 2013)	R-27
57.			31 January	Claimant's Appeal against the Ruling of District Court of Bratislava I dated 7 January 2013 (delivered to Court on 4 February 2013)	R-28
58.			22 February	Court serves Respondent's Appeal on Claimant offering an opportunity to submit a response within 10 days	
59.			28 February	Claimant's Request for Extension of Time to submit a statement to Respondent's appeal of 1 February 2013	R-33
60.			4 March	Respondent's response to Claimant's appeal to Ruling of District Court Bratislava I (delivered to Court on 6 March 2013)	R-29
61.			18 March	Constitutional complaint of Respondent	R-30
62.	28 March	Claimant's Reply to Respondent's Supplementary Statement of Defense (Reply to the SSD)			
63.			3 April	Claimant's Statement to Respondent's Appeal of 1 February 2013	R-34

AGREED CHRONOLOGY (Sect. 6 of Procedural Order No. 6)

Nr.	DATE	ARBITRAL PROCEEDINGS	DATE	SLOVAK COURT PROCEEDINGS	
64.			16 April	Ruling of the Constitutional Court	R-35
65.	24 May	Respondent's Rejoinder in Support of its Further Jurisdictional Objections ("Rejoinder")			
66.			28 June	Respondent's Supplementary Response to Claimant's Appeal against the Ruling of the District Court Bratislava I of 7 January 2013	R-36
67.	27 May	Claimant's letter to Tribunal			
68.	28 May	Respondent's letter to Tribunal			
69.	28 May	Claimant's request for an order for document production			
70.	29 May	Claimant's letter to Tribunal			
71.	29 May	Telephone conference between the Presiding Arbitrator and the Parties			
72.	30 May	Procedural Order No. 6			
73.	3 June	Respondent's letter to Tribunal			
74.	4 June	Claimant's letter to Tribunal			
75.	5 June	Claimant's letter to Tribunal			
76.	7 June	Respondent's letter to Tribunal			

AGREED CHRONOLOGY (Sect. 6 of Procedural Order No. 6)

Nr.	DATE	ARBITRAL PROCEEDINGS	DATE	SLOVAK COURT PROCEEDINGS
77.	11 June	Procedural Order No. 7		
78.	22 July	Claimant's Rebuttal to Respondent's Rejoinder		
79.	31 July	Respondent's letter to Tribunal		
80.	1 August	Claimant's letter to Tribunal		
81.	6 August	Respondent's letter to Tribunal		
82.	7 August	Claimant's letter to Tribunal		
83.	9 August	Procedural Order No. 8		
84.	14 August	Claimant's letter to Tribunal		
85.	20 August	Procedural Order No. 9		