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")

AWARD ON JURISDICTION

Arbitral Tribunal

Sir Christopher Greenwood
Professor Brigitte Stern
Dr Dr Alexander Petsche

Secretary to the Tribunal

Mr Martin Doe

Registry

Permanent Court of Arbitration

22 October 2012

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LIST OF DEFINED TERMS

Amendment I	*Act No. 530/2007 Coll., Amending and Supplementing Act No. 581/2004 Coll. on Health Insurance Companies and Healthcare Supervision, and Amending and Supplementing Certain Acts as Amended,* published on 24 November 2007 and entered into force on 1 January 2008
Amendment II	*Act No. 594/2007 Coll.*, published on 19 December 2007 and entered into force together with Amendment I on 1 January 2008
Agreement	*Agreement between the Republic of Austria and the Czech and Slovak Federal Republic concerning the promotion and protection of investments*, dated 15 October 1990
AMO	The Slovak Anti-Monopoly Office
Apollo	Chemická zdravotná poist'ovňa Apollo
Austria	The Republic of Austria
BIT	Bilateral Investment Treaty, specifically 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
Brussels I	*Council Regulation (EC) No.44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters*
Charter	Charter of Fundamental Rights of the European Union
Claimant	European American Investment Bank Aktiengesellschaft
Claimant's Comment	Claimant's Comment on the Observations Submitted by Austria, the Czech Republic and the EU Commission
Counter-Memorial	Claimant's Counter-Memorial on Respondent's Objections to Jurisdiction, dated 14 May 2011
CSFR	The Czech and Slovak Federal Republic
CWS	Claimant's Witness Statement
EC	European Commission
EC Treaty or ECT	*Treaty Establishing the European Economic Community*, as amended by subsequent Treaties, dated 25 March 1957
ECHR	*Convention for the Protection of Human Rights and Fundamental Freedoms*, dated 4 November 1950

ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EIC	EIC a.s., Claimant's Slovak subsidiary
EU	European Union
Euram Bank	European American Investment Bank Aktiengesellschaft
Europe Agreement	*European Agreement establishing an association between the European Communities and their Member States, on the one part, and the Slovak Republic, of the other part*, dated 4 October 1993
Exhibit C	Claimant's Exhibit
Exhibit R	Respondent's Exhibit
ICJ	International Court of Justice
ILC Report	International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 13 April 2006
Memorial	Respondent's Memorial on Jurisdiction, dated 22 February 2011
MFN	Most favoured nation
New York Convention	*Convention on the Recognition and Enforcement of Arbitral Awards*, 1958
Notice of Arbitration	Claimant's Notice of Arbitration, dated 23 November 2009
Parties	The Respondent and the Claimant
PC	The Patent Court
PCA	Permanent Court of Arbitration
Rejoinder	Claimant's Rejoinder on Jurisdiction, dated 18 July 2011
Reply	Respondent's Reply on Jurisdiction, dated 16 June 2011
Respondent	The Slovak Republic
Respondent's Comment	Respondent's Comment on the Observations Submitted by Austria, the Czech Republic and the EU Commission
Statement of Claim	Claimant's Statement of Claim, dated 23 November 2009

Statement of Defence	Respondent's Statement of Defence, dated 5 November 2010
TFEU	*Treaty on the Functioning of the European Union*
Treaty	*Agreement between the Republic of Austria and the Czech and Slovak Federal Republic concerning the promotion and protection of investments*, dated 15 October 1990
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	*Arbitration Rules of the United Nations Commission on International Trade Law*, 15 December 1976
UNCLOS	*United Nations Convention on the Law of the Sea*, 1982
UNCTAD	United Nations Conference on Trade and Development
UNTS	*United Nations Treaty Series*
VCLT	*Vienna Convention on the Law of Treaties*, 1969
WTO	World Trade Organization

I. INTRODUCTION

A. THE 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, Attorneys at Law
Mr Stanislav Durica, Ružička Csekes.

Until 18 June 2010, the Claimant was represented by Mr Marko Szucsich of Law@Teg7. Between 18 June 2010 and 25 July 2012, the Claimant was represented by Dr Erhard Böhm, Mag. Magda Svoboda-Mascher and Mag. Amelie Starlinger of Baier Böhm, Attorneys at Law and, as of 14 May 2011, also by Mr Stanislav Durica of 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
Ms Tafadzwa Pasipanodya, Foley Hoag LLP
Mr Constantinos Salonidis, 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**").

4. In its Notice of Arbitration, the Claimant appointed the Hon. Charles N. Brower as the first arbitrator. By letter dated 8 December 2009, the Respondent challenged the Claimant's appointment of Judge Brower. The Claimant accepted the challenge and, by letter dated 15 December 2009, appointed Dr Dr Alexander Petsche as the first arbitrator. By letter dated 14 January 2010, the Respondent notified the Claimant of its appointment of Professor Brigitte Stern as the second arbitrator. The Claimant submitted a challenge to Professor Stern's appointment pursuant to Article 13(2) of the UNCITRAL Rules in a letter dated 28 January 2010. By letter dated 2 February 2010, Professor Stern submitted her comments and affirmed that she was committed to the "deontological requirements for an arbitrator."

5. In a letter dated 15 February 2010, the Claimant proposed to the Respondent the designation of the Secretary-General of the Permanent Court of Arbitration ("**PCA**") as Appointing Authority in this case. The Respondent agreed, by letter of 19 February 2010, that the PCA should act as the Appointing Authority. By letter dated 26 February 2010, the Claimant requested that the Secretary-General of the PCA sustain the Claimant's challenge of Professor Stern. By letter to the Parties dated 8 March 2010, the Secretary-General of the PCA set out a schedule of submissions whereby the Respondent would provide a response to the Claimant's request by 15 March 2010 and Professor Stern would be able to submit comments by 22 March 2010.

6. By letter dated 15 March 2010, the Respondent submitted its response on the challenge to its party-appointed arbitrator, requesting that the challenge be denied. By letter dated 21 March 2010, Professor Stern reiterated her views that she is a "dedicated and scrupulous arbitrator." By letter dated 29 March 2010, the Claimant submitted its rebuttal to the Respondent's response. By letter dated 5 April 2010, the Respondent submitted its comments to the Claimant's rebuttal and requested a reasoned decision by the Appointing Authority. On 12 April 2010, the Secretary-General of the PCA rejected the challenge to Professor Stern in a reasoned decision.

7. By letters dated 25 May 2010 and 8 June 2010, respectively, the Parties agreed to have the Secretary-General of the PCA appoint the presiding arbitrator. On 13 July 2010, the Secretary-General of the PCA appointed, pursuant to the list-procedure foreseen under Article 6(3) of the UNCITRAL Rules, Sir Christopher Greenwood as the presiding arbitrator.

8. On 21 September 2010, the Tribunal held a Preliminary Procedural Meeting at the Peace Palace, The Hague, the Netherlands. Present at the meeting were:

> **The Tribunal**:
> Sir Christopher Greenwood
> Professor Brigitte Stern
> Dr Dr Alexander Petsche
>
> **For the Claimant**:
> Dr Erhard Böhm
>
> **For the Respondent**:
> Mr Radovan Hronsky, Ministry of Finance of the Slovak Republic
> Mr Tomas Jucha, Ministry of Finance of the Slovak Republic
> Mr Mark Clodfelter
> Mr David Pawlak
>
> **For the Permanent Court of Arbitration**:
> Mr Martin Doe
> Ms Sarah Melikian.

9. On 21 September 2010, in the course of the Preliminary Procedural Meeting, the Parties and the Tribunal signed the **Terms of Appointment** providing, *inter alia*, confirmation of the appointment of the members of the Tribunal, stating that the 1976 UNCITRAL Rules would be the applicable procedural rules, and that the PCA would serve as Registry for the proceedings. The Terms of Appointment also detailed the procedure for communications and provided information regarding the initial and supplementary deposits as well as the Tribunal's fees and expenses.

10. On 27 September 2010, taking into account the agreements reached between the Parties and the Tribunal on procedural issues during the 21 September 2010 hearing, the Tribunal issued **Procedural Order No. 1** providing, *inter alia*, that the seat of the arbitration would be Stockholm and that the language of the arbitration would be English. Procedural Order No. 1 also made provision for the written submissions, communications, filings, document production, witnesses, experts, hearings, and

confidentiality. In addition, Procedural Order No. 1 made the following provisions regarding the schedule of proceedings:

9. SCHEDULE OF PROCEEDINGS

9.1. In accordance with the agreement of the Parties, the following schedule shall apply.

9.2. The Respondent shall lodge its Statement of Defence (including any jurisdictional objections) by 5 November 2010.

9.3. Notice has been given that jurisdictional objections may be made and there may be a request for bifurcation. In the event that bifurcation is agreed between the parties or ordered by the Tribunal, a potential schedule envisaged by the Tribunal is attached as an Annex to this order.

…

Annex to Procedural Order No. 1
Proposed Schedule in the Event of Bifurcation

A1.1 Following the submission of Respondent's Statement of Defence on 5 November 2010, the following schedule is proposed in the event of bifurcation.

A1.2 Within 84 days of an agreement or order on bifurcation, Respondent's Memorial on Jurisdiction shall be submitted together with all evidence (documents, as well as witness statements and expert statements, if any) upon which Respondent wishes to rely, in accordance with the sections on evidence above.

A1.3 Within 84 days of Respondent's Memorial on Jurisdiction, Claimants' Counter-Memorial on Jurisdiction shall be submitted together with all evidence (documents, as well as witness statements and expert statements, if any) upon which Claimants wish to rely, in accordance with the sections on evidence above.

A1.4 Within 30 days of Claimants' Counter-Memorial on Jurisdiction, Respondent's Reply Memorial on Jurisdiction shall be submitted together with all evidence (documents, as well as witness statements and expert statements if any) upon which Respondent wishes to rely, in accordance with the sections on evidence above.

A1.5 Within 30 days of Respondent's Reply Memorial on Jurisdiction, Claimants' Rejoinder on Jurisdiction shall be submitted together with all evidence (documents, as well as witness statements and expert statements, if any) upon which Claimants wish to rely, in accordance with the sections on evidence above.

A1.6 On 24 and 25 August 2011, and extending through 26 August 2011 if necessary, a Hearing on Jurisdiction shall be held.

A1.7 As soon as possible after the Hearing on Jurisdiction, the Tribunal will decide on how it will address the question of jurisdiction and inform the Parties by order, award, or otherwise.

11. On 5 November 2010, in accordance with the timetable set out in the annex to Procedural Order No. 1, the Respondent submitted its Statement of Defence and Request for Bifurcation.

12. By letter dated 10 November 2010, the Tribunal invited the Claimant to submit any comments regarding the Respondent's Request for Bifurcation by 18 November 2010. By letter dated 16 November 2010, the Claimant requested additional time to submit comments, and by letter dated 30 November 2010, the Claimant wrote to the Tribunal indicating that it agreed to the bifurcation of the proceedings into a jurisdictional phase and a merits phase.

13. On 2 December 2010, the Tribunal issued **Procedural Order No. 2**, which detailed the deadlines for the jurisdictional phase of the proceeding as follows:

1. The Tribunal notes that, on 5 November 2010, the Respondent filed an objection to the jurisdiction of the Tribunal, together with a request for bifurcation of the proceedings and that, on 30 November 2010, the Claimant sent to the Tribunal a letter accepting the request for bifurcation.

2. In the light of Section 9 of Procedural Order No. 1, and in view of the Claimant's letter of 30 November 2010, the Tribunal concludes that the Parties have agreed that the proceedings should be bifurcated and that issues of jurisdiction should be addressed in the first phase of the proceedings (hereinafter the "jurisdictional phase").

3. Accordingly, the Tribunal, taking account of the Annex to Procedural Order No. 1 and treating the time limits set out in that Annex as being calculated from 30 November 2010, determines that the schedule for the jurisdictional phase of the proceedings shall be as follows:

22 February 2011: The Respondent shall file its Memorial on Jurisdiction, together with all evidence upon which the Respondent wishes to rely in relation to the issues to be considered in the jurisdictional phase.

17 May 2011: The Claimant shall file its Counter-Memorial on Jurisdiction, together with all evidence upon which the Claimant wishes to rely in relation to the issues to be considered in the jurisdictional phase.

> **16 June 2011**: The Respondent shall file its Reply on Jurisdiction, together with all additional evidence (if any) upon which the Respondent wishes to rely in relation to the issues to be considered in the jurisdictional phase.
>
> **18 July 2011:** The Claimant shall file its Rejoinder on Jurisdiction, together with all additional evidence (if any) upon which the Claimant wishes to rely in relation to the issues to be considered in the jurisdictional phase.
>
> **24 and 25 August 2011** (extending through 26 August 2011 if necessary): Hearing on Jurisdiction.

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

15. On 14 May 2011, the Claimant submitted, in accordance with Procedural Order No. 2, its Counter-Memorial on Jurisdiction and accompanying documents.

16. On 16 June 2011, the Respondent submitted, in accordance with Procedural Order No. 2, its Reply on Jurisdiction and accompanying documents.

17. On 12 July 2011, the Claimant submitted a second challenge to Professor Stern pursuant to Articles 9, 10 and 11 of the UNCITRAL Rules. By letter dated 23 July 2011, the Secretary-General of the PCA set out a schedule for submissions on the challenge, with Professor Stern invited to submit comments on the Parties' submission by 29 July 2011, the Claimant being invited to submit any further comments by 5 August 2011, and the Respondent being invited to submit any further comments it may have on the challenge by 12 August 2011.

18. On 12 July 2011, the Claimant also submitted a request to the Tribunal to invite the Republic of Austria to submit an *amicus curiae* brief on the effect of the Respondent's accession to the EU on the Treaty in the case at hand. The Claimant indicated its agreement that, if the Republic of Austria were invited to intervene as *amicus curiae*, the EU Commission be invited to do the same if the Respondent requested it or if the Tribunal wished to extend such an invitation.

19. On 18 July 2011, the Claimant submitted, in accordance with Procedural Order No. 2, its Rejoinder on Jurisdiction and accompanying documents.

20. By letter dated 4 August 2011, the Respondent requested the postponement of the jurisdictional hearing scheduled for 24-26 August 2011. By letter dated 8 August 2011, the Claimant requested that the hearing proceed as planned. By letter dated 10 August 2011, the Presiding Arbitrator informed the Parties that the hearing would be postponed.

21. On 15 August 2011, the Secretary-General of the PCA rejected the challenge to Professor Stern.

22. By letter dated 25 August 2011, the Tribunal informed the Parties that the Hearing on Jurisdiction had been rescheduled for 19-20 December 2011.

23. By letters dated 30 August 2011 and 31 August 2011, the Parties set forth their agreement that they would agree on excerpts of their written submissions to be provided to the prospective *amici curiae*.

24. On 2 September 2011, the Tribunal issued **Procedural Order No. 3** setting forth the Tribunal's invitation to Austria, the Czech Republic and the European Commission to file written *amicus curiae* submissions on the issue of whether the Treaty continues to be in force and the effect, if any, which it possesses (hereinafter the "**Intra-EU BIT Issue**"). Procedural Order No. 3 further set forth an amended schedule for the jurisdictional phase of proceedings.

25. By letter dated 6 September 2011, the Tribunal invited Austria, the Czech Republic and the European Commission to file *amicus curiae* briefs. On 9 September 2011, the PCA provided the *amici curiae* with the Parties' agreed redacted submissions as well as two alternative translations of the Treaty.

26. By letter dated 13 October 2011, the European Commission submitted its observations on the Intra-EU BIT Issue.

27. On 20 October 2011, the Republic of Austria submitted its observations on the Intra-EU BIT Issue.

28. On 1 November 2011, the Czech Republic submitted its observations on the Intra-EU BIT Issue.

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

30. On 19 and 20 December 2011, the Tribunal held a Hearing on Jurisdiction at the Peace Palace, The Hague, the Netherlands. Present at the meeting 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
> Mag. Magda Svoboda-Mascher
> Mag. Amelie Starlinger
> Mr Stanislav Durica
> Ms Martina Novylsedlakova
>
> **For the Respondent**:
> Ms Andrea Holíková, Ministry of Finance of the Slovak Republic
> Mr Miroslav Kabat, Ministry of Finance of the Slovak Republic
> Mr Mark Clodfelter
> Mr David Pawlak
> Mr Constantinos Salonidis
> Ms Tafadzwa Pasipanodya
>
> **For the Permanent Court of Arbitration**:
> Mr Martin Doe
> Ms Hinda Rabkin.

31. By letters dated 27 January 2012, the Parties submitted their respective positions on the issue of the translation of the Treaty.

32. By letter dated 3 April 2012, the Respondent informed the Tribunal of two developments since the Hearing on Jurisdiction, namely the filing of the National Council of the Slovak Republic's Reply in the First District Court of Bratislava and the commencement of the EU Pilot case against the Slovak Republic regarding the Austria-CFSR BIT.[1]

[1] *See* ¶¶102 *et seq.*, below.

33. By letter dated 4 April 2012, the Claimant informed the Tribunal of the Slovak Republic's challenge of the *Eureko B.V. v. The Slovak Republic* award in the Higher Regional Court of Frankfurt ("**Frankfurt Court**").[2]

34. 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.

35. By letter dated 21 May 2012, the Claimant informed the Tribunal of the decision by the Frankfurt Court to dismiss the Slovak Republic's setting aside application of the *Eureko B.V. v. The Slovak Republic* award ("**Frankfurt Court Decision**").[3]

36. On 26 May 2012, the Respondent submitted a Supplementary Statement of Defence, raising further jurisdictional objections.

37. By letter dated 28 May 2012, the Claimant requested that the Tribunal dismiss the Respondent's Supplementary Statement of Defence as untimely.

38. By letter dated 30 May 2012, pursuant to the Tribunal's invitation, the Respondent submitted its comments on the Frankfurt Court Decision.

39. On 8 June 2012, the Tribunal issued **Procedural Order No. 4**, deciding that it would defer any consideration of the jurisdictional objections contained in the Respondent's Supplementary Statement of Defence until after it had rendered an award on the original jurisdictional objections. The present award is, therefore, without prejudice to the admissibility or the merits of the objections referred to in the Respondent's Supplementary Statement of Defence.

C. THE PROVISIONS OF THE BIT

40. The BIT under which the present proceedings have been brought was concluded on 15 October 1990 between the Federal Republic of Austria and the Czech and Slovak Federal Republic. It entered into force on 1 October 1991. The Czech and Slovak Federal Republic was dissolved and Slovakia became an independent State on 1 January 1993. The Parties agree that the BIT became binding on the Slovak Republic

[2] *See* ¶¶248 *et seq.*, below.
[3] OLG Frankfurt am Main, Beschluss vom 10.5.2012, AZ: 26 SchH 11/10 (hereinafter "Frankfurt Court Decision"). *See* ¶¶248 *et seq.*, below.

by succession. The Respondent maintains that the BIT became binding on the Slovak Republic with effect from 1 January 1995.[4]

41. The BIT is authentic in Czech and German. The Czech and German texts are attached to the Award as Annexes 1 and 2, respectively. The English translation published in the *United Nations Treaty Series* ("**UNTS**") is attached as Annex 3 and the translation on which the Claimant initially relied (which was attached to its pleadings as Attachment C1), which is closely based upon the UNTS version, is attached as Annex 4. The Respondent submitted its own translations into English from the Czech and German texts (Exhibits RL-40A and RL-40B) which are attached as Annexes 5 and 6, respectively. Finally, after the conclusion of the oral proceedings, the Claimant submitted a new translation into English which appears at Annex 7. The Tribunal addresses the differences between the Parties regarding the translations in Chapter III of this Award.

42. Article 1 of the BIT defines the terms "investment", "investor" and "earnings". The extent of the definitions is considered in Chapter IV of the Award. Article 2 provides, *inter alia*, that each Party shall accord fair and equitable treatment to investments made in its territory by investors of the other Party and that such investments and the earnings which they generate shall have the full protection of the BIT. Article 3 is a most-favoured-nation clause, the scope of which will be considered in Chapter V(C) of the Award. Article 4, which is entitled "Compensation" provides for compensation to a qualifying investor in the event of expropriation, nationalization or similar measures. Its scope, and relationship to other provisions in the BIT, is considered in detail in Chapter V(A) of the Award. Article 5 requires each Party to guarantee to investors of the other Party the free transfer, without delay, of payments, including earnings, in connection with an investment. Article 8 provides for arbitration between a Party to the BIT and an investor of the other Party, at the investor's request, of certain disputes regarding Articles 4 and 5 of the BIT. As such, it is Article 8 which is the source of any jurisdiction which the Tribunal may possess. Its scope is keenly contested between the Parties and is discussed in detail in Chapter V(A) of the Award.

[4] Respondent's Memorial on Jurisdiction, ¶33.

D. STATEMENT OF FACTS

43. The subject matter of the dispute concerns the Claimant's interest in Chemická zdravotná poist'ovňa Apollo (hereinafter "**Apollo**"), a health insurance company organised under the laws of the Slovak Republic. The following section sets out the Parties' submissions regarding the facts insofar as these are relevant to the issues before the Tribunal in the current phase of the proceedings.

44. Apollo was founded in 1994 as a public health insurance provider and was converted from a statutory health insurance company to a private joint stock company in 2005 after the Slovak Republic adopted reforms to the health insurance company regulations of 2004.[5]

45. On 19 December 2006, the Claimant's Slovak subsidiary, EIC a.s. ("**EIC**"), purchased a 51% shareholding in Apollo.

EIC's proposed acquisition of Apollo required the approval of the Health Care Supervision Office and the Slovak Anti-Monopoly Office ("**AMO**"). According to the Respondent, EIC represented to the AMO that it was acting independently of the Claimant and that the Claimant did not perform any activities in the Slovak Republic. The AMO approved the transaction on 16 April 2007, noting that "on the basis of ownership of the shares representing 100% interest in the registered capital, the entrepreneur E.I.C. is exclusively controlled by the entrepreneur European American Investment Bank."[9]

46. In 2006, there was a general election in the Slovak Republic, as a result of which a new government came to power. On 24 November 2007, the National Council of the Slovak Republic adopted Act No. 530/2007 Coll. ("**Amendment I**"), which amended

[5] *Ibid.*, ¶¶11-12. Claimant's Counter-Memorial on Jurisdiction, ¶¶30-36.
[6] Claimant's Counter-Memorial on Jurisdiction, ¶41. *See* also Respondent's Memorial on Jurisdiction, ¶13.
[7] Respondent's Memorial on Jurisdiction, ¶13. *See* also Claimant's Counter-Memorial on Jurisdiction, ¶¶45-46.
[8] EIC Registration on the Slovak Ministry of Justice Business Register (R-12).
[9] Claimant's Counter-Memorial on Jurisdiction, ¶¶42-43.

the 2004 law on health insurance companies. A second Amendment, Act No. 594/2007 Coll. ("**Amendment II**"), was adopted on 19 December 2007. Amendments I and II entered into force on 1 January 2008. These Amendments prohibited Slovak public health insurance providers from distributing as dividends profits derived from public health insurance and required them to reinvest all such profits in the provision of public health care. EIC sold its shareholding in Apollo in May 2008.

47. The Claimant maintains that the effect of the Amendments was to destroy the value of its investment, because Apollo was no longer able to remit profits to EIC, and that the Amendments therefore amounted to expropriation, or a measure similar to expropriation, within the meaning of Article 4(1) of the BIT, as well as violating the requirement of fair and equitable treatment in Article 2 of the BIT and the provisions of Article 5 of the BIT regarding transfers. It estimates that the value of its investment in Apollo as at 23 November 2007 (*i.e.* the day before the promulgation of the Amendments) was EUR 131,400,000.[11] The Claimant seeks an award of not less than EUR 131,400,000, together with interest and costs.[12] The Respondent denies that the Amendments amounted to expropriation or a measure similar to expropriation and that they were contrary to Articles 2 and 5 of the BIT.[13]

E. THE RESPONDENT'S JURISDICTIONAL OBJECTIONS

48. The Respondent raises four objections to the jurisdiction of the Tribunal:

(1) *(the intra-EU BIT objection)* that the arbitration provision of the BIT is no longer applicable, because the Respondent and Austria are both Member States of the European Union ("**EU**"). The Respondent puts this argument in three different ways. First, it maintains that, under international law, the BIT must be considered to have been terminated when the Slovak Republic joined the EU in 2003, because the EU treaties (collectively referred to in the Award as the "**ECT**") and the BIT deal with the same subject-matter and their

[10] Statement of Defence, ¶38.
[11] Statement of Claim, ¶34.
[12] *Ibid.*, ¶46.
[13] Statement of Defence, ¶¶58-71.

provisions are incompatible. Secondly, the Respondent contends that, even if the BIT was not terminated when Slovakia joined the EU, the arbitration provision in Article 8 of the Treaty is incompatible with the EU treaties and therefore inapplicable under international law. Thirdly, the Respondent advances the argument that, as a matter of EU law, which forms part of the *lex arbitri*, Article 8 of the BIT can no longer be applied;

(2) (*the indirect investment objection*) that, in any event, the claims do not arise out of a qualifying investment, because it was not the Claimant which owned shares in Apollo but its subsidiary, EIC, a company incorporated in the Slovak Republic;

(3) (*the Article 8 objection)* that the Claimant's claims under Articles 2 and 4 of the BIT fall outside the scope of the arbitration provisions in Article 8, since Article 8 provides for investor-State arbitration only in respect of disputes regarding Article 5 of the BIT and disputes regarding the amount, or arrangements for payment, of compensation in respect of Article 4 and do not confer upon the Tribunal jurisdiction to determine whether or not there has been an expropriation or similar measure within Article 4 or whether such a measure was unlawful;

(4) (*the procedural objection*) in relation to the claims for alleged breach of Article 2 of the BIT, the Respondent maintains that the Claimant did not comply with the requirement to provide a pre-arbitration notice sufficiently specifying the claims or with the requirement to attempt to negotiate a settlement and that compliance with these conditions is a prerequisite to the establishment of jurisdiction.

49. The Claimant argues that the Tribunal should dismiss all four objections:

(1) with regard to the *intra-EU BIT objection*, the Claimant denies that either the BIT as a whole or the arbitration provisions in Article 8 is incompatible with the EU treaties;

(2) with regard to the *indirect investment objection*, the Claimant contends that the BIT protects the investments of investors of one State Party in the territory of the other State Party irrespective of whether the investment is made through a locally incorporated subsidiary;

(3) with regard to the *Article 8 objection*, the Claimant denies that the provision restricts the jurisdiction of the Tribunal in the manner suggested by the Respondent with regard to a claim under Article 4 of the BIT but argues that, even if it does, the question whether or not the Amendments were unlawful has already been decided by the Constitutional Court of the Slovak Republic. Moreover, the Claimant argues that the provisions of Article 8 have to be read in the light of Article 3(1) of the BIT (the "**MFN clause**") which requires the Respondent to accord the Claimant treatment no less favourable than that accorded to investors of third States and contends that the Slovak Republic is party to a number of bilateral investment treaties which accord investors a right to bring arbitration proceedings in respect of alleged unfair and inequitable treatment and in respect of all aspects of alleged expropriation or similar measures;

(4) with regard to the *procedural objection*, the Claimant denies that compliance with the procedural requirements relied on by the Respondent is a condition for the jurisdiction of the Tribunal and maintains that it has, in any event, complied with those requirements.

50. It is common ground between the Parties that if the Respondent succeeds on either the *intra-EU BIT objection* or the *indirect investment objection*, the result will be to deprive the Tribunal of jurisdiction in respect of all the claims. If the Respondent succeeds on its *Article 8 objection,* the Tribunal will be deprived of jurisdiction in respect of the claims under Articles 2 and 4 of the BIT but its jurisdiction to address the claims under Article 5 of the BIT will be unaffected. The *procedural objection* applies only to the claims for alleged breach of Article 2 of the BIT.

F. RELIEF REQUESTED

51. The Respondent requests that the Tribunal enter 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;

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.[14]

52. The Claimant requests that the Tribunal enter an award:

i. in favour of the Claimant and against the Respondent, assuming jurisdiction over the Claimant's claims and dismissing the Respondent's objections to jurisdiction;

ii. that, pursuant to paragraphs 1 and 2 of Article 40 of the UNCITRAL Rules, the Respondent bear all the costs of this arbitration, including the Claimant's costs for legal representation and assistance.[15]

G. THE STRUCTURE OF THE AWARD

53. The Award is structured as follows.

Chapter II deals with the three variants of the Respondent's *intra-EU BIT objection*.

Chapter III considers the differences between the Parties regarding the proper translation of the Treaty into English.

Chapter IV deals with the *indirect investment objection*.

Chapter V deals with the *Article 8 objection.* Section A deals with the meaning of Article 8 of the BIT; Section B considers the Claimant's argument that the Slovak Constitutional Court has already decided that the Amendments were an unlawful

[14] Respondent's Memorial on Jurisdiction, ¶306; Respondent's Reply on Jurisdiction, ¶581.
[15] Claimant's Counter-Memorial on Jurisdiction, ¶444; Claimant's Rejoinder on Jurisdiction, ¶322.

interference with property rights; Section C examines the Claimant's argument based upon the MFN provision in Article 3 of the BIT.

Chapter VI considers the *procedural objection.*

Chapter VII addresses the question of costs.

Chapter VIII sets out the Tribunal's conclusions and the Order regarding the jurisdictional objections.

54. The Tribunal has considered carefully the submissions made by the Parties, as well as the observations of the Government of Austria, the Government of the Czech Republic and the European Commission, all of which were helpful and for which the Tribunal thanks their respective authors. All of the points made in those submissions have been fully taken into account by the Tribunal even if the Tribunal does not repeat them in its reasoning. In its Award, the Tribunal addresses what it considers to be the factors which are determinative of each of the issues which it is required to decide.

II. FIRST OBJECTION: THE INTRA-EU BIT ISSUE

A. INTRODUCTION

55. The Respondent's intra-EU BIT objection has three separate strands.

56. First, the Respondent considers that the BIT as a whole is not applicable by virtue of the principle stated in Article 59 of the Vienna Convention on the Law of Treaties, 1969 ("**VCLT**"), having been terminated by the accession of Slovakia to the European Union in 2004, since it considers that the ECT, to which Slovakia became party on accession, is incompatible with the BIT.[16] Article 59 VCLT provides, in relevant part as follows:

> *Article 59*
> *Termination or suspension of the operation of a treaty implied by conclusion of a later treaty*
>
> 1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:
>
> (*a*) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
>
> (*b*) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.
>
> 2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.
>
> …

57. Secondly, even if the BIT as a whole has not been terminated, the Respondent maintains that Article 8 cannot be applied, by virtue of the principle in Article 30(3) of the VCLT, as it considers Article 8 to be incompatible with EU law.[17] Article 30 of the VCLT provides as follows:

[16] Respondent's Memorial on Jurisdiction, Section III; Respondent's Reply on Jurisdiction, Section III.
[17] Respondent's Memorial on Jurisdiction, ¶¶186-190; Respondent's Reply on Jurisdiction, ¶¶216-220.

Article 30
Application of successive treaties relating to the same subject matter

> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
>
> …

58. The Respondent summarises these two ways of putting its case in the Memorial on Jurisdiction:

> *First*, the Treaty ceased to be available as a basis for the arbitration of BIT claims because under international law it must be considered to have been terminated by the treaty granting Slovakia membership in the EU, or, alternatively, because the Treaty's investor-State arbitration clause became inoperative due to its incompatibility with EU law.[18]

59. Thirdly, independently of the application of the VCLT, the Respondent argues that this pre-eminence of EU law has to apply in any case, because EU law, as part of Swedish law, is part of the *lex arbitri* of this UNCITRAL arbitration (Section E) and thereby renders Article 8 of the BIT inapplicable.[19]

60. The Claimant argues that Article 8 of the BIT, and the BIT as a whole, are unaffected by Slovakia's accession to the European Union.[20] In support of its argument, the Claimant discusses Articles 30, 59 and 65 of the VCLT. It also refers, in particular, to the awards of the tribunals in *Eureko B.V. v. Slovak Republic*[21] and *Eastern Sugar B.V.*

[18] Respondent's Memorial on Jurisdiction, ¶6.
[19] *Ibid.*, ¶¶191-195; Respondent's Reply on Jurisdiction, ¶¶41-61.
[20] Claimant's Counter-Memorial on Jurisdiction, ¶¶76-110.
[21] *Eureko B.V. v. Slovak Republic*, PCA Case No. 2008-13 (Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010) (RL-156) (hereinafter "*Eureko*").

v. Czech Republic,[22] in which, it maintains, the precise arguments now advanced by the Respondent have already been rejected.

61. In its *amicus curiae* brief, submitted pursuant to the invitation of the Tribunal,[23] the European Commission maintains that the BIT deals with "subject matters that *fall squarely* within the scope of the [ECT], specifically the rules on foreign investment activity including post-establishment treatment and operation"[24] and is incompatible with the principle of non-discrimination on grounds of nationality in EU law. It maintains that EU law takes precedence over any conflicting provisions of a treaty between EU Member States and notes that a private party cannot rely on such a treaty to take advantage of dispute settlement mechanisms that conflict with EU law.[25] The *amicus curiae* brief submitted by the Czech Republic also contends that the BITs which it concluded with other EU Member States have been rendered obsolete on the accession of the Czech Republic to the EU and that, in accordance with Articles 59 and 30(3) of the VCLT, Article 8 of the BIT should be regarded as having been terminated.[26] By contrast, the Republic of Austria considers that the BIT is still in force and endorses the reasoning of the tribunals in *Eureko* and *Eastern Sugar*, concluding that the BIT and the ECT do not deal with the same subject-matter.[27]

62. The Tribunal will consider each of the three variations of the intra-EU BIT objection in turn. Before doing so, however, it is necessary to consider the threshold question of whether the VCLT is applicable to the relation between the BIT and the ECT.

B. WHETHER THE VCLT IS APPLICABLE

1. The Positions of the Parties

63. The initial position of the Respondent was that the VCLT, as a treaty to which the Slovak Republic succeeded in 1993, is applicable to the relationship between the BIT and the ECT.[28] For the Respondent, the ECT forms part of international law, so that it

[22] *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004 (Partial Award, 27 March 2007) (RL-148) (hereinafter "*Eastern Sugar*").
[23] *See* ¶25, above.
[24] Observations of the European Commission, p. 2.
[25] *Ibid.*, p. 4.
[26] Observations of the Czech Republic, ¶¶13-23.
[27] Observations of the Republic of Austria, pp. 2-6.
[28] Respondent's Memorial on Jurisdiction, ¶37.

is international law which must determine the relationship of the ECT with all the other treaties to which the Slovak Republic is party, including the BIT.[29] Without taking a clear theoretical position on the applicability of the VCLT in its Memorial on Jurisdiction, the Respondent in practice analysed the relationship between the BIT and the ECT by reference to Articles 59 and 30(3) of the VCLT.[30]

64. The Claimant responds that the ECT is not an ordinary treaty and that EU law should not be regarded as part of international law but rather as a body of law which forms part of the law of each Member State. In the Claimant's view, "European Union law is not part of ordinary international law"[31], so that the VCLT is not applicable to the relationship of the ECT with international treaties such as the BIT. In other words, "this special legal character of EU law – as being domestic, rather than international law, leads to the conclusion that neither Article 30 nor Article 59 VCLT are applicable in the present case."[32]

65. The Claimant also advances a separate argument that, if the VCLT is applicable to the relationship between the BIT and the ECT, and if the two agreements are indeed incompatible, the BIT should not be regarded as having been terminated, because the Slovak Republic has not followed the procedure for termination required by Article 65 of the VCLT. Article 65 of the VCLT provides as follows:

> *Article 65*
> *Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty*
>
> 1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.
>
> 2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

[29] *Ibid.*, ¶¶39, 42.
[30] *Ibid.*, ¶39.
[31] Claimant's Counter-Memorial on Jurisdiction, ¶101.
[32] *Ibid.*

> 3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.
>
> 4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.
>
> 5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

66. In its Reply on Jurisdiction, the Respondent maintains that the VCLT, as such, is not applicable, because Article 4 of the VCLT provides that the VCLT is applicable only to treaties concluded by States after the VCLT became applicable to them. The Respondent contends that the VCLT entered into force for it in 1993, whereas it must be deemed to have concluded the BIT in 1990 or 1991. Nevertheless, according to the Respondent, Articles 59 and 30(3) of the VCLT state rules of customary international law which are applicable even though the VCLT, *qua* treaty, is not. It argues, however, that the provisions of Article 65 of the VCLT did not reflect customary international law and were, therefore, inapplicable with regard to the present case.

67. As an answer to this new argument on the part of the Respondent, the Claimant maintains, in its Rejoinder on Jurisdiction, that the BIT cannot be regarded as having been concluded by Slovakia until it became binding upon Slovakia in 1995. It was therefore concluded subsequent to the VCLT and the VCLT is applicable in its entirety.[33]

2. The Tribunal's Analysis

68. The Tribunal will first examine the general issue of the applicability of the VCLT to the relationship between an intra-EU BIT and the ECT, as well as the law flowing from the ECT, and will then deal separately with the issue of the applicability or non-applicability of the VCLT to the particular BIT in this case in light of the State succession that followed the dissolution of the Czech and Slovak Federal Republic.

[33] Claimant's Rejoinder on Jurisdiction, ¶¶18-25.

(1) Application of the VCLT to the relations between the EU treaties and intra-EU BITs

69. The Tribunal begins by stating that, in its opinion, EU law is part of international law, even if, at the same time, it is also part of the internal legal order of each EU Member State. This dual nature of EU law has already been underscored by the *AES* tribunal, which stated:

> Regarding the Community competition law regime, it has a dual nature: on the one hand, it is an international law regime, on the other hand, once introduced in the national legal orders, it is part of these legal orders.[34]

70. EU law is international law, first and foremost because it is based upon an international treaty, the ECT. It was for that reason that the European Court of Justice (the "**ECJ**") stated, in the famous and often cited case *Van Gend en Loos,* that

> The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights … [35]

71. It is the Tribunal's view that EU law is a subsystem of public international law. The fact that EU law has some special features – like the direct effect of some of its decisions in the national legal orders of its Member States – and forms part of national law does not render this corpus of rules completely different from international law, which is also incorporated – whether automatically in monist countries or through the requisite constitutional procedure in dualist countries – into national legal orders.

72. The tribunal in the *Eureko* case, applying a Slovak BIT similar to the one at issue here, has also recognised that EU law is part of international law:

> In the view of the Tribunal, the proper framework for its analysis of these arguments is, in the first place, the framework applicable to the legal instrument from which the Tribunal derives its *prima facie* jurisdiction. Just as the Court of Justice of the European Communities has held that its own perspective is dictated by the treaties that established it, so the perspective of this Tribunal must begin with the instrument by which and the legal order within which consent originated,

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[34] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22 (Award, 23 September 2010), ¶7.6.6 (hereinafter "*AES v. Hungary*").
[35] Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend & Loos v. Netherlands Internal Revenue Administration*, [1963] ECR 1 (RL-94), Section B (hereinafter "*van Gend & Loos*").

> *i.e.*, the first stage described above. That framework is the BIT and *international law, including applicable EU law*.[36]

73. Since EU law has to be analysed as a system of international law and the ECT as a treaty governed by international law, its relationship with the BIT is itself a matter governed by the relevant rules of public international law. The Tribunal must, therefore, ascertain the content of those rules.

74. It is clear that the BIT and the ECT are both treaties within the meaning of Article 2(1)(a) of the VCLT, so that their respective interpretation and interaction is potentially governed by the provisions of the VCLT, and subsidiarily by any other applicable rule of international law.

75. The same conclusion regarding the applicability of the VCLT was adopted by the tribunal in the *Eastern Sugar* case, applying a BIT similar to the one at issue here:

> The Arbitral Tribunal is of the view that in the absence of more specific legal provisions, the effect of the Czech Republic accession to the European Union, a regional multilateral treaty, on the BIT must be judged by the law of Nations, and in particular the Vienna Convention on the Law of Treaties dated 1969.[37]

76. The Tribunal's conclusion, therefore, is that the VCLT is in principle applicable to the relationship between the BIT and the ECT. The Tribunal will accordingly examine whether the application of the VCLT is barred by the non-retroactivity provision in its Article 4.

(2) Whether the BIT was concluded before or after Slovakia became party to the VCLT

77. The starting point of the new argument presented by the Respondent in its Reply is the principle stated in Article 4 of the VCLT, which provides that the Convention "applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States." The Respondent argues that "concluded" in this provision means "ratified", rather than "entered into force"; the Respondent then argues that, because of the rules on State succession, the VCLT does not apply to the situation dealt with by the Tribunal:

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[36] *Eureko*, *supra* note 21, ¶228 (emphasis added).
[37] *Eastern Sugar*, *supra* note 22, ¶156.

> The Treaty was concluded on October 15, 1990 and entered into force in the relations of Austria and Czechoslovakia on October 1, 1991. The Slovak Republic emerged as a successor sovereign State on January 1, 1993. The applicability of the Treaty by way of state succession was confirmed by an exchange of diplomatic notes on 4 August and 25 November 1994, entering into force on January 1, 1995.
>
> On the other hand, by way of a declaration of succession filed with the Secretary-General of the United Nations on May 19, 1993, Slovakia is bound by the provisions of the VCLT as of January 1, 1993. In light of Article 4 VCLT, this would mean that the provisions of the Vienna Convention apply only to treaties which are concluded by Slovakia and other States parties to the Convention after January 1, 1993.[38]

78. Although the Respondent's precise argument is not entirely clear, it appears that the latter must have relied on the date of the initial "conclusion" or *initial ratification* of the BIT by Czechoslovakia in 1990 and not its entry into force for Slovakia in 1995.

79. The Tribunal does not need to address the question of whether a treaty can be said to be concluded, within the meaning of this term in Article 4 of the VCLT, when it is ratified or only when it enters into force, as both the exchange of diplomatic notes in the framework of the process of State succession – which can be considered as equivalent to a ratification by the successor State – and the entry into force of the BIT for Slovakia, took place after Slovakia became bound by the VCLT. Indeed, once Slovakia became an independent successor State, it could not be bound by the BIT, notwithstanding the fact that its predecessor State had signed and ratified the BIT, until it had taken the steps necessary to succeed to the BIT. Only once it had taken those steps could it be regarded as having concluded the BIT. In the present case, Slovakia did not take those steps until after it had become bound by the VCLT.

80. This conclusion is confirmed by information given by Austria in its submission, which explains that, as regards the BIT an Exchange of Diplomatic Notes took place in 1994, and the BIT entered into force between Austria and the Slovak Republic in 1995, after the entry into force of the VCLT:

> The Agreement between the Republic of Austria and the Czech and Slovak Federative Republic on the Promotion and Protection of Investments was signed on 15 October 1990 and entered into force on 1 October 1991 (…). Following the dissolution of the Czech and Slovak Federative Republic, Austria and the newly independent Slovakia jointly identified the BIT, among other treaties, to be in

[38] Respondent's Reply on Jurisdiction, ¶¶81-82.

> force and applicable between them by means of an Exchange of Diplomatic Notes (See Federal Law Gazette No. 1046/1994). Moreover, the Exchange of Diplomatic Notes also amended the BIT, so as to insert the designations "Slovak Republic" and "Slovak" into the text of the Agreement as appropriate.[39]

81. In other words, the BIT would not have become applicable between Austria and the Respondent had it not been for the Exchange of Notes. The Tribunal therefore concludes that the BIT cannot be considered to have been concluded by the Respondent until, at the earliest, the date of the Exchange of Notes in 1994. Since the VCLT became applicable to Slovakia on 1 January 1993, it therefore applies to the relations between the BIT and the ECT, the latter treaty having entered into force for Slovakia on 1 May 2004.

C. THE APPLICATION OF ARTICLE 59 OF THE VCLT

82. The Tribunal will now turn to the question whether the effect of Article 59(1) of the VCLT is that the BIT was terminated upon the Slovak Republic's accession to the EU.

1. The Positions of the Parties and the Amici Curiae

(1) The Respondent

83. According to the Respondent, there are three conditions for the application of Article 59 of the VCLT: (1) the parties to the earlier and later treaty must coincide; (2) the treaties must relate to the same subject matter, and (3) either (i) the intention of the contracting parties must have been to govern the subject matter of the treaties by the later treaty, or (ii) there must be incompatibility between the provisions of the earlier and the later treaty, which makes it impossible to apply both treaties simultaneously.[40] The Respondent argues that the above requirements for the application of Article 59(1) of the VCLT have been met in the case of the BIT and the ECT.

84. The Respondent submits that it is beyond dispute that the 2003 Treaty of Accession, by which it became a Member State of the EU and a Party to the ECT, was concluded after

[39] Observations of the Republic of Austria, p. 1.
[40] Respondent's Memorial on Jurisdiction, ¶53.

the conclusion of the BIT and that both Austria and the Respondent are States Parties to the Treaty of Accession as well as the BIT.[41]

85. The Respondent argues that the BIT and the EC Treaty "relate to the same subject matter."[42] The Respondent submits, consistent with the International Law Commission Report on Fragmentation of International Law (hereinafter the "**ILC Report**"), that the "criterion of sameness must be considered fulfilled if two *different* rules or sets of rules are invoked in regard to the *same* factual situation."[43] Contrary to the findings of the *Eastern Sugar* tribunal, and as the *Eureko* tribunal acknowledged, "[n]othing in Article 59 requires that the two treaties should be *in all respects co-extensive*; but the later treaty must have more than a minor overlap or incidental overlap with the earlier treaty."[44] The Respondent submits that "the fundamental purpose of both treaties is to broaden and strengthen mutual economic relationships, to promote the flow of capital and the economic development of the Parties, while guaranteeing the protection of private parties involved in the process."[45] The Respondent also advances several specific ways in which the EC Treaty and the BIT relate to a common subject matter, namely that the EC Treaty's protection of an investment made in an EU Member State extends to the "same circle of entities", covers the same types of investments, offers the same concrete protections, and provides comparable systems of remedies as the BIT.[46]

86. Relying on the Charter of Fundamental Rights of the European Union ("**Charter**") and the jurisprudence of the European Court of Human Rights ("**ECtHR**"), the Respondent discusses four particular areas of substantive investment protection where it submits that EU law provides for equivalent protection to that found in the BIT: expropriation, fair and equitable treatment, full protection and security, and free movement of

[41] *Ibid.*, ¶54.
[42] *Ibid.*, ¶¶55-120; Respondent's Reply on Jurisdiction, ¶¶93-105.
[43] Respondent's Memorial on Jurisdiction, ¶55, citing International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 13 April 2006, UN Doc. No. A/CN.4/L.682 (RL-175), ¶23 (hereinafter "ILC Report") (emphasis in original).
[44] Respondent's Memorial on Jurisdiction, ¶56 (emphasis in original), citing *Eureko*, *supra* note 21, ¶242.
[45] *Ibid.*, ¶60.
[46] *Ibid.*, ¶¶65-85, 113, 119.

capital.[47] According to the Respondent, this equivalent protection leads to the conclusion that the ECT and the BIT relate to the same subject matter.

87. The Respondent asserts that the *Eureko* tribunal erroneously concluded that the protection against expropriation under Article 5 of the Netherlands-Czech and Slovak Federal Republic ("**CSFR**") BIT was not coextensive with the right to property as secured by EU law.[48] The Respondent refers to the case law of the ECJ which stresses that the "right to property is guaranteed in the EU legal order."[49]

88. With respect to fair and equitable treatment under Article 2(1) of the BIT, the Respondent submits that it only incorporates the minimum standard under customary international law. According to the Respondent, the standard so defined mirrors the protections provided under EU law which go "far beyond the principle of non-discrimination."[50] The Respondent points to the ECJ's determination that freedom of establishment under EU law mandates that any obstacles, restrictions or hindrances to the enjoyment of this freedom be removed.[51]

89. Regarding the overlap between EU law and the BIT concerning full protection and security, the Respondent distinguishes the BIT in this case from the BIT at issue in the *Eureko* award and notes that the present BIT does not impose an additional substantive obligation of "full protection and security."[52] The Respondent asserts that, in any event, EU law provides an equivalent protection to the obligation to accord "full protection and security"[53] which it argues only relates to the physical protection of foreign investment.[54]

90. The Respondent additionally argues that there is complete overlap between the free transfer of payments guaranteed in Article 5 of the BIT and Article 56 of the EC Treaty,

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[47] *Ibid.*, ¶¶78-112.
[48] *Ibid.*, ¶86, citing *Eureko*, *supra* note 21, ¶261.
[49] *Ibid.*, Respondent's Memorial on Jurisdiction ¶89, citing Case C-44/79, *Liselotte Hauer v. Land Rheinland-Pfalz* [1979] ECR I-3727 (RL-85), ¶7.
[50] *Ibid.*, ¶100.
[51] *Ibid.*, citing Case C-255/97, *Pfeiffer Grosshandel GmbH v. Löwa Warenhandel GmbH* [1999] ECR I-2835 (RL-93); Case C-153/02, *Valentina Neri v. European School of Economics (ESE Insight World Education System Ltd)* [2003] ECR I-13555 (RL-80); Case C-411/03, *Sevic Systems* [2005] ECR I-10805 (RL-113).
[52] *Ibid.*, ¶106.
[53] *Ibid.*, ¶¶109-110; Respondent's Reply on Jurisdiction, ¶¶106-146.
[54] Respondent's Reply on Jurisdiction, ¶¶118-119, citing *Saluka Investments BV v. The Czech Republic* (Partial Award, March 17 2006) (RL-235), ¶484 (hereinafter "*Saluka*").

which prohibits restrictions on the movement of capital and payments between EU Member States.[55]

91. Furthermore, the Respondent stresses that EU law "*does* contain limitations on the right of Member States to expropriate property" since Member States are obliged to respect fundamental human rights when implementing EU law and EU law has a broad scope of application.[56]

92. Finally, the Respondent argues that both the BIT and the EU have comparable systems of remedies for investments impaired by State action, pointing to the various EU mechanisms available to investors.[57] The "complete" remedial system established by the EC Treaty is, according to the Respondent, "at least as favourable to investors" as the arbitration mechanism established under Article 8 of the BIT, particularly in light of the narrow scope of the latter.[58]

93. As to the last condition for the application of Article 59(1) of the VCLT, the Respondent argues that, by virtue of the Slovak Republic's accession to the EU, the States Parties to the BIT manifested their intention to have the subject matter of the BIT governed by EU law.[59]

94. The Respondent discusses the test for "intention", pointing to Article 59(1)(a) of the VCLT, which it argues concerns situations in which a treaty is "implicitly terminated" even if the parties have not expressly provided for it.[60]

95. Relying on the ILC Commentary on the Law of Treaties for the proposition that the intention of the parties is a "matter of construction of the two treaties", the Respondent concludes that, because of its later date, the Treaty of Accession is "key to determining, in its terms and in the circumstances of its conclusion" the intention of the parties to the BIT as to the BIT's termination or continuation.[61] The Respondent argues that "intent may be discerned in the relative importance and scope of the two treaties," and the fact

[55] Respondent's Memorial on Jurisdiction, ¶111.
[56] Respondent's Reply on Jurisdiction, ¶¶122-129 (emphasis in original).
[57] Respondent's Memorial on Jurisdiction, ¶¶113-119.
[58] *Ibid.*, ¶¶114-118, 119; Respondent's Reply on Jurisdiction, ¶¶139-144.
[59] Respondent's Memorial on Jurisdiction, ¶¶121-136; Respondent's Reply on Jurisdiction, ¶¶147-152.
[60] Respondent's Memorial on Jurisdiction, ¶121.
[61] *Ibid.*

that the earlier treaty contains more specific rules is not preclusive of an implicit termination.[62] Furthermore, the ILC Report provides that "the principle of *lex specialis* may be overridden by treaties of a more general character by virtue of their 'relevance' or 'importance'."[63]

96. According to the Respondent, the Parties' intent to supplant the BIT is demonstrated by an overriding commitment to a pervasive internal market and common commercial policy, with the corresponding removal of obstacles to the free movement of goods, persons, services and capital.[64] The Respondent also stresses, as proof that bilateral investment treaties are obsolete in the relations of the EU Member States *inter se*, that "no BIT has been concluded between EU Member States after their accession into the EU."[65]

97. The Respondent claims that it has established far more than a minor or incidental overlap between the BIT and the EC Treaty.[66]

98. The Respondent argues that the incompatibility between the provisions of the ECT and those of the BIT is such that the two treaties cannot be applied at the same time and that therefore, pursuant to Article 59(1) of the VCLT, the BIT must have been terminated by the Respondent's accession to the ECT.[67] The Respondent maintains that incompatibility between the provisions of the BIT and EU law must be construed broadly and is established on four grounds: (a) fundamental freedoms may be incompatible with BIT protections; (b) measures by Member States that restrict fundamental freedoms in conformity with EU law may breach BIT protections; (c) competition and regulatory law essential for the functioning of the single European market may conflict with BIT provisions and; (d) the BIT dispute settlement provision infringes the exclusive jurisdiction of the ECJ to interpret EU law.[68]

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[62] *Ibid.*, ¶122.
[63] *Ibid.*, ¶123.
[64] *Ibid.*, ¶¶126-132.
[65] *Ibid.*, ¶129.
[66] *Ibid.*, ¶¶133-136.
[67] *Ibid.*, ¶¶137-181; Respondent's Reply on Jurisdiction, ¶¶153-205.
[68] Respondent's Reply on Jurisdiction, ¶205.

99. The Respondent discusses the test for "incompatibility", relying on the ILC Report, to argue that "incompatibility may arise … when a treaty *frustrates* the goals of another treaty *without* there being any incompatibility *stricto sensu* between their respective provisions."[69]

100. The Respondent considers a wide range of EU regulatory provisions which restrict compliance with the provisions of the BIT.[70] The Respondent submits two particular categories of such EU regulatory provisions: (a) EU legal rules which would prevent a BIT Party from honouring specific guarantees given to the investor,[71] and (b) EU legal rules which generally and negatively alter the legal environment in which the investor operates.[72] The Respondent therefore argues that the "application and enforcement" of EU law could constitute a breach of obligations under the BIT, or that meeting obligations under the BIT could result in a violation of EU law.[73]

101. The Respondent advances two arguments in support of its position that the investor-state dispute settlement mechanism established in Article 8 of the BIT is incompatible with EU law. First, the Respondent argues that Article 8 of the BIT is incompatible with the ECT provisions on the exclusive jurisdiction of EU judicial institutions pursuant to Article 292 EC Treaty, since the Tribunal may fail properly to take EU law into account.[74] Secondly, the Respondent submits that the existence and applicability of Article 8 of the BIT has already breached EC Treaty provisions on non-discrimination under Article 12 of the EC Treaty since it creates preferential treatment not tolerated under EU law by allowing Austrian investors to choose from different enforcement options not available to other EU investors.[75]

102. Additionally, the Respondent highlights the proceedings (the *EU Pilot* case) commenced by the European Commission ("**EC**") against the Slovak Republic, wherein the EC expressed serious concerns regarding the compatibility of the

[69] Respondent's Memorial on Jurisdiction, ¶¶138-143, citing ILC Report, *supra* note 43, ¶24 (emphasis in original).
[70] *Ibid*., ¶145.
[71] *Ibid*., ¶¶147-149.
[72] *Ibid*., ¶145.
[73] *Ibid*., ¶¶147-149.
[74] *Ibid*., ¶¶153-173.
[75] *Ibid*., ¶¶174-181; Respondent's Reply on Jurisdiction, ¶¶171-174.

