
UNCITRAL Ad Hoc Arbitration

between

Mr A J O

Mrs T L

Claimants

and

The Slovak Republic

Respondent

FINAL AWARD

Rendered by the Arbitral Tribunal composed of:

Prof. Gabrielle Kaufmann-Kohler, President

Prof. Mikhail Wladimiroff, Arbitrator

Dr. Vojtěch Trapl, Arbitrator

23 April 2012

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List of Abbreviations

BIT or Treaty	Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and Czech and Slovak Federal Republic of 29 April 1991
Claimants	Mr. O. and Mrs. L.
CBJ	Claimants' Brief on Jurisdiction (19 June 2009)
CNotice	Claimants' Notice of Arbitration (28 March 2006)
CPHB	Claimants' Post-Hearing Brief (18 March 2011)
CRep.	Claimants' Reply to Respondent's Statement of Defence (13 November 2008)
CSDT	Claimants' Submission on the Deed of Transfer (1 June 2011)
CSJ	Claimants' Submission on Jurisdiction (26 October 2009)
CSM	Claimants' Submission on the Merits (31 August 2010)
ECJ	European Court of Justice
Exh. C	Claimants' Exhibit
Exh. CL	Claimants' Legal Authorities
Exh. R	Respondent's Exhibit
Exh. RL	Respondent's Legal Authorities
Exp. Rep.	Expert Report
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
NAFTA	North American Free Trade Agreement
Netherlands	The Kingdom of the Netherlands
Parties	Claimants and Respondent
PILA	Swiss Private International Law Act (18 December 1987)
P.O. 1	Procedural Order No. 1 (27 February 2007)
P.O. 14	Procedural Order No. 14 (11 May 2009)
P.O. 15	Procedural Order No. 15 (19 October 2009)
P.O. 16	Procedural Order No. 16 (6 July 2010)
P.O. 17	Procedural Order No. 17 (4 December 2010)

P.O. 18	Procedural Order No. 18 (19 January 2011)
Respondent	The Slovak Republic
RPHB	Respondent's Post Hearing Brief (20 May 2011)
RRej.	Respondent's Rejoinder to the Reply of the Claimants (7 April 2009)
RReply	Respondent's Reply to the Brief on Jurisdiction (28 July 2009)
RSDT	Respondent Submission on the Deed of Transfer (9 June 2011)
RSJ	Respondent's Submission on Jurisdiction (4 November 2009)
RSM	Respondent's Submission on the Merits (1 November 2010)
Slovakia	The Slovak Republic
SoC	Statement of Claim (6 November 2007)
SoD	Statement of Defence (29 May 2008)
Dec. Jur.	The Arbitral Tribunal's Decision on Jurisdiction (30 April 2010)
Dec. Corr. Jur.	The Arbitral Tribunal's Decision on Correction of Decision on Jurisdiction (12 July 2010)
Tr. J. [page:line]	Transcript of the Hearing on Jurisdiction (17 November 2009)
Tr. M. [page:line]	Transcript of the Hearing on the Merits (11-13 January 2011)
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law of 1976
Vienna Convention	Vienna Convention on the Law of Treaties of 23 May 1969 (entered into force on 27 January 1980)
WS	Witness Statement

I. THE FACTS

1. This chapter summarises the factual background of this arbitration in so far as is necessary to understand the issues raised in the present case. The Tribunal will refer to the facts in more detail in the discussion of the arguments of the Parties.

A. THE PARTIES

1. The Claimants

2. The Claimants in this arbitration are:

Mr. A J O

("Claimant 1", "Mr. O")

and

Mrs. T L

("Claimant 2", "Mrs. L"; jointly "the Claimants")

3. The Claimants are represented in this arbitration by:

Mr. J. L. M. v G

V G & L D K

2. The Respondent

4. The Respondent is the Slovak Republic. It is represented in this arbitration by:
- Mr. R H and Ms. A H, Ministry of Finance of the Slovak Republic, Štefanovičova 5, 81782 Bratislava 15, Slovak Republic; and
 - Messrs Martin Maisner, Ludovít Mičinský, Miloš Olik and Jiří Zeman of ROWAN Legal s.r.o, Námestie Slobody 11, 811 06 Bratislava, Slovak Republic.

B. THE TRIBUNAL

5. The Arbitral Tribunal is composed of:
- the Presiding Arbitrator:
Initially, Dr. Robert Briner, I. Dr.
Briner resigned on 28 July 2009. From 7 September 2009, Professor Gabrielle Kaufmann-Kohler, Lévy Kaufmann-Kohler,
 - the Arbitrator appointed by the Claimants:
Professor Mikhail Wladimiroff,
 - the Arbitrator appointed by the Respondent:
Dr. Vojtěch Trapl,
6. A Secretary to the Tribunal was appointed by the Tribunal with the consent of the Parties. The Secretary was initially Ms. I K, an associate at the firm of the Presiding Arbitrator, Lévy Kaufmann-Kohler,
She was replaced on 25 November 2010 by Mrs. P Z, also an associate at the firm of the Presiding Arbitrator.

C. CHRONOLOGY OF MAIN FACTS

7. Following a call for public tender from the National Property Fund of the Slovak Republic (the "NPF") (Exh. R-8), on 20 December 1994, the company B C T, a.s. ("BCT") was privatized.

8. The reason for the privatization of BCT was to attract foreign investors who would modernize the company and the thread industry more generally in the Slovak Republic.
9. On 22 December 1994, Mr. O , a Dutch citizen, acquired 40.33% of the shares of BCT at the price of SKK 67,500,000 (Exh. C-1).
10. On 8 June 1995, BCT stopped its traditional yarn and thread manufacturing. This activity was expunged from the Commercial Register.
11. Mrs. L , a Dutch citizen and Mr. O 's wife, acquired BCT shares on several occasions starting 1 February 1996. Eventually she owned 27.74% of the shares of BCT (Exh. R-137). Together the Claimants thus owned the majority of shares in BCT (Exh. C-4).
12. At the time of privatization, BCT had tax arrears and other liabilities. These tax arrears and liabilities increased under the Claimants' administration.
13. On BCT's request, the Slovak Republic granted BCT tax allowances as well as payment schedules, i.e. extensions for tax payments, so that the accumulated tax debts could be paid in instalments. In 1996 and 1997, BCT was granted tax allowances in the amount of SKK 55,347,438 (Exh. R-43, R-45, R-44).
14. Following the acquisition, the Claimants introduced changes in the administration of BCT. On 29 March 1996, BCT established a subsidiary also based in Slovakia, BCT-T a.s. ("BCT-T"), in conjunction with T ("T "), a Dutch or Slovakian company owned by Mr. O .¹ On 15 April 1996, the Claimants established two more subsidiaries in Slovakia: R E: a.s. ("R E: ") and

¹ The record on the exact identity of T is unclear. In its Decision on Jurisdiction, the Tribunal noted that while T: N B.V. is Dutch (Exh. C-309 A), in their last submission on jurisdiction of 26 October 2009 (p. 5), the Claimants claimed damages to their investment made through T S s.r.o, which is a company with its registered seat in Slovakia (Exh. C-309 B, Exh. R-138). On the other hand, the Respondent alleged that T does not qualify as an investor under the Dutch-Slovak BIT, as it is not established under Dutch law; nor can it be considered as an investor of a third state (RSJ, ¶53). The Decision on Jurisdiction indicated that the Tribunal would "determine the issue of T 's identity, as well as the question relating to the precise amount of shares currently owned by Mr. O (RReply, ¶264, fn.153) if necessary to resolve the dispute at the merits stage" (Decision on Jurisdiction ¶140, fn.23). During the merits phase, the Claimants did not explain the relationship, if any, between T S s.r.o and T N B.V. The resolution of this issue does not appear necessary for the determination of the merits of this dispute.

E E a.s. ("E E "). In 1997, further subsidiaries were incorporated in Slovakia: S G M s.r.o. ("SGM"), B C N a.s. ("BCN"), and C s.r.o. ("C "). The real property assets of BCT were held by these subsidiaries.

15. As early as in 1999, the liabilities of BCT and its subsidiaries (the "BCT group") exceeded its assets. Most of the real property assets under the group's ownership were pledged.
16. On 17 February 2000, the Tax Authority of Bratislava II (the "Tax Authority") notified BCT that the amount of its tax arrears totaled SKK 57,886,634 (Exh. R-43).
17. On 13 July 2000, BCT concluded a contract for the sale of shares in E E to A T Ltd. ("A "), a company incorporated in Gibraltar (UK) and owned by Mr. O . The purchase price was paid in the form of a claim held by BCT against A for the amount of SKK 150,000,000 (Exh. R-16, R-173).
18. Between 31 January and 22 November 2001, four creditors of BCT, namely M B a.s ("M B "), A - i t , a.s., known as A S o.c.p. from 4 January 2000 until 14 May 2002 ("A S "), S K s.r.o. ("S K "), and F s.r.o ("F "), filed petitions for bankruptcy of BCT ("the original petitions") (Exh. R-50, C-19, C-27, C-25, C-53).
19. On 21 February 2001, BCT sold BCN shares to T (Exh. R-17).
20. On 19 June 2001, the Regional Court of Bratislava ("the Regional Court") appointed a preliminary trustee, Mr. J P , to identify BCT's assets (Exh. C-35, R-55).
21. The preliminary report of Mr. P , who assessed BCT's assets based on documents submitted by the BCT Board of Directors, noted that BCT had been insolvent for some time. The indebtedness indicator was high and BCT had been incapable of performing its due liabilities for a long time (Exh. R-56). The Claimants question the competence and independence of Mr. P (Exh. C-49).
22. On 5 March 2002, the Regional Court dismissed the original bankruptcy petitions submitted by M B , S K , A S , and F (Exh. C-56, R-057).

The petitioners were notified and had a right to file an appeal against the decision of the Regional Court within 15 days.

23. The next day, on 6 March 2002, the Tax Authority of Bratislava II filed a petition to join the petitioners in the bankruptcy proceedings, with a receivable in the amount of SKK 85,503,192 (Exh. C-92, R-058). The Regional Court attached this petition to the original petitions.
24. On 14 March 2002, A S appealed against the Court's decision that dismissed the bankruptcy petition (Exh. C-57).
25. On 10 June 2002, the Supreme Court of the Slovak Republic confirmed the judgment of the Regional Court dated 5 March 2002, which had dismissed the original petitions (Exh. C-58, R-59). Proceedings then continued with the Tax Authority of Bratislava II as a petitioner.
26. BCT submitted requests dated 15 August 2002 and 15 January 2003 for the Supreme Court to remove the judge in charge of the bankruptcy proceedings at the time, Mrs. P (Exh. R-178, R-179). The requests were rejected.
27. On 14 April 2003, the Regional Court declared BCT in bankruptcy and appointed Mr. P as bankruptcy trustee and Messrs K K and R S as special trustees (Exh. C-2).
28. The conduct of the bankruptcy proceedings by the Slovak Judiciary constitute one of the main points of disagreement between the Parties in this arbitration. It was the subject of actions before national courts and complaints before Government officials.
29. On 7 May 2003, BCT appealed the decision of the Regional Court declaring it in bankruptcy (Exh. C-2.1, C-105).
30. On 29 May 2003, the Slovak municipality of Dunajská Streda became another bankruptcy petitioner (Exh. C-258).

31. After the adjudication of bankruptcy, the creditors of BCT submitted their claims against the bankruptcy assets. On 11 June 2003, Mr. O , as well as certain companies owned by him, submitted claims in the bankruptcy proceedings in the amount of approximately SKK 400 million.
32. On 16 June 2003, the Tax Authority of Bratislava II registered its own claim in the bankruptcy proceedings for the sum of SKK 87,815,783 (Exh. R-79).
33. On 20 June 2003, the Supreme Court of the Slovak Republic confirmed the bankruptcy of BCT (Exh. C-2.2; Exh. R-68).
34. On 16 October 2003, Claimant 1 and affiliated companies transferred the claims they had filed in the BCT bankruptcy proceedings to the company P a.s, ("P ") (Exh. R-86; R-158). The purchase price was agreed as 45% of the proceeds that the assignee would receive from the collection of the debt at maturity (Exh. C-227).
35. On 8 March 2004, P in turn assigned these claims to another company, L S Ltd., incorporated in the United Kingdom ("L "), which thus became the largest creditor in the BCT bankruptcy, holding over 50% of all the receivables.
36. At a meeting held on 14 June 2005, the registered creditors (13 present and 36 *in absentia*) approved BCT's asset realization plan (Exh. R-72). In compliance with Act No. 32S/1991 on Bankruptcy and Composition (the "BCA") (Exh. RL-1), as amended, the creditors resolved that BCT would be sold under the realization plan through an auction for a minimum price of 25% of the total value determined by an assessor. On 22 July 2005, the assessor fixed the total value at SKK 507,947,000 (Exh. R-189).
37. On 9 September 2005, a contract for the sale of BCT was concluded with P s.r.o. ("P "), a company registered in the Slovak Republic that was found to have presented the highest bid, at a price of SKK 175,002,000 (Exh. R-128; R-41).
38. On 8 November 2006, the bankruptcy trustee submitted the final report on the realization of the bankrupt estate (Exh. R-84).

39. On 9 April 2008, the Regional Court took a decision regarding the allocation of the proceeds from the liquidation of BCT. The claims accepted in the bankruptcy proceedings were partially settled in line with the recommendations of the bankruptcy trustee regarding the allocation of proceeds. While there is no document in the record on these events, they are not disputed.
40. On 12 June 2008, the Regional Court closed the bankruptcy proceedings and removed both the bankruptcy and the special trustees from their functions. While no document in the record confirms this closure, this fact, again, is undisputed.

II. PROCEDURAL HISTORY

A. INITIAL PHASE

41. On 28 March 2006, the Claimants filed a Notice of Arbitration (the "Notice"), under the Arbitration Rules of the United Nations Commission on International Trade Law of 1976 (the "UNCITRAL Rules").
42. On 8 December 2006, the Claimants appointed as arbitrator Prof. Wladimiroff, who accepted the appointment on the same day. Dr. Trapl was appointed as arbitrator by the Respondent on 1 December 2006, and accepted the appointment on 4 December 2006. The Party-appointed arbitrators selected Dr. Briner to act as the President of the Tribunal, who accepted his appointment on 9 February 2007.
43. On 1 March 2007, the Tribunal issued its first Procedural Order ("P.O. 1"). In accordance with Article 16 of the UNCITRAL Rules, the Tribunal fixed Geneva as the place of arbitration. The language of the arbitration was determined to be English.
44. The Claimants requested an extension of the time limit set in P.O. 1 for submitting their Statement of Claim on several occasions. The Claimants cited difficulties in obtaining documents from the Slovak authorities and in particular the bankruptcy file from the Bratislava County Court as the reason for the delay in submitting their Statement of Claim.
45. By Procedural Orders Nos. 2, 3, 4 and 5, the Tribunal granted the Claimants' requests for extension after having heard the Respondent's view.

