UNCITRAL Ad Hoc Arbitration

between

[redacted]

Claimant

and

The Slovak Republic

Respondent

FINAL AWARD

9 October 2009

Place of arbitration: Paris

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TABLE OF ABBREVIATIONS

Answer	Respondent's Answer of 8 August 2008 to the Claimant's Notice of Arbitration of 8 April 2008
Arbitration Rules	Arbitration Rules of the United Nations Commission on International Trade Law of 1976 (the UNCITRAL Rules)
Austria	The Republic of Austria
Counter-Memorial	Claimant's Counter-Memorial on Jurisdiction (13 March 2009)
EU	European Union
Exh. C	Claimant's Exhibit
Exh. CL	Claimant's Legal Authorities
CWS-1	Claimant's witness statement of Dr. F
CWS-2	Claimant's witness statement of C
Exh. R	Respondent's Exhibit
Exh. RL	Respondent's Legal Authorities
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
Memorial	Memorial on Objections to Jurisdiction by Respondent The Slovak Republic (3 February 2009)
MFN	Most Favoured Nation
Notice	Claimant's Notice of Arbitration (8 April 2008)
Parties	Claimant and Respondent
PCIJ	Permanent Court of International Justice
PO 1	Procedural Order No. 1 (14 October 2008)

Request for Discovery	Request for Production of Documents of Respondent The Slovak Republic (13 February 2009)
Respondent	The Slovak Republic
RWS-1	Respondent's witness statement of E
SOC	Statement of Claim (19 December 2008)
SCC	Stockholm Chamber of Commerce
ToA	Terms of Appointment (14 October 2008)
Treaty	Bilateral investment treaty; specifically "Agreement between the Republic of Austria and the Czech and Slovak Federal Republic Concerning the Promotion and Protection of Investments" of 15 October 1990 (entered into force on 1 October 1991).
Tribunal	The Arbitral Tribunal
Tr. J.	Tribunal's Hearing on Jurisdiction (8 April 2009)
VCLT	Vienna Convention on the Law of Treaties of 23 May 1969 (entered into force on 27 January 1980).

I. RELEVANT FACTS REGARDING JURISDICTION

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

A. PARTIES

a. Claimant

b. Respondent

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

- Mr. A [illegible] Ms A [illegible], Ministry of Finance of The Slovak Republic, Department of the Management and Accounting the Specific Operations of the State, Štefanovičova 5, 81782 Bratislava 15, The Slovak Republic; and
- Mr. David Pawlak, David A. Pawlak LL.C., c/o Soltysinski Kawecki & Szlezak, ul. Wawelska 15B, 02-034 Warsaw, Poland; and
- Dr. Rudolf Ostrihansky, Soltysinski Kawecki & Szlezak, ul. Wawelska 15B, 02-034 Warsaw, Poland; and
- Daniel Weinhold and Robert Kovacik, Weinhold Legal, branch office Bratislava, Hodzovo nám. 1A, 811 06 Bratislava, The Slovak Republic.

c. Arbitral Tribunal

5. The Arbitral Tribunal is composed of

- Presiding Arbitrator: Professor Gabrielle Kaufmann-Kohler, Lévy Kaufmann-Kohler, rue du Conseil-Général 3-5, P.O. Box 552, 1211 Geneva 4, Switzerland; and
- Arbitrator appointed by the Claimant: The Honorable Charles N. Brower, 20 Essex Street Chambers, 20 Essex Street, London WC2R 3AL, United Kingdom; and
- Arbitrator appointed by the Respondent: Dr. Vojtěch Trapl, Dr. Trapl a partner advokáti s.r.o, Dvorecká 1162/2a, 147 00 Praha 4, Czech Republic.

d. **Secretary to the Tribunal**

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

- Dr. Jorge E. Vinuales, Lévy Kaufmann-Kohler, rue du Conseil-Général 3-5, P.O. Box 552, 1211 Geneva 4, Switzerland.

B. BACKGROUND FACTS

a. **Treaty**

7. On 15 October 1990, a treaty concerning the promotion and protection of investments was concluded between the Republic of Austria and the Czech and Slovak Federal Republic (the "Treaty") (Exh. C-2). The Treaty entered into force on 1 October 1991.

8. At the time of the conclusion of the Treaty, the Respondent did not exist as a sovereign State. It emerged as a sovereign State on 1 January 1993 out of the dissolution of the Czech and Slovak Federal Republic, which was officially enacted on 31 December 1992. The applicability of the Treaty between Austria and the Respondent by way of State succession was confirmed by an exchange of diplomatic notes on 4 August and 25 November 1994 (and entered into force on 1 January 1995) (Exh. C-3).

b. **Origin of the present dispute**

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c. Contract

14. On 17 September 2004, the Claimant, the Ministry entered into a trilateral agreement for the purpose of developing, assisting and privatising (the "Contract") (Exh. C-4).

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1 Article I(2), I(4) and I(10) of the Contract, Exh. C-4.

2 Article I(6) of the Contract, Exh. C-4.

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3 Article I(7) and I(8) of the Contract, Exh. C-4.

4 Article I(12) of the Contract, Exh. C-4.

5 Article I(11) of the Contract, Exh. C-4.

6 Article I(13) of the Contract, Exh. C-4.

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II. PROCEDURAL HISTORY

A. INITIAL PHASE

26. On 8 April 2008, the Claimant filed a Notice of Arbitration (the "Notice"), under the Arbitration Rules of the United Nations Commission on International Trade Law of 1976 (the "UNCITRAL Rules"), accompanied by eight exhibits (Exh. C-1 to C-8). In its Notice the Claimant invoked provisions of the Treaty and sought the following relief (noting that such relief would be further specified in due course):

(i) a declaration that Slovakia has breached the Treaty, in particular Articles 2, 3 and 4 thereof;

(ii) an order that Slovakia immediately pay full compensation to ; in an amount to be determined but no less than € , plus pre- and post-award interest at appropriate rates; and

(iii) an order that Slovakia is to bear in full and exclusively all costs of these arbitration proceedings, including but not limited to the Tribunal's fees and expenses and all costs and expenses

incurred by ... in bringing and prosecuting these proceedings plus interest. (Notice, ¶ 65)

27. On 14 July 2008, the Parties were advised of the constitution of the Tribunal. The Tribunal invited the Respondent to submit an Answer to the Claimant's Notice by 21 July 2008 (the "Answer") and to state its position with regard to the seat and language of the arbitration. The Tribunal proposed that an initial procedural hearing be held by telephone conference on 18 August 2008 and invited the Parties to confirm their availability on the proposed date by no later than 18 July 2008.

28. On 17 July 2008, the Respondent requested an extension of three months to submit its Answer. On 18 July 2008, the Tribunal invited the Claimant to submit a reply to the Respondent's request for extension by no later than 22 July 2008. Upon request from the Claimant, the Tribunal extended this deadline by one day. On 23 July 2008, the Claimant filed its reply objecting to the Respondent's request for an extension. On 28 July 2008, the Tribunal granted the Respondent an extension of time to submit its Answer until 13 August 2008.

29. On 8 August 2008, the Respondent submitted its Answer.

30. On 14 August 2008, the Tribunal invited the Parties to confirm by no later than 15 August 2008 their availability to hold an initial procedural hearing by conference call on 18 August 2008. The Parties confirmed their availability for the proposed hearing and the Tribunal circulated a tentative agenda, draft Terms of Appointment, draft Procedural Rules, and Dr. Jorge E. Vinuales's CV, in view of his potential appointment as Secretary to the Tribunal.

31. On 18 August 2008, an initial procedural hearing was held by telephone conference, during which the Tribunal and the Parties discussed the issues contemplated in the agenda circulated by the Tribunal as well as other issues that arose on this occasion.

32. On 20 August 2008, the Tribunal, *inter alia*, invited the Respondent to advise whether it intended to raise jurisdictional objections. In this letter, the Presiding Arbitrator also confirmed her independence from the Parties, referring to an earlier communication pursuant to which (i) she was an independent non-executive member of the Board of UBS, (ii) UBS had relationships with many companies and governments, (iii) in her capacity she had no direct involvement in client matters.