Netherlands-Slovakia BIT with EU law, as another indication of the incompatibility of the Treaty with EU law.[76]

103. The Respondent takes note of the *Eureko* tribunal's findings that the uniformity of EU law can be preserved in set aside proceedings in national court based on public policy, pursuant to the ECJ's *Eco Swiss* decision which qualified a violation of EU competition law as a matter of public policy.[77] However, the Respondent argues that it is unclear which rules of EU law apart from competition law enjoy the status of public policy, and that the public policy provisions in the New York Convention and the Swedish Arbitration Act (1999), respectively, are narrow in scope and would not provide a safeguard for EU law issues that may arise under Article 8 of the BIT.[78]

104. Furthermore, the Respondent disputes the argument that the discrimination inherent in the BIT due to its protections being available solely to Austrian or Slovak nationals can be cured by extending the benefit of the BIT to all other EU investors. The Respondent submits that the "extension doctrine" cannot be relied upon to "undo a breach that has already occurred" and the fact that it only harms potential investors rather than the Claimant is irrelevant since this discrimination establishes incompatibility with EU law, which is relevant for the purposes of Article 59 VCLT.[79]

105. Lastly, the Respondent argues that Article 65 of the VCLT, which requires notification in the case of termination or suspension of the operation of a treaty, does not apply to Article 59 of the VCLT.[80] Instead, the Respondent asserts that, pursuant to Article 59, "there is no explicit requirement under the law of treaties for notification in case of termination or suspension of the operation of a treaty by the conclusion of a subsequent treaty."[81] The Respondent argues that the premise underlying Article 59 of the VCLT is to regulate cases where the conclusion of a later treaty is not clear evidence of the

[76] Respondent's Reply on Jurisdiction, ¶¶206-209, discussing Pilot Case 1786/11/MARK (RL-389), p. 2 (hereinafter "*EU Pilot Case*").
[77] Respondent's Memorial on Jurisdiction, ¶165; Respondent's Reply on Jurisdiction, ¶204, Citing Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECR I-3055 (RL-77), ¶37 (hereinafter "*Eco Swiss*").
[78] Respondent's Memorial on Jurisdiction, ¶¶166-172; Respondent's Reply on Jurisdiction, ¶204.
[79] Respondent's Memorial on Jurisdiction, ¶¶177-185; Respondent's Reply on Jurisdiction, ¶¶178-183.
[80] Respondent's Memorial on Jurisdiction, ¶¶182-185; Respondent's Reply on Jurisdiction, ¶¶62-79.
[81] Respondent's Memorial on Jurisdiction, ¶¶182-183; Respondent's Reply on Jurisdiction, ¶63.

parties' consent to abrogate the earlier treaty.[82] The Respondent notes that State practice supports the conclusion that termination pursuant to Article 59 of the VCLT is not subject to the procedural requirements of Article 65 VCLT.[83] The Respondent therefore criticises the *Eureko* tribunal's finding that Article 59 VCLT is subject to Article 65 VCLT procedural requirements, calling it a fundamental error.[84]

(2) The Claimant

106. The Claimant argues that the Tribunal should first look at the wording of the BIT itself, instead of turning to extrinsic evidence.[85] The Claimant notes that the language of the BIT indicates that the Contracting States foresaw and provided for the possibility that they may enter into international obligations with one another and third parties in the future, citing as evidence Articles 3(2) and 7 of the BIT.[86] Article 3(2) of the BIT creates an exception to Most-Favoured Nation treatment for "present and future privileges accorded by one Contracting Party to the investors of a third State or their investments in connection with: (a) [a]n economic union, tariff union, common market, free trade zone or economic community."[87] The Claimant argues that these exceptions fit perfectly with Austria's and Slovakia's accession to the EU.[88] Article 7 of the BIT stipulates that the BIT will remain in full force and effect unless a more favourable regime takes precedence.[89] Thus, the BIT already explicitly provides conflict rules for the case where one or both parties to the BIT join a community such as the EU. In the present case, since accession to the EU did not create a more favourable treatment for investor-State disputes, the Claimant asserts that the BIT remains unaffected by Slovakia's accession to the EU.[90]

107. The Claimant argues that the preconditions for termination under Article 59 VCLT have not been met. The Claimant submits that there was no intent that the "matter" of the BIT should be governed by EU law since it was not addressed in connection with

[82] Respondent's Reply on Jurisdiction ¶66.
[83] *Ibid.*, ¶¶77-78.
[84] *Ibid.*, ¶79.
[85] Claimant's Rejoinder on Jurisdiction, ¶27.
[86] *Ibid.*, ¶¶28-29.
[87] *Ibid.*, ¶28.
[88] *Ibid.*, ¶29.
[89] *Ibid.*, ¶¶31-34.
[90] *Ibid.*, ¶¶27-35.

Slovakia's accession to the EU.[91] Furthermore, the Claimant alleges that EU law and the Treaty are not incompatible; the Treaty protects already existing investments whereas EU law concentrates on the four freedoms which focus on the pre-establishment phase.[92] In addition, the Claimant submits that insofar as the Treaty and EU law regulate similar matters, they are parallel, but not contradictory.[93]

108. Regarding the application of Article 59(1) of the VCLT, the Claimant argues that the provision envisages two possible avenues for implicit termination: (i) the intention to abrogate the earlier treaty appears from the terms of the later treaty or is otherwise established or (ii) the provisions of the later treaty "are so far incompatible that they are not capable of being applied at the same time."[94]

109. Regarding the first option, the Claimant states that "[n]owhere does the Accession Treaty say that the Treaty is abrogated and nowhere does it say that the Accession Treaty and EU law 'govern the matter' of bilateral investment treaty protection."[95] As to the second option, the Claimant notes that the incompatibility between the two treaties must be sufficient to demonstrate the intent to completely abrogate the earlier treaty.[96] The Claimant argues that termination pursuant to Article 59 of the VCLT requires the treaties to strictly relate to the same subject matter, and that EU law and the BIT do not relate to the same subject matter.[97] The Claimant asserts that "[t]o accede a community is simply not the same as a specific investment protection regime providing for investor-State arbitration."[98]

110. The Claimant further distinguishes the BIT and EU law: (i) EU law does not provide for any guarantees relating to legal property regimes since the regulation of property is controlled by Member States, (ii) the ECJ does not provide for the protection of fundamental rights, (iii) the aim and purpose of the treaties are different, the BIT dealing only with economic aims and the EU Treaty also addressing political aims, and

[91] Claimant's Counter-Memorial on Jurisdiction, ¶95.
[92] *Ibid.*, ¶96.
[93] *Ibid.*, ¶97; Claimant's Rejoinder on Jurisdiction, ¶¶62-74.
[94] Claimant's Rejoinder on Jurisdiction, ¶39.
[95] *Ibid.*, ¶40.
[96] *Ibid.*, ¶41.
[97] Claimant's Rejoinder on Jurisdiction, ¶¶41-56.
[98] *Ibid.*, ¶¶44-45.

(iv) the ECJ is not a court set up to protect investors.[99] Pointing to the *Eco Swiss* case, the Claimant argues that EU law does not prohibit arbitral tribunals from interpreting EU law; instead, the two "concepts" work "in parallel."[100]

111. Contrary to any intention to terminate or suspend treaties, the Claimant points to Article 6(12) of the *Act Concerning the Conditions of Accession* attached to the Treaty of Accession, which it argues, explicitly contemplates subsequent measures to adjust rights and obligations under prior international agreements rather than their automatic termination or suspension.[101]

112. The Claimant maintains that the ECJ has ruled that EU Member States "may conclude bilateral treaties between themselves."[102] The Claimant distinguishes the two ECJ judgments on BITs which found that these infringed EU law, noting that these were BITs concluded between EU Member States and third countries and are therefore not relevant to the present case.[103] Finally, the Claimant points to actions of the Slovak Republic that, according to the Claimant, demonstrate that the Respondent "did not assume that intra-EU BITs would be ineffective": (i) neither party denounced the BIT; (ii) a letter from the Respondent stating that the health insurance laws would be in accordance with BITs; (iii) assurances made by the Respondent to the Netherlands regarding the validity of the Netherlands-CSFR BIT; (iv) the Respondent's amendment of its BIT with Romania in light of that country's forthcoming accession to the EU which did not alter the dispute resolution clause, and; (v) the inclusion of the Treaty on the Slovak Republic's Ministry of Foreign Affairs homepage listing all current BITs.[104]

113. Turning to the case law, the Claimant emphasises that the *Eureko* tribunal found that the preconditions for termination under Article 59 of the VCLT were not met since "the EC Treaty *does not relate to the same subject matter* as the Netherlands-CSFR BIT."[105] Instead, the tribunal found that the protections available in the BIT were broader than

[99] *Ibid.*, ¶¶45-47, 51.
[100] *Ibid.*, ¶¶52-55, citing *Eco Swiss*, *supra* note 77.
[101] *Act Concerning the Conditions of Accession,* dated 23 September 2003 (RL-5), p. 37.
[102] Claimant's Counter-Memorial on Jurisdiction, ¶¶105-110.
[103] Claimant's Counter-Memorial on Jurisdiction ¶107, citing Case C-205/06, *Commission v. Austria* [2009] ECR I-1301 (R-87); Case C-249/06, *Commission v. Sweden* [2009] ECR I-1335 (RL-63); Case C-118/07, *Commission v. Finland* [2009] ECR I-10889 (RL-62).
[104] Claimant's Counter-Memorial on Jurisdiction, ¶108.
[105] *Ibid.*, citing *Eureko*, *supra* note 21, ¶239ff.

those available under EU law, although it accepted that there may be a certain duplication of rights.[106] The Claimant also points to the *Eureko* tribunal's findings that (i) there is no rule in EU law that would prohibit investor-State arbitration, (ii) transnational arbitration is commonplace within the EU, and (iii) the ECJ does not have an "interpretative monopoly" on considering and applying EU law.[107]

114. The Claimant also discusses *Eastern Sugar*, another case under the Netherlands-CSFR BIT where the tribunal found that neither the Europe Agreement with the Czech Republic[108] nor the Treaty of Accession provided that the BIT was terminated, and that the BIT and EU law "do not cover the same precise subject matter" so that Article 59 of the VCLT does not apply.[109] Furthermore, the *Eastern Sugar* tribunal held that if the BIT gives greater rights to the Netherlands and Dutch investors over other EU investors, then "it will be for those other countries and investors to claim their equal rights. The fact that these rights are unequal does not make them incompatible."[110]

115. The Claimant also submits that any termination under Article 59 of the VCLT must follow the procedure laid out in Article 65 VCLT, requiring explicit termination by notice of the grounds to the other Party and that no notice was provided by either State Party to the BIT.[111]

(3) The Amici Curiae

116. The EC requests the Tribunal to declare that it has no jurisdiction.[112] The EC alleges that arbitral awards rendered in breach of EU public order, such as those rendered pursuant to agreements between EU Member States which confer jurisdiction on tribunals not bound by EU law and which rule on EU law, "cannot be recognised or enforced in the European Union."[113]

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[106] *Ibid*., ¶84-86, citing *Eureko*, *supra* note 21, ¶¶249, 263-264.
[107] *Ibid*., ¶88, citing *Eureko*, *supra* note 21, ¶¶274, 277, 282-283.
[108] *Agreement Establishing an Association between the European Communities and their Member States of the one part and the Czech Republic of the other part*, concluded on 4 October 1993, entered into force on 1 February 1995 (hereinafter "Europe Agreement with the Czech Republic").
[109] Claimant's Counter-Memorial on Jurisdiction, ¶89, citing *Eastern Sugar*, *supra* note 22, ¶¶158-177.
[110] Claimant's Counter-Memorial on Jurisdiction, ¶90, citing *Eastern Sugar*, *supra* note 22, ¶170.
[111] *Ibid.*
[112] Observations of the European Commission, p. 5.
[113] *Ibid*., p. 2.

117. The EC does not base its submissions upon Article 59 VCLT, since the application of that provision is a matter of public international law and the EC confines its arguments to EU law. Nevertheless, the EC maintains that the Treaty deals with "subject matters that fall squarely within the scope of the Treaty [on] the Functioning of the European Union" ("**TFEU**"), specifically the rules on foreign investment activity including post-establishment treatment and operation.[114] The EC submits that the principle of non-discrimination on grounds of nationality requires the same treatment of investors from all EU Member States "as regards both substantive standards of protection and procedural remedies."[115]

118. The EC notes that where arbitration claims involve questions of the "application and interpretation of law covered by the EU treaties, EU law takes precedence. Where there is a conflict with EU law, the general international law rule of *'pacta sunt servanda'* does not apply to treaties concluded between EU Member States."[116] The EC stresses that it is the domestic courts of Member States which must ensure the correct application of EU law and guarantee procedural and substantive protection to private parties for breaches of EU law, with oversight by the ECJ to determine whether the Member States have fulfilled their obligation under EU law and to rule on questions of EU law as requested by EU domestic courts.[117] The EC submits that the "right of individuals to compensation from Member States for breaches of EU law is firmly grounded in EU law and is a principle inherent in the system of EU law."[118] The EC also notes that in the TFEU, EU Member States agreed not to submit disputes involving the application or interpretation of EU law to a method of dispute settlement other than those set out in the EU treaties.[119]

119. The EC further alleges that an "international agreement cannot affect the allocation of responsibilities defined in the European treaties, including the autonomy of the European Union legal system and the exclusive jurisdiction of EU courts", and notes that a private party cannot rely on an international agreement to justify a possible

[114] *Ibid.* (emphasis in original).
[115] *Ibid.*
[116] *Ibid.*, p. 3.
[117] *Ibid.*
[118] *Ibid.*
[119] *Ibid.*, p. 4, citing Art. 344 TFEU; Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635 (RL-431), ¶177 (hereinafter "*Mox Plant*").

breach of EU law, nor can it rely on dispute settlement mechanisms that conflict with the EU judicial system.[120]

120. The EC concludes by drawing attention to Opinion 1/09 delivered by the ECJ on 8 March 2011, which found that a court, set up outside the institutional and judicial framework of the European Union to resolve patent-related disputes between private parties, was not compatible with the provisions of European Union treaties.[121] The EC relies on Opinion 1/09 to argue that "the investor-state arbitration mechanism set out in the bilateral investment treaty on which the arbitral tribunal dealing with PCA Case No. 2010-17 was established is incompatible with the provisions of the European Union treaties" since the Tribunal is outside the institutional and judicial framework of the European Union, given that it cannot make references to the ECJ for issues relating to interpretation of EU law and is not obliged to respect EU law.[122]

121. The Czech Republic submits that the BITs it concluded with other EU Member States are obsolete by virtue of its accession to the EU.[123] The Czech Republic submits that Articles 59(1) and 30(3) of the VCLT designate the later treaty as the point of reference to assess incompatibility and the intent to terminate the earlier treaty.[124] The Czech Republic notes that there are Member States which consider that BITs can function in parallel to the EC Treaties and that there are Member States, like itself, which consider the overlap between the BIT provisions and EU law to be substantial and do not intend that BITs between EU Member States should remain in effect.[125]

122. The Czech Republic finds that the procedures of Article 65 of the VCLT do not apply to Article 59 of the VCLT which is a special case of abrogation through the parties' consent, as evidenced by its practice with Norway.[126] The Czech Republic notes that when it and Norway confirmed the validity of bilateral treaties concluded between the

[120] Observations of the European Commission, p. 4.
[121] *Ibid*., pp. 4-5, citing ECJ Opinion 1/09, *Opinion delivered pursuant to Article 218(11) TFEU*, 8 March 2011, ECR 2011 (RL-385) (hereinafter "*Opinion 1/09*").
[122] *Ibid*., p. 5.
[123] Observations of the Czech Republic, ¶17.
[124] *Ibid*., ¶¶13-15.
[125] *Ibid*., ¶16.
[126] *Ibid*., ¶¶22-23.

CSFR and Norway, the two States had agreed that a number of bilateral agreements had been terminated in accordance with Article 59 of the VCLT.[127]

123. The Czech Republic submits that the incompatibility of the BIT with EU law is established to the extent that the Tribunal finds that the BIT and EU law relate to the same subject matter.[128] The Czech Republic also submits that the Tribunal should adopt a broad view of "sameness" and incompatibility.[129] The Czech Republic observes that the *Eureko* tribunal employed an unduly strict understanding of incompatibility when it found that the permissibility of an act under EU law and its prohibition under the BIT did not constitute incompatibility.[130]

124. The Czech Republic alleges that to the "extent that EU law and the [Treaty] indeed relate to the same subject matter, the dispute settlement mechanism established in Article 8 of the BIT is incompatible with EU law."[131] The Czech Republic notes that arbitral tribunals established under Article 8 of the BIT cannot request a preliminary ruling by the ECJ on the interpretation of EU law under Article 234 of the EC Treaty, and that Article 8 of the BIT may violate the principle of non-discrimination under Article 12 of the EC Treaty.[132]

125. The Republic of Austria submits that the BIT is still in force.[133] It mentions that in a note dated 5 May 2011, the Respondent "informally indicated its interest in exploring avenues to terminate the Agreement" but highlights that it was only a request for an exchange of views and not a formal notification.[134] In its reply on 20 May 2011, Austria expressed its view that the BIT continues to be in force and indicated that it was ready to enter into consultations under Article 9 of the BIT if so desired.[135] Austria observes that the issue of the *lex posterior* rule of Article 59 of the VCLT has been dealt with "*in extenso* by the *Eastern Sugar* and the *Eureko* tribunals" and that Austria concurs with their findings, contending that none of the criteria of Article 59 of the

[127] *Ibid*., ¶22.
[128] *Ibid*., ¶31.
[129] *Ibid*., ¶¶27-29.
[130] *Ibid*., ¶32.
[131] *Ibid*., ¶34.
[132] *Ibid*., ¶¶35-36.
[133] Observations of the Republic of Austria, p. 1.
[134] *Ibid.*
[135] *Ibid.*

VCLT is met.[136] Austria notes that the EU treaties and the BIT "have different objectives and a different content" with the former aiming at establishing a monetary and economic union in the wider context of a political union, while the latter is a specific treaty aiming solely at the promotion and protection of investments.[137]

126. Austria also submits that the notification procedure in Article 65 of the VCLT is applicable to any termination under Article 59 of the VCLT and notes that neither party took any steps to terminate the BIT, contending that, even if the VCLT does not apply, the principle that "one State cannot impose any rule unilaterally on another State without the latter's consent" as found in Article 65 of the VCLT, is a rule of customary international law.[138] Austria notes that there is a dearth of State practice with respect to Article 59 of the VCLT, but points out that when it concluded a bilateral air transport agreement with another State which overlapped almost article by article with a previous treaty, it notified its view that the earlier agreement was to be considered terminated and did not receive any objection, which it contends is a typical example of the application of Article 59 of the VCLT.[139]

127. Austria further observes that applying Article 59 of the VCLT would be inconsistent with the legal effects of EU law since EU law in general does not abrogate contradicting national law or treaties between Member States but rather "claims prevailing application" which in terms of treaty law means referring to Article 30 of the VCLT rather than to Article 59 of the VCLT.[140] Indeed, Austria asserts that "[a]ir transport agreements or agreements with neighbouring States on facilitated border-crossings are typical categories of further treaties affected by EU law" and that as far as Austria is concerned, it does not consider these treaties to have been terminated under Article 59 of the VCLT.[141] Austria notes that it only decided to consider an agreement terminated in "one exceptional case" which involved an agreement that regulated visa

[136] *Ibid.*, p. 2.
[137] *Ibid.*
[138] *Ibid.*, p. 4.
[139] *Ibid.*, pp. 4-5.
[140] *Ibid.*, p. 5.
[141] *Ibid.*

requirements since it was clearly evident that EU law "covered exactly the same subject-matter in its totality."[142]

128. Austria submits that since the BIT continues to be in force, the relationship between EU law and the BIT is to be determined in accordance with Article 30 of the VCLT, confined to assessing the incompatibility of Article 8 which is the only relevant provision at the jurisdictional phase.[143] Austria distinguishes Opinion 1/09 of the ECJ on the creation of a unified patent litigation system since the jurisdiction of the Tribunal in the present case is not exclusive, but optional and dependent on the consent of the parties to the dispute.[144] The ECJ has already determined that arbitral tribunals are not incompatible with the EU legal order.[145] Austria argues that, since it is possible to integrate the Tribunal's award into the EU legal system at the enforcement stage, Article 8 of the BIT is not incompatible with the institutional and jurisdictional framework of the EU.[146]

129. Austria further contests the argument that allowing for arbitration discriminates against other EU nationals, arguing by analogy from the bilateral double taxation treaties. The ECJ held that Member States could conclude bilateral double taxation agreements in the absence of EU measures involving all Member States, despite the fact that these reciprocal rights and obligations would only apply to residents of two contracting Member States since this was an inherent consequence of such conventions.[147]

(4) The Parties' Responses to the Amici Curiae

130. The Respondent submits that Austria's conclusion that the Treaty remains in force and that Article 8 of the Treaty is fully applicable, is erroneous.[148] The Respondent notes

[142] *Ibid.*, p. 6.
[143] *Ibid.*
[144] *Ibid.*, p. 7.
[145] *Ibid.*, citing *Eco Swiss*, *supra* note 77.
[146] Observations of the Republic of Austria, p. 7.
[147] *Ibid.*, p. 8, citing Case C-376/03 *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* (Judgment of the Court (Grand Chamber) of 5 July 2005) [2005] ECR I-5821 (CL-31), ¶¶50-63 (hereinafter "*D.*" or "*D. v. Inspecteur*").
[148] Respondent's Comment, ¶24.

Austria's concurrence with the *Eureko* and *Eastern Sugar* tribunals, and asserts that its previous submissions address the shortcomings in the reasoning of those awards.[149]

131. The Respondent disputes Austria's observation that, for the purposes of Article 59 of the VCLT, the EU Treaties and the BIT "do not 'relate to the same subject matter' because the EU Treaties also contain 'substantial non-economic objectives'."[150] The Respondent alleges that "nothing in Article 59 implies a requirement of co-extensiveness of purpose" and that the later treaty may serve "other, *additional*, objects and purposes" without excluding the operation of Article 59 of the VCLT.[151] Furthermore, the Respondent contends that the objective of the EU Treaties is primarily and most importantly to "establish a Common Market."[152] In any event, the Respondent notes that the policy objectives of treaties are not relevant when looking at whether the two treaties "relate to the same subject matter" for the purposes of Article 59(1) VCLT.[153] Rather, as the Czech Republic also submitted in its observation, "the criterion of 'same subject matter' should be considered fulfilled if two different rules or sets of rules are invoked in regard to the same factual situation."[154]

132. The Respondent further takes issue with Austria's insistence that there is no right to initiate international arbitration under EU law, since the question to be analysed is whether EU law offers effective means for the assertion of claims and the enforcement of rights.[155]

133. The Respondent disputes Austria's submission that termination under Article 59 VCLT requires notification in accordance with Article 65 VCLT and that in any event the requirement of formal notification under Article 65 VCLT has been met by the Slovak Republic's diplomatic note of 5 May 2011.[156] According to the Respondent, rather than being an "'informal' indication of interest in 'exploring avenues to terminate the Agreement' … the Slovak Republic expressly notified Austria of its view that 'upon

[149] *Ibid.*, ¶26.
[150] *Ibid.*, ¶27.
[151] *Ibid.*, ¶¶27-31 (emphasis in original).
[152] *Ibid.*, ¶28, citing *van Gend & Loos*, *supra* note 35, p. 12.
[153] *Ibid.*, ¶29.
[154] *Ibid.*
[155] *Ibid.*
[156] *Ibid.*, ¶¶39-41.

accession of the Slovak Republic to the European Union, our BITs entered into with other EU Member States must be considered as terminated by virtue of Article 59 VCLT, or at the very least inapplicable by virtue of Article 30(3) VCLT', asking at the same time Austria to 'outline its willingness to terminate mutually the BIT' for the sake of legal certainty."[157]

134. The Respondent concedes the validity of Austria's observation that "applying Article 59 [VCLT] would be inconsistent with the legal effect of EU law" since EU law does not abrogate earlier treaties but rather claims prevailing application, yet asserts that the "implicit termination of conflicting treaty obligations among Member States is not an unprecedented phenomenon in the EU legal order", noting Austria's reference to the agreement with the Slovak Republic on the abolishment of visa requirements, which was terminated in accordance with Article 59 VCLT by virtue of EU law.[158]

135. The Respondent takes issue with Austria's observation that incompatibility requires that "two provisions cannot be applied at the same time in the sense that applying one necessarily entails the violation of the other."[159] The Respondent asserts that this position has been refuted by the "work of the ILC and academic authority, which consider incompatibility to exist also where a treaty provision frustrates the goals of another treaty provision relating to the same subject matter without there being any incompatibility *stricto sensu* between the two provisions."[160]

136. The Respondent disputes Austria's attempt to distinguish the relevance of Opinion 1/09 which dealt with setting up a patent court, submitting that the view that international arbitration is optional and therefore unlike the exclusive jurisdiction of the patent court, goes against its "previous statement on the investor's right to initiate international arbitration proceedings being 'an *essential* characteristic of the BIT, which cannot be found in EU law'."[161]

137. The Respondent further takes issue with Austria's reliance on the ECJ decisions of *Nordsee* and *Eco Swiss* for the proposition that the Tribunal's awards can be integrated

[157] *Ibid*., ¶41.
[158] *Ibid*., ¶43.
[159] *Ibid*., ¶¶44-45.
[160] *Ibid*., ¶45.
[161] *Ibid*., ¶47, citing *Opinion 1/09*, *supra* note 121.

into the EU legal system so that Article 8 of the BIT is not incompatible with Article 267 TFEU.[162] The Respondent submits that "[t]hese cases concerned arbitration agreements entered into by *private* entities" which, *contra* to Member States, are not responsible for ensuring that EU law obligations are complied with.[163]

138. The Respondent also disputes Austria's observation that the discriminatory effects of Article 8 of the BIT is an "inherent consequence" of the BIT and should be tolerated under EU law in the same way that reciprocal rights and obligations under bilateral conventions for the avoidance of double taxation are tolerated under EU law.[164] The discriminatory effects of the BIT "cannot be properly considered an 'inherent consequence' of the Treaty."[165]

139. Finally, the Respondent takes issue with Austria's observation that the discriminatory effects of the nationality requirement in the BIT can easily be remedied since any national of an EU Member State can organise their investments in a way that would allow them to satisfy the nationality requirement.[166] The Respondent takes this point as evidence of the "anomaly" of the continued existence of BITs within the EU internal market.[167]

140. The Claimant focuses its comments on the observations of the EC and those of the Czech Republic.

141. The Claimant submits that the EC's contention that investor-State arbitration is outside the legal and judicial order of the EU is wrong.[168] Furthermore, the Claimant argues "that EU law contains no standards of protection for private investors that would even only remotely be comparable to those under the Treaty" and that "the recognition of

[162] *Ibid.*, ¶49, citing Case C-102/81 *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hockseefischerei Nordstern AG* [1982] ECR 01095 (RL-69) and *Eco Swiss*, *supra* note 77.
[163] *Ibid.*
[164] *Ibid.*, ¶51.
[165] *Ibid.*, ¶52.
[166] *Ibid.*, ¶¶53-54.
[167] *Ibid.*, ¶53.
[168] Claimant's Comment, ¶3.

arbitration in the legal and judicial system of the EU is an expression of the mutual trust by EU Member States in the administration of justice."[169]

142. The Claimant notes that, while the EC describes its observations as a summary of the position it took in *Eureko*, the position the EC took in *Eureko*, as well as in *Eastern Sugar*, was actually that "intra-EU BITs are not automatically terminated by virtue of EU accession" and that "to terminate these BITs, EU Member States would have to strictly follow the relevant procedure provided in the BITs."[170]

143. The Claimant disputes the EC's observation that the investor-State arbitration mechanism is incompatible with the EU legal and judicial order, noting that this is contrary to the *Eco Swiss* judgment.[171]

144. The Claimant takes issue with the relevance of Opinion 1/09 concerning the establishment of a patents court with exclusive jurisdiction, which was cited both by the EC and the Czech Republic.[172] The Claimant distinguishes the proposed court from international investment arbitration since that court had the power to "examine the validity of an act of the European Union."[173]

145. The Claimant notes that every EU Member State has its own arbitration laws and is a member of the New York Convention, which implicitly recognises that disputes "which may potentially involve rules of EU law may be settled by arbitration to the exclusion of national courts" and that were the EC's observation correct, "it could be argued that each and every EU Member State would be infringing EU law by allowing for arbitration and obliging itself to enforce foreign arbitral awards."[174]

146. The Claimant also disputes the reliance, by the EC and the Czech Republic in their observations, on Article 292 of the EC Treaty in support of the view that Article 8 of the BIT conflicts with the exclusive jurisdiction of the ECJ. Rather, the Claimant posits that "Article 292 of the EC Treaty (Article 344 TFEU) deals with disputes concerning

[169] *Ibid.*, ¶4.
[170] *Ibid.*, ¶8.
[171] *Ibid.*, ¶¶14-17, 28.
[172] *Ibid.*, ¶18.
[173] *Ibid.*, ¶21.
[174] *Ibid.*, ¶25.

the interpretation or application of the Treaties between Member States" which are "extremely rare" and which has no application for arbitrations such as the one at hand which is not between two EU Member States.[175]

147. The Claimant questions the EC's reference to the basic principle of mutual trust by EU Member States in the application of EU law and in the administration of justice, submitting that the EC "does not attempt to elaborate what purpose … is served by reference to that principle."[176] If the EC's purpose is to indicate that it considers submitting disputes to arbitration to be an expression of distrust in the domestic courts of the EU, then the Claimant points to *Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters* ("**Brussels I**") which excludes arbitration from its ambit, "thereby expressly (by exclusion) recognizing and accepting arbitration on the level of EU law."[177]

148. The Claimant highlights that the relevant question is not whether the dispute settlement mechanism of Article 8 of the Treaty is outside the EU legal and judicial order (which the Claimant maintains it is not), but rather "if and to which extent the arbitrators may or may have to apply relevant EU law, whether that relevant EU law constitutes 'public policy' and to which extent, if any, the Swedish courts may review an award in the light of EU law when seized with a relevant application."[178]

149. The Claimant takes issue with the EC's view that arbitrators are not obliged to respect EU law, asserting that arbitrators do have to apply the applicable law to the case that may include elements of EU law, and which cannot simply be disregarded.[179]

150. The Claimant submits that the Czech Republic's observations on the status of intra-EU BITs by virtue of EU accession are a *non sequitur*.[180] The Claimant alleges that the Czech Republic adduces no evidence of consent as required by Article 54 VCLT and

[175] *Ibid*., ¶32.
[176] *Ibid*., ¶44.
[177] *Ibid*., ¶44, citing *Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters* (CL-132) (hereinafter "Brussels I").
[178] *Ibid*., ¶35.
[179] *Ibid*., ¶36.
[180] *Ibid*., ¶51.

that the Protocol between the Czech Republic and Norway is not evidence of State practice.[181]

151. The Claimant further takes issue with the Czech Republic's observation regarding the Treaty having been rendered inapplicable under Article 30 VCLT, to the extent that the Treaty and EU law relate to the same subject-matter and are thus incompatible. The Claimant highlights that "[t]here is not only no identity, there is also no incompatibility."[182] The Claimant asserts that the Czech Republic's definition of "sameness of subject matter" is circular since it involves looking at whether the two different rules are invoked in regard to the "same matter."[183] The Claimant argues, agreeing with Austria's submission, that "despite some overlaps between provisions of EU law and BITs, the two are parallel systems with their own scope of protection and offering their own remedies."[184]

152. The Claimant also disputes the Czech Republic's observation on "incompatibility" of the Treaty with EU law, noting that the Czech Republic uses a broad understanding of incompatibility.[185] The Claimant asserts that the guarantees in the Treaty and the fundamental freedoms of the EU do not point in different directions but rather "exist side by side and 'point' into the same direction."[186]

153. The Claimant further takes issue with the Czech Republic's observation that Article 8 of the Treaty violates the EU principle of non-discrimination which is another circumstance of the Treaty's incompatibility with EU law.[187] The Claimant argues that investor-state arbitration cannot be regarded as "outsourcing" as described by the EC and submits that extending the availability of arbitration to all EU investors "leads to a situation where there is no potential breach of EU law."[188]

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[181] *Ibid.*, ¶¶49-51.
[182] *Ibid.*, ¶¶53-54.
[183] *Ibid.*, ¶¶53-55.
[184] *Ibid.*, ¶53.
[185] *Ibid.*, ¶57.
[186] *Ibid.*, ¶¶57-60.
[187] *Ibid.*, ¶66.
[188] *Ibid.*, citing August Reinisch, Supplementary Legal Opinion on Jurisdictional Issues concerning the 1990 Austria/Czech and Slovak Federal Republic BIT, 14 July 2011 (CEWS-4), ¶¶49-50 (hereinafter "Reinisch Opinion").

154. Finally, the Claimant agrees with the Czech Republic in its conclusion that the Treaty has not been terminated under Article 59(1)(a) VCLT, since the treaties themselves are silent on the issue and no intent has been manifested to terminate the Treaty.[189] The Claimant refers to a decision by the Municipal Court of Prague on the challenge of an award on jurisdiction in *Binder v. the Czech Republic* which held that the Czech-German BIT was "valid and effective."[190] The Claimant further notes that the Czech Republic still considers that the BIT between it and Austria is in effect as it is listed as such on the homepage of the Czech Ministry of Finance and that while it has renegotiated certain BITs, it has left the investor-State mechanism untouched.[191] Thus the "conduct of the Czech Republic indicates that it did not maintain its view that its intra-EU BITs were automatically terminated", noting that in 2009, the Czech Republic requested that various other EU Member States agree to terminate their bilateral treaties with the Czech Republic.[192]

2. The Tribunal's Analysis

155. The Tribunal considers it worth noting that, for Article 59 of the VCLT to apply, two conditions have to be met:

> (a) the first treaty (here the BIT) and the second treaty (here the ECT) must relate to the same subject matter; and
>
> (b) if this condition is fulfilled then, the ratification of the second treaty will terminate the first treaty if either:
>
> (1) the two States must be taken to have intended that the second treaty should supersede the first treaty (*the subjective condition*); or
>
> (2) the provisions of the first treaty must be so far incompatible with the provisions of the second treaty that the two are not capable of being applied at the same time (*the objective condition*).

The Tribunal will analyse whether each of these conditions is satisfied.

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[189] *Ibid.*, ¶67.
[190] *Ibid.*, ¶69, citing *Czech Republic v. Binder*, Municipal Court of Prague, Resolution dated 2 July 2010, Case No. 18 Co 164/2010-183 (CL-206), p. 6.
[191] *Ibid.*, ¶68.
[192] *Ibid.*, ¶71.

(1) Do the ECT and the BIT relate to "the same subject matter"?

(a) What is the test for determining that the two treaties have the "same subject matter"?

156. Professor Vierdag, relied upon by the Respondent, comments that "the requirement that the instruments must relate to the same subject-matter seems to raise extremely difficult problems in theory, but may turn out not to be so very difficult in practice."[193]

157. The Tribunal is not convinced that this requirement is easy in practice, but certainly agrees that it is a difficult theoretical question.

158. The Respondent supports an extensive interpretation of this requirement, invoking the International Law Commission Report on Fragmentation of International Law.[194] According to the approach of the ILC,

> The criterion of "same subject-matter" seems already fulfilled if two different rules or sets of rules are invoked in regard to the same matter, or if, in other words, as a result of interpretation, the relevant treaties seem to point to different directions in their application by a party.[195]
>
> …the test of whether two treaties deal with the "same subject matter" is resolved through the assessment of whether the fulfilment of the obligation under one treaty affects the fulfilment of the obligation of another. This "affecting" might then take place either as strictly preventing the fulfilment of the other obligation or undermining its object and purpose in one or another way.[196]

159. According to the Respondent, this means that the "criterion of sameness must be considered fulfilled if two *different* rules or sets of rules are invoked in regard to the *same* factual situation."[197] Under this expansive approach, this would mean that *two rules have the same subject matter if they apply to the same facts.*

160. The Claimant mainly relied, in its Counter Memorial, on the findings of the *Eastern Sugar* and *Eureko* tribunals stating that the EC Treaty does not relate to the same subject matter as the relevant BITs, without attempting to elaborate on the theoretical

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[193] E.W. Vierdag, "The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions", BYBIL vol. 59 (1988) (RL-147), p. 100.
[194] ILC Report, *supra* note 43.
[195] *Ibid*., ¶23.
[196] *Ibid*., ¶254.
[197] Respondent's Memorial on Jurisdiction, ¶55 (emphasis in original). *See* also, Respondent's Reply on Jurisdiction, ¶40: "the requirement of 'same subject matter' is satisfied when the implicated treaties both lay a normative claim to regulate the same facts."

meaning of the "same subject matter." A more abstract approach was adopted in the Rejoinder, in other words giving mainly a negative definition of when it cannot be considered that two rules have the same subject matter but without attempting to provide a more positive definition:

> An ordinary meaning of what is to be understood to be the "*same*" should be the basis for an understanding the phrase (sic) "*the same subject matter*". Usually, "*same*" does not mean that two things are merely comparable or, when it comes to different sets of laws, simply deal with issues arising from the same facts.[198]

161. In other words, the Claimant refutes the analysis of the Respondent and seems to adopt a more restrictive interpretation, although it relies "on the ordinary meaning", considering that *it is not enough that two rules apply to the same facts for those rules to have the same subject matter.* But no further indication is provided on characterising a situation where two treaties have the same subject matter.

162. Before the *Eureko* tribunal, the Respondent argued that the BIT and the ECT relate to the same subject matter, because they cover the same types of investors (*i.e.* natural persons and legal entities) and investments, serve the same purposes (*i.e.* to broaden and strengthen the economic relations), offer the same standards of protection relating to the establishment of investments (*i.e.* equal treatment and non-discrimination, free movement of capital, protection of proprietary rights) and provide for equivalent remedies:

> Under EU law, investors pursue their claims before national courts with involvement of the ECJ via a preliminary ruling procedure; and under the BIT investors can have their dispute heard before an arbitral tribunal. Both mechanisms aim at the same objective, namely the protection of investments. Under both mechanisms, investors may seek compensation for damages from States for unlawful conduct … [199]

163. Here the emphasis is somewhat different, in that it is mainly stated that *two rules have the same subject matter if they have the same goal.*

164. Little can be found on this issue in the *Eastern Sugar* case, where the tribunal was content to state, without further conceptual definition, that "the two regulations do not

[198] Claimant's Rejoinder on Jurisdiction, ¶43 (emphasis in original).
[199] *Eureko*, *supra* note 21, ¶71.

cover the same precise subject-matter."[200] The *Binder* tribunal did not even raise the issue.

165. After a review of the different elements of analysis that have been advanced in order to interpret the expression "same subject matter", the question remains: how should "same subject matter" be understood?

166. It is the Tribunal's view that the terms of the VCLT are to be interpreted in good faith, in accordance with their ordinary meaning in their context and in light of the object and purpose of the VCLT. There is, therefore, no presumption in favour of either a broad or a narrow interpretation. The necessity of a balanced interpretation in good faith has already been emphasised in various decisions of arbitral tribunals, such as in the *AMCO* decision:

> … a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties … Moreover, … any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged.[201]

167. The same principle was adopted in the *El Paso* tribunal's Decision on Jurisdiction:

> This Tribunal considers that a balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow.[202]

168. In performing a good faith interpretation of the ordinary meaning of the expression "same subject matter", the Tribunal first adopts a negative approach and rejects the interpretation according to which the "same subject matter" can be equated to being applicable to "the same facts," or having "the same goal."

169. First, the Tribunal notes that the wording of Article 59 of the VCLT is not that the two treaties must apply to the same facts or same situations but that they must deal with the

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[200] *Eastern Sugar*, *supra* note 22, ¶160 (emphasis added).
[201] *Amco Asia et al. v. Indonesia*, ICSID Case No. ARB/81/1 (Decision on Jurisdiction, September 25, 1983) 23 ILM 351 (1984), ¶14 (hereinafter "*AMCO*").
[202] *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, (Decision on Jurisdiction, 27 April 2006), ¶70.

same *subject matter*. Even if two different rules deal with issues arising from the same facts, it does not necessarily mean that they have the same subject matter. This can be seen from a simple example: a treaty on environmental protection and a treaty on trade may both apply to the same factual situation but the subject matter with which they deal is quite different.

170. Secondly, the Tribunal notes that the wording of Article 59 of the VCLT does not support the argument that it is sufficient for two treaties to have the same goal for them to have the same subject matter. For example, two treaties can each have the goal of enhancing the well-being of children, one in providing for an international mechanism of monitoring of child labour, another in deciding that children under fourteen may not be married against their will. Yet no reasonable person would consider that those two treaties, although pursuing the same goal, the same overall purpose, have the same subject matter.

171. The subject matter of a treaty, in the Tribunal's understanding, therefore differs both from the concrete situations in which it will be applicable and from its goal. Accordingly, the Tribunal regards as irrelevant the Respondent's statement that

> It cannot be seriously disputed that investment protection, the subject matter of the Treaty, is an important means for attaining the objective of a common market under the EC Treaty "characterised by the abolition, between Member States, of obstacles to the free movement of goods, persons, services and capital."[203]

172. It is moreover the view of the Tribunal, which adopts next a positive approach, that the subject matter of a treaty is inherent in the treaty itself and refers to the issues with which its provisions deal, *i.e.* its topic or its substance. The Tribunal will therefore focus on that question when determining whether or not the BIT and the ECT have the same subject matter.

173. An important remark has to be made here by the Tribunal. In its view, the question at issue has invariably been obscured by frequent confusion or conflation between sameness and incompatibility. Even the ILC is not free from such error as can be seen when reading the definition of the criterion of "sameness":

[203] Respondent's Reply on Jurisdiction, ¶103.

> The criterion of "*same* subject-matter" seems already fulfilled if two different rules or sets of rules are invoked in regard to the same matter, or if, in other words, as a result of interpretation, the relevant treaties seem to point to *different* directions in their application by a party.[204]

174. The Respondent seems to be aware, in theory, of the necessity to distinguish the two aspects, when it opines that "the concept of 'same subject matter' should be understood separately from the other requirements of Article 59 of the Vienna Convention"[205], one of which is incompatibility. However in its concrete analysis, the Respondent conflates the two requirements.

175. The Tribunal considers that Article 59 of the VCLT requires a two-step inquiry. First, do the two treaties "relate to the same subject matter"? Secondly, do the rules in those treaties point in the same direction or in different directions, to use the terminology of the ILC? If the answer to the second question is that the two sets of rules point in the same direction, the two treaties can easily coexist and be interpreted in harmony; if the answer is that they point in different directions and the different directions imply a true incompatibility, the latter treaty prevails. However, that second question arises only if the first question has been answered in the affirmative.

(b) Application of the test to the facts of the present case

176. The Respondent considers that the two treaties have the same subject matter, since they both regulate investment and investor rights and encompass comparable substantive and procedural standards. For example, Slovakia argued during the oral hearing that "EU law and the BIT regulate their common subject matter in substantially similar ways, which far exceeds minor or incidental overlap."[206] The EC, in its submission, also stated that "[t]he bilateral investment treaty…deals with subject matters that fall squarely within the scope of the Treaty of the Functioning of the European Union."[207]

177. The Claimant, on the contrary, considers that the two treaties do not have the same subject matter. The Claimant's position was summarized during the oral hearing in the following way:

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[204] ILC Report, *supra* note 43, ¶23 (emphasis added).
[205] Respondent's Reply on Jurisdiction, ¶100.
[206] Respondent's Hearing Presentation, p. 5.
[207] Observations of the European Commission, p. 2.

> The EU liberalization guarantee (market access) focus on pre-establishment phase
>
> Treaty gives no automatic right of access (only in accordance with "[i]ts [Slovakia's] laws"; focus on post-establishment phase [208]

178. The Tribunal, after thorough analysis, has come to the conclusion that the two treaties do not have the same overall subject matter. When asking "with what issues do the rules of the two treaties deal?" it is evident that the treaties do not deal with the same issues. The ECT deals with the creation of an internal market,[209] the BIT with the fostering of international flows of investment by protecting the rights of the investors.

179. The *Eastern Sugar* tribunal, looking at the "precise" subject matter of the ECT and the BIT determined that "[t]he European Union guarantees the free movement of capital"[210], while "[b]y contrast, the BIT provides for fair and equitable treatment of the investor during the investor's investment in the host country.… the BIT also provides for a special procedural protection"[211], adding:

> From the point of view of the promotion and protection of investments, the arbitration clause is in practice the most essential provision of Bilateral Investment Treaties. … EU law does not provide such a guarantee.[212]

180. In other words, the *Eastern Sugar* tribunal arrived at the conclusion that the two treaties did not have the same subject matter, relying mainly on two features. First, the two treaties had a generally different approach, the ECT being more focused on the pre-establishment period, and the BIT on the post-establishment period. Secondly, a specific element linked with the remedies open to an investor when it considers that its rights have been infringed is dealt with differently by the two treaties, since only the BIT offers the investor access to international arbitration.

181. The *Eureko* tribunal also acknowledged, that "[n]othing in Article 59 requires that the two treaties should be in all respects co-extensive; but the later treaty must have more than a minor overlap or incidental overlap with the earlier treaty."[213]

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[208] Claimant's Hearing Presentation, Day 1, 19 December 2011, p. 20 (emphasis in original).
[209] *See*, now, Art. 3(3), Treaty on the European Union.
[210] *Ibid*., ¶161.
[211] *Ibid*., ¶164.
[212] *Ibid*., ¶165.
[213] *Eureko*, *supra* note 21, ¶242.

182. Although employing different analyses, these two tribunals arrived at the same conclusion as this Tribunal.

183. The Tribunal wishes to add that it cannot be denied that the subject matter of the BIT is foreign investment. It is also well-known that, until the Lisbon Treaty, foreign direct investment was not one of the competences of the EU. This would almost suffice to conclude that the two treaties, the Austria-Slovakia BIT and the ECT do not have the same subject matter. If the European Union had no jurisdiction to deal with direct investment, it would be difficult to argue that the EU Treaties have the same subject matter – direct investment – as the BITs, of which direct investment is one of the subject matters.

184. The Tribunal has come to the conclusion that the EU Treaties and the EU law rooted in, and flowing from them do not relate to the same subject matter as BITs or multilateral treaties for the protection of foreign investment. To accede to an economic community is simply not the same as to set up a specific investment protection regime providing for investor-State arbitration.

185. The Tribunal therefore concludes that the two treaties do not have the same subject matter. It follows that the BIT has not been terminated by virtue of the application of Article 59 VCLT.

(2) Did the Parties to the BIT manifest an intention to terminate that Treaty or are the BIT and the ECT incapable of being applied at the same time?

186. The Tribunal's conclusion that the BIT and the ECT do not relate to the same subject matter is determinative of the Article 59 of the VCLT argument. However, even if the Tribunal had reached a different conclusion on that point, it would nevertheless have found that the other requirements of Article 59 of the VCLT were not met. It will be recalled that Article 59 of the VCLT provides that where the parties to a treaty conclude a later treaty relating to the same subject matter, the earlier treaty is terminated only if either (a) it appears from the later treaty, or is otherwise established, that the parties intended to terminate the earlier treaty (the *subjective* test) or (b) the provisions of the later treaty are so far incompatible with those of the earlier treaty that the two are not capable of being applied at the same time (the *objective* test). The Tribunal considers

that, in the present case, neither test is met. It will briefly set out its reasons for that conclusion.

(a) The subjective test

187. The question here is whether the States Parties to the BIT manifested in one way or another a clear common intention to terminate the BIT?

188. The Respondent infers such an intention from the mere existence of the ECT. According to the Respondent, "the very magnitude, scope and fundamentality of the obligations undertaken in the second treaty can evidence the States Parties' necessary intent to supersede and replace an earlier treaty addressing the same subject matter."[214]

189. The Claimant considers that "the intention of the Slovak Republic and the Republic of Austria to terminate or suspend the Treaty is not manifested at all. The Accession Treaty – whether by its nature or words – does clearly not provide for any manifestations of such intention."[215]

190. The Claimant also refers to the EU Commission's submission in the *Eureko* case,[216] on which it commented:

> In its observations submitted to the Tribunal, the EU Commission itself did not discern any intention of the parties to abrogate earlier intra-EU BITs in the 2003 Act of Accession and stated that the intra-EU BITs have not been implicitly terminated or suspended pursuant to Article 59 VCLT following the Slovak Republic's accession to the EU.[217]

191. The Tribunal is not convinced by the Respondent's argument that, by its very nature, the ECT demonstrated an implied intent to terminate the BITs between Members and non-Members of the EU that were transformed into intra-EU BITs by the accession of Slovakia to the EU.

192. The Tribunal considers that nothing in the EU Treaties gives such an indication of intent, rather to the contrary. As rightly emphasised by the Claimant, "[n]owhere does

[214] Respondent's Memorial on Jurisdiction, ¶123.
[215] Claimant's Rejoinder on Jurisdiction, ¶57.
[216] Observations by the European Commission in the arbitration *Eureko B.V. v. Slovak Republic*, 7 July 2010 (RL-382) (hereinafter "EC Observations in *Eureko*").
[217] Claimant's Counter-Memorial on Jurisdiction, ¶83.

the Accession Treaty say that … [the] Accession Treaty and EU law '*govern the matter*' of bilateral investment treaty protection with its protection standards and enforcement mechanisms. The Accession Treaty and the European Treaties do also not say anything about investment protection for investors of one EU Member State in another Member State."[218]

193. On the contrary, the Europe Agreement which entered into force one month after the BIT, includes certain articles that would rather indicate that all rights belonging to economic operators should be preserved until equivalent rights are granted in the framework of the EU:

> ARTICLE 74
> INVESTMENT PROMOTION AND PROTECTION
>
> 1. Co-operation shall aim to establish a favourable climate for private investment, both domestic and foreign, which is essential to economic and industrial reconstruction in the Slovak Republic.
>
> 2. The particular aims of co-operation shall be:
>
> - to improve the institutional framework for investments in the Slovak Republic;
>
> - the extension by the Member States and the Slovak Republic of agreements for the promotion and protection of investment;
> …
>
> ARTICLE 118
>
> This Agreement shall not, until equivalent rights for individuals and economic operators have been achieved under this Agreement, affect rights assured to them through existing agreements binding one or more Member States, on the one hand, and the Slovak Republic, on the other.

194. It is difficult for the Tribunal to consider that the express aim of the Europe Agreement of an "extension by the Member States and the Slovak Republic of agreements for the promotion and protection of investment" could be considered as an implied intent to terminate them. Moreover, although the Europe Agreement does not deal expressly with the termination of the BITs, it appears, in the view of the Tribunal, that it implies that unless rights equivalent to those from which they benefitted under BITs before accession to the EU were conferred upon investors by the EU law, such rights should

[218] Claimant's Rejoinder on Jurisdiction, ¶40 (emphasis in original).

be maintained. This leans rather in the direction of maintaining the BIT since it is quite difficult to deny that, under the EU framework, the foreign investors do not have, for example, the direct right to bring international arbitration proceedings against the State in which they have invested, a right which is a central feature of the BIT.

195. Neither can the BIT be interpreted as embodying a common intention that it will be terminated if more favourable treatment is accorded to investors under a later treaty. Article 7(1) of the BIT reads

> If under the laws of one of the Contracting Parties or under international obligations now or in the future undertaken between the Contracting Parties in addition to this Agreement there exists a general or special regime whereby the investments of investors of the other Contracting Party are accorded more favourable treatment than under this Agreement, the said regime shall take precedence over the present Agreement to the extent that it is more favourable.

196. It is clear that what the two States Parties had in mind was that future treaties between them would complement the States Parties' rights and obligations, and not that such treaties would replace provisions in the BIT.

197. The Tribunal concludes that it cannot find an implied intention in the treaties adopted in view of the accession to the EU, or in the ECT, to terminate the BIT.

198. Nor is the Tribunal persuaded that there is evidence extrinsic to the treaties which manifests such a shared intention. It is common ground between the Parties that even if some express manifestation of a wish to terminate the BIT has been performed by Slovakia, this has not been followed by a common decision of the States Parties to terminate the BIT.

199. The BIT includes some rules for its termination, which have not been utilised by the Parties:

> Article 11
> Entry into Force and Term
>
> (1) This Agreement is subject to ratification and shall enter into force on the first day of the third month that follows the month during which the instruments of ratification have been exchanged.

> (2) The Agreement shall remain in force for ten years; upon the expiry of that period, it shall be extended for an indefinite period of time and may be denounced by either Contracting Party subject to twelve months' prior notice in writing through the diplomatic channel.
>
> (3) In the case of investments that will have been made before the date of denunciation of this Agreement, articles 1 to 10 of this Agreement shall apply for a further ten years from that date.[219]

200. The BIT entered into force on 1 January 1995. There has been no mutual termination of the BIT, nor an express denunciation by either State Party to the BIT.

201. It has been brought to the attention of the Tribunal that upon accession to the EU, the Slovak Republic had sent a note requesting its BIT partners that were EU Member States to accept a *mutual termination*. This document sent by the Ministry of Finance of the Slovak Republic to "all Member States concerned", had as its subject heading: "Request for statement – *possible termination* of Bilateral Investment Treaties concluded between the EU Member States" (emphasis added), and stated: "… we would like to kindly ask you to outline your Government's willingness *to terminate mutually* the BITs that you have concluded with the Slovak Republic" (emphasis added).[220]

202. However, no mention has been made by either Party that a mutual agreement was reached between Austria and Slovakia in order to agree to the termination of their BIT. In fact, the Slovak Republic,[221] as well as Austria list their common BIT as one of the international treaties to which they are a Party. The Tribunal recalls here that the *Eastern Sugar* tribunal held that implicit termination could not be found in

[219] The Respondent's certified translation from the Czech original (RL-40A).
[220] Ministry of Finance of the Slovak Republic, Request for Statement − Possible Termination of Bilateral Investment Treaties Concluded between the EU Member States, 5 May 2011 (RL-435) (emphasis added).
[221] *See* for example, Claimant's Counter-Memorial on Jurisdiction, ¶108: "The Ministry of Foreign Affairs of the Slovak Republic maintains on its [website's] home page [C-13], a list of all existing BITs, and the Austria/Slovakia BIT is among those listed." At the Hearing on Jurisdiction, the Chairman asked the Respondent whether it was "the case that, as [counsel for the Claimant] said yesterday, the BIT nevertheless remains on the Slovakian Government's website as a treaty in force?" to which counsel for the Respondent replied that it had "no reason to doubt that representation. I have not checked it myself. We do not think that that is a significant fact, however. We note the Eureko tribunal also discounted these argments" Transcript (Hearing on Jurisdiction), Day 2, 20 December 2011, p. 22:17-25.

circumstances where both Contracting Parties to the BIT still list the BIT as an international treaty to which they are party.[222]

203. In the Tribunal's understanding, a request for a mutual termination which can be considered as a manifestation of *a unilateral intention* or desire to terminate the treaty plainly indicates that the Party making such request did not consider that *a mutual intention* already existed, either as something implicit in the text of the treaty or something which could be inferred from the behaviour of the Parties.

204. No notice of termination has been given either by the Slovak Republic or by Austria. This is confirmed in unambiguous terms by the Respondent, when it states that "[t]here is no suggestion by the Slovak Republic in these proceedings that the BIT would be terminated in accordance with Article 11(2) of the Treaty."[223]

205. It can also be noted that Austria has reiterated, during the course of this proceeding, its position to the effect that it considers the BIT in force. In a letter dated 18 May 2011 to Euram Bank's counsel, the Austrian Federal Ministry for European and International Affairs, in reply to certain questions, stated the following:

> "(a) Does the Republic of Austria consider the Treaty still to be in force?
>
> By means of an Exchange of Diplomatic Notes between the Republic of Austria and the Slovak Republic on the continued application of certain Austro-Czechoslovakian Treaties, the Agreement between the Republic of Austria and the Czech and Slovak Federative Republic on the Promotion and Protection of Investments of 15 October 1990 was jointly identified as remaining in force and being applicable between the parties. Moreover, the Exchange of Diplomatic Notes also amended the Agreement, so as to insert the designations "Slovak Republic" and "Slovak" into the text of the Agreement as appropriate.[224]

206. The EU Commission itself has admitted that no BIT has been automatically terminated, since it has asked the States to terminate them, for its own policy reasons:

> Eventually, all intra-EU BITS will have to be terminated. Commission services intend to contact all Member States again, urging them to take concrete steps soon. Furthermore, while the Commission is in favour of consensual solutions with EU

[222] *Eastern Sugar*, *supra* note 22, ¶155.
[223] Respondent's Reply on Jurisdiction, ¶211.
[224] Letter from the Republic of Austria of 18 May 2011 (C-28).