46. On 6 November 2007, the Claimants filed their Statement of Claim, accompanied by exhibits.
47. Following unsuccessful settlement discussions, on 29 May 2008, the Respondent filed its Statement of Defence containing its objections to jurisdiction and attaching exhibits.
48. The Claimants' Reply to the Respondent's Statement of Defence was submitted on 13 November 2008. The Reply included exhibits, among which the opinion of the legal expert Mr. V (Exh. C-258) and witness statements.
49. On 7 April 2009, the Respondent filed its Rejoinder to the Reply of the Claimants, including exhibits. On the same date, the Respondent requested the Tribunal to issue a procedural order determining that there be a separate jurisdictional phase.
50. In its Procedural Order No. 14 of 11 May 2009, in light of the Respondent's jurisdictional objections and in accordance with Article 21(4) of the UNCITRAL Rules, the Tribunal decided to bifurcate the proceedings and determine the issue of its jurisdiction before dealing with the merits of the case.
51. Following the resignation of Dr. Briner on 28 July 2009, the Party-appointed arbitrators appointed Prof. Kaufmann-Kohler to act as the President of the Tribunal. On 7 September 2009, Prof. Kaufmann-Kohler advised the Parties that she had accepted her appointment as President of the Tribunal.

B. PHASE ON JURISDICTION

52. On 19 June 2009, the Claimants submitted their Brief on Jurisdiction, along with exhibits.
53. On 28 July 2009, the Respondent submitted its Reply to the Claimants' Brief on Jurisdiction, along with exhibits and witness statements.
54. A pre-hearing telephone conference was held on 14 October 2009 to discuss outstanding issues with respect to the organization of the hearing. On 19 October 2009, the Tribunal issued Procedural Order No. 15, summarizing the matters

decided during the telephone conference and confirming the procedural schedule for the Parties' subsequent submissions.

55. Pursuant to Procedural Order No. 15, on 26 October 2009, the Claimants filed an additional submission on jurisdiction, accompanied by exhibits.
56. The Respondent's Reply to the Claimants' Submission on Jurisdiction was filed on 4 November 2009.
57. Following Respondent's objections (about the presence at the hearing on jurisdiction of certain persons on behalf of the Claimants), on 13 November 2009, the Tribunal ruled that such persons could only attend the hearing if they were designated as party representatives, because, under the UNCITRAL Rules, hearings are held *in camera*.
58. The Tribunal held the hearing on jurisdiction on 17 November 2009 in Geneva, Switzerland. The hearing started at 9:00 a.m. and ended at approximately 2:30 p.m. In addition to the Members and the Secretary of the Tribunal, the following persons attended the hearing:
- (i) For the Claimants:
 - Mr. J. L. M. v. G., GLSK A, The Netherlands
 - Mr. O. (Claimant 1)
 - Mrs. L. (Claimant 2)
 - Mr. W. B. (Claimants' representative)
 - (ii) For the Respondent:
 - Mr. Martin Maisner, ROWAN Legal s.r.o.
 - Mr. Ludovít Mičinský, ROWAN Legal s.r.o.
 - Mr. Miloš Olik, ROWAN Legal s.r.o.
 - Mr. Jiří Zeman, ROWAN Legal s.r.o.
 - Ms. A. H., Slovak Ministry of Finance
 - Mr. R. H., Slovak Ministry of Finance
59. During the hearing, Messrs v G. and O. addressed the Tribunal on behalf of the Claimants, and Mr. Maisner addressed the Tribunal on behalf of the Respondent.

60. A *verbatim* transcript was taken at the hearing and later distributed to the Parties.
61. Pursuant to the Parties' agreement, and in accordance with Procedural Order No. 15 of 19 October 2009, there were no post-hearing briefs.
62. On 30 April 2010, the Tribunal issued its Decision on Jurisdiction (the "Decision").
63. The Respondent acknowledged receipt of the Decision on 4 May 2010. On 31 May 2010, the Respondent submitted a Request to Correct the Decision on Jurisdiction (the "Request"), in which it proposed changes to some parts of the reasons of the Decision "since those parts have not been fully in compliance with facts stated in the Parties' (sic) submissions and procedural orders".
64. By letter of 2 June 2010, the Tribunal invited the Claimants to make any comments on the Request. The Claimants stated their position in response to the Request in a letter received by fax dated 9 June 2010.
65. On 6 July 2010, the Tribunal issued Procedural Order No. 16, which set the general timetable for the rest of the proceedings.
66. On 12 July 2010, the Tribunal issued a Decision on Correction of Decision on Jurisdiction (the "Decision on Correction"), in which the Tribunal concluded that the proposed changes were inadmissible and/or had no material impact on the validity of the Decision, thus rejecting the Request in its entirety.

C. PHASE ON THE MERITS

67. On 6 July 2010, the Tribunal issued Procedural Order No. 16, which set the schedule for the submissions and hearing on the merits.
68. On 31 August 2010, the Claimants submitted their Submission on the Merits along with exhibits and witness statements.
69. On 30 September 2010, the Claimants' witness Mr. L communicated that due to his responsibilities as Minister of the Interior of the Slovak Republic, he would not be able to testify during the merits phase. On 22 October 2010, in light of the fact that Mr. L's written witness statement consisted of one paragraph endorsing a report

prepared by the Slovak Ministry of Justice (Exh. C-48), the Tribunal decided not to summon him to the hearing and not to consider his written testimony, while still keeping the said report by the Slovak Ministry of Justice in the record.

70. On 1 November 2010, the Respondent filed its Submission on the Merits, along with exhibits, witness statements and expert reports.
71. On 16 November 2010, the Claimants submitted a request that the Tribunal strike from the record the written evidence of Mr. P ; the Respondent's damages expert, and refuse to hear him at the hearing, based on the lack of translation of certain annexes to his report and the lack of a copy of an annex to the report. The Claimants also reported the death of their own legal expert, Mr. V .
72. On 17 November 2010, the Tribunal invited the Respondent to provide comments on the Claimant's request in relation to Mr. P 's evidence and invited the Claimants to provide legible copies of their exhibits accompanied by English translations.
73. On 19 November 2010, the Tribunal proposed to the Parties the agenda for the forthcoming prehearing telephone conference and requested their approval for the replacement of the Secretary of the Tribunal.
74. On 29 November 2010, the Tribunal and the Parties held a telephone conference to discuss issues related to the organization of the hearing on the merits, as well as other matters raised during the telephone conference and in previous correspondence between the Parties and the Tribunal, including the issues of the expert testimony of Mr. P and the missing translations and illegibility of the Claimants' exhibits. On 4 December 2010, the Tribunal issued Procedural Order No. 17, summarizing the matters decided during the telephone conference.
75. On 14 December 2010, the Tribunal admitted into the record two documents (Exh. R-193 and R-194) which supplemented the statements of Respondent's factual witnesses Messrs H and Š .
76. The Tribunal held the hearing on the merits on 11-13 January 2011 in Geneva, Switzerland. The hearing started at 9:00 a.m. each day, and ended at approximately 7 p.m. on the first and second day, and at 4:30 p.m. on the third and final day. In

addition to the Members and the Secretary of the Tribunal, the following persons attended the hearing:

(i) For the Claimants:

- Mr. J. L. M. v. G., GLSK A., The Netherlands
- Mr. O. (Claimant 1)
- Mrs. L. (Claimant 2)
- Mr. W. B. (Claimants' representative)
- Mrs. E. P. (fact witness)
- Mr. D. V. (fact witness)

(ii) For the Respondent:

- Mr. David Fyrbach, ROWAN Legal s.r.o.
- Mr. Ludovít Mičinský, ROWAN Legal s.r.o.
- Mr. Miloš Olík, ROWAN Legal s.r.o.
- Mr. Jiří Zeman, ROWAN Legal s.r.o.
- Ms. A. H., Slovak Ministry of Finance
- Mr. R. H., Slovak Ministry of Finance
- Mr. Jiří P. (fact witness)
- Mr. M. Č. (fact witness)
- Mr. V. Š. (fact witness)
- Mr. F. H. (fact witness)
- Mr. J. B. (legal expert)
- Mr. M. P. (damages expert)

77. During the hearing, Messrs v G., O and B addressed the Tribunal on behalf of the Claimants, and Mr. Olík addressed the Tribunal on behalf of the Respondent. In the course of the hearing, the Parties presented opening arguments and examined fact and expert witnesses.

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

79. On 19 January 2011, the Tribunal issued P.O. No. 18 restating procedural matters addressed at the end of the hearing. P.O. No. 18 provided that the post-hearing briefs "shall present a synthesis of the positions of the Parties regarding the entire dispute, with reference to previous submissions for the avoidance of repetition of detailed information provided therein, and an emphasis on the evidence gathered at

the hearing on the merits". The Tribunal also suggested that, to the extent feasible, "the synthesis presented by the Claimant adopt a breach by breach structure, supported by the facts as well as the evidence related to each treaty breach, and a reference to damage caused by each alleged breach." The Tribunal invited the Respondent to reply possibly using the same structure.

80. On 24 February 2011, the Tribunal authorised the production of the decision of the Highest Court of the Czech Republic No. 6, 2001, 44, further to a request by the Claimant and lack of opposition of the Respondent.
81. On 18 March 2011, the Claimants submitted their post-hearing brief, along with exhibits and annexes.
82. On 20 May 2011, the Respondent submitted its post-hearing brief, along with legal authorities and annexes.
83. On 25 May 2011, noting that in its post-hearing brief the Respondent had challenged the validity of the deed of transfer of claims from Claimant 2, T A , S and T to Claimant 1 (the "Deed"), the Tribunal gave the Parties the opportunity to provide comments strictly limited to the issue of the validity of the Deed. The Claimants submitted their comments on 1 June 2011 and the Respondent submitted its reply on 9 June 2011.
84. On 17 August 2011, pursuant to Article 4.1 of P.O. No. 18, the Tribunal closed the proceedings and invited the Parties to submit their statements of costs incurred in connection with this arbitration, which they did.
85. On 8 December 2011, the Claimants presented a submission entitled "Amendment to the claim on the actual property value located at P. , B. ", together with exhibits which allegedly reinforced their argument concerning the correctness of their own damage calculations and the inaccuracy of the Respondent's damage report. On 9 December 2011, the Tribunal invited the Claimants to explain by 14 December 2011 what exceptional circumstances would justify reopening the proceedings. The Claimants did so and also took that opportunity to produce a court decision as new authority for their argument that the State can be held responsible for the acts of bankruptcy trustees. The Respondent

submitted its comments on the Claimants' request to reopen proceedings on 20 December 2011, opposing the request.

86. On 7 February 2012, the Tribunal issued a decision denying the Claimants' request for the reopening of the proceedings. The Tribunal considered that the matter of the correctness of the Parties' assessment of damages, as well as the issue whether a State can be held responsible for the act of bankruptcy trustees, had been sufficiently addressed during the proceedings, and that no exceptional circumstances had occurred justifying the reopening of the proceedings.

* * *

87. The Tribunal has deliberated and considered the Parties' written and oral arguments. To the extent that these arguments are not referred to expressly, they must be deemed to be subsumed into the analysis. Before analyzing the claims advanced by the Claimant and reaching a conclusion on the merits, the Tribunal will set out the positions of the Parties, and address some preliminary issues as well as procedural matters.

III. POSITIONS OF THE PARTIES AND RELIEF REQUESTED

A. CLAIMANTS' POSITION

88. The Claimants' case essentially revolves around the contention that the bankruptcy proceedings of BCT were conducted in an illegitimate manner. In this context, a series of State actions and omissions, contrary to the treatment guaranteed by the applicable BIT, brought about the collapse of the investment of the Claimants in the Slovak Republic and the loss of business and credit opportunities, thereby allegedly affecting the Claimants' reputation in other markets, namely Germany, Switzerland, France and Sweden.
89. The Claimants acknowledge the existence of BCT's tax debts. However, they emphasize that these tax debts already existed at the time they acquired the shares in the company. They argue that, from the moment they acquired BCT, they established a collaborative relationship with the authorities of the Slovak Republic, particularly with the Finance Minister at the time, Ms. B. S.

90. The Claimants submit that, on the basis of that collaborative relationship with Slovak public officials, BCT was transformed under their management into a holding which they managed overall in a way which the Slovak Republic approved, particularly since its liabilities were being progressively settled by means of successive agreements leading to partial payments. The Claimants' view is that BCT performed well in a difficult market and was responsibly managed.
91. This positive rapport between BCT and the government of the Slovak Republic resulted in negotiations with Minister S. concerning the tax arrears and successive extensions for the Claimants to complete payment of the tax debt. Because of the fluent communication with the authorities and their benevolent attitude, the Claimant was led to believe that the mere existence of tax arrears would not lead to forced collection, and that this policy would be maintained. A sign of this flexible policy towards BCT was that in the agreements concluded with the authorities, no specific deadline to pay the tax arrears was stated.
92. The Claimants further submit that the so-called "Slovak financial mafia" had an interest in gaining control of the Claimants' assets, particularly in real estate. More concretely, the Claimants identify the company A S, later one of the bankruptcy petitioners, as belonging to the so-called "financial mafia" existing in the Slovak Republic. They argue that the objective behind the bankruptcy petition submitted by A S and the latter's acquisition of receivables against BCT was not the collection of debts, but rather the acquisition of control over BCT's assets.
93. According to the Claimants, under the pressure of the so-called "financial mafia", the Slovak Republic unjustifiably changed its policy towards BCT and collaborated with A S in a "chain of evil" set to inflict damage to BCT. The Claimants consider this situation a manifestation of corruption, allegedly a widespread phenomenon in the Slovak Republic.
94. Regarding the actions of the Judiciary of the Slovak Republic, the Claimants argue that the bankruptcy proceedings were plagued with irregularities. The judge in charge of the file was improperly assigned to the case. From then on, the judge and her two successors were partial to A S. They conducted the proceedings in an irregular manner in order to help this particular petitioner in many ways including actively searching for other creditors that could file a petition, purposely delaying the proceedings, appointing a lawyer linked to A S as trustee, allowing the

liquidation of assets at knockdown prices and ignoring BCT's submissions to the Court. The Regional Court of Bratislava also collaborated with the so-called "financial mafia" by allowing the bankruptcy petitions to be handled by a pre-determined judge, unjustifiably appointing a pre-determined bankruptcy trustee, and generally ignoring BCT's requests to correct the irregularities in the proceedings. Similarly, the Tax Office of Bratislava II joined the bankruptcy petitioners, not because it sought payment of the tax arrears, but to serve the interests of A S . Moreover, the Supreme Court of the Slovak Republic failed to correct the situation and take disciplinary action against the accused officials. Finally, the Claimants also invoke the responsibility of the Slovak Republic for the conduct of the provisional trustee and bankruptcy trustee appointed by the Judiciary for abusing their role and serving the interests of A S .

95. The Claimants allege that the situation described constituted a violation of the fair and equitable treatment and full protection and security guarantees found in the Treaty. It also amounted to a violation of the right to a fair trial as established in the European Convention on Human Rights (the "ECHR"), which was ratified by the Slovak Republic in 1992. As a result of the irregularities in the proceedings, caused by both actions and omissions of the Slovak State, most notably its Judiciary, the Claimants experienced unreasonable measures, undue delay, an unfair trial, and a denial of justice resulting in the expropriation of its investment in BCT.
96. Apart from the loss of their investment in BCT, the Claimants request compensation for the losses of all of their subsidiaries, since BCT owned the companies R E ; BCT T and S G M . These companies in turn owned other companies, such as BCT B C , T A BCT-T K H , R S , all of which went allegedly bankrupt due to the bankruptcy of BCT.
97. The Claimants acknowledge that after years of efforts fighting their case before the courts and the tax administration of the Slovak Republic, and negotiating with State officials who did not abide by their promises, they did not exhaust all local remedies. However, the Claimants believe that it would have been futile to do so given the unwarranted delays and unfair treatment that their case received from the Judiciary and the Government of the Slovak Republic.