The Presiding Arbitrator also invited the Parties to revert to the Tribunal by no later than 27 August 2008 on the matters addressed in this letter.

33. On 25 August 2008, Arbitrator Charles N. Brower confirmed the disclosure made during the telephone conference of 18 August 2008 pursuant to which from 1997 to 2004 he represented Ceskoslovenska Obchodni Banka in an arbitration against the Slovak Republic.

34. On 27 August 2008, both Parties reverted to the Tribunal expressing their agreement, *inter alia*, on the choice of Paris as the seat of the arbitration and the appointment of Dr. Vinuales as the Secretary to the Tribunal. Neither Party raised any objections regarding the disclosures made by the Presiding Arbitrator and Arbitrator Brower. Disagreements remained however on the timetable in view of possible future objections to jurisdiction by the Respondent.

35. On 19 September 2008, the Tribunal circulated revised draft Terms of Appointment, revised draft Rules of Procedure and a draft Procedural Order No. 1 with a proposed procedural calendar ("PO 1"). The Tribunal invited the Parties to revert with any comments on the draft PO 1 by no later than 26 September 2008.

36. On 24 September 2008, the Respondent requested an extension of the deadline until 29 September 2008 in order to submit its comments to the draft PO 1. On 25 September 2008, the Tribunal extended the initial deadline of 26 September 2008, set for both Parties regarding their comments on draft PO 1, until 29 September 2008.

37. On 29 September 2008, both Parties sent their comments on the draft PO 1. The Claimant requested *inter alia* that the Tribunal order the bifurcation of liability and quantum.

38. On 14 October 2008, the Tribunal circulated the final version of the Terms of Appointment ("ToA") for signature and notified PO 1 to the Parties. The Tribunal also took note of the Claimant's request for bifurcation of the merits and quantum phases of the proceedings and invited the Respondent to submit its views. By letter of the same date, the Presiding Arbitrator informed the Parties that she had been asked to provide an expert opinion on issues of international arbitration law and practice in certain arbitration proceedings pending before the Stockholm Chamber of

Commerce ("SCC") in which acted as co-counsel for the claimants in said proceedings.

39. On 20 October 2008, the Respondent sought further information about the Presiding Arbitrator's disclosure of 14 October 2008, which the Presiding Arbitrator provided by letter of 24 October 2004.

40. On 22 October 2008, the Respondent submitted its views and did not oppose the Claimant's request for bifurcation of the merits and quantum phases of the proceedings.

41. By letter of 28 October 2008, the Tribunal circulated the executed ToA and confirmed that the timetable contemplated in PO 1 would apply to issues of liability and, as the case may be, of jurisdiction, issues of quantum being left for a potential subsequent phase.

42. On 3 November 2008, the Tribunal advised the Permanent Court of Arbitration at The Hague ("PCA") that the Parties wished to retain its administrative services. On the same day, the PCA confirmed that a specific account had been designated and sought authorisation to post on its website information regarding the dispute. Upon refusal by the Claimant, such authorisation was denied.

43. On 19 December 2008, in accordance with paragraph 1 of PO 1, the Claimant submitted its Statement of Claim (SOC), accompanied by two witness statements (CWS-1 and CWS-2) and five binders of supporting documentary exhibits and legal authorities (Exh. C-1 to C-76 and Exh. CL-1 to CL-38).

B. WRITTEN PHASE ON JURISDICTION

44. On 3 February 2009, the Respondent submitted its Memorial on Objections to Jurisdiction (the "Memorial"), accompanied by one witness statement (RWS) and three binders of supporting documentary exhibits and legal authorities (Exh. R-1 to R-80 and Exh. and RL-1 to RL-106).

45. By letter of 9 February 2009, the Tribunal notified that the calendar was to follow the timetable set out in paragraphs 3 to 5 of PO 1.

46. By letter of 12 February 2009, the Claimant expressed its concern with respect to the scope of the Respondent's Memorial alleging that the Memorial addressed issues relating to the merits and quantum phases. By email of the same date, the Respondent confirmed its objections and advised that it would respond more fully in short.

47. By letter of 13 February 2009, the Respondent requested the Tribunal to appoint an expert to address the issues of State aid raised in the Memorial and submitted a document production request seeking a number of documents from the Claimant. The Claimant responded on 16 February 2009.

48. On 17 February 2009, the Tribunal invited the Respondent to submit a response to the issues of scope raised by the Claimant in its letters of 12 and 16 February 2009, which the Respondent did on 18 February 2009.

49. On 24 February 2009, the Tribunal ruled that the Claimant's request in connection with the scope of the Memorial was premature. It also denied the Respondent's requests for a Tribunal-appointed expert as well as for document production.

50. By letter of 3 March 2009, the Tribunal advised the Parties that, in light of their disagreement as to the venue of the hearing on jurisdiction, the hearing would be held in Paris, Paris being the seat of the arbitration. It also invited the Parties to confirm their availability for the pre-hearing telephone conference to be held on 24 March 2009 at 6:00 p.m. By letters of 4 and 10 March 2009, the Parties confirmed their availability for such conference.

51. On 13 March 2009, the Claimant filed its Counter-Memorial on Jurisdiction ("Counter-Memorial") accompanied by two annexes (A and B) and one volume of supporting evidence (Exh. C-77 to C-81 and CL-39 to CL-131).

52. On 16 March 2009, the Tribunal invited the Parties *inter alia* to identify any issues that they wished to discuss at the pre-hearing telephone conference, in addition to those proposed by the Tribunal, which the Parties did on 19 and 20 March 2009.

53. On 24 March 2009, at 6 p.m., the Tribunal held a pre-hearing telephone conference with the Parties for the organisation of the hearing on jurisdiction. The results of this

conference are recorded in the summary minutes circulated by the Tribunal on 30 March 2009.

C. HEARING ON JURISDICTION

54. The Tribunal held the hearing on jurisdiction on 8 April 2009, starting at 9:30 a.m. and ending at 4:55 p.m., at the ICC Hearing Centre, 112, avenue Kléber, 75016 Paris, France. In addition to the Members of the Tribunal, and the Secretary of the Tribunal, the following persons attended the hearing on jurisdiction:

(i) Representing the Claimant:

(ii) Representing the Respondent:

- Mr. David Pawlak, David A. Pawlak LLC
- Ms. Ms Agata Szeliga, Soltysinski Kawecki & Szlezak
- Mr. Eric Rheims, Soltysinski Kawecki & Szlezak
- Mr. Daniel Weinhold, Weinhold Legal
- Mr. Peter Kažimir, State Secretary of the Slovak Ministry of Finance
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55. During the hearing on jurisdiction, Messrs. Kažimir and Pawlak addressed the Tribunal on behalf of the Respondent and Mr. Turner addressed the Tribunal on behalf of the Claimant.

56. The jurisdictional hearing was tape-recorded; a *verbatim* transcript was produced and later distributed to the Parties.

57. At the end of the hearing, the Tribunal invited the Parties to submit, if possible jointly, a list of investment treaties contemporaneous to the Austria-Slovakia BIT. This was later confirmed in writing by the Tribunal, which set a deadline for the submission of such additional information on 22 April 2009.

D. POST-HEARING SUBMISSIONS

58. On 20 April 2009, the Tribunal circulated the draft transcript of the hearing and invited the Parties to submit proposed corrections to the draft transcript by 1 May 2009, together with any comments on the decision rendered in *Renta 4 S.V.S.A. et al v. Russian Federation*[7] ("Renta 4"), which the Tribunal deemed potentially relevant to the present case.

59. On 22 April 2009, the Claimant advised the Tribunal that it was conferring with the Respondent in order to submit the list of investment treaties requested by the Tribunal and asked for an extension of time to submit such list together with its proposed corrections to the draft transcript and comments on the *Renta 4* decision by 1 May 2009.

60. On the same day, the Respondent submitted additional information regarding the contemporaneous practice of the Slovak Republic and Austria regarding investment treaties, and asked for an extension of the time to submit proposed corrections to the draft transcript as well as comments on the *Renta 4* decision.