> Member States, as guardian of the EU treaties it cannot exclude eventually having to resort to infringement proceedings against certain Member States.[225]

207. It might also be apposite to cite here an excerpt of the European Commission's letter dated 13 January 2006 which was quoted in the *Eastern Sugar* partial award:

> The Commission therefore takes the view that the intra-EU BITs should be terminated in so far as the matters under the agreements fall under Community competence.
> …
> However, the effective prevalence of the EU acquis does not entail at the same time the automatic termination of the concerned BITs or necessarily the non-application of all their provisions.
>
> Without prejudice to the primacy of Community law, to terminate these agreements Member States would have to strictly follow the relevant procedure provided for this in the agreements themselves.[226]

208. A request to terminate can logically only mean that the Commission thinks that such termination has not yet taken place. This conclusion has also been arrived at by the tribunal in the *Binder* case:

> Moreover, the EU documents to which the Parties have referred in this case do not show that, in the opinion of the EU institutions, BITs have automatically ceased to be operative once both Contracting States have become Member States of the EU. The issue of whether measures should be envisaged to terminate intra-EU BITs as not being well adapted to internal co-operation within the EU has given rise to some debate within the EU but has not been finally settled even as a policy matter to this date.[227]

209. The Tribunal thus comes to the same conclusion as the *Eureko* tribunal concerning the termination of the BIT, when it noted that "[n]othing in the text of the EU Treaties produces that result; and the necessary intention is not established by extraneous evidence."[228]

210. The Tribunal thus concludes that, even if the BIT and the ECT were considered as having the same subject matter, the BIT could not be deemed terminated on the basis of a common intention of the Parties.

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[225] EC Observations in *Eureko*, *supra* note 216, ¶38.
[226] *Eastern Sugar*, *supra* note 22, ¶119.
[227] *Binder v. Czech Republic*, UNCITRAL (Award on Jurisdiction, 6 June 2007) (CL-202), ¶64 (hereinafter "*Binder*").
[228] *Eureko*, *supra* note 21, ¶244.

(b) The objective test

211. The Tribunal therefore turns to the objective question outlined in paragraph 186, above, namely whether there is such a measure of incompatibility between the provisions of the BIT and the ECT that the two treaties are not capable of being applied at the same time.

212. The Tribunal considers that there does not exist such an incompatibility between the two treaties that the former, the BIT, must be considered as having been automatically terminated. The same solution has indeed been adopted in *Binder*, *Eastern Sugar* and *Eureko*. Before elaborating on a comparison between the two treaties, the Tribunal will however try to clarify the meaning of "incompatibility" in the VCLT.

(i) What is the test for finding that there is "incompatibility"?

213. The Tribunal will first address the question on a theoretical plane: what does it mean to say that two treaties are incompatible?

214. For the Respondent, it is not necessary that one act be permissible under one treaty, but not permissible under the other treaty for incompatibility to arise. Rather, it is sufficient that "a treaty *frustrates* the goals of another treaty *without* there being any incompatibility *stricto sensu* between their respective provisions."[229]

215. The Claimant has offered a definition of what "incompatibility" means during the oral hearing, when it explained that

> Theoretically, substantive incompatibility only if, in EU law, either
>
> (i) mandatory higher protection standard than in BIT
> (ii) mandatory lower protection standard than in BIT.[230]

216. In the Tribunal's view, as always when interpreting a treaty, it is necessary to go back to the ordinary meaning of the text. According to the Tribunal, "incompatibility" is explained in the text of Article 59 of the VCLT itself, by the words that are used: "the two treaties cannot be applied at the same time." The Tribunal considers that this phrase limits incompatibility to the case where one treaty requires what the other treaty

[229] Respondent's Memorial on Jurisdiction, ¶138 (emphasis in original).
[230] Claimant's Hearing Presentation, Day 1, 19 December 2011, p. 32.

prohibits; in other words, conflict occurs when compliance with one treaty necessarily causes a breach of the other treaty. The Tribunal does not consider that incompatibility extends to a situation where something that is forbidden under the BIT is merely permitted by EU law, or vice versa.[231]

217. This means, *a fortiori*, that the Tribunal does not consider that two treaties are incompatible when they point in the same direction or when the rules they adopt are similar.

(ii) Applying that test, are the BIT and the ECT so far incompatible that they are not capable of being applied at the same time?

218. The Respondent, while claiming that the two treaties are "incompatible", explains that, in its view, "it cannot be seriously doubted that, in the scope of their attention, they address very much the same subject and indeed do so in very similar ways."[232] In the Tribunal's view, as already mentioned, this is a conflation of two distinct conditions for the application of Article 59 of the VCLT, the "sameness" and the "incompatibility." The Tribunal finds it difficult to accept the idea that two treaties dealing with the same topic in a similar way are completely incompatible. It would rather consider that the two treaties go in the same direction and are therefore complementary rather than mutually exclusive.

219. In the concrete case at hand, the Claimant argues that no such incompatibility exists and moreover that the provisions of the two treaties are

> even less incompatible in such a way that they were not capable of being applied at the same time. The core subject of the Treaty is the protection of already existing investments (the "post-establishment" phase) whereas EU law concentrates on the

[231] This position was however adopted in other fora dealing with international economic relations as mentioned by the Respondent in its Reply: The World Trade Organization panel in the *Bananas III* case defined the notion of "conflict" between obligations under GATT 1994 and the Annex 1A WTO Agreements along similar lines. The panel stressed that the conflict clause is designed to deal with clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, not only where those obligations are mutually exclusive (in the sense that a Member cannot comply with both obligations at the same time), but also where "a rule in one agreement prohibits what a rule in another agreement explicitly permits." Respondent's Reply on Jurisdiction, ¶167. *See*, WTO Panel Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, adopted on Sep. 25, 1997 (RL-423), ¶7.159 and note 728.

[232] Respondent's Memorial on Jurisdiction, ¶57. *See* also, Respondent's Comment, ¶5: "EU law and the BIT relate to their common subject matter in similar ways and, in fact, establish substantially equivalent substantive and procedural investment protections."

> free movement of goods, persons, services and capital … thus the 'pre-establishment' phase.[233]

Even if one looks at the standards of protection during the investment phase, no incompatibility can be found:

> The guarantees provided in the Treaty and the fundamental EU freedoms the EU Commission considers as infringed by the Slovak Republic exist side by side and "point" into the same direction.[234]

220. The Tribunal has been quite convinced by the powerful demonstration of the Respondent that, if it is admitted that the two treaties have the same subject matter (which is not, of course, the conclusion of the Tribunal, but is discussed here for the sake of completeness and clarification of the issues), they deal with the common questions in quite a similar way, with one exception which will be dealt with further below.

221. The Respondent explains that covered investors and investments are similar:

> [t]he EC Treaty ensures protection of an investment made in an EU Member State to the same circle of entities as that under the BIT.[235]
> …
> In conclusion, EU law covers investments of the same type as covered under the BIT.[236]

222. Moreover, "with regard to the pre-establishment phase, both the BIT and EU law offer the same concrete protection to investors by supporting market access and prohibiting any restrictions thereof."[237] The same analysis is pursued as far as the protection of investment during the investment period is concerned.

223. Concerning first the protection against expropriation, which was not initially clearly expressed in EU law, the Respondent argues that this is no longer true, because of the adoption of the Charter of Fundamental Rights of the EU which formalised the attitude of the EU towards fundamental human rights and in particular the provisions of the European Convention on Human Rights ("**ECHR**") and the jurisprudence of the

[233] Claimant's Counter-Memorial on Jurisdiction, ¶96.
[234] Claimant's Comment, ¶60.
[235] Respondent's Memorial on Jurisdiction, ¶67.
[236] *Ibid*., ¶73.
[237] *Ibid*., ¶77.

ECtHR. As a consequence, the protection against expropriation is equivalent in EU law and in the BIT.[238]

224. The Respondent's analysis of the other standards of protection is to the same effect:

> Treatment standards established in the BIT, such as non-expropriation, "fair and equitable treatment," "national treatment," "most favored nation treatment", correspond to core "treatment standards" in EU law, enunciated in the EC Treaty provisions regarding the fundamental freedoms.[239]
> …
> EU law includes protections that are very much equivalent to the composite obligation to accord fair and equitable treatment under the BIT.[240]
> …
> It follows that the protection and security of investments guaranteed by EU law overlaps completely with the scope of protection considered to be afforded under the most liberal interpretation of the "full protection and security" standard that sometimes has been asserted by claimants or the decisions of international investment tribunals.[241]

225. Lastly, the Respondent also mentions the overlap of the provisions concerning the free movement of capital and the free transfer of payments.

226. Without adhering necessarily to all the details or implications of the Respondent's comparative presentation of a certain number of provisions, the Tribunal considers that it presents an accurate general picture of the plain fact that the two treaties are far from being so incompatible that they cannot be applied at the same time.

227. A similar conclusion was reached by the *Binder* tribunal:

> The Arbitral Tribunal further cannot find that the invoked substantive provisions of the Czech-German BIT, *i.e.* Article 2(2), which provides for protection against impairment of investments by arbitrary or discriminatory treatment, Article 2(3), which ensures full protection of investments and revenues, Article 4(1), which provides for full protection and security of investments, and Article 4(2), which stipulates that expropriation must be for public benefit and must be accompanied by full compensation, are in any way in conflict with EC law. Consequently, there

[238] The Respondent stresses the fact that considering the narrow dispute settlement in the precise BIT at stake, there is no dispute resolution for expropriation, but only for compensation in case of expropriation, which renders EU law even more favorable than the BIT.
[239] Respondent's Memorial on Jurisdiction, ¶64.
[240] *Ibid.*, ¶105.
[241] *Ibid.*, ¶110.

> is no substantive conflict with EC law, and the question of the primacy of EC law does not arise in respect of these provisions.[242]

228. If indeed, the investors are protected in a similar way by two different regimes, why should only one of these regimes be applicable? In such a factual situation, the Tribunal considers that far from being necessarily incompatible, the parallel rules under the BIT and the ECT, can be cumulatively applied.

229. The same idea was put forward in the *SPP* case[243], where the issue was whether the use of ICC arbitration excluded the use of ICSID arbitration:

> [i]t matters not how many different paths are pursued in an effort to obtain that remedy.[244]
> …
> There is in this case no inconsistency in pursuing alternative remedies … The Claimants are trying to find a competent forum in which to adjudicate their claim[245]
> …
> Thus, the possibility arises that concurrent jurisdiction might be exercised with respect to the same Parties, the same facts and the same cause of action by two different arbitral tribunals.[246]
> …
> When the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction.[247]

230. Although the Tribunal is aware that the issues can be distinguished, it considers that the main idea underlying the *SPP* decision is apposite in this case, *i.e.* that the existence of several fora for obtaining remedies does not render them incompatible.[248] On the contrary, they must be considered as parallel since they enhance the protection of the investor.

231. The parallel rules under the BIT and the ECT are not incompatible, but should be viewed as cumulative. This kind of situation is frequent in international law and has

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[242] *Binder v. Czech Republic*, *supra* note 227, ¶63.
[243] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3 (First Decision on Jurisdiction, 27 November 1985) (hereinafter "*SPP*").
[244] *Ibid*., ¶11.
[245] *Ibid*., ¶13.
[246] *Ibid*., ¶28.
[247] *Ibid*., ¶30.
[248] The Tribunal here takes no view on the question of whether a prior or subsequent agreement to submit disputes to one forum should preclude access another forum, as was at issue in the cases of *SGS v. Pakistan* and *SGS v. Philippines*.

never meant that only one set of rules can be applied. For example, in the *Southern Bluefin Tuna* case (2000), Japan had argued *inter alia* that the 1993 Convention on the Conservation of the Southern Bluefin Tuna applied to the case both as *lex specialis* and *lex posterior,* excluding the application of the 1982 UNCLOS. The arbitration tribunal, however, held that both the 1982 as well as the 1993 instrument were applicable. The tribunal recognised that

> … it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently *a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder*. The current range of international legal obligations benefits from a process of accretion and cumulation.[249]

232. This parallelism and complementarity of the BIT and the ECT has also frequently been emphasised in legal writings. For example, Dr Christian Tietje analyses the interaction of the two treaties in the following way:

> There are no convincing legal reasons that would cause intra-EU BITs to be classified as being *per se* incompatible with the law of the European Union. Also in the context of EU law, bilateral investment protection treaties are "added" legal guarantees for investors. … The cancellation of bilateral investment protection treaties between EU member states as demanded by the EU Commission would thus deprive EU citizens of subjective rights. This would be an unparalleled occurrence as regards fundamental principles of the European Union … Intra-EU BITs help to increase and enhance the overall level of legal protection of economic subjects in the internal market.[250]

233. Although it deals with the BIT between a Member (Slovakia) and a non Member of the EU (Switzerland) as well as the Energy Charter Treaty on the one side and EU law on the other, the Tribunal considers the opinion of the Advocate-General Jääskinen in Case C-264/09, *European Commission v. Slovak Republic* very apposite to the question it is discussing here:

> With respect to the enjoyment and protection of investments, the general level of the protection of fundamental rights provided by EU law affords protection to

[249] *Southern Bluefin Tuna case* (*Australia and New Zealand v. Japan*) (Award on Jurisdiction and Admissibility, 4 August 2000) UNRIAA vol. XXIII (2004) p. 23, ¶52 (emphasis added).
[250] Christian Tietje "Bilateral Investment Protection Treaties between EU Member States (Intra-EU BITs) as a Challenge in the Multi-Level Legal System" in Christian Tietje, Gerhard Kraft and Mathias Lehmann (eds.), *Beiträge zum Translationalen Wirtschaftsrecht* (Essays in Transnational Economic Law), number 104 (CL-146), p. 19.

> investors, which fulfils the obligations resulting from Article 10(1) and 13(1) of the ECT.[251]

234. The Tribunal therefore rejects the Respondent's contention that the objective test in Article 59 VCLT has been met in the present case; the provisions of the BIT and the ECT are not so incompatible that the two treaties cannot be applied at the same time.

(3) Is termination under Article 59 of the VCLT subject to the notification requirement of Article 65 of the VCLT?

235. The Tribunal's conclusions regarding the application of Article 59 VCLT make it unnecessary to consider the Claimant's alternative argument based upon Article 65 VCLT.

(4) Conclusion

236. The conclusion of the Tribunal is that the two treaties – the BIT and the EC Treaty – do not have the same subject matter and can therefore be applied in parallel and be interpreted so as to be in harmony. Subsidiarily, the Tribunal finds that, even if the two treaties were to be considered to have the same subject matter, they still can be applied in parallel, first because no common intent to terminate the BIT can be ascertained either from the texts of the relevant treaties nor from the behaviour of the States Parties and secondly because far from being so incompatible as not being capable of being applied at the same time, they provide in some cases for very similar protections and even in cases where they differ – like for the procedures to obtain a remedy – they are complementary.

237. The same three-fold conclusion was reached by the tribunal in the *Eastern Sugar* case:

> *First*, the Arbitral Tribunal does not accept the Czech Republic's argument that the EU treaty as the later treaty (as between the Czech Republic and the Netherlands) covers the *same subject matter* as the BIT, the earlier treaty.
> …

[251] Advocate General's Opinion of 15 March 2011, *European Commission v. Slovakia*, Case C-264/09 (RL-313), ¶52. Article 10(1) of the ECT sets forth obligations for the promotion, protection and treatment of investments which include the commitment to accord at all times fair and equitable treatment and constant protection and security. Article 13(1) provides for guarantees against expropriation.

> *Second*, the Czech Republic has not established that the common *intention* of the Czech Republic and the Netherlands was that the EU Treaty would supersede the BIT.
> …
> *Third*, the Arbitral tribunal is of the view that the BIT and the EU Treaty are *not incompatible*.[252]

238. The overall conclusion of the Tribunal is therefore that the BIT has not been automatically terminated by application of Article 59 of the VCLT and has therefore to be considered as a treaty in force.[253]

D. THE ISSUE OF THE APPLICABILITY OF ARTICLE 30(3) OF THE VCLT IMPLYING THE INAPPLICABILITY OF ARTICLE 8 OF THE BIT

239. The second strand of the first objection raised by the Respondent is that Article 8 of the BIT has to be considered inapplicable by virtue of Article 30(3) of the VCLT. According to Article 30(3) of the VCLT, when all the States Parties to an anterior treaty are also States Parties to a posterior treaty, and the earlier treaty is not terminated or suspended by operation of Article 59 of the VCLT, the "earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty." Article 30(4) of the VCLT adds that, "[w]hen the parties to the later treaty do not include all the parties to the earlier one, (a) as between States Parties to both treaties the same rule applies."[254]

240. Unlike Article 59 of the VCLT, Article 30(3) of the VCLT requires no proof of the States Parties' intention to terminate a particular provision and does not relate to the incompatibility of the treaties as a whole, but rather to the incompatibility of specific provisions.

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[252] *Eastern Sugar*, *supra* note 22, ¶¶159, 167-168 (emphasis in original).
[253] It is interesting to note that this position concerning intra-EU BITs has not only been adopted in international arbitration, but also by national courts. It is noteworthy that the Czech courts have indeed confirmed, in the course of an unsuccessful challenge of the *Binder* decision, the existence of the BIT between the Czech and Slovak Federative Republic and the Federal Republic of Germany, and did not find any implied termination, stating to the contrary that "the BIT is in the Appellate Court's view valid and effective, as it has so far been a component of valid legal orders of both states …" *See Czech Republic v. Binder*, *supra* note 190.
[254] In fact the pertinent rule in this case, as the parties to the BIT and to the ECT are not all the same, is Article 30(4), which refers to Article 30(3); but as both Parties have only discussed the application of Article 30(3), the Tribunal has used the same approach.

1. The Positions of the Parties

241. The Respondent argues that, under Article 30(3) of the VCLT, even if the BIT has not been terminated by application of Article 59 of the VCLT, at least Article 8 of the BIT must be deemed inapplicable as it is incompatible with EU law. The basis for such finding of incompatibility, according to the Respondent, is to be found in Articles 12 and 292 of the EC Treaty. Article 12 prohibits discrimination inside the EU on grounds of nationality and Article 292 prevents the submission of disputes between Member States to any method of settlement other than those provided for therein – arbitration not being referred to in the ECT.

242. This analysis of the Respondent has been strongly supported by the European Commission, which seems concerned to protect what could be described as the ECJ's monopoly over the interpretation and application of EU law. According to the EC, the EU is a system of integration, which implies that there must be a unique institution entrusted with the final word on what EU law means, and the existence inside the EU of arbitral tribunals dealing with the interpretation of EU law could jeopardise the uniform application of EU law.

243. Both the Respondent and the EC rely on Article 292 of the EC Treaty (now Article 344 TFEU) which confers exclusive jurisdiction on the ECJ to deal with disputes among Member States on the application of EU law in the following terms:

> Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.

The EC points to Opinion 1/09 delivered by the ECJ on 8 March 2011, which considered that the creation of a new Patent Court, to solve patent-related disputes between European private parties, was against the basic principles of EU law.[255]

244. Moreover, according to the Respondent and the EC, the fact that the BIT grants a right to international arbitration on the basis of nationality is contrary to Article 12 of the ECT. Article 12 provides:

[255] Opinion 1/09, *supra* note 121, ¶106.

> Article 12
>
> Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
>
> The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.

245. The Claimant, for its part, considers that Article 344 TFEU is only applicable to disputes between States, as results from the plain wording of the text. Moreover, it considers that there is absolutely no rule or principle in EU law that prevents an arbitration between an EU investor and a Member State of the European Union. The Claimant also argues that the so-called discrimination between nationals of a EU Member State that can rely on international arbitration and others that cannot can be solved by extending this right to all, rather than depriving those who benefit from it under a BIT of this protection.

2. The Tribunal's Analysis

246. The Tribunal is not going to deal here with the issue of the general incompatibility of the two treaties which has already been dealt with above, but only with the possible incompatibility of Article 8 of the BIT with the ECT. The tribunal in *Eureko* has also rightly pointed to the difference of approach of the two articles, Article 59 and Article 30 (3):

> Under Article 30 the test is whether the two successive treaty provisions are "compatible." Under Article 59 the test is whether the provisions of the later treaty are "so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time." Article 30 may be triggered by the slightest incompatibility between the provisions of the earlier and later treaties.[256]

247. The Tribunal will examine successively whether Article 8 of the BIT is incompatible with Article 292 of the ECT (now Article 344 TFEU) and/or with Article 12 of the ECT (now Article 18 TFEU).

[256] *Eureko*, *supra* note 21, ¶241.

(1) Does Article 8 of the BIT violate Article 292 of the ECT (Article 344 TFEU)?

248. In the Tribunal's view, Article 292 of the ECT (now Article 344 TFEU) does not provide for an absolute monopoly of the ECJ over the interpretation and application of EU law[257] and does not prevent many other judicial or arbitral institutions from routinely dealing with EU law. The same conclusion was reached in *Eureko B.V. v. The Slovak Republic*:

> The argument that the ECJ has an "interpretative monopoly" and that the Tribunal therefore cannot consider and apply EU law, is incorrect. The ECJ has no such monopoly. Courts and arbitration tribunals throughout the EU interpret and apply EU law daily. What the ECJ has is a monopoly on the final and authoritative interpretation of EU law: but that is quite different. Moreover, even final courts are not obliged to refer questions of the interpretation of EU law to the ECJ in all cases. The *acte clair* doctrine is well-established in EU law.[258]

249. There are indeed numerous instances where EU law is applied outside the institutional and judicial framework of the European Union, and experience shows that there is no such thing as an absolute monopoly of the ECJ over the interpretation and application of EU law.

250. It is first not contested that *national courts and tribunals* are frequently called upon to interpret and apply EU law and their action in doing so is in no way incompatible with EU law, even when (as is most commonly the case) they are located in Member States of the EU which are subject to the requirements of Article 292 of the ECT (now Article 344 TFEU).

251. As far as the courts and tribunals of non-Member States are concerned, it is evident that they cannot turn to the ECJ to submit to it a question of interpretation of EU law, but this cannot mean that they are prevented from applying EU law, when under the choice of law rules such law is applicable. In other words, to take an example, an Argentinian tribunal, dealing with a dispute between an Argentinian company and a European company, might well have to apply a mandatory rule of EU law applicable to the dealings of the European company with non-EU companies. In such a case, this

[257] A similar conclusion was reached by the Higher Regional Court of Frankfurt am Main in its Decision of 10 May 2012, when dealing with a request by the Slovak Republic to set aside the *Eureko* Award: "[e]ven independent of the stipulation of Art. 344 TFEU, it cannot be assumed that the ECJ holds a monopoly on interpreting EU law." *See Frankfurt Court*, *supra* note 3, p. 22.
[258] *Eureko*, *supra* note 21, ¶282.

application cannot be controlled by the ECJ if there is no enforcement in Europe. As all of this takes place outside Europe, there seems to be no reason to require the intervention of the ECJ as an EU institution. However, if the award is susceptible of integration into the institutional and judicial framework of the European Union, *i.e.* if there is an attempt at enforcement in Europe through the relevant procedure, there may be the possibility of intervention by the ECJ if the enforcement raises questions of compatibility with EU law. In this case, the control by the ECJ is not a certainty: it depends on the willingness of the court of the Member State where enforcement is sought to submit a question of interpretation to the ECJ – and therefore it remains only a possibility.

252. As far as the courts and tribunals of the Member States are concerned, a certain uniformity of interpretation is without doubt rendered possible by their capacity (for any court or tribunal) and their obligation (for a court or tribunal of last resort under national law) to submit preliminary questions of interpretation of EU law to the ECJ by virtue of Article 234 of the EC Treaty (now Article 267 TFEU).[259] But even in this situation, the ECJ does not have an absolute monopoly. The Tribunal stresses the fact that national courts have a certain degree of discretion in their decision to refer a question of interpretation to the ECJ, and that the courts of last resort may use the theory of the "*acte clair*" to maintain some discretion as well. In other words, there is no automatic seizure or *ex officio* seizure of the ECJ as soon as EU law is at stake, which leaves open, even if not very broadly, the possibility of divergent interpretations of EU law.

253. Secondly, EU law is also routinely applied in *arbitration*, in other words, outside the institutional and judicial framework of the European Union. It is the Claimant's submission that, if the Respondent's analysis were to prevail, this would be the end of

[259] Article 267 (ex Article 234 ECT): "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court."

arbitration in the European Union, as underscored, for example, in the Claimant's observations on the *amicus curiae* briefs, where it stated that "the logical culmination of the EU Commission's argument would be the end of arbitration within the EU."[260] This is indeed inherent in the EC position as expressed in its Submission, where it argued that "all natural and legal persons, as well as states that are directly or indirectly involved in the arbitration … are subject to and bound by the law of the European Union. All are therefore required to respect the primacy of European Union law as well as the autonomy of its judicial system."[261]

254. As far as arbitration is concerned, it appears that Article 344 TFEU (formerly Article 292 ECT) precludes arbitration between Member States regarding their obligations under EU law. This has indeed been decided by the ECJ in the *Mox Plant* case[262], between the UK and Ireland, where the ECJ stated that EU Member States are prevented from submitting their disputes to "any other method of dispute settlement" than the ones provided for by EU law, and that the ECJ has exclusive jurisdiction in resolving a dispute between two EU Member States that is at least partially covered by EU law.

255. However, the Tribunal does not consider that this solution can be transposed to a case like the present one. There is no provision in the ECT, equivalent to Article 344 TFEU, dealing with arbitration between two or more private parties, nationals of Member States, or with the so-called mixed disputes settlement mechanisms like investment arbitration between individuals who are nationals of Member States and Member States. In other words, the principles set out in Article 292 (now Article 344 TFEU) are not applicable to these situations.

256. Concerning arbitration between two private parties, it has been recognised by the ECJ that arbitrations between private parties, which apply EU law, are perfectly possible and are not in contradiction with any monopoly of interpretation of EU law by the ECJ, as illustrated for example in the *Eco Swiss* case.[263] The main reason the ECJ did not

[260] Claimant's Comment, ¶14.
[261] Observations of the European Commission, p. 2.
[262] Case C-459/03, *Commission v. Ireland*, Judgment of 30 May 2006, [2006] ECR I-4635 (CL-32).
[263] *Eco Swiss*, *supra* note 77. The ECJ has repeatedly held that arbitral tribunals are under an obligation to apply fundamental EU law. While the *Eco Swiss* case was decided in the context of competition law, the same

find such arbitration objectionable was because the arbitration in that case, having been established in accordance with the rules of the Netherlands Arbitration Institute, was therefore placed under the control of the Dutch courts, which could seek the interpretation of the ECJ on the basis of Article 234 of the EC Treaty (now Article 267 TFEU). But in such a case, again, the same remark that was made concerning the decisions of national courts which are not compelled to refer to the ECJ is apposite.

257. Concerning arbitration between one Member State and nationals of another Member State – which is the situation encountered in the present case – it is the view of the Tribunal that it does not come under Article 292 of the EC Treaty (now Article 344 TFEU) and is therefore perfectly compatible with EU law.

258. A first remark is that, even, if it were argued that the Member State cannot "submit" a dispute to arbitration with a private party, it is uncontested that Slovakia, being the Respondent in this case, has not "submitted" any dispute to this Tribunal. It has merely defended its positions against the claims of Euram Bank.

259. Moreover, there is indeed no rule in EU law that forbids such a type of arbitration. In this case, an arbitration brought under the UNCITRAL Rules and seated in Stockholm, Swedish law applies as the *lex arbitri*, and the award rendered by this Tribunal is therefore placed under the control of the Swedish courts, which could, as shown specifically by the case of *Eco Swiss*, seek the interpretation of the ECJ on the basis of Article 234 of the EC Treaty (now Article 267 TFEU).

260. In fact, this position has been reiterated by the ECJ in other cases involving arbitral awards as has been brought to the attention of the Tribunal by the Claimant:

> In at least two other cases that were referred to it by a Spanish and a Slovak court for a preliminary ruling at the stage of the enforcement of arbitral awards that had been rendered against consumers in their absence, the ECJ confirmed that national courts of EU Member States have to interpret EU law at the enforcement stage, thereby making clear once again that (i) arbitration is admissible even though arbitrators may have to apply EU rules and (ii) that national courts of EU Member states are not deprived of the power to refer matters for a preliminary ruling just because the dispute was decided by an arbitral tribunal rather than a court. Both

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position was adopted in the field of consumer rights, *see* for example, Case C-168/05, *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*, Judgment of 26 October 2006, [2006] ECR I-10421.

> cases involved the interpretation of Council Directive 93/13 EEC of 5 April 1993 on unfair terms in consumer contracts. The Spanish case[264] concerned the issue of an unfair arbitration clause in a consumer contract. The Slovak case[265] dealt with a potentially unfair penalty applied in an arbitral award rendered against a consumer.[266]

261. Contrary to the arguments of the Respondent and the EC, the Tribunal considers that the analysis, according to which arbitration between private parties or a private party and a Member State is not contrary to EU law, is not contradicted by Opinion 1/09 of the Court (Full Court) of 8 March 2011[267], an opinion delivered pursuant to Article 218(11) TFEU.[268] That case can be distinguished on several accounts from the present situation. The question was whether the creation of a Patent Court ("**PC**") by an international agreement was contrary to the exclusivity of the EU courts:

> 1. The request submitted for the Opinion of the Court by the Council of the European Union is worded as follows:
>
> "Is the envisaged agreement creating a Unified Patent Litigation System (currently named European and Community Patents Court) compatible with the provisions of the Treaty establishing the European Community?"

262. On the issue of whether Article 292 ECT (now Article 344 TFEU) applies to the mechanisms of the settlement of disputes involving private parties, the answer was unambiguously negative:

> Nor can the creation of the PC be in conflict with Article 344 TFEU, given that that article merely prohibits Member States from submitting a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties. *The jurisdiction which the draft agreement intends to grant to the PC relates only to disputes between individuals in the field of patents*.[269]

263. It is true that, *in fine*, the ECJ considered the creation of the PC to be in violation of the monopoly of the ECJ, but this was the monopoly of rendering judgments, or at least

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[264] Case C-40/08, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, Judgement of 6 October 2009 (CL-204).
[265] Case C-76/10, *Pohotovost' s.r.o. v. Iveta Korčkovská*, Order of 16 November 2010 (CL-205).
[266] Claimant's Comment, ¶16.
[267] Opinion 1/09, *supra* note 121.
[268] Article 218(11) TFEU (ex Article 300 ECT): "11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised."
[269] Opinion 1/09, *supra* note 121, ¶63 (emphasis added).

having the last word, not only on the interpretation of the EC Treaty but also on the validity of decisions of the EU organs and institutions, provided for in Article 230 (now Article 263 TFEU)[270], stating that "the PC may be called upon to determine a dispute pending before it in the light of the fundamental rights and general principles of European Union law, or even to examine the validity of an act of the European Union." The difference between the PC and the present Tribunal was, quite rightly in the view of the Tribunal, argued by the Claimant.[271] It is not alleged that, in the present case, the Tribunal is entrusted with a determination of the validity of an act of one of the European Union institutions. Another distinguishing factor between the PC and the present UNCITRAL arbitration is the impossibility of bringing infringement proceedings against the decisions of the PC, while it is possible to have infringement proceedings in the case of awards of arbitral tribunals constituted under the BIT like this Tribunal, at the stage of enforcement in the European Union.

264. Indeed, if a Member State were minded to enforce an arbitral award that would violate EU law, tools remain in the hands of the EU institutions – and particularly the ECJ – to ensure a proper application of EU law. The Tribunal considers it noteworthy to quote here Article 226 ECT (now Article 258 TFEU) and Article 228 ECT[272] (now Article 260 TFEU):

> Article 226
>
> If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
>
> If the State concerned does not comply with the opinion within the period laid down by the Commission, *the latter may bring the matter before the Court of Justice.*

[270] Article 263 (ex Article 230 ECT): "The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission …"
[271] Claimant's Comment, ¶21.
[272] This Article was indeed cited in the Observations of the European Commission, at ¶27: "If a Member State does not comply with this obligation, the Commission can bring the matter directly before the European Court of Justice in accordance with Article 88 (2) EC. If the judgment of the Court of Justice is not complied with, the Court may impose pecuniary sanctions in accordance with Article 228 (2) EC."

> Article 228 (1)
>
> If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take *the necessary measures to comply with the judgment of the Court of Justice*. (emphasis added)

265. In other words, even when cases are brought to arbitration, if they are to be enforced in the EU, the ECJ maintains the possibility, through different mechanisms, to have the final and authoritative word on the interpretation of EU law.[273]

266. As a last subsidiary remark, the Tribunal wishes to draw attention to the fact that EU law has indeed already been applied by arbitration tribunals, without raising any problems. To give just an example, in the *Maffezini* case, the arbitral tribunal interpreted and applied EU law in order to analyse the extent of the investor's rights, as can be seen from the following extract:

> Particularly noteworthy is the legislation on EIA. Strict procedures in this respect are provided in *EEC Directive* 85/337 of June 27, 1985 and in Spain's Royal Legislative Decree No. 1302/1986 of June 28, 1986.24 Chemical industries are specifically required under both measures to undertake an EIA. Public information, consultation with pertinent authorities, licensing and other procedures are also a part thereof. The *EEC Directive*, like the one that later came to amend it, requires "that an EIA is undertaken before consent is given to certain public and private projects considered to have significant environmental implications." Suspension of projects can be ordered under Spanish law, particularly if work thereon is begun before the EIA is approved.[274]

267. In sum, the Tribunal considers that, if the BIT and the ECT were considered as having the same subject matter, the application of Article 30(3) of the VCLT would not result in the inapplicability of Article 8 of the BIT, because of an incompatibility with Article 292 ECT (now Article 344 TFEU).[275]

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[273] A similar conclusion was reached by the Higher Regional Court of Frankfurt am Main in its Decision of 10 May 2012, when dealing with a request of the Slovak Republic to set aside the *Eureko* Award: "It is therefore the view of the Senate that it is not the case that arbitration proceedings are entirely removed from the institutional and judiciary framework of the EU." Frankfurt Court Decision, *supra* note 3, p. 21.

[274] *Maffezini v. Spain*, ICSID Case No. ARB/97/7 (Award on the Merits, 13 November 2000), ¶69 (emphasis added).

[275] The same conclusion was reached by the Higher Regional Court of Frankfurt am Main in its Decision of 10 May 2012, when dealing with a request of the Slovak Republic to set aside the *Eureko* Award: "The prevailing view in the commentaries and literature takes this to mean that Art. 344 TFEU only covers disputes between Member States. … In contrast … there is no source to be found that specifically holds the view that Art. 344 TFEU is also applicable to a dispute between a private individual and an EU Member State. … The possible risk of arbitral awards that contradict EU law, however, cannot constitute a direct application of Art. 344 TFEU to

(2) Does Article 8 of the BIT violate Article 12 of the ECT (Article 18 TFEU)?

268. This question might seem at first glance more difficult, as mentioned by the Claimant's expert, Professor August Reinisch: "Under the EU legal regime the availability of remedies for only some EU nationals but not for all others may be problematic."[276]

269. The Tribunal considers that it is not possible to avoid this question by a mere statement that Article 8 of the BIT does not introduce any aspect of discrimination, as the *Binder* tribunal did when it stated:

> The fact that, when there is a BIT, such national remedy is replaced or supplemented by an international arbitration mechanism does not, in the Arbitral Tribunal's view, involve any discrimination and is not otherwise incompatible with EC rules and principles.[277]

270. The question is indeed somewhat more complex, as recognised by the Claimant's expert, Professor Reinisch. However, Professor Reinisch immediately provides methods of resolving this seemingly problematic question. The first answer is that any possible discrimination might be taken up by the European institutions to sanction a Member State for violation of EU law, but that such discrimination has no consequence on the validity of the treaty under public international law: "this is an internal EU law problem and not an issue of treaty compatibility."[278] The Tribunal is convinced by this analysis.

271. Moreover, Professor Reinisch adds that it is for those suffering from discrimination to seek enforcement of their rights, by obtaining an extension of the favourable treatment granted in the Austria-Slovakia BIT to them:

> Furthermore, this consequence may be avoided by extending the favourable treatment accorded to BIT partners to all other EU Member States.[279]

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state/investor disputes per se. … The case law of the ECJ – insofar as apparent and submitted by the parties – does not provide any indication that Art. 344 TFEU would also apply directly to disputes between a Member State and an investor of another Member State, or that the general competence of investment tribunals was in question." Frankfurt Court Decision, *supra* note 3, pp. 18-20.

[276] Reinisch Opinion, ¶60.

[277] *Binder v. Czech Republic*, *supra* note 227, ¶65.

[278] Reinisch Opinion, ¶60.

[279] Reinisch Opinion, ¶60. A similar conclusion was reached by the Higher Regional Court of Frankfurt am Main in its Decision of 10 May 2012, when dealing with a request of the Slovak Republic to set aside the

272. The same idea was developed by other tribunals. Thus, the tribunal in *Eastern Sugar* stated:

> If the BIT gives rights to the Netherlands and to Dutch investors that it does not give other EU countries and investors, it will be for those other countries and investors to claim their equal rights.
>
> If the EU Treaty gives more rights than does the BIT, then all EU parties, including the … investors, may claim those rights. If the BIT gives rights to the … investors that it does not give other EU countries and investors, it will be for those other countries and investors to claim their *equal rights*.[280]

Similarly, the tribunal in *Eureko* said that

> There is moreover no reason, legal or practical, why an EU Member State should not accord to investors of all other EU Member States rights equivalent to those which the State has bound itself to accord to investors of its EU bilateral investment treaty partners … [281]

273. This discrimination can also easily be remedied by the application of the EU principle of freedom of establishment, as mentioned by Austria in its submission, explaining that other EU nationals can put themselves in the same situation as Austrian nationals, and therefore benefit from the substantive and procedural protection of the BIT:

> Furthermore, other EU nationals enjoy the freedom of establishment. If they want to take advantage of the provisions of the Austro-Slovakian BIT for their investments in one of those States, they are free to organise their investment in a way that allows them to do so. The only precondition is to qualify as an investor in terms of the BIT, which can easily be achieved in exercising the freedom of establishment.[282]

274. More generally, the Tribunal considers that EU law does not exclude the existence of bilateral treaties giving some advantages to the nationals of the States Parties, *if these advantages are reciprocal*. The Tribunal can take inspiration here from the *"D"* case. In this case, under a bilateral tax treaty between the Netherlands and Belgium some tax

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Eureko Award : "The Senate, in agreement with the arbitral tribunal, does consider it possible that an arbitration clause which only grants certain investors access to arbitration proceedings might violate the non-discrimination rule of EU law, yet this does not lead to the conclusion that the present claimant is denied access to an arbitral tribunal; for ultimately, a possible violation can only lead to an expansion of the rights of other investors as well, yet not to a restriction of the claimant's rights." Frankfurt Court Decision, *supra* note 3, p. 25.

[280] *Eastern Sugar*, *supra* note 22, ¶170 (emphasis in original).

[281] *Eureko*, *supra* note 21, ¶267.

[282] Observations of the Republic of Austria, p. 8.

advantages were granted to Belgian citizens which were not granted to German nationals under the bilateral tax treaty between the Netherlands and Germany. This appears on its face to be discrimination between German nationals and Belgium nationals, the same kind of discrimination as that said to exist in this case between the rights of investors benefiting from a BIT and those who do not benefit from such a BIT. On a reference from a Dutch court, the ECJ stated in its opinion, "… the national court inquires whether, in light of the Treaty, the different treatment, in such a case, of a resident of Belgium and a resident of Germany is lawful."[283]

275. The arguments of the parties, as summarised by the ECJ, were the following:

> Mr D. submits that the difference, resulting from application of the Belgium-Netherlands Convention, between his situation and that of a resident of Belgium in an equivalent situation amounts to discrimination prohibited by the Treaty.[284]
> …
> The governments which have submitted observations and the Commission submit conversely that the different treatment of a person such as Mr D. and a resident of Belgium is not discriminatory. They argue that a Member State party to a bilateral convention is not in any way required, by virtue of the Treaty, to extend to all Community residents the benefits which it grants to residents of the Contracting Member State. Those governments and the Commission refer to the danger which the extension of the benefits provided for by a bilateral convention to all Community residents would entail for the application of existing bilateral conventions and of those which the Member States might be prompted to conclude in the future, and to the legal uncertainty which that extension would cause.[285]

276. As explained by commentators on this decision, the governments which presented their views to the ECJ – the Netherlands, Belgium, France and Germany – as well as the European Commission considered that a finding of non-discrimination should be arrived at based on "the concept that a Member State that is a party to a bilateral convention is not in any way required, by virtue of the EC Treaty, to extend to all Community residents the benefits that it grants to residents of the other contracting Member State."[286]

277. The ECJ considered that in the absence of European measures of harmonisation on the question dealt with in the relevant bilateral treaties and the absence as well of a

[283] *D. v. Inspecteur*, *supra* note 147, ¶46.
[284] *Ibid.*, ¶47.
[285] *Ibid.*, ¶48.
[286] G. Kofler and C. Philipp Schindler "Dancing with Mr D: The ECJ's Denial of Most-Favoured-Nation Treatment in the 'D' case" (2005) *European Taxation* 45(12) (RL-433), p. 537.

multilateral treaty on the issue, it was left to the Member States to adopt bilateral treaties with reciprocal rights and obligations,[287] causing the ones subject to one of these treaties to be considered as not being in the same situation than the ones subject to another treaty. Therefore, the ECJ did not consider this situation to be a violation of the principle of non-discrimination, on the basis of the idea that the rights in these treaties were fundamentally based on reciprocity, and could therefore not be compared:

> The fact that those reciprocal rights and obligations apply only to persons resident in one of the two Contracting Member States is an inherent consequence of bilateral double taxation conventions. It follows that a taxable person resident in Belgium is not in the same situation as a taxable person resident outside Belgium so far as concerns wealth tax on real property situated in the Netherlands.
>
> A rule such as that laid down in Article 25(3) of the Belgium-Netherlands Convention cannot be regarded as a benefit separable from the remainder of the Convention, but is an integral part thereof and contributes to its overall balance.[288]

278. It seems to the Tribunal that the exact same reasoning can be followed for the BITs which are based on reciprocal rights and obligations, with the result that the situation of the different investors cannot be compared.

(3) Conclusion

279. In sum, the Tribunal considers that, if the BIT and the ECT were considered as having the same subject matter, the application of Article 30(3) of the VCLT would not result in the inapplicability of Article 8 of the BIT, on the grounds of incompatibility with either Article 292 ECT (now Article 344 TFEU) or Article 12 ECT (now Article 18 TFEU).

280. As a general conclusion, the Tribunal reiterates that, in its view, the BIT and the ECT do not have the same subject matter, and as such coexist and are complementary in the international sphere, where they should be interpreted in harmony with one another. In addition, the Tribunal has come to the conclusion that, if the BIT and the ECT were considered to have the same subject matter, the BIT would not be terminated under

[287] *Ibid.*, ¶¶50-51: "…no unifying or harmonising measure for the elimination of double taxation had yet been adopted at Community level and that the Member States had not yet concluded any multilateral convention to that effect… In the absence of other Community measures or conventions involving all the Member States, numerous bilateral conventions have been concluded between the latter."
[288] *Ibid.*, ¶¶60-61.

Article 59 of the VCLT, for lack of a common intention to terminate and for lack of incompatibility; neither, in such hypothesis, would the application of Article 30(3) of the VCLT compel the inapplicability of Article 8 of the BIT, as the Tribunal could trace no EU rule which would be violated by such application.[289]

E. THE ISSUE OF THE APPLICATION OF EU LAW AS LEX ARBITRI

281. Lastly, the Tribunal turns to the final variant of the Respondent's EU objection, that based upon the relationship between EU law and the law of Sweden, where the Tribunal has fixed its seat in accordance with Article 16(1) of the UNCITRAL Rules.

282. The Respondent maintains that the rules of EU law on which it relies form part of Swedish law and therefore constitute part of the *lex arbitri.* According to the Respondent, it is a well-established principle of EU law that the supremacy of EU law must be recognized and given effect by the laws of all EU Member States. For example, the ECJ held in *Commission v. Italy* that "[i]n matters governed by the EC Treaty, the treaty takes precedence over agreements concluded between the Member States before its entry into force."[290]

283. The Respondent argues that the priority of EU law over incompatible pre-accession agreements concluded between Member States is one such rule. Therefore, the Respondent maintains that "the conflict between the dispute settlement clause of the BIT and EU law can only be resolved by rendering Article 8 of the BIT inapplicable."[291]

284. The Respondent contests the Claimant's characterisation of EU law and the Claimant's reliance on *AES v. Hungary* for the assertion that EU law should only be taken into account as fact, alleging instead that, in addition to operating as international law, EU law operates as part of Swedish law which constitutes the *lex arbitri*.[292] The Respondent disputes the Claimant's reliance on *AES v. Hungary* for the assertion that EU law should only be considered as fact. Rather, the Respondent stresses that in *AES*

[289] This last conclusion was equally reached by the *Binder* tribunal, *supra* note 227, ¶65: "The Arbitral Tribunal does not find either that Article 10(2) of the Czech-German BIT, which provides for a specific procedural protection in the form of arbitration between the investor and the host State, is in conflict with EC Law."
[290] Respondent's Memorial on Jurisdiction, ¶192, citing Case C-10/61 *European Commission v. Italy* [1962] ECR 1 (RL-67), ¶¶10, 23.
[291] *Ibid.*, ¶¶191-95.
[292] Respondent's Reply on Jurisdiction, ¶¶56-60.

v. Hungary, the parties both agreed that EU law should be considered as fact, so the tribunal did not concern itself with the international nature of EU law, but nevertheless did highlight the *dual* nature of EU law.[293] Furthermore, the Respondent distinguishes *AES v. Hungary* since it is an ICSID case which is therefore not governed by the *lex loci arbitri*, unlike the present case which is one involving an *ad hoc* tribunal subject to Swedish arbitration law.[294]

285. The Tribunal considers that this argument requires only a very brief response. The argument could only succeed if the exercise of jurisdiction under Article 8 of the BIT would be contrary to a rule of EU law. The Tribunal has already held, however, that there is no conflict between Article 8 of the BIT and EU law.

286. Accordingly, the Tribunal considers that this final strand of the Respondent's intra-EU BIT objection must be rejected for the reasons it has already given in relation to the other strands of this objection.

F. CONCLUSION ON THE INTRA-EU BIT OBJECTION

287. For all the reasons explained in this Section devoted to the Respondent's first jurisdictional objection, the Tribunal rules that the objection is dismissed.

[293] Respondent's Reply on Jurisdiction ¶¶57-59, citing *AES v. Hungary*, *supra* note 34.
[294] *Ibid.*, ¶60.

III. THE DIFFERENT TRANSLATIONS OF THE TREATY

288. The remaining jurisdictional objections all involve differences regarding the interpretation of the BIT. Those differences are complicated by the fact that the BIT is authentic in Czech and German and the Parties also disagree about the translation of the BIT into English. Before considering the remaining objections, therefore, the Tribunal must address the issue of translation.

289. The Claimant initially relied upon a translation ("**Exhibit C1**") which was attached to its pleadings[295] and was based upon the translation published in the UNTS.[296] The Respondent objected that this translation was inaccurate and submitted its own certified translations from Czech ("**Exhibit RL-40A**") and German ("**Exhibit RL-40B**").[297] While the Respondent maintained that there was no substantive difference between its two translations and referred to RL-40B in its submissions, it contended that, in accordance with the principles set out in Article 33 of the VCLT,[298] questions of interpretation had to be resolved by reference to both texts and thus to both translations. The Claimant accepted, during the hearings, that "C1" was unsatisfactory in certain respects. The Tribunal therefore invited the Parties to agree upon a translation.[299] After the hearings, the Parties informed the Tribunal that they had been unable to so agree.

290. The Claimant then tendered a new translation, attached as Annex 7 to this Award, which differed from both "C1" and, to a lesser extent, "RL-40B". The Respondent objects to the submission of a new translation at such a late stage. The Tribunal agrees that this late submission is less than optimal. Nevertheless, the Tribunal can derive jurisdiction only from the terms of the BIT which are authentic only in Czech and German. It cannot therefore exclude a translation which the Claimant now considers is a more accurate rendition of the two authentic texts.

291. Since the differences between the Parties concern the four provisions most directly relevant to the remaining jurisdictional objections, namely Articles 1, 2, 4 and 8, the

[295] Attached as Annex 4 to the Award.
[296] Attached as Annex 3 to the Award.
[297] Attached as Annexes 5 and 6 respectively. The original Czech and German texts are at Annexes 1 and 2 respectively.
[298] See ¶323, below.
[299] Transcript (Hearing on Jurisdiction), Day 2, 20 Dec 2011, pp. 112-114.

Tribunal (while mindful of the Respondent's comment about its translation "RL-40A"), sets out here the texts of the relevant parts of the two translations on which the Parties now rely, *i.e.* the Respondent's translation from German, "RL-40B" and the Claimant's post-hearing translation with the principal differences between the translations on which each Party finally relied highlighted.

Article 1: Definitions

Respondent's translation from German ("RL-40B")	***Claimant's post-hearing translation***
For the **purpose** of this Agreement: (1) The term "investment" shall mean all assets **which an investor of one Contracting Party invests** in the territory of the other Contracting Party in accordance with its legislation, in particular: a) Movable and immovable property, as well as **any real rights**; b) shares and other forms of participation in enterprises; c) claims **and** titles to money transferred to create an economic value, **and** claims to performance having an economic value; d) rights relating to intellectual property, incl-uding copyrights, industrial property rights such as patents **and inventions**, trademarks, industrial designs, models and samples, technical processes, know-how, business names and goodwill; e) concessions under public law for prospecting, mining or extracting of natural resources; (2) "Investor" shall mean, in the case of the Republic of Austria: … b) any legal entity or partnership under commercial law established in accordance with the laws of the Republic of Austria, **having** its seat in the territory of the Republic of Austria, and **making** an investment in the territory of the other Contracting Party; … (3) "Earnings" shall mean the amounts yielded by an investment and includes, in particular, profits, interest, capital gains, dividends, royalties and license fees.	For the **purposes** of this Agreement: (1) The term "investment" shall mean all assets **that are invested by an investor of one Contracting Party** in the territory of the other Contracting Party in accordance with its legislation, in particular: a) Movable and immovable property, as well as **all rights in rem**; b) Shares and other forms of participation in enterprises; c) claims **or** titles to money **that was** transferred to create an economic value, **or** claims to performance**s** having an economic value; d) Rights relating to intellectual property, including copyrights, industrial property rights such as patents, trademarks, industrial designs, models and samples, technical processes, know-how, business names and goodwill; e) concessions under public law for prospecting, mining or extracting of natural resources; (2) "Investor" shall mean, in the case of the Republic of Austria: … b) any legal entity or partnership under commercial law **which was** established in accordance with the laws of the Republic of Austria, **has** its seat in the territory of the Republic of Austria, and **makes** an investment in the territory of the other Contracting Party; … (3) "Earnings" shall mean the amounts yielded by an investment and includes, in particular, profits, interest, capital gains, dividends, royalties and license fees.

Article 2: Promotion and Protection of Investments

Respondent's translation from German ("RL-40B")	***Claimant's post-hearing translation***
(1) Each Contracting Party shall, **as far as** possible, promote investments made in its territory by investors from the other Contracting Party, shall permit such investments in accordance with its laws and shall accord them **fair** and equitable treatment. (2) Investments and the earning yielded by investments shall have the full protection of this Agreement. **The** same shall also apply to earnings **from reinvestment**. Legal extension or alteration of the investment shall be in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made.	(1) Each Contracting Party shall, **to the extent** possible, promote investments made in its territory by investors from the other Contracting Party, shall permit such investments in accordance with its laws and shall accord them **just** and equitable treatment. (2) Investments and the earning yielded by investments shall have the full protection of this Agreement. **In case of reinvestment, the** same shall also apply to earnings **yielded by such reinvestment**. Legal extension or alteration of the investment shall be in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made.

Article 4: Compensation

Respondent's translation from German ("RL-40B")	*Claimant's post-hearing translation*
(1) **Expropriation measures, including nationalization or** other measures having **the same consequences**, **may be applied** in the territory of the other Contracting Party **to investments of investors of a Contracting Party only in cases where these expropriation measures are carried out** for reasons of public interest, on the basis of legal proceedings and in return for compensation.	(1) **Investments by Investors of one Contracting Party may only be expropriated, nationalized or subject to** other measures having **similar effect** in the territory of the other Contracting Party for reasons of public interest, on the basis of legal proceedings and in return for compensation.
(2) The compensation must correspond to the value of the investment, **determined** immediately prior to the time when the actual or impending expropriation measures **were made public**. The compensation must be paid without delay and, until **it is paid**, interest **shall be calculated on the amount of the compensation in accordance with the usual** bank interest rate **in** the State in whose territory the investment was made; it must be freely transferable. **Provision shall be made** in an appropriate manner **no later than the date of expropriation** for determining and paying compensation.	(2) The compensation must correspond to the value of the investment immediately prior to the time when the actual or impending expropriation measures **became publicly known**. The compensation must be paid without delay and, until **payment, shall yield interest based on the customary** bank interest rate **of** the State in whose territory the investment was made; it must be freely transferable. **At the time of expropriation at the latest, provisions shall have been made** in an appropriate manner for determining and paying compensation.
(3) If a Contracting Party expropriates the assets of a company which is to be considered a company of **such** Contracting Party under Article 1 para. 2 of this Agreement and in which an investor of the other Contracting Party owns shares, the provisions of para. 1 above shall be applied in such a way as to ensure adequate compensation of such an investor.	(3) If a Contracting Party expropriates the assets of a company which is to be considered a company of **that** Contracting Party under Article 1 para. 2 of this Agreement and in which an investor of the other Contracting Party owns shares, the provisions of para. 1 above shall be applied in such a way as to ensure adequate compensation of such an investor.
(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.	(4) The investor shall have the right to have the **legality** 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.	(5) The investor shall have the right to have the amount of the compensation and the **method** of payment reviewed either by the competent authorities of the Contracting Party which prompted the expropriation or by an arbitral tribunal **in accordance with** Article 8 of this Agreement.

Article 8: Settlement of Investment Disputes

Respondent's translation from German ("RL-40B")	***Claimant's post-hearing translation***
(1) If disputes arise **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, or the transfer obligations **pursuant to** Article 5, of this Agreement, they shall, as far as possible, be settled **amicably** between the parties to the dispute.	(1) If disputes arise between a Contracting Party and an investor of the other Contracting Party **concerning an investment with regard to** the amount or the **arrangements for** payment of compensation **in accordance with** Article 4, or **to** the transfer obligations **in accordance with** Article 5 of this Agreement, they shall, as far as possible be settled between the parties to the dispute **on an amicable basis**.
(2) If a dispute within the meaning of paragraph 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 for both Contracting Parties at** the date of the motion for the arbitration proceeding.	(2) If a dispute within the meaning of paragraph 1 above cannot be settled within six months **as from a written notice of sufficiently specific 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 arbitration in accordance with the UNCITRAL Arbitration Rules **in the version in effect on** the date of the request to initiate arbitration.
…	…

292. The Tribunal has scrutinised the differences between these translations with care. Although some of the differences between the translations advanced by the Claimant and the Respondent will require comment, the Tribunal has concluded that those differences are not such as to affect the outcome of the present jurisdictional challenge. The Tribunal has not, therefore, found it necessary to invite further submissions from the Parties.