98. The Claimants consider that the forced collection of tax arrears by means of bankruptcy proceedings constituted an exceptional application of bankruptcy law against BCT, and actual discrimination, since other Slovak or foreign investors in like circumstances were not subject to such proceedings. The Claimants argue that, in normal circumstances, it is implausible that the Slovak tax authorities would want to seek the bankruptcy of a firm that employs 600 people in the heart of the country's capital. It is thus the Claimants' case that the discriminatory behaviour of various government services and public officials (including a Minister, tax authorities, judges, and the trustees appointed by the Judiciary) caused the loss of the Claimants' investment.
99. The Claimants also argue that the actions and omissions of the Slovak Republic *vis-à-vis* BCT amounted to an expropriation of their investment. In this respect, the Claimants highlight that the Slovak State applied disproportionately high penalties and interest (110% per year) on old tax debts, a fatal rate for any company.
100. In pursuing the bankruptcy of BCT, the Slovak Republic not only violated the BIT and the ECHR, but also agreements it had concluded with BCT through its Finance Ministers and tax authorities.
101. First, the Claimants submit that Ms. S [redacted]'s successor, Minister H [redacted], in a visit to BCT, confirmed his intention to keep the attitude of flexibility that Ms. S [redacted] had shown towards BCT. Through Minister H [redacted], the Slovak Republic committed itself to pardon interest and penalties on old tax arrears. However, Mr. H [redacted] broke this promise and the Tax Authority joined the bankruptcy proceedings. The Claimants consider Mr. H [redacted] co-responsible for the bankruptcy.
102. Second, aside from Minister H [redacted]'s promise, the Tax Office of Bratislava II, by means of a written agreement with the Claimant dated 13 November 2002, had also committed itself to withdraw the petition of bankruptcy.
103. Finally, the Claimants allege that the bankruptcy of BCT was not only an illegal collection procedure, but also entirely unnecessary and unhelpful for the economy of the country. The Tax Office of Bratislava II had secured all of its claims by means of a lien on lucrative real estate in the centre of Bratislava. It is illogical that the Slovak State preferred to collect the debt by means of a bankruptcy rather than an

execution on the lien, which would have been a more effective method. Ultimately, the Slovak Republic only received 9% of its claim as a creditor in the bankruptcy of BCT, and hundreds of employees were made redundant. The insufficient liquidity of BCT did not have to lead to its bankruptcy, since the State could have been paid with real estate. Above all, the receivables of the commercial creditors as well as the claim by the Tax Office were dwarfed by the value of BCT's buildings and the credit possibilities that the buildings could generate. In sum, BCT was not an insolvent company.

104. On the basis of these arguments, the Claimants conclude that the Slovak Republic is responsible for the damage suffered by the Claimants and must be ordered to provide full compensation.

B. CLAIMANT'S REQUEST FOR RELIEF

105. In the post-hearing brief, the Claimants requested the following relief:

"All the above urges O to request the arbitrators to decide already by interlocutory decree:

1.

That the state has violated the BIT-regulations on the basis of which the state is obliged to compensate O's damage [sic]

2.

Which damage also by the elements of the claims taken up by O in his Submission on the Merits are reasonably in connection with the violations

3.

To sentence the state to a compensation of the damage that has already been established now, as far as this, according to the judgement [sic] of the arbitrators is in connection with the violation, consisting of:

a. the loss of the repayment on loans ad SKK 405,600,592.84.

b. the value of the immovable property that was lost by the bankruptcy, as calculated by Mr P ad SKK 555.000.000,-

c. the value of the damage from the sale of S G M ad SKK 383.699.841 SKK c.q. SKK 15.000.000,-

4.

To sentence the state to the payment of a delay interest on the amounts under 3 from the date of the bankruptcy (i.e. 14-04-2003) until the day of the complete payment to be established on 8 % per year on the basis of compound interest.

5.

To sentence the state in the costs of the trial, including the costs made by O _____ for judicial costs and advances.

Further to judge that the remaining items of loss must be estimated by an accountant and a state agent, specialised in industrial immovable property to be appointed by the arbitrators, with the instruction to establish in dialogue the suffered damage with regard to the items in O: _____'s claim, about which the arbitrators have established the causal link by interlocutory decree.

In that case, before publishing their report, the experts will have to hear all parties and after this hearing they will send a concept report for comment to each of the parties within a period that will be established by the arbitrators, whereafter the final report will be deposited at the arbitrators."

[CPHB, ¶190; emphasis in original]

106. Previously, in the Statement of Claim, the Claimants had sought the following relief:

"1. To declare for justice, that the Republic Slovakia [sic] the agreement between Slovakia and the Netherlands has been violated concerning the mutual protection of investments of 29 April 1991 by:

- a. providing no safeguard for an honest and fair treatment of the below mentioned and more explicit "O _____ investments" (article 3 sub 1).

- b. hindering the operations, the management, the maintenance, the usage, the enjoyment, and the disposition of the investments by means of unreasonable and, or discriminatory measures (article 3 sub 1).

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

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

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

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

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

[SoC, Section XVI, p. 57-58]

C. RESPONDENT'S POSITION

107. In essence, the Respondent argues that the bankruptcy of BCT is the result of the Claimants' own mismanagement and that it cannot be held responsible for the business failure of the Claimants.
108. The Respondent's organs acted within their competencies and the adjudication of bankruptcy by the Judiciary of the Slovak Republic was conducted in accordance with national and international law standards.
109. Moreover, the Respondent notes that the Claimants wrongfully attribute to the State activities of certain private unrelated persons and that they have not shown that these persons or the trustees infringed Slovak law.
110. The Respondent argues that the Claimants' case is unsubstantiated and vague, and that their grave allegations against the Slovak Republic are speculative and unsupported by evidence or specific references. The Claimants make a series of affirmations without establishing any causal link, such as the allegations of corruption, bribery and the alleged collaboration of the Slovak Judiciary with the so-called "financial mafia". The Respondent observes in particular that, in the post-hearing brief, which was meant to summarize the Claimants' case, the references to the breaches of the BIT are included as a passing reference by way of a simple mention of the provision in question, without further in-depth explanation or rationalisation.
111. The Respondent underlines that in five years since the beginning of the proceedings, the Claimants have not only failed to prove the damage and especially any causal link with the alleged acts of the Respondent, but they have furthermore failed to fully prove the existence of their own investment.
112. The Respondent asserts that the Claimants acquired shares of BCT at a price well below the actual value, fully aware of the condition of BCT at the time when they made their investments. The expectation of the Respondent regarding the privatization procedure was that the Claimants, as foreign investors, would bring know-how and capital to BCT and the thread industry of the country. However, under the Claimants' management, BCT never made a profit from textile production.

Quite the opposite, it halted its traditional production, and, on 8 June 1995, the sales activity involving yarn and thread was expunged from the commercial register.

113. Under the Claimants' management, BCT continued to fall more and more into debt while the Claimants enriched themselves by dividing BCT's assets and transferring them to other companies which they owned without the latter paying adequate consideration to BCT. The Claimants let BCT secure the debts of their other companies, and when these debts were not met, BCT had to cover them. BCT's equity decreased from SKK 352 million in 1994 to negative SKK 44 million as of the date of bankruptcy.
114. For the Respondent, it is clear that the Claimants goal was to take the most valuable assets into their own possession. This asset-stripping decreased BCT's value, damaged minority shareholders and led BCT to insolvency, bankruptcy and liquidation.
115. During the entire period of the Claimants' management, BCT failed to pay taxes and its tax arrears continued to grow. The Respondent, for its part, helped BCT within the bounds of legal regulation. It offered not only substantial tax allowances but also schedules or extensions that allowed the company to pay their debt in instalments.
116. In 1999, five years after the Claimants assumed control over BCT, the financial situation of BCT and its subsidiaries was notably unsatisfactory and the BCT Group was inundated with debts: liabilities exceeded assets by approximately SKK 23,000,000. In 2000, BCT's financial situation had worsened: liabilities exceeded assets by SKK 123,000,000. BCT's debts towards the State as a result of unpaid taxes represented a sum of SKK 57,886,634. Its liabilities towards private companies represented a much larger amount (according to BCT's annual report for 1999, the company's liabilities amounted SKK 654,122,000). BCT did not pay its debts, which lead to the filing of the first bankruptcy petition at the beginning of 2001.
117. The Claimants tried to protect themselves from the bankruptcy petition and proceeded to separately satisfy some of the creditors contrary to bankruptcy rules. Likewise, after the appointment of the preliminary trustee, BCT disposed of its assets for minimal prices in a malicious manner without the approval of the trustee required by law.

118. At the time when the Tax Authority of Bratislava II joined the bankruptcy petitions, BCT was objectively bankrupt. The promises made by BCT and the Claimants towards the Slovak authorities had remained substantially unfulfilled for more than seven years. In joining the bankruptcy petitions, the Tax Authority of Bratislava II merely exercised its right and duty to collect tax arrears. The Respondent had made no promise that it would refrain from enforcing tax claims.
119. On 14 May 2003, the Regional Court declared BCT's bankruptcy. BCT and the Claimants appealed the decision based on some formal defects of the petition, not on the substantive reasons for adjudication of the bankruptcy.
120. On 27 May 2003, at a time when the appeal had been filed, but not yet heard, Claimant 1 sold his BCT shares (167,160 shares) at the Bratislava Stock Exchange (Exh. R-141, p.7). With this sale, Claimant 1 terminated its investment in the Slovak Republic before the bankruptcy decision was confirmed by the Supreme Court. The Respondent makes no similar allegations with respect to Claimant 2.
121. After the decision on the adjudication of bankruptcy by the Regional Court, the creditors of BCT submitted their claims against the bankruptcy's assets. On 11 June 2003, Claimant 1, as well as the companies allegedly owned by him (A , T , S and T), submitted claims in the bankruptcy proceedings in the amount of approximately SKK 400,000,000 (Exh. C-7).
122. On 20 June 2003, the Supreme Court confirmed the Regional Court's decision on the adjudication of bankruptcy as the bankruptcy was correctly adjudicated.
123. Approximately one month later, on 22 July 2003, Claimant re-purchased at the Bratislava Stock Exchange 167,160 essentially worthless shares of BCT, then a bankrupt company from which no revenue could be expected (Exh. R-141, p.7). The Respondent submits that this investment must be viewed as a new investment which gives ground to no claims in the present dispute, and whose only purpose was to initiate a dispute against the Slovak Republic.
124. On 16 October 2003, Claimant 1 and affiliated companies transferred the claims they had filed in the BCT bankruptcy proceedings to P . Through this voluntary transfer, Claimant 1 removed his own ability to decide as creditor on the

manner of the liquidation of BCT assets and satisfaction of the receivables through bankruptcy. The Respondent makes no allegation about Claimant 2 in this context.

125. The Respondent stresses that bankruptcy law and bankruptcy proceedings constitute a standard and legitimate procedure of collective debt settlement. In the specific case, the Respondent submits that the proceedings preceding the adjudication of bankruptcy were conducted in compliance with national law as well as international standards of protection. This is demonstrated by the fact that the Claimants' appeal did not dispute the objective reasons for bankruptcy and is further demonstrated by the decision of the Supreme Court confirming the correctness of the Regional Court's rulings (on the appeals of A S and BCT, and on BCT's application to remove the judge in charge of the file).
126. Particularly in relation to the allegation of undue delay, the Respondent points out that no delays occurred which could have resulted in a breach of international law, a denial of justice, or a violation of the BIT. The length of the bankruptcy proceedings was standard: two years since the first filing of the bankruptcy petition until the adjudication of bankruptcy itself, including the many obstructions by BCT and the Claimants and the numerous submissions by the creditors. The Respondent contends further that it is only due to BCT's submissions and complaints that the file was out of the reach of the judge in charge of the file at the time for approximately 9 months. From the perspective of international law, these alleged delays are not sufficient to constitute a denial of justice. Moreover, for the Respondent, the Claimants are not entitled to claim a denial of justice under the BIT, since they did not exhaust local remedies effectively available during the bankruptcy proceedings.
127. The Respondent also argues that the Claimants have not properly quantified their alleged damages in this arbitration proceeding. The damages are stated in a range of up to EUR 130 million (Notice of Arbitration), from approximately SKK 7.5 billion plus EUR 18 million (SoC, ¶12) to approximately SKK 8 billion plus EUR 31 million (CSM, p. 63). The Respondent points out that the Claimants' post-hearing submission lacks a summary quantification of the alleged damages, referring to clustered calculations, where a vast majority of the numbers are not verifiable. Without prejudice to the fact that the Respondent is not responsible for any alleged damages, the Respondent considers that the Claimants' calculations are wholly unsubstantiated. In the view of the Respondent, the Claimants' alleged damages are

frivolous, speculative and entirely made up, and they exceed the Claimants' investment into the shares of BCT more than 100 times.

128. The Respondent contends likewise that the Claimants failed to prove that during the relevant time period they owned the shares of BCT, either directly or through third parties. The Claimants failed to address the changes in Mr. O's ownership of BCT shares at different moments in time and its consequences. Likewise, the Respondent submits that the Claimants have not proven that they were shareholders of the companies A, T, S and T during the relevant times; nor have they shown the amount for which these companies acquired the shares of BCT.
129. According to the Respondent, the vagueness of the Claimants' responses to questions such as the identity of the Claimants, the amount claimed, and the basis for the claims makes a review of the claims almost impossible. For this reason, the Respondent objected not only against the submission of claims on behalf of A, T, S and T (because they fall outside of the scope of this arbitration), but also against the claims of the Claimants 1 and 2 (because they are confusing and unsubstantiated).

D. RESPONDENT'S REQUEST FOR RELIEF

130. In its post-hearing brief, the Respondent requested the Tribunal to grant the following relief:

"a) The Claimants' proposal to issue the interlocutory decree and continue the proceedings is rejected.

b) The Respondent did not breach any of its duties according to the BIT i.e. Articles 3(1), 3(2) and 5 as claimed by the Claimants.

c) The Claimants' claims are rejected in full.

d) The Respondent shall be awarded the costs of the arbitration and its legal representation. "

[RPHB, ¶293]

131. Previously, in its Submission on the Merits, the Respondent had requested the following relief:

"227. It follows from the presented arguments in this Respondent's Submission on Merits, Respondent's records as well as expert statements that the Claimants' alleged claims shall be rejected in their entirety. The Respondent has not breached any of its obligations arising from the BIT:

- (a) The Claimants have not proven the alleged breaches of the BIT, damage caused either sufficient link with respect to each claim as requested in paragraph 1.2 of Procedural Order No. 16.*
- (b) Any breaches alleged by the Claimants caused by the private entities or preliminary/bankruptcy trustees are not attributable to the Respondent.*
- (c) The Respondent has not breached any of its obligations arising from the BIT, i.e. articles 3(1), 3(2) and 5 as claimed by the Claimants.*
- (d) The Respondent's organs have acted within in the circumstances within their competences and in compliance with the law.*
- (e) Any alleged damage caused to the Claimants was result of their own business activities and thus cannot be attributed to the Respondent.*
- (f) The Claimants' claim shall be rejected as speculative and frivolous and the Respondent shall be awarded costs of the arbitration and its legal representation.*

228. Based on the foregoing the Respondent requests the Tribunal to dismiss all of the Claimants' claims and to decide in favour of the Respondent's proposals as presented in Part F of its Statement of Defence, dated 29 May 2008."