61. On 24 April 2009, the Tribunal granted an extension until 12 May 2009 to both Parties.

62. On that same date, the Claimant submitted its comments on the information filed by the Respondent on 22 April 2009.

63. On 12 May 2009, each Party submitted its proposed corrections to the draft transcript as well as comments on the decision in *Renta 4*.

* * *

64. The Tribunal has deliberated and considered the Parties' written submissions, their oral arguments and post-hearing submissions on its jurisdiction. Before reaching a conclusion on the question of jurisdiction (V), the Tribunal will summarise the positions of the Parties (III) and analyse the issues raised by the jurisdictional objections (IV).

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[7] *Renta 4 S.V.S.A. et al v. Russian Federation*, SCC Case No. 024/2007, Award on Preliminary Objections, 20 March 2009.

III. POSITIONS OF THE PARTIES

A. RESPONDENT'S OBJECTIONS TO JURISDICTION

65. In its Memorial, the Respondent puts forward seven objections to the jurisdiction of the Tribunal. First, it argues that the Claimant has not shown that it has made an investment "in the territory" of Slovakia and that, therefore, the investment is outside the scope of the Treaty defined in Article 10. Moreover, the Respondent argues that indirectly held investments of the type alleged by the Claimant are not covered by the Treaty.

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67. Third, the Respondent asserts that the claims are not covered by the Treaty's dispute resolution provision contained in Article 8 which is limited to disputes regarding the amount or the conditions of payment of compensation for expropriation.

68. Fourth, the Respondent also argues that the MFN clause contained in Article 3 of the Treaty cannot serve as a basis to import the dispute resolution clauses of other BITs concluded by the Slovak Republic because such an interpretation would run afoul of the intention of the State parties to the Treaty as it arises from the record of the negotiation of the Treaty. Moreover, such an interpretation would not be supported by arbitral jurisprudence.

69. Fifth, the Respondent contends that even assuming that the Tribunal has jurisdiction over the Claimant's invocation of the MFN clause contained in Article 3 and of the special agreements provision contained in Article 7(2) of the Treaty, *quod non*, the Claimant cannot rely on the MFN clause to obtain benefits of a type not contemplated by the State parties to the Treaty, such as the umbrella clauses referred to by the Claimant in its SOC.

70. Sixth, the Respondent argues that there is no basis in the Treaty for a claim for breach of the full protection and security standard. In particular, the Claimant cannot rely in this regard on Article 2.2 or Article 3 of the Treaty.

71. Seventh, the Respondent is of the view that even if it were admitted that the Tribunal has jurisdiction under the Treaty to decide whether an expropriation has occurred, the Claimant has failed to make even a *prima facie* showing of expropriation.

72. On the basis of these arguments, the Respondent requests the Tribunal to render an award

> (i) in favor of Slovakia and against , dismissing , 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 Arbitration Rules, ordering tha. bear all the costs of this arbitration, including the Slovak Republic's costs for legal representation and assistance (Memorial, ¶ 261).

B. CLAIMANT'S RESPONSES

73. In its Counter-Memorial, the Claimant responds that the Tribunal has jurisdiction to adjudicate the claims, as both the requirements *ratione personae* and *ratione materiae* set out in the Treaty are met. It addresses certain of the objections of the Respondent only briefly, because it considers that they relate to the merits and quantum.

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75. The Claimant further argues that the Respondent's request for an early dismissal of the Claimant's expropriation claim is unfounded because the UNCITRAL Rules do not provide for the dismissal of claims at a preliminary phase and, in any case, in the jurisdictional phase the Tribunal should merely determine whether, if established, the facts alleged would be capable of constituting a breach of the Treaty.

76. The Claimant discusses the question whether it has made a qualifying investment in detail. It asserts that it has made an investment in accordance with the Treaty by acquiring shares through interposed companies. It also contends that its investment was made in accordance with the laws of the Slovak Republic because it acted in good faith and according to commercial practice, and because the Respondent's breach of its own laws cannot be held against the Claimant.

77. The Claimant also addresses in detail the scope of the MFN clause contained in the Treaty with respect to the possibility of importing dispute resolution clauses from other BITs concluded by the Slovak Republic. Its position is that (i) the Tribunal is entitled to determine the effects of the MFN clause by application of the principle of competence-competence; (ii) the purpose of an MFN clause is to import more favorable clauses from other treaties, which is precisely the intention of the States introducing an MFN clause in their treaty; (iii) the scope of an unrestricted MFN clause extends to dispute resolution clauses; (iv) the wording of Article 3 of the Treaty is unrestricted and therefore extends to Article 8 of the Treaty, as shown by both Slovak and Austrian treaty practice; (v) international arbitration is more favorable for the investor than litigation in the courts of the host State.

78. On the basis of these arguments, the Claimant requests the Tribunal to:

- Declare that the , the "full protection and security argument" and the "request for 'early dismissal' of expropriation claim" advanced by the Respondent in its Memorial do not constitute proper jurisdictional objections and shall therefore not be dealt with at this stage of the proceedings;
- Declare that the Arbitral Tribunal has jurisdiction *ratione personae* and *ratione materiae* over the Claimant's claims as set out in its Statement of Claim;
- Dismiss any and all of Slovakia's objections to the admissibility of the Claimant's claims and to the jurisdiction of the Arbitral Tribunal; and
- Order the Respondent to pay all of the costs and expenses incurred by the Claimant in defending against the Respondent's objections, including, but not limited to, the Arbitral Tribunal's fees and expenses, the fees and expenses of the Claimant's counsel, and interest, on a full indemnity basis. (Counter-Memorial, ¶ 254)

IV. ANALYSIS

79. After addressing some preliminary issues (A), the Tribunal will discuss the Respondent's objections to jurisdiction (B).

A. PRELIMINARY ISSUES

a. Applicable laws

80. Section 6 of the ToA states that "[t]he applicable substantive law shall be the Treaty as well as any relevant rules of international law".

81. With respect to procedure, these proceedings are governed by the arbitration law of the seat. In addition, Section 7 of the ToA provides for the application of the following rules:

> "7.1. In order of priority, this arbitration shall be governed by the UNCITRAL Arbitration Rules, these Terms of Appointment and the Procedural Rules issued by the Arbitral Tribunal. 7.2. If the provisions therein do not address a specific procedural issue, the Arbitral Tribunal shall, after consultation of the parties, determine the applicable procedure".

b. Uncontroversial matters

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

c. Relevance of previous awards and decisions of other tribunals

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

84. The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law[8].

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

B. OBJECTIONS TO JURISDICTION

85. The Tribunal will start its analysis with the scope of the dispute resolution clause (Art. 8 Treaty) (a); it will then continue with the scope of the MFN clause (Art. 3 Treaty) (b). Provided it has not ruled out jurisdiction on such grounds, it will pursue its analysis with the questions whether the Claimant has made an investment protected by the Treaty; whether the Claimant's allegation of breach of the Treaty's umbrella clause has sufficient basis; whether the Claimant's allegation of breach of the Treaty's full protection clause has sufficient basis; and whether the Claimant's allegation of breach of the Treaty's expropriation clause has sufficient basis. This said, it will only examine the foregoing objections to the extent necessary to reach a conclusion on jurisdiction.

a. Scope of **Article 8 of the Treaty: Expropriation or only Compensation?**

i. Respondent's position

86. The Respondent argues that Article 8 of the Treaty provides no basis to entertain the claims. According to the Respondent, the application of the rules of treaty interpretation of the Vienna Convention on the Law of Treaties (VCLT)[9] leads to the conclusion that the Slovak Republic did not consent to arbitrate the claims before this Tribunal (Memorial, paras. 191 et seq.; Tr. J., p. 39:3 – 40:11).

87. More specifically, the Slovak Republic puts forward that the Claimant has conceded in its Counter-Memorial that Article 8 of the Treaty does not provide for the jurisdiction of the Tribunal over the expropriation claim (Tr. J., p. 23, 6-10), and that the ordinary meaning and the negotiating history show that the wording of that provision was purposefully amended to confine it to disputes regarding the amount or the conditions of payment of compensation pursuant to Article 4 of the Treaty (Tr. J., pp. 28:14 et seq. and 38-39).