IV. SECOND OBJECTION: WHETHER EURAM'S CLAIMS ARISE OUT OF A QUALIFYING INVESTMENT WITHIN THE MEANING OF THE TREATY

A. THE POSITIONS OF THE PARTIES

1. The Respondent

293. The Respondent's second objection to the jurisdiction of the Tribunal is that the dispute at issue does not fall within the scope of Article 8(1) of the BIT, because it does not arise out of an investment directly owned by the Claimant but rather out of a shareholding in Apollo which was owned not by the Claimant but by the Claimant's subsidiary EIC. Since EIC was incorporated in Slovakia, the Respondent maintains that the dispute falls outside the scope of Article 8(1). The Respondent argues that the BIT covers only investments which are directly made by an Austrian investor in Slovakia:

> … EURAM's claims do not arise out of a qualifying investment – the sine qua non for protection under the Treaty – but rather out of an investment made by its Slovak subsidiary. The Treaty's disputes clause does not cover claims arising out of indirectly-owned investments or investments made by host-country entities.[300]

The Respondent advances five arguments in support of this objection.[301]

294. First, the Respondent argues that the terms of the BIT, given their ordinary meaning, demonstrate that it was the intention of the States Parties to exclude claims based upon indirect ownership of investments. Citing Article 8(1) and 8(2) of the BIT, the Respondent maintains that the only disputes which may be submitted to investor-State arbitration under the BIT are those which "arise out of an investment, between a Contracting Party and an investor of the other Contracting Party."[302] According to the Respondent, "investment" is defined in Article 1(1) of the BIT as "all assets which an investor of one Contracting Party invests in the territory of the other Contracting Party in accordance with its legislation."[303] The Respondent argues that investments covered

[300] Respondent's Memorial on Jurisdiction, ¶7.
[301] *Ibid.*, Section IV.
[302] *Ibid.*, ¶¶200-201; Respondent's Reply on Jurisdiction, ¶225 (no version specified).
[303] Respondent's translation (RL-40A), Annex 5.

by the BIT are thus limited so that "the foreign investor must be the source of the investment in the territory of the State concerned, not a local company in which the investor has an interest."[304] According to the Respondent, a tribunal would have jurisdiction "over disputes arising out of an asset of an Austrian company invested in Slovakia. But it does not have jurisdiction over disputes arising out of assets invested in Slovakia by that Austrian investor's Slovak subsidiary."[305] Additionally, the Respondent argues, the term "assets" referred to in Article 1(1) means assets "owned by that investor, not assets owned by someone else."[306] Article 1(2) of the BIT, in defining "investor," further confirms that it is the entity with Austrian nationality that must "make[] an investment in the territory of the [Slovak Republic]."[307]

295. The Respondent maintains that its interpretation of the BIT is confirmed by the approach taken in a number of other arbitration awards, in particular the award in *HICEE BV v. Slovak Republic*, which concerned the Netherlands-CSFR BIT,[308] and the award in *Berschader v. Russia,* which was made under the BIT between Belgium/Luxembourg and the USSR.[309]

296. The Respondent further refers to Article 4(3) of the Treaty, which provides as follows:

> If a Contracting Party expropriates the assets of a company which is to be considered a company of such Contracting Party under Article 1 para. 2 of this Agreement and in which an investor of the other Contracting Party owns shares, the provisions of para. 1 above shall be applied in such a way as to ensure adequate compensation of such an investor.

For the Respondent, this provision demonstrates that the States Parties addressed indirectly-owned assets where they wished to do so.[310] The Claimant's interpretation that all indirectly-owned investments would already be investments under Article 1(1),

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[304] Respondent's Memorial on Jurisdiction, ¶202; Respondent's Reply on Jurisdiction, ¶¶227-233.
[305] Respondent's Reply on Jurisdiction, ¶225.
[306] Respondent's Memorial on Jurisdiction, ¶¶202-203.
[307] *Ibid.*, ¶¶204-205.
[308] Transcript (Hearing on Jurisdiction), Day 1, 19 December 2011, pp. 62-71, citing *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11 (Partial Award and Dissenting Opinion, 23 May 2011) (RL-438) (hereinafter "*HICEE*").
[309] Respondent's Memorial on Jurisdiction, ¶¶229, 267, citing *Berschader v. Russia*, SCC Case No. 080/2004 (Award, 21 April 2006) (RL-56) (hereinafter "*Berschader*").
[310] Respondent's Reply on Jurisdiction, ¶¶234-241.

the Respondent argues, would render Article 4(3) purposeless, thereby violating the "fundamental principle of effectiveness" in treaty interpretation.[311]

297. Secondly, the Respondent argues that general international law corroborates its argument that the BIT excludes claims based upon indirect ownership of investments.[312] According to the Respondent, "in the absence of a specific provision forming *lex specialis* in a treaty, the rules of customary international law govern matters such as shareholder standing and nationality of claims."[313]

298. In support, the Respondent refers to the judgments of the International Court of Justice in *Ahmadou Sadio Diallo Case*.[314] According to the Respondent, in those judgments, the ICJ reaffirmed the principle of distinct corporate personality in international law originally stated by the Court in the *Barcelona Traction* and *ELSI* cases,[315] and explained that the rights and assets of a company must be distinguished from the rights and assets of a shareholder in that company.[316] The Respondent maintains that these judgments state a general principle not confined to diplomatic protection.[317]

299. The Respondent points to municipal and international law, citing Professor Sasson for the theory that the "distinction between shareholders and their companies, which is regulated at a municipal level, has to be maintained at an international plane, unless the relevant treaty confers on shareholders the right to pursue their indirect claims and consequently to pierce the corporate veil."[318]

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[311] *Ibid.*, ¶¶237-240, citing *Asian Agricultural Products, Ltd (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3 (Award, 27 June 1990) 30 ILM 581 (1991) (RL-22), ¶40 (hereinafter "*Asian Agricultural Products*") and *Eureko B.V. v. Poland* (Partial Award, 19 August 2005) (RL-155), ¶248.
[312] Respondent's Memorial on Jurisdiction, ¶¶207-216.
[313] *Ibid.*, ¶¶207-216.
[314] *Ahmadou Sadio Diallo (Guinea v. Democratic Republic of Congo*), Judgment of 24 May 2007 (Preliminary Objections), I.C.J. Reports 2007, p. 582 (RL-11) (hereinafter "*Diallo*"); Judgment of 30 November 2010 (Merits), I.C.J. Reports 2010 (II), p. 692 (RL-10).
[315] *Barcelona Traction Light and Power Company Ltd* (*Belgium v. Spain*), Second Phase, Judgment of 5 February 1970, I.C.J. Reports 1970, p. 3 (RL-27) (hereinafter "*Barcelona Traction*"), and *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of 20 July 1989, I.C.J. Reports 1989, p. 15 (RL-150) (hereinafter "*ELSI*").
[316] Respondent's Memorial on Jurisdiction, ¶¶211-213; Respondent's Reply on Jurisdiction, ¶245.
[317] Respondent's Reply on Jurisdiction, ¶246.
[318] Respondent's Memorial on Jurisdiction, ¶213, citing, M. Sasson, *Substantive Law in Investment Treaty Arbitration* (2010) (RL-199), p. 131.

300. The Respondent also distinguishes Claimant's reliance on *Azurix v. Argentina* and *CMS v. Argentina*, arguing that they are "unhelpful to the Claimant because the US-Argentina Treaty at issue in both those cases is precisely the kind of investment treaty that expressly allows investors to assert such indirect investment claims."[319]

301. Thirdly, according to the Respondent, the Treaty's limitation to directly-owned investments is confirmed by the *travaux préparatoires*, which it argues are relevant under Article 32 of the VCLT.[320] The Respondent points to a report submitted by the Czechoslovak Federal Ministry of Finance together with the draft BIT with Austria for parliamentary approval, which states that the Treaty "specifies the term 'investment' and 'investor' in connection with their participation in the business in the territory of one of the Contractual Parties."[321]

302. Fourthly, the Respondent submits that treaty practice under other investment treaties concluded by the Slovak Republic, Austria, and other States on indirect shareholder investment confirm that claims like the Claimant's are excluded under the Treaty.[322] Discussing general treaty practice, the Respondent outlines three distinct approaches taken by States when electing to move away from the limitations of municipal and international law regarding the rights of indirect owners.[323] The treaties either grant foreign-controlled local companies *jus standi,* make special provisions to allow shareholders to claim on behalf of a local corporation where they own or control the local corporation, or expressly extend access to arbitration for claims arising out of investments indirectly controlled or owned by the claimant.[324] The Contracting Parties to the instant Treaty intentionally, the Respondent concludes, "eschewed all three of these means."[325]

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[319] Respondent's Reply on Jurisdiction, ¶253, citing *Azurix Corp v. Argentina*, ICSID Case No. ARB/01/12 (Award, 23 June 2006) (CL-6) (hereinafter "*Azurix*"), *CMS Gas Transmission v. Argentina*, ICSID Case No. ARB/01/8 (Award, 12 May 2005) (CL-36) (hereinafter "*CMS Gas Transmission*").
[320] Respondent's Memorial on Jurisdiction, ¶217; Respondent's Reply on Jurisdiction, ¶261.
[321] Respondent's Memorial on Jurisdiction, ¶217, citing Annex II to the proposal for the negotiation regarding the agreement between the Czechoslovak Socialist Republic and Austria on the promotion and protection of investments and a proposal for the procedure related to the negotiation of similar agreements with other interested countries, No. FMF III/4-17.639/89 dated 17 October 1989 (R-4), ¶9.
[322] Respondent's Memorial on Jurisdiction, ¶¶218-225; Respondent's Reply on Jurisdiction, ¶264.
[323] Respondent's Memorial on Jurisdiction, ¶¶219-220.
[324] *Ibid.*, ¶219-222.
[325] *Ibid.*, ¶221.

303. The Respondent also discusses the *travaux préparatoires* of the Netherlands-CSFR BIT, which were prepared at the same time as the Austria-CSFR BIT which make clear that the CSFR "did not consider the indirect investments of a foreign investor through a local subsidiary to be international investments to be protected under investment treaties" and was deliberate in its drafting so as to exclude them.[326]

304. Finally, the Respondent submits that the exclusion of claims based on indirect ownership of investments is consistent with the Treaty's object and purpose. In this connection, the Respondent refers to three arbitration cases, *Saluka v. Czech Republic*, *Austrian Airlines v. Slovak Republic*, and *Berschader v. Russia*, for the argument that investment protection is but one of the aims of the Treaty, that investment treaties must be interpreted in a balanced manner, and that limitations on the coverage of indirect investors or the right to initiate an arbitration "cannot be deemed contrary to the Treaty's object and purpose."[327]

2. The Claimant

305. The Claimant contests the Respondent's analysis of the issue and maintains that Euram Bank's investment is an "investment" within the meaning of the BIT.[328] The Claimant maintains that the terms of the BIT, in their ordinary meaning, give a definition of assets which is "broad in scope and capable of comprising both direct and indirect investments."[329] The Claimant argues that "Article 1(1) does not limit the investor in its discretion to decide what kind of asset he wants to invest", nor how or by what means: "[t]he only condition is that the investment needs to be '*in accordance with* [the Host State's] *legislation*'."[330] The enumeration of examples of what may constitute an investment under Article 1(1) of the BIT is a non-exhaustive list.[331] This "broad, open-ended approach" to defining investments is typical, the Claimant argues.[332]

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[326] *Ibid.*, ¶224.
[327] *Ibid.*, ¶¶227-229, citing *Saluka*, *supra* note 54, ¶300, *Austrian Airlines v. Slovak Republic*, (Award, 9 October 2009) (RL-23), ¶103 (hereinafter "*Austrian Airlines*"); and *Berschader*, *supra* note 309, ¶144.
[328] Claimant's Counter-Memorial on Jurisdiction, ¶¶111-173.
[329] *Ibid.*, ¶¶113-114.
[330] Claimant's Rejoinder on Jurisdiction, ¶91.
[331] Claimant's Counter-Memorial on Jurisdiction, ¶¶119-122.
[332] *Ibid.*, ¶120.

306. The Claimant disputes the Respondent's reliance on Article 4(3) of the BIT, arguing that there "is nothing in Article 4(3) that would indicate that it was intended to modify the definition of the term 'investment' as defined in Article 1."[333] According to the Claimant, the fact that Articles 2, 3, and 5 of the BIT do not specifically refer to indirectly-owned investments also does not mean that these are not covered.[334] Similar arguments were roundly rejected by the arbitration tribunal in *Siemens v. Argentina* under the Germany-Argentina BIT.[335]

307. The Claimant argues that the inclusion of indirect investments is now typical of BITs and in this connection relies upon the awards in *Mobil Corporation*, *Venezuela Holdings B.V. and ors v. Venezuela*, *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Venezuela*, *Siemens AG v. Argentina*, and *Kardassopoulos v. Georgia*.[336]

308. The Respondent's reliance upon customary international law is said to be misplaced since the customary law to which the Respondent refers is irrelevant for the purpose of interpreting the term "investment" in the Treaty.[337] Specifically, the Claimant argues that there is no reference in Article 31 of the VCLT to customary international law in general; only Article 31(3)(c) "speaks of '*relevant rules of international law applicable in the relations between the parties*'."[338]

309. Contrary to the Respondent's insistence that the Tribunal conduct an analysis under customary international law, the Claimant argues that the Treaty is *lex specialis* and thereby displaces customary international law. According to the Claimant, the

[333] Claimant's Rejoinder on Jurisdiction, ¶99.
[334] *Ibid.*, ¶102.
[335] *Ibid.*, ¶102, citing *Siemens AG v. Argentina*, ICSID Case No. ARB/02/8 (Decision on Jurisdiction, 3 August, 2004) (RL-238) (hereinafter "*Siemens*").
[336] Claimant's Counter-Memorial on Jurisdiction, ¶¶123-133, citing *Mobil Corporation, Venezuela Holdings B.V. and ors v. Venezuela* ICSID Case No. ARB/07/27 (Decision on Jurisdiction, 10 June 2010) (CL-127) (hereinafter "*Mobil*"); *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Venezuela*, ICSID Case No. ARB/08/15 (Decision on Jurisdiction, 30 December 2010) (CL-34) (hereinafter "*Cemex*"); *Siemens*, *supra* note 335; and *Kardassopoulos v. Georgia* ICSID Case No. ARB/05/18 (Decision on Jurisdiction, 6 July 2007) (CL-119) (hereinafter "*Kardassopoulos*").
[337] Claimant's Counter-Memorial on Jurisdiction, ¶¶134-150; Claimant's Rejoinder on Jurisdiction, ¶¶103-111 (emphasis in original).
[338] Claimant's Counter-Memorial on Jurisdiction, ¶134; Claimant's Rejoinder on Jurisdiction, ¶108.

Tribunal's task "is an interpretative one, namely to determine whether the scope of the term '*investment'* is such as to comprise both direct and indirect investments."[339]

310. The Claimant criticises the Respondent's reliance on *ADM, Loewen*, *Barcelona Traction*, *Diallo*, and *ELSI*, arguing that the reliance on these cases is misplaced as they do not address the same issues.[340] Regarding *Loewen*, the Claimant submits that in that case the tribunal found that "[t]here is no language in [NAFTA] which deals with the question of whether nationality must continue to the time of resolution of the claim. It is that silence in [NAFTA] that requires the application of customary international law."[341] This is in contrast to the CSFR-Austria BIT, "which is not silent on 'investment' and the mere necessity to interpret the term of a treaty must not be confused with 'silence' that calls for an analysis under customary international law. To the contrary, it prevents a reference to customary international law."[342]

311. Regarding the Respondent's reliance on *Barcelona Traction* and *Diallo*, the Claimant regards those cases as concerning "the issue of (diplomatic) protection by 'substitution' and centred on the question whether, in customary international law, there is an exception to the general rule '*that the right of diplomatic protection of a company belongs to its national State*', which allows for protection of the shareholders by their own national State '*by substitution*'."[343] The Claimant asserts that there is no principle of customary international law which considers "investment" to mean only "direct investment".[344]

312. With regard to the *travaux préparatoires,* the Claimant argues that the Respondent has not shown how the negotiating history of the Treaty is relevant, other than by referring to Article 32 of the VCLT, whose conditions for application the Claimant maintains are

[339] Claimant's Counter-Memorial on Jurisdiction, ¶135.
[340] Claimant's Counter-Memorial on Jurisdiction, ¶¶138-146, citing *Archer Daniels Midland Company & Tate & Lyle Ingredients Americas, Inc. v. Mexico*, ICSID Case No. ARB (AF)/04/5 (Award, 21 November 2007), (RL-21) (hereinafter "*ADM*"), *Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3 (Award, 26 June 2003) 128 ILR 334 (RL-198) (hereinafter "*Loewen*"), *Barcelona Traction*, *supra* note 315, *Diallo*, *supra* note 314, and *ELSI*, *supra* note 315.
[341] Claimant's Counter-Memorial on Jurisdiction, ¶140, citing *Loewen*, *ibid.*, ¶¶226, 228.
[342] *Ibid.*, ¶141.
[343] *Ibid.*, ¶142 (emphasis in original), citing *Barcelona Traction*, *supra* note 315, and *Diallo*, *supra* note 314.
[344] *Ibid.*, ¶146.

not satisfied.[345] Moreover, the evidence offered only refers to the CSFR's intention and does not show that this intention was shared by Austria.[346]

313. The Claimant also takes issue with the Respondent's reference to treaty practice and the Treaty's object and purpose.[347] The Claimant states that the Respondent has failed to explain the relevance of treaty practice as a supplementary means of interpretation.[348] In any event, the Claimant contends that "[t]he fact that treaties vary in their language does not mean that language used in one treaty excludes something included in another treaty or vice versa."[349]

314. The Claimant nonetheless points to treaties contemporaneous to the Austria-CSFR BIT to show that "whenever the Slovak Republic wanted to exclude indirect investment, it did so."[350]

B. THE TRIBUNAL'S ANALYSIS

315. In considering the Respondent's second objection, the Tribunal begins by noting that the principles which it must apply to its task of interpretation of the Treaty are those set out in Articles 31 to 33 of the VCLT:

> Article 31: *General Rule*
>
> (1) 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.
>
> (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

[345] *Ibid.*, ¶160.
[346] *Ibid.*, ¶161.
[347] *Ibid.*, ¶162-173.
[348] *Ibid.*, ¶¶162-165.
[349] *Ibid.*, ¶¶166.
[350] Claimant's Rejoinder on Jurisdiction, ¶¶115-117.

(3) There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

(4) A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: *Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33: *Interpretation of Treaties authenticated in Two or More Languages*

(1) When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

(2) A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

(3) The terms of the treaty are presumed to have the same meaning in each authentic text.

(4) Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

316. Since the Tribunal has already decided (paragraph 81, above) that the VCLT is applicable to the BIT, these provisions govern the approach which the Tribunal must take to the interpretation of the BIT. It is, however, well established that these provisions state principles which are part of customary international law which would be applicable in any event.

317. As the Tribunal can derive jurisdiction only from the terms of the BIT, it must begin by considering the ordinary meaning to be given to those terms in their context and in light of the object and purpose of the BIT.

318. According to Article 8(1) and 8(2) of the BIT, for the Tribunal to have jurisdiction, it must be faced with a dispute (1) between a Contracting Party and an investor of the other Contracting Party, which (2) arises out of (or, in the Claimant's new translation, "concerns"[351]) an investment. There is no doubt that the first requirement is satisfied. Euram Bank is an investor of the Republic of Austria, within the meaning of Article 1(2) of the BIT, and it is in dispute with the Slovak Republic. The Respondent maintains, however, that the second requirement is not satisfied, because, in its view, the dispute does not arise out of an "investment" as that term is used in the BIT.

319. "Investment" is defined in Article 1(1) of the BIT and the different translations of that provision relied upon by the Parties are set out at paragraphs 288 *et seq.*, above. The definition is in broad terms (the specific assets listed being only examples) and includes "shares and other forms of participation in enterprises." However, the Tribunal agrees with the Respondent that the issue is not what type of asset can constitute an investment but, rather, what link is required between that asset and the investor.

320. In the present case, the asset which was allegedly expropriated (or otherwise subjected to measures inconsistent with the BIT) is the shareholding in Apollo. The investor is Euram Bank. However, it was not Euram Bank but its subsidiary, EIC, which owned the shareholding in Apollo. Since EIC is a company incorporated in the Slovak Republic, it is not an investor which can claim against the Slovak Republic under the BIT. It follows that, if the BIT required that the asset be owned directly by the investor, that requirement would not be satisfied in the present case.

321. The Tribunal is not persuaded, however, that the BIT requires that the investor be the direct owner of the asset. Article 1(1) makes no reference to ownership. Rather, it stipulates that "the term 'investment' shall mean all assets which an investor of one Contracting Party invests in the territory of the other Contracting Party in accordance

[351] *See* Chapter III, above. Nothing turns on the difference between "arise out of" in the Respondent's translation and "concerning" in the Claimant's new translation.

with its legislation."[352] This is broad language which is quite wide enough to encompass what is today the very common situation of a foreign company making an investment through a subsidiary incorporated in the host State. In the usage which was common in relation to investment by the time the BIT was concluded, an investor of State A which acquired control of a shareholding in a company incorporated in State B would be described as investing in the territory of State B irrespective of whether it had purchased the shares in its own name or arranged that they be purchased by a locally incorporated subsidiary whose decision-making it controlled. In the present case, there is no doubt that Euram Bank controlled the decisions made by EIC, which was its 100% owned subsidiary.[353] Taking the words used in Article 1(1) of the BIT in their ordinary meaning, therefore, the Tribunal considers that they include the shareholding in Apollo, notwithstanding that those shares were owned by EIC rather than being directly owned by Euram Bank.

322. In the Tribunal's view, neither the context of those words, nor the object and purpose of the BIT compel a different conclusion. So far as the context is concerned, both Parties made extensive reference to Article 4(3) of the BIT (the text of which appears on page 93, above). According to the Respondent, this provision would be unnecessary if assets held through a subsidiary were included as investments under Article 1(1). On the Respondent's interpretation of the BIT, Article 4(3) stands alone as the only provision concerning indirectly owned assets, a category which Article 4(3) demonstrates is otherwise outside the scope of the BIT.

323. The Tribunal does not agree. Article 4(3) has to be seen in the context of Article 4 as a whole. Article 4(1) provides that a Contracting Party may expropriate (or take similar measures with regard to) an investment of an investor of the other Contracting Party only if it pays compensation. Article 4(2) requires that the compensation correspond to the value of the investment immediately prior to the expropriation. Accordingly, if the investment in question is a factory, the measure of compensation is the value of that factory at that time. What Article 4(3) does is to make clear that where the foreign investor owns not the factory itself but a shareholding (even a very small one) in the

[352] Translation RL-40B. The Claimant's new translation refers to "assets which are invested by an investor of one Contracting Party." The Tribunal sees no substantive difference between the two translations.
[353] Claimant's Counter-Memorial on Jurisdiction, ¶40.

local company which owns the factory – a company the majority of whose shares may well be owned by nationals of the expropriating State or other shareholders who could not qualify as investors under the BIT and who would therefore have no entitlement to compensation under that Agreement – adequate compensation must nevertheless be paid to that foreign investor. The term "adequate compensation" in this context would seem to require that the investor receive a proportion of the value of the asset relative to the proportion of his shareholding in the local company. The clarification provided by Article 4(3) in respect of such a case by no means compels the conclusion that assets held by a local subsidiary of which the investor owns 100% of the shares cannot constitute an investment under the terms of Article 1(1).

324. Moreover, the Respondent's interpretation of Articles 1(1) and 4(3) would produce a curious result. Only disputes relating to something which qualifies as an investment under Article 1(1) may be referred to arbitration in accordance with Article 8(1) and (2). Since the Respondent's interpretation of Article 4(3) is that it provides for a duty to compensate notwithstanding that there is no such investment, it would follow that a dispute regarding the arrangements for payment of compensation under Article 4(3) would not be subject to arbitration. Yet, as the Tribunal will explain below (at paragraphs 366-369), Article 4(5) suggests that any dispute regarding the amount of compensation and the method or conditions of its payment is intended to fall within the scope of Article 8.

325. In the Tribunal's view, the provisions for compensation in Article 4(3) do not suggest a narrower interpretation of Article 1(1).

326. With regard to the object and purpose of the BIT, the Tribunal agrees with the Respondent that the object and purpose of the BIT is not such that it requires provisions which confer protection upon investors to be given the broadest possible interpretation in order to further the goal of investment protection. In particular, the Tribunal considers that it would not be justified in departing from the ordinary meaning of the terms of a definition provision on the basis that a more expansive definition of "investment" would further what is only one of the objects of the BIT. In the present case, however, the Tribunal has already concluded that the ordinary meaning of the terms used in Article 1(1) encompasses assets invested by an investor of the Republic

of Austria in the territory of the Slovak Republic through a Slovak subsidiary owned by that investor. There is nothing in the object and purpose of the BIT which would suggest, let alone require, that the Tribunal accord a narrower interpretation to the language of Article 1(1).

327. Turning to the Respondent's argument concerning customary international law, the Tribunal considers that this argument is based upon two propositions. The first, which relies upon the judgments of the International Court of Justice in *Barcelona Traction*, *ELSI* and *Diallo*,[354] is that customary international law distinguishes between the assets of a company and those of its shareholders. The second, which is largely based upon arbitration awards such as those in *Loewen* and *ADM*,[355] is that rules of customary international law continue to apply unless a treaty departs from them. The Tribunal does not consider that the authorities invoked by the Respondent sustain the conclusion that a dispute about an indirect investment falls outside the scope of the jurisdiction conferred by Article 8 of the BIT.

328. The Tribunal accepts that the recent judgments of the International Court of Justice in *Diallo* amount to an authoritative reaffirmation of its earlier judgment in *Barcelona Traction*. Those judgments were, however, concerned with the extent of the right of diplomatic protection, where a State brings proceedings to protect one of its nationals. That was expressly stated by the Court in its 2007 Judgment in *Diallo*, where it said the following:

> The Court is bound to note that, in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the treaties for the promotion and protection of foreign investments, and the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, which created an International Centre for Settlement of Investment Disputes (ICSID), and also by contracts between States and foreign investors. In that context, the role of diplomatic protection somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative. It is in this particular and relatively limited context that the question of protection by substitution might be raised. The theory of protection by substitution seeks indeed to offer protection to the foreign shareholders of a company who could not rely on the benefit of an international

[354] *See* ¶298, above.
[355] *See* ¶297, above.

> treaty and to whom no other remedy is available, the allegedly unlawful acts having been committed against the company by the State of its nationality. Protection by "substitution" would therefore appear to constitute the very last resort for the protection of foreign investments.[356]

329. The 2007 judgment determined that Guinea could not exercise diplomatic protection with regard to the companies in which Mr Diallo held a controlling interest, because those companies were incorporated in the Democratic Republic of Congo. In its 2010 judgment in *Diallo*, the Court went on to hold that, in exercising its right of diplomatic protection with regard to Mr Diallo, Guinea could not recover in respect of acts which, though they may have violated obligations owed to the companies, did not amount to violations of the rights of Mr Diallo as *associé*.

330. The Respondent also referred to the judgment of the International Court in *ELSI*, which it denied was a case of diplomatic protection. The Tribunal does not believe that this judgment has any bearing on the issues in the present case. Since it was an action brought by the United States on behalf of two United States companies,[357] albeit by reference to a Friendship, Commerce and Navigation Treaty, it was a diplomatic protection case. Moreover, it did not turn on questions relating to indirect investment but was concerned with the application of the local remedies rule and the scope of protection under the treaty, neither of which issues is relevant to the present case.

331. The Tribunal is not concerned with the "particular and relatively limited context" of diplomatic protection. The issue in the present case is not whether Austria may exercise a right of diplomatic protection with regard to the alleged expropriation of EIC's shareholding in Apollo, nor whether, if Austria exercised its right of diplomatic protection with regard to Euram Bank, it could recover damages in respect of the alleged expropriation of that shareholding. The issue in the present case is whether that shareholding falls within the definition of "investment" in the BIT. The BIT constitutes *lex specialis* in that regard.

332. Nor does the Tribunal find the passages in the *Loewen* and *ADM* awards on which the Respondent relied to be relevant to the present case. Those awards (like the judgment

[356] *Diallo*, *supra* note 314, ¶88 (emphasis added).
[357] *ELSI*, *supra* note 315, ¶51.

in *ELSI*) show that where a treaty is silent on a subject it cannot be presumed to have departed from an established rule of customary international law such as the local remedies rule (*ELSI*) or the doctrine of continuing nationality (*Loewen*). But that is not the case here. The BIT creates a right of action for an investor which would not exist under customary international law. It does so in respect of disputes about "investments", a term which the BIT defines in some detail in Article 1(1). There is no general rule of customary international law which would normally be applicable in this situation and on which the BIT is silent.

333. The Tribunal will next turn to the question of the *travaux préparatoires* of the BIT. In view of the Tribunal's findings regarding the meaning of Article 1(1), it has doubts about whether this is a case in which recourse to the *travaux préparatoires* is appropriate under Article 32 VCLT.[358] The Tribunal considers, however, that, even if it were to have recourse to the *travaux préparatoires* of the BIT, doing so would not affect the outcome. The Tribunal finds nothing in the *travaux préparatoires* which have been put before it that compels the conclusion that the States Parties intended that the BIT should define investment so as to exclude indirectly owned investments of the kind at issue in the present case. The Respondent relied upon a brief statement in a Report submitted to the Government of the then CSFR by its Ministry of Finance to the effect that the proposed agreement with Austria "specifies the terms 'investment' and 'investor' in connection with their participation in the business in the territory of one of the Contractual Parties".[359] This statement reveals nothing about the manner of that participation nor about whether it had to be direct or could be made through a locally incorporated subsidiary.

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[358] The tribunal in *Methanex v. United States* considering the 1966 Report of the International Law Commission to the General Assembly stressed the limited relevance of the negotiating history in the light of Article 31 of the VCLT:

> […] pursuant to Article 32, recourse may be had to supplementary means of interpretation only in the limited circumstances there specified. Other than that, the approach of the Vienna Convention is that the text of the treaty is deemed to be the authentic expression of the intentions of the parties; and its elucidation, rather than wide-ranging searches for the supposed intentions of the parties, is the proper object of interpretation. (*Methanex Corp. v. United States*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part II, Chapter B, ¶22)

[359] Annex II to the proposal for the Negotiation regarding the agreement between the Czechoslovak Socialist Republic and Austria on the promotion and protection of investments and a proposal for the procedure related to the negotiation, No. FMF III/4-17/639/89, 17 October 1989 (R-4), p. 5.

334. The Tribunal is aware that the tribunal in *HICEE B.V. v. Slovak Republic*, a case which was also concerned with the Slovak Republic's change to the law regarding health insurers and related to that part of the shares in Apollo which was not held by EIC, relied on the *travaux préparatoires* of the Netherlands-CSFR BIT in arriving at the conclusion that indirectly owned assets did not fall within the definition of investment in that treaty. Despite the similarity between the underlying facts of that case and the present proceedings, however, the legal materials are quite different. Not only was the relevant provision of the Netherlands-CSFR BIT in different terms from those of the BIT at issue here (a matter to which the Tribunal will return below), the *travaux* presented to the *HICEE* tribunal contained a passage which was far more explicit than that quoted in the preceding paragraph.

335. The *HICEE* tribunal relied upon the following passage in the Explanatory Note submitted by the Dutch Government to the Parliament of the Netherlands regarding the proposed BIT between the Netherlands and the CSFR:

> The Agreement covers direct investments and investments made through a company in a third country. Normally, investment protection agreements also cover investments in the host country made by a Dutch company's subsidiary which is already established in the host country ("subsidiary"-"sub-subsidiary" structure). Czechoslovakia wishes to exclude the "sub-subsidiary" from the scope of this Agreement, because this is in fact a company created by a Czechoslovakian legal entity, and Czechoslovakia does not want to grant, in particular, transfer rights to such company. This restriction can be dealt with by incorporating a new company directly from the Netherlands. As the restriction is therefore not of great practical importance, the Dutch delegation has consented to it.[360]

There is no statement of similar clarity in the *travaux* of the Austria-CSFR BIT with which the present case is concerned.

336. Nor does the Tribunal find the practice in respect of other treaties relied upon by the Respondent to be of any assistance. The fact that the Slovak Republic (and its predecessor States) was concerned to limit the scope of investments covered in other treaties and inserted restrictive language to that effect (as was done in the Netherlands BIT) serves, if anything, to highlight the absence of such restrictive language in the

[360] *HICEE*, *supra* note 308, ¶38.

present BIT. The practice of other States seems to the Tribunal to shed no light whatsoever upon the intention of the States Parties to the present BIT.

337. The Tribunal has considered the way in which the issue of indirect ownership has been dealt with by other arbitral tribunals. In this context, both Parties invoked awards which they considered supported their favoured interpretation. The Tribunal believes that such awards have to be approached with a degree of caution. In several instances, the BIT under consideration used language which was different from that of the present BIT and the award is, therefore, of no assistance. For example, the award in *HICEE*, on which the Respondent relied, concerned a clause which was very similar to Article 1(1) of the current BIT in defining "investment", except that it included a provision that the asset had to be "invested either directly or through an investor of a third State." Given that language, it is not surprising that the tribunal held that a structure similar to the one employed by Euram Bank and EIC in the present case was excluded, since the asset in question was invested neither directly nor through an investor of a third State.[361] Article 1(1) of the present BIT, however, contains no statement that the asset in question must be "invested either directly or through an investor of a third State." Conversely, a number of the awards relied upon by the Claimant concerned BITs which expressly included indirectly owned assets within their definition of investment, whereas no such provision appears in the present BIT.

338. The Tribunal notes, however, that in a number of cases tribunals confronted with clauses similar to that in the present case have held that they include indirectly owned assets. For example, in *Siemens v. Argentina*, the BIT between Germany and Argentina defined "investment" as

> all kinds of assets in accordance with the legislation of the Contracting Party in the territory of which the capital investment is made in accordance with this treaty, in particular, but not exclusively […] (b) shares of corporate stock, shares in companies and other kinds of participations in companies.[362]

[361] *Berschader*, *supra* note 309, on which the Respondent relied, also contained an express provision regarding investment made through a company incorporated in a third State. The tribunal there concluded that an investment made through a company incorporated in the State of nationality of the claimant, but which was not a party to the proceedings, was excluded.
[362] Germany-Argentina BIT, Article 1.

The tribunal came to the conclusion that "the quality of a direct dispute is not affected by Siemens not being the direct shareholder of the local company."[363]

339. In considering the scope of a similar clause, the tribunal in *Mobil Corporation v. Venezuela* stated the matter even more clearly:

> The Tribunal notes that there is no explicit reference to direct or indirect investments in the BIT. The definition of investment given in Article 1 is very broad. It includes "every kind of assets" and enumerates specific categories of investments as examples. One of those categories consists of "shares, bonds or other kinds of interests in companies and joint ventures". The plain meaning of this provision is that shares or other kind of interests held by Dutch shareholders in a company or in a joint venture having made investment on Venezuelan territory are protected under Article 1. The BIT does not require that there be no interposed companies between the ultimate owner of the company or of the joint venture and the investment. Therefore, a literal reading of the BIT does not support the allegation that the definition of investment excludes indirect investments.[364]

340. The tribunals in *Cemex Caracas v. Venezuela*, *Ioannis Karadassopoulos v. Georgia*, *Tza Yap Shum v. Peru* and *Mobil v. Venezuela* also dealt with the coverage of indirect investments by applying a broad investment definition within the respective BITs. The tribunals all came to similar conclusions, namely that indirect investments were covered by the respective clauses. The Tribunal considers that these awards serve to confirm the conclusion it had already reached regarding the interpretation of Article 1(1) of the BIT.

341. The Tribunal therefore rejects the Respondent's second jurisdictional objection.

[363] *Siemens*, *supra* note 335, ¶150.
[364] *Mobil*, *supra* note 336, ¶165.

V. THIRD OBJECTION: THE SCOPE OF ARTICLE 8

342. The Respondent's third jurisdictional objection is that the Claimant's claims under Articles 2 and 4 of the BIT fall outside the scope of Article 8, from which the Tribunal derives its jurisdiction. The Respondent's submissions and the Claimant's response thereto raise three issues which the Tribunal will address separately.

343. First, the Respondent argues that the terms of Article 8 limit jurisdiction to two types of dispute: (a) those regarding the amount, or conditions of payment, of compensation in the case of expropriation or similar measures under Article 4, and (b) those concerning the right to free transfers under Article 5. The Respondent therefore contends that the Tribunal lacks jurisdiction in the present case with regard to the claims under Article 4, since the dispute between the Claimant and the Respondent is not over the amount or conditions of payment of compensation for expropriation but concerns the more fundamental question whether there has been an expropriation, or similar measure. According to the Respondent, Article 8 does not confer jurisdiction over that question. The Respondent also maintains that the Tribunal lacks jurisdiction over the claims under Article 2 for alleged breaches of the obligation to accord fair and equitable treatment, since disputes over that obligation are not mentioned in Article 8. The Respondent accepts that this third jurisdictional objection does not apply to the claims under Article 5 of the BIT. The Claimant disputes the Respondent's interpretation of Article 8, so far as it concerns its claims under Article 4 of the BIT (although it accepts that its claims under Article 2 fall outside the terms of Article 8 if those terms are considered in isolation). This issue is addressed in Part A, below.

344. Secondly, the Claimant raises a separate issue by contending that, even if the Respondent's interpretation of Article 8 is correct, the Constitutional Court of the Slovak Republic has already decided, in its judgment of 24 March 2011, that the shareholding in Apollo was the subject of expropriation or similar measures falling within Article 4(1). Consequently, it contends that the way is clear for the Tribunal to exercise jurisdiction under Article 8 to decide the dispute regarding compensation for what has already been established as an expropriation. The Respondent disputes the Claimant's analysis of the meaning and effect of the judgment of the Constitutional

Court. This argument does not affect the claims under Article 2. The judgment of the Constitutional Court is considered in Part B, below.

345. Finally, the Claimant maintains that, even if the Tribunal accepts the Respondent's interpretation of Article 8 and rejects the Claimant's argument regarding the judgment of the Constitutional Court, its jurisdiction is nevertheless established. According to the Claimant, the effect of the most favoured nation ("**MFN**") clause in Article 3 of the BIT is that the Claimant may take advantage of the broader jurisdictional provisions in other BITs concluded by the Slovak Republic and its predecessor State. On this basis, the Claimant maintains that the Tribunal has jurisdiction not only over its Article 4 claims but also over its claims under Article 2 of the BIT. The MFN issue is addressed in Part C, below.

A. THE INTERPRETATION OF ARTICLE 8

1. The Positions of the Parties

(1) The Respondent

346. The Respondent bases its argument that the Claimant's claims for violation of Articles 2 and 4 of the Treaty do not fall within the scope of Article 8 of the Treaty on the "text, context, object and purpose, and the circumstances of the conclusion and the preparatory work of the Treaty."[365] According to the Respondent, Article 8 is "plain on its face" and demonstrates that Slovakia has not agreed to arbitrate claims under Article 4, except in respect of the amount, or conditions of payment, of compensation, or any matter under Article 2.[366]

347. The Respondent asserts that Article 8 of the BIT confers jurisdiction only with respect to disputes "concerning the amount or the conditions of payment of a compensation pursuant to Article 4, or the transfer obligations pursuant to Article 5."[367] According to the Respondent, the use of the word "concerning" shows that expropriation claims are confined to the issue of the "amount or the conditions of payment of a compensation"[368] and excludes the questions whether there has been an expropriation or other similar

[365] Respondent's Memorial on Jurisdiction, ¶¶236, 239.
[366] *Ibid.*, ¶238.
[367] *Ibid.*, ¶¶242-243.
[368] *Ibid.*, ¶243.

measure and, if so, whether that measure was contrary to the requirements of Article 4(1) regarding matters other than compensation.[369] According to the Respondent, the finding of whether an expropriation has occurred and the finding of the amount of compensation are divisible and can be reviewed separately.[370]

348. According to the Respondent, this interpretation of Article 8 is strengthened when the provision is viewed in the context of the other provisions of the BIT, in particular, the title of Article 4 and the text of Article 4(4) and 4(5). The Respondent contends that Article 4(4) and 4(5) establish a "division of responsibility."[371] Article 4(4) permits a claimant to litigate the "legitimacy/legality" of an expropriation in the Slovak courts, but "does not contemplate access to an arbitral tribunal for a determination of lawfulness."[372] Article 4(5) allows an arbitral tribunal to review "the amount of compensation and conditions of payment", but nothing in Article 4(5) "suggests that arbitral review may go beyond 'the amount of the compensation and conditions of payment'."[373] The Respondent also places reliance on the phrase "pursuant to Article 4" in Article 8(1), which, it contends, ties the grant of jurisdiction under Article 8 to the division of responsibility laid down in Article 4(4) and 4(5). The Respondent notes that the decision of the *Austrian Airlines* tribunal "unreservedly, and unanimously endorsed the above textual analysis."[374]

349. Pointing to the VCLT, the Respondent argues that the object and purpose of the Treaty and the *travaux préparatoires* further deny the existence of consent to the arbitration of expropriation claims.[375] The Respondent considers that the Treaty's preamble is narrow as compared with other BITs,[376] and in any event notes that "the object and purpose cannot be used to add words to the text of the Treaty."[377] Additionally, the Respondent cites a previous draft of Article 8(2) to point out that the Contracting Parties restricted

[369] *Ibid.*, Respondent's Reply on Jurisdiction, ¶¶292-299.
[370] Respondent's Reply on Jurisdiction, ¶310.
[371] Respondent's Memorial on Jurisdiction, ¶248; Respondent's Reply on Jurisdiction ¶317.
[372] Respondent's Memorial on Jurisdiction, ¶248.
[373] *Ibid.*, ¶249.
[374] *Ibid.*, ¶¶250-251, citing *Austrian Airlines*, *supra* note 327, ¶97.
[375] *Ibid.*, ¶¶253-260.
[376] *Ibid.*, ¶253, citing *cf.* US-Ecuador BIT signed on 27 August 1993, entry into force 11 May 1997 (RL-54).
[377] *Ibid.*, ¶256, citing *Plama Consortium Limited v. Bulgaria* ICSID Case No. ARB/03/24 (Decision on Jurisdiction, 8 February 2005) (RL-222), ¶193 (hereinafter "*Plama*").

the scope from "related claims" to "specified claims."[378] According to the Respondent, this indicates a "deliberateness in narrowing the jurisdictional clause" and "reflects an undeniable intention not to extend jurisdiction beyond the limited scope of the text of Article 8."[379]

350. According to the Respondent, the States Parties' compliance with Article 4(4), and the Claimant's arguments regarding the effectiveness of the Slovak Courts is not relevant to interpreting Article 8(1).[380] The Respondent argues that even if compliance with Article 4(4) were relevant, the Claimant has not met the burden of demonstrating non-compliance.[381] The Respondent points to several remedies available to the Claimant under Slovak law that "allow foreign investors to obtain a determination that an expropriation has occurred within the meaning of the Treaty."[382] According to the Respondent, the Slovak Constitution enables foreign investors to bring their claims, and the courts of general jurisdiction would entertain four different actions under national statutes.[383] The Respondent also refers to the fact that the Claimant has initiated proceedings before the District Court of Bratislava, thus demonstrating that it considers there are remedies available to it under the laws of Slovakia.

(2) The Claimant

351. The Claimant begins by noting that its case under Article 4 is that its investment was the subject of indirect expropriation. In arguing that the Treaty covers more than just disputes over the amount of compensation, the Claimant takes issue with the Respondent's translation of Article 8(1) of the BIT.[384] The Claimant argues that the correct translation, as set out in the translation which it filed after the hearing, does not contain the words "pursuant to." For the Claimant, while "the use of the words '*the amount ... of (a) compensation*' seemingly limits the scope of the arbitration, [t]he

[378] *Ibid.*, ¶¶257-258, citing Annex III, Proposal for the negotiation regarding the agreement between the Czechoslovak Socialist Republic and Austria on the promotion and protection of investments, No. FMF III/4-17.639/89, dated 17 October 1989 (R-5).
[379] Respondent's Memorial on Jurisdiction, ¶¶257-260.
[380] Respondent's Reply on Jurisdiction, ¶¶332-336.
[381] *Ibid.*, ¶337.
[382] *Ibid.*, ¶347.
[383] *Ibid.*, ¶¶349-358.
[384] Claimant's Counter-Memorial on Jurisdiction, ¶¶237-245.

words '*concerning*' or '*with regard to*', however, are broad."[385] In particular, the Claimant takes issue with the Respondent's characterisation of "concerning" as a narrowing term similar to "about."[386]

352. The Claimant argues that the ordinary meaning of the words in Article 8 and the cross-references made to Article 4 demonstrate that jurisdiction is not confined to disputes over the amount of compensation.[387] Instead, the Claimant submits, the Tribunal is empowered to consider whether an event enumerated in Article 4(1) of the BIT has occurred and its precise nature. The contrary conclusion would deprive Article 8 of the BIT of purpose and meaning since then "[a] state could defeat investment arbitration merely by asserting that no expropriation had taken place and that would be the end of the matter for any investor and tribunal."[388]

353. The Claimant also disputes the relevance of Article 4(4) of the BIT for the interpretation of Article 8 of the Treaty. While Article 4(1) of the BIT covers "nationalization" and other "measures having similar consequences" as well as "expropriation", Article 4(4) only mentions "expropriation". The Claimant's claims, which arise *inter alia* from "measures having similar consequences", thus fall within the ambit of Article 8 of the BIT, which refers generally to all compensable events under Article 4 but are not encompassed by Article 4(4), which deals only with "expropriation."[389]

354. Furthermore, the Claimant argues that Articles 4(4) and (5) of the BIT provide for a right to domestic court review, but "the fact that the Treaty contains a specific right to challenge some aspects of expropriation before national authorities does not imply that this presents a system according to which some disputes should be settled before national authorities and others before international arbitration."[390]

355. According to the Claimant, this interpretation is consistent with the cases of *EMV*, *Renta 4*, *Sedelmayer v. Russian Federation*, *Telenor v. Hungary*, and *Tza Yap Shum v.*

[385] *Ibid.*, ¶¶242-244 (emphasis in original).
[386] Claimant's Rejoinder on Jurisdiction, ¶129.
[387] Claimant's Counter-Memorial on Jurisdiction, ¶247.
[388] *Ibid.*, ¶¶247-248.
[389] Claimant's Rejoinder on Jurisdiction, ¶152.
[390] *Ibid.*, ¶150.

Republic of Peru, in which tribunals either found that they had jurisdiction in situations with narrow BITs, or at least interpreted similar BITs to allow a tribunal to consider not just compensation claims but also expropriation claims.[391]

356. The Claimant advances that since the "(indirect) expropriation" effected by Amendment I is "manifestly illegal", there is nothing in Article 4(4) to be reviewed for legality.[392] The Claimant argues that it is generally accepted that the legality of expropriation is conditioned on four requirements, which must be fulfilled cumulatively in order for an expropriation to be legal.[393] The expropriatory measure must: (i) serve a public purpose, (ii) not be arbitrary or discriminatory, (iii) follow principles of due process, and (iv) provide prompt, adequate and effective compensation.[394] Regarding compensation, the Claimant notes that the Respondent "does not even attempt to say it has offered compensation and the fact that no compensation has been offered is confirmed by the Constitutional Court in its judgment dated 26 January 2011."[395]

357. The Claimant argues that due process was not fulfilled since "there was also no 'reasonable advance notice' to Euram Bank, no 'fair hearing' in front of an 'unbiased and impartial adjudicator' (or at all) and no procedure that was 'meaningful' to the investor."[396] The Claimant further asserts that if Article 4(4) is to be interpreted as argued by the Respondent and confers exclusive jurisdiction on the Slovak courts, the burden then falls on the Respondent "to show that it has put in place suitable effective legal mechanisms domestically that allow an investor a meaningful pursuit of the right to have the legality of the expropriation reviewed as provided for in Article 4(4) of the Treaty.[397] The Claimant advances that the Tribunal "need not look further than to the undeniable fact that no compensation has been offered. This finding alone suffices to

[391] Claimant's Counter-Memorial on Jurisdiction, ¶¶250-268; Claimant's Rejoinder on Jurisdiction, ¶¶120-126, citing *EMV v. Czech Republic*, UNCITRAL (Award on Jurisdiction, 15 May 2007) (hereinafter "*EMV*") (RL-141), *Renta 4 SVSA and ors v. Russian Federation*, SCC Case No. 24/2007 (Award on Preliminary Objections, 20 March 2009) (CL-134) (hereinafter "*Renta 4*"), *Sedelmayer v. Russian Federation*, SCC (Award, 7 July 1998) (CL-138) (hereinafter "*Sedelmayer*"), *Telenor Mobile Communications AS v. Hungary*, ICSID Case No. ARB/04/15 (Award, 22 June 2006) (CL-145) (hereinafter "*Telenor"*), *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6 (Decision on Jurisdiction and Competence, 19 June 2009) (hereinafter "*Tza Yap Shum*") (CL-148).
[392] Claimant's Counter-Memorial on Jurisdiction, ¶¶283-294.
[393] *Ibid.*, ¶¶284-285.
[394] *Ibid.*, ¶285.
[395] *Ibid.*, ¶286.
[396] *Ibid.*, ¶291.
[397] *Ibid.*, ¶292.

establish the illegality of the indirect expropriation on the level of international and treaty law."[398]

358. The Claimant rejects the Respondent's contention that there are remedies available to the Claimant to pursue its claim other than through international arbitration under the Treaty.[399] Arguing that the burden of proof to demonstrate the availability of other options is on the Respondent, the Claimant advances that the Slovak courts of general jurisdiction have no jurisdiction over this matter and that there is no effective protection available to the investor before Slovak authorities.

359. The Claimant responds to the Respondent's suggestion that an investor could seek protection of its rights before Slovak courts through an action based on Act No. 514/2003 Coll. on Liability for Damages caused by the Exercise of Public Authority.[400] The Claimant argues that this can only be relied on when damage is caused "to an individual or legal entity by an organ or representative of the State within individual proceedings," but does not provide for a remedy to an investor when the damage is caused by an act of Parliament.[401]

2. The Tribunal's Analysis

361. In accordance with the principles already set out (in paragraphs 315-317, above), the Tribunal begins by considering the "ordinary meaning" of the terms used in Article 8 of the BIT. In doing so, it focuses only on the treatment of disputes regarding Article 4 of

[398] *Ibid.*, ¶293.
[399] *Ibid.*, ¶¶335-422; Claimant's Rejoinder on Jurisdiction, ¶¶158-208.
[400] Claimant's Counter-Memorial on Jurisdiction, ¶¶413-415.
[401] *Ibid.*, ¶¶413-415.
[402] Claimant's Rejoinder on Jurisdiction, ¶¶202-203, 205.

the BIT, since it is common ground that disputes regarding Article 5 claims are within the scope of the provision.[403]

362. The critical words are those in Article 8(1) which define the type of dispute over which Article 8(2) gives an arbitration tribunal jurisdiction. According to the Respondent's translation,[404] Article 8(1) requires that the dispute must be one "concerning the amount or the conditions of payment of a compensation pursuant to Article 4." The Claimant's post-hearing translation is that the dispute must be one "with regard to the amount or the arrangements for payment of compensation in accordance with Article 4."

363. The words used in this part of Article 8(1) clearly limit the scope of that provision, which is thus rendered far more restrictive than the disputes clauses found in many BITs. The Parties are agreed on that much and the Claimant does not suggest, for example, that the wording of Article 8(1) could embrace its claim for a violation of Article 2 of the BIT unless the Tribunal accepts its MFN argument. Unless it is to be read as modified by the effect of the MFN provision, Article 8(1) plainly confines the Tribunal to disputes regarding Articles 4 and 5. The question, however, is whether it is more restrictive than that and denies the Tribunal jurisdiction to determine whether there has been an expropriation or other act falling within Article 4(1).

364. The Tribunal does not consider that any significance attaches, for present purposes, to the differences between the translations proffered by the Parties and set out at page 95, above. Whether the provision is correctly translated as referring to "conditions of payment" or "arrangements for payment" has no relevance to the issue before the Tribunal. Nor does the question whether the indefinite article should appear before the word "compensation." The other two differences require a little more attention. The Respondent places some reliance on the word "concerning", arguing that it has a limitative effect. However, the Tribunal considers that it is no more (and no less) limiting than "with regard to" and that the two expressions are, for practical purposes, synonymous in the present context. It has come to the same conclusion regarding the terms "pursuant to" and "in accordance with".

[403] *See*, Respondent's Memorial on Jurisdiction, ¶8; Claimant's Counter-Memorial on Jurisdiction, ¶¶233-236.
[404] *See* p. 95, above.

365. The Tribunal considers that, even if it treats as definitive the most recent translation offered by the Claimant, the interpretation advanced by the Respondent more accurately reflects the ordinary meaning of the words used. According to the Claimant's translation, Article 8(1) gives jurisdiction only over a dispute "with regard to the amount or the arrangements for payment of compensation pursuant to Article 4." The language is narrow and specific. It is in marked contrast to the equivalent provision in the BIT concluded only eighteen months earlier between the Belgian-Luxembourg Economic Union and the CSFR, which was considered by the tribunal in the case of *EMV v. Czech Republic* (the award in which is discussed below). Article 8 of that BIT provided for an arbitral tribunal to have jurisdiction over disputes "concerning compensation due by virtue of" the provisions equivalent to those of Article 4 of the present treaty. That provision was held to confer jurisdiction over the issue whether an expropriation or similar measure had occurred so as to give rise to a right to compensation. Article 8(1) of the present treaty specifies that the dispute must be about not simply "compensation" but "the *amount* or the *arrangements for payment* of compensation." If the intention had been to confer upon an arbitral tribunal established under Article 8 the jurisdiction to determine whether there was any entitlement to compensation at all, it is difficult to see why the words "the amount or the arrangements for payment" were included; the Claimant's interpretation of Article 8(1) effectively renders those words redundant and, in doing so, runs counter to the principle of treaty interpretation that all words used should, if possible, be given meaning.

366. The Claimant and the Respondent also differ over whether the words "in accordance with Article 4" qualify the term "compensation" or the whole phrase "the amount or the arrangements for payment of compensation." The Claimant argues that the qualification relates to the word "compensation" and thus directs the reader to the basic entitlement to compensation in Article 4(1), which, so the Claimant contends, means that an Article 8 tribunal is given jurisdiction to rule on whether or not the conditions in Article 4(1) have been met. The Respondent argues that the qualifying words refer to the whole phrase "the amount or the arrangements for payment of compensation". The Tribunal finds the Respondent's analysis more persuasive. The structure of Article 8(1) is such that the phrase "in accordance with Article 4" would most naturally be seen as

referring to the whole of what precedes it; there is no grammatical or logical reason for singling out the word "compensation" from the remainder of the phrase in which it appears.