[RSM, ¶¶227-228]

132. In the Statement of Defense referred above, the Respondent requested the following relief:

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

- (a) The Tribunal dismisses the Statement of Claims submitted by Claimant 1 and Claimant 2 because it has no jurisdiction to decide on the merit of the claim.*
- (b) Claimant 1 and Claimant 2 shall pay the costs of this arbitration proceeding including the costs of the Tribunal as well as the legal and other costs incurred by the Respondent, on a full indemnity basis.*

698. *In case the Tribunal comes to a conclusion it has jurisdiction to decide on the merit of the claim, the Respondent requires the Tribunal to dismiss all the claims stated in the Statement of Claim and to render Arbitration Award to the below stated effect:*
- (a) The Respondent has not breached the BIT.*
 - (b) The Respondent has ensured the Claimants' investment fair and equitable treatment.*
 - (c) The Respondent has not impaired the operation, management, maintenance, use, enjoyment or disposal of the Claimants' investment and that it has not taken any unreasonable or discriminatory measures with regard to the Claimants' investment.*
 - (d) The Respondent has accorded to the Claimants' investments full security and protection.*
 - (e) The Respondent has observed obligations it entered into with regard to the Claimants' investment.*
 - (f) The Respondent has not taken any illegal or unreasonable measures depriving, directly or indirectly, the Claimants of their investment*
 - (g) Claimant 1 and Claimant 2 shall pay the costs of this arbitration proceeding including the costs of the Tribunal as well as the legal and other costs incurred by the Respondent, on a full indemnity basis.*

[SoD, ¶¶697-698]

IV. ANALYSIS

133. The Tribunal will first address certain preliminary issues (A), followed by some procedural matters (B), before turning to the discussion of the merits (C).

A. PRELIMINARY ISSUES

1. Jurisdiction

134. In the Decision on Jurisdiction, the Tribunal affirmed its jurisdiction in the following terms:

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

- (i) The Respondent's jurisdictional objections are denied;*
- (ii) The Tribunal has jurisdiction over the dispute submitted to it in this arbitration;*
- (iii) The decision regarding the costs of arbitration is deferred to the second phase of the arbitration on the merits."*

[Decision on Jurisdiction, ¶190]

135. This determination on jurisdiction was a final one which has a *res judicata* effect. It was not issued *prima facie*. The only *prima facie* finding related to the existence of treaty breaches, which, by its very nature, can only be preliminary at the jurisdictional stage.²
136. While it accepted that the Claimants had made an investment under the terms of the BIT and therefore had the status of investors,³ the Tribunal noted in the Decision on Jurisdiction that the record was unclear with respect to the investment made through companies owned by the Claimants.⁴ Considering that this did not impact jurisdiction, which was established, it deferred these matters to be determined at the merits phase, if necessary.⁵ These matters would indeed have influenced the quantification of damages. Yet, in light of the conclusion on liability, their resolution is without relevance for the outcome of this case. The Tribunal thus dispenses with addressing them any further. The same holds true with respect to the issue of the validity of the deed dated 5 October 2006 (Exh. C-322bis).⁶
137. Finally, in its post-hearing brief, the Respondent submitted that there existed no qualifying investment at all because Claimant had sold its shares in BCT on 27 May 2003 and reacquired them on 27 July of the same year. According to the Respondent, this reacquisition is a new investment which deserves no protection under the BIT because its sole purpose was to bring a claim against the Slovak Republic.⁷ This argument goes to jurisdiction. It was not raised during the jurisdictional phase.⁸ Under Articles 186(3) PILA and 21(3) UNCITRAL Rules (1976), objections to jurisdiction must be raised prior to defenses on the merits. Hence, this objection is belated. In light of the decision on liability, it is also without relevance for the outcome.

² Decision on Jurisdiction, ¶¶185.

³ Decision on Jurisdiction, ¶167.

⁴ It noted so, in particular, in the context of the assessment of the requirements of nationality (¶140, fn. 23) and of the existence of an investment (¶167).

⁵ Decision on Jurisdiction, ¶190, fn. 23.

⁶ Decision on Jurisdiction, ¶148, pursuant to which this issue has no impact on jurisdiction (which does not mean that it could not have had an influence on quantification of an entitlement to damages).

⁷ See ¶123 above.

⁸ Other objections in connection with the requirement of investment were indeed raised (Decision on Jurisdiction, ¶¶151et. seq.).

2. Law governing the merits of the dispute

138. As was already stated in the Decision on Jurisdiction, the present proceedings are based on the Agreement concerning the promotion and protection of investments that was concluded on 29 April 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (the "BIT" or the "Treaty") (Exh. C-245), the Slovak Republic having succeeded the Czech and Slovak Federal Republic in its international obligations following the separation on 1 January 1993.
139. Article 8(6) of the BIT contains a choice of law clause that reads as follows:
" [...] 6) The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:
• the law in force of the Contracting Party concerned;
• the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;
• the provisions of special agreements relating to the investment;
• the general principles of international law."
140. Accordingly, the Tribunal will apply, in addition to the BIT, municipal law, as well as general principles of international law. Whenever the BIT is silent on an issue, the Tribunal will resort to either municipal or international law depending on the nature of the issue in question. If and when the issue arises, it will determine whether the applicable international law should be limited to general principles of international law under Article 8(6) of the BIT, or whether it includes customary international law. Moreover, with respect to the interpretation of the BIT, the Tribunal will resort to the Vienna Convention on the Law of Treaties⁹, to which both States are parties, and which is in any event recognized as a codification of the customary international law governing treaty interpretation.
141. As regards the method for establishing the content of the governing law, the Tribunal observes that the BIT and the UNCITRAL Arbitration Rules are silent on this issue. By contrast, under Swiss international arbitration law which governs these proceedings, the principle of *iura novit iuria* - or better *iura novit arbiter* - does apply to an arbitral tribunal.¹⁰ Thus, the arbitral tribunal is under an obligation to apply the

⁹ Vienna Convention on the Law of Treaties, signed on 23 May 1969 in Vienna, entered into force on 27 January 1980, United Nations Treaty Series, vol. 1155, p. 331.

¹⁰ Swiss Supreme Court decision of 19 December 2001, P. 114/2001, section 3.a, ASA Bulletin 2002 p. 493; see also G. Kaufmann-Kohler, "The Governing Law: Fact or Law? - A Transnational

law *ex officio* without being bound by the arguments and sources invoked by the Parties. However, the Tribunal should not base its decision on a legal theory which was not part of the debate and which the parties could not expect to be relevant.¹¹

3. Law and rules governing the procedure

142. As was stated in the Decision on Jurisdiction, these proceedings are governed by the arbitration law of the seat, i.e. by Chapter 12 PILA and, as provided in Article 8(5) of the BIT, by the UNCITRAL Arbitration Rules (1976).
143. Further, pursuant to section 3.15 of P.O. 16, the Tribunal may seek guidance from, but will not be bound by, the IBA Rules on the Taking of Evidence in International Arbitration 2010.¹²
144. Eventually, Article 8(7) of the BIT provides that "the tribunal takes its decision by majority of votes; such decision shall be final and binding upon the parties to the dispute."

4. Relevance of previous awards and decisions of other tribunals

145. In its Decision on Jurisdiction, the Tribunal has already stated - and it restates here - that it is not bound by previous decisions, but is of the opinion that it must pay due consideration to earlier decisions of international tribunals and that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases.¹³

5. Burden of proof

146. In accordance with Article 24(1) of the UNCITRAL Rules (1976), "[e]ach party shall have the burden of proving the facts relied on to support its claim or defence". Under Swiss international arbitration law, this principle *actori incumbat probatio* is considered part of procedural *ordre public*.¹⁴ Similarly, it is widely recognised and

Rule on Establishing its Content," in *Best Practices in International Arbitration*, ASA Special Series No. 26, at 79 (M. Wirth, Ed. 2006).

¹¹ Decision cited in foregoing footnote, p. 513.

¹² P.O. 16, Section 3.15.

¹³ Decision on Jurisdiction, ¶¶61-62, p. 18.

¹⁴ Bernhard Berger/Franz Kellerhals, *International and Domestic Arbitration in Switzerland*, 2d ed 2010, p. 467, ¶1322; Gabrielle Kaufmann-Kohler/Antonio Rigozzi, *Arbitrage international - Droit et pratique à la lumière de la LDIP*, 2d ed, Berne 2010, ¶ 353a p. 412.

applied by international courts and tribunals. The International Court of Justice as well as tribunals constituted under the ICSID Convention and under NAFTA have characterized this rule as a general principle of law.¹⁵

147. While the general principle *actori incumbat probatio* pertains to procedure, governed here by Swiss international arbitration law as the law of the seat, the rules establishing presumptions or shifting the burden of proof under certain circumstances, or drawing the inferences from a lack of proof are generally deemed to be part of the *lex causae*. In the present case, the *lex causae* is essentially the BIT, and as the case may be, the laws specified in its Article 8(6). The BIT itself provides no rules shifting the burden of proof or establishing presumptions. Since the claims brought in this arbitration seek to establish the responsibility of a State for breach of the latter's international obligations, it appears appropriate to apply international law to the burden of proof, more particularly the last category of legal sources listed in the BIT's choice of law clause, i.e. general principles of international law.
148. Hence, the Tribunal will apply the general principle of *actori incumbat probatio* and consider that the Claimants must adduce evidence of the facts on which they base their claims to succeed. International arbitration is not an inquisitorial system where the Tribunal establishes the facts for a denouncing party, nor a system where it is sufficient to make a *prima facie* case relying on the opponent to rebut that case.

6. Attribution of responsibility to the State

149. The Claimants complain about the acts and omissions of a number of different actors: the Judiciary of the Slovak Republic (particularly the three judges who were successively in charge of the bankruptcy action), its tax authorities, Ministers

¹⁵ See eg. *Military and Paramilitary Activities in and against Nicaragua*, I.C.J. Reports 1984, p. 437, ¶101. For other cases holding that it is a well-established principle of law that it is up to the Claimant to prove the facts on which it relies in support of his claim, see *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka* ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶56; *Chevron Corp and Texaco Petroleum Corp v Ecuador*, Interim Award, Ad hoc - UNCITRAL Arbitration Rules, 1 December 2008, ¶¶136-140; *Tradex Hellas S.A. v. Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999 [hereinafter, *Tradex*], ¶74; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶¶89 et seq.; *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Jurisdiction, 7 July 2004, ¶58. See also C. Amerasinghe, "Evidence in International Litigation" (2005), p. 34, 61; C. Brown, "A Common Law of International Adjudication (2007)", 92-97; A. Tsatsos, "Burden of Proof in Investment Treaty Arbitration: Shifting?", *Humboldt Forum Recht*, Nr. 6, 2009.

(particularly Finance Minister H), the provisional and bankruptcy trustees, and the so-called "financial mafia".

150. The Decision on Jurisdiction held that actions of State officials and judges appeared *prima facie* attributable to the State. The Tribunal must now assess whether the challenged conduct is indeed attributable to Slovakia. In this context, there are three possible bases for attribution of wrongful acts to a State. They are found in Article 4, 5 and 8 of the Articles on State Responsibility of the International Law Commission (the "ILC Articles").

151. Article 4 of the ILC Articles reads as follows:

"Article 4.

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

152. The Parties have not disputed - and rightly so - that the Judiciary of the Slovak Republic, its tax authorities, and its Finance Minister, are State organs. Therefore, the State is responsible for the actions they have performed in their official capacity, in accordance with Article 4 of the ILC Articles.

153. As regards the provisional and the bankruptcy trustees, the Claimants submit that, regardless of their status or the nature of their actions under municipal law, under international law their actions must be attributed to the State since the conduct of persons who are supervised by or receive instructions from the State must be deemed conduct of the State.¹⁶ The Claimants refer to the *Tradex* case as supporting this view.¹⁷

154. In reliance on jurisprudence, the Respondent submits that acts of persons other than State organs cannot be attributed to the Respondent, because these other persons are not directed or controlled by the State, which has not acknowledged or

¹⁶ CSM, ¶¶9, 13; CPHB, ¶¶81-87.

¹⁷ The Claimant's reference is unclear, but the Tribunal understands that the Claimants refer to *Tradex Hellas SA v Albania*, Award, ICSID Case No ARB/94/2.

adopted their conduct as its own. In the case of the trustees, the Respondent submits that the Claimants erroneously regard the trustee as a State organ, while he is part of a business company who does not exercise State authority.¹⁸

155. The Arbitral Tribunal is satisfied that under Slovak law, provisional and bankruptcy trustees are not State organs for whose acts the State is responsible according to Article 4 of the ILC Articles. This view concords with the one expressed in *Plama v Bulgaria*.¹⁹
156. The analysis of the Tribunal then turns to the possible attribution of the act of a trustee under Articles 5 and 8 of the ILC Articles, which read as follows:

"Article 5

Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

...

Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

157. On the basis of the evidence presented, particularly of the report and oral evidence of the Respondent's legal expert Dr. B and the cases quoted therein, the Tribunal is persuaded that the acts of the preliminary and the bankruptcy trustees cannot be said to be carried out in the exercise of governmental authority, nor on the instructions, or under the direction or control of the State. It is clear from sections 8 and 9 of Act No. 328/1991 on Bankruptcy and Composition of the Slovak Republic (the "BCA")²⁰ that both types of trustees are independent from the State in the performance of their functions. The involvement of the competent court is essentially limited to matters of appointment, determination of fees, and removal in exceptional circumstances. The Tribunal is of the opinion that the role of the competent court *vis*

¹⁸ RRej., ¶197; CSM ¶178.

¹⁹ *Plama Consortium v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 [hereinafter, *Plama*], ¶253.

²⁰ Exh. R-A-03, p. 4-5.

à vis the trustees in bankruptcy proceedings does not constitute a sufficient basis for the attribution of the trustees' own acts to the State under international law.

158. This conclusion is further supported by the observation that under Slovak bankruptcy law, the bankruptcy trustee, not the State, is liable for damage inflicted on the parties to the bankruptcy proceedings or on third parties as a result of a breach of duties. The record shows that Claimant 1 has indeed sought to engage the responsibility of the trustee in criminal proceedings against an "unknown offender" concerning "the suspicion of the crime of violating the liability at the administration of other party's property according to the Section 235 Subsection 1 and 3 of the Criminal Code No. 140/1961".²¹
159. Therefore, the Tribunal dismisses Claimants' argument that the responsibility for the acts of the trustees themselves can be attributed to the Slovak State. It will thus disregard the actions of the trustees when examining the treaty breaches alleged by the Claimants. As the *Plama* tribunal put it, "the acts of the syndics, if they were wrongful — and the Tribunal makes no finding in this respect — are not attributable to Respondent."²² This view is not contradicted by the conclusion of the tribunal in *Tradex*, on which the Claimants rely, where attribution could not be established.²³ As regards the contention that the Slovak Courts did not properly supervise the trustees' activity, it addresses the acts or omissions of a State organ and will thus be reviewed with the alleged treaty breaches.
160. The Claimants also devote a substantial part of their pleadings to complain about the "financial mafia", which they mostly identify with the companies A S and P G a.s ("P "). The Claimants submit in essence that the bankruptcy proceedings were triggered by A S 's aim to oust Mr. O from BCT and acquire his assets in BCT and E E .
161. The Claimants describe conduct of A S akin to extortion, in particular a failed attempt to agree with BCT - prior to the latter's bankruptcy - on a commitment by A S to cease buying BCT receivables against payment from BCT. This was followed by an allegedly successful attempt to actually ruin BCT through the

²¹ These proceedings started on 25 November 2004; were reactivated on appeal by Claimant 1 on 13 May 2008 and appear to be still pending (Exh. C-126, C-250, C-251, C-347, C-348, R-196).

²² *Plama*, ¶1253.