88. In support of its arguments, the Respondent refers to the decisions in *EMV v. Czech Republic*,[10] *Berschader v. Russia*,[11] *Nagel v. Czech Republic*,[12] *RosInvest v.*

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9 Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969 and entered into force on 27 January 1980; UN Treaty Series, vol. 1155, p.331.

10 *European Media Ventures SA v. Czech Republic*, (2007) EWHC 2851 (Comm), Judgment on jurisdiction, 5 December 2007.

Russia,[13] and *Telenor v. Hungary* [14] (Memorial, paras 210 et seq.; Tr. J., pp. 41-45). The Respondent further refers to *Renta 4*, in which the word "due" contained in the dispute settlement clause was decisive for the tribunal to hold that it had jurisdiction over the principle of the expropriation claim. It notes that such word is not found in the Treaty (Respondent's submission of 12 May 2009, p. 3). Moreover, unlike in the *Renta 4* case, the Treaty specifies in Articles 4(4) and (5) that the Slovak courts are competent to review the principle of expropriation (Respondent's submission of 12 May 2009, pp.4-5).

ii. Claimant's position

89. The Claimant argues that the Tribunal has jurisdiction on the basis of Article 8 of the Treaty over its claim for unlawful expropriation (SOC, par. 173; Tr. J., p. 175:13 – 176:10).

90. At the hearing, when addressing the decision in *EMV v. Czech Republic*,[15] , advanced that it would be difficult for an international tribunal to value an expropriation claim "when those findings [on the principle of expropriation] have been reached elsewhere", which would "render the system of investment protection wholly ineffective" (Tr. J., p. 178:2-7). According to the Claimant, the decision in *EMV v. Czech Republic* is therefore not inconsistent with its interpretation of Article 8.

91. The Claimant further refers to *Renta 4* in support of its allegation that the wording of Article 8 does not preclude the Tribunal from exercising jurisdiction over the principle of the expropriation claim. According to , the tribunal in *Renta 4* paid limited attention to the original intentions of the State parties and to the doctrines prevailing at the time of the conclusion of the treaty and focused instead on the specific wording of the arbitration clause in the light of the object and purpose of the BIT. According to the Claimant, "[...] if Article 10 of the Spanish BIT [the arbitration provision in *Renta 4*] was read as giving limited jurisdiction to the arbitral tribunal,

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11 *Berschader v. Russia*, SCC Case No. 080/2004, Award, 21 April 2006.

12 *Nagel v. Czech Republic*, SCC Case 49/2002, Award, 9 September 2003.

13 *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. Arb. V079/2005, Award on Jurisdiction, 5 October 2007.

14 *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006.

15 *EMV v. Czech Republic*, Award on Jurisdiction (Lord Mustill, Pres.; Dr J. Lew Q.C.; Prof C. Greenwood Q.C.), 15 May 2007.

leaving the decision as to whether compensation was due at all to Russian courts (which, on the international level, would mean Russia itself), this would give Russia the unilateral power to avoid arbitration altogether" (Claimant's submission of 12 May 2009, p. 6). The Claimant acknowledges that the jurisdiction over the principle of expropriation and over the compensation could be split provided such a split stemmed clearly from the applicable treaty. It argues that this is not the case here because Article 4(4) of the Treaty cannot be construed as giving the Slovak courts exclusive jurisdiction over the principle of an expropriation. Therefore, the Claimant can choose to bring its expropriation claim either before the Slovak courts or before an arbitral tribunal constituted under Article 8 of the Treaty (Claimant's submission of 12 May 2009, p. 7)

iii. Analysis

92. The provisions of the Treaty most directly relevant to the elucidation of the Respondent's first objection are Articles 8 and 4. The first one reads in relevant part, as follows:

> "(1) Any disputes arising out of an investment, between a Contracting Party and an investor of the other Contracting Party, concerning the amount or the conditions of payment of a compensation pursuant to Article 4 of this Agreement, or the transfer obligations pursuant to Article 5 of this Agreement, shall, as far as possible, be settled amicably between the parties to the disputes.
> (2) If a dispute pursuant to para. 1 above cannot be amicably settled within six months as from the date of a written notice containing sufficiently specified claims, the dispute shall, unless otherwise agreed, be decided upon the request of the Contracting Party or the Investor of the other Contracting Party by way of arbitral proceedings in accordance with the UNCITRAL-Arbitration Rules, as effective at the date of the motion for the institution of the arbitration proceeding" (Exh C-2).

93. Article 8 must be read in connection with the pertinent passages of Article 4:

> "(4) The investor shall have the right to have the legitimacy of the expropriation reviewed by the competent authorities of the Contracting Party which prompted the expropriation.
> (5) The investor shall have the right to have the amount of the compensation and the conditions of payment reviewed either by the competent authorities of the Contracting Party which prompted the expropriation or by an arbitral tribunal according to Article 8 of this Agreement" (Exh C-2).

94. Regarding first the Respondent's allegation that the Claimant concedes in its submissions, particularly at paragraph 202 of the Claimant's Counter-Memorial, that Article 8 of the Treaty does not provide for the jurisdiction of the Tribunal over the expropriation claim, the Tribunal is unpersuaded by the Respondent's arguments. Paragraph 202, as well as paragraphs 102 and 152 of the Claimant's Counter-Memorial, which the Respondent also singled out at the hearing on jurisdiction (Tr. J., pp. 25-26), cannot be read in isolation from the overall reasoning developed by

the Claimant, which does not support the Respondent's argument. Moreover, even if such paragraphs were read in isolation, they do not clearly state what the Respondent seeks to assert, namely that the Claimant does not rely on Article 8 as the jurisdictional basis for its expropriation claim.

95. The Tribunal must thus review the scope of Article 8. Articles 31 and 32 of the VCLT will guide its interpretation. More specifically, pursuant to Article 31(1) of the VCLT "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

96. The ordinary meaning of Article 8(1) arises from the words used in that provision which are clear by themselves. They mean that only disputes "concerning the amount or the conditions of payment of a compensation" can be submitted to arbitration. The scope of Article 8 is therefore limited to disputes about the amount of the compensation and does not extend to the review of the principle of expropriation.

97. Such meaning is confirmed by the context of Article 8, which includes Articles 4(4) and 4(5). Indeed, Article 4(4) provides that an investor may challenge the "legitimacy" of the expropriation before the competent authorities of the host State. Article 4(5) provides, in contrast, that an investor who challenges the "amount of the compensation and the conditions of payment" may do so either before the local authorities or before an arbitral tribunal. For this second possibility, Article 4(5) refers expressly to Article 8. The distinction made in Article 4(5), which is not present in Article 4(4), shows that access to arbitration was intended to be limited to the amount and conditions of the indemnity, as opposed to the "legitimacy", or lawfulness, or principle of expropriation.

98. The Claimant seeks to defend another interpretation. It is of the opinion that Article 4(4) does not grant the host State's authorities exclusive jurisdiction over the principle of expropriation and that the use of the term "right" shows that an investor is entitled to choose to submit the principle of expropriation to the local authorities but that this entitlement does not rule out recourse to an arbitral tribunal under Article 8. The Tribunal cannot share this interpretation. It is at odds with the wording of Article 4(4) read in the light of Article 4(5) for the reasons just set out. Claims about the principle of expropriation are for the local authorities under Article 4(4) and

claims about the amount of compensation are for the local authorities *or* for an arbitral tribunal under Articles 4(5) and 8. In the second case, the investor has a choice of means. In the first one, he has no choice of means. His choice is limited to whether to challenge the principle of expropriation or not. If he decides to challenge it, he must do it before the local authorities. The ordinary meaning of Article 4(4) and 4(5) is plain. Being part of the context of Article 8, it confirms the ordinary meaning of that latter provision. In sum, Article 8 provides for arbitration on the amount and conditions of payment of the compensation for expropriation. The principle of the expropriation is beyond the scope of Article 8 of the Treaty.