367. The Claimant further contends that "in accordance with" should be given the same meaning as "due by virtue of". As the arbitral tribunal in *Renta 4 v. Russian Federation* (an award on which the Claimant relied) said, the latter phrase necessarily raises the question "who determines whether compensation is indeed 'due'."[405] The Tribunal is not persuaded that the two phrases carry the same meaning. To say that compensation is due by virtue of a provision is a clear reference to the existence of an entitlement to compensation derived from that provision. The term "in accordance with" does not have the same clear reference to entitlement; it is more commonly used as synonymous with "pursuant to" or "according to" (the other translations offered in respect of this part of Article 8(1)) and thus acts in large part as a cross-reference. In the context of the present BIT, the phrase "in accordance with Article 4" also seems more naturally to tie the provisions of Article 8(1) in with those of Article 4(5), which provides (again using the Claimant's latest translation) as follows:

> The investor shall have the right to have the amount of the compensation and the method of payment reviewed either by the competent authorities of the Contracting Party which prompted the expropriation or by an arbitral tribunal *in accordance with Article 8 of this Agreement*. (Emphasis added)

The Tribunal considers that the italicised words and the use in Article 8(1) of the phrase "in accordance with Article 4" were intended to create a close relationship between the two provisions. Under that relationship, the only type of dispute regarding Article 4 in respect of which Article 8 confers jurisdiction upon an arbitration tribunal is the type of dispute which Article 4 expressly provides may be referred to such a tribunal, *i.e.* those contemplated by Article 4(5).

368. Article 31(1) of the VCLT requires that the terms of a treaty be interpreted in their context. In the present case, the most important part of the context of Article 8 is Article 4, to which Article 8(1) makes express reference. The Tribunal has already considered several aspects of Article 4, but one more requires attention. Article 4(4)

[405] *Renta 4*, *supra* note 391, ¶27.

provides that an investor shall have the right to have the "legality"[406] of an expropriation reviewed by the national authorities; no reference is made to review of that question by any other body. By contrast, Article 4(5), as has already been seen, gives the investor the right to have the amount of compensation and the arrangements for paying it reviewed by either the national authorities or an Article 8 tribunal. According to the Respondent, Article 4(4) and 4(5), read together, confirm the comparatively limited role which the Parties to the BIT intended to give to an arbitral tribunal established under Article 8.

369. The Claimant seeks to counter this apparent effect of Article 4(4) and 4(5) in a number of ways. First, it maintains that Article 4(4) applies only to "expropriation" and not to the other types of measure referred to in Article 4(1). It sees that fact as possessing particular significance, because its argument on the merits is that the present case is one of indirect taking and not of classic "expropriation." The Tribunal does not agree that Article 4(4) is limited in the way suggested by the Claimant. It notes that the Respondent's translation of Article 4(1) refers to "expropriation measures, *including* nationalization or other measures having the same consequences." Whether that is in fact a more accurate rendition into English of the authentic texts of Article 4(1), it undoubtedly reflects the overall approach of Article 4. The terms "expropriation" or "expropriation measures" are used in paragraphs (2) to (5) of Article 4 in such a way that they are plainly intended to encompass all of the types of measures referred to in Article 4(1). Thus, the provisions for the amount and arrangements for payment of compensation in Article 4(2) are applicable to all "expropriation measures." If the Claimant's analysis were correct, then neither Article 4(2) nor Article 4(3) (a provision on which the Claimant relies in other parts of its argument) would be applicable to the type of measure of which it claims to have been the victim.

370. Secondly, the Claimant maintains that Article 4(4) is intended to apply only to measures taken with regard to specific property under powers granted by a statute or similar legislation of general application and not to a measure which is itself legislative in form (as was the case with Amendment I). The Tribunal can see nothing in the text

[406] The Respondent's translation refers to "legitimacy." The Tribunal does not consider that the difference between these two terms has any significance for the issues currently under consideration.

of Article 4 to support, let alone compel, such an interpretation. Nor does the Tribunal agree that considerations of logic compel it to read such a limitation into the provision. There is no reason in principle why States should not agree that the legality of any type of expropriation measure (including a legislative one) could be reviewed by the competent national authorities.

371. Lastly, the Claimant contends that Article 4(4) lacks the significance which the Respondent attributes to it, because it provides only for the right to have the legality of the expropriation reviewed and does not make any provision for the national authorities to review the question whether or not an expropriation has occurred. In the Claimant's view, the question whether there has been an expropriation or comparable measure has to be determined by an arbitral tribunal, even though the question whether or not that measure is lawful is reserved to the relevant national authorities. The Tribunal agrees with the Respondent that this analysis is unrealistic and is unsupported by the text of Article 4(4) and 4(5). The power to determine whether an expropriation or comparable measure is lawful is a far more extensive power than is the power to determine the amount of compensation to be paid (or the arrangement for the payment of that compensation) in respect of such a measure. It is also one which, in any case in which legality is contested, must necessarily be exercised first. The idea that an investor might go to an Article 8 tribunal for the determination of whether there had been an expropriation, then to the national authorities for review of the legality of that expropriation and, finally, back to an Article 8 tribunal for the assessment of the amount of compensation is far too cumbersome to be plausible.

372. The Tribunal agrees with the Respondent that Article 4(4) and 4(5) provide for a division of responsibility. Article 4(4) reserves disputes about the principle of expropriation to the national authorities, while the amount of compensation and the arrangements for payment of compensation can be referred to the national authorities or to an arbitration tribunal under Article 8.

373. Both Parties referred to a number of arbitration awards which they invoked in support of their respective interpretations of Articles 4 and 8 of the BIT. The Tribunal has examined these awards with care. While it accepts that they offer some assistance, the Tribunal considers that a degree of caution is called for in relying upon them. It is not

simply that there is no doctrine of binding precedent in international law; most of the awards invoked by the Parties concerned the jurisdictional provisions of other BITs which use different terms from those employed in the present BIT. As such, expressions of opinion about the meaning of those terms are only indirectly relevant to the interpretation of the present BIT.

374. The exception is the award of the tribunal in *Austrian Airlines v. Slovak Republic*, which concerned the same BIT as that in the present case. The tribunal in that case unanimously[407] concluded that the ordinary meaning of the words used in Article 8 of the BIT meant that jurisdiction was "limited to disputes about the amount of the compensation and does not extend to review of the principles of expropriation."[408] It found that such an interpretation was confirmed by the provisions of Article 4(4) and 4(5) which it considered provided that

> 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 so before the local authorities. The ordinary meaning of Article 4(4) and 4(5) is plain.[409]

The tribunal rejected an argument that this conclusion was contrary to the object and purpose of the BIT:

> 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.[410]

[407] Professor Kaufmann-Kohler, Judge Brower and Dr Trapl constituted the tribunal. Judge Brower dissented, but not on this point.
[408] *Austrian Airlines*, *supra* note 327, ¶96.
[409] *Ibid.*, ¶98.
[410] *Ibid.*, ¶103.

The tribunal in *Austrian Airlines* thus analysed the relevant provisions of the BIT in exactly the same way as the present Tribunal has done.

375. *EMV v. Czech Republic* was relied upon by both Parties. That case concerned the 1989 BIT between the Belgium-Luxembourg Economic Union and the Czechoslovak Socialist Republic. Article 8 of that BIT provided that an arbitration tribunal would have jurisdiction over "disputes … concerning compensation due by virtue of Article 3 paragraphs (1) and (3)." Article 3(1) provided that

> Investments made by investors of one of the Contracting Parties in the territory of the other Contracting Party may not be expropriated or subjected to other measures of direct or indirect dispossession, total or partial, having a similar effect, unless such measures are
> (a) taken in accordance with a lawful procedure and are not discriminatory;
>
> (b) accompanied by provisions for the payment of compensation, which shall be paid to the investors in convertible currency and without delay. The amount shall correspond to the real value of the investments on the day before the measures were taken or made public.[411]

The *EMV* tribunal rejected an argument similar to that advanced by the Respondent in the present case and held that the jurisdiction conferred by Article 8 of the Belgium-Luxembourg-CSR BIT included jurisdiction to determine whether an expropriation or other measure within the meaning of Article 3(1) had taken place. It stated that

> In the absence of a clear provision for these issues to be determined in some other forum these determinations must be made by the tribunal which is determining the amount of compensation payable or the system of investment protection created by the Treaty will be rendered wholly ineffective.[412]

However, the tribunal expressly compared the provisions in the BIT which it had to apply with those of the BIT at issue in the present case:

> The above conclusion is supported by the fact that the treaty is silent as to where and how the issues of expropriation and dispossession are to be determined. The Respondent has suggested that this could be in the local courts or under inter-State arbitration under Article 7 of the treaty. However, these solutions are neither practicable nor expressly intended by the Treaty.

[411] The provisions of Article 3(3) are not material for present purposes. The treaty was authentic in Czech and French; the quotation is from a translation used by the tribunal which appears to have been agreed between the parties.
[412] *EMV*, *supra* note 391, ¶58.

> One can presume that a foreign investor will not generally seek redress for the action of a government expropriating it or dispossessing it of its property in the local courts *unless that is expressly provided in the BIT (as is the case in the BIT between Austria and the Czech and Slovak Federal Republic)*.[413]

The tribunal went on to say that, if it had been the intention and policy of the Czechoslovak Government at the time of negotiating the BIT to exclude the question whether there had been an expropriation justifying compensation from an Article 8 tribunal, "it could and should have expressly provided how all issues prior to the question of compensation were to be determined, *i.e.* local courts or international tribunal, and then to provide separately for how compensation was to be resolved if not agreed."[414]

376. Taken as a whole, therefore, the analysis of the *EMV* tribunal tends to support the arguments of the Respondent in the present arbitration. Article 4(4) of the present BIT contains precisely the express provision as to how all issues prior to the question of compensation were to be resolved. Moreover, the tribunal referred to the present BIT, by way of comparison with the treaty it had to construe, in such a way as to suggest that the answer would have been different under the present BIT.

377. That conclusion is reinforced by the analysis of the English High Court,[415] before which the award was challenged under a provision in the United Kingdom's Arbitration Act which required the Court to rehear the question of jurisdiction.[416] The High Court concluded that the tribunal had been right in finding that it had jurisdiction. In reaching that conclusion, however, the judge, Simon J, emphasised two features of the Belgium-Luxembourg BIT which are absent from the present BIT. First, he held that the phrase "concerning compensation" could not, as a matter of the ordinary meaning of the words used, be read to mean only "relating to the amount of compensation".[417] In the present case, however, the phrase used in Article 8(1) is "with regard to the *amount or the arrangements for payment of* compensation". Secondly, Simon J emphasised that the phrase "due by virtue of" in Article 8 of the BIT at issue in the case before him

[413] *Ibid.*, ¶¶60-61 (emphasis added).
[414] *Ibid.* ¶63.
[415] *Czech Republic v. EMV SA* [2007] EWCA 2851 (Comm), Simon J. (RL-141).
[416] *Ibid.*, ¶13.
[417] *Ibid.*, ¶43.

"connects entitlement to compensation to events specified in Articles 3(1) and (3)."[418] That phrase is noticeably absent from Article 8 of the present BIT.

378. The Respondent's case is also supported by *RosInvest v. Russian Federation*.[419] That case arose under the 1989 UK-USSR BIT, the jurisdictional provision of which provided (in the English text) that

> This Article shall apply to any legal disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former either concerning the amount or payment of compensation under Articles 4 or 5 of this Agreement, or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement, or concerning the consequences of the non-implementation, or of the incorrect implementation, of Article 6 of this Agreement.[420]

The text was thus similar to that in Article 8(1) of the present BIT in expressly referring to the "amount" of compensation and in not employing the phrase "due by virtue of". On the other hand, there was no equivalent of Article 4(4) and (5). The tribunal unanimously concluded[421] that the clause quoted above did not confer jurisdiction to determine whether there had been an expropriation. It considered that a grant of jurisdiction to determine a dispute regarding the "amount of compensation" did not extend to determining whether there had been an act giving rise to an entitlement to compensation.[422]

379. On the other hand, the Claimant's case derives some support from the award in *Renta 4 v. Russian Federation*. The relevant BIT in that case was the 1991 BIT between Spain and the Russian Federation, Article 10 of which conferred jurisdiction with regard to "any dispute … relating to the amount or method of payment of the compensation due under Article 6 of this Agreement." Article 6 provided that

> Any nationalization, expropriation or any other measure having similar consequences taken by the authorities of either Party against investments made

[418] *Ibid*., ¶45.
[419] *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005 (Jurisdiction Award, 5 October 2007) (hereinafter "*RosInvest*") (CL-135).
[420] The tribunal held that the differences between this text and the Russian text were not significant for the purposes of the question it had to decide.
[421] Sir Franklin Berman added a note to ¶123 that the precedential effect of the award had to be treated with caution.
[422] *RosInvest*, *supra* note 419, ¶¶110-114.

> within its territory by investors of the other Party, shall be taken only on the grounds of public use and in accordance with the legislation in force in the territory. Such measures should on no account be discriminatory. The Party adopting such measures shall pay the investor or his beneficiary adequate compensation, without undue delay and in freely convertible currency.

380. The tribunal unanimously concluded that it had jurisdiction over whether an expropriation or similar measure within the meaning of Article 6 had taken place. The award is closely reasoned and contains an important critique of the award in *RosInvest*. It also examines in greater detail than any of the other awards cited by the Parties the practical difficulties to which a jurisdiction limited to determining the amount or method of payment of compensation could give rise. For a number of reasons, however, the Tribunal is not persuaded that the award in *Renta 4* should lead it to accept the Claimant's arguments in the present case.

381. First, the wording of Article 10 of the Spain-Russian Federation BIT differs in an important respect from that of Article 8 of the BIT in the present case. It is true that both provisions expressly refer to the "amount" and the "method of payment" (or in the present BIT, the "arrangements for payment"), unlike the BIT at issue in the *EMV* case. Nevertheless, the *Renta 4* tribunal was faced with a clause which conferred jurisdiction over disputes "relating to the amount or method of payment of the compensation *due under Article 6* of this Agreement." Article 8 of the present BIT does not use the phrase "due under" or "due by virtue of" but rather uses the phrase "in accordance with". The Tribunal has already referred to the significance it attaches to that phrase (a significance also mentioned by the High Court in *EMV*). The *Renta 4* tribunal itself considered the phrase to be significant.[423]

382. Secondly, the BIT under consideration in *Renta 4* contained no equivalent of Article 4(4) and 4(5) of the present BIT. The significance of that point is thrown into sharp relief by paragraphs 58 and 59 of the *Renta 4* award. Having noted what it saw as the unsatisfactory consequences of a provision leaving the question whether there had been an expropriation to be determined by the national courts of the respondent State, the *Renta 4* tribunal went on to say

[423] *See*, *e.g.*, *Renta 4*, *supra* note 391, ¶¶31, 35.

> The present Tribunal does not deny that such a provision could be given effect if such was the clear import of the Treaty. Article 6 might have explained how entitlement is to be determined. Article 10 might have stipulated that the proposition that compensation is "due" may be established only by an authority identified in Article 6. But there is nothing of the kind.[424]

In the present BIT, however, there is "something of the kind", namely the provisions of Article 4(4) and Article 4(5).

383. Lastly, it is noticeable that one of the *Renta 4* arbitrators, Judge Brower, was also a member of the tribunal in *Austrian Airlines* and concurred in the latter tribunal's decision that Article 8(1) of the present BIT does not confer jurisdiction over anything other than the amount and arrangements for payment of compensation. The award in *Austrian Airlines* was given some six months after that in *Renta 4* award and expressly distinguishes the BIT between Austria and the Slovak Republic from those at issue in *Renta 4*, commenting that what might have been "a valid argument under the treaties applicable in *EMV v. Czech Republic* and *Renta 4 v. Russia* … cannot succeed here in the light of the unmistakable meaning of Articles 8 and 4."[425] Judge Brower concurred both in this part of the *Austrian Airlines* award and in the corresponding part of *Renta 4*.

384. The reasoning in these four awards and in the judgment of the High Court in *EMV* thus reinforces the conclusion which the present Tribunal had provisionally reached in relation to the ordinary meaning of the words in Articles 4 and 8 of the present BIT. The Tribunal did not find the other awards cited by the Parties of much assistance. *Berschader v. Russian Federation*, on which the Respondent relied, comes to the same conclusion as *RosInvest*, but the relevant part of the award is *obiter* and contains no reasoning not set out in the other awards reviewed above. *Saipem v. Bangladesh*, *Telenor v. Hungary* and *Sedelmayer v. Russian Federation* are invoked by the Claimant, because they all take the view that the BIT in question conferred jurisdiction to determine whether there had been an expropriation but in none of the cases was the issue contested. In addition, the BIT in *Saipem* contained an arbitration clause in terms significantly broader than that in the present case. *Tza Yap Shum v. Peru* contains more

[424] *Ibid*., ¶¶58-59.
[425] *Austrian Airlines*, *supra* note 327, ¶101.

of a discussion, but the relevant treaty provision was significantly different from that in the present case.

385. Two other matters need to be considered before the Tribunal can reach a final conclusion on this point. First, the Claimant argues that a broader construction is justified by the object and purpose of the BIT. It maintains that the purpose of the BIT is to ensure investor protection and that this goal justifies a more expansive construction of Article 8 so as to render the right of recourse to arbitration, which it sees as a key feature of that protection, more effective. In this argument, it derives considerable support from the reasoning in *Renta 4* and, to some extent, from that of the High Court in *EMV*. The Tribunal agrees that the protection of foreign investment is one (though not the only one) of the purposes of the BIT and is, therefore, an important factor in interpretation of the provisions of the BIT. That does not, however, entitle the Tribunal to disregard or ride roughshod over the provisions agreed between the States Parties to the BIT. Reference to the object and purpose of a treaty does not entitle a tribunal to rewrite the bargain between the parties to that treaty on the ground that they could have made a better bargain which would more effectively have secured the object and purpose of their treaty. In particular, the Tribunal cannot accept what appears to be the premise of the Claimant's argument, namely that treaty provisions laying down standards of substantive treatment for an investor must be deemed ineffective if they are not enforceable through arbitration. It may well be the case that such provisions are more effective if they are enforceable in that way, but the States Parties to the present BIT clearly decided that (subject to the later discussion of the MFN clause) they would adopt several substantive standards, such as the requirement of fair and equitable treatment in Article 2, which would not be enforceable through arbitration. There are numerous other BITs in which the same choice has been made and one State which is both a major recipient of foreign investment and the State of nationality of some important investors, namely Australia, has recently announced that its policy will be not to include any investor-State arbitration provisions in its future BITs. Like the tribunal in the *Austrian Airlines* case, the Tribunal considers, therefore, that considerations of the object and purpose of the BIT cannot prevail over the clear meaning of the words used in Articles 4 and 8 of the BIT.

386. Secondly, the Claimant argued that there was in reality no possibility of it being able to contest the issue whether it had been the victim of an expropriation or equivalent measure in proceedings in the courts of the Slovak Republic, so that a broader interpretation of Article 8 was required. The Tribunal does not agree. It is unable to see how an argument about what remedies might be available in 2012 can be relevant to the interpretation of an agreement concluded twenty years earlier. Moreover, the Claimant's argument sits uneasily alongside the fact that it has commenced proceedings in the Slovak courts raising, *inter alia*, precisely this question.

387. The Tribunal's analysis of the text of Article 8 in its context and in the light of the object and purpose of the BIT having led to a clear conclusion, it is not necessary to examine the *travaux préparatoires* of the BIT. However, since these will have to be examined in connection with the MFN argument (considered below), the Tribunal observes that, although the *travaux préparatoires* of Article 8 make clear that the provision was intentionally narrowed from the much wider clause originally proposed by Austria, they contain no clear indication of precisely how narrow the new clause was intended to be and thus do not add anything to the preceding analysis.

388. The Tribunal thus concludes that, subject to what it will say in the following sections of the award regarding the 2011 judgment of the Constitutional Court and the Claimant's MFN argument, the Respondent's third jurisdictional objection is well-founded.

B. THE JUDGMENT OF THE CONSTITUTIONAL COURT

1. The Positions of the Parties

389. The Tribunal must next consider the Claimant's argument regarding the effect of the 2011 judgment of the Constitutional Court on the scope of the Tribunal's jurisdiction regarding the Article 4 claims. Each Party submitted expert evidence on the effects of the judgment: the Respondent annexed to its Reply a witness statement from Professor JUDr Ján Klučka, CSc, while the Claimant submitted with its Rejoinder a witness statement from Professor JUDr Alexander Bröstl, CSc. Both experts are former judges of the Constitutional Court. Although this issue arises in relation to the Respondent's third jurisdictional objection, the Tribunal begins with the arguments put forward by the

Claimant, since it was the Claimant which advanced the argument that the judgment provides a response to that jurisdictional objection.

(1) The Claimant

390. The judgment of the Constitutional Court of the Slovak Republic, adopted on 26 January 2011 and delivered on 24 March 2011,[426] concluded that Amendment I contravened the Constitution of the Slovak Republic in the following ways:

(1) it amounted to a material restriction of property rights, contrary to Article 20 of the Constitution and Article 1 of the First Protocol to the ECHR;
(2) it entailed an unjustified interference with the right of the private health insurers to conduct their business, contrary to Article 35 of the Constitution;
(3) it involved a Constitutionally unacceptable interference with the general principle of the rule of law.

The case had been brought before the Constitutional Court by a group of deputies of the National Assembly of the Slovak Republic.

391. The Claimant maintains that the judgment amounts to a finding that its investment was the subject of an unlawful expropriation and that "[t]he matter is now finally determined by the Slovak Republic's highest court on this issue and is *res judicata*."[427] The Claimant acknowledges that it was not a party to the proceedings before the Constitutional Court but maintains that the judgment has effect *erga omnes*, so that "it does not matter whether the Constitutional Court's decision specifically addresses an individual investor."[428]

392. While the judgment does not speak of "expropriation" but rather of "substantial restriction of property rights,"[429] the Claimant argues that the "facts subsumed by the Constitutional Court under the Slovak constitutional law category of 'substantial restriction of property rights' can be subsumed under the concept of 'measures having similar consequences' in Article 4(1) of the Treaty."[430] In any event, the Claimant

[426] PL.ÚS 3/09-378 (CL-105).
[427] Claimant's Counter-Memorial on Jurisdiction, ¶¶297-298.
[428] Claimant's Rejoinder on Jurisdiction, ¶206.
[429] *Ibid.*, ¶¶184-192.
[430] *Ibid.*, ¶184, citing Dr Bröstl's Legal Opinion (CEWS-3).

submits that since the Tribunal has to decide the dispute under the Treaty, and thus under international law, the precise categorization of the act under Slovak constitutional law is irrelevant[431] since what matters in international arbitration is the factual determination of the measure under international law, not under the national law of respondent State.[432]

(2) The Respondent

393. The Respondent replied that the doctrine of *res judicata* could not be applicable as the Claimant had not been a party to the proceedings before the Constitutional Court. According to the Respondent, the doctrine of *res judicata* applies only in the event that the parties to the earlier proceedings are the same as those in the subsequent proceedings. In any event, the Respondent, referring to the language used by the Constitutional Court, maintained that the judgment did not amount to a finding of expropriation or other similar measures but was based upon different considerations.

2. The Tribunal's Analysis

394. The Tribunal agrees with the Respondent that this is not a case of *res judicata*. As the British-United States Claims Tribunal explained:

> It is a well established rule of law that the doctrine of *res judicata* applies only where there is identity of the parties and of the question at issue.[433]

These requirements were reiterated by the Permanent Court of International Justice in its Opinion on the *Polish Postal Service in Danzig*, and feature in the literature on *res judicata*.[434] Neither the Claimant in the proceedings before this Tribunal, nor its subsidiary EIC, was party to the proceedings before the Constitutional Court, so the doctrine of *res judicata* has no application.

395. Nevertheless, that does not make the judgment of the Constitutional Court irrelevant. Article 4(4) of the BIT gives the Claimant the right to have the legitimacy of an act of

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[431] *Ibid.*, ¶188.
[432] Claimant's Rejoinder on Jurisdiction, ¶188-191, citing *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL (Partial Award, 13 September 2001) (hereinafter "*CME*") (RL-134), ¶467; *Siemens*, *supra* note 335, ¶267; and *Kardassopoulos*, *supra* note 336, ¶182.
[433] *The Newchang*, (1921) Nielsen's Report 411, p. 415.
[434] *Polish Postal Service in Danzig*, PCIJ Reports, 1925, Series B No. 11, p. 30; *See*, *e.g.*, the chapter of *res judicata* in B. Cheng, *General Principles of Law* (1953) (RL-297), p. 339 *et seq.*

expropriation or other similar measure determined by the competent authorities of the Respondent. If, as the Claimant suggests, one effect of the judgment of the Constitutional Court is that the legality of Amendment I cannot be raised in other proceedings before the Slovak courts, because the matter was treated as having been settled by that judgment, it would be unduly formalistic to hold that the judgment of the Constitutional Court could not qualify as the Article 4(4) ruling for the purpose of proceedings brought under Articles 8 and 4(5) of the BIT. The Tribunal considers, therefore, that it must inquire into what was decided by the judgment of the Constitutional Court.

396. In doing so, it is particularly important to be clear as to precisely what is the issue before this Tribunal. That issue is whether or not the Constitutional Court found that Amendment I amounted to an expropriation, or a measure of similar effect, within the meaning of Article 4(1) of the BIT. The Court was not, of course, applying the BIT. It judged Amendment I against the yardstick of the Constitution and the provisions of Article 1 of Protocol I to the European Convention on Human Rights. Nevertheless, that does not render the judgment irrelevant for present purposes. If the Court considered Amendment I to be an expropriation, or characterised it in such a way as to make clear that the Court treated Amendment I as an act having effects similar to an expropriation, that judgment would be of considerable importance for the present proceedings.[435]

397. It follows that the only part of the judgment of the Constitutional Court which is material is its finding that Amendment I constituted a "forced restriction of ownership rights of health insurance agencies and their shareholders."[436] The Court's other findings – that the Amendment was a violation of the Constitutional right to conduct a

[435] In its Rejoinder, the Claimant argued that Slovakia could not rely upon Slovak law, as applied by the Court, to avoid its obligations under international law, *see* Claimant's Rejoinder on Jurisdiction, ¶¶188 et seq. The Tribunal does not see the relevance of this argument. There is a well established principle in international law that a State may not rely upon its own domestic law to justify non-compliance with a treaty obligation but that is not the issue here. There is no suggestion that the Respondent can rely upon the judgment of the Constitutional Court, or upon that Court's application of Slovak law, to avoid being found in breach of the BIT; the question is whether the judgment of the Constitutional Court amounts to a finding that there had been an expropriation or other similar act, thus enabling the Claimant to avoid the limits on the jurisdiction of the Tribunal under Article 8 of the BIT which the Tribunal has identified in Chapter V(A) of the award.

[436] Paragraph (a) of the Court's conclusions (Part VI, p. 63 of the English translation supplied by the Claimant; (CL-105)).

business and that it infringed the Constitutional protection of the rule of law – address different matters and have no direct bearing on whether the Amendment was considered to be an expropriation or similar measure.

398. In concluding that the Amendment was a restriction of ownership rights, the Court applied Article 20 of the Constitution, the relevant parts of which read as follows:

> (1) Everyone shall have the right to own property. Property rights of all owners shall be uniformly construed and equally protected by law. The right of inheritance is guaranteed.
> …
>
> (4) Expropriation or restrictions of right in property may be imposed only to the necessary extent and in public interest, based on the law and for a valuable consideration.

399. The Court also took account of Article 1 of Protocol I to the ECHR, which reads as follows:

> *Protection of Property*
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

400. It is apparent that both of these provisions, while they include the acts of expropriation, also embrace other measures concerning property which fall short of anything that could be regarded as expropriation. In the case of Article 20 of the Constitution, the Respondent's expert witness, Professor Klučka, testified that the concept of forced restriction of ownership rights included expropriation but also encompassed a range of lesser measures. Professor Bröstl, the Claimant's expert witness, considered that

> forced restriction of ownership rights in Article 20(4) of the Constitution is close to an equivalent to indirect expropriation ("measures having similar consequences" as expropriation and nationalization) in the sense of Article 4(1) of the Austria/Slovakia BIT.

He did not, however, consider the two concepts to be identical.[437]

401. In the case of Article 1 of the Protocol, the ECtHR has held, in *Sporrong and Lönnroth v. Sweden* that

> That Article comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it is set out in the second sentence of the same paragraph. The third rule recognizes that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.[438]

The ECtHR, however, recognizes a close relationship between these three rules.

402. The Tribunal considers that Article 20 of the Constitution and Article 1 of the Protocol are broader in scope than Article 4 of the BIT and were treated as such by the Constitutional Court in its judgment of 24 March 2011. That is scarcely surprising. Both Article 20 of the Constitution and Article 1 of the Protocol contain a comprehensive protection of property rights. Article 4 of the BIT, on the other hand, is only one of a number of provisions protecting the property rights of an investor. In particular, Article 2(1) of the BIT requires that the investment be accorded fair and equitable treatment. Some aspects of the protection afforded by Article 1 of the Protocol and Article 20 of the Constitution, as discussed in the judgment of March 2011 (and the Strasbourg case-law cited therein), appear to correspond to the protection afforded by the right to fair and equitable treatment, rather than the protection from expropriation and similar measures.

403. The Constitutional Court did not find that Amendment I amounted to expropriation (and the plaintiffs in the proceedings before it seem not to have contended that it did). At page 49 of its judgment, the Court stated that

> When there is expropriation, there is transfer of ownership title to the property. When there is restriction of ownership, no transfer occurs, there is only interference with the scope of entitlements arising out of the ownership title warranted by the Constitution (II. US 8/97). Section 20 subsection 4 of the Constitution suggests that interference with ownership rights (either through expropriation or forced restriction thereof) may be

[437] CEWS 3, ¶13(a).
[438] (1982) 68 ILR 86, ¶61.

> acceptable from the point of view of the Constitution only if it is made in the public interest and to the extent, which is strictly necessary, by virtue of the law and against fair compensation.[439]

Having thus distinguished between expropriation and restriction of ownership rights, the Court then proceeded to a finding that Amendment I amounted to a restriction of ownership rights.

404. Nevertheless, as the Claimant points out in its Rejoinder, Article 4(1) deals not only with expropriation but also with measures having the same (or, in some translations, similar) consequences. The Tribunal has therefore considered whether the restriction of ownership rights which the Constitutional Court found had occurred amounted to a measure having the same, or similar, consequences as expropriation, a concept which can be described as "*de facto* expropriation". That is not an easy task since the Court, unsurprisingly given that it was not applying the BIT, did not express itself in the language of Article 4(1). Nevertheless, the Tribunal has concluded that the Court did not find that Amendment I amounted to a measure having the same (or similar) consequences as expropriation. As the Court said, the essence of expropriation is a taking of ownership rights. There is nothing in the Court's judgment to suggest that it considered that Amendment I produced consequences which were the same as, or similar to, such a taking.

405. Examination of the Strasbourg judgments to which the Constitutional Court referred at pages 44-47 of its judgment, confirms the conclusion that it did not regard Amendment I as having attained that level. The Court noted that the ECtHR had interpreted the second rule in Article 1 of Protocol I as including not just formal expropriation but also *de facto* expropriation, which included deprivation of the right to dispose of property. It then cited the judgments of the ECtHR in *Mellacher v. Austria*[440] and *Velosa Barreto v. Portugal*,[441] both of which concerned the imposition of rent restrictions. In both cases, the ECtHR held that the acts in question did not amount to expropriation, either *de jure* or *de facto*, because the owner retained the right to dispose of the property but went on to consider whether the restriction on the use of the property by the owner

[439] *See* also pp. 46-47.
[440] *Mellacher et al v. Austria*, 12 E.H.R.R. 39 (Series A, No. 169) (1989).
[441] *Velosa Baretto v. Portugal*, 334 Eur. Ct. H.R. (Ser. A) (1995).

amounted to a violation of the more general rule contained in Article 1. It seems to the Tribunal that the Constitutional Court was, therefore, clearly aware that there was a category of impermissible restrictions on the use of property by its owner which did not amount to *de facto* expropriation and that the dividing line between that category and *de facto* expropriation lay in whether or not the owner was deprived of the right to dispose of his property. The Court did not find that Amendment I went so far as to deprive the private health insurers and their shareholders of the right to dispose of their property (indeed, in the case of the Claimant, it was able to dispose of its shareholding – at a price substantially higher than it had paid for the shares – not long after the enactment of Amendment I). While the findings of the Constitutional Court, made as they were without reference to the provisions of the BIT and in general terms – none of the health insurers being party to the proceedings – are not easy to analyse in terms of Article 4(1) of the BIT, it is for the Claimant, as the party relying on the judgment on this point, to establish that the judgment of the Constitutional Court amounts to a finding that the Slovak Republic had adopted a measure of the kind covered by Article 4(1) of the BIT. The Tribunal concludes that the Claimant has not succeeded in establishing that proposition.

406. Accordingly, the Tribunal rejects the Claimant's argument based upon the Constitutional Court's judgment of 24 March 2011, to the effect that it would amount to a finding that Amendment I was an expropriation, or a measure equivalent to an expropriation, of the Claimant's rights within the meaning of Article 4(1) of the BIT.

C. THE EFFECT OF THE MFN CLAUSE

407. The Tribunal thus turns to the argument advanced by the Claimant regarding the effect of the MFN clause in the BIT. That clause is contained in Article 3, which provides as follows:

> (1) Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment that is no less favourable 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, however, shall not apply to present or future privileges granted by one Contracting Party to investors of a third State or their investments in connection with

> (a) an economic union, customs union, a common market, free trade zone or economic community;
>
> (b) an international agreement or a bilateral agreement or national laws and regulations concerning matters of taxation;
>
> (c) a regulation to facilitate border traffic.

The translation is that supplied by the Claimant after the close of the hearings but, in contrast to the position regarding certain other provisions, it is not contested by the Respondent.[442] Again, it is appropriate to begin with the Claimant's arguments.

1. The Positions of the Parties

(1) The Claimant

408. The Claimant argues that the effect of Article 3 is that, notwithstanding the limitations in the text of Article 8, the Tribunal has jurisdiction over its expropriation and Article 2 claims.[443] The Claimant submits that MFN clauses are "a source of international obligations other than those explicitly included in the basic treaty" that allows for "borrowing treaty provisions from other treaties or possibly state practice regarding third states."[444] The Claimant argues that the Treaty's MFN clause in Article 3(1) is a "neutral clause which is worded openly, without explicitly excluding or including matters of dispute resolution or the host state's consent to arbitration."[445]

409. The Claimant challenges the *Austrian Airlines* majority's conclusion that the Treaty's MFN clause had to be read in the context of Article 8. Rather, the Claimant cites the dissenting opinion of Judge Brower who held that "if every time an MFN clause were invoked it were read together with the provision which the MFN clause is alleged to circumvent, such a clause might never be given any effect; it would be vitiated by that which it seeks to avoid, modify or expand."[446] The Claimant also argues that the *Austrian Airlines* tribunal erred in considering the *travaux préparatoires* of the Treaty

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[442] Respondent's letter to the Tribunal of 27 January 2012, p. 4 contains the statement that "to assist the Tribunal in narrowing the areas of disagreement between the Parties, Respondent notes that, in the case of the Preamble and Articles 3, 6, 7 and 9, there are no material differences between Respondent's Exhibit RL-40B and Claimant's newly proposed translation."
[443] Claimant's Counter-Memorial on Jurisdiction, ¶¶299-334.
[444] *Ibid.*, ¶301.
[445] Claimant's Counter-Memorial on Jurisdiction, ¶¶302-303.
[446] *Ibid.*,¶305, citing *Austrian Airlines*, *supra* note 327, ¶7. *See* also Claimant's Rejoinder on Jurisdiction, ¶216.

to limit the scope of the MFN clause, pursuant to Article 32 VCLT, because the MFN clause is not ambiguous.[447]

410. The Claimant traces the changes in the MFN clause during the negotiating history of the Treaty, and argues that the "*travaux préparatoires* show no intention of the parties to limit the scope and operation of the MFN clause by the working of the arbitration clause." The Claimant concludes that "[i]f Article 8 was specifically negotiated (and narrowed down), Article 3 was equally specifically negotiated (and not narrowed down)", noting in particular the fact that the exclusions listed in Article 3(2) do not include dispute resolution.[448]

411. The Claimant discusses two cases, *RosInvest* and *Renta 4*, where "the availability of broader dispute settlement clauses in other BITs of a host state via MFN clauses were confirmed."[449] The Claimant relies on the *Renta 4* case for arguing that the MFN clause should apply to dispute resolution clauses, regardless of whether the right to bring arbitration is characterised as a procedural or substantive right. Indeed, in *Renta 4*, the tribunal rejected formal distinctions between procedural and substantive matters. The Claimant further refers to a number of commentators who agree that a broadly worded MFN clause that refers to "treatment" without qualification should be interpreted as applying to dispute settlement as well as substantive matters.[450] The Claimant also argues, based on the finding of the *RosInvest* tribunal, that "had the States Parties intended that the MFN clause should not apply to arbitration, it would have been easy to add corresponding language" noting that this was done in other CSFR BITs.[451]

412. Furthermore, if an investor is unable to enforce its substantive rights under a BIT by means of arbitration, while other investors are able to enforce their treaty rights in such a fashion, the Claimant argues that the investor is clearly discriminated against with regard to the substantive rights themselves, in violation of the object and purpose of the treaty in general and the MFN clause in particular.

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[447] Claimant's Counter-Memorial on Jurisdiction, ¶¶304-307.
[448] Claimant's Rejoinder on Jurisdiction, ¶¶234-235.
[449] Claimant's Counter-Memorial on Jurisdiction, ¶¶312-318, citing *RosInvest*, *supra* note 419; *Renta 4*, *supra* note 391.
[450] Claimant's Rejoinder on Jurisdiction, ¶¶319-323. .
[451] Claimant's Counter-Memorial on Jurisdiction, ¶317, citing *RosInvest*, *supra* note 419, ¶135.

413. The Claimant submits that the term "treatment" in Article 3 is broad enough to apply to dispute resolution. In this regard, the Claimant first refers to a number of cases, including *Gas Natural v. Argentina* and *Maffezini,* where tribunals interpreted MFN clauses referring to "all matters", and concluded that "unless it appears clearly that the States Parties to a BIT … settled on a different method for resolution of disputes that may arise, most-favoured-nation provisions in BITs should be understood to be applicable to dispute settlement."[452] The Claimant asserts that there is no reason to interpret the term "treatment" narrowly and that it is only a small step to interpret a broad term like "treatment" to cover dispute settlement as well, even where the MFN clause lacks the language of "all matters".[453] Furthermore, the Claimant submits that the term "treatment" in Article 3 is only limited by the three circumstances enumerated in Article 3(2).

414. The Claimant takes issue with the Respondent's characterisation of the Claimant's argument as using the MFN clause as a tool of incorporation. Rather, the Claimant argues that the MFN clause can be used to "borrow more favourable clauses in other treaties."[454]

415. The Claimant distinguishes the cases cited by the Respondent which rejected using the MFN clause to broaden the dispute resolution clause available, submitting several differences in those cases from the Treaty in the case at hand. First, the Claimant argues that the *RosInvest* tribunal rejected expanding the dispute resolution clause via Article 3(1) of the UK-Soviet BIT because it afforded protection to "investment" and not "investors". The Claimant submits that the *Renta 4* tribunal denied the use of the MFN clause because of the wording of another article in the Spain-Russia BIT which limited the MFN clause to the realm of the fair and equitable treatment, which the Claimant contrasts with the language of the MFN in the Treaty.[455] The Claimant disputes the relevance of the *Plama* decision for the case at hand, arguing that the relevant BIT in that case did not provide for investor-state arbitration and the investor

[452] Claimant's Rejoinder on Jurisdiction, ¶225, citing *Gas Natural SDG v. Argentina*, ICSID No. ARB/03/10, (Decision of the Tribunal on Preliminary Questions on Jurisdiction, June 17, 2005) (CL-117) (hereinafter "*Gas Natural*").
[453] Claimant's Rejoinder on Jurisdiction, ¶¶227-228, citing *Impregilo S.p.A. v. Argentine Republic*, ICSID No. ARB/07/17 (Award, 21 June 2011) (CL-187) (hereinafter "*Impregilo*").
[454] Claimant's Rejoinder on Jurisdiction, ¶222.
[455] Claimant's Rejoinder on Jurisdiction, ¶252, citing *Renta 4*, *supra* note 391.

was therefore trying to replace a jurisdictional provision which did not allow investor-state arbitration.

416. The Claimant maintains that, in application of the MFN clause, it may avail itself of treaties adopted before the present BIT.[456] Furthermore, the Claimant argues, based on an ordinary meaning interpretation, that Article 3 of the Treaty contains no temporal limitations, since the treatment is "accorded", which includes both past and future tenses.[457] In the alternative, the Claimant also relies on the Croatia-Slovakia BIT and the Hungary-Slovakia BIT which came into force in 1997 and 1996, respectively, and which make broad provision for the arbitration of disputes.

417. Finally, the Claimant argues that "[t]he comparator for the purpose of the MFN clause is not a 'particular investor' that has in fact been accorded more favourable treatment in the form of access to dispute resolution regarding 'the measures challenged here'" as alleged by the Respondent.[458] In any event, the Claimant asserts that there are other investors who have challenged the Amendment and who have benefited from wider dispute resolution clauses, pointing to *Eureko* and *HICEE* who commenced arbitration under the Netherlands-CSFR BIT.[459]

418. The Claimant contends that neither the ability to bring claims before the Slovak courts, nor the fact that it has done so in this case, proves in any way that this is an "effective recourse." The Claimant stresses that it does not argue that national courts are "inferior" to international arbitration.[460] Even if the courts did have jurisdiction however, the Claimant argues that Austrian investors would face "an extremely uncertain legal environment." In the Claimant's view, this would come at a high cost which investors under more favourable BITs do not have to bear and thus forms an instance of "concrete discrimination" covered by the MFN provision.[461]

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[456] *Ibid*., ¶¶261-270.
[457] *Ibid*., ¶263.
[458] *Ibid*., ¶271.
[459] *Ibid*., citing *Eureko*, *supra* note 21, and *HICEE*, *supra* note 308.
[460] Claimant's Rejoinder on Jurisdiction, ¶278.
[461] *Ibid*., ¶¶279-280.

(2) The Respondent

419. The Respondent objects to the Claimant's invocation of the Article 3 MFN clause as a basis for the Tribunal's jurisdiction. The Respondent maintains that such an argument has already been conclusively rejected under the present Treaty in *Austrian Airlines*.

420. The Respondent argues that a "clean reading of the investor-State jurisdictional clause of Article 8", namely its circumscribed jurisdictional mandate, shows that the Tribunal "has no power to exercise any authority with respect to Article 3."[462] The Respondent also submits that, applying basic principles of Treaty interpretation, the Treaty's MFN clause provides no basis for incorporation of provisions from another Treaty to ground jurisdiction.

421. The Respondent argues that the MFN clause of Article 3 must be read in the context of the other provisions of the Treaty, including Article 8. The Respondent submits that Article 8 of the Treaty provides a narrow basis of jurisdiction to adjudicate disputes. According to the Respondent, the question is not whether the "MFN clause applies to the Treaty's Article 8 dispute resolution provision, but whether in view of the narrowly-construed dispute resolution mechanism, the Tribunal may exercise any authority with respect to the MFN provision of Article 3". The Respondent then answers in the negative, citing the cases of *Nagel v. Czech Republic*, *EMV*, and *Telenor*.[463]

422. The Respondent counters the Claimant's reliance on *RosInvest*, submitting that the tribunal in that case "did not enter into the much more general question [of] whether MFN-clauses can be used to transfer arbitration clauses from one treaty to another" and that the MFN clause at issue had different wording (specifically the terms "use" and "enjoyment"), and broader scope.[464] The Respondent equally objects to the Claimant's reliance on the *Renta 4* decision, alleging that the award did not extend the MFN clause to "enlarge the competence of the tribunal" and that its "BIT by BIT analysis" applied to this case demonstrates that "treatment" does not extend to dispute settlement.[465]

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[462] Respondent's Reply on Jurisdiction, ¶401.
[463] *Ibid.*, ¶¶409-412, 481-490, citing *Nagel v. Czech Republic*, SCC Case 49/2002 (Award, Sept. 9, 2003) (RL-379), *EMV*, *supra* note 391, and *Telenor*, *supra* note 391.
[464] Respondent's Reply on Jurisdiction ¶¶416, 468-470, citing *RosInvest*, *supra* note 419.
[465] Respondent's Reply on Jurisdiction, ¶¶471-475, citing *Renta 4*, *supra* note 391.

423. The Respondent also distinguishes the *Maffezini* decision, submitting that it was based on a broad jurisdictional clause.[466] The Respondent further cites the *Plama* award for the proposition that "an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them" which it contends is not the case at hand.[467] Lastly, the Respondent submits that, where tribunals have applied MFN clauses to dispute settlement matters, they have done so only in respect of waiting periods and other procedural hurdles and not in order to broaden the scope of jurisdiction under the relevant treaty.[468]

424. The Respondent counters the Claimant's argument that Article 3 is a tool of incorporation, which it argues is "unsupported by the text of the Treaty, as well as fundamental logic and rules of international law."[469] The Respondent submits that Article 3 sets out a treatment obligation, and does not allow for "borrowing" treaty provisions from other treaties.[470] In addition, the Respondent argues that customary international law requires that consent to jurisdiction be established by a preponderance of evidence, which standard cannot be met here given the clear intention to limit jurisdiction in Article 8.[471]

425. The Respondent argues that the "treatment" referred to in Article 3 does not include dispute resolution and contests the Claimant's characterisation of Article 3 as a broad MFN clause.[472] Rather, the Respondent submits that Article 3 is narrowly phrased in contrast to broad MFN clauses that read "[i]n all matters subject to this Agreement", the latter drafting being the basis underlying the decisions that have extended MFN treatment to dispute settlement matters under other treaties.[473]

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[466] Respondent's Reply on Jurisdiction, ¶¶476-480, citing *Emilio Augstin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7 (Decision of the Tribunal on Objection to Jurisdiction, 25 January 2000) (RL-151) (hereinafter "*Maffezini*").
[467] Respondent's Reply on Jurisdiction, ¶487, citing *Plama*, *supra* note 377.
[468] *Ibid*., ¶489.
[469] *Ibid*., ¶¶420-431.
[470] *Ibid*., ¶¶421-422.
[471] *Ibid*., ¶¶427-430.
[472] *Ibid*., ¶¶432-453.
[473] *Ibid*., ¶434, distinguishing, *e.g.*, *Maffezini*, *supra* note 466.

426. The Respondent also argues that the Treaty text itself confirms that "treatment" in Article 3(1) pertains only to substantive matters, since where reference is made to the adjudicatory process the Treaty employs the term "right", while the term "privileges" and "treatment" are used in Article 3.[474]

427. The Respondent relies on the commentary to the ILC Report on MFN provisions and the *ejusdem generis* rule of interpretation, arguing that unless there is substantial identity between the subject-matter of the MFN clause and dispute resolution clause, an MFN provision may result in imposing obligations on the State which were never contemplated and this violates general principles of treaty interpretation.[475]

428. The Respondent also takes issue with the Claimant's argument that the *Austrian Airlines* tribunal did not properly consider the interpretive principle of *expressio unius est exclusio alterius*. The tribunal gave ample consideration to the principle and, in any event, the rule when applied to Article 8, clearly contradicts the Claimant's MFN-based claim to jurisdiction.[476]

429. Finally, the Respondent contends that, even if the MFN clause is used to incorporate provisions from other treaties, it would not eliminate Article 4(4) and (5), resulting in a pathological arbitration clause.[477]

430. The Respondent rejects the Claimant's assertion that the *Austrian Airlines* tribunal improperly considered the Treaty's negotiating history. The Respondent argues that Article 32 of the VCLT provides for recourse to the *travaux préparatoires* for treaty interpretation without any need for a formal finding that the treaty terms at issue are ambiguous, and in particular the *travaux* can be referred to in order to confirm an interpretation of the treaty. The Respondent submits that the negotiating history of Article 8 of the Treaty is dynamic and indicates a "deliberate choice to limit the

[474] *Ibid.*, ¶¶437-440.
[475] Respondent's Reply on Jurisdiction, ¶¶441-442, citing Report of the Commission to the General Assembly on the Work of Its Thirtieth Session [1978] Y.B.I.C.L. A/CN.4/SER.A/1978/Add.1.
[476] Respondent's Reply on Jurisdiction, ¶¶448-452, citing *Austrian Airlines*, *supra* note 327, ¶¶131, 135.
[477] *Ibid.*, ¶453.

jurisdiction". By contrast, the Respondent alleges that the history of the MFN clause is "static", which is why it was not considered by the *Austrian Airlines* tribunal.[478]

431. The Respondent argues that the "treaty practices of both Slovakia and Austria also confirm the conclusions that the State-Parties did not have dispute resolution in mind when they agreed upon the Article 3(1) MFN obligation", a conclusion it alleges is supported by the *Austrian Airlines* tribunal.[479]

432. The Respondent submits that the MFN clause only operates with regard to later treaties, and it contends that all four specific treaties invoked by the Claimant to supplant the instant Treaty's Article 8 entered into force before the BIT, such that they cannot be relied upon to expand the Tribunal's jurisdictional mandate.[480]

433. Finally, the Respondent contends that, even accepting *arguendo* that the different dispute resolution mechanisms constitute "treatment" under Article 3 of the Treaty, the Claimant has still failed to prove such treatment, as it has not shown that other investors have been accorded more favourable treatment.[481] In addition, the Respondent asserts that the Claimant still has an effective recourse available before the Slovak courts and that the Claimant has offered "no basis to judge the insufficiency of the Slovak courts."[482]

2. The Tribunal's Analysis

434. The Tribunal will begin its analysis by disposing of certain arguments which it does not consider to be well-founded.

435. First, the Tribunal is not persuaded by the Respondent's argument that the Tribunal lacks jurisdiction to rule upon the Claimant's Article 3 argument, because Article 3 is not one of the provisions specified in Article 8 of the BIT. That argument confuses, or conflates, two entirely different issues. If the Claimant were seeking to advance before the Tribunal a claim that the Respondent had committed a violation of Article 3 of the BIT, as part of the substantive standards of protection prescribed by the BIT, by

[478] *Ibid*., ¶¶456-460.
[479] *Ibid*., ¶¶461-464, citing *Austrian Airlines*, *supra* note 327, ¶134.
[480] *Ibid*., ¶¶499-503.
[481] *Ibid*., ¶¶504-510.
[482] *Ibid*., ¶¶506-508.

denying the Claimant recourse to arbitration, then the objection that such a claim is not within the scope of the jurisdiction conferred by Article 8 would be a potent one. However, that is not what the Claimant is seeking to do. The Claimant relies on Article 3 of the BIT, not as the substantive basis for a claim, but rather as indicating that each State Party to the BIT intended to make an offer to arbitrate that was wider than the terms of Article 8[483] to the extent that such State Party concluded a treaty with a third State containing an arbitration clause which was wider and more favourable to an investor. The Tribunal agrees with the *Austrian Airlines* tribunal that it has jurisdiction to rule on this argument in the exercise of its *compétence de la compétence*.[484] The Tribunal considers that the same confusion is evident in the Respondent's argument that the Claimant must adduce evidence of a specific investor of a third State who has received treatment more favourable than that accorded to the Claimant. The award in the NAFTA case of *Loewen v. United States*,[485] on which the Respondent bases this argument, is not about the application of an MFN clause but concerns a claim for alleged discrimination. In order to recover damages for discriminatory treatment, a claimant must normally establish the existence of a comparator and then demonstrate that such comparator has received better treatment than that which the claimant has received. But, as explained in the previous paragraph, the Claimant in the present case is not making a claim for relief for an alleged breach of the MFN clause but is arguing that the effect of that clause is that it is entitled to the benefit of higher standards of protection provided for in other treaties. Accordingly, it is not a matter of comparison with the actual treatment accorded to a specific third State investor, but of comparison between the standard of treatment guaranteed to a group of investors by one treaty and the standard of treatment guaranteed to another group of investors by another treaty.

436. Secondly, the Tribunal considers that it can derive only limited assistance from the numerous awards of other tribunals to which the Parties referred. While the Tribunal has paid careful attention to the awards in other cases, it is plain that they reveal no clear arbitral consensus on this issue. Indeed, so far from constituting a *jurisprudence constante*, they manifest a complete lack of consistency, which is the product of a

[483] *See Renta 4*, *supra* note 391, ¶83.
[484] *Austrian Airlines*, *supra* note 327, ¶¶117-118.
[485] *Loewen*, *supra* note 340.

fundamental difference of views between various arbitrators.[486] Thus, arguments to the effect that an arbitration clause may be affected by the MFN provision have been accepted in *Maffezini v. Spain*, *Camuzzi v. Argentina*, *Gas Natural v. Argentina*, *Suez Sociedad General de Aguas and Interaguas v. Argentina*, *National Grid v. Argentina*, *Siemens v. Argentina*, *RosInvest v. Russian Federation*, *AWG Group v. Argentina*, *Impregilo v. Argentina* (with a dissenting opinion by Professor Stern) and *Hochtief v. Argentina* (with a dissenting opinion by Mr Thomas).[487] Such arguments have, however, been rejected by the tribunals in *Técnicas Medioambientales v. Mexico*, *Salini v. Jordan*, *Plama v. Bulgaria*, *Berschader v. Russian Federation* (with a dissenting opinion by Mr Weiler), *Telenor v. Hungary*, *Wintershall v. Argentina*, *Renta 4 v. Russian Federation* (with a separate opinion by Judge Brower), *Tza Yap Shum v. Peru*, *Austrian Airlines v. Slovak Republic* (with a dissenting opinion by Judge Brower), *ICS v. Argentina*, and, most recently, *Daimler v. Argentina* (with a dissenting opinion by Judge Brower).[488]

437. This lack of a *jurisprudence constante* cannot be explained only by reference to differences between the terms of the BITs involved (although such differences can be significant). Of the four tribunals to have ruled on the effect of the MFN clause in the Argentina-Germany BIT on the requirement in the arbitration clause of that BIT that disputes could be submitted to arbitration only after a period of eighteen months had elapsed from their submission to the local courts, those in *Wintershall* and *Daimler*

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[486] For reviews of the extent of that difference, as manifested in the jurisprudence, see Julie Maupin, "MFN-based Jurisdiction in Investor-State Arbitration: Is there any Hope for a Consistent Approach?", 14 Journal of International Economic Law (2011) 157 and the exchange of views between Zachary Douglas, "The MFN Clause in Investment Treaty Arbitration: Treaty Interpretation off the Rails", 2 Journal of International Dispute Settlement (2011) 97 and Stephen Schill, "Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction", 2 Journal of International Dispute Settlement (2011) 353.

[487] *Maffezini*, *supra* note 466; *Camuzzi International S.A. .v. Argentina*, ICSID Case No. ARB/03/7 (Decision on Jurisdiction, 10 June 2005) (RL-304); *Gas Natural*, *supra* note 452, *Suez*, *Sociedad General de Aguas de Barcelona S.A. and Interaguas Servicios Integrales del Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17 (Decision on Jurisdiction, 16 May August 2006) (RL-409); *National Grid v. Argentina*, UNCITRAL (Decision on Jurisdiction, 20 June 2006) (CL-128); *Siemens*, *supra* note 335; *RosInvest*, *supra* note 419; *AWG Group Ltd. v. Argentina*, UNCITRAL (Decision on Liability, 30 July 2010) (RL-291); *Impregilo*, *supra* note 453; *Hochtief v. Argentina*, ICSID Case No. ARB/07/31 (Decision on Jurisdiction, 24 October 2011) (hereinafter "*Hochtief*").