²³ *Tradex*, ¶¶158-175.

bankruptcy proceedings with the alleged assistance of state officials. Further, the Claimants suggest the existence of personal links between A S and P (SoC, ¶¶2-5).

162. The Respondent's view is that the Claimants have not demonstrated that P was interested in BCT shares and in gaining control over BCT, and that any connection between P and A S is irrelevant for this dispute. A S by contrast, was a BCT shareholder since 2001 and thus had an interest in the company (SoD, ¶290). The Respondent argues that A S's actions concerning the adjudication of bankruptcy of BCT are within its competence as a private company. BCT's actions as a petitioner in the bankruptcy proceedings are unrelated to those of A S.²⁴ This is demonstrated by the fact that ultimately the original bankruptcy petitions were rejected by the Regional Court, after which proceedings continued on the basis of the petition of the Tax Authority of Bratislava II. Finally, the Respondent concludes that it has no responsibility for any action of private entities not related to the State (RRej., ¶100).

163. The Tribunal agrees with the Respondent that the State cannot be liable for the acts of the so-called "financial mafia", as none of the grounds for attribution embodied in Articles 4, 5 and 8 of the ICC Articles apply. In contrast, if it were established that a State organ had acted under the influence of the mafia, such acts would be attributable to the State. The Tribunal will analyze whether any such person or entity acted under the influence of the so-called "financial mafia" when dealing with the treaty breaches alleged by Claimant in Section IV.C below.

B. OUTSTANDING PROCEDURAL ISSUES: REQUESTS FOR AN "INTERLOCUTORY DECREE" AND FOR THE DESIGNATION OF TRIBUNAL-APPOINTED EXPERTS

164. The prayer for relief contained in the Claimants' post-hearing brief reads as follows:

"190.

All the above urges O to request the arbitrators to decide already by interlocutory decree:

1.

That the state has violated the BIT-regulations on the basis of which the state is obliged to compensate o 's damage [sic]

²⁴ SoD, ¶¶412, 422.

2.
Which damage also by the elements of the claims taken up by O in his Submission on the Merits are reasonably in connection with the violations

3.
To sentence the state to a compensation of the damage that has already been established now, as far as this, according to the judgement of the arbitrators is in connection with the violation, consisting of:

- a. the loss of the repayment on loans ad SKK 405,600,592.84.*
- b. the value of the immovable property that was lost by the bankruptcy, as calculated by Mr P ad SKK 555.000.000,—*
- c. the value of the damage from the sale of S. G M. ad SKK 383.699.841 SKK c.q. SKK 15.000.000,—*

4.
To sentence the state to the payment of a delay interest on the amounts under 3 from the date of the bankruptcy (i.e. 14-04-2003) until the day of the complete payment to be established on 8 % per year on the basis of compound interest.

5.
To sentence the state in the costs of the trial, including the costs made by O for judicial costs and advances.

Further to judge that the remaining items of loss must be estimated by an accountant and a state agent, specialised in industrial immovable property to be appointed by the arbitrators, with the instruction to establish in dialogue the suffered damage with regard to the items in O 's claim, about which the arbitrators have established the causal link by interlocutory decree.

In that case, before publishing their report, the experts will have to hear all parties and after this hearing they will send a concept report for comment to each of the parties within a period that will be established by the arbitrators, whereafter the final report will be deposited at the arbitrators."

[CPHB, ¶190]

165. In another passage of their post-hearing brief, the Claimants had stated as follows:

"187.

Therefore it is proposed to appoint a new internationally orientated accountant, who has no connection with the Slovak and Czech Republics, who has directly or indirectly no residence in one of these states and who is prepared to be supported with his report by a state agent specialized in industrial immovable property, of whom the same qualifications are requested as of the accounted [sic] as far as his connections with the Slovak and Czech Republics are concerned.

188.

He will be instructed to establish, in dialogue with the state [sic] agent, what value the immovable properties had in the economic traffic in free sale at the time of the bankruptcy adjudication, without prescribing him which valuation methodology he has to follow and the ROCS-methodology mustn't be excluded; consequently which value was missed by O , due to the los [sic] of the value increase. Finally the accountant shall give an evaluation of the other items of loss, as far as it was not adjudged by an interlocutory decree. More about this below.

Before the publication of his report the accountant shall hear the parties and consequently he shall send a concept report to each of the parties within a term that will be established by the arbitrators. Then the final report will be deposited at the arbitrators."

[CPHB, ¶¶187-188]

166. Accordingly, the Claimants request the Arbitral Tribunal:

- (a) to issue an interlocutory award on the liability of the Respondent under the BIT;
- (b) to declare that the Respondent must compensate the damage already established; and
- (c) to appoint two independent experts in order to assess the remaining damages: an accounting expert as well as an expert in industrial real estate.²⁵

167. The Tribunal will now address the first and third of the requests summarized above, as they raise issues of procedure that need to be addressed before the merits. The request of the Claimants concerning an order to compensate damages presupposes liability. It will thus be addressed if and when it becomes necessary.

168. The Tribunal understands the first request as an application for an interim award on liability. The third request seeks the appointment of damages experts (and thus the continuation of the proceedings), which the Claimants justify based on an alleged lack of information and opportunity to present their own expert, as well as by an alleged bias of the Respondent's damages expert and defects in the latter's report.²⁶

²⁵ With respect to the second one, the Claimants mention a "state agent", which is contradicted by their own requirements of independence and is thus deemed due to some mistake or misunderstanding.

²⁶ CPHB, ¶¶166-188.

169. The Respondent's position is that the requests submitted by the Claimants are unwarranted. It asks the Tribunal to reject the request for an interim award and continuation of the proceedings, emphasising that the BIT has not been breached. With regard to the request for tribunal-appointed experts, it submits that although pursuant to Article 27(1) of the UNCITRAL Rules the Tribunal may indeed appoint experts when specific expertise is required to make a decision, this rule should be interpreted in conjunction with Article 24(1) of the same Rules, according to which each party must prove the facts on which it relies.²⁷ Over the course of the five-year long proceedings, the Claimants had the chance to retain an expert, and well as the opportunity to duly cross-examine the Respondent's quantum expert at the evidentiary hearing. The Respondent strongly rejects the accusation of bias and incompetence made against its expert.
170. Regarding the first request for an interim award, the Tribunal notes that, while there was a separate phase on jurisdiction, the procedure set in this arbitration did not provide for a bifurcation of liability and quantum.²⁸ The merits phase that is now completed covered both liability and quantum. As the procedural history in Section II above shows, the Claimants had ample opportunity to present its case, including its case on damages. Under the circumstances, the Tribunal can see no reason to change course at the last minute and deviate from the procedure set for this arbitration and the expectations created thereby. In addition, in light of the outcome of this case, any decision on liability would, by force, be a final award. As a result, the Tribunal cannot but deny the Claimants' request for an "interlocutory decree".
171. As for the Claimants' request for tribunal-appointed experts, the Tribunal observes that the Claimants have submitted this request in their post-hearing brief, the main aim of which was to summarize the positions of the Parties after the evidentiary hearing with a view to assisting the Tribunal in its deliberation. This was specifically set forth at Article 3.2 of P.O. No. 18 as was the rule that no new evidence should accompany the post-hearing briefs subject to leave of the Tribunal (Article 3.5, P.O. No. 18). More importantly, the Tribunal notes that the Claimants had ample opportunity throughout the arbitration to discharge their burden of proof concerning damages, including by presenting a damage expert report and oral testimony. Their

²⁷ RPHB, ¶¶14-17.

²⁸ Pursuant to Art. 182 PILA: "[i]f the parties have not regulated the procedure, it shall be fixed, as necessary, by the arbitral tribunal either directly or by reference to a law or rules of arbitration". In the present arbitration, the only bifurcation allowed in the proceedings referred to jurisdiction and merits, in P.O. 14 dated 11 May 2009.

attention was expressly drawn to this in several procedural orders.²⁹ They were equally on notice of the time limitation for the submission of expert evidence.

172. In light of these considerations, the Claimants' request for the appointment of Tribunal-appointed quantum experts is denied. The Tribunal adds that such an appointment would in any event serve no purpose in view of the outcome of the Tribunal's analysis on liability.

C. TREATY BREACHES

173. This chapter sets forth and analyzes the main claims as the Tribunal understands them. In order to assess these claims, the Tribunal has examined the entire record.

1. Claimant's case

1.1 General assessment

174. The manner in which the Claimants have argued their case posed considerable difficulties for the assessment of the claims brought before this Tribunal. The Claimants' submissions did not present the factual allegations in a clear, consistent and systematic manner. The evidence submitted was disorganized and incomplete. Contrary to the letter of the President of the Tribunal dated 16 January 2008, and to P.O. Nos. 1 and 17, over 70 exhibits submitted by the Claimants lacked a translation into the language of the arbitration. Notably, part of the Claimants' submissions, as well as certain statements of fact witnesses, were submitted in the form of exhibits.³⁰
175. The Parties devoted most of their pleadings to factual allegations. Regarding issues of law, the Claimants' reliance on legal authorities was particularly deficient. Quotes

²⁹ P.O. 1 ordered that submissions of the Parties were to be made "together with *all* the documents including possible *witness* statements on which they rely" (Art. 9, emphasis added). The same opportunity was reiterated in Article 1.3 of P.O. 16 regarding the merits phase, emphasising the existence of a time-limit for discharging the burden of proof: "Both Parties may file any further documentary evidence, as well as *witness statements and/or expert reports* with the written submissions described in para. 1.1 above. After the time limits set forth in para. 1.1 above, there will be no further opportunity to file submissions and/or documents except with the express leave of the Tribunal" (emphasis added). Further, Article 3.14 of P.O. 16 reads as follows: "Each Party may retain and submit the evidence of one or more experts to the Arbitral Tribunal. The procedural rules set out above in connection with fact witnesses shall apply by analogy to the evidence of experts."

³⁰ The content of Exhibits C-272 to 279, C-281 to 290, C-293 to 303, and C-313 corresponds to that of pleadings; i.e. arguments put forward by the Claimants. Exhibit C-280 is a statement from Claimants' fact witness Mr. V . Exhibits C-328 and C-329 are statements from Claimants' fact witness Mrs. P , while Exhibits C-304 and C-388 are a joint statement of Mr. V and Mrs. P .

from decisions and literature were scarce, often incomplete, or their content had been distorted. Little was offered in form of analysis.

176. In light of these deficiencies, the Tribunal repeatedly requested clarification of the factual allegations and legal arguments. It had already required the Claimants to clearly identify their claims, allegations, and evidence at the stage of jurisdiction.³¹ It had again done so when providing for the submissions on the merits.³² It had once more done so in respect of the post-hearing briefs, requesting the Parties to present a synthesis of their positions regarding the entire dispute and suggesting that the Claimants' synthesis adopt a breach by breach structure, "supported by the facts as well as the evidence related to each treaty breach, and a reference to damage caused by each alleged breach".³³ The Claimants did not follow these suggestions.
177. As a result, the Tribunal had to elucidate the alleged treaty breaches from statements made unsystematically in the Claimants' pleadings and in some exhibits. In order to comply with its duty to apply the law *ex officio*³⁴, it also did its own legal research. It is confident that such research and its outcome dealt with issues within the debate, which, in light of the claims, the Parties expected to be relevant. The following is a summary of what the Tribunal understands to be the Claimant's main allegations.

1.2 Summary of the Claimants' case

178. The Claimants' fundamental complaint is that the bankruptcy case against BCT is explained by A S 's wish to deprive the Claimants of their real estate; that the State officials involved in the bankruptcy procedure (tax authorities, ministers, judges and trustees) supported and actively cooperated with A S in achieving the latter's aim, possibly due to corruption;³⁵ and thus that the purpose of the bankruptcy petition submitted by the Slovak authorities and the declaration of bankruptcy upheld by the Slovak Judiciary was not the collection of claims but the service of A S 's interest.³⁶ Excluding the alleged actions of the trustees from

³¹ Art. 4, P.O. 14.

³² Art. 1.2, P.O. 16.

³³ Oral instructions at the hearing on the merits, Tr.M., 666; Art. 3.2 and 3.3, P.O. 18.

³⁴ See ¶141 above.

³⁵ CPHB, ¶65.

³⁶ CPHB, ¶¶42, 102.

the analysis³⁷, the Claimants' general claim can be subdivided into two types of allegations:

- those concerning the filing of a bankruptcy petition by State organs against BCT (i.e. acts of the Finance Minister and the Tax Authority), and
- those concerning the conduct of the bankruptcy proceedings (i.e. acts of Slovak Judiciary).

179. In connection with the first type of allegations, the Tribunal understands that the conducts regarded by the Claimants as treaty breaches are basically two:

- The Finance Minister changed an established policy of leniency and chose to submit an unnecessary bankruptcy petition via the tax authorities; and
- The petition was not withdrawn although the Slovak Republic had committed to do so in agreements concluded with BCT representatives.

180. The Claimants sum up their arguments concerning this first type of allegations in the following conclusions:

"The Conclusion

115. The conclusion is that the tax authorities acted ambiguous, that her attitude preceding the petition in bankruptcy was incorrect by starting a relation with A S , that they treated BCT uniquely through the petition in bankruptcy, that this was an aberration to earlier flexible attitudes, no deadline was ever set and BCT never put on one on themselves, while there were better options for the petition in bankruptcy, that there were absolutely no causes provable for the sudden change in attitude and in spite of an attitude of considerateness they didn't switch to a withdrawal after the petition in bankruptcy. Frequently said is that the tax authorities became the third link in the chain of evil by everything they are blamed for with a bankruptcy and total loss as a consequence.

[...]

Conclusion

132. The conclusion of the above has to be that H took a totally irresponsible decision. He did not know the file, he did not study any business plans or BT's [sic] financial situation, he did not know about the existence of securities, he just took his decision after a visit, which had a social character, while he did not keep the promises he had made there and he just followed the incorrect information by the Tax Office, which took a point of view that was the same as A S 's in a much too short period of time. Without further announcement and unfoundedly he totally deviated of his own fellow party-members' points of view and decided to bankruptcy in contradiction with the customs of the moment. By his actions and neglect he became the fourth link in the chain of Evil."

[CPHB, ¶¶115, 132]

³⁷ See section IV.A.6 on attribution.

181. The Claimants devote sections C (dealing with acts of the Tax Authority) and D (dealing with acts of the Finance Minister)³⁸ of the summary of their case contained in their post-hearing brief³⁹ to restate their allegations against the executive officials, indicate the damage, and characterise those acts and omissions as unfair in light of agreements concluded with State officials and in contradiction to the lenient attitude that the administration had shown towards tax debtors up to this point. This summary of arguments is consistent with the presentation of the case in previous pleadings.
182. Regarding the acts of the Finance Minister, the Claimants cite Article 3.1 (on fair and equitable treatment) and 3.2 of the BIT (on full protection and security) as the relevant treaty provision.⁴⁰ Reliance on these provisions is in line with the content of prior submissions, and explained by the content of the relevant section of the post-hearing brief, which concludes with the following description of the alleged breach:
- "a. failing to give guarantees for a fair and honest handling of the 'O investments' to be specified in more detail below (article 3, par. 1)
 - b. hampering the operation, management, maintenance, use, enjoyment and disposal of investments through unreasonable and/or discriminatory measures (article 3 par. 1)
 - c. not granting full security and protection to the investments (article 3 par. 2)"
- [CPHB, ¶133; emphasis in original]
183. Still in relation to the acts of the Finance Minister, the Claimants also refer to Article 5 of the BIT on expropriation. However, they give no explanation of any kind anywhere in the post-hearing brief and in prior submissions as to why the Finance Minister's acts constitute an expropriation.
184. Turning now to the acts of the Tax Authority, the Claimants provide a description of conduct that follows the one of the Minister. They do not rely on Article 3 of the BIT in this context, but assert that the Tax Authority collaborated in an act of expropriation under Article 5 of the BIT. They give no reason for this choice.