99. These considerations suffice to conclude that Article 8 provides no jurisdiction over the principle of the Claimant's expropriation claim. Indeed, in the words of the International Court of Justice, "if the relevant words [of a treaty] in their natural and ordinary meaning make sense in their context, that is the end of the matter".[16] For abundance of motives, the Tribunal will nevertheless review the further arguments of the Parties in connection with the object and purpose of the Treaty and the intent of the Contracting States reflected in the *travaux préparatoires*.

100. The Claimant argues by reference to *EMV v. Czech Republic* that it is difficult for an international tribunal to value an expropriation claim "when those findings [on the principle of expropriation] have been reached elsewhere", which would "render the system of investment protection wholly ineffective" (Tr. J., p. 178:14-19). The Claimant makes a similar argument in reliance of *Renta 4 v. Russia*, stating that "if Article 10 of the Spanish BIT [the arbitration provision in *Renta 4 v. Russia*] was read as giving limited jurisdiction to the arbitral tribunal, leaving the decision as to whether compensation was due at all to Russian courts (which, on the international level, would mean Russia itself), this would give Russia the unilateral power to avoid arbitration altogether" (Claimant's submission of 12 May 2009, p. 6).

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16 Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations *("Competence of Assembly regarding admission to the United Nations, Advisory Opinion: I.C.J. Reports 1950, p.4"):* "The first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words." These canons of construction were later reasserted in the Case concerning the Arbitral Award of 31 July 1989 between Guinea-Bissau and Senegal (*Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991*, p.53).

101. The Tribunal understands the Claimant's arguments as suggesting that a clause which provides for arbitration *over* the amount of compensation only is not in conformity with the object and purpose of a BIT, which is *inter alia* the *protection of foreign investors. While this* may have been a valid argument under the treaties applicable in *EMV v. Czech Republic* and *Renta 4 v. Russia*, it cannot succeed here in the light of the unmistakable meaning of Articles 8 and 4.

102. Indeed, this Treaty is different from the ones governing in the two other cases. It expressly states that an investor who intends to challenge the expropriation can do so but only before the local authorities. This difference was recognised by the Tribunal in *EMV v. Czech Republic* with specific reference to the Treaty under consideration in the present arbitration: "One can presume that a foreign investor will generally not seek redress for the actions of a government expropriating or dispossessing it of its property in the local courts unless that is expressly provided for in the BIT (as is the case in the BIT between Austria and the Czech and Slovak Federal Republic)".[17]

103. In assessing the scope of Article 8 of the Treaty in the light of the Treaty's object and purpose, the Tribunal cannot ignore the investment protection regime set up by the Contracting States. Here they have in particular agreed that an investor may challenge the legality of an expropriation but only before the local authorities. The observation that they did not provide for arbitration on every aspect of all treaty breaches cannot be deemed to be contrary to the Treaty's object and purpose of protecting investment. It all depends on the protection contracted for. Otherwise the provisions of an investment protection treaty (without or) with limited access to arbitration would necessarily have to be viewed as contrary to the object and purpose of that treaty consisting *inter alia* in protecting investment.

104. Moreover, from a practical perspective, the Tribunal has no reason to believe that the review of the legality of the expropriation by the host State's authorities, be they Slovak or Austrian, would be ineffective. In other words, there is no indication in the record that such review would not support the Treaty's object and purpose of protecting foreign investors.

105. The Tribunal's conclusions are further supported by the *travaux préparatoires* of the Treaty. The negotiating history shows that the final wording of Article 8 is the result

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[17] *EMV v. Czech Republic*, ¶ 61, *supra* footnote 16.

of a process by which the scope of the disputes subject to arbitration was purposefully restricted (Tr. J., pp. 28-32). Indeed, a draft Article 8(1) of 14 April 1988 merely referred to disputes "regarding an investment".

"If differences of opinion arise between a Contract Party and an investor of the other Contract Party *regarding an investment*, then these are to be resolved amicably between the disagreeing parties to the extent possible" (Exh. R-5). (Emphasis added)

106. A later draft of Article 8(1) dating from 14 September 1989 added the restriction about the amount of compensation:

"If differences of opinion arise between a Contract Party and an investor of the other Contract Party regarding an investment *concerning the amount or modality of compensation per Article 4* or transfer obligations under Article 5 of this Agreement, then these are to be resolved amicably between the disagreeing parties to the extent possible." (Exh. R-6). (Emphasis added)

107. The final wording of Article 8(1) kept this restriction and is practically identical to the one just quoted as it refers to disputes "concerning the amount or conditions of payment of a compensation pursuant to Article 4". One can only deduct from this sequence of texts that the Contracting States deliberately narrowed down the initially broad scope of arbitral disputes.

108. Based on the foregoing considerations, the Tribunal concludes that it has no jurisdiction over the Claimant's expropriation claim under Article 8 of the Treaty.

b. Scope of Article 3 of the Treaty: MFN clause

i. Respondent's position

109. The Respondent argues that the Claimant cannot rely on the Treaty's MFN provision to replace *in toto* the dispute resolution mechanism that formed the basis of the bargain for the Contracting States.

110. First, according to the Respondent, the Tribunal has no power to rule on Article 3. Its power is restricted to the matters specified in Article 8 (Tr. J., p. 48, 6-16).

111. Second, the Respondent argues that, even if the Tribunal considers that it is empowered to rule on the MFN clause, such clause cannot operate to replace the dispute resolution mechanism of the Treaty in its entirety. In this regard, the Respondent advances in essence the following arguments: there is nothing in Article 3 that shows that it extends to dispute settlement; such an extension is not

compatible with the interpretation of Article 3 in the light *inter alia* of its wording, context (particularly Articles 4(4), 4(5) and 8), and of the negotiating history of the Treaty (Tr. J., p. 58, 9-19; pp. 77 et seq.); the extension of the MFN clause to dispute settlement is contrary to the *ejusdem generis* principle, because the Contracting States would not have narrowed the scope of Article 8 during their negotiations if they had at the same time intended that dispute settlement be covered by the MFN clause (Tr. J., p. 60, 3-16); interpretation on the basis of the object and purpose of the Treaty should not be used to reach exaggerated results (Tr. J., p. 61, 2-22); the practice of the Slovak Republic regarding dispute settlement clauses in other contemporaneous or later treaties does not support the assertion that the Slovak Republic subsequently consented to broadening the available dispute resolution mechanisms (Tr. J., p. 62 et seq.).

112. In support of its arguments, the Respondent refers to a number of decisions, including *Tecmed v. Mexico*,[18] *Salini v. Jordan*,[19] *Impregilo v. Pakistan*,[20] *Plama v. Bulgaria*,[21] *Telenor v. Hungary*,[22] *Berschader v. Russia*,[23] and *Wintershall v. Argentina*,[24] which, according to the Respondent, have barred investors' attempts to apply MFN treatment to dispute resolution (Memorial, para. 227 n. 408; Tr. J., p. 58-59). The Respondent also cites *EMV v. Czech Republic*, which held that "one can presume that a foreign investor will generally not seek redress for the actions of a government in the local courts unless that is expressly provided for in the BIT (as in the case between Austria and the Czech and Slovak Republic)" (Tr. J., pp. 77-78).

113. The Respondent further points to *Renta 4* arguing that, even if the Tribunal follows *Renta 4*'s "BIT by BIT approach" with respect to the determination of the breadth of the MFN clause, it must conclude that the MFN clause did not cover dispute settlement in the present case. It refers in this regard to the wording of the Treaty, arguing that the Treaty uses the words "right" or "rights" in relation with the

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18 *Tecnicas Medioambientales Tecmed SA v. The United Mexican States*, ICSID Case No. ARB/AF 00/2, Award, 29 May 2003.

19 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004.

20 *Impregilo S.p.A v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005.

21 *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005.

22 *Telenor Mobile Communications A.S. v. The Republic of Hungary*, *supra* footnote 15.

23 *Berschader v. Russia*, *supra* footnote 12.