[488] *Técnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2 (Award, 29 May 2003) (RL-414); *Salini v. Jordan*, ICSID Case No. ARB/02/13 (Decision on Jurisdiction, 29 November 2004) (RL-403); *Plama*, *supra* note 377; *Berschader*, *supra* note 309; *Telenor*, *supra* note 391; *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14 (Award, 8 December 2008) (RL-265); *Renta 4*, *supra* note 391; *Tza Yap Shum*, *supra* note 391; *Austrian Airlines*, *supra* note 327; *ICS Inspection and Control Services Limited v. Argentina*, PCA Case No. 2010-9 (Award on Jurisdiction, 10 February 2012); *Daimler Financial Services v. Argentina*, ICSID Case No. ARB/05/01 (Award, 22 August 2010).

rejected the MFN argument, while those in *Siemens* and *Hochtief* accepted it. Moreover, even where tribunals have come to the same conclusion, they have often done so for radically different reasons, as a comparison between the awards in *Plama* and *Renta 4* demonstrates. Accordingly, while the Tribunal has drawn on the reasoning in the various awards where appropriate, it has not felt compelled to follow any particular line of awards.

438. In this context, the Tribunal notes the Respondent's contention that there is no basis for the Tribunal to "depart from" the award of the majority in *Austrian Airlines*. In the view of the Tribunal, that way of putting the point goes too far. There is no doctrine of binding precedent in international law and the present Tribunal is not bound by the award in *Austrian Airlines* (or any other case). Nor is there a presumption in favour of following the award in *Austrian Airlines* in the sense that, unless the Claimant can offer a compelling reason to do so, the Tribunal is in some way obliged to decide the MFN point in the present case in the same way in which the *Austrian Airlines* tribunal decided that point in the case before it. Of course, the Tribunal has paid close attention to the award in *Austrian Airlines*, as will be apparent from the following paragraphs; it is a well reasoned award addressing precisely the point in issue here under the same BIT. It was, however, subject to a dissenting opinion on this point and the Tribunal does not consider that it can simply adopt the reasoning of the majority in *Austrian Airlines* without discussion.

439. Finally, both Parties suggested that the Tribunal should approach the MFN issue from the standpoint of what they identified as a "principle" or "presumption" regarding a State's submission to arbitration. The Claimant urged that a broad, "liberal" approach was warranted by what it identified as the object and purpose of the BIT. By contrast, the Respondent argued that treaty provisions by which a State agrees to the jurisdiction of an international court or tribunal should be restrictively construed. The Tribunal does not agree with either of these submissions. The Tribunal has already stated (in paragraph 326, above) that it does not consider that the object and purpose of the BIT require either a broad or a restrictive approach to the interpretation of its provision for arbitration. Nor does the Tribunal accept that there is any general principle of

international law that the acceptance by a State of the jurisdiction of an international court or tribunal must be restrictively construed.

440. The Tribunal thus considers that its approach to the question before it is not determined by the awards of tribunals in earlier cases or by any general principle or presumption regarding jurisdiction.

441. The question before the Tribunal is whether or not the claims for alleged violations of Articles 2 and 4 of the BIT fall within the scope of the agreement to arbitrate. Where an investor initiates arbitration proceedings in reliance on the terms of a BIT, the agreement to arbitrate takes a peculiar form, arising from the fact that the claimant in the arbitration proceedings is relying on the provision for arbitration contained in an instrument – the BIT – to which it is not a party.[489] The provision for arbitration in the BIT thus operates at two levels: as between the States Parties to the BIT, it is one of several reciprocal undertakings which take effect on the level of treaty commitments between two States, but it also operates as an offer extended by each State Party to investors of the other State Party to submit to arbitration the disputes specified in that provision. By initiating arbitration proceedings, an investor accepts that offer and thus brings into being the agreement to arbitrate from which the jurisdiction of the Tribunal is derived. Since it is the terms of the offer which determine the content of the agreement to arbitrate, the limits of that agreement and, therefore, of the jurisdiction of the Tribunal, are dictated by the intentions of the States Parties to the BIT as expressed in the provisions of the BIT, provisions which have to be interpreted in accordance with the international law rules on treaty interpretation set out in paragraphs 315-316, above.

442. In concluding that BIT, those two States were free to frame their offer of arbitration in whatever way they saw fit. It might be broad (*e.g.* applying to any dispute regarding a qualifying investment) or narrow (*e.g.* confining arbitration to disputes relating only to certain aspects of the treatment of investments required by the other provisions of the BIT). The more than 2000 BITs currently in force include a wide range of arbitration clauses of both kinds, as well as examples which fall between the two extremes and cases in which the BIT contains no provision for arbitration at all.

[489] Jan Paulsson, "Arbitration without Privity" 10(2) ICSID Review-Foreign Investment Law Journal (1995), p. 232.

443. The States Parties to a BIT are also free to choose the manner in which they express their consent to arbitration. They may do so in one clause or in more than one. There is no inherent reason why the limits of the consent to arbitrate cannot be ascertained by examination of more than one clause. Nor is there any general principle which precludes an MFN clause from being one of those provisions which determine the extent of the consent to arbitration; if a BIT contained an MFN clause which expressly stated that it was applicable to the disputes settlement provision of that BIT (as is the case with some recent United Kingdom BITs),[490] then a tribunal seeking to determine the extent of the consent to arbitrate under such a BIT would have to apply that MFN clause, as well as the arbitration clause in the treaty, in order to determine the scope of the State's consent to arbitration.

444. The text of Article 3(1) is neutral in its wording. There is no express provision that the guarantee of most favoured nation treatment is intended to apply to investor-State arbitration but nor is there an express provision excluding that possibility. What the Tribunal is therefore called upon to decide is whether the States Parties to the present BIT intended that Article 3 should widen the offer of arbitration set out in Article 8 so as to include (a) issues regarding expropriation which Articles 4 and 8 taken together assign to the national courts and (b) issues regarding alleged violations of Article 2 of the BIT which are wholly outside the terms of Article 8.

445. The Tribunal considers that there is a fundamental difference between Article 8 of the BIT and the other provisions, including Article 3. The difference lies in the fact that the investor-State arbitration clause in a BIT is the only one which creates – or rather makes possible the creation of – a direct relationship between one of the States Parties to the BIT and an investor. The inter-State arbitration provision in a BIT operates at the "normal" level of relations between the two States Parties to the treaty. The provisions on substantive standards of treatment (such as a provision requiring fair and equitable treatment) confer rights upon investors, but do so entirely through the medium of agreement between the States Parties. By contrast, a clause which provides for the investor of one State Party to arbitrate with the other States Party, although it derives its legal force from the agreement between the two States Parties, operates (as explained in

[490] *See* United Kingdom Model BIT 2005 (with 2006 amendments), Article 3(3).

paragraph 441, above) not only as an undertaking between the States Parties but also as an offer by each State Party to qualifying investors of the other State Party. If such an investor opts to accept that offer by commencing arbitration proceedings, the result is the creation of an entirely new, direct, relationship between that investor and the State Party concerned. The resulting dual character of the investor-State arbitration provision was the (very substantial) innovation introduced into international law by the network of BITs and similar treaties and one which many States had difficulty accepting (as the records of negotiations concerning the present BIT and numerous other BITs demonstrate).

446. The provision for arbitration in a BIT is thus the gateway through which the investor must pass in order to create an arbitration agreement and confer jurisdiction upon a tribunal to hear its claims regarding breach of the standards of treatment to which it is entitled under the BIT. Applying an MFN clause so as to alter the scope of that arbitration provision is therefore a very different matter from applying an MFN clause to the other provisions of the BIT's legal régime which do not have the same dual character.

447. The full extent of that difference may be demonstrated by one example. If a BIT has no provision for investor-State arbitration, there is no offer of arbitration and thus no scope for the creation of an arbitration agreement. Even if that BIT contains a broadly worded MFN clause, that clause cannot substitute for the arbitration provision and make it possible for an investor successfully to bring arbitration proceedings against a State Party to the BIT, no matter what provisions for arbitration that State Party might have agreed to include in its other BITs. By contrast, if a BIT contains no provision on fair and equitable treatment, an investor may nonetheless be able to derive from the MFN clause contained in that BIT a right to be accorded such treatment by one of the States Parties, provided that there is at least one other BIT concluded by that State which contains a provision for fair and equitable treatment.

448. While the present BIT does, of course, contain a provision for investor-State arbitration, the substantive scope of that provision is strictly limited. It encompasses disputes regarding Article 5 of the BIT and certain aspects of Article 4 but, as the Tribunal has found in Chapter V(A) of the Award, it excludes disputes regarding other aspects of

Article 4 and alleged violations of the other provisions of the BIT. As regards those categories of disputes, there is no offer of arbitration at all. Acceptance of the Claimant's argument would therefore mean that the MFN clause completely transformed the scope of the arbitration provision.

449. That would be to accord the MFN clause a far more dramatic result than that achieved in all but one of the awards (listed in paragraph 436, above) in which a tribunal has upheld an argument that the MFN clause in a BIT affected that treaty's arbitration provision.[491] With that one exception, all of those cases concerned, not limits on the substantive scope of the provision for arbitration, but requirements to submit a dispute to national courts for a period of time before that dispute could be brought to an investor-State arbitration tribunal. In those cases, the dispute was one which fell within the substantive scope of the offer to arbitrate. Even so, the issue was a highly controversial one, as demonstrated by the fact that the MFN argument was accepted by some arbitration tribunals and rejected by others. The Tribunal in the present case does not need to enter into that controversy and has no intention of doing so. It expresses no opinion on whether those tribunals which accepted the MFN argument in the time-limit cases were right to do so. For present purposes, the point is not whether those awards are correct but simply that, even if they are so regarded, they were not concerned with the kind of transformation in the scope of the offer to arbitrate which is at issue in the present proceedings.[492]

450. The Tribunal therefore considers that the special character of the provision for investor-State arbitration and the radical nature of the transformation in that provision which acceptance of the Claimant's argument would entail, both militate against attributing to Article 3 of the BIT the effect suggested by the Claimant unless there are clear indications that such was the intention of the States Parties.

451. The Tribunal does not find such clear indications in either the language of Article 3 or its place in the context of the BIT, taken as a whole, to warrant the conclusion that the States Parties intended that it should have the potential to transform the scope of the offer to arbitrate in the way suggested by the Claimant. Article 3(1) requires the

[491] The exception is the *RosInvest* award, *supra* note 419.
[492] The distinction is the subject of comment by the tribunal in *Hochtief*, *supra* note 487, ¶¶ 77-99.

Respondent to accord to Austrian investors and their investments "treatment" no less favourable than that which it accords to its own investors or investors of third States. The Tribunal is well aware that different tribunals have reached different conclusions regarding the meaning of the term "treatment" and, in particular, whether that term should be read as confined to "substantive" standards of treatment (such as those addressed in Articles 2 and 4 of the present BIT) or as including also access to investor-State arbitration. While the Tribunal agrees that either interpretation is plausible, it considers that the term "treatment" is more apposite to cover substantive standards of treatment than to apply to the provision for investor-State arbitration, given what has already been said above regarding the special character of that provision.

452. That conclusion is reinforced by consideration of the place which Article 3 occupies in the context of the BIT. Article 3(1) appears as part of a group of provisions which prescribe the substantive standards to be accorded by one State Party to investments and investors of the other State Party. Thus Article 2(1) requires that such investments shall be accorded fair and equitable treatment; Article 4 accords certain rights in respect of expropriation and similar measures; Article 5 guarantees rights of transfer. Article 3(1), as has been seen, requires that each State Party accord the other's investors "treatment" no less favourable than that accorded to its own investors or investors of third States. Failure to comply with Article 3(1) would constitute a substantive breach of the BIT in just the same way as would failure to comply with Article 2(1), Article 4 or Article 5. Bearing in mind what has been said above about the differences between the substantive provisions of a BIT and the provision for investor-State arbitration, the fact that Article 3(1) is located in the group of substantive provisions and worded in the same way as the other substantive provisions suggests that it was not intended to be capable of transforming the scope and extent of the investor-State arbitration provision.

453. The Tribunal considers that Article 3(2) is of no assistance in this matter. That provision excludes from the scope of Article 3(1) privileges granted to investors of a third State in connection with an economic union or similar agreement, taxation instruments and regulations on border traffic. The Claimant argues that, on the principle of *expressio unius exclusio alterius*, this list must be treated as an exhaustive list of the matters excluded from the scope of Article 3(1). Article 3(2) is not, however,

dealing with the matters covered by Article 3(1) but rather with the sources to which Article 3(1) refers. Article 3(2) makes clear that, *e.g.*, an investor cannot use Article 3(1) to gain the benefit of a right to better treatment which has its source in an economic union or double taxation agreement. It says nothing about what type of right Article 3(1) was intended to apply to in the first place.

454. The Tribunal considers that the *travaux préparatoires* of Articles 3(1) and 8 confirm that the States Parties did not intend the former provision to have the potential for transforming the scope of the latter. The *travaux* of Article 8 show that there was a deliberate decision to narrow the scope of investor-State arbitration. The initial proposal from Austria was a clause which would have given jurisdiction in respect of any dispute regarding investments covered by the BIT. That was replaced, at the insistence of the CSFR, with a text substantially identical to the one finally agreed. By contrast, the *travaux* give no indication that Article 3 was intended to have an effect upon the carefully negotiated scope of Article 8. The Tribunal agrees with the reasoning of the majority in the *Austrian Airlines* case that the *travaux* tend to confirm the interpretation of Article 3(1) advanced by the Respondent. What is even more important – given that the Claimant has to establish that the Parties intended to adopt a MFN provision capable of expanding the scope of their agreement on investor-State arbitration – is that the *travaux* lend no support to the interpretation advanced by the Claimant.

455. The Tribunal, therefore, concludes that the MFN provision in Article 3(1) of the BIT does not affect the scope of its jurisdiction under Article 8 and rejects the Claimant's argument to the contrary.

456. Accordingly, the Tribunal upholds the Respondent's third jurisdictional objection.

VI. FOURTH OBJECTION: COMPLIANCE WITH NOTICE AND AMICABLE SETTLEMENT REQUIREMENTS FOR THE ARTICLE 2 CLAIMS

457. The Respondent's final jurisdictional objection is that the Claimant failed, with respect to its Article 2 claims, to fulfil three pre-conditions for arbitration, namely (i) to give notice of the specific claim; (ii) to allow six months for amicable settlement from the date of that notice; and (iii) to make genuine efforts to engage in good faith negotiations for such a settlement. According to the Respondent, compliance with these conditions is a prerequisite to establishing the jurisdiction of the Tribunal in respect of a claim. It therefore maintains that the Tribunal lacks jurisdiction to hear the Claimant's Article 2 claims.[493]

458. The Tribunal's decision in relation to the Respondent's third jurisdictional objection means, however, that the Tribunal lacks jurisdiction over the Article 2 claims in any event, since Article 8 of the BIT confers jurisdiction only with regard to claims under Article 5 and claims concerning the amount, or arrangements for payment, of compensation under Article 4. That decision means that the conditions regarding notice, negotiations and amicable settlement in Article 8 are not applicable to the claims under Article 2. The Tribunal considers, therefore, that it is not called upon to decide whether or not compliance with those conditions would have been a prerequisite for jurisdiction, since such jurisdiction cannot exist in any event.

[493] Respondent's Memorial on Jurisdiction, ¶¶274-305; Respondent's Reply on Jurisdiction, ¶¶562-567.

VII. COSTS

459. The effect of the Tribunal's decisions on the different jurisdictional objections is that the Tribunal lacks jurisdiction over all of the Claimant's claims, except for those under Article 5 of the BIT. As a result, the present award does not amount to a final disposal of the case. The Tribunal therefore reserves the question of costs to the next phase of the proceedings.

VIII. THE TRIBUNAL'S DECISION

460. For the reasons stated above, the Tribunal:

(1) Rejects the Respondent's first jurisdictional objection;

(2) Rejects the Respondent's second jurisdictional objection;

(3) Upholds the Respondent's third jurisdictional objection;

(4) Considers it is not required to rule upon the Respondent's fourth jurisdictional objection;

(5) Holds that it lacks jurisdiction over all aspects of the Claimant's claim other than the claim under Article 5 of the BIT; and

(6) Reserves to itself all matters regarding further proceedings in the case.

Done this 22nd day of October 2012.
Place of Arbitration: Stockholm, Sweden.

Dr Dr Alexander Petsche

Professor Brigitte Stern

Sir Christopher Greenwood CMG QC
Presiding Arbitrator

Annex 1

[CZECH TEXT — TEXTE TCHÈQUE]

DOHODA MEZI ČESKOU A SLOVENSKOU FEDERATIVNÍ REPUBLIKOU A RAKOUSKOU REPUBLIKOU O PODPORE A OCHRANĚ INVESTIC

ČESKÁ A SLOVENSKÁ FEDERATIVNÍ REPUBLIKA A RAKOUSKÁ REPUBLIKA dále jen „smluvní strany",

VEDENY PŘÁNÍM rozvíjet přátelské vztahy v souladu se zásadami Závěrečného aktu Konference o bezpečnosti a spolupráci v Evropě, podepsaného dne 1 srpna 1975 v Helsinkách, a vytvořit příznivé předpoklady pro větší hospodářskou spolupráci mezi smluvními stranami;

JSOUCE PŘESVĚDČENY, že podpora a ochrana investic může posílit zájem zakládat takové investice, a tím významně přispět k rozvoji hospodářských vztahů,

DOHODLY SE NA TOMTO:

Článek 1

Definice

Pro účely této Dohody

(1) pojem „investice" zahrnuje všechny majetkové hodnoty, které jsou uskutečněny investorem jedné smluvní strany na území druhé smluvní strany v souladu s jejími právními předpisy, zejména:

a) movité a nemovité věci a všechna věcná práva;
b) podíly a jiné druhy účasti na podnicích;
c) pohledávky a nároky na peníze, které byly předány, aby vytvořily hospodářskou hodnotu, nebo nároky na plnění, které má hospodářskou hodnotu;
d) práva z oblasti duševního vlastnictví, včetně autorských práv, obchodní ochranná práva jako patenty a vynálezy, obchodní známky, obchodní vzory a modely, jakož i spotřební vzory, technické postupy, know-how, obchodní názvy a goodwill;
e) veřejnoprávní oprávnění týkající se vyhledávání, dobývání nebo využití přírodního bohatství;

(2) pojem „investor" pokud jde o Českou a Slovenskou Federativní Republiku, označuje:

a) každou fyzickou osobu, která je podle československého právního řádu občanem České a Slovenské Federativní Republiky, podle československého právního řádu je oprávněna jednat jako investor a investuje na území druhé smluvní strany;
b) každou právnickou osobu, která byla zřízena podle československého právního řádu, má sídlo na území České a Slovenské Federativní Republiky a investuje na území druhé smluvní strany;

pokud jde o Rakouskou republiku označuje:

a) každou fyzickou osobu, která má státní příslušnost Rakouské republiky a investuje na území druhé smluvní strany;
b) každou právnickou osobu nebo společnost osob podle obchodního práva, která byla zřízena v souladu s rakouským právním řádem, má sídlo na území Rakouské republiky a investuje na území druhé smluvní strany;

(3) pojem „výnosy" označuje všechny částky, které plynou z investice a zahrnuje zejména zisky, úroky, přírůstky kapitálu, dividendy, tantiemy a licenční poplatky.

Článek 2

Podpora a ochrana investic

(1) Každá smluvní strana podle možnosti podporuje na svém území investice investorů druhé smluvní strany, umožňuje jejich vznik v souladu se svým právním řádem a v každém případě s nimi nakládá řádně a spravedlivě.

(2) Investice a jejich výnosy požívají plné ochrany podle této Dohody. Totéž platí v případě reinvestic pro jejich výnosy. Právní rozšíření nebo změna investice se musí uskutečnit v souladu s právními předpisy smluvní strany, na jejímž území je investice zřízena.

Článek 3

Nakládání s investicemi

(1) Každá smluvní strana nakládá s investory druhé smluvní strany a jejich investicemi ne méně příznivě než s vlastními investory nebo s investory třetích států a jejich investicemi.

(2) Ustanovení odstavce 1 se však nevztahují na současné nebo budoucí výhody, které jedna smluvní strana poskytuje investorům třetího státu nebo jejich investicím v souvislosti s:

a) hospodářskou unií, celní unií, společným trhem, zónou volného obchodu nebo hospodářským seskupením;

b) mezinárodní dohodou nebo mezistátní smlouvou nebo vnitrostátním právním předpisem o daňových otázkách;
c) úpravou k ulehčení pohraničního styku.

Článek 4

Odškodnění

(1) Investice investorů jedné smluvní strany smějí být na území druhé smluvní strany vyvlastněny, znárodněny nebo podrobeny jinému opatření se stejnými důsledky jen ve veřejném zájmu, na základě právního postupu a proti odškodnění.

(2) Odškodnění musí odpovídat hodnotě investice bezprostředně před tím, než bylo zveřejněno skutečné nebo hrozící vyvlastnění. Odškodnění musí být poskytnuto bez prodlení a musí být úročeno až do doby zaplacení běžnými bankovními úrokovými sazbami toho státu, na jehož území byla investice zřízena; musí být volně převoditelné. Nejpozději v době vyvlastnění musí být vhodným způsobem zajištěno stanovení výše a poskytnutí odškodnění.

(3) Jestliže jedna smluvní strana vyvlastní majetkové hodnoty společnosti, na kterou nutno podle článku 1 odstavec 2 této Dohody pohlížet jako na vlastní společnost a na které má investor druhé smluvní strany podíl, použijí se ustanovení odstavce 1 tak, aby přiměřené odškodnění investora bylo zajištěno.

(4) Investor má právo nechat prověřit opravněnost vyvlastnění příslušnými orgány smluvní strany, která provedla vyvlastnění.

(5) Investor má právo nechat prověřit výši odškodnění a způsob jeho zaplacení buď příslušnými orgány smluvní strany, která provedla vyvlastnění, nebo rozhodčím soudem podle článku 8 této Dohody.

Článek 5

Převody

(1) Každá smluvní strana zaručuje investorům druhé smluvní strany bez prodlení volný převod platů, které souvisejí s investicí ve volně směnitelné měně, zejména

a) kapitálu a dodatečných částek k údržbě nebo rozšíření investice, včetně její správy;
b) výnosů;
c) splátek půjček;
d) výnosů v případě úplné nebo částečné likvidace nebo prodeje investice;
e) odškodnění podle článku 4 odstavce 1 této Dohody.

(2) Převody podle tohoto článku se uskutečňují oficiálním směnným kursem platným na území smluvní strany v den převodu. Bankovní poplatky budou v řádné výši a přiměřené.

Článek 6

Subrogace

(1) Jestliže jedna smluvní strana nebo její zmocněná instituce poskytne svému investorovi platbu z důvodu záruky na investici umístěné na území druhé smluvní strany, uzná druhá smluvní strana převod všech práv nebo nároků tohoto investora podle zákona nebo na základě právního ujednání na první smluvní stranu. To platí bez ohledu na práva investora první smluvní strany vyplývající z článku 8 a práva první smluvní strany vyplývající z článku 9 této Dohody.

(2) Dále uzná druhá smluvní strana vstup první smluvní strany do všech práv nebo nároků, které je první smluvní strana oprávněna vykonávat ve stejném rozsahu jako její právní předchůdce. Pro převod platů, jež mají být provedeny na základě převedených nároků na uvedenou smluvní stranu, platí přiměřeně článek 4 a 5 této Dohody.

Článek 7

Jiné závazky

(1) Vyplývají-li z právních předpisů jedné smluvní strany nebo z mezinárodněprávních závazků, které platí mezi smluvními stranami kromě této Dohody nebo vzniknou v budoucnosti, všeobecná nebo zvláštní ustanovení, na základě nichž má být poskytnuto investicím investorů jiné smluvní strany výhodnější zacházení než podle této Dohody, používají se tato ustanovení do te míry, do které jsou vůči stávající Dohodě výhodnější.

(2) Investoři jedné smluvní strany mohou uzavřít s druhou smluvní stranou zvláštní smlouvy, avšak jejich ustanovení nesmějí být v rozporu s touto Dohodou. Investice založené podle těchto smluv se budou řídit jejich ustanoveními, jakož i ustanoveními této Dohody.

Článek 8

Řešení sporů z investic

(1) Vzniknou-li mezi jednou smluvní stranou a investorem druhé smluvní strany spory týkající se investice o výši nebo způsobu zaplacení odškodnění podle článku 4 nebo povinnosti převodu podle článku 5 této Dohody, budou vyřešeny, pokud možno, mezi stranami ve sporu přátelsky.

(2) Nemůže-li být spor podle odstavce 1 vyřešen ve lhůtě šesti měsíců od písemného oznámení týkajícího se dostatečně určených nároků, bude spor rozhodnut, není-li dohodnuto jinak, na návrh smluvní strany nebo investora druhé smluvní strany

v rozhodčím řízení podle rozhodčích pravidel UNCITRAL ve znění platném pro obě smluvní strany v době podání návrhu na rozhodčí řízení.

(3) Rozhodnutí rozhodčího soudu je konečné a závazné; každá smluvní strana zajistí uznání a provedení rozhodčího nálezu v souladu se svým právním řádem.

(4) Smluvní strana, která je stranou ve sporu, neuplatní v žádném stadiu smírčího nebo rozhodčího řízení nebo při výkonu rozhodčího výroku námitku, že investor, který je druhou stranou ve sporu, obdržel za některé nebo všechny své ztráty odškodnění na základě záruky.

Článek 9

Spory mezi smluvními stranami

(1) Spory mezi smluvními stranami o výklad nebo použití Dohody mají být, pokud možno, odstraněny v rámci přátelských jednání.

(2) Nemohou-li být spory podle odstavce 1 odstraněny během šesti měsíců, budou předloženy na žádost jedné ze smluvních stran k posouzení rozhodčímu soudu.

(3) Rozhodčí soud bude zřízen případ od případu. Každá smluvní strana určí jednoho rozhodce a tito dva rozhodci se dohodnou na třetí osobě, jež bude působit jako předseda. Rozhodci mají být určeni do tří měsíců a předseda do dalších dvou měsíců poté, co jedna smluvní strana oznámila druhé smluvní straně, že hodlá předložit spor rozhodčímu soudu.

(4) Nebudou-li lhůty uvedené v odstavci 3 dodrženy a není-li jiné dohody, může každá smluvní strana požádat předsedu Mezinárodního soudního dvora, aby provedl potřebná jmenování. Je-li předseda Mezinárodního soudního dvora státním občanem jedné ze smluvních stran nebo má-li jinou překážku, může být požádán zástupce předsedy a v případě, že by ani on nemohl, služebně nejstarší člen Mezinárodního soudního dvora, aby za stejných podmínek provedl jmenování.

(5) Rozhodčí soud sám určuje procesní pravidla.

(6) Rozhodčí soud rozhoduje na základě této Dohody a všeobecně uznávaných pravidel mezinárodního práva. Rozhoduje většinou hlasů; rozhodnutí je konečné a závazné.

(7) Každá smluvní strana nese výlohy svého rozhodce a svého zastoupení v rozhodčím řízení. Výlohy předsedy a ostatní výlohy nesou obě strany stejným dílem. Soud však může ve svém výroku rozhodnout o nákladech jinak.

Článek 10

Použití Dohody

Tato Dohoda platí pro investice, které investoři jedné smluvní strany zřídili v souladu s právními předpisy druhé smluvní strany na jejím území po 1. 1. 1950, nebo které budou zřízeny později.

Článek 11

Vstup v platnost a trvání

(1) Tato Dohoda podléhá ratifikaci a vstupuje v platnost prvního dne třetího měsíce, který následuje po měsíci, v němž byly vyměněny ratifikační listiny.

(2) Dohoda zůstává v platnosti 10 let; po uplynutí této doby bude prodlouzena na neurcitou dobu a může být písemně diplomatickou cestou vypovězena kteroukoli smluvní stranou, při dodržení výpovědní lhůty 12 měsíců.

(3) Na investice, které byly uskutečněny před ukončením platnosti této Dohody, se vztahují články 1 až 10 této Dohody ještě 10 let po skončení její platnosti.

DÁNO ve Vídni dne 15. října 90 ve dvou vyhotoveních, každé v jazyce českém a německém, přičemž obě znění mají stejnou platnost.

Za Rakouskou Republiku:

Dkfm. FERDINAND LACINA

Za Českou a Slovenskou Federativní Republiku:

Ing. VÁCLAV KLAUS

Annex 2

[GERMAN TEXT — TEXTE ALLEMAND]

ABKOMMEN ZWISCHEN DER REPUBLIK ÖSTERREICH UND DER TSCHECHISCHEN UND SLOWAKISCHEN FÖDERATIVEN REPUBLIK ÜBER DIE FÖRDERUNG UND DEN SCHUTZ VON INVESTITIONEN

DIE REPUBLIK ÖSTERREICH UND DIE TSCHECHISCHE UND SLOWAKISCHE FÖDERATIVE REPUBLIK, im folgenden die „Vertragsparteien" genannt,

VON DEM WUNSCHE GELEITET, freundschaftliche Beziehungen im Einvernehmen mit den Grundsatzen der Schlußakte der Konferenz über Sicherheit und Zusammenarbeit in Europa, die am 1. August 1975 in Helsinki unterzeichnet wurde, zu entwickeln und gunstige Voraussetzungen für eine großere wirtschaftliche Zusammenarbeit zwischen den Vertragsparteien zu schaffen,

IN DER ERKENNTNIS, daß die Forderung und der Schutz von Investitionen die Bereitschaft zur Vornahme solcher Investitionen stärken und dadurch einen wichtigen Beitrag zur Entwicklung der Wirtschaftsbeziehungen leisten konnen,

SIND WIE FOLGT ÜBEREINGEKOMMEN:

Artikel 1

Definitionen

Fur die Zwecke dieses Abkommens

(1) umfaßt der Begriff „Investition" alle Vermogenswerte, die durch den Investor einer Vertragspartei auf dem Gebiet der anderen Vertragspartei in Übereinstimmung mit deren Rechtsvorschriften veranlagt werden, insbesondere:

a) bewegliche und unbewegliche Sachen sowie alle dinglichen Rechte;

b) Anteilsrechte und andere Arten von Beteiligungen an Unternehmen;

c) Forderungen oder Anspruche auf Geld, das übergeben wurde, um einen wirtschaftlichen Wert zu schaffen, oder Anspruche auf eine Leistung, die einen wirtschaftlichen Wert hat;

d) Rechte auf dem Gebiet des geistigen Eigentums, einschließlich Urheberrechte, gewerbliche Schutzrechte wie Erfinderpatente, Handelsmarken, gewerbliche Muster und Modelle sowie Gebrauchsmuster, technische Verfahren, Know-how, Handelsnamen und Goodwill;

e) offentlichrechtliche Konzessionen für die Aufsuchung, den Abbau oder die Gewinnung von Naturschatzen;

(2) bezeichnet der Begriff „Investor" in bezug auf die Republik Österreich

a) jede natürliche Person, die die Staatsangehorigkeit der Republik Österreich besitzt und die im Hoheitsgebiet der anderen Vertragspartei eine Investition tatigt;

b) jede juristische Person oder Personengesellschaft des Handelsrechtes, die in Übereinstimmung mit den Gesetzen der Republik Österreich geschaffen wurde, ihren Sitz im Hoheitsgebiet der Republik Österreich hat und die im Hoheitsgebiet der anderen Vertragspartei eine Investition tatigt;

in bezug auf die Tschechische und Slowakische Föderative Republik

a) jede natürliche Person, die gemäß der tschechoslowakischen Rechtsordnung Angehorige der Tschechischen und Slowakischen Föderativen Republik ist, gemaß der tschechoslowakischen Rechtsordnung als Investor zu handeln berechtigt ist und die im Hoheitsgebiet der anderen Vertragspartei eine Investition tatigt;

b) jede juristische Person, die gemaß der tschechoslowakischen Rechtsordnung errichtet worden ist, ihren Sitz im Hoheitsgebiet der Tschechischen und Slowakischen Föderativen Republik hat und die im Hoheitsgebiet der anderen Vertragspartei eine Investition tatigt;

(3) bezeichnet der Begriff „Ertrag" diejenigen Betrage, die eine Investition erbringt, und umfaßt insbesondere Gewinne, Zinsen, Kapitalzuwachse, Dividenden, Tantiemen und Lizenzgebühren

Artikel 2

Förderung und Schutz von Investitionen

(1) Jede Vertragspartei fördert nach Möglichkeit in ihrem Hoheitsgebiet Investitionen von Investoren der anderen Vertragspartei, läßt diese in Übereinstimmung mit ihren Rechtsvorschriften zu und behandelt sie in jedem Fall gerecht und billig

(2) Investitionen und ihre Ertrage genießen den vollen Schutz dieses Abkommens. Gleiches gilt im Falle ihrer Wiederveranlagung auch für deren Ertrage. Die rechtliche Erweiterung oder Veranderung einer Investition hat in Übereinstimmung mit den Rechtsvorschriften der Vertragspartei zu erfolgen, in deren Hoheitsgebiet die Investition getatigt wird.

Artikel 3

Behandlung von Investitionen

(1) Jede Vertragspartei behandelt Investoren der anderen Vertragspartei und deren Investitionen nicht weniger günstig als eigene Investoren oder Investoren dritter Staaten und deren Investitionen.

(2) Die Bestimmungen des Absatzes 1 beziehen sich jedoch nicht auf gegenwärtige oder künftige Vorrechte, die eine Vertragspartei den Investoren eines dritten Staates oder deren Investitionen einräumt im Zusammenhang mit

a) einer Wirtschaftsunion, einer Zollunion, einem gemeinsamen Markt, einer Freihandelszone oder einer Wirtschaftsgemeinschaft;
b) einem internationalen Abkommen oder einer zwischenstaatlichen Vereinbarung oder innerstaatlichen Rechtsvorschrift über Steuerfragen;
c) einer Regelung zur Erleichterung des Grenzverkehrs.

Artikel 4

Entschädigung

(1) Investitionen von Investoren einer Vertragspartei dürfen im Hoheitsgebiet der anderen Vertragspartei nur im öffentlichen Interesse, auf Grund eines rechtmäßigen Verfahrens und gegen Entschädigung enteignet, verstaatlicht oder einer sonstigen Maßnahme mit gleicher Wirkung unterworfen werden.

(2) Die Entschädigung muß dem Wert der Investition unmittelbar vor dem Zeitpunkt entsprechen, in dem die tatsächliche oder drohende Enteignung öffentlich bekannt wurde. Die Entschädigung muß ohne Verzögerung geleistet werden und ist bis zum Zeitpunkt der Zahlung mit dem üblichen bankmäßigen Zinssatz jenes Staates, in dessen Hoheitsgebiet die Investition durchgeführt wurde, zu verzinsen; sie muß frei transferierbar sein. Spätestens im Zeitpunkt der Enteignung muß in geeigneter Weise für die Festsetzung und Leistung der Entschädigung Vorsorge getroffen sein.

(3) Enteignet eine Vertragspartei die Vermögenswerte einer Gesellschaft, die in Anwendung von Artikel 1 Absatz 2 dieses Abkommens als ihre eigene Gesellschaft anzusehen ist, und an welcher ein Investor der anderen Vertragspartei Anteile besitzt, so wendet sie die Bestimmungen des Absatzes 1 dergestalt an, daß die angemessene Entschädigung dieses Investors sichergestellt wird.

(4) Dem Investor steht das Recht zu, die Rechtmäßigkeit der Enteignung durch die zuständigen Organe der Vertragspartei, welche die Enteignung veranlaßt hat, überprüfen zu lassen.

(5) Dem Investor steht das Recht zu, die Höhe der Entschädigung und die Zahlungsmodalitäten entweder durch die zuständigen Organe der Vertragspartei, welche die Enteignung veranlaßt hat, oder durch ein Schiedsgericht gemäß Artikel 8 dieses Abkommens überprüfen zu lassen.

Artikel 5

Überweisungen

(1) Jede Vertragspartei gewährleistet den Investoren der anderen Vertragspartei ohne Verzögerung den freien Transfer in frei konvertierbarer Währung der im Zusammenhang mit einer Investition stehenden Zahlungen, insbesondere

a) des Kapitals und zusätzlicher Beträge zur Aufrechterhaltung oder Erweiterung der Investition, einschließlich ihrer Verwaltung;
b) der Erträge;
c) der Rückzahlung von Darlehen;
d) des Erlöses im Falle vollständiger oder teilweiser Liquidation oder Veräußerung der Investition;
e) einer Entschädigung gemäß Artikel 4 Absatz 1 dieses Abkommens.

(2) Die Überweisungen gemäß diesem Artikel erfolgen zu den offiziellen Wechselkursen im Hoheitsgebiet der Vertragspartei, die am Tage der Überweisung gelten. Die Bankgebühren werden gerecht und angemessen sein.

Artikel 6

Eintrittsrecht

(1) Leistet eine Vertragspartei oder eine von ihr hiezu ermächtigte Institution ihrem Investor Zahlungen auf Grund einer Garantie für eine Investition im Hoheitsgebiet der anderen Vertragspartei, so erkennt diese andere Vertragspartei die Übertragung aller Rechte oder Ansprüche dieses Investors kraft Gesetzes oder auf Grund eines Rechtsgeschäfts auf die erstgenannte Vertragspartei an. Dies gilt unbeschadet der Rechte des Investors der erstgenannten Vertragspartei aus Artikel 8 und der Rechte der erstgenannten Vertragspartei aus Artikel 9 dieses Abkommens.

(2) Ferner erkennt die andere Vertragspartei den Eintritt der erstgenannten Vertragspartei in alle diese Rechte oder Ansprüche an, welche die erstgenannte Vertragspartei in demselben Umfang wie ihr Rechtsvorgänger auszuüben berechtigt ist. Für den Transfer der an die betreffende Vertragspartei auf Grund der übertragenen Ansprüche zu leistenden Zahlungen gelten Artikel 4 und Artikel 5 dieses Abkommens sinngemäß.

Artikel 7

Andere Verpflichtungen

(1) Ergibt sich aus den Rechtsvorschriften einer Vertragspartei oder aus völkerrechtlichen Ver-

pflichtungen, die neben diesem Abkommen zwischen den Vertragsparteien bestehen oder in Zukunft begründet werden, eine allgemeine oder besondere Regelung, durch die den Investitionen der Investoren der anderen Vertragspartei eine günstigere Behandlung als nach diesem Abkommen zu gewahren ist, so geht diese Regelung dem vorliegenden Abkommen insoweit vor, als sie günstiger ist.

(2) Investoren einer Vertragspartei können mit der anderen Vertragspartei besondere Vertrage abschließen, deren Bestimmungen jedoch nicht im Widerspruch zu diesem Abkommen stehen dürfen. Die nach diesen Vertragen getatigten Investitionen werden durch deren Bestimmungen sowie durch die Bestimmungen dieses Abkommens geregelt.

Artikel 8

Beilegung von Investitionsstreitigkeiten

(1) Entstehen zwischen einer Vertragspartei und einem Investor der anderen Vertragspartei Meinungsverschiedenheiten aus einer Investition, die die Höhe oder die Zahlungsmodalitäten einer Entschädigung gemaß Artikel 4 oder Transferverpflichtungen gemaß Artikel 5 dieses Abkommens betreffen, so werden diese so weit wie möglich zwischen den Streitparteien freundschaftlich beigelegt.

(2) Kann eine Meinungsverschiedenheit gemaß Absatz 1 nicht innerhalb von sechs Monaten ab einer schriftlichen Mitteilung hinreichend bestimmter Ansprüche beigelegt werden, wird die Meinungsverschiedenheit, wenn nichts anderes vereinbart ist, auf Antrag der Vertragspartei oder des Investors der anderen Vertragspartei durch ein Schiedsverfahren nach der UNCITRAL-Schiedsgerichtsordnung in der zum Zeitpunkt des Antrags auf Einleitung des Schiedsverfahrens gültigen Fassung entschieden.

(3) Die Entscheidung des Schiedsgerichts ist endgültig und bindend; jede Vertragspartei stellt die Anerkennung und Durchsetzung des Schiedsspruches in Übereinstimmung mit ihrer Rechtsordnung sicher.

(4) Eine Vertragspartei, die Streitpartei ist, macht in keinem Stadium des Schiedsverfahrens oder der Durchsetzung eines Schiedsspruchs als Einwand geltend, daß der Investor, der die andere Streitpartei bildet, auf Grund einer Garantie bezüglich einiger oder aller seiner Verluste eine Entschädigung erhalten habe.

Artikel 9

Streitigkeiten zwischen den Vertragsparteien

(1) Meinungsverschiedenheiten zwischen den Vertragsparteien über die Auslegung oder Anwendung dieses Abkommens sollen, soweit wie möglich, durch freundschaftliche Verhandlungen beigelegt werden.

(2) Kann eine Meinungsverschiedenheit gemaß Absatz 1 innerhalb von sechs Monaten nicht beigelegt werden, so wird sie auf Verlangen einer der beiden Vertragsparteien einem Schiedsgericht unterbreitet.

(3) Das Schiedsgericht wird von Fall zu Fall gebildet, in dem jede Vertragspartei ein Mitglied bestellt und beide Mitglieder sich auf eine dritte Person als Vorsitzenden einigen. Die Mitglieder sind innerhalb von drei Monaten, nachdem die eine Vertragspartei der anderen mitgeteilt hat, daß sie die Meinungsverschiedenheit einem Schiedsgericht unterbreiten will, der Vorsitzende innerhalb von weiteren zwei Monaten zu bestellen.

(4) Werden die in Absatz 3 genannten Fristen nicht eingehalten, so kann in Ermangelung einer anderen Vereinbarung jede Vertragspartei den Präsidenten des Internationalen Gerichtshofes bitten, die erforderlichen Ernennungen vorzunehmen. Besitzt der Präsident des Internationalen Gerichtshofes die Staatsangehörigkeit einer der beiden Vertragsparteien oder ist er aus einem anderen Grund verhindert, so kann der Vizepräsident, oder im Falle seiner Verhinderung, das dienstalteste Mitglied des Internationalen Gerichtshofes unter den selben Voraussetzungen eingeladen werden, die Ernennungen vorzunehmen.

(5) Das Schiedsgericht regelt sein Verfahren selbst.

(6) Das Schiedsgericht entscheidet auf Grund dieses Abkommens sowie auf Grund der allgemein anerkannten Regeln des Völkerrechtes. Es entscheidet mit Stimmenmehrheit; die Entscheidung ist endgültig und bindend.

(7) Jede Vertragspartei tragt die Kosten ihres Mitglieds und ihrer Vertretung in dem Schiedsverfahren. Die Kosten des Vorsitzenden sowie die sonstigen Kosten werden von den beiden Vertragsparteien zu gleichen Teilen getragen. Das Gericht kann jedoch in seiner Entscheidung eine andere Kostenregelung treffen.

Artikel 10

Anwendung dieses Abkommens

Dieses Abkommen gilt für Investitionen, die Investoren der einen Vertragspartei in Übereinstimmung mit den Rechtsvorschriften der anderen Vertragspartei in deren Hoheitsgebiet nach dem 1. Jänner 1950 vorgenommen haben oder vornehmen werden.

Artikel 11

Inkrafttreten und Dauer

(1) Dieses Abkommen bedarf der Ratifikation und tritt am ersten Tag des dritten Monats in Kraft, der auf den Monat folgt, in welchem die Ratifikationsurkunden ausgetauscht worden sind.

(2) Das Abkommen bleibt zehn Jahre lang in Kraft; nach deren Ablauf wird es auf unbestimmte Zeit verlängert und kann von jeder Vertragspartei unter Einhaltung einer Kündigungsfrist von zwölf Monaten schriftlich auf diplomatischem Wege gekündigt werden.

(3) Für Investitionen, die bis zum Zeitpunkt des Außerkrafttretens dieses Abkommens vorgenommen worden sind, gelten die Artikel 1 bis 10 dieses Abkommens noch für weitere zehn Jahre vom Tage des Außerkrafttretens des Abkommens an.

GESCHEHEN zu Wien, am 15 Oktober 1990, in zwei Urschriften, jede in deutscher und tschechischer Sprache, wobei jeder Wortlaut gleichermaßen authentisch ist.

Für die Republik
Österreich:

Dkfm. FERDINAND LACINA

Für die Tschechische und Slowakische
Föderative Republik:

Ing. VÁCLAV KLAUS

Annex 3

[TRANSLATION — TRADUCTION]

AGREEMENT[1] BETWEEN THE REPUBLIC OF AUSTRIA AND THE CZECH AND SLOVAK FEDERAL REPUBLIC CONCERNING THE PROMOTION AND PROTECTION OF INVESTMENTS

The Republic of Austria and the Czech and Slovak Federal Republic, hereinafter referred to as the "Contracting Parties",

Desiring to further friendly relations in accordance with the principles of the Final Act of the Conference on Security and Cooperation in Europe signed in Helsinki on 1 August 1975[2] and to establish favourable conditions for broader economic cooperation between the Contracting Parties,

Recognizing that the promotion and protection of investments can enhance the willingness to undertake such investments and thereby make an important contribution to the development of economic relations,

Have agreed as follows:

Article 1

DEFINITIONS

For the purposes of this Agreement:

(1) "Investment" shall mean all assets that are invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with its legislation, in particular:

(*a*) Movable and immovable property and other rights *in rem*;

(*b*) Shares and other forms of equity interest in companies;

(*c*) Debts receivable or claims to money that was handed over for the purpose of creating economic value, or claims to services that have economic value;

(*d*) Rights relating to intellectual property, including copyrights, industrial property rights such as patents, trademarks, industrial designs, models and samples, technical processes, know-how, business names and goodwill;

(*e*) Concessions under public law to prospect for, extract or otherwise exploit natural resources.

(2) "Investor" shall mean, in the case of the Republic of Austria:

(*a*) Any individual who is a citizen of the Republic of Austria and makes an investment in the territory of the other Contracting Party;

(*b*) Any body corporate or commercial partnership constituted in accordance with the laws of the Republic of Austria with a registered office in the territory of the Republic of Austria that makes an investment in the territory of the other Contracting Party;

[1] Came into force on 1 October 1991, i.e., the first day of the third month following the exchange of the instruments of ratification, which took place at Prague on 23 July 1991, in accordance with article 11 (1).

[2] *International Legal Materials*, vol. 14 (1975), p. 1292 (American Society of International Law).

In the case of the Czech and Slovak Federal Republic:

(*a*) Any individual who is a national of the Czech and Slovak Federal Republic in accordance with Czechoslovak law, who is authorized to act as an investor in accordance with Czechoslovak law and who makes an investment in the territory of the other Contracting Party;

(*b*) Any body corporate constituted in accordance with Czechoslovak law with a registered office in the territory of the Czech and Slovak Federal Republic that makes an investment in the territory of the other Contracting Party.

(3) "Earnings" shall mean the amounts derived from an investment, including in particular profits, interest, capital gains, dividends, directors' percentages of profits and royalties.

Article 2

PROMOTION AND PROTECTION OF INVESTMENTS

(1) Each Contracting Party shall to the extent possible promote investments in its territory by investors from the other Contracting Party, shall permit such investments in accordance with its laws and shall accord them just and equitable treatment.

(2) Investments and the earnings therefrom shall be accorded the full protection of this Agreement. The same shall hold for reinvestment, including reinvestment of earnings. Legal extension or modification of an investment may take place only in accordance with the laws of the Contracting Party in whose territory the investment is made.

Article 3

TREATMENT OF INVESTMENTS

(1) Each Contracting Party shall accord investors of the other Contracting Party treatment no less favourable than that accorded to its own investors or investors of a third State and their investments.

(2) The provisions of paragraph 1 shall not apply, however, to present or future privileges accorded by one Contracting Party to the investors of a third State or their investments in connection with:

(*a*) An economic union, tariff union, common market, free trade zone or economic community;

(*b*) An international convention or intergovernmental agreement or domestic legislation concerning tax matters;

(*c*) An arrangement to facilitate frontier traffic.

Article 4

COMPENSATION

(1) Investments by investors of one Contracting Party in the territory of the other Contracting Party may not be expropriated, nationalized or subjected to other

measures having similar consequences except in the public interest, on the basis of legal proceedings and in return for compensation.

(2) Compensation must correspond to the value of the investment immediately prior to the time that the actual or impending expropriation became public knowledge. Compensation must be paid without delay and shall earn interest until it is paid, at the customary bank rate of interest in the State in whose territory the investment was made; it must be freely transferable. Provision shall be made no later than the date of expropriation for determining and paying compensation.

(3) If a Contracting Party expropriates the property of a company which is considered to be a company of that Contracting Party according to article 1, paragraph 2, of this Agreement and in which an investor of the other Contracting Party owns shares, the provisions of paragraph 1 shall be applied in such a way as to ensure that such an investor receives appropriate compensation.

(4) The investor shall have the right to have the legality of the expropriation reviewed by the competent authorities of the Contracting Party which has instituted the expropriation.

(5) The investor shall have the right to have the amount of compensation and the arrangements for paying it reviewed by the competent authorities of the Contracting Party which has instituted the expropriation or by an arbitral tribunal in accordance with article 8 of this Agreement.

Article 5

REMITTANCES

(1) Each Contracting Party shall guarantee to investors of the other Contracting Party free transfer without delay in freely convertible currency of payments in connection with an investment, in particular:

(*a*) Capital and additional payments to maintain or increase an investment, including management fees;

(*b*) Earnings;

(*c*) Loan repayments;

(*d*) Proceeds from the complete or partial liquidation or sale of the investment;

(*e*) Compensation in accordance with article 4, paragraph 1, of this Agreement.

(2) Remittances in accordance with this article shall be at the official rates of exchange in effect in the territory of the Contracting Party on the date of remittance. The bank charges applied shall be fair and reasonable.

Article 6

SUBROGATION

(1) If a Contracting Party, or an institution authorized for that purpose, makes payments to its own investor on the basis of a guarantee on an investment in the territory of the other Contracting Party, that other Contracting Party shall recognize the assignment of all rights or claims of the investor to the first-mentioned Contracting Party by operation of law or on the basis of a legal transaction. This provi-

sion shall apply without prejudice to the rights of the investor of the first-mentioned Contracting Party under article 8 and the rights of the first-mentioned Contracting Party under article 9 of this Agreement.

(2) Furthermore, the other Contracting Party shall recognize the subrogation by the first-mentioned Contracting Party of all such rights or claims, to which the first-mentioned Contracting Party shall be entitled to the same extent as its legal predecessor. Articles 4 and 5 of this Agreement shall apply *mutatis mutandis* to the transfer of payments to be made to the Contracting Party in question on the basis of the assigned claims.

Article 7

OTHER OBLIGATIONS

(1) If under the laws of one of the Contracting Parties or under international obligations now or in the future undertaken between the Contracting Parties in addition to this Agreement there exists a general or special regime whereby the investments of investors of the other Contracting Party are accorded more favourable treatment than under this Agreement, the said regime shall take precedence over the present Agreement to the extent that it is more favourable.

(2) Investors of one Contracting Party may conclude special agreements with the other Contracting Party, but the provisions thereof may not be in contradiction to this Agreement. The investments made under such agreements shall be governed both by the provisions thereof and by the provisions of this Agreement.

Article 8

SETTLEMENT OF DISPUTES CONCERNING INVESTMENTS

(1) If disputes should arise between one Contracting Party and an investor of the other Contracting Party concerning an investment with regard to the amount or the arrangements for payment of compensation in accordance with article 4, or to the transfer obligations in accordance with article 5 of this Agreement, they shall as far as possible be settled between the parties to the dispute on an amicable basis.

(2) If a dispute within the meaning of paragraph 1 cannot be settled within six months from written notification of sufficiently specific claims, the dispute shall be resolved, unless otherwise agreed, by arbitration at the request of the Contracting Party or the investor of the other Contracting Party in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) in the version in effect on the date of the request to initiate arbitral proceedings.

(3) The decision of the arbitral tribunal shall be final and binding; each Contracting Party shall ensure the recognition and enforcement of the arbitral award in accordance with its own laws.

(4) A Contracting Party which is a party to the dispute may not at any stage of the arbitral proceedings or the enforcement of the arbitral award raise the objection that the investor who is the other party to the dispute has received compensation for some or all of his losses on the basis of a guarantee.

Article 9

DISPUTES BETWEEN CONTRACTING PARTIES

(1) Disputes between Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled on an amicable basis.

(2) If a dispute within the meaning of paragraph 1 cannot be settled within six months, it shall be submitted to an arbitral tribunal at the request of either of the two Contracting Parties.

(3) The arbitral tribunal shall be constituted on an *ad hoc* basis; each Contracting Party shall appoint one arbitrator, and the two arbitrators shall agree on a third person to act as chairman. The arbitrators shall be appointed within three months from the date on which one Contracting Party has informed the other that it wishes to submit the dispute to an arbitral tribunal, and the chairman shall be appointed within a further two months.

(4) If the time-limits specified in paragraph 3 are not met, either Contracting Party may, in the absence of any other agreement, request the President of the International Court of Justice to make the necessary appointments. If the President of the International Court of Justice is a national of one of the two Contracting Parties or is unable to act for any other reason, the Vice-President or, if he is unable to act, the most senior member of the International Court of Justice may under the same conditions be asked to make the appointments.

(5) The arbitral tribunal shall determine its own procedure.

(6) The arbitral tribunal shall base its decision on this Agreement and on generally recognized rules of international law. It shall decide by majority vote; its decision shall be final and binding.

(7) Each Contracting Party shall bear the cost of its own arbitrator and of its representation in the arbitration proceedings. The cost of the chairman and the other costs shall be shared equally by the two Contracting Parties. The tribunal, however, may make a different ruling on costs in its decision.

Article 10

APPLICATION OF THIS AGREEMENT

This Agreement shall be applicable to investments that investors of one Contracting Party have made or will make in the territory of the other Contracting Party in accordance with its laws after 1 January 1950.

Article 11

INCEPTION AND DURATION

(1) This Agreement is subject to ratification, and shall enter into force on the first day of the third month following the month in which the instruments of ratification have been exchanged.

(2) The Agreement shall remain in force for ten years; upon the expiry of that period, it shall be extended for an indefinite period of time and may be denounced

by either Contracting Party subject to twelve months' prior notice in writing through the diplomatic channel.

(3) In the case of investments that will have been made before the date of denunciation of this Agreement, articles 1 to 10 of this Agreement shall apply for a further ten years from that date.

Done at Vienna on 15 October 1990 in two originals, each in the German and Czech languages, both texts being equally authentic.

For the Republic
of Austria:

FERDINAND LACINA

For the Czech and Slovak
Federal Republic:

VÁCLAV KLAUS

Annex 4

BEGLAUBIGTE ÜBERSETZUNG AUS DEM DEUTSCHEN
CERTIFIED TRANSLATION FROM GERMAN

[GERMAN TEXT]

AGREEMENT BETWEEN THE REPUBLIC OF AUSTRIA AND THE CZECH AND SLOVAK FEDERAL REPUBLIC CONCERNING THE PROMOTION AND PROTECTION OF INVESTMENTS

The Republic of Austria and the Czech and Slovak Federal Republic, hereinafter referred to as the "Contracting Parties",

Desiring to further friendly relations in accordance with the principles of the Final Act of the Conference on Security and Cooperation in Europe signed in Helsinki on 1 August 1975 and to establish favourable conditions for broader economic cooperation between the Contracting Parties,

Recognizing that the promotion and protection of investments can enhance the willingness to undertake such investments and thereby make an important contribution to the development of economic relations,

Have agreed as follows:

Article 1

DEFINITIONS

For the purposes of this Agreement:

(1) "Investment" shall mean all assets that are invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with its legislation, in particular:

(*a*) Movable and immovable property and all rights *in rem*;

(*b*) Shares and other forms of equity interest in companies;

(*c*) Debts receivable or claims to money that was handed over for the purpose of creating economic value, or claims to services that have economic value;

(*d*) Rights relating to intellectual property, including copyrights, industrial property rights such as patents, trademarks, industrial designs, models and samples, technical processes, know-how, business names and goodwill;

(*e*) Concessions under public law to prospect for, extract or otherwise exploit natural resources.