³⁸ CPHB, ¶88.

³⁹ See CPHB, ¶1 for the outline of this submission.

⁴⁰ CPHB, ¶¶133-134.

185. With respect to the second type of allegations, involving the role of the Slovak Judiciary in the bankruptcy proceedings, the Tribunal understands that judicial organs are essentially blamed for :

- conducting the bankruptcy proceedings in an illegitimate manner from the outset;
- illegally continuing the proceedings on the basis of the bankruptcy petition filed by the Tax Authority despite the withdrawal of the original petitions of private creditors; and
- authorizing the sale of BCT assets at a price much lower than the real value by a trustee who cooperated with A S .

186. The Claimants sum up their arguments concerning this second type of allegations with the following conclusions:

"Conclusions about the judge

64. All the above-mentioned in combination makes that it has been conclusively proved that, in this case, it can be believed that, in all probability, the judge can not only be blamed for the fact that, by her actions, there was no fair trial, that it is a matter of undue delay and that she did not comply with the law, but also that she conspired with P and K = A S ."

[CPHB, ¶64; emphasis in original]

187. The Claimants devote sections A (dealing with acts of the Judiciary) and B (dealing with acts of the trustees) of their post-hearing submission to summarize their allegations against the Judiciary⁴¹, state the alleged damage⁴², and characterise the actions of the Judiciary and trustees as "undue delay, denial of justice, unfair trial".⁴³ They allege that the acts and omissions of the Judiciary breach Article 3.1 and 3.2 of the BIT. Section A of the post-hearing brief ends with the following description of the alleged breach:

- a. failing to give guarantees for a fair and honest handling of the 'O investments' to be specified in more detail below (**article 3, par. 1**)
- b. hampering the operation, management, maintenance, use, enjoyment and disposal of investments through unreasonable and/or discriminatory measures (**article 3 par. 1**)
- c. not granting full security and protection to the investments (**article 3 par. 2**)"

[CPHB, ¶68; emphasis in original]

⁴¹ CPHB, ¶¶1-87.

⁴² CPHB, ¶¶70-71.

⁴³ CPHB, ¶¶5 *et seq.*

188. To this description, the Claimants added that “[f]urthermore the judge’s actions come down to wrongful expropriation of a public body”.⁴⁴ Their post hearing brief does not develop this statement, and neither do their prior submissions.

1.3 Tribunal’s conclusion on identification of Claimants’ claims

189. In light of the preceding analysis, the Tribunal understands that the Claimants allege violations of:

- Articles 3.1 (FET) and 3.2 (FPS) of the BIT, with an emphasis on a breach of the fair and equitable treatment standard and the notion of denial of justice, with respect to the actions or omissions of the Judiciary and of the Finance Minister; and
- Article 5 of the BIT, with respect to the actions or omissions of the Judiciary, the Finance Minister and the Tax Authority of Bratislava II.

190. The Tribunal will thus examine if the standards of fair and equitable treatment and full protection and security contained in Article 3 of the BIT have been breached by alleged acts and omissions of the Slovak Judiciary and executive officials (including the Finance Ministry and the Tax Authority).⁴⁵

191. As regards the mention of Article 5 of the BIT in connection with actions of the Respondent, the Tribunal understands that, although not well articulated, there is a claim of expropriation. This claim is analyzed separately in Section IV.C.3.

2. Breach of Article 3 BIT

192. The allegations are the same for the violations under paragraphs 1 (FET) and 2 (FPS) of Article 3 of the BIT. The Tribunal will therefore summarize the positions of the Parties without distinguishing between FET and FPS (2.1 and 2.2). Thereafter, it will review the standards of protection contained in both paragraphs of Article 3 (2.3). Finally, it will assess a possible treaty breach of FET and FPS separately.

⁴⁴ CPHB, ¶168.

⁴⁵ The Tribunal notes that the Claimants, when summarizing their case, argued that in joining the petitions for the bankruptcy of BCT, the Tax Authority implemented a decision of Finance Minister H (see for example, CPHB, ¶¶104, 117, 131, 146 and 150 and in connection with the examination of Mr. H at the hearing on the merits, see Tr.M., 446-447). However, the Tribunal notes that previously the Claimant argued that the Tax Authority passed over agreements reached by BCT with former Minister S “on its own initiative” (CSM, ¶81).

2.1 Claimants' position

193. The Claimants' allegations in connection with the violation of the BIT and the Respondent's counter-arguments center around the conduct of the Slovak Judiciary (2.1.1), the Finance Minister (2.1.2), and the Tax Authority of Bratislava II (2.1.3).

2.1.1 With respect to the Judiciary

194. According to the Claimants, they did not benefit from a fair trial during the BCT bankruptcy proceedings.⁴⁶ The judge in charge of the file was partial to the so-called "financial mafia" that wanted to deprive BCT of its assets, which explains the passivity with which the file was handled.⁴⁷ The bankruptcy proceedings were not stopped immediately after the withdrawal of the petition by M B ; and the second and third petitions (the ones by A S and S K , respectively) were not dismissed in due time.⁴⁸ There were considerable delays in the proceedings due to the lack of responsiveness of the judge.⁴⁹ These procedural irregularities were confirmed by the report that the Minister of Justice of the Slovak Republic issued at the request of the Claimants (Exh. C-48).⁵⁰
195. The judge in charge of BCT's bankruptcy file committed a series of "faults"⁵¹, including the following: appointing a pre-determined preliminary trustee who was partial to A S and was not remunerated in accordance with the law;⁵² not informing BCT of the filing of bankruptcy petitions within the statutory ten-day period;⁵³ not providing adequate access to the file; appointing a bankruptcy trustee who was closely connected with A S ;⁵⁴ allowing A S to abuse its rights and buy claims in order to secure the bankruptcy;⁵⁵ encouraging the Tax Authority to file a bankruptcy petition;⁵⁶ improperly authorizing the joinder of the Tax Authority's petition to the original petitions which had already been dismissed;⁵⁷ consenting to

⁴⁶ CPHB, ¶15.

⁴⁷ CPHB, ¶21.

⁴⁸ CSM, ¶¶40-43.

⁴⁹ CPHB, ¶¶17-18.

⁵⁰ CPHB, ¶¶8-10.

⁵¹ CSM, ¶53.

⁵² CPHB, ¶¶33-35.

⁵³ CPHB, ¶37.

⁵⁴ CPHB, ¶72.

⁵⁵ CPHB, ¶¶25-29.

⁵⁶ CPHB, ¶24.

⁵⁷ CSM, ¶78; Tr.M., 17:14-18.

the sale of BCT assets at rock-bottom prices,⁵⁸ not including in the file transmitted to the Supreme Court⁵⁹ the letter from the Tax Authority which expressed the latter's wish to withdraw the bankruptcy petition.

196. More generally, the Claimants blame the Judiciary of the Slovak Republic for adjudicating an unfair bankruptcy, since the insufficient liquidity of BCT should not necessarily have led to bankruptcy.⁶⁰

2.1.2 With respect to the Finance Minister

197. The Claimants argue that they invested in BCT, a company affected by four decades of mismanagement by the State,⁶¹ with the aim of revitalizing and modernizing it. They set to achieve these goals by transforming BCT's corporate structure, buying new machinery, and maintaining a cooperative attitude towards the Slovak authorities regarding the payment of tax arrears. They assert that BCT was managed competently,⁶² and that the company's good relationship with the Slovak authorities was reflected in the agreements for the payments of debts that the parties concluded over the years. Thus, the attitude of the State organs gave Claimants the impression that the existence of debts would not lead to their forced collection.⁶³
198. In February 2002, Minister H visited the BCT factory. During the visit he verbally committed to continue the long-standing policy of tolerance concerning old tax arrears adopted by his predecessors. However, unexpectedly after that visit, the Minister changed his mind about the promise he had made,⁶⁴ and instructed the Tax Authority to join the original bankruptcy petitions against BCT.⁶⁵

⁵⁸ CPHB, ¶¶60-63.

⁵⁹ CPHB, ¶41.

⁶⁰ CPHB, ¶57.

⁶¹ CRep., ¶¶33, 54.

⁶² CSM, ¶134.

⁶³ CSM, p. 22, ¶5.

⁶⁴ CPHB, ¶¶130-134.

⁶⁵ CPHB, ¶¶117-126, 132.

2.1.3 With respect to the Tax Authority

199. It is the Claimants' case that the penalties imposed on the Claimants were exorbitant, even fraudulent.⁶⁶ The Claimants believe that no other tax subject was treated in the same way and that the only reason why the Tax Authority imposed penalties on BCT between 1995 and 1997 was because Claimant 1 had become a majority shareholder. The Claimants never accepted these penalties and thus requested payment schedules.
200. The agreements providing for tax relief and payment schedules that BCT concluded in the period between 1996-2001 and the positive relationship established with the tax authorities raised the expectations of the Claimants that they would be allowed further relief and payment schedules, especially since the agreements with the authorities did not impose "fatal" deadlines for payment.⁶⁷ Accordingly, Claimant 1 has never been declared in default.⁶⁸ The meeting of BCT with Minister S on 28 March 2009, in particular, raised the Claimants' expectations of further payment schedules, and even of a complete remission of fines and interests.⁶⁹
201. In light of these facts, the Tax Authority's request to join the original bankruptcy petitions did not conform to the legitimate expectations of BCT. In addition, it was discriminatory, since at the time it was unusual for the Tax Authority to submit a petition for bankruptcy.⁷⁰ The acts of the Tax Authority in the bankruptcy proceedings were also malicious, driven by the intent to ruin BCT.⁷¹ The Claimants' tried in vain to offer payment for tax arrears so that the petition of the Tax Authority would be withdrawn. However, there was a concerted discriminatory⁷² action of the Tax Authority, the Judiciary and Minister H to favour the bankruptcy mafia.⁷³ One piece of evidence of this joint action is a letter in which A' S requested the Tax Office to join in the bankruptcy proceedings against the debtor (Exh. C-87).

⁶⁶ CRep., ¶¶34, 186.

⁶⁷ CPHB, ¶93; CSM, ¶89.

⁶⁸ CSM, ¶110.

⁶⁹ CPHB, ¶¶111, 137-150

⁷⁰ CPHB, ¶¶92-97, CRep., ¶14.

⁷¹ CPHB, ¶¶89, 107.

⁷² CSM, ¶¶83-86, CPHB, ¶96, SoC, p. 30.

⁷³ CRep., ¶¶247, 257.

202. The dismissal of the then director of the Tax Authority (Mr. B) suggests that he acted beyond his authority when, on the order of Minister H , he filed a petition for bankruptcy of BCT.⁷⁴ The new director, Ms. H , attempted to correct this error. Her letter to the Regional Court states that the Tax Authority did not intend to be the sole petitioner for the bankruptcy of BCT once the original petitions were dismissed (Exh. C-315, the "H letter"). This letter is in line with the policy of the previous Finance Minister.

2.2. Respondent's position

203. The Respondent essentially responds as follows:

2.2.1. With respect to the Judiciary

204. As confirmed by the Supreme Court of the Slovak Republic, the adjudication of bankruptcy against BCT was justified. The Supreme Court had the entire record available and held that the Court of First Instance had thoroughly substantiated its findings of fact and drawn the correct legal conclusions.⁷⁵ As the expert evidence has shown, BCT was over-indebted and had a plurality of creditors with overdue claims. There exists no link between the conduct of the judge and the damage alleged by the Claimants.

205. Assertions of corruption are unfounded, and the speculation as to an alleged cooperation of the judge in charge of the file with the so-called "financial mafia" in order to trigger bankruptcy is absurd. This is demonstrated by the fact that the judge dismissed the original petitions, including A S: petition. If the Claimants believed that one of the creditors had abused its rights, it was up to them to prove it.

206. The Claimants' complaints about various aspects of the bankruptcy proceedings are baseless. They always had the opportunity to access the file. The statutory ten-day period to inform the debtor of petitions was only in force after 2005 and thus did not apply at the time of the adjudication of BCT's bankruptcy. The sales price of BCT's assets was approved not by the judge handling the file, but in a creditor's meeting in which the Claimants did not participate because they had sold their claims.⁷⁶ The trustees were appointed in accordance with the law, and the bankruptcy trustee

⁷⁴ CPHB, ¶¶90, 57.

⁷⁵ RPHB, ¶¶66-69.

⁷⁶ RPHB, ¶¶83, 184, 192.

cannot be said to be closely associated with A S only because his offices are located in the same building. All other allegations in respect of the trustees are not relevant in relation to the adjudication of the bankruptcy.

207. The report of the Minister of Justice does not warrant the conclusion that there was a breach of statutory duties on the part of any judge or that there was a violation of the right to a fair trial.⁷⁷ In particular, the report does not suggest that proceedings should have stopped immediately upon the withdrawal of the petition of M B.⁷⁸ Bankruptcy proceedings can only be terminated when, after the bankruptcy, all the claims have been paid. Since this condition was not met, the judge acted properly in continuing the bankruptcy proceedings. Above all, a procedural error cannot by itself constitute a breach of the BIT. In any case, the liability of the Respondent for such alleged damage has not been demonstrated.
208. Moreover, there were no delays in the proceedings that could constitute a treaty breach. A judge has no set time during which to decide a case. Possible delays appear to have been explained by the complexity of the case due to the large number of creditors, as well as by BCT's own conduct. Indeed, BCT lodged many unsubstantiated complaints with which the Court had to deal. This meant that the file was often not available to the judge. Moreover, the Claimants did not avail themselves of the procedural opportunity to complain about the delays that the Respondent's expert identified.⁷⁹ Finally, the length of the proceedings (two years), cannot be deemed a denial of justice under international law, as the practice of investment tribunals and the ECHR shows.⁸⁰

2.2.2. With respect to the Finance Minister

209. According to case law, the decisive moment for the assessment of legitimate expectations is the time of the investment. There is no evidence dating back to that time and implying that the Slovak Republic would refrain from enforcing tax arrears.⁸¹ Thereafter, the State authorities adopted a facilitative approach in the expectation that the Claimants would contribute to the development of the thread industry in the country in accordance with their promises. This attitude is not

⁷⁷ RPHB, ¶¶57, 147-155.

⁷⁸ RPHB, ¶¶145-146.

⁷⁹ Tr.M., 577:8-12.

⁸⁰ RPHB, ¶¶155-157.

⁸¹ RPHB, ¶137.

relevant to alleged legitimate expectations on the part of the Claimants. In any event, the expectation that tax debts would not be enforced is neither reasonable nor justifiable.