24 *Wintershall Aktiengesellschaft v. The Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008.

adjudicatory system and "treatment" in relation to substantive matters (Respondent's submission of 12 May 2009, p. 8). According to the Respondent, this interpretation is confirmed by the fact that the Contracting States did not have the extension of the MFN clause to dispute settlement in mind when they concluded the Treaty, contrary to the *ejusdem generis* rule articulated in *Wintershall v. Argentina* and the 1979 ILC Commentaries on Draft Articles on the topic of MFN clauses[25] (Respondent's submission of 12 May 2009, p. 9). Furthermore, the Respondent asserts that the *Renta 4* tribunal acknowledged the dangers of exaggerating investor protections (Respondent's submission of 12 May 2009, p. 9). It contends further that the only decision where a dispute settlement clause was imported *in toto*, i.e. *Rosinvest v. Russia*, was based on specific wording that does not appear in the Treaty (Respondent's submission of 12 May 2009, p. 8 and Memorial, paras. 230-232). In any event, in the Respondent's view it is not established that arbitration is a more favourable forum than the Slovak courts. The Respondent refers in this connection to the majority in *Renta 4* stating that "it would be invidious for international tribunals to be finding (in the absence of specific evidence) that host State adjudication of treaty rights was necessarily inferior to international arbitration" (Respondent's submission of 12 May 2009, p. 9)

ii. Claimant's position

114. The Claimant essentially puts forward the following arguments: the Tribunal is empowered to determine the effects of the MFN clause by application of the principle of competence competence; the purpose of an MFN clause is to import more favourable clauses from other treaties, which is in fact the intention of the State parties when agreeing on such clauses; the scope of an unrestricted MFN clause extends to dispute resolution; the wording of Article 3 of the Treaty is unrestricted and therefore covers Article 8, as shown by both Slovak and Austrian treaty practice; access to international arbitration is more favourable than litigation in the courts of the host State (Counter-Memorial, para. 149; Tr. J., pp. 182 et seq.).

115. More specifically, the Claimant contends that the debate about the intent of the State parties to the Treaty is misleading, because the MFN clause precisely reflects those intentions. It also notes that there should be no difference between substantive and procedural rights in the application of an unrestricted MFN clause such as Article 3 of the Treaty (Tr. J., p. 184:12-19). Moreover, the fact that

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25 *Yearbook of the International Law Commission*, 1978, Vol. II, Part Two.

paragraph (2) of Article 3 does not exclude the dispute resolution provisions from the scope of Article 3(1) demonstrates that MFN applies to dispute settlement.

116. The Claimant further refers to *Renta 4* arguing that this decision sets out a number of principles that are consistent with the Claimant's position. First, the Claimant emphasizes that *Renta 4* supports the idea that the very purpose of an MFN clause "is precisely to avoid the need (i) to check continually what the other contracting party may be concurrently negotiating with third parties and (ii) to renegotiate the basic treaty to take account of more favourable clauses in third-party treaties" (Claimant's submission of 12 May 2009, p. 8). Second, the Claimant asserts that *Renta 4* "emphasised that the jurisdiction of an arbitral tribunal cannot be limited, in the presence of an MFN clause, to the bare wording of the dispute resolution provision in the basic treaty" (Claimant's submission of 12 May 2009, p. 8). Third, the Claimant notes that *Renta 4* confirms that the wording of the applicable MFN clause determines whether the clause extends jurisdiction. There is no consistent line of precedents that excludes such extension. Fourth, according to the Claimant, *Renta 4* denies any distinction between substantive and procedural rights. Fifth, the Claimant observes that the only reason why the majority in *Renta 4* found that the MFN clause in the Spanish BIT could not be used to import a dispute resolution clause from another treaty was the specific wording of the particular MFN clause, which referred to fair and equitable treatment only, whereas the MFN clause in the Treaty does not contain any such restriction (Claimant's submission of 12 May 2009, p. 8-10).

iii. Analysis

117. At the outset, the Tribunal notes that it has jurisdiction to review the application of the MFN clause in Article 3(1) of the Treaty by virtue of the principle of *compétence-compétence*. Pursuant to Article 21(1) of the UNCITRAL Arbitration Rules, which govern this arbitration, "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement." This provision is an expression of the principle of *compétence-compétence:*

> "The power of tribunals to determine their own jurisdiction is widely accepted. When such power is not expressly provided for, as in the UNCITRAL Rules, it is generally thought to exist as an inherent power of the tribunal. The power is thus so generally accepted that

tribunals in proceedings governed by the UNCITRAL Rules have very rarely found it necessary to expressly address their ability to determine their own existence."[26]

118. This principle is solidly established in international law. As stated by the ICJ in the Nottebohm case "[s]ince the *Alabama* case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction."[27] In the present case, the Tribunal has the power to interpret Article 3(1) of the Treaty, which in the Claimant's submission grants it jurisdiction over the claims.

119. Having determined that it has jurisdiction to do so, the Tribunal must now turn to the interpretation of Article 3(1) and to the other arguments within the Respondent's second objection to jurisdiction. In this regard, the Tribunal does not consider that provisions that embody a State's consent to arbitration must be strictly interpreted. This view, which was adopted by the tribunals in *Plama v. Bulgaria*,[28] *Telenor v. Hungary*,[29] *Berschader v. Russia*[30] and *Wintershall v. Argentina*,[31] is not an accurate reflection of international law on this matter. As noted by another strand of decisions and awards, including *Amco v. Indonesia*,[32] *Mondev v. United States*,[33] *Suez and Interaguas v. Argentina*,[34] and *Suez and Vivendi v. Argentina*,[35] there is no principle of either restrictive or extensive interpretation of an agreement to arbitrate in international law (it being specified that this may indeed be different under certain national arbitration laws).

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26 CARON, D., CAPLAN, L.M., PELLONPAA, M., *The UNCITRAL Arbitration Rules. A Commentary*, p. 445.

27 *Nottebohm case (Preliminary Objections)*, Judgment of 18 November 1953, I.C.J. Reports 1953, p. 111, at 119.

28 *Plama v. Bulgaria*, *supra* footnote 22, ¶¶ 198, 199, 200, 204, 212, 218, 223.

29 *Telenor v. Hungary*, *supra* footnote 15, ¶ 90.

30 *Berschaderv. Russia*, *supra* footnote 12, ¶ 181.

31 *Wintershall v. Argentina*, *supra* footnote 25, ¶ 167.

32 *Amco Asia Corporation v. Republic of Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 389 at p. 394 (1993).

33 *Mondev v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 43.

34 *Suez and Interaguas v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, ¶ 64.

35 *Suez and Vivendi v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006, ¶ 66.

120. This point has also been stressed by the PCIJ in the case concerning the *Rights of Minorities in Upper Silesia*,[36] as well as more recently by the ICJ in the *Fisheries Jurisdiction* case.[37] Judge Rosalyn Higgins has summarized the position of both the PCIJ and the ICJ as follows:

> "It is clear from the jurisprudence of the Permanent Court and of the International Court that there is no rule that requires a restrictive interpretation of compromissory clauses. But equally, there is no evidence that the various exercises of jurisdiction by the two Courts really indicate a jurisdictional presumption in favour of the plaintiff. [...] The Court has no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses: they are judicial decisions like any other."[38]

121. Therefore, the Tribunal considers that it must interpret Article 3 of the Treaty "neither restrictively nor expansively but rather objectively and in good faith".[39] It must do so in accordance with the usual rules of treaty interpretation set forth in Articles 31 and 32 of the VCLT, taking into account *inter alia* the wording of Article 3 of the Treaty, its context, the object and purpose of the Treaty, as well as the relevant supplementary means of interpretation.

122. Article 3 of the Treaty reads as follows:

> "(1) Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment that is no less favorable than that which it accords to its own investors or to investors of any third states and their investments;
>
> (2) The provisions of para. 1 above, however, shall not apply to present or future benefits and privileges granted by one Contracting Party to investors of a third state or their investments in connection with
>
> (a) any membership in an economic or customs union, a common market, a free trade zone or an economic community;
>
> (b) an international agreement or a bilateral arrangement or national laws and regulations concerning matters of taxation;
>
> (c) a regulation to facilitate border traffic."
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> (Exh C-2).

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36 *Rights of Minorities in Upper Silesia (Minority Schools)*, Judgment No. 12 of 26 April 1928, 1928 P.C.I.J. Series A, No. 15, p. 25.