(2) "Investor" shall mean, in the case of the Republic of Austria:

(*a*) Any individual who is a citizen of the Republic of Austria and makes an investment in the territory of the other Contracting Party;

(*b*) Any body corporate or commercial partnership constituted in accordance with the laws of the Republic of Austria with a registered office in the territory of the Republic of Austria that makes an investment in the territory of the other Contracting Party;

In the case of the Czech and Slovak Federal Republic:

(*a*) Any individual who is a national of the Czech and Slovak Federal Republic in accordance with Czechoslovak law, who is authorized to act as an investor in accordance with Czechoslovak law and who makes an investment in the territory of the other Contracting Party;

(*b*) Any body corporate constituted in accordance with Czechoslovak law with a registered office in the territory of the Czech and Slovak Federal Republic that makes an investment in the territory of the other Contracting Party.

(3) "Earnings" shall mean the amounts derived from an investment, including in particular profits, interest, capital gains, dividends, directors' percentages of profits and royalties.

Article 2

PROMOTION AND PROTECTION OF INVESTMENTS

(1) Each Contracting Party shall to the extent possible promote investments in its territory by investors from the other Contracting Party, shall permit such investments in accordance with its laws and shall accord them just and equitable treatment.

(2) Investments and the earnings therefrom shall be accorded the full protection of this Agreement. The same shall hold for reinvestment, including the earnings therefrom . Legal extension or modification of an investment may take place only in accordance with the laws of the Contracting Party in whose territory the investment is made.

Article 3

TREATMENT OF INVESTMENTS

(1) Each Contracting Party shall accord investors of the other Contracting Party treatment no less favourable than that accorded to its own investors or investors of a third State and their investments.

(2) The provisions of paragraph 1 shall not apply, however, to present or future privileges accorded by one Contracting Party to the investors of a third State or their investments in connection with:

(*a*) An economic union, tariff union, common market, free trade zone or economic community;

(*b*) An international convention or intergovernmental agreement or domestic legislation concerning tax matters;

(*c*) An arrangement to facilitate frontier traffic.

Article 4

COMPENSATION

(1) Investments by investors of one Contracting Party in the territory of the other Contracting Party may not be expropriated, nationalized or subjected to other

measures having similar consequences except in the public interest, on the basis of legal proceedings and in return for compensation.

(2) Compensation must correspond to the value of the investment immediately prior to the time that the actual or impending expropriation became public knowledge. Compensation must be paid without delay and shall earn interest until it is paid, at the customary bank rate of interest in the State in whose territory the investment was made; it must be freely transferable. Provision shall be made no later than the date of expropriation for determining and paying compensation.

(3) If a Contracting Party expropriates the property of a company which is considered to be a company of that Contracting Party according to article 1, paragraph 2, of this Agreement and in which an investor of the other Contracting Party owns shares, the provisions of paragraph 1 shall be applied in such a way as to ensure that such an investor receives appropriate compensation.

(4) The investor shall have the right to have the legality of the expropriation reviewed by the competent authorities of the Contracting Party which has instituted the expropriation.

(5) The investor shall have the right to have the amount of compensation and the arrangements for paying it reviewed by the competent authorities of the Contracting Party which has instituted the expropriation or by an arbitral tribunal in accordance with article 8 of this Agreement.

Article 5

REMITTANCES

(1) Each Contracting Party shall guarantee to investors of the other Contracting Party free transfer without delay in freely convertible currency of payments in connection with an investment, in particular:

(*a*) Capital and additional payments to maintain or increase an investment, including management fees;

(*b*) Earnings;

(*c*) Loan repayments;

(*d*) Proceeds from the complete or partial liquidation or sale of the investment;

(*e*) Compensation in accordance with article 4, paragraph 1, of this Agreement.

(2) Remittances in accordance with this article shall be at the official rates of exchange in effect in the territory of the Contracting Party on the date of remittance. The bank charges applied shall be fair and reasonable.

Article 6

SUBROGATION

(1) If a Contracting Party, or an institution authorized for that purpose, makes payments to its own investor on the basis of a guarantee on an investment in the territory of the other Contracting Party, that other Contracting Party shall recognize the assignment of all rights or claims of the investor to the first-mentioned Contracting Party by operation of law or on the basis of a legal transaction. This provi-

sion shall apply without prejudice to the rights of the investor of the first-mentioned Contracting Party under article 8 and the rights of the first-mentioned Contracting Party under article 9 of this Agreement.

(2) Furthermore, the other Contracting Party shall recognize the subrogation by the first-mentioned Contracting Party of all such rights or claims, to which the first-mentioned Contracting Party shall be entitled to the same extent as its legal predecessor. Articles 4 and 5 of this Agreement shall apply *mutatis mutandis* to the transfer of payments to be made to the Contracting Party in question on the basis of the assigned claims.

Article 7

OTHER OBLIGATIONS

(1) If under the laws of one of the Contracting Parties or under international obligations now or in the future undertaken between the Contracting Parties in addition to this Agreement there exists a general or special regime whereby the investments of investors of the other Contracting Party are accorded more favourable treatment than under this Agreement, the said regime shall take precedence over the present Agreement to the extent that it is more favourable.

(2) Investors of one Contracting Party may conclude special agreements with the other Contracting Party, but the provisions thereof may not be in contradiction to this Agreement. The investments made under such agreements shall be governed both by the provisions thereof and by the provisions of this Agreement.

Article 8

SETTLEMENT OF DISPUTES CONCERNING INVESTMENTS

(1) If disputes should arise between one Contracting Party and an investor of the other Contracting Party concerning an investment with regard to the amount or the arrangements for payment of compensation in accordance with article 4, or to the transfer obligations in accordance with article 5 of this Agreement, they shall as far as possible be settled between the parties to the dispute on an amicable basis.

(2) If a dispute within the meaning of paragraph 1 cannot be settled within six months from written notification of sufficiently specific claims, the dispute shall be resolved, unless otherwise agreed, by arbitration at the request of the Contracting Party or the investor of the other Contracting Party in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) in the version in effect on the date of the request to initiate arbitral proceedings.

(3) The decision of the arbitral tribunal shall be final and binding; each Contracting Party shall ensure the recognition and enforcement of the arbitral award in accordance with its own laws.

(4) A Contracting Party which is a party to the dispute may not at any stage of the arbitral proceedings or the enforcement of the arbitral award raise the objection that the investor who is the other party to the dispute has received compensation for some or all of his losses on the basis of a guarantee.

Article 9

DISPUTES BETWEEN CONTRACTING PARTIES

(1) Disputes between Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled on an amicable basis.

(2) If a dispute within the meaning of paragraph 1 cannot be settled within six months, it shall be submitted to an arbitral tribunal at the request of either of the two Contracting Parties.

(3) The arbitral tribunal shall be constituted on an *ad hoc* basis; each Contracting Party shall appoint one arbitrator, and the two arbitrators shall agree on a third person to act as chairman. The arbitrators shall be appointed within three months from the date on which one Contracting Party has informed the other that it wishes to submit the dispute to an arbitral tribunal, and the chairman shall be appointed within a further two months.

(4) If the time-limits specified in paragraph 3 are not met, either Contracting Party may, in the absence of any other agreement, request the President of the International Court of Justice to make the necessary appointments. If the President of the International Court of Justice is a national of one of the two Contracting Parties or is unable to act for any other reason, the Vice-President or, if he is unable to act, the most senior member of the International Court of Justice may under the same conditions be asked to make the appointments.

(5) The arbitral tribunal shall determine its own procedure.

(6) The arbitral tribunal shall base its decision on this Agreement and on generally recognized rules of international law. It shall decide by majority vote; its decision shall be final and binding.

(7) Each Contracting Party shall bear the cost of its own arbitrator and of its representation in the arbitration proceedings. The cost of the chairman and the other costs shall be shared equally by the two Contracting Parties. The tribunal, however, may make a different ruling on costs in its decision.

Article 10

APPLICATION OF THIS AGREEMENT

This Agreement shall be applicable to investments that investors of one Contracting Party have made or will make in the territory of the other Contracting Party in accordance with its laws after 1 January 1950.

Article 11

INCEPTION AND DURATION

(1) This Agreement is subject to ratification, and shall enter into force on the first day of the third month following the month in which the instruments of ratification have been exchanged.

(2) The Agreement shall remain in force for ten years; upon the expiry of that period, it shall be extended for an indefinite period of time and may be denounced

BEGLAUBIGTE ÜBERSETZUNG AUS DEM DEUTSCHEN
CERTIFIED TRANSLATION FROM GERMAN

by either Contracting Party subject to twelve months' prior notice in writing through the diplomatic channel.

(3) In the case of investments that will have been made before the date of denunciation of this Agreement, articles 1 to 10 of this Agreement shall apply for a further ten years from the date of denunciation of this Agreement.

Done at Vienna on 15 October 1990 in two originals, each in the German and Czech languages, both texts being equally authentic.

For the Republic
of Austria:

FERDINAND LACINA

For the Czech and Slovak
Federal Republic:

VÁCLAV KLAUS

Die genaue Übereinstimmung der vorstehenden Übersetzung mit der angehefteten Ablichtung bestätige ich unter Berufung auf meinen Eid.

With reference to my oath of office I hereby certify the exact conformity of the above translation with the attached German copy.

Vienna, 11 April 2011

MMag. Sabine Fehringer
Allg. beeid. und gerichtl. zertifizierter Dolmetscher für die englische Sprache
Wien

MMag. Sabine Fehringer, LL.M.

[GERMAN TEXT — TEXTE ALLEMAND]

ABKOMMEN ZWISCHEN DER REPUBLIK ÖSTERREICH UND DER TSCHECHISCHEN UND SLOWAKISCHEN FÖDERATIVEN REPUBLIK ÜBER DIE FÖRDERUNG UND DEN SCHUTZ VON INVESTITIONEN

DIE REPUBLIK ÖSTERREICH UND DIE TSCHECHISCHE UND SLOWAKISCHE FÖDERATIVE REPUBLIK, im folgenden die „Vertragsparteien" genannt,

VON DEM WUNSCHE GELEITET, freundschaftliche Beziehungen im Einvernehmen mit den Grundsatzen der Schlußakte der Konferenz uber Sicherheit und Zusammenarbeit in Europa, die am 1. August 1975 in Helsinki unterzeichnet wurde, zu entwickeln und gunstige Voraussetzungen für eine großere wirtschaftliche Zusammenarbeit zwischen den Vertragsparteien zu schaffen,

IN DER ERKENNTNIS, daß die Forderung und der Schutz von Investitionen die Bereitschaft zur Vornahme solcher Investitionen starken und dadurch einen wichtigen Beitrag zur Entwicklung der Wirtschaftsbeziehungen leisten konnen,

SIND WIE FOLGT ÜBEREINGEKOMMEN:

Artikel 1

Definitionen

Fur die Zwecke dieses Abkommens

(1) umfaßt der Begriff „Investition" alle Vermogenswerte, die durch den Investor einer Vertragspartei auf dem Gebiet der anderen Vertragspartei in Übereinstimmung mit deren Rechtsvorschriften veranlagt werden, insbesondere:

a) bewegliche und unbewegliche Sachen sowie alle dinglichen Rechte;
b) Anteilsrechte und andere Arten von Beteiligungen an Unternehmen;
c) Forderungen oder Anspruche auf Geld, das übergeben wurde, um einen wirtschaftlichen Wert zu schaffen, oder Anspruche auf eine Leistung, die einen wirtschaftlichen Wert hat;
d) Rechte auf dem Gebiet des geistigen Eigentums, einschließlich Urheberrechte, gewerbliche Schutzrechte wie Erfinderpatente, Handelsmarken, gewerbliche Muster und Modelle sowie Gebrauchsmuster, technische Verfahren, Know-how, Handelsnamen und Goodwill;
e) offentlichrechtliche Konzessionen für die Aufsuchung, den Abbau oder die Gewinnung von Naturschatzen;

(2) bezeichnet der Begriff „Investor" in bezug auf die Republik Österreich

a) jede natürliche Person, die die Staatsangehorigkeit der Republik Österreich besitzt und die im Hoheitsgebiet der anderen Vertragspartei eine Investition tatigt;
b) jede juristische Person oder Personengesellschaft des Handelsrechtes, die in Übereinstimmung mit den Gesetzen der Republik Österreich geschaffen wurde, ihren Sitz im Hoheitsgebiet der Republik Österreich hat und die im Hoheitsgebiet der anderen Vertragspartei eine Investition tatigt;

in bezug auf die Tschechische und Slowakische Föderative Republik

a) jede natürliche Person, die gemäß der tschechoslowakischen Rechtsordnung Angehorige der Tschechischen und Slowakischen Föderativen Republik ist, gemaß der tschechoslowakischen Rechtsordnung als Investor zu handeln berechtigt ist und die im Hoheitsgebiet der anderen Vertragspartei eine Investition tatigt;
b) jede juristische Person, die gemaß der tschechoslowakischen Rechtsordnung errichtet worden ist, ihren Sitz im Hoheitsgebiet der Tschechischen und Slowakischen Foderativen Republik hat und die im Hoheitsgebiet der anderen Vertragspartei eine Investition tatigt;

(3) bezeichnet der Begriff „Ertrag" diejenigen Betrage, die eine Investition erbringt, und umfaßt insbesondere Gewinne, Zinsen, Kapitalzuwachse, Dividenden, Tantiemen und Lizenzgebuhren

Artikel 2

Förderung und Schutz von Investitionen

(1) Jede Vertragspartei fordert nach Möglichkeit in ihrem Hoheitsgebiet Investitionen von Investoren der anderen Vertragspartei, laßt diese in Übereinstimmung mit ihren Rechtsvorschriften zu und behandelt sie in jedem Fall gerecht und billig

(2) Investitionen und ihre Ertrage genießen den vollen Schutz dieses Abkommens. Gleiches gilt im Falle ihrer Wiederveranlagung auch für deren Ertrage. Die rechtliche Erweiterung oder Veranderung einer Investition hat in Übereinsummung mit den Rechtsvorschriften der Vertragspartei zu erfolgen, in deren Hoheitsgebiet die Investition getatigt wird.

Artikel 3

Behandlung von Investitionen

(1) Jede Vertragspartei behandelt Investoren der anderen Vertragspartei und deren Investitionen nicht weniger günstig als eigene Investoren oder Investoren dritter Staaten und deren Investitionen.

(2) Die Bestimmungen des Absatzes 1 beziehen sich jedoch nicht auf gegenwärtige oder künftige Vorrechte, die eine Vertragspartei den Investoren eines dritten Staates oder deren Investitionen einräumt im Zusammenhang mit

a) einer Wirtschaftsunion, einer Zollunion, einem gemeinsamen Markt, einer Freihandelszone oder einer Wirtschaftsgemeinschaft;
b) einem internationalen Abkommen oder einer zwischenstaatlichen Vereinbarung oder innerstaatlichen Rechtsvorschrift über Steuerfragen;
c) einer Regelung zur Erleichterung des Grenzverkehrs.

Artikel 4

Entschädigung

(1) Investitionen von Investoren einer Vertragspartei dürfen im Hoheitsgebiet der anderen Vertragspartei nur im öffentlichen Interesse, auf Grund eines rechtmäßigen Verfahrens und gegen Entschädigung enteignet, verstaatlicht oder einer sonstigen Maßnahme mit gleicher Wirkung unterworfen werden.

(2) Die Entschädigung muß dem Wert der Investition unmittelbar vor dem Zeitpunkt entsprechen, in dem die tatsächliche oder drohende Enteignung öffentlich bekannt wurde. Die Entschädigung muß ohne Verzögerung geleistet werden und ist bis zum Zeitpunkt der Zahlung mit dem üblichen bankmäßigen Zinssatz jenes Staates, in dessen Hoheitsgebiet die Investition durchgeführt wurde, zu verzinsen; sie muß frei transferierbar sein. Spätestens im Zeitpunkt der Enteignung muß in geeigneter Weise für die Festsetzung und Leistung der Entschädigung Vorsorge getroffen sein.

(3) Enteignet eine Vertragspartei die Vermögenswerte einer Gesellschaft, die in Anwendung von Artikel 1 Absatz 2 dieses Abkommens als ihre eigene Gesellschaft anzusehen ist, und an welcher ein Investor der anderen Vertragspartei Anteile besitzt, so wendet sie die Bestimmungen des Absatzes 1 dergestalt an, daß die angemessene Entschädigung dieses Investors sichergestellt wird.

(4) Dem Investor steht das Recht zu, die Rechtmäßigkeit der Enteignung durch die zuständigen Organe der Vertragspartei, welche die Enteignung veranlaßt hat, überprüfen zu lassen.

(5) Dem Investor steht das Recht zu, die Höhe der Entschädigung und die Zahlungsmodalitäten entweder durch die zuständigen Organe der Vertragspartei, welche die Enteignung veranlaßt hat, oder durch ein Schiedsgericht gemäß Artikel 8 dieses Abkommens überprüfen zu lassen.

Artikel 5

Überweisungen

(1) Jede Vertragspartei gewährleistet den Investoren der anderen Vertragspartei ohne Verzögerung den freien Transfer in frei konvertierbarer Währung der im Zusammenhang mit einer Investition stehenden Zahlungen, insbesondere

a) des Kapitals und zusätzlicher Beträge zur Aufrechterhaltung oder Erweiterung der Investition, einschließlich ihrer Verwaltung;
b) der Erträge;
c) der Rückzahlung von Darlehen,
d) des Erlöses im Falle vollständiger oder teilweiser Liquidation oder Veräußerung der Investition;
e) einer Entschädigung gemäß Artikel 4 Absatz 1 dieses Abkommens.

(2) Die Überweisungen gemäß diesem Artikel erfolgen zu den offiziellen Wechselkursen im Hoheitsgebiet der Vertragspartei, die am Tage der Überweisung gelten. Die Bankgebühren werden gerecht und angemessen sein.

Artikel 6

Eintrittsrecht

(1) Leistet eine Vertragspartei oder eine von ihr hiezu ermächtigte Institution ihrem Investor Zahlungen auf Grund einer Garantie für eine Investition im Hoheitsgebiet der anderen Vertragspartei, so erkennt diese andere Vertragspartei die Übertragung aller Rechte oder Ansprüche dieses Investors kraft Gesetzes oder auf Grund eines Rechtsgeschäfts auf die erstgenannte Vertragspartei an. Dies gilt unbeschadet der Rechte des Investors der erstgenannten Vertragspartei aus Artikel 8 und der Rechte der erstgenannten Vertragspartei aus Artikel 9 dieses Abkommens.

(2) Ferner erkennt die andere Vertragspartei den Eintritt der erstgenannten Vertragspartei in alle diese Rechte oder Ansprüche an, welche die erstgenannte Vertragspartei in demselben Umfang wie ihr Rechtsvorgänger auszuüben berechtigt ist. Für den Transfer der an die betreffende Vertragspartei auf Grund der übertragenen Ansprüche zu leistenden Zahlungen gelten Artikel 4 und Artikel 5 dieses Abkommens sinngemäß.

Artikel 7

Andere Verpflichtungen

(1) Ergibt sich aus den Rechtsvorschriften einer Vertragspartei oder aus völkerrechtlichen Ver-

pflichtungen, die neben diesem Abkommen zwischen den Vertragsparteien bestehen oder in Zukunft begründet werden, eine allgemeine oder besondere Regelung, durch die den Investitionen der Investoren der anderen Vertragspartei eine günstigere Behandlung als nach diesem Abkommen zu gewähren ist, so geht diese Regelung dem vorliegenden Abkommen insoweit vor, als sie günstiger ist.

(2) Investoren einer Vertragspartei können mit der anderen Vertragspartei besondere Verträge abschließen, deren Bestimmungen jedoch nicht im Widerspruch zu diesem Abkommen stehen dürfen. Die nach diesen Verträgen getätigten Investitionen werden durch deren Bestimmungen sowie durch die Bestimmungen dieses Abkommens geregelt.

Artikel 8

Beilegung von Investitionsstreitigkeiten

(1) Entstehen zwischen einer Vertragspartei und einem Investor der anderen Vertragspartei Meinungsverschiedenheiten aus einer Investition, die die Höhe oder die Zahlungsmodalitäten einer Entschädigung gemäß Artikel 4 oder Transferverpflichtungen gemäß Artikel 5 dieses Abkommens betreffen, so werden diese so weit wie möglich zwischen den Streitparteien freundschaftlich beigelegt.

(2) Kann eine Meinungsverschiedenheit gemäß Absatz 1 nicht innerhalb von sechs Monaten ab einer schriftlichen Mitteilung hinreichend bestimmter Ansprüche beigelegt werden, wird die Meinungsverschiedenheit, wenn nichts anderes vereinbart ist, auf Antrag der Vertragspartei oder des Investors der anderen Vertragspartei durch ein Schiedsverfahren nach der UNCITRAL-Schiedsgerichtsordnung in der zum Zeitpunkt des Antrags auf Einleitung des Schiedsverfahrens gültigen Fassung entschieden.

(3) Die Entscheidung des Schiedsgerichts ist endgültig und bindend; jede Vertragspartei stellt die Anerkennung und Durchsetzung des Schiedsspruches in Übereinstimmung mit ihrer Rechtsordnung sicher.

(4) Eine Vertragspartei, die Streitpartei ist, macht in keinem Stadium des Schiedsverfahrens oder der Durchsetzung eines Schiedsspruchs als Einwand geltend, daß der Investor, der die andere Streitpartei bildet, auf Grund einer Garantie bezüglich einiger oder aller seiner Verluste eine Entschädigung erhalten habe.

Artikel 9

Streitigkeiten zwischen den Vertragsparteien

(1) Meinungsverschiedenheiten zwischen den Vertragsparteien über die Auslegung oder Anwendung dieses Abkommens sollen, soweit wie möglich, durch freundschaftliche Verhandlungen beigelegt werden.

(2) Kann eine Meinungsverschiedenheit gemäß Absatz 1 innerhalb von sechs Monaten nicht beigelegt werden, so wird sie auf Verlangen einer der beiden Vertragsparteien einem Schiedsgericht unterbreitet.

(3) Das Schiedsgericht wird von Fall zu Fall gebildet, in dem jede Vertragspartei ein Mitglied bestellt und beide Mitglieder sich auf eine dritte Person als Vorsitzenden einigen. Die Mitglieder sind innerhalb von drei Monaten, nachdem die eine Vertragspartei der anderen mitgeteilt hat, daß sie die Meinungsverschiedenheit einem Schiedsgericht unterbreiten will, der Vorsitzende innerhalb von weiteren zwei Monaten zu bestellen.

(4) Werden die in Absatz 3 genannten Fristen nicht eingehalten, so kann in Ermangelung einer anderen Vereinbarung jede Vertragspartei den Präsidenten des Internationalen Gerichtshofes bitten, die erforderlichen Ernennungen vorzunehmen. Besitzt der Präsident des Internationalen Gerichtshofes die Staatsangehörigkeit einer der beiden Vertragsparteien oder ist er aus einem anderen Grund verhindert, so kann der Vizepräsident, oder im Falle seiner Verhinderung, das dienstälteste Mitglied des Internationalen Gerichtshofes unter den selben Voraussetzungen eingeladen werden, die Ernennungen vorzunehmen.

(5) Das Schiedsgericht regelt sein Verfahren selbst.

(6) Das Schiedsgericht entscheidet auf Grund dieses Abkommens sowie auf Grund der allgemein anerkannten Regeln des Völkerrechtes. Es entscheidet mit Stimmenmehrheit; die Entscheidung ist endgültig und bindend.

(7) Jede Vertragspartei trägt die Kosten ihres Mitglieds und ihrer Vertretung in dem Schiedsverfahren. Die Kosten des Vorsitzenden sowie die sonstigen Kosten werden von den beiden Vertragsparteien zu gleichen Teilen getragen. Das Gericht kann jedoch in seiner Entscheidung eine andere Kostenregelung treffen.

Artikel 10

Anwendung dieses Abkommens

Dieses Abkommen gilt für Investitionen, die Investoren der einen Vertragspartei in Übereinstimmung mit den Rechtsvorschriften der anderen Vertragspartei in deren Hoheitsgebiet nach dem 1. Jänner 1950 vorgenommen haben oder vornehmen werden.

Artikel 11

Inkrafttreten und Dauer

(1) Dieses Abkommen bedarf der Ratifikation und tritt am ersten Tag des dritten Monats in Kraft, der auf den Monat folgt, in welchem die Ratifikationsurkunden ausgetauscht worden sind.

(2) Das Abkommen bleibt zehn Jahre lang in Kraft; nach deren Ablauf wird es auf unbestimmte Zeit verlängert und kann von jeder Vertragspartei unter Einhaltung einer Kündigungsfrist von zwölf Monaten schriftlich auf diplomatischem Wege gekündigt werden.

(3) Für Investitionen, die bis zum Zeitpunkt des Außerkrafttretens dieses Abkommens vorgenommen worden sind, gelten die Artikel 1 bis 10 dieses Abkommens noch für weitere zehn Jahre vom Tage des Außerkrafttretens des Abkommens an.

GESCHEHEN zu Wien, am 15 Oktober 1990, in zwei Urschriften, jede in deutscher und tschechischer Sprache, wobei jeder Wortlaut gleichermaßen authentisch ist.

Für die Republik
Österreich:

Dkfm. FERDINAND LACINA

Für die Tschechische und Slowakische
Föderative Republik:

Ing. VÁCLAV KLAUS


MMag. Sabine Fehringer
Allg. beeid. und
gerichtl. zertifizierter
Dolmetscher für die
englische Sprache
Wien


MMag. Sabine Fehringer
Allg. beeid. und
gerichtl. zertifiz'erter
Dolmetscher für die
englische Sprache
Wien

Annex 5

AGREEMENT
BETWEEN THE CZECH AND SLOVAK FEDERAL REPUBLIC AND THE REPUBLIC OF AUSTRIA
CONCERNING THE PROMOTION AND PROTECTION OF
INVESTMENTS

THE CZECH AND SLOVAK FEDERAL REPUBLIC AND THE REPUBLIC OF AUSTRIA, hereinafter referred to as "the Contracting Parties",

DESIRING to develop friendly relations in conformity with the principles of the Final Act of the Conference on Security and Co-operation in Europe, signed on August 1, 1975 in Helsinki, and desiring to create favorable conditions for greater economic cooperation between the Contracting Parties,

RECOGNIZING that the promotion and protection of investments may strengthen the readiness to make such investments and thereby make an important contribution to the development of economic relations,

HAVE AGREED AS FOLLOWS:

Article 1
Definitions

For the purpose of this Agreement:

1. The term "investment" shall mean all assets which an investor of one Contracting Party invests in the territory of the other Contracting Party in accordance with its legislation, in particular:

a) movable and immovable property, as well as any real rights;
b) shares and other forms of participation in enterprises;
c) claims and titles to money transferred to create an economic value, and claims to performance having an economic value;
d) rights relating to intellectual property, including copyrights, industrial property rights such as patents and inventions, trademarks, industrial designs, models and samples, technical processes, know-how, business names and goodwill;
e) concessions under public law for prospecting, mining or extracting of natural resources;

(2) "Investor" shall mean, in the case of the Czech and Slovak Federal Republic:

a) any natural person being a citizen of the Czech and Slovak Federal Republic under Czechoslovak law, being authorized to make investments under Czechoslovak law, and making an investment in the territory of the other Contracting Party;
b) any legal entity established in accordance with the Czechoslovak laws, having its seat in the territory of the Czech and Slovak Federal Republic, and making an investment in the territory of the other Contracting Party;

and in the case of the Republic of Austria:

a) any natural person having the citizenship of the Republic of Austria and making an investment in the territory of the other Contracting Party;
b) any legal entity or partnership under commercial law established in accordance with the laws of the Republic of Austria, having its seat in the territory of the Republic of Austria, and making an investment in the territory of the other Contracting Party;

(3) "Earnings" shall mean the amounts yielded by an investment and includes, in particular, profits, interest, capital gains, dividends, royalties and license fees.

Article 2
Promotion and protection of investments

(1) Each Contracting Party shall, as far as possible, promote investments made in its territory by investors from the other Contracting Party, shall permit such investments in accordance with its laws and shall accord them fair and equitable treatment.
(2) Investments and the earnings yielded by investments shall have the full protection of this Agreement. The same shall also apply to earnings from reinvestment. Legal extension or alteration of the investment shall be in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made.

Article 3
Treatment of Investments

(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 privileges granted by one Contracting Party to investors of a third state or their investments in connection with
   a) an economic union, customs union, a common market, free trade zone or 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.

Article 4
Compensation

(1) Expropriation measures, including nationalization or other measures having the same consequences, may be applied in the territory of the other Contracting Party to investments of investors of a Contracting Party only in cases where these expropriation measures are carried out for reasons of public interest, on the basis of legal proceedings and in return for compensation.
(2) The compensation must correspond to the value of the investment, determined immediately prior to the time when the actual or impending expropriation measures were made public. The compensation must be paid without delay and, until it is paid, interest shall be calculated on the amount of the compensation in accordance with the usual bank interest rate in the State in whose territory the investment was made; it must be freely transferable. Provision shall be made in an appropriate manner no later than the date of expropriation for determining and paying compensation.
(3) If a Contracting Party expropriates the assets of a company which is to be considered a company of such Contracting Party under Article 1 para. 2 of this Agreement and in which an investor of the other Contracting Party owns shares, the provisions of para. 1 above shall be applied in such a way as to ensure adequate compensation of such an investor.
(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.

Article 5
Remittances

(1) Each Contracting Party shall guarantee to investors of the other Contracting Party free transfer without delay in freely convertible currency of payments in connection with an investment, in particular:
   a) Capital and additional payments to maintain or increase an investment, including management fees;
   b) Earnings;
   c) The repayment of loans;
   d) The proceeds in case of a partial or complete liquidation or sale of the investment;
   e) The compensation referred to in Article 4 para. 1 of this Agreement.

(2) Remittances in accordance with this article shall be at the official rates of exchange in effect in the territory of the Contracting Party on the date of remittance. The bank charges applied shall be fair and appropriate.

Article 6
Succession in Rights

(1) If a Contracting Party, or an institution authorized for that purpose, makes payments to its own investor on the basis of a guarantee on an investment in the territory of the other Contracting Party, that other Contracting Party shall recognize the assignment of all rights or claims of the investor to the first-mentioned Contracting Party by operation of law or on the basis of a legal transaction. This provision shall apply without prejudice to the rights of the investor of the first-mentioned Contracting Party under article 8 and the rights of the first-mentioned Contracting Party under article 9 of this Agreement.
(2) Furthermore, the other Contracting Party shall recognize the subrogation by the first-mentioned Contracting Party of all such rights or claims, to which the first-mentioned Contracting Party shall be entitled to the same extent as its legal predecessor. Articles 4 and 5 of this Agreement shall apply mutatis mutandis to the transfer of payments to be made to the Contracting Party in question on the basis of the assigned claims.

Article 7
Other Obligations

(1) If under the laws of one of the Contracting Parties or under international obligations now or in the future undertaken between the Contracting Parties in addition to this Agreement there exists a general or special regime whereby the investments of investors of the other Contracting Party are accorded more favorable treatment than under this Agreement, the said regime shall take precedence over the present Agreement to the extent that it is more favorable.
(2) Investors of one Contracting Party may conclude special agreements with the other Contracting Party, but the provisions thereof may not be in contradiction to this Agreement. The investments made under such agreements shall be governed both by the provisions thereof and by the provisions of this Agreement.

Article 8
Settlement of investment disputes

(1) If disputes arise 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 compensation pursuant to Article 4, or the transfer obligations pursuant to Article 5, of this Agreement, they shall, as far as possible, be settled amicably between the parties to the dispute.
(2) If a dispute within the meaning of paragraph 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 for both Contracting Parties at the date of the motion for the arbitration proceeding.
(3) The award of the arbitral tribunal shall be final and binding; each Contracting Party shall ensure the recognition and enforcement of the arbitral award in accordance with its own laws.
(4) A Contracting Party which is a party to a dispute shall not, at any stage of the reconciliation or arbitration proceedings or enforcement of an arbitral award, raise the objection that the investor who is the other party to the dispute has received compensation by virtue of a guarantee in respect of some or all of its losses.

Article 9
Disputes between the Contracting Parties

(1) Disputes between Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled on an amicable basis.
(2) If a dispute within the meaning of paragraph 1 cannot be settled within six months, it shall be submitted to an arbitral tribunal at the request of either of the two Contracting Parties.
(3) The arbitral tribunal shall be constituted on an ad hoc basis; each Contracting Party shall appoint one arbitrator, and the two arbitrators shall agree on a third person to act as chairman. The arbitrators shall be appointed within three months from the date on which one Contracting Party has informed the other that it wishes to submit the dispute to an arbitral tribunal, and the chairman shall be appointed within a further two months.
(4) If the time-limits specified in paragraph 3 are not met, either Contracting Party may, in the absence of any other agreement, request the President of the International Court of Justice to make the necessary appointments. If the President of the International Court of Justice is a national of one of the two Contracting Parties or is unable to act for any other reason, the Vice-

President or, if he is unable to act, the most senior member of the International Court of Justice may under the same conditions be asked to make the appointments.

(5) The arbitral tribunal shall determine its own procedure.

(6) The arbitral tribunal shall base its decision on this Agreement and on generally recognized rules of international law. It shall decide by majority vote; its decision shall be final and binding.

(7) Each Contracting Party shall bear the cost of its own arbitrator and of its representation in the arbitration proceedings. The cost of the chairman and the other costs shall be shared equally by the two Contracting Parties. The tribunal, however, may make a different ruling on costs in its decision.

Article 10
Application of the Agreement

This Agreement shall apply to investments made or to be made in the territory of one of the Contracting Parties in accordance with its legislation by investors of the other Contracting Party after January 1, 1950.

Article 11
Entry into Force and Term

(1) This Agreement is subject to ratification and shall enter into force on the first day of the third month that follows the month during which the instruments of ratification have been exchanged.

(2) The Agreement shall remain in force for ten years; upon the expiry of that period, it shall be extended for an indefinite period of time and may be denounced by either Contracting Party subject to twelve months' prior notice in writing through the diplomatic channel.

(3) In the case of investments that will have been made before the date of denunciation of this Agreement, articles 1 to 10 of this Agreement shall apply for a further ten years from that date.

DONE in Vienna, on October 15, 1990, in two original copies in the Czech and German languages, both texts being equally authentic.

For the Federal Republic of Austria:**Dkfm. Ferdinand Lacina**

For the Czech and Slovak Federal Republic

Ing. Vaclav Klaus

P. b. b. Erscheinungsort Wien, Verlagspostamt 1030 Wien

BUNDESGESETZBLATT

FÜR DIE REPUBLIK ÖSTERREICH

Jahrgang 1991 Ausgegeben am 24. September 1991 186. Stück

513. Abkommen zwischen der Republik Österreich und der Tschechischen und Slowakischen Föderativen Republik über die Förderung und den Schutz von Investitionen
(NR: GP XVIII RV 88 AB 154 S. 29. BR: AB 4063 S. 542.)

513.

Der Nationalrat hat beschlossen:

Der Abschluß des nachstehenden Staatsvertrages wird genehmigt.

ABKOMMEN

ZWISCHEN DER REPUBLIK ÖSTERREICH UND DER TSCHECHISCHEN UND SLOWAKISCHEN FÖDERATIVEN REPUBLIK ÜBER DIE FÖRDERUNG UND DEN SCHUTZ VON INVESTITIONEN

DIE REPUBLIK ÖSTERREICH UND DIE TSCHECHISCHE UND SLOWAKISCHE FÖDERATIVE REPUBLIK, im folgenden die „Vertragsparteien" genannt,

VON DEM WUNSCHE GELEITET, freundschaftliche Beziehungen im Einvernehmen mit den Grundsätzen der Schlußakte der Konferenz über Sicherheit und Zusammenarbeit in Europa, die am 1. August 1975 in Helsinki unterzeichnet wurde, zu entwickeln und günstige Voraussetzungen für eine größere wirtschaftliche Zusammenarbeit zwischen den Vertragsparteien zu schaffen;

IN DER ERKENNTNIS, daß die Förderung und der Schutz von Investitionen die Bereitschaft zur Vornahme solcher Investitionen stärken und dadurch einen wichtigen Beitrag zur Entwicklung der Wirtschaftsbeziehungen leisten können,

SIND WIE FOLGT ÜBEREINGEKOMMEN:

Artikel 1

Definitionen

Für die Zwecke dieses Abkommens

(1) umfaßt der Begriff „Investition" alle Vermögenswerte, die durch den Investor einer Vertragspartei auf dem Gebiet der anderen Vertragspartei in Übereinstimmung mit deren Rechtsvorschriften veranlagt werden, insbesondere:

a) bewegliche und unbewegliche Sachen sowie alle dinglichen Rechte;

b) Anteilsrechte und andere Arten von Beteiligungen an Unternehmen;

DOHODA

MEZI ČESKOU A SLOVENSKOU FEDERATIVNÍ REPUBLIKOU A RAKOUSKOU REPUBLIKOU O PODPOŘE A OCHRANĚ INVESTIC

ČESKÁ A SLOVENSKÁ FEDERATIVNÍ REPUBLIKA A RAKOUSKÁ REPUBLIKA dále jen „smluvní strany",

VEDENY PŘÁNÍM rozvíjet přátelské vztahy v souladu se zásadami Závěrečného aktu Konference o bezpečnosti a spolupráci v Evropě, podepsaného dne 1 srpna 1975 v Helsinkách, a vytvořit příznivé předpoklady pro větší hospodářskou spolupráci mezi smluvními stranami;

JSOUCE PŘESVĚDČENY, že podpora a ochrana investic může posílit zájem zakládat takové investice, a tím významně přispět k rozvoji hospodářských vztahů,

DOHODLY SE NA TOMTO:

Článek 1

Definice

Pro účely této Dohody

(1) pojem „investice" zahrnuje všechny majetkové hodnoty, které jsou uskutečněny investorem jedné smluvní strany na území druhé smluvní strany v souladu s jejími právními předpisy, zejména:

a) movité a nemovité věci a všechna věcná práva;

b) podíly a jiné druhy účastí na podnicích;

c) Forderungen oder Ansprüche auf Geld, das übergeben wurde, um einen wirtschaftlichen Wert zu schaffen, oder Ansprüche auf eine Leistung, die einen wirtschaftlichen Wert hat;

d) Rechte auf dem Gebiet des geistigen Eigentums, einschließlich Urheberrechte, gewerbliche Schutzrechte wie Erfinderpatente, Handelsmarken, gewerbliche Muster und Modelle sowie Gebrauchsmuster, technische Verfahren, Know-how, Handelsnamen und Goodwill;

e) öffentlichrechtliche Konzessionen für die Aufsuchung, den Abbau oder die Gewinnung von Naturschätzen;

(2) bezeichnet der Begriff „Investor" in bezug auf die Republik Österreich

a) jede natürliche Person, die die Staatsangehörigkeit der Republik Österreich besitzt und die im Hoheitsgebiet der anderen Vertragspartei eine Investition tätigt;

b) jede juristische Person oder Personengesellschaft des Handelsrechtes, die in Übereinstimmung mit den Gesetzen der Republik Österreich geschaffen wurde, ihren Sitz im Hoheitsgebiet der Republik Österreich hat und die im Hoheitsgebiet der anderen Vertragspartei eine Investition tätigt;

in bezug auf die Tschechische und Slowakische Föderative Republik

a) jede natürliche Person, die gemäß der tschechoslowakischen Rechtsordnung Angehörige der Tschechischen und Slowakischen Föderativen Republik ist, gemäß der tschechoslowakischen Rechtsordnung als Investor zu handeln berechtigt ist und die im Hoheitsgebiet der anderen Vertragspartei eine Investition tätigt;

b) jede juristische Person, die gemäß der tschechoslowakischen Rechtsordnung errichtet worden ist, ihren Sitz im Hoheitsgebiet der Tschechischen und Slowakischen Föderativen Republik hat und die im Hoheitsgebiet der anderen Vertragspartei eine Investition tätigt;

(3) bezeichnet der Begriff „Ertrag" diejenigen Beträge, die eine Investition erbringt, und umfaßt insbesondere Gewinne, Zinsen, Kapitalzuwächse, Dividenden, Tantiemen und Lizenzgebühren.

c) pohledávky a nároky na peníze, které byly předány, aby vytvořily hospodářskou hodnotu, nebo nároky na plnění, které má hospodářskou hodnotu;

d) práva z oblasti duševního vlastnictví, včetně autorských práv, obchodní ochranná práva jako patenty a vynálezy, obchodní známky, obchodní vzory a modely, jakož i spotřební vzory, technické postupy, know-how, obchodní názvy a goodwill;

e) veřejnoprávní oprávnění týkající se vyhledávání, dobývání nebo využití přírodního bohatství;

(2) pojem „investor" pokud jde o Českou a Slovenskou Federativní Republiku, označuje:

a) každou fyzickou osobu, která je podle československého právního řádu občanem České a Slovenské Federativní Republiky, podle československého právního řádu je oprávněna jednat jako investor a investuje na území druhé smluvní strany;

b) každou právnickou osobu, která byla zřízena podle československého právního řádu, má sídlo na území České a Slovenské Federativní Republiky a investuje na území druhé smluvní strany;

pokud jde o Rakouskou republiku označuje:

a) každou fyzickou osobu, která má státní příslušnost Rakouské republiky a investuje na území druhé smluvní strany;

b) každou právnickou osobu nebo společnost osob podle obchodního práva, která byla zřízena v souladu s rakouským právním řádem, má sídlo na území Rakouské republiky a investuje na území druhé smluvní strany;

(3) pojem „výnosy" označuje všechny částky, které plynou z investice a zahrnuje zejména zisky, úroky, přírůstky kapitálu, dividendy, tantiemy a licenční poplatky.

Artikel 2

Förderung und Schutz von Investitionen

(1) Jede Vertragspartei fördert nach Möglichkeit in ihrem Hoheitsgebiet Investitionen von Investoren der anderen Vertragspartei, läßt diese in Übereinstimmung mit ihren Rechtsvorschriften zu und behandelt sie in jedem Fall gerecht und billig.

(2) Investitionen und ihre Erträge genießen den vollen Schutz dieses Abkommens. Gleiches gilt im

Článek 2

Podpora a ochrana investic

(1) Každá smluvní strana podle možností podporuje na svém území investice investoru druhé smluvní strany, umožňuje jejich vznik v souladu se svým právním řádem a v každém případě s nimi nakládá řádně a spravedlivě.

(2) Investice a jejich výnosy požívají plné ochrany podle této Dohody. Totéž platí v případě reinvestic

Falle ihrer Wiederveranlagung auch für deren Erträge. Die rechtliche Erweiterung oder Veränderung einer Investition hat in Übereinstimmung mit den Rechtsvorschriften der Vertragspartei zu erfolgen, in deren Hoheitsgebiet die Investition getätigt wird.

pro jejich výnosy. Právní rozšíření nebo změna investice se musí uskutečnit v souladu s právními předpisy smluvní strany, na jejímž území je investice zřízena.

Artikel 3

Behandlung von Investitionen

(1) Jede Vertragspartei behandelt Investoren der anderen Vertragspartei und deren Investitionen nicht weniger günstig als eigene Investoren oder Investoren dritter Staaten und deren Investitionen.

(2) Die Bestimmungen des Absatzes 1 beziehen sich jedoch nicht auf gegenwärtige oder künftige Vorrechte, die eine Vertragspartei den Investoren eines dritten Staates oder deren Investitionen einräumt im Zusammenhang mit

a) einer Wirtschaftsunion, einer Zollunion, einem gemeinsamen Markt, einer Freihandelszone oder einer Wirtschaftsgemeinschaft;
b) einem internationalen Abkommen oder einer zwischenstaatlichen Vereinbarung oder innerstaatlichen Rechtsvorschrift über Steuerfragen;
c) einer Regelung zur Erleichterung des Grenzverkehrs.

Článek 3

Nakládání s investicemi

(1) Každá smluvní strana nakládá s investory druhé smluvní strany a jejich investicemi ne méně příznivě než s vlastními investory nebo s investory třetích států a jejich investicemi.

(2) Ustanovení odstavce 1 se však nevztahují na současné nebo budoucí výhody, které jedna smluvní strana poskytuje investorům třetího státu nebo jejich investicím v souvislosti s:

a) hospodářskou unií, celní unií, společným trhem, zónou volného obchodu nebo hospodářským seskupením;
b) mezinárodní dohodou nebo mezistátní smlouvou nebo vnitrostátním právním předpisem o daňových otázkách;
c) úpravou k ulehčení pohraničního styku.

Artikel 4

Entschädigung

(1) Investitionen von Investoren einer Vertragspartei dürfen im Hoheitsgebiet der anderen Vertragspartei nur im öffentlichen Interesse, auf Grund eines rechtmäßigen Verfahrens und gegen Entschädigung enteignet, verstaatlicht oder einer sonstigen Maßnahme mit gleicher Wirkung unterworfen werden.

(2) Die Entschädigung muß dem Wert der Investition unmittelbar vor dem Zeitpunkt entsprechen, in dem die tatsächliche oder drohende Enteignung öffentlich bekannt wurde. Die Entschädigung muß ohne Verzögerung geleistet werden und ist bis zum Zeitpunkt der Zahlung mit dem üblichen bankmäßigen Zinssatz jenes Staates, in dessen Hoheitsgebiet die Investition durchgeführt wurde, zu verzinsen; sie muß frei transferierbar sein. Spätestens im Zeitpunkt der Enteignung muß in geeigneter Weise für die Festsetzung und Leistung der Entschädigung Vorsorge getroffen sein.

(3) Enteignet eine Vertragspartei die Vermögenswerte einer Gesellschaft, die in Anwendung von Artikel 1 Absatz 2 dieses Abkommens als ihre eigene Gesellschaft anzusehen ist, und an welcher ein Investor der anderen Vertragspartei Anteile besitzt, so wendet sie die Bestimmungen des Absatzes 1 dergestalt an, daß die angemessene Entschädigung dieses Investors sichergestellt wird.

Článek 4

Odškodnění

(1) Investice investorů jedné smluvní strany smějí být na území druhé smluvní strany vyvlastněny, znárodněny nebo podrobeny jinému opatření se stejnými důsledky jen ve veřejném zájmu, na základě právního postupu a proti odškodnění.

(2) Odškodnění musí odpovídat hodnotě investice bezprostředně před tím, než bylo zveřejněno skutečné nebo hrozící vyvlastnění. Odškodnění musí být poskytnuto bez prodlení a musí být úročeno až do doby zaplacení běžnými bankovními úrokovými sazbami toho státu, na jehož území byla investice zřízena; musí být volně převoditelné. Nejpozději v době vyvlastnění musí být vhodným způsobem zajištěno stanovení výše a poskytnutí odškodnění.

(3) Jestliže jedna smluvní strana vyvlastní majetkové hodnoty společnosti, na kterou nutno podle článku 1 odstavec 2 této Dohody pohlížet jako na vlastní společnost a na které má investor druhé smluvní strany podíl, použijí se ustanovení odstavce 1 tak, aby přiměřené odškodnění investora bylo zajištěno.

(4) Dem Investor steht das Recht zu, die Rechtmäßigkeit der Enteignung durch die zuständigen Organe der Vertragspartei, welche die Enteignung veranlaßt hat, überprüfen zu lassen.

(5) Dem Investor steht das Recht zu, die Höhe der Entschädigung und die Zahlungsmodalitäten entweder durch die zuständigen Organe der Vertragspartei, welche die Enteignung veranlaßt hat, oder durch ein Schiedsgericht gemäß Artikel 8 dieses Abkommens überprüfen zu lassen.

(4) Investor má právo nechat prověřit oprávněnost vyvlastnění příslušnými orgány smluvní strany, která provedla vyvlastnění.

(5) Investor má právo nechat prověřit výši odškodnění a způsob jeho zaplacení buď příslušnými orgány smluvní strany, která provedla vyvlastnění, nebo rozhodčím soudem podle článku 8 této Dohody.

Artikel 5

Überweisungen

(1) Jede Vertragspartei gewährleistet den Investoren der anderen Vertragspartei ohne Verzögerung den freien Transfer in frei konvertierbarer Währung der im Zusammenhang mit einer Investition stehenden Zahlungen, insbesondere

a) des Kapitals und zusätzlicher Beträge zur Aufrechterhaltung oder Erweiterung der Investition, einschließlich ihrer Verwaltung;
b) der Erträge;
c) der Rückzahlung von Darlehen;
d) des Erlöses im Falle vollständiger oder teilweiser Liquidation oder Veräußerung der Investition;
e) einer Entschädigung gemäß Artikel 4 Absatz 1 dieses Abkommens.

(2) Die Überweisungen gemäß diesem Artikel erfolgen zu den offiziellen Wechselkursen im Hoheitsgebiet der Vertragspartei, die am Tage der Überweisung gelten. Die Bankgebühren werden gerecht und angemessen sein.

Článek 5

Převody

(1) Každá smluvní strana zaručuje investorům druhé smluvní strany bez prodlení volný převod platů, které souvisejí s investicí ve volně směnitelné měně, zejména

a) kapitálu a dodatečných částek k údržbě nebo rozšíření investice, včetně její správy;
b) výnosu;
c) splátek půjček;
d) výnosů v případě úplné nebo částečné likvidace nebo prodeje investice;
e) odškodnění podle článku 4 odstavce 1 této Dohody.

(2) Převody podle tohoto článku se uskutečňují oficiálním směnným kursem platným na území smluvní strany v den převodu. Bankovní poplatky budou v řádné výši a přiměřené.

Artikel 6

Eintrittsrecht

(1) Leistet eine Vertragspartei oder eine von ihr hiezu ermächtigte Institution ihrem Investor Zahlungen auf Grund einer Garantie für eine Investition im Hoheitsgebiet der anderen Vertragspartei, so erkennt diese andere Vertragspartei die Übertragung aller Rechte oder Ansprüche dieses Investors kraft Gesetzes oder auf Grund eines Rechtsgeschäfts auf die erstgenannte Vertragspartei an. Dies gilt unbeschadet der Rechte des Investors der erstgenannten Vertragspartei aus Artikel 8 und der Rechte der erstgenannten Vertragspartei aus Artikel 9 dieses Abkommens.

(2) Ferner erkennt die andere Vertragspartei den Eintritt der erstgenannten Vertragspartei in alle diese Rechte oder Ansprüche an, welche die erstgenannte Vertragspartei in demselben Umfang wie ihr Rechtsvorgänger auszuüben berechtigt ist. Für den Transfer der an die betreffende Vertragspartei auf Grund der übertragenen Ansprüche zu leistenden Zahlungen gelten Artikel 4 und Artikel 5 dieses Abkommens sinngemäß.

Článek 6

Subrogace

(1) Jestliže jedna smluvní strana nebo jí zmocněná instituce poskytne svému investorovi platbu z důvodu záruky na investici umístěné na území druhé smluvní strany, uzná druhá smluvní strana převod všech práv nebo nároků tohoto investora podle zákona nebo na základě právního ujednání na první smluvní stranu. To platí bez ohledu na práva investora první smluvní strany vyplývající z článku 8 a práva první smluvní strany vyplývající z článku 9 této Dohody.

(2) Dále uzná druhá smluvní strana vstup první smluvní strany do všech práv nebo nároků, které je první smluvní strana oprávněna vykonávat ve stejném rozsahu jako její právní předchůdce. Pro převod platů, jež mají být provedeny na základě převedených nároků na uvedenou smluvní stranu, platí přiměřeně článek 4 a 5 této Dohody.

Artikel 7

Andere Verpflichtungen

(1) Ergibt sich aus den Rechtsvorschriften einer Vertragspartei oder aus völkerrechtlichen Verpflichtungen, die neben diesem Abkommen zwischen den Vertragsparteien bestehen oder in Zukunft begründet werden, eine allgemeine oder besondere Regelung, durch die den Investitionen der Investoren der anderen Vertragspartei eine günstigere Behandlung als nach diesem Abkommen zu gewähren ist, so geht diese Regelung dem vorliegenden Abkommen insoweit vor, als sie günstiger ist.

(2) Investoren einer Vertragspartei können mit der anderen Vertragspartei besondere Verträge abschließen, deren Bestimmungen jedoch nicht im Widerspruch zu diesem Abkommen stehen dürfen. Die nach diesen Verträgen getätigten Investitionen werden durch deren Bestimmungen sowie durch die Bestimmungen dieses Abkommens geregelt.

Článek 7

Jiné závazky

(1) Vyplývají-li z právních předpisů jedné smluvní strany nebo z mezinárodněprávních závazků, které platí mezi smluvními stranami kromě této Dohody nebo vzniknou v budoucnosti, všeobecná nebo zvláštní ustanovení, na základě nichž má být poskytnuto investicím investorů jiné smluvní strany výhodnější zacházení než podle této Dohody, používají se tato ustanovení do té míry, do které jsou vůči stávající Dohodě výhodnější.

(2) Investoři jedné smluvní strany mohou uzavřít s druhou smluvní stranou zvláštní smlouvy, avšak jejich ustanovení nesmějí být v rozporu s touto Dohodou. Investice založené podle těchto smluv se budou řídit jejich ustanoveními, jakož i ustanoveními této Dohody.

Artikel 8

Beilegung von Investitionsstreitigkeiten

(1) Entstehen zwischen einer Vertragspartei und einem Investor der anderen Vertragspartei Meinungsverschiedenheiten aus einer Investition, die die Höhe oder die Zahlungsmodalitäten einer Entschädigung gemäß Artikel 4 oder Transferverpflichtungen gemäß Artikel 5 dieses Abkommens betreffen, so werden diese so weit wie möglich zwischen den Streitparteien freundschaftlich beigelegt.

(2) Kann eine Meinungsverschiedenheit gemäß Absatz 1 nicht innerhalb von sechs Monaten ab einer schriftlichen Mitteilung hinreichend bestimmter Ansprüche beigelegt werden, wird die Meinungsverschiedenheit, wenn nichts anderes vereinbart ist, auf Antrag der Vertragspartei oder des Investors der anderen Vertragspartei durch ein Schiedsverfahren nach der UNCITRAL-Schiedsgerichtsordnung in der zum Zeitpunkt des Antrags auf Einleitung des Schiedsverfahrens gültigen Fassung entschieden.

(3) Die Entscheidung des Schiedsgerichts ist endgültig und bindend; jede Vertragspartei stellt die Anerkennung und Durchsetzung des Schiedsspruches in Übereinstimmung mit ihrer Rechtsordnung sicher.

(4) Eine Vertragspartei, die Streitpartei ist, macht in keinem Stadium des Schiedsverfahrens oder der Durchsetzung eines Schiedsspruchs als Einwand geltend, daß der Investor, der die andere Streitpartei bildet, auf Grund einer Garantie bezüglich einiger oder aller seiner Verluste eine Entschädigung erhalten habe.

Článek 8

Řešení sporů z investic

(1) Vzniknou-li mezi jednou smluvní stranou a investorem druhé smluvní strany spory týkající se investice o výši nebo způsobu zaplacení odškodnění podle článku 4 nebo povinnosti převodu podle článku 5 této Dohody, budou vyřešeny, pokud možno, mezi stranami ve sporu přátelsky.

(2) Nemůže-li být spor podle odstavce 1 vyřešen ve lhůtě šesti měsíců od písemného oznámení týkajícího se dostatečně určených nároků, bude spor rozhodnut, není-li dohodnuto jinak, na návrh smluvní strany nebo investora druhé smluvní strany v rozhodčím řízení podle rozhodčích pravidel UNCITRAL ve znění platném pro obě smluvní strany v době podání návrhu na rozhodčí řízení.