210. There was no sudden change of policy of the Finance Ministry or the Tax Authority concerning the enforcement of the tax debt. Whether during the time of Minister H [redacted] or Minister S [redacted], the intention of the Slovak State was clearly to collect its receivables.⁸² The negotiations with Minister S [redacted] were attempts to this effect. The approach of the Slovak State developed over time in accordance with relevant legislation and the attitude of the Claimants, who ultimately did not meet their obligations towards the State despite maintaining communication with State organs.⁸³

211. Minister H [redacted] visit to BCT on 22 February 2002 was a mere courtesy visit during which he made no commitments of any kind to the Claimants.⁸⁴ He did not take the decision that the Tax Authority would join the original bankruptcy petitions.⁸⁵ Prior to his visit to the BCT factory, the Tax Authority had already decided to join the bankruptcy proceedings, as is evident from the Tax Authority's response to the request for involvement in the proposal for the bankruptcy, which A S [redacted] had submitted as one of the original petitioners and the Regional Court had transmitted to the Tax Authority (Exh. C-88). This response, in which the Tax Authority states that it joins A S [redacted] original bankruptcy petition is dated 1 February 2002, i.e. three weeks prior to the ministerial visit.⁸⁶

2.2.3. With respect to the Tax Authority

212. Prior to the Claimants' investment, BCT owed monies to the Slovak Republic and the Claimants were fully aware of the existence of this debt.⁸⁷

213. Under the Claimant's management, penalties were imposed on BCT regardless of the controlling shareholder (Exh. R-112),⁸⁸ as it is done with any tax payer. The tax penalties were incorporated in the legislation prior to the Claimants' investment and

⁸² RPHB, ¶¶214, 219, 220.

⁸³ RPHB, ¶205.

⁸⁴ RPHB, ¶¶226-227.

⁸⁵ RPHB, ¶¶212, 215.

⁸⁶ RPHB, ¶65.

⁸⁷ RPHB, ¶114.

⁸⁸ RPHB, ¶229.

the Claimants and BCT were under an obligation to respect them. The Claimants, in particular, never filed any recourse against the imposition of penalties and only applied for tax relief.⁸⁹

214. The Respondent asserts that, despite the imposition of penalties, the Claimants were treated better than the standard tax payer. They received substantial tax relief (approximately SKK 55 million in the years 1996-2001) and payment schedules, which meant that penalties were not charged.⁹⁰ Deadlines for the payment of the taxes, which are stipulated by law, were included in the payment schedules granted upon BCT's request.⁹¹ At meetings with the authorities, BCT repeatedly committed itself to pay its liabilities. However, the Claimants did not comply with the repayments provided in the schedules. Between 1994 and 2001, when the first petition of bankruptcy was submitted, the amount of tax arrears doubled (Exh. R-43). Because the Claimants did not fulfil their promises concerning payment of the arrears, they could not expect that they would be allowed further concessions because this was prohibited by law.⁹²
215. The Respondent further points out that the meeting with Minister S. [redacted] on 28 March 2000 primarily regarded the outstanding liabilities of the Claimants towards the state-owned bank Consolidation Bank Bratislava, s.p.u. ("KBB") (Exh. C-082; R-104). Therefore, this meeting could not raise BCT's expectations for relief from its tax penalties. On that occasion, the Claimants were offered relief from interest on the debt BCT had with KBB on the pre-condition that the principal of this debt would be paid, that the obligations of BCT towards the Tax Authority would also be settled, and that the Claimants would use the released interest amounts for investments in the short term. The commitment to settle the tax debt was confirmed by Claimant 1 as BCT's major shareholder during the meeting held with Minister S. [redacted] in the following year, on 13 February 2001 (Exh. R-46). Mr. O. [redacted] and BCT failed to fulfil the commitments undertaken at these negotiations.⁹³

⁸⁹ RPHB, ¶101.

⁹⁰ RPHB, ¶¶95, 113; Exh. R-45.

⁹¹ RPHB, ¶¶98-100, 219.

⁹² RPHB, ¶¶118, 218.

⁹³ RPHB, ¶¶234-240.

216. The bankruptcy proceedings that the Tax Authority joined were the consequence of the Claimants' own doing. They decreased its equity to a negative value over their nine years of management. No substantial investments were made in BCT either in the thread business or in its real estate. BCT's infrastructure was dismantled. Through the creation of artificial claims against BCT, and the subsequent swap of these claims for BCT's property, its assets were passed onto other companies controlled by Claimant 1 without adequate consideration. Entities under the control of the Claimants, but not part of the BCT group, gained ownership over assets of the group through obscure debt rescheduling transactions.⁹⁴ Claimant 1 constantly borrowed funds for his companies and secured these loans by pledges of BCT's real property. When the companies failed to repay the loans, the pledges were attached to the real property owned by BCT.⁹⁵
217. Since the bankruptcy was the result of their own mismanagement, the Claimants' suggestion of a malicious intent on the part of the Tax Authority in coordination with the Judiciary, the Finance Minister and A S is absurd.⁹⁶ The Tax Authority joined the petitions for bankruptcy because BCT had not fulfilled its obligations towards its creditors for a long time, because it became evident that it would not do so, and because new payment schedules could not be offered in accordance with the law. The letter of 28 January 2002 in which A S requested the Tax Authority to join the petition was a simple matter of coordination among creditors concerning next steps in the bankruptcy proceedings.⁹⁷
218. Moreover, the fact that the Tax Authority joined the bankruptcy petitions was not a discriminatory act. The Tax Authority always had the option of submitting bankruptcy petitions. From 2004 onwards, it was required by law to file a petition when a debt exceeded a certain amount.⁹⁸ Before the BCT case, the Tax Authority had submitted approximately thirty such petitions against other companies.⁹⁹
219. The Tax Authority delivered its petition to join the bankruptcy at a time when the dismissal of the petitions was not yet final because of an appeal. The Supreme

⁹⁴ P. Report, p. 4-5; table 39.

⁹⁵ RPHB, ¶¶122; RSM, parts C.1.3.1. and C.1.3.2.

⁹⁶ RPHB, ¶¶197, 203.

⁹⁷ RPHB, ¶198.

⁹⁸ Tr.M., 379:9-15,

⁹⁹ RPHB, ¶203; Exh. R-117.

Court found nothing objectionable about the joinder.¹⁰⁰ After it joined the bankruptcy, the Tax Authority did not attempt to withdraw its bankruptcy petition. The letter of Director H: only expressed that the Tax Authority was prepared to withdraw the petition if the tax debts were paid, which did not happen.¹⁰¹ The suggestion that the termination of the employment of Ms. H: 's predecessor was linked to the joinder of the bankruptcy petitions, is thus speculation.

2.3. Analysis

2.3.1. Article 3.1 of the BIT (Fair and equitable treatment)

2.3.1.1 Content of the standard

220. The Tribunal observes that the Claimants did not elaborate on the content of the FET standard. The Respondent, for its part, addresses two aspects of the standard: legitimate expectations and denial of justice. First, relying on cases, it states that legitimate expectations must be assessed at the time of the investment, adding that the investor's due diligence about the conditions of the given investment is a prerequisite for reasonable and legitimate expectations.¹⁰² Second, the Respondent argues that a State is internationally liable for denial of justice only if justice is administered "in a seriously inadequate way," resulting in "manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety" or a "clearly improper and discreditable" procedure.¹⁰³ The Respondent also claims that procedural delays do not constitute a denial of justice if they are justified in light of the circumstances of the case, particularly its complexity

¹⁰⁰ RPHB, ¶64.

¹⁰¹ RPHB, ¶132; Exh. C-98, R-193.

¹⁰² RPHB, ¶138 refers to *Frontier Petroleum Services Ltd. v Czech Republic*, PCA - UNCITRAL Arbitration Rules, Final Award, 12 November 2010 [hereinafter, *Frontier*], ¶287: "Tribunals have stated consistently that protected expectations must rest on the conditions as they exist at the time of the investment. They have pointed out that a foreign investor has to make its business decisions and shape its expectations on the basis of the law and the factual situation prevailing in the country as it stands at the time of the investment."; *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶9.3.8; and *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶219: "Legitimate expectations cannot be solely the subjective expectations of the investor. They must be examined as the expectations at the time the investment is made, as they may be deduced from all the circumstances of the case, due regard being paid to the host State's power to regulate its economic life in the public interest."

¹⁰³ See RSM, ¶¶97-102, which refers to *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 [hereinafter, *Mondev*], ¶136; *Azinian, Davitian, & Baca v. Mexico*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999 [hereinafter, *Azinian*], ¶102; *Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award on Merits, 26 June 2003 [hereinafter, *Loewen*], ¶132.

and the conduct of the party allegedly affected by the delays.¹⁰⁴ Finally, the Respondent emphasizes that protection under this standard requires the exhaustion of local remedies.¹⁰⁵

221. The Treaty provision, interpreted in accordance with the VCLT, offers little guidance on the content of the FET standard. The Tribunal will thus turn to the interpretation adopted in case law. A number of factors have been repeatedly identified as forming part of the FET standard.¹⁰⁶ These include the obligations to act transparently and grant due process,¹⁰⁷ to refrain from taking arbitrary or discriminatory measures,¹⁰⁸ from exercising coercion,¹⁰⁹ and from frustrating the investor's reasonable expectations with respect to the legal framework affecting the investment.¹¹⁰ Tribunals have emphasised that the FET guarantee must be appreciated *in concreto*, taking into account the specific circumstances of each case.¹¹¹
222. More specifically with respect to *legitimate expectations*, as the *Tecmed* tribunal stated, the purpose of the FET guarantee is "to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment".¹¹² The notion of the investor's legitimate expectations is closely related to stability.¹¹³

¹⁰⁴ See RPHB, ¶¶61, 78 and RSOM, ¶¶106-10 which respectively refer to *Calvelli and Siglio v. Italy*, ECHR, Application no. 32967/96, Judgment, 17 January 2002, ¶¶65-66; *Frontier* ¶330; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Republic of Ecuador*, Partial Award on the Merits, 30 March 2010 [hereinafter, *Chevron Partial Award*], ¶250; and *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon* ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, ¶163.

¹⁰⁵ See RPHB, ¶78 and RSM, ¶¶98-101 referring to *Limited Liability Company Amto v. Ukraine*, Final Award, 26 March 2008, ¶¶85-89; *Loewen*, ¶156; *Toto*, ¶164; and *Chevron Partial Award*, ¶¶327-329.

¹⁰⁶ *Bayindir Insaat Turizm Ticaret ve Sanayi A Ş v Pakistan*, Award, ICSID Case No ARB/03/29, 24 August 2009 [hereinafter, *Bayindir*], ¶178.

¹⁰⁷ *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000 [hereinafter, *Metalclad*], ¶76.

¹⁰⁸ See *inter alia Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 [hereinafter, *Waste Management*], ¶98; *Ronald S. Lauder v. Czech Republic*, Ad Hoc Arbitration, UNCITRAL Rules, Award of 3 September 2001 [hereinafter, *Lauder*], ¶292.

¹⁰⁹ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Ad Hoc Arbitration, UNCITRAL Rules, Partial Award of 17 March 2006 [hereinafter *Saluka*], ¶308.

¹¹⁰ *Duke Energy Electroquil Partners and Electroquil SA v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 [hereinafter, *Duke Energy*], ¶¶342, 340; *Jan de Nul NV and Dredging International NV v Egypt*, ICSID Case No ARB/04/13, Award, 24 October 2008 [hereinafter, *Jan de Nul*], ¶186.

¹¹¹ *Mondev*, ¶118; *Jan de Nul*, ¶185.

¹¹² *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 [hereinafter, *Tecmed*], ¶154. See also *Waste*

223. Recently, the tribunal in *El Paso* underlined that, since "economic and legal life is by nature evolutionary", the notion of stability of the legal framework and business environment as an element of FET cannot be equated to an absolute obligation of immutability of the regulatory framework.¹¹⁴ For the *El Paso* tribunal, the State should not modify the legal framework unreasonably or contrary to a specific commitment.¹¹⁵
224. Legitimate expectations were defined in *El Paso* as "the result of a balancing of interests and rights", which "varies according to the context".¹¹⁶ In the words of the *Saluka* tribunal, "the scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations".¹¹⁷ Similarly, it was held in *Duke Energy* that "the assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State".¹¹⁸ In sum, this Tribunal agrees that stability of the legal and business environment does not equate immutability of the legal framework and that legitimate expectations must be measured through a balancing test taking account of specific circumstances.
225. Moving to denial of justice, several tribunals have ruled that the absence of a fair procedure was an important factor in the assessment of a FET breach.¹¹⁹ The *Waste Management* tribunal stated that the FET standard was breached by state conduct that involved a lack of due process leading to an outcome which offends judicial propriety, as may be the case with a manifest failure of natural justice in judicial proceedings.¹²⁰ Other tribunals have also held that denial of justice, understood as the failure of a national legal system as a whole to satisfy minimum

Management, ¶98.

¹¹³ *Frontier*, ¶285, adding transparency.

¹¹⁴ *El Paso Energy International Company v. Argentina*, Award, ICSID Case No. ARB/03/15, Award, 27 October 2011 [hereinafter, *El Paso*], ¶348, ¶¶350-352, 355; see also *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005 [hereinafter, *CMS*] ¶277; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶258.

¹¹⁵ *El Paso*, ¶364.

¹¹⁶ *El Paso*, ¶356.

¹¹⁷ *Saluka*, ¶304.

¹¹⁸ *Duke Energy*, ¶340.

¹¹⁹ *Metalclad*, ¶91.

¹²⁰ *Waste Management*, ¶98.

standards for a fair procedure, or resulting in an egregious misapplication of the law, was part of the FET standard.¹²¹ Because denial of justice deals with the failure of a system not of a single court, it cannot be established until local remedies have been exhausted thereby giving an opportunity for higher courts to rectify mistakes of lower instances.¹²²

226. Concerning the possible link between due process and procedural propriety and the standard of full protection and security, the Tribunal agrees, in principle, with the opinion of the *Frontier* tribunal that almost all of the decisions dealing with procedural propriety and due process in the context of FET concerned proceedings involving disputes with the host State or with State entities. This may suggest that "complaints about lack of due process in disputes with private parties are better dealt with in the context of full protection and security standards".¹²³ In the present case, however, given that the BIT introduces full protection and security as a specific application of FET, the distinction between the two types of complaints seems to lack relevance.

227. Finally, although it is a general principle of national and international law, the notion of good faith has been analyzed by investment tribunals as an element of the FET standard. Actions such as conspiracy of state organs to inflict damage on an investment, or the use of legal instruments for purposes other than those for which they were created,¹²⁴ have been cited by tribunals as examples of actions performed in bad faith which may constitute a violation of the standard. This said, it is clear that the FET standard may be violated even when the State does not act in bad faith.¹²⁵

2.3.1.2 Was there a breach?

228. This case is about claims brought under the BIT. Hence, for the Respondent to incur liability, its acts must constitute breaches of the BIT and not only breaches of municipal law.

¹²¹ *Jan de Nul*, ¶¶187, 188, 191, 255–261.

¹²² Or, the wrong does not arise until "reasonable attempts have been made to secure the remedies available within that system J. Paulsson, "Denial of Justice in International Law", Cambridge University Press, Hersch Lauterpacht Memorial Lecture Series, 2005 [hereinafter, *Paulsson*], p. 130.

¹²³ *Frontier*, ¶296.

¹²⁴ *Waste Management*, ¶322.

¹²⁵ *Tecmed* ¶153; *Loewen* ¶132; *CMS* ¶280; *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶372; *Siemens AG v. Argentina*, ICSID, ARB/02/9, Award, 6 February 2007, ¶299; *Mondev*, ¶116.

229. Article 3.1 of the BIT reads as follows:

"Each Contracting Party shall ensure fair and equitable treatment to the investment of the investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors".

230. In the Preamble of the BIT, Contracting Parties of the BIT have expressly emphasized fair and equitable treatment:

"The Government of the Kingdom of the Netherlands
and
the Government of the Czech and Slovak Federal Republic,
(hereinafter referred to as the Contracting Parties")
Desiring to extend and intensify the economic relations between them
particularly with respect to investments by the investors of one Contracting
Party in
the territory of the other Contracting Party,
Recognizing that agreement upon the treatment to be accorded to such
investments will stimulate the flow of capital and technology and the
economic development of the Contracting Parties and that *fair and
equitable treatment is desirable*"

[Exh. C-245; emphasis added.]