37 *Fisheries Jurisdiction (Spain v. Canada)*, Judgment of 4 December 1998, I.C.J. Reports 1998, pp. 450-451, ¶ 38.

38 *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 12 December 1996, Separate Opinion by Judge Higgins, I.C.J. Reports 1996, p. 857, ¶ 35.

39 *Southern Pacific Properties (Middle East) and Southern Pacific Properties Ltd v. the Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision of Jurisdiction, 14 April 1988, 3 ICSID Reports 142/4; see also *Duke Energy Electroquil Partners v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 12 August 2008, ¶¶ 130-131; see further *Ceskoslovenska Obchodni Banka, A.S. (CSOB) v. The Slovak Republic*, Decision on Jurisdiction, 24 May 1999, ¶ 35.

123. The Parties disagree on the significance of the word "treatment" used in Article 3(1). The Respondent has argued that extending the scope of the MFN clause to dispute settlement provisions is contrary to the *ejusdem generis* principle in the light of the negotiation history of the Treaty. More specifically, the Respondent stresses that the Treaty uses the words "right" or "rights" in relation with the adjudicatory system and "treatment" in relation to substantive matters (Respondent's submission of 12 May 2009, p. 8). The Claimant objects that an unrestricted MFN clause such as the present one does extend to dispute resolution.

124. As a general matter, the Tribunal observes that it sees no conceptual reason why an MFN clause should be limited to substantive guarantees and rule out procedural protections, the latter being a means to enforce the former.[40] The Tribunal notes, in this connection, that the potential application of an MFN clause to procedural protections is widely accepted by investment tribunals. This view has been held mostly with respect to the avoidance of procedural requirements prior to commence arbitration,[41] but also, more recently, with respect to the import of a dispute settlement clause.[42]

125. This said, a specific treaty can of course spell out a different approach. As noted by the tribunal's majority in *Renta 4 v. Russia*:

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40 *See Ambatielos Claim* (Greece v. United Kingdom), U.N.R.I.A.A., vol. XII, 1963, p. 101, at p. 107, noting that: "It is true that 'the administration of justice', when viewed in isolation, is a subject-matter other than 'commerce and navigation', but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by treaties of commerce and navigation." The situation is no different in an investment context.

41 *See Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 Jan. 2000, ¶¶ 54-56; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 Aug. 2004, ¶¶ 32 *et seq.* (concerning an MFN clause referring to "treatment" of investors and their investments); *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction, 17 July 2005, ¶¶ 24-30 (concerning an MFN clause referring to "treatment" accorded to investments, qualified by "[i]n all matters governed by the present Agreement"); *National Grid PLC v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, ¶¶ 53 *et seq.* (concerning an MFN clause referring to "treatment" of investors and their investments); *Suez and Interaguas v. Argentina*, *supra* footnote 35, ¶¶ 52-66 (concerning an MFN clause referring to "treatment" accorded to investments, qualified by "[i]n all matters governed by the present Agreement"); *Suez and Vivendi v. Argentina*, *supra* footnote 36, ¶¶ 52-68 (concerning an MFN clause referring to "treatment" accorded to investments, qualified by "[i]n all matters governed by the present Agreement").

42 *See Rosinvest v. Russia*, *supra* footnote 14, ¶¶ 124-139; *Renta 4 v. Russia*, *supra* footnote 7, ¶ 119 (the tribunal in *Renta 4 v. Russia*, despite agreeing with the possibility that MFN may cover accessibility to international fora, found that the circumstances of that case did not warrant such an extension).

"One might therefore wonder if the drafters of the Spanish BIT truly applied their minds to the issue of arbitration when drafting Article 5 [the MFN clause]. The doubt may be justified. Yet it hardly advantages the Claimants. The Treaty must be taken as it is written [...] The conclusion must be that the specific MFN promise contained in Article 5(2) of the Spanish BIT cannot be read to enlarge the competence of the present Tribunal. This conclusion [...] is that of a majority of the Tribunal. The separate opinion appended hereto is viewed with full respect by the majority. They agree that 'more favourable' may in principle include accessibility to international fora. Ultimately however their view is that the terms of the Spanish BIT restrict MFN treatment to the realm of FET as understood in international law."[43]

126. In the present case, Article 3(1) of the Treaty does not specify whether it applies to dispute settlement. Such a possibility is neither affirmed nor ruled out by the language of Article 3(1), which uses the term "treatment" without distinguishing between substantive and procedural matters. The distinction made by the Respondent between the words "treatment" and "right", may provide an indication that the MFN clause was not meant for procedural "rights", but only for substantive "treatment". Yet this distinction is not in and of itself sufficient to clear the ambiguity.

127. The Tribunal must therefore look to the context of Article 3(1) as well as to the other elements relevant for its interpretation. Starting with the context, Article 3(1) must be viewed for present purposes in combination with Article 3(2) as well as with the treaty provisions that deal with dispute settlement, i.e. Articles 8 and 4(4) and 4(5).

128. Article 3(2) introduces three exceptions to the applicability of the MFN clause set forth in Article 3(1). The Claimant argues that the exceptions identified in Article 3(2) must be read to imply that all other matters not specifically excluded fall under the scope of the MFN clause under the principle *expressio unius est exclusio alterius*. Although this principle is not explicitly mentioned in Articles 31 and 32 of the VCLT, the Tribunal agrees with the Claimant that it may be relevant in the framework of the contextual interpretation of the scope of Article 3(1) of the Treaty.[44]

129. At first sight at least, the Tribunal sees the force of the argument drawn from the *expressio unius* principle, of which Lord McNair meant that it "would find a place in the logic of the nursery".[45] If the Contracting States have excluded certain matters

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43 *See Renta 4 v. Russia*, *supra* footnote 7, ¶ 119.

44 The *expressio unius* principle is generally considered as a supplementary means of interpretation under Article 32 of the VCLT (see AUST, A., *Modern Treaty Law and Practice*, 2nd edn, pp. 248-249; GARDINER, R., *Treaty Interpretation*, p. 312). The Tribunal refers to this principle as an aid to contextual interpretation under Article 31 VCLT (*see* GARDINER, R., *ibid.*).

45 Lord McNair, *The Law of Treaties*, pp. 399-400: "That there is substantial element of truth in this maxim is obvious. It would find a place in the logic of the nursery. If I agree that my brother may play with my railway engine and my motor car, it is obvious that I have not given

from the scope of the MFN clause, it could indeed be argued that they have not excluded others, such as procedural treatment. It could also be argued, however, as was noted at the hearing (Tr. J., p. 208, 3-10), that the exceptions in Article 3(2) pertain to substance, and therefore Article 3(1) should be read as applying only to substantive matters. Yet, matters are not necessarily as simple.

130. The substantive and/or procedural nature of the exceptions contemplated in Article 3(2) cannot be ascertained *in abstracto*, as the type of instruments or arrangements envisaged in this provision may include both substantive and procedural clauses. Thus, Article 3(2) is not sufficient to exclude procedural matters from the scope of Article 3(1), as procedural matters could implicitly be comprised in the exceptions set forth in Article 3(2). Nor can Article 3(2) in and of itself be considered sufficient to circumscribe the scope of the MFN clause in Article 3(1), independently of the other provisions of the Treaty.

131. This is particularly so taking into account that the *expressio unius* principle is only a supplementary means of interpretation that cannot alone determine the outcome of the interpretation when a treaty contains other relevant elements. As noted by one authority in the law of treaties with reference to the *expressio unius* principle and to other supplementary means, "[a]ll these supplementary means of interpretation need to be used with special care. They are no more than aids to interpretation, and might well produce wrong results if followed slavishly".[46] What the Tribunal must examine is whether the Treaty provides for exceptions to the application of the MFN clause and, more specifically, whether the provisions governing access to arbitration under the Treaty are to be regarded as a limitation to the scope of the MFN clause.