(3) Rozhodnutí rozhodčího soudu je konečné a závazné; každá smluvní strana zajistí uznání a provedení rozhodčího nálezu v souladu se svým právním řádem.

(4) Smluvní strana, která je stranou ve sporu, neuplatní v žádném stadiu smírčího nebo rozhodčího řízení nebo při výkonu rozhodčího výroku námitku, že investor, který je druhou stranou ve sporu, obdržel za některé nebo všechny své ztráty odškodnění na základě záruky.

Artikel 9

Streitigkeiten zwischen den Vertragsparteien

(1) Meinungsverschiedenheiten zwischen den Vertragsparteien über die Auslegung oder Anwendung dieses Abkommens sollen, soweit wie möglich, durch freundschaftliche Verhandlungen beigelegt werden.

(2) Kann eine Meinungsverschiedenheit gemäß Absatz 1 innerhalb von sechs Monaten nicht beigelegt werden, so wird sie auf Verlangen einer der beiden Vertragsparteien einem Schiedsgericht unterbreitet.

(3) Das Schiedsgericht wird von Fall zu Fall gebildet, in dem jede Vertragspartei ein Mitglied bestellt und beide Mitglieder sich auf eine dritte Person als Vorsitzenden einigen. Die Mitglieder sind innerhalb von drei Monaten, nachdem die eine Vertragspartei der anderen mitgeteilt hat, daß sie die Meinungsverschiedenheit einem Schiedsgericht unterbreiten will, der Vorsitzende innerhalb von weiteren zwei Monaten zu bestellen.

(4) Werden die in Absatz 3 genannten Fristen nicht eingehalten, so kann in Ermangelung einer anderen Vereinbarung jede Vertragspartei den Präsidenten des Internationalen Gerichtshofes bitten, die erforderlichen Ernennungen vorzunehmen. Besitzt der Präsident des Internationalen Gerichtshofes die Staatsangehörigkeit einer der beiden Vertragsparteien oder ist er aus einem anderen Grund verhindert, so kann der Vizepräsident, oder im Falle seiner Verhinderung, das dienstälteste Mitglied des Internationalen Gerichtshofes unter den selben Voraussetzungen eingeladen werden, die Ernennungen vorzunehmen.

(5) Das Schiedsgericht regelt sein Verfahren selbst.

(6) Das Schiedsgericht entscheidet auf Grund dieses Abkommens sowie auf Grund der allgemein anerkannten Regeln des Völkerrechtes. Es entscheidet mit Stimmenmehrheit; die Entscheidung ist endgültig und bindend.

(7) Jede Vertragspartei trägt die Kosten ihres Mitglieds und ihrer Vertretung in dem Schiedsverfahren. Die Kosten des Vorsitzenden sowie die sonstigen Kosten werden von den beiden Vertragsparteien zu gleichen Teilen getragen. Das Gericht kann jedoch in seiner Entscheidung eine andere Kostenregelung treffen.

Článek 9

Spory mezi smluvními stranami

(1) Spory mezi smluvními stranami o výklad nebo použití Dohody mají být, pokud možno, odstraněny v rámci přátelských jednání.

(2) Nemohou-li být spory podle odstavce 1 odstraněny během šesti měsíců, budou předloženy na žádost jedné ze smluvních stran k posouzení rozhodčímu soudu.

(3) Rozhodčí soud bude zřízen případ od případu. Každá smluvní strana určí jednoho rozhodce a tito dva rozhodci se dohodnou na třetí osobě, jež bude působit jako předseda. Rozhodci mají být určeni do tří měsíců a předseda do dalších dvou měsíců poté, co jedna smluvní strana oznámila druhé smluvní straně, že hodlá předložit spor rozhodčímu soudu.

(4) Nebudou-li lhůty uvedené v odstavci 3 dodrženy a není-li jiné dohody, může každá smluvní strana požádat předsedu Mezinárodního soudního dvora, aby provedl potřebná jmenování. Je-li předseda Mezinárodního soudního dvora státním občanem jedné ze smluvních stran nebo má-li jinou překážku, může být požádán zástupce předsedy a v případě, že by ani on nemohl, služebně nejstarší člen Mezinárodního soudního dvora, aby za stejných podmínek provedl jmenování.

(5) Rozhodčí soud sám určuje procesní pravidla.

(6) Rozhodčí soud rozhoduje na základě této Dohody a všeobecně uznávaných pravidel mezinárodního práva. Rozhoduje většinou hlasů; rozhodnutí je konečné a závazné.

(7) Každá smluvní strana nese výlohy svého rozhodce a svého zastoupení v rozhodčím řízení. Výlohy předsedy a ostatní výlohy nesou obě strany stejným dílem. Soud však může ve svém výroku rozhodnout o nákladech jinak.

Artikel 10

Anwendung dieses Abkommens

Dieses Abkommen gilt für Investitionen, die Investoren der einen Vertragspartei in Übereinstim-

Článek 10

Použití Dohody

Tato Dohoda platí pro investice, které investoři jedné smluvní strany zřídili v souladu s právními

mung mit den Rechtsvorschriften der anderen Vertragspartei in deren Hoheitsgebiet nach dem 1. Jänner 1950 vorgenommen haben oder vornehmen werden.

předpisy druhé smluvní strany na jejím území po 1. 1. 1950, nebo které budou zřízeny později.

Artikel 11

Inkrafttreten und Dauer

(1) Dieses Abkommen bedarf der Ratifikation und tritt am ersten Tag des dritten Monats in Kraft, der auf den Monat folgt, in welchem die Ratifikationsurkunden ausgetauscht worden sind.

(2) Das Abkommen bleibt zehn Jahre lang in Kraft; nach deren Ablauf wird es auf unbestimmte Zeit verlängert und kann von jeder Vertragspartei unter Einhaltung einer Kündigungsfrist von zwölf Monaten schriftlich auf diplomatischem Wege gekündigt werden.

(3) Für Investitionen, die bis zum Zeitpunkt des Außerkrafttretens dieses Abkommens vorgenommen worden sind, gelten die Artikel 1 bis 10 dieses Abkommens noch für weitere zehn Jahre vom Tage des Außerkrafttretens des Abkommens an.

GESCHEHEN zu Wien, am 15. Oktober 1990, in zwei Urschriften, jede in deutscher und tschechischer Sprache, wobei jeder Wortlaut gleichermaßen authentisch ist.

Für die Republik Österreich:

Dkfm. Ferdinand Lacina

Für die Tschechische und Slowakische Föderative Republik:

Ing. Václav Klaus

Článek 11

Vstup v platnost a trvání

(1) Tato Dohoda podléhá ratifikaci a vstupuje v platnost prvního dne třetího měsíce, který následuje po měsíci, v němž byly vyměněny ratifikační listiny.

(2) Dohoda zůstává v platnosti 10 let; po uplynutí této doby bude prodloužena na neurčitou dobu a může být písemně diplomatickou cestou vypovězena kteroukoli smluvní stranou, při dodržení výpovědní lhůty 12 měsíců.

(3) Na investice, které byly uskutečněny před ukončením platnosti této Dohody, se vztahují články 1 až 10 této Dohody ještě 10 let po skončení její platnosti.

DÁNO ve Vídni dne 15. října 90 ve dvou vyhotoveních, každé v jazyce českém a německém, přičemž obě znění mají stejnou platnost.

Za Rakouskou republiku:

Dkfm. Ferdinand Lacina

Za Českou a Slovenskou Federativní Republiku.

Ing. Václav Klaus

Die vom Bundespräsidenten unterzeichnete und vom Bundeskanzler gegengezeichnete Ratifikationsurkunde wurde am 23. Juli 1991 ausgetauscht; das Abkommen tritt gemäß seinem Art. 11 Abs. 1 mit 1. Oktober 1991 in Kraft.

Vranitzky

Interpreter's Provision

As an English language interpreter appointed by decision of the Regional Court in Ostrava on 18 September 2007 under Ref. No. Spr 3362/07, I hereby certify that the translation is in agreement with the text of the attached document.

This interpreting operation is recorded in the interpreter's journal under serial number ...3507/2011...

Interpreter's signature:

Mgr. Lukáš UTÍKAL
Tlumočník jazyka anglického a španělského

Annex 6

AGREEMENT
BETWEEN THE REPUBLIC OF AUSTRIA AND THE CZECH AND SLOVAK FEDERAL REPUBLIC CONCERNING THE PROMOTION AND PROTECTION OF INVESTMENTS

THE REPUBLIC OF AUSTRIA AND THE CZECH AND SLOVAK FEDERAL REPUBLIC, hereinafter referred to as "the Contracting Parties",

DESIRING to develop friendly relations in conformity with the principles of the Final Act of the Conference on Security and Co-operation in Europe, signed on August 1, 1975 in Helsinki, and desiring to create favorable conditions for greater economic cooperation between the Contracting Parties,

RECOGNIZING that the promotion and protection of investments may strengthen the readiness to make such investments and thereby make an important contribution to the development of economic relations,

HAVE AGREED AS FOLLOWS:

Article 1
Definitions

For the purpose of this Agreement:

(1) The term "investment" shall mean all assets which an investor of one Contracting Party invests in the territory of the other Contracting Party in accordance with its legislation, in particular:

a) movable and immovable property, as well as any real rights;

b) shares and other forms of participation in enterprises;

c) claims and titles to money transferred to create an economic value, and claims to performance having an economic value;

d) rights relating to intellectual property, including copyrights, industrial property rights such as patents and inventions, trademarks, industrial designs, models and samples, technical processes, know-how, business names and goodwill;

e) concessions under public law for prospecting, mining or extracting of natural resources;

(2) "Investor" shall mean, in the case of the Republic of Austria:

a) any natural person having the citizenship of the Republic of Austria and making an investment in the territory of the other Contracting Party;

b) any legal entity or partnership under commercial law established in accordance with the laws of the Republic of Austria, having its seat in the territory of the Republic of Austria, and making an investment in the territory of the other Contracting Party;

and in the case of the Czech and Slovak Federal Republic:

a) any natural person being a citizen of the Czech and Slovak Federal Republic under Czechoslovak law, being authorized to make investments under Czechoslovak law, and making an investment in the territory of the other Contracting Party;

b) any legal entity established in accordance with the Czechoslovak laws, having its seat in the territory of the Czech and Slovak Federal Republic, and making an investment in the territory of the other Contracting Party;

(3) "Earnings" shall mean the amounts yielded by an investment and includes, in particular, profits, interest, capital gains, dividends, royalties and license fees.

Article 2
Promotion and protection of investments

(1) Each Contracting Party shall, as far as possible, promote investments made in its territory by investors from the other Contracting Party, shall permit such investments in accordance with its laws and shall accord them fair and equitable treatment.

(2) Investments and the earnings yielded by investments shall have the full protection of this Agreement. The same shall also apply to earnings from re-investment. Legal extension or alteration of the investment shall be in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made.

Article 3
Treatment of Investments

(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 privileges granted by one Contracting Party to investors of a third state or their investments in connection with

a) an economic union, customs union, a common market, free trade zone or 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.

Article 4
Compensation

(1) Expropriation measures, including nationalization or other measures having the same consequences, may be applied in the territory of the other Contracting Party to investments of investors of a Contracting Party only in cases where these expropriation measures are carried out for reasons of public interest, on the basis of legal proceedings and in return for compensation.

(2) The compensation must correspond to the value of the investment, determined immediately prior to the time when the actual or impending expropriation measures were made public. The compensation must be paid without delay and, until it is paid, interest shall be calculated on the amount of the compensation in accordance with the usual bank interest rate in the State in whose territory the investment was made; it must be freely transferable. Provision shall be made in an appropriate manner no later than the date of expropriation for determining and paying compensation.

(3) If a Contracting Party expropriates the assets of a company which is to be considered a company of such Contracting Party under Article 1 para. 2 of this Agreement and in which an investor of the other Contracting Party owns shares, the provisions of para. 1 above shall be applied in such a way as to ensure adequate compensation of such an investor.

(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.

Article 5
Remittances

(1) Each Contracting Party shall guarantee to investors of the other Contracting Party free transfer without delay in freely convertible currency of payments in connection with an investment, in particular:

a) Capital and additional payments to maintain or increase an investment, including management fees;

b) Earnings;

c) The repayment of loans;

d) The proceeds in case of a partial or complete liquidation or sale of the investment;

e) The compensation referred to in Article 4 para. 1 of this Agreement.

(2) Remittances in accordance with this article shall be at the official rates of exchange in effect in the territory of the Contracting Party on the date of remittance. The bank charges applied shall be fair and appropriate.

Article 6
Succession in Rights

(1) If a Contracting Party, or an institution authorized for that purpose, makes payments to its own investor on the basis of a guarantee on an investment in the territory of the other Contracting Party, that other Contracting Party shall recognize the assignment of all rights or claims of the investor to the first-mentioned Contracting Party by operation of law or on the basis of a legal transaction. This provision shall apply without prejudice to the rights of the investor of the first-mentioned Contracting Party under article 8 and the rights of the first-mentioned Contracting Party under article 9 of this Agreement.

(2) Furthermore, the other Contracting Party shall recognize the subrogation by the first-mentioned Contracting Party of all such rights or claims, to which the first-mentioned Contracting Party shall be entitled to the same extent as its legal predecessor. Articles 4 and 5 of this Agreement shall apply mutatis mutandis to the transfer of payments to be made to the Contracting Party in question on the basis of the assigned claims.

Article 7
Other Obligations

(1) If under the laws of one of the Contracting Parties or under international obligations now or in the future undertaken between the Contracting Parties in addition to this Agreement there exists a general or special regime whereby the investments of investors of the other Contracting Party are accorded more favorable treatment than under this Agreement, the said regime shall take precedence over the present Agreement to the extent that it is more favorable.

(2) Investors of one Contracting Party may conclude special agreements with the other Contracting Party, but the provisions thereof may not be in contradiction to this Agreement. The investments made under such agreements shall be governed both by the provisions thereof and by the provisions of this Agreement.

Article 8
Settlement of investment disputes

(1) If disputes arise 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, or the transfer obligations pursuant to Article 5, of this Agreement, they shall, as far as possible, be settled amicably between the parties to the dispute.

(2) If a dispute within the meaning of paragraph 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 for both Contracting Parties at the date of the motion for the arbitration proceeding.

(3) The award of the arbitral tribunal shall be final and binding; each Contracting Party shall ensure the recognition and enforcement of the arbitral award in accordance with its own laws.

(4) A Contracting Party which is a party to a dispute shall not, at any stage of the reconciliation or arbitration proceedings or enforcement of an arbitral award, raise the objection that the investor who is the other party to the dispute has received compensation by virtue of a guarantee in respect of some or all of its losses.

Article 9
Disputes between the Contracting Parties

(1) Disputes between Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled on an amicable basis.

(2) If a dispute within the meaning of paragraph 1 cannot be settled within six months, it shall be submitted to an arbitral tribunal at the request of either of the two Contracting Parties.

(3) The arbitral tribunal shall be constituted on an ad hoc basis; each Contracting Party shall appoint one arbitrator, and the two arbitrators shall agree on a third person to act as chairman. The arbitrators shall be appointed within three months from the date on which one Contracting Party has informed the other that it wishes to submit the dispute to an arbitral tribunal, and the chairman shall be appointed within a further two months.

(4) If the time-limits specified in paragraph 3 are not met, either Contracting Party may, in the absence of any other agreement, request the President of the International Court of Justice to make the necessary appointments. If the President of the International Court of Justice is a national of one of the two Contracting Parties or is unable to act for any other reason, the Vice-President or, if he is unable to act, the most senior member of the International Court of Justice may under the same conditions be asked to make the appointments.

(5) The arbitral tribunal shall determine its own procedure.

(6) The arbitral tribunal shall base its decision on this Agreement and on generally recognized rules of international law. It shall decide by majority vote; its decision shall be final and binding.

(7) Each Contracting Party shall bear the cost of its own arbitrator and of its representation in the arbitration proceedings. The cost of the chairman and the other costs shall be shared equally by the two Contracting Parties. The tribunal, however, may make a different ruling on costs in its decision.

Article 10
Application of the Agreement

This Agreement shall apply to investments made or to be made in the territory of one of the Contracting Parties in accordance with its legislation by investors of the other Contracting Party after January 1, 1950.

Article 11
Entry into Force and Term

(1) This Agreement is subject to ratification and shall enter into force on the first day of the third month that follows the month during which the instruments of ratification have been exchanged.

(2) The Agreement shall remain in force for ten years; upon the expiry of that period, it shall be extended for an indefinite period of time and may be denounced by either Contracting Party subject to twelve months' prior notice in writing through the diplomatic channel.

(3) In the case of investments that will have been made before the date of denunciation of this Agreement, articles 1 to 10 of this Agreement shall apply for a further ten years from that date.

DONE in Vienna, on October 15, 1990, in two original copies in the German and Czech languages, both texts being equally authentic.

For the Federal Republic of Austria:

Ferdinand Lacina

For the Czech and Slovak Federal Republic

Vaclav Klaus

The Instrument of Ratification signed by the Federal President and countersigned by the Federal Chancellor was exchanged on July 23, 1991; pursuant to Article 11 para. 1 hereof, this Agreement shall enter in force on October 1, 1991.

P. b. b. Erscheinungsort Wien, Verlagspostamt 1030 Wien

BUNDESGESETZBLATT

FÜR DIE REPUBLIK ÖSTERREICH

Jahrgang 1991 Ausgegeben am 24. September 1991 186. Stück

513. Abkommen zwischen der Republik Österreich und der Tschechischen und Slowakischen Föderativen Republik über die Förderung und den Schutz von Investitionen (NR: GP XVIII RV 88 AB 154 S. 29. BR: AB 4063 S. 542.)

513.

Der Nationalrat hat beschlossen:

Der Abschluß des nachstehenden Staatsvertrages wird genehmigt.

ABKOMMEN

ZWISCHEN DER REPUBLIK ÖSTERREICH UND DER TSCHECHISCHEN UND SLOWAKISCHEN FÖDERATIVEN REPUBLIK ÜBER DIE FÖRDERUNG UND DEN SCHUTZ VON INVESTITIONEN

DIE REPUBLIK ÖSTERREICH UND DIE TSCHECHISCHE UND SLOWAKISCHE FÖDERATIVE REPUBLIK, im folgenden die „Vertragsparteien" genannt,

VON DEM WUNSCHE GELEITET, freundschaftliche Beziehungen im Einvernehmen mit den Grundsätzen der Schlußakte der Konferenz über Sicherheit und Zusammenarbeit in Europa, die am 1. August 1975 in Helsinki unterzeichnet wurde, zu entwickeln und günstige Voraussetzungen für eine größere wirtschaftliche Zusammenarbeit zwischen den Vertragsparteien zu schaffen;

IN DER ERKENNTNIS, daß die Förderung und der Schutz von Investitionen die Bereitschaft zur Vornahme solcher Investitionen stärken und dadurch einen wichtigen Beitrag zur Entwicklung der Wirtschaftsbeziehungen leisten können,

SIND WIE FOLGT ÜBEREINGEKOMMEN:

Artikel 1

Definitionen

Für die Zwecke dieses Abkommens

(1) umfaßt der Begriff „Investition" alle Vermögenswerte, die durch den Investor einer Vertragspartei auf dem Gebiet der anderen Vertragspartei in Übereinstimmung mit deren Rechtsvorschriften veranlagt werden, insbesondere:

a) bewegliche und unbewegliche Sachen sowie alle dinglichen Rechte;

b) Anteilsrechte und andere Arten von Beteiligungen an Unternehmen;

DOHODA

MEZI ČESKOU A SLOVENSKOU FEDERATIVNÍ REPUBLIKOU A RAKOUSKOU REPUBLIKOU O PODPOŘE A OCHRANĚ INVESTIC

ČESKÁ A SLOVENSKÁ FEDERATIVNÍ REPUBLIKA A RAKOUSKÁ REPUBLIKA dále jen „smluvní strany",

VEDENY PŘÁNÍM rozvíjet přátelské vztahy v souladu se zásadami Závěrečného aktu Konference o bezpečnosti a spolupráci v Evropě, podepsaného dne 1. srpna 1975 v Helsinkách, a vytvořit příznivé předpoklady pro větší hospodářskou spolupráci mezi smluvními stranami;

JSOUCE PŘESVĚDČENY, že podpora a ochrana investic může posílit zájem zakládat takové investice, a tím významně přispět k rozvoji hospodářských vztahů,

DOHODLY SE NA TOMTO:

Článek 1

Definice

Pro účely této Dohody

(1) pojem „investice" zahrnuje všechny majetkové hodnoty, které jsou uskutečněny investorem jedné smluvní strany na území druhé smluvní strany v souladu s jejími právními předpisy, zejména:

a) movité a nemovité věci a všechna věcná práva;

b) podíly a jiné druhy účasti na podnicích;

c) Forderungen oder Ansprüche auf Geld, das übergeben wurde, um einen wirtschaftlichen Wert zu schaffen, oder Ansprüche auf eine Leistung, die einen wirtschaftlichen Wert hat;

d) Rechte auf dem Gebiet des geistigen Eigentums, einschließlich Urheberrechte, gewerbliche Schutzrechte wie Erfinderpatente, Handelsmarken, gewerbliche Muster und Modelle sowie Gebrauchsmuster, technische Verfahren, Know-how, Handelsnamen und Goodwill;

e) öffentlichrechtliche Konzessionen für die Aufsuchung, den Abbau oder die Gewinnung von Naturschätzen;

(2) bezeichnet der Begriff „Investor" in bezug auf die Republik Österreich

a) jede natürliche Person, die die Staatsangehörigkeit der Republik Österreich besitzt und die im Hoheitsgebiet der anderen Vertragspartei eine Investition tätigt;

b) jede juristische Person oder Personengesellschaft des Handelsrechtes, die in Übereinstimmung mit den Gesetzen der Republik Österreich geschaffen wurde, ihren Sitz im Hoheitsgebiet der Republik Österreich hat und die im Hoheitsgebiet der anderen Vertragspartei eine Investition tätigt;

in bezug auf die Tschechische und Slowakische Föderative Republik

a) jede natürliche Person, die gemäß der tschechoslowakischen Rechtsordnung Angehörige der Tschechischen und Slowakischen Föderativen Republik ist, gemäß der tschechoslowakischen Rechtsordnung als Investor zu handeln berechtigt ist und die im Hoheitsgebiet der anderen Vertragspartei eine Investition tätigt;

b) jede juristische Person, die gemäß der tschechoslowakischen Rechtsordnung errichtet worden ist, ihren Sitz im Hoheitsgebiet der Tschechischen und Slowakischen Föderativen Republik hat und die im Hoheitsgebiet der anderen Vertragspartei eine Investition tätigt;

(3) bezeichnet der Begriff „Ertrag" diejenigen Beträge, die eine Investition erbringt, und umfaßt insbesondere Gewinne, Zinsen, Kapitalzuwächse, Dividenden, Tantiemen und Lizenzgebühren.

c) pohledávky a nároky na peníze, které byly předány, aby vytvořily hospodářskou hodnotu, nebo nároky na plnění, které má hospodářskou hodnotu;

d) práva z oblasti duševního vlastnictví, včetně autorských práv, obchodní ochranná práva jako patenty a vynálezy, obchodní známky, obchodní vzory a modely, jakož i spotřební vzory, technické postupy, know-how, obchodní názvy a goodwill;

e) veřejnoprávní oprávnění týkající se vyhledávání, dobývání nebo využití přírodního bohatství;

(2) pojem „investor" pokud jde o Českou a Slovenskou Federativní Republiku, označuje:

a) každou fyzickou osobu, která je podle československého právního řádu občanem České a Slovenské Federativní Republiky, podle československého právního řádu je oprávněna jednat jako investor a investuje na území druhé smluvní strany;

b) každou právnickou osobu, která byla zřízena podle československého právního řádu, má sídlo na území České a Slovenské Federativní Republiky a investuje na území druhé smluvní strany;

pokud jde o Rakouskou republiku označuje:

a) každou fyzickou osobu, která má státní příslušnost Rakouské republiky a investuje na území druhé smluvní strany;

b) každou právnickou osobu nebo společnost osob podle obchodního práva, která byla zřízena v souladu s rakouským právním řádem, má sídlo na území Rakouské republiky a investuje na území druhé smluvní strany;

(3) pojem „výnosy" označuje všechny částky, které plynou z investice a zahrnuje zejména zisky, úroky, přírůstky kapitálu, dividendy, tantiémy a licenční poplatky.

Artikel 2

Förderung und Schutz von Investitionen

(1) Jede Vertragspartei fördert nach Möglichkeit in ihrem Hoheitsgebiet Investitionen von Investoren der anderen Vertragspartei, läßt diese in Übereinstimmung mit ihren Rechtsvorschriften zu und behandelt sie in jedem Fall gerecht und billig.

(2) Investitionen und ihre Erträge genießen den vollen Schutz dieses Abkommens. Gleiches gilt im

Článek 2

Podpora a ochrana investic

(1) Každá smluvní strana podle možností podporuje na svém území investice investorů druhé smluvní strany, umožňuje jejich vznik v souladu se svým právním řádem a v každém případě s nimi nakládá řádně a spravedlivě.

(2) Investice a jejich výnosy požívají plné ochrany podle této Dohody. Totéž platí v případě reinvestic

Falle ihrer Wiederveranlagung auch für deren Erträge. Die rechtliche Erweiterung oder Veränderung einer Investition hat in Übereinstimmung mit den Rechtsvorschriften der Vertragspartei zu erfolgen, in deren Hoheitsgebiet die Investition getätigt wird.

pro jejich výnosy. Právní rozšíření nebo změna investice se musí uskutečnit v souladu s právními předpisy smluvní strany, na jejímž území je investice zřízena.

Artikel 3

Behandlung von Investitionen

(1) Jede Vertragspartei behandelt Investoren der anderen Vertragspartei und deren Investitionen nicht weniger günstig als eigene Investoren oder Investoren dritter Staaten und deren Investitionen.

(2) Die Bestimmungen des Absatzes 1 beziehen sich jedoch nicht auf gegenwärtige oder künftige Vorrechte, die eine Vertragspartei den Investoren eines dritten Staates oder deren Investitionen einräumt im Zusammenhang mit

a) einer Wirtschaftsunion, einer Zollunion, einem gemeinsamen Markt, einer Freihandelszone oder einer Wirtschaftsgemeinschaft;
b) einem internationalen Abkommen oder einer zwischenstaatlichen Vereinbarung oder innerstaatlichen Rechtsvorschrift über Steuerfragen;
c) einer Regelung zur Erleichterung des Grenzverkehrs.

Článek 3

Nakládání s investicemi

(1) Každá smluvní strana nakládá s investory druhé smluvní strany a jejich investicemi ne méně příznivě než s vlastními investory nebo s investory třetích států a jejich investicemi.

(2) Ustanovení odstavce 1 se však nevztahují na současné nebo budoucí výhody, které jedna smluvní strana poskytuje investorům třetího státu nebo jejich investicím v souvislosti s:

a) hospodářskou unií, celní unií, společným trhem, zónou volného obchodu nebo hospodářským seskupením;
b) mezinárodní dohodou nebo mezistátní smlouvou nebo vnitrostátním právním předpisem o daňových otázkách;
c) úpravou k ulehčení pohraničního styku.

Artikel 4

Entschädigung

(1) Investitionen von Investoren einer Vertragspartei dürfen im Hoheitsgebiet der anderen Vertragspartei nur im öffentlichen Interesse, auf Grund eines rechtmäßigen Verfahrens und gegen Entschädigung enteignet, verstaatlicht oder einer sonstigen Maßnahme mit gleicher Wirkung unterworfen werden.

(2) Die Entschädigung muß dem Wert der Investition unmittelbar vor dem Zeitpunkt entsprechen, in dem die tatsächliche oder drohende Enteignung öffentlich bekannt wurde. Die Entschädigung muß ohne Verzögerung geleistet werden und ist bis zum Zeitpunkt der Zahlung mit dem üblichen bankmäßigen Zinssatz jenes Staates, in dessen Hoheitsgebiet die Investition durchgeführt wurde, zu verzinsen; sie muß frei transferierbar sein. Spätestens im Zeitpunkt der Enteignung muß in geeigneter Weise für die Festsetzung und Leistung der Entschädigung Vorsorge getroffen sein.

(3) Enteignet eine Vertragspartei die Vermögenswerte einer Gesellschaft, die in Anwendung von Artikel 1 Absatz 2 dieses Abkommens als ihre eigene Gesellschaft anzusehen ist, und an welcher ein Investor der anderen Vertragspartei Anteile besitzt; so wendet sie die Bestimmungen des Absatzes 1 dergestalt an, daß die angemessene Entschädigung dieses Investors sichergestellt wird.

Článek 4

Odškodnění

(1) Investice investorů jedné smluvní strany smějí být na území druhé smluvní strany vyvlastněny, znárodněny nebo podrobeny jinému opatření se stejnými důsledky jen ve veřejném zájmu, na základě právního postupu a proti odškodnění.

(2) Odškodnění musí odpovídat hodnotě investice bezprostředně před tím, než bylo zveřejněno skutečné nebo hrozící vyvlastnění. Odškodnění musí být poskytnuto bez prodlení a musí být úročeno až do doby zaplacení běžnými bankovními úrokovými sazbami toho státu, na jehož území byla investice zřízena; musí být volně převoditelné. Nejpozději v době vyvlastnění musí být vhodným způsobem zajištěno stanovení výše a poskytnutí odškodnění.

(3) Jestliže jedna smluvní strana vyvlastní majetkové hodnoty společnosti, na kterou podle článku 1 odstavec 2 této Dohody pohlíží jako na vlastní společnost a na které má investor druhé smluvní strany podíl, použijí se ustanovení odstavce 1 tak, aby přiměřené odškodnění investora bylo zajištěno.

(4) Dem Investor steht das Recht zu, die Rechtmäßigkeit der Enteignung durch die zuständigen Organe der Vertragspartei, welche die Enteignung veranlaßt hat, überprüfen zu lassen.

(5) Dem Investor steht das Recht zu, die Höhe der Entschädigung und die Zahlungsmodalitäten entweder durch die zuständigen Organe der Vertragspartei, welche die Enteignung veranlaßt hat, oder durch ein Schiedsgericht gemäß Artikel 8 dieses Abkommens überprüfen zu lassen.

(4) Investor má právo nechat prověřit oprávněnost vyvlastnění příslušnými orgány smluvní strany, která provedla vyvlastnění.

(5) Investor má právo nechat prověřit výši odškodnění a způsob jeho zaplacení buď příslušnými orgány smluvní strany, která provedla vyvlastnění, nebo rozhodčím soudem podle článku 8 této Dohody.

Artikel 5

Überweisungen

(1) Jede Vertragspartei gewährleistet den Investoren der anderen Vertragspartei ohne Verzögerung den freien Transfer in frei konvertierbarer Währung der im Zusammenhang mit einer Investition stehenden Zahlungen, insbesondere

a) des Kapitals und zusätzlicher Beträge zur Aufrechterhaltung oder Erweiterung der Investition, einschließlich ihrer Verwaltung;
b) der Erträge;
c) der Rückzahlung von Darlehen;
d) des Erlöses im Falle vollständiger oder teilweiser Liquidation oder Veräußerung der Investition;
e) einer Entschädigung gemäß Artikel 4 Absatz 1 dieses Abkommens.

(2) Die Überweisungen gemäß diesem Artikel erfolgen zu den offiziellen Wechselkursen im Hoheitsgebiet der Vertragspartei, die am Tage der Überweisung gelten. Die Bankgebühren werden gerecht und angemessen sein.

Článek 5

Převody

(1) Každá smluvní strana zaručuje investorům druhé smluvní strany bez prodlení volný převod plateb, které souvisejí s investicí ve volně směnitelné měně, zejména

a) kapitálu a dodatečných částek k údržbě nebo rozšíření investice, včetně její správy;
b) výnosu;
c) splátek půjček;
d) výnosů v případě úplné nebo částečné likvidace nebo prodeje investice;
e) odškodnění podle článku 4 odstavce 1 této Dohody.

(2) Převody podle tohoto článku se uskutečňují oficiálním směnným kursem platným na území smluvní strany v den převodu. Bankovní poplatky budou v řádné výši a přiměřené.

Artikel 6

Eintrittsrecht

(1) Leistet eine Vertragspartei oder eine von ihr hiezu ermächtigte Institution ihrem Investor Zahlungen auf Grund einer Garantie für eine Investition im Hoheitsgebiet der anderen Vertragspartei, so erkennt diese andere Vertragspartei die Übertragung aller Rechte oder Ansprüche dieses Investors kraft Gesetzes oder auf Grund eines Rechtsgeschäfts auf die erstgenannte Vertragspartei an. Dies gilt unbeschadet der Rechte des Investors der erstgenannten Vertragspartei aus Artikel 8 und der Rechte der erstgenannten Vertragspartei aus Artikel 9 dieses Abkommens.

(2) Ferner erkennt die andere Vertragspartei den Eintritt der erstgenannten Vertragspartei in alle diese Rechte oder Ansprüche an, welche die erstgenannte Vertragspartei in demselben Umfang wie ihr Rechtsvorgänger auszuüben berechtigt ist. Für den Transfer der an die betreffende Vertragspartei auf Grund der übertragenen Ansprüche zu leistenden Zahlungen gelten Artikel 4 und Artikel 5 dieses Abkommens sinngemäß.

Článek 6

Subrogace

(1) Jestliže jedna smluvní strana nebo jí zmocněná instituce poskytne svému investorovi platbu z důvodu záruky na investici umístěné na území druhé smluvní strany, uzná druhá smluvní strana převod všech práv nebo nároků tohoto investora podle zákona nebo na základě právního ujednání na první smluvní stranu. To platí bez ohledu na práva investora první smluvní strany vyplývající z článku 8 a práva první smluvní strany vyplývající z článku 9 této Dohody.

(2) Dále uzná druhá smluvní strana vstup první smluvní strany do všech práv nebo nároků, které je první smluvní strana oprávněna vykonávat ve stejném rozsahu jako její právní předchůdce. Pro převod plateb, jež mají být provedeny na základě převedených nároků na uvedenou smluvní stranu, platí přiměřeně článek 4 a 5 této Dohody.

Artikel 7

Andere Verpflichtungen

(1) Ergibt sich aus den Rechtsvorschriften einer Vertragspartei oder aus völkerrechtlichen Verpflichtungen, die neben diesem Abkommen zwischen den Vertragsparteien bestehen oder in Zukunft begründet werden, eine allgemeine oder besondere Regelung, durch die den Investitionen der Investoren der anderen Vertragspartei eine günstigere Behandlung als nach diesem Abkommen zu gewähren ist, so geht diese Regelung dem vorliegenden Abkommen insoweit vor, als sie günstiger ist.

(2) Investoren einer Vertragspartei können mit der anderen Vertragspartei besondere Verträge abschließen, deren Bestimmungen jedoch nicht im Widerspruch zu diesem Abkommen stehen dürfen. Die nach diesen Verträgen getätigten Investitionen werden durch deren Bestimmungen sowie durch die Bestimmungen dieses Abkommens geregelt.

Článek 7

Jiné závazky

(1) Vyplývají-li z právních předpisů jedné smluvní strany nebo z mezinárodněprávních závazků, které platí mezi smluvními stranami kromě této Dohody nebo vzniknou v budoucnosti, všeobecná nebo zvláštní ustanovení, na základě nichž má být poskytnuto investicím investorů jiné smluvní strany výhodnější zacházení než podle této Dohody, používají se tato ustanovení do té míry, do které jsou vůči stávající Dohodě výhodnější.

(2) Investoři jedné smluvní strany mohou uzavřít s druhou smluvní stranou zvláštní smlouvy, avšak jejich ustanovení nesmějí být v rozporu s touto Dohodou. Investice založené podle těchto smluv se budou řídit jejich ustanoveními, jakož i ustanoveními této Dohody.

Artikel 8

Beilegung von Investitionsstreitigkeiten

(1) Entstehen zwischen einer Vertragspartei und einem Investor der anderen Vertragspartei Meinungsverschiedenheiten aus einer Investition, die die Höhe oder die Zahlungsmodalitäten einer Entschädigung gemäß Artikel 4 oder Transferverpflichtungen gemäß Artikel 5 dieses Abkommens betreffen, so werden diese so weit wie möglich zwischen den Streitparteien freundschaftlich beigelegt.

(2) Kann eine Meinungsverschiedenheit gemäß Absatz 1 nicht innerhalb von sechs Monaten ab einer schriftlichen Mitteilung hinreichend bestimmter Ansprüche beigelegt werden, wird die Meinungsverschiedenheit, wenn nichts anderes vereinbart ist, auf Antrag der Vertragspartei oder des Investors der anderen Vertragspartei durch ein Schiedsverfahren nach der UNCITRAL-Schiedsgerichtsordnung in der zum Zeitpunkt des Antrags auf Einleitung des Schiedsverfahrens gültigen Fassung entschieden.

(3) Die Entscheidung des Schiedsgerichts ist endgültig und bindend; jede Vertragspartei stellt die Anerkennung und Durchsetzung des Schiedsspruches in Übereinstimmung mit ihrer Rechtsordnung sicher.

(4) Eine Vertragspartei, die Streitpartei ist, macht in keinem Stadium des Schiedsverfahrens oder der Durchsetzung eines Schiedsspruchs als Einwand geltend, daß der Investor, der die andere Streitpartei bildet, auf Grund einer Garantie bezüglich einiger oder aller seiner Verluste eine Entschädigung erhalten habe.

Článek 8

Řešení sporů z investic

(1) Vzniknou-li mezi jednou smluvní stranou a investorem druhé smluvní strany spory týkající se investice o výši nebo způsobu zaplacení odškodnění podle článku 4 nebo povinnosti převodu podle článku 5 této Dohody, budou vyřešeny, pokud možno, mezi stranami ve sporu přátelsky.

(2) Nemůže-li být spor podle odstavce 1 vyřešen ve lhůtě šesti měsíců od písemného oznámení týkajícího se dostatečně určených nároků, bude spor rozhodnut, není-li dohodnuto jinak, na návrh smluvní strany nebo investora druhé smluvní strany v rozhodčím řízení podle rozhodčích pravidel UNCITRAL ve znění platném pro obě smluvní strany v době podání návrhu na rozhodčí řízení.

(3) Rozhodnutí rozhodčího soudu je konečné a závazné; každá smluvní strana zajistí uznání a provedení rozhodčího nálezu v souladu se svým právním řádem.

(4) Smluvní strana, která je stranou ve sporu, neuplatní v žádném stadiu smírčího nebo rozhodčího řízení nebo při výkonu rozhodčího výroku námitku, že investor, který je druhou stranou ve sporu, obdržel za některé nebo všechny své ztráty odškodnění na základě záruky.

Artikel 9

Streitigkeiten zwischen den Vertragsparteien

(1) Meinungsverschiedenheiten zwischen den Vertragsparteien über die Auslegung oder Anwendung dieses Abkommens sollen, soweit wie möglich, durch freundschaftliche Verhandlungen beigelegt werden.

(2) Kann eine Meinungsverschiedenheit gemäß Absatz 1 innerhalb von sechs Monaten nicht beigelegt werden, so wird sie auf Verlangen einer der beiden Vertragsparteien einem Schiedsgericht unterbreitet.

(3) Das Schiedsgericht wird von Fall zu Fall gebildet, in dem jede Vertragspartei ein Mitglied bestellt und beide Mitglieder sich auf eine dritte Person als Vorsitzenden einigen. Die Mitglieder sind innerhalb von drei Monaten, nachdem die eine Vertragspartei der anderen mitgeteilt hat, daß sie die Meinungsverschiedenheit einem Schiedsgericht unterbreiten will, der Vorsitzende innerhalb von weiteren zwei Monaten zu bestellen.

(4) Werden die in Absatz 3 genannten Fristen nicht eingehalten, so kann in Ermangelung einer anderen Vereinbarung jede Vertragspartei den Präsidenten des Internationalen Gerichtshofes bitten, die erforderlichen Ernennungen vorzunehmen. Besitzt der Präsident des Internationalen Gerichtshofes die Staatsangehörigkeit einer der beiden Vertragsparteien oder ist er aus einem anderen Grund verhindert, so kann der Vizepräsident, oder im Falle seiner Verhinderung, das dienstälteste Mitglied des Internationalen Gerichtshofes unter den selben Voraussetzungen eingeladen werden, die Ernennungen vorzunehmen.

(5) Das Schiedsgericht regelt sein Verfahren selbst.

(6) Das Schiedsgericht entscheidet auf Grund dieses Abkommens sowie auf Grund der allgemein anerkannten Regeln des Völkerrechtes. Es entscheidet mit Stimmenmehrheit; die Entscheidung ist endgültig und bindend.

(7) Jede Vertragspartei trägt die Kosten ihres Mitglieds und ihrer Vertretung in dem Schiedsverfahren. Die Kosten des Vorsitzenden sowie die sonstigen Kosten werden von den beiden Vertragsparteien zu gleichen Teilen getragen. Das Gericht kann jedoch in seiner Entscheidung eine andere Kostenregelung treffen.

Článek 9

Spory mezi smluvními stranami

(1) Spory mezi smluvními stranami o výklad nebo použití Dohody mají být, pokud možno, odstraněny v rámci přátelských jednání.

(2) Nemohou-li být spory podle odstavce 1 odstraněny během šesti měsíců, budou předloženy na žádost jedné ze smluvních stran k posouzení rozhodčímu soudu.

(3) Rozhodčí soud bude zřízen případ od případu. Každá smluvní strana určí jednoho rozhodce a tito dva rozhodci se dohodnou na třetí osobě, jež bude působit jako předseda. Rozhodci mají být určeni do tří měsíců a předseda do dalších dvou měsíců poté, co jedna smluvní strana oznámila druhé smluvní straně, že hodlá předložit spor rozhodčímu soudu

(4) Nebudou-li lhůty uvedené v odstavci 3 dodrženy a není-li jiné dohody, může každá smluvní strana požádat předsedu Mezinárodního soudního dvora, aby provedl potřebná jmenování. Je-li předseda Mezinárodního soudního dvora státním občanem jedné ze smluvních stran nebo má-li jinou překážku, může být požádán zástupce předsedy a v případě, že by ani on nemohl, služebně nejstarší člen Mezinárodního soudního dvora, aby za stejných podmínek provedl jmenování.

(5) Rozhodčí soud sám určuje procesní pravidla.

(6) Rozhodčí soud rozhoduje na základě této Dohody a všeobecně uznávaných pravidel mezinárodního práva. Rozhoduje většinou hlasů; rozhodnutí je konečné a závazné.

(7) Každá smluvní strana nese výlohy svého rozhodce a svého zastoupení v rozhodčím řízení. Výlohy předsedy a ostatní výlohy nesou obě strany stejným dílem. Soud však může ve svém výroku rozhodnout o nákladech jinak.

Artikel 10

Anwendung dieses Abkommens

Dieses Abkommen gilt für Investitionen, die Investoren der einen Vertragspartei in Übereinstim-

Článek 10

Použití Dohody

Tato Dohoda platí pro investice, které investoři jedné smluvní strany zřídili v souladu s právními

mung mit den Rechtsvorschriften der anderen Vertragspartei in deren Hoheitsgebiet nach dem 1. Jänner 1950 vorgenommen haben oder vornehmen werden.

předpisy druhé smluvní strany na jejím území po 1. 1. 1950, nebo které budou zřízeny později.

Artikel 11

Inkrafttreten und Dauer

(1) Dieses Abkommen bedarf der Ratifikation und tritt am ersten Tag des dritten Monats in Kraft, der auf den Monat folgt, in welchem die Ratifikationsurkunden ausgetauscht worden sind.

(2) Das Abkommen bleibt zehn Jahre lang in Kraft; nach deren Ablauf wird es auf unbestimmte Zeit verlängert und kann von jeder Vertragspartei unter Einhaltung einer Kündigungsfrist von zwölf Monaten schriftlich auf diplomatischem Wege gekündigt werden.

(3) Für Investitionen, die bis zum Zeitpunkt des Außerkrafttretens dieses Abkommens vorgenommen worden sind, gelten die Artikel 1 bis 10 dieses Abkommens noch für weitere zehn Jahre vom Tage des Außerkrafttretens des Abkommens an.

GESCHEHEN zu Wien, am 15. Oktober 1990, in zwei Urschriften, jede in deutscher und tschechischer Sprache, wobei jeder Wortlaut gleichermaßen authentisch ist.

Für die Republik Österreich:

Dkfm. Ferdinand Lacina

Für die Tschechische und Slowakische Föderative Republik:

Ing. Václav Klaus

Článek 11

Vstup v platnost a trvání

(1) Tato Dohoda podléhá ratifikaci a vstupuje v platnost prvního dne třetího měsíce, který následuje po měsíci, v němž byly vyměněny ratifikační listiny.

(2) Dohoda zůstává v platnosti 10 let; po uplynutí této doby bude prodloužena na neurčitou dobu a může být písemně diplomatickou cestou vypovězena kteroukoli smluvní stranou, při dodržení výpovědní lhůty 12 měsíců.

(3) Na investice, které byly uskutečněny před ukončením platnosti této Dohody, se vztahují články 1 až 10 této Dohody ještě 10 let po skončení její platnosti.

DÁNO ve Vídni dne 15. října 90 ve dvou vyhotoveních, každé v jazyce českém a německém, přičemž obě znění mají stejnou platnost.

Za Rakouskou republiku:

Dkfm. Ferdinand Lacina

Za Českou a Slovenskou Federativní Republiku:

Ing. Václav Klaus

Die vom Bundespräsidenten unterzeichnete und vom Bundeskanzler gegengezeichnete Ratifikationsurkunde wurde am 23. Juli 1991 ausgetauscht; das Abkommen tritt gemäß seinem Art. 11 Abs. 1 mit 1. Oktober 1991 in Kraft.

Vranitzky

Sworn translation of a German language document

Translator's clause:

I, Nora Martišková, translator for English and German languages (native language Czech) appointed by The Regional Court of Law in Hradec Králové, Czech Republic, on February 3, 1995, file number 3641/94, certify that ***"This is a true and accurate translation of the attached document in the German language."***

Corrections of the document: —

File number of the translation 1768

Date 1. 6. 2011

Number of pages 6

Nora Martišková, noramartiskova@seznam.cz, Tel./Fax: +420 /283 923 022, Tel.: +420 /724 090 898

Seal and signature of the translator:

Annex 7

[**CLAIMANT'S TRANSLATION FROM GERMAN ORIGINAL TAKING INTO ACCOUNT THE CZECH ORIGINAL**]

AGREEMENT BETWEEN THE REPUBLIC OF AUSTRIA AND THE CZECH AND SLOVAK FEDERAL REPUBLIC CONCERNING THE PROMOTION AND PROTECTION OF INVESTMENTS

The Republic of Austria and the Czech and Slovak Federal Republic, hereinafter referred to as the "Contracting Parties".

DESIRING to develop friendly relations in accordance with the principles of the Final Act of the Conference on Security and Cooperation in Europe, signed on August 1, 1975 in Helsinki, and desiring to create favourable conditions for greater economic cooperation between the Contracting Parties,

RECOGNIZING that the promotion and protection of investments may strengthen the readiness to make such investments and thereby make an important contribution to the development of economic relations,

HAVE AGREED AS FOLLOWS:

Article 1

Definitions

For the purposes of this Agreement:

(1) The term "investment" shall mean all assets that are invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with its legislation, in particular:

a) Movable and immovable property, as well as all rights in rem;

b) Shares and other forms of participation in enterprises;

c) Claims or titles to money that was transferred to create an economic value, or claims to performances having an economic value;

d) Rights relating to intellectual property, including copyrights, industrial property rights such as patents, trademarks, industrial designs, models and samples, technical processes, know-how, business names and goodwill;

e) Concessions under public law for prospecting, mining or extracting of natural resources;

(2) "Investor" shall mean, in the case of the Republic of Austria:

a) any natural person, who has the citizenship of the Republic of Austria and who makes an investment in the territory of the other Contracting Party;

b) any legal entity or partnership under commercial law, which was established in accordance with the laws of the Republic of Austria, has its seat in the territory of the Republic of Austria, and makes an investment in the territory of the other Contracting Party;

and in the case of the Czech and Slovak Federal Republic:

a) any natural person, who is a citizen of the Czech and Slovak Federal Republic under Czechoslovak law, who is authorized to act as investor under Czechoslovak law, and who makes an investment in the territory of the other Contracting Party;

b) any legal entity, which was established in accordance with the Czechoslovak laws, which has its seat in the territory of the Czech and Slovak Federal Republic, and makes an investment in the territory of the other Contracting Party;

(3) "Earnings" shall mean the amounts yielded by an investment and includes, in particular, profits, interest, capital gains, dividends, royalties and license fees.

Article 2

Promotion and protection of investments

(1) Each Contracting Party shall, to the extent possible, promote investments made in its territory by investors from the other Contracting Party, shall permit such investments in accordance with its laws and shall accord them just and equitable treatment.

(2) Investments and the earnings yielded by investments shall have the full protection of this Agreement. In case of reinvestment, the same shall also apply to earnings yielded by such reinvestment. Legal extension or alteration of the investment shall be in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made.

Article 3

Treatment of Investments

(1) Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment that is no less favourable 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, however, shall not apply to present or future privileges granted by one Contracting Party to investors of a third state or their investments in connection with

a) an economic union, customs union, a common market, free trade zone or economic community;

b) an international agreement or a bilateral agreement or national laws and regulations concerning matters of taxation;

c) a regulation to facilitate border traffic.

Article 4

Compensation

(1) Investments by Investors of one Contracting Party may only be expropriated, nationalized or subject to other measures having similar effect in the territory of the other Contracting Party for reasons of public interest, on the basis of legal proceedings and in return for compensation.

(2) The compensation must correspond to the value of the investment immediately prior to the time when the actual or impending expropriation measures became publicly known. The compensation must be paid without delay and, until payment, shall yield interest based on the customary bank interest rate of the State in whose territory the investment was made; it must be freely transferable. At the time of expropriation at the latest, provisions shall have been made in an appropriate manner for determining and paying compensation.

(3) If a Contracting Party expropriates the assets of a company which is to be considered a company of that Contracting Party under Article 1 para. 2 of this Agreement and in which an investor of the other Contracting Party owns shares, the provisions of para. 1 above shall be applied in such a way as to ensure adequate compensation of such an investor.

(4) The investor shall have the right to have the legality 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 method of payment reviewed either by the competent authorities of the Contracting Party which prompted the expropriation or by an arbitral tribunal in accordance with Article 8 of this Agreement.

Article 5

Remittances

(1) Each Contracting Party shall guarantee to investors of the other Contracting Party free transfer without delay in freely convertible currency of payments in connection with an investment, in particular:

a) Capital and additional payments to maintain or increase an investment, including its management;

b) Earnings;

c) The repayment of loans;

d) The proceeds in case of a complete or partial liquidation or sale of the investment;

e) Compensation in accordance with Article 4 para. 1 of this Agreement.

(2) Remittances in accordance with this article shall be at the official rates of exchange in effect in the territory of the Contracting Party on the date of remittance. The bank charges applied shall be just and adequate.

Article 6

Succession in Rights

(1) If a Contracting Party, or an institution authorized for that purpose, makes payments to its own investor on the basis of a guarantee on an investment in the territory of the other Contracting Party, that other Contracting Party shall recognize the assignment of all rights or claims of the investor to the first mentioned Contracting Party by operation of law or on the basis of a legal transaction. This provision shall apply without prejudice to the rights of the investor of the first-mentioned Contracting Party under article 8 and the rights of the first-mentioned Contracting Party under article 9 of this Agreement.

(2) Furthermore, the other Contracting Party shall recognize the subrogation by the first-mentioned Contracting Party of all such rights or claims, to which the first mentioned Contracting Party shall be entitled to the same extent as its legal predecessor. Articles 4 and 5 of this Agreement shall apply mutatis mutandis to the transfer of payments to be made to the Contracting Party in question on the basis of the assigned claims.

Article 7

Other Obligations

(1) If under the laws of one of the Contracting Parties or under international obligations now or in the future undertaken between the Contracting Parties in addition to this Agreement there exists a general or special regime whereby the investments of investors of the other Contracting Party are accorded more favourable treatment than under this Agreement, the said regime shall take precedence over the present Agreement to the extent that it is more favourable.

(2) Investors of one Contracting Party may conclude special agreements with the other Contracting Party, but the provisions thereof may not be in contradiction to this Agreement. The investments made under such agreements shall be governed both by the provisions thereof and by the provisions of this Agreement.

Article 8

Settlement of investment disputes

(1) If disputes arise between a Contracting Party and an investor of the other Contracting Party concerning an investment with regard to the amount or the arrangements for payment of compensation in accordance with Article 4, or to the transfer obligations in

accordance with Article 5 of this Agreement, they shall, as far as possible be settled between the parties to the dispute on an amicable basis.

(2) If a dispute within the meaning of paragraph 1 above cannot be settled within six months as from a written notice of sufficiently specific 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 arbitration in accordance with the UNCITRAL Arbitration Rules in the version in effect on the date of the request to initiate arbitration.

(3) The award of the arbitral tribunal shall be final and binding; each Contracting Party shall ensure the recognition and enforcement of the arbitral award in accordance with its own laws.

(4) A Contracting Party which is a party to the dispute shall not, at any stage of the arbitration or enforcement of an arbitral award, raise the objection that the investor who is the other party to the dispute has received compensation by virtue of a guarantee in respect of some or all of its losses.

Article 9

Disputes between the Contracting Parties

(1) Disputes between Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled on an amicable basis.

(2) If a dispute within the meaning of paragraph 1 cannot be settled within six months, it shall be submitted to an arbitral tribunal at the request of either of the two Contracting Parties.

(3) The arbitral tribunal shall be constituted on an ad hoc basis; each Contracting Party shall appoint one arbitrator, and the two arbitrators shall agree on a third person to act as chairman. The arbitrators shall be appointed within three months from the date on which one Contracting Party has informed the other that it wishes to submit the dispute to an arbitral tribunal, and the chairman shall be appointed within a further two months.

(4) If the time-limits specified in paragraph 3 are not met, either Contracting Party may, in the absence of any other agreement, request the President of the International Court of Justice to make the necessary appointments. If the President of the International Court of Justice is a national of one of the two Contracting Parties or is unable to act for any other reason, the Vice-President or, if he is unable to act, the most senior member of the International Court of Justice may under the same conditions be asked to make the appointments.

(5) The arbitral tribunal shall determine its own procedure.

(6) The arbitral tribunal shall base its decision on this Agreement and on generally recognized rules of international law. It shall decide by majority vote; its decision shall be final and binding.

(7) Each Contracting Party shall bear the cost of its own arbitrator and of its representation in the arbitration proceedings. The cost of the chairman and the other costs shall be

shared equally by the two Contracting Parties. The tribunal, however, may make a different ruling on costs in its decision.

Article 10

Application of the Agreement

This Agreement shall be applicable to investments that investors of one Contracting Party have made or will make in the territory of the other Contracting Party in accordance with its laws after 1 January 1950.

Article 11

Entry into Force and Term

(1) This Agreement is subject to ratification and shall enter into force on the first day of the third month that follows the month in which the instruments of ratification have been exchanged.

(2) The Agreement shall remain in force for ten years; upon the expiry of that period, it shall be extended for an indefinite period of time and may be denounced by either Contracting Party subject to twelve months' prior notice in writing through the diplomatic channel.

(3) In the case of investments that will have been made before the date of denunciation of this Agreement, articles 1 to 10 of this Agreement shall apply for a further ten years from that date.

DONE in Vienna, on 15 October 1990, in two original copies, each in the German and Czech languages, both texts being equally authentic.

For the Federal Republic of Austria:

Dkfm. Ferdinand Lacina

For the Czech and Slovak Federal Republic

Ing. Vaclav Klaus