231. In its assessment of a possible violation of Article 3.1 of the BIT (with reference to the acts of the Finance Minister, the Tax Authority, and the Judiciary of the Slovak Republic), the Tribunal, in particular, will focus on the following issues:

- a. Were the Claimants' reasonable expectations frustrated?
- b. Did the Claimants experience a denial of justice?
- c. Have the State organs acted in bad faith?
- d. Do all of the acts of the Respondent taken together violate Article 3.1 of the BIT?

a. *Were the Claimants' reasonable expectations frustrated?*

232. The analysis of the Tribunal will address three points in time:

- (i) the time of privatization;
- (ii) the time of the Claimants' management;
- (iii) the time after the Tax Authority joined the bankruptcy proceedings.

233. The Tribunal is aware that it is generally considered that expectations must be assessed at the time of the investment. In this case, this would be the time of privatization. As the Claimants have invoked their expectations throughout all three points in time, the Tribunal, to assure the Claimants their arguments have been heard (even if they have not succeeded), will not limit its inquiry to the first point in time.

(i) Time of privatization

234. It is not disputed that at the time the investment was made, BCT had important liabilities towards the Tax Authority. The Claimants have stated that the amount of initial debt was such that "in fact the State sold a bankrupt enterprise".¹²⁶ They repeated this fact in their opening statement at the evidentiary hearing:

"BCT at the moment of the transfer of shares in 1995 was formally in a state of bankruptcy, as this was the case with almost all State-owned enterprises".

[Tr.M., 15:16-19]

235. Similarly, Claimant 1 testified that BCT's financial condition at the time of the investment was a "disaster".¹²⁷ It is not disputed either (and corroborated by evidence), that the Claimants were aware of such "disaster" and accepted that they would have to deal with it. In their Submission on the Merits, the Claimants note that "[t]he Republic further states that BCT at the moment of the purchase of the shares, knew about the existence of tax arrears and the amount of it. O fails to see the importance of this correct observation [...]". In addition, a letter from BCT to the National Property Fund of the Slovak Republic, dated 16 November 1995 states as follows:

"As of 16 January 1995, Mr. O received from the National Property Fund 232,452 pieces of shares equalling to 40.3% interest in BCT, a.s. He as a predominant shareholder (however, not yet a majority one) accepted the responsibility to deal with:

- a) financial situation of BCT
- b) development of new EU markets."¹²⁸

[CSM, ¶197]

¹²⁶ CRep., ¶33.

¹²⁷ Tr.M., 15:15-18. See also Tr.M., 19, 44:18-22, 115:14-16, 132:21-25, 206:16-20.

¹²⁸ Exh. R-151. See also Tr.M., 45:12.

236. There is no indication in the record of any assurance according to which the investors would benefit from relief concerning the old tax liabilities of BCT. In the absence of specific assurance, it does not appear reasonable or legitimate for a tax payer to expect to be relieved from tax liabilities. It is indeed one of the important functions of a State to collect taxes. Every tax payer should expect that his dues will be collected.

(ii) Time of the Claimants' management of BCT

237. As regards the financial situation of BCT under the Claimants' management, it was up to the Claimants to provide evidence of the injection of cash and competent management required to improve the initial situation of the investment and achieve the goal of modernization. The Claimants have not met this burden of proof. It is clear that BCT's line of business was altered, and that a new corporate structure and real estate division were introduced allegedly as part of the Claimant's business plan for BCT. However, Claimants' representations (in these proceedings as well as prior ones made to Slovak authorities (Exh. C-83; C-85.1)), concerning alleged investments made into the company, competitiveness of BCT products in the European market, and expenditure in the modernization and development of BCT, appear self-serving and unreliable, as do the benefits for BCT of such alleged expenditure and new corporate structures. Further, no evidence of the Claimants' "business plans" for BCT was provided.¹²⁹

238. Above all, the record shows an unsuccessful business operation. Under the Claimants' management, BCT did not become a profitable enterprise. The Claimants did not offer proof to the contrary. The Tribunal is satisfied with the Respondent's witness evidence¹³⁰ and the report of its damages expert, which concludes that BCT stumbled on the verge of bankruptcy for a number of years before being declared bankrupt. This evidence was not rebutted by the Claimants. Their counter-allegations remained unverified. Moreover, in the light of the evidence

¹²⁹ A letter from BCT to the National Property Fund of the Slovak Republic, dated 16 November 1995 (Exh. R-151) informed the latter that:

"In BCT, a.s., business plans have been prepared for the following areas:

- a) production of threads
- b) revitalization of real estates
- c) modernization of spinning factory
- d) development of S... G m ...

¹³⁰ p... WS and oral testimony (Tr.M., 298-300).

given by the witnesses and the experts, the Respondent's assertion of mismanagement was clearly shown to be plausible.

239. Notwithstanding the situation just described, BCT did establish a fluent line of communication with the Slovak Finance Ministry and the Tax Authority, as demonstrated by the authorities granting BCT's repeated requests for tax relief between 1996 and 2001 and by a waiver of interest on a loan by the State-owned bank KBB (Exh. C-82). Although the Claimants submit now that their requests for payment schedules were prompted by the discriminatory nature of the penalties applied to BCT, at the time they did not complain about discrimination (Exh. C-83). Quite the contrary. In a letter dated 15 January 1999 in which BCT requested assistance with its financial concerns from Minister S , the company acknowledged the lawfulness of the taxes and appealed for patience with respect to payment:

"We understand the rightful requirements of the State but we would like to appeal for its patience. The BCT does not take any unfair steps to back out of the duty towards the State. But it needs time to be able to create the space to start the aforementioned activities. The solutions through the executor which for example the VsZP or the Customs Authorities chose mean only the pointless increasing of the expenses; they do not help to the BCT and in the final consequence to the State which is interested in the development of the production".

[Exh. R-47, p. 2]

240. Under the Claimants' management, BCT benefited, repeatedly from an important remission of taxes and payment schedules. Despite this relief, and the payment of some of the tax arrears, the tax debt of BCT doubled in the period between 1994 and the first petition for bankruptcy in 2001 (Exh. R-43).
241. The Tribunal finds no evidence of a discriminatory application of tax penalties, not to mention that the Claimants' assertions about discrimination are unpersuasive in light of long-standing ministerial policy of tolerance for tax arrears. Further, the Claimants did not challenge the evidence presented by the Respondent showing that the Tax Authority had requested the bankruptcy of numerous companies before submitting a petition for BCT's bankruptcy.
242. In addition, correspondence of BCT with Finance Minister S (Exh. R-47, R-105/C-83) and the Tax Authority (Exh. C-85.1), as well as the minutes of the meetings held by the Ministry, the Tax Authority and KBB representatives with BCT

(Exh. C-82, C-84, R-46) demonstrate that the flexibility shown by public officials in relation to the debts towards the Slovak State was not mere benevolence. In the negotiation meeting of 2000, in which the Claimant requested State assistance "for the expansion of BCT", the authorities agreed to waive interest on the debt towards KBB on the condition, among others, that BCT's tax arrears would be settled. Since the condition was not fulfilled, another meeting was convened in 2001 "for the purpose of completing the solution of repayment of old tax arrears of the company BCT - towards the Tax Office Bratislava II in the connection with maintenance and development of textile industry in SR" (Exh. C-84, p. 1).

243. The tax relief, as well as the waiver of interest on the KBB loan, appear to be rational responses to representations and assurances repeatedly given by BCT and Claimant 1 that the modernization of the company was ongoing; that financing was secured for the completion of development plans and even for making new investments in the Slovak Republic; that the timing was right for further investments into the company; and that hundreds of jobs would be maintained and new ones created in depressed regions outside the country's capital. More importantly, the tax and interest relief were subject to the condition that a sum equivalent to the forgiven penalties would be invested in BCT and into the recovery of the textile industry in the Slovak Republic, and that the principal of the debt would be paid (for the tax relief granted in 2000, the condition was that the payment of the debt towards the Tax Authority had to be made within six months). It is clear from the record that the Ministry attached great importance to the fulfilment of these conditions.¹³¹
244. In other words, the flexibility shown by the authorities was linked to the expectations which the State had of the investor, which, in turn, shaped the expectations the investor reasonably could have of the State. The minutes of the meetings show that the Slovak Republic sought to collect the tax arrears while keeping a flexible attitude in order to assist the Claimants in achieving the modernization of the company, which was the aim of its privatization.

¹³¹ Exh. C-82, p. 2: "Mrs. Minister noted that in case that these conditions are not observed, the interests may not be forgiven and in addition to it she proposed to embed the increasing of rate of interest in such case in the agreement".

245. For example, the minutes of the meeting which BCT held with Finance Minister S on 28 March 2000, state that:

"Mrs. Minister shared the presented proposal of Mr. O for solution of claim of KBB, s.p.u towards BCT, a.s. and the suggested repayment schedule of the principal. She conditioned the forgiving the interests on the fact,

1. that the principal will be repaid,
2. that there will be carried out investment into BCT, a.s. at least in the amount of forgiven interests
3. that there will be settled the obligations of BCT, a.s. towards the Tax Office.

Mrs. Minister noted that in case that these conditions are not observed, the interests may not be forgiven and in addition to it she proposed to embed the increasing of rate of interest in such case in the agreement"

[Exh. C-82, p.2; Exh. R-104, p.2]

246. The minutes of the following meeting of BCT with Finance Minister S held on 13 February 2001, record the following conclusions:

"Conclusions of negotiation:

1. The company BCT shall pay as a lump sum to the Tax Office Bratislava II the whole due amount of the tax arrears from the proceeds from sale of real estate of the subsidiary E -E . This promise is guaranteed by the management of the company and Mr. A. O
2. The minister of finance recommended to the management of the Tax Office Bratislava II to solve the application of company BCT a. s. for forgiving the penalization after payment of due principal at the level of the Tax Office Bratislava The forgiven penalties shall be provable [sic] invested into recovery and development of textile industry in Slovakia."

[Exh. C-84, p.3; Exh. R-46, p.3]

247. The following year, on 21 November 2002, at a meeting of BCT with the tax authorities, it was agreed that:

"[T]he Tax Office will withdraw from the petition in bankruptcy only when the company BCT a.s. pays the principal of the arrears of taxes, i.e. about SKK 40 mil."

[Exh. C-99, p. 1]

248. Given that: (i) the Claimants failed to comply with the conditions set in these negotiations; (ii) the tax debts continued to increase; and (iii) the traditional activity of BCT in the field of yarns and threads was completely abandoned,¹³² any

¹³² According to the situation report of the tax authority (Exh. R-43, p. 2), during the same period of time where BCT benefited from tax relief, its line of business changed progressively. From 1 January 1991, the main activity of BCT was production and trading in the field of yarns and threads; from 13 December 1993, it was production and trading in the field of cotton, silk and

expectations on the part of the Claimants that the authorities would invariably maintain a lenient attitude, appear unjustified.

249. As regards the commitment allegedly made by Finance Minister H. [redacted] during a visit of BCT that he would continue the tolerant policy of his predecessors, the Claimants provided no evidence other than their own interpretation of the visit. The Tribunal is satisfied with the testimony of former Minister H. [redacted] that no promise was made on his part:

"[T]he letter addressed to me by one of the Claimants, it stated in the letter that I have made certain promises and we have concluded some conclusions, while at that time I knew, now I can only remember that vaguely, back then I knew that I did not make any promises and did not take upon myself any obligations"

[Tr.M., 426:19-25]

250. The conclusion that no promise was made at the time, and that Claimant 1 nevertheless hoped for a total remission of tax arrears, is confirmed by the tenor of Claimants' own letter sent to Minister H. [redacted] after his visit:

"I am prepared to pay the whole principal in taxes by the end of March. Furthermore I am ready for additional investment into BCT a. s. and other companies in the Slovakia [sic] in the amount that much exceeds the tax penalties from late payments and *I expect that we manage to reach an agreement on forgiving all penalties.*"

[Exh. C-91, p. 2; emphasis added]

251. The Tribunal finds that the allegation that Finance Minister H. [redacted] ordered the Tax Office to join the petition is equally unsubstantiated. The record shows that although the petition was filed on 6 March 2002, the decision to file had been made by the Tax Authority three weeks prior to Minister H. [redacted]'s visit to the BCT site on 22 February 2002.
252. However, it is true that Minister H. [redacted] admitted to having made a decision after his visit to BCT that no further leniency regarding tax debt would be allowed and to having instructed the Director of the Tax Authority accordingly. At the hearing, he said so in the following terms:

synthetic yarns and threads and related foreign trade; from 9 June 1995, the textile-related activities were completely abandoned, and accounting, economic and organizational consultancy, book-keeping, education and training were linked as the activities of BCT.

"[S]ubsequently my impressions and the information that I have obtained at the visit I had discussed with the General Director of the Tax Office at a meeting which was held regularly once every week. It was not a long discussion but the Director of the Tax Office likewise expressed certain doubts and he informed me about the problems which they had with the taxpayer and since I was politically responsible so to say and given the situation my feeling of responsibility was even stronger. I had pointed out to the Director that it is his duty to secure the claim which the Tax Office had to the company and, in that sense, I made a decision which was, in fact, an instruction and I decided that I did not find it correct to continue accepting more and more promises and that it is necessary to secure the repayment of the tax debt and this is what subsequently happened."

[Tr.M., 443:4-24]

253. The Tribunal finds that the decision of the Tax Authority to join the bankruptcy petitions and the decision of the Minister to secure the repayment of tax debts did not betray the legitimate expectations of the Claimants. This is so regardless of whether the decision to join the bankruptcy proceedings was indeed the result of the instructions of Minister H after his visit to the BCT site.
254. The fairness of these decisions must be assessed against the background of information that the Claimants knew and should have known at the time the investment was made. Both decisions are consistent with the law¹³³ (which always allowed the Tax Authority to file a bankruptcy petition), and with the progression of the relationship between the Parties, from the moment the investment was made.¹³⁴ Subject to specific assurances which they did not have, the Claimants could not have fostered legitimate expectations that there would be no forced collection of tax arrears.
255. The legitimacy of the procedure is confirmed by Claimant 1 himself in its communication to Minister H of 18 March 2002:
- "I accepted with great bitterness the information that the Tax Directorate through the Tax Office Bratislava II filed on March 6th the petition for bankruptcy as for our company BCT - B c t that is recorded at the District Court Bratislava under the reference 6K 22/02. Though I admit the competence of the Tax Office to act in this way so that they will ensure the debt recovery I am unpleasantly surprised that there was not chosen the other way than bankruptcy that is the instrument leading to liquidation of business entity. At the same time I remark that the Tax Office has all its claims covered by the pledge of good financial standing on lucrative real estates of BCT that it as early as in August of last year extended so that all its claims will be covered.

¹³³ RPHB, Annex B1 – B2; Tr.M., 392-394.

¹³⁴ Tr.M., 376-377, 401, 404 (Š); 408, 415-18, 433, 441 (H).

Therefore, I expected that in case that there would be an application of "resolute" actions towards BCT . there should have been rather the realization of pledge that would be more advantageous for state and not the bankruptcy.

In connection with our negotiation on 22 February 2002 I did not expect anything like this at least by 31st March, 2002".

[Exh. C-94, Exh. R-49, p. 1; emphasis added]

256. The letter sent by Claimant 1 to the Director of the Tax Office the following year on 14 January 2003 confirms his