132. In its analysis of jurisdiction over expropriation claims, the Tribunal has held that Article 8 does not grant jurisdiction over the principle of expropriation. It did so on the basis of the objective meaning of Article 8 and of the interaction between that provision and Article 4(4) and 4(5). In particular, it held that Article 4(4) must be read as precluding foreign investors from submitting the "legitimacy" or legality of an expropriation to arbitration. This conclusion was also buttressed by the negotiating history, which shows that the Contracting States intended to limit arbitral jurisdiction to the amount and payment of compensation for expropriation.

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him permission to play with my model aeroplane." The PCIJ used a similar "a *contrario*" reasoning to interpret certain provisions of the Treaty of Versailles in the *Case of the S.S. "Wimbledon"*, Judgment of 17 August 1923, PCIJ Series A No. 1 (1923), at 24.

46 AUST, A., *Modern Treaty Law and Practice*, *supra* footnote 44, p. 249.

133. One may object that the introduction in Article 4(4) of the possibility of challenging the legality of the expropriation represented a liberalization of the more restrictive approach followed by socialist countries at the time. Be this as it may, it does not change the Tribunal's conclusion. What matters is that, in the context of the Treaty, the Contracting States agreed to regulate the access to dispute settlement and to allocate disputes by categories to either the national courts or to international arbitration. It matters further that with respect to this very Treaty, after having initially contemplated broad access to arbitration, the Contracting States restricted such access.

134. In this regard, the Tribunal further notes that the evidence presented in connection with the treaty practice of the Slovak Republic at the relevant times appears to confirm this conclusion. Indeed, certain BITs involving Czechoslovakia in effect at the time of entry into force of the Treaty did contain broader dispute settlement provisions as acknowledged by the Claimant (Respondent's submission of 22 April 2009, table of Slovak BITs; Claimant's submission of 24 April 2009, p. 2).

135. Faced with a manifest, specific intent to restrict arbitration to disputes over the amount of compensation for expropriation to the exclusion of disputes over the principle of expropriation, it would be paradoxical to invalidate that specific intent by virtue of the general, unspecific intent expressed in the MFN clause. As a result of these contextual considerations, the specific intent expressed in Articles 8, 4(4) and 4(5) informs the scope of the general intent expressed in Article 3(1), with the result that the former prevails over the latter. In other words, the restrictive dispute settlement mechanism for expropriation claims set out in Articles 8, 4(4) and 4(5) constitutes an exception to the scope of Article 3(1). Hence, the MFN clause does not apply to the settlement of disputes over the legality of expropriations.

136. There remains the question whether the MFN clause may bring claims for other breaches within the jurisdiction of this Tribunal. In this respect, the Tribunal notes that Article 8 does not limit arbitration to the amount and conditions of payment of compensation for expropriation. It also makes arbitration available for disputes on transfer obligations pursuant to Article 5 of the Treaty. The Tribunal sees in this element an indication that the limits imposed by the Treaty on the access to arbitration were not exclusively concerned with expropriation but had a more general scope. The fact that Article 5 does not contain specifications such as those found in Articles 4(4) and 4(5) does not change this observation. In other words, the Treaty's

dispute settlement mechanism is not confined to expropriation but also takes into account other potential disputes. For some types of disputes specified in Article 8(1) arbitration is available; for others, such as those specified in Article 4(4), arbitration is not available. The analysis of Articles 4(4), 4(5), 5 and 8(1) further suggests that the Contracting States have expressly so stated when they intended to make arbitration available.

137. The general scope of the limitations imposed on the MFN clause by the dispute settlement provisions is unequivocally confirmed by the *travaux préparatoires* of the Treaty. As already discussed, the initial formulation of draft Article 8(1) of 14 April 1988 contemplated the availability of arbitration for differences between a Contracting State and an investor from the other Contracting State "regarding an investment" without any limitation (Exh. R-5). This general clause was subsequently limited in the draft of 14 September 1989 to differences "regarding an investment *concerning the amount or modality of compensation per Article 4 or transfer obligations under Article 5 of this Agreement*" (Exh. R-6). The formulation of Article 8(1) finally adopted is almost identical to the draft of 14 September 1989 referring to "disputes arising out of an investment, between a Contracting Party and an investor of the other Contracting Party, concerning the amount or the conditions of payment of a compensation pursuant to Article 4 of this Agreement, or the transfer obligations pursuant to Article 5 of this Agreement". This is a clear confirmation that the scope of arbitration under the Treaty was intended to be restricted to two specific hypotheses, i.e., compensation for expropriation and transfer obligations.

138. Considered in this light, the Claimant's argument that Article 3(1) expresses an intent to import a more favourable arbitration clause from another treaty is unpersuasive. Indeed, such argument could only succeed if Article 3(1) were to be read as a neutral MFN clause taken in isolation. This would be contrary to the rules of treaty interpretation that require that the context be considered. Taken in context, Article 3(1) is not a neutral MFN clause. The Contracting States have confined recourse to arbitration to clearly defined categories of disputes. This is particularly evident for expropriation claims. It is also clear for disputes over transfer obligations. Seen in interaction with the express limitations which the Treaty imposes on arbitration, the general intent manifested in the MFN clause is insufficient to displace such limitations. Moreover, if it were to follow the Claimant, the Tribunal would adopt an extensive interpretation of the dispute resolution clause in contradiction to the

relevant interpretative approach, which rules out restrictive as well as extensive interpretations.

139. As a result, neither the claim for expropriation nor the other claims brought by the Claimant are covered by the arbitration provisions appearing in the Treaty. For purposes of access to arbitration, there is no reason to treat these other claims differently depending on whether the relevant substantive protection standards are contained in the Treaty or not. For instance, even if the Treaty contained no umbrella clause, which is a disputed issue, and such a clause could be imported from another treaty together with the procedural protections attached to it in that other treaty - a point that has not been argued before the Tribunal and upon which it expresses no view - that would not change the Tribunal's conclusion as to the limited availability of arbitration under the specific wording of the Treaty.

140. For the foregoing reasons, the Tribunal concludes that access to arbitration does not fall within the scope of the MFN clause in Article 3(1). Accordingly, it lacks jurisdiction over the Claimant's claims by application of Article 3 of the Treaty. As a result, it would serve no purpose to review the Respondent's other objections to jurisdiction.

141. Judge Brower wrote a separate opinion, which is appended to this Award.

C. Costs

142. Each Party has advanced costs in the amount of EUR which gives a total advance of EUR

143. The expenses of the Tribunal amount to EUR Such amount also includes hearing costs. The PCA's fees amount to EUR

144. The members of the Tribunal have spent a total of hours on this matter, which they decided to reduce to hours spread as follows: The Honorable Charles Brower hours; Dr. Vojtěch Trapl hours; and Prof. Gabrielle Kaufmann-Kohler hours. The Secretary of the Tribunal has spent hours. In the ToA, it was agreed that the Tribunal's time would be compensated at

an hourly rate of EUR and the Secretary's time at an hourly rate of EUR Accordingly, the total arbitrator fees incurred amount to EUR Vojtěch Trapl fees are subject to 19% VAT. Thus, EUR) should be added to such amount, which yields EUR

145. On the basis of the amounts set out above, the total costs of the arbitrati amount to EUR

146. Although the Respondent has prevailed in the present proceedings, the jurisdiction of the Tribunal raised genuine and complex issues and, as a claimant, one could legitimately initiate an arbitration in such a fashion that it was not unjustified for the Claimant to have started this arbitration. Hence, in the exercise of its discretion under Article 38 of the UNCITRAL Arbitration Rules in matters of allocation of costs and in accordance with a practice often followed in investor-state arbitrations, the Tribunal finds it fair that the Parties bear the costs of the arbitration in equal shares and that each Party bear its own legal and other costs expended in connection with this arbitration.

V. DECISION

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

(i) The Tribunal lacks jurisdiction over the present dispute;

(ii) The arbitration costs are fixed at EUR

(iii) The Parties shall bear the costs of the arbitration in equal shares;

(iv) Each Party shall bear its own legal and other costs;

(v) All other claims are dismissed.

The Honorable Charles Brower

Separate Opinion

Date:

Dr. Vojtěch Trapl

Date: 7 October 2009

Prof. Gabrielle Kaufmann-Kohler

Date: 7 October 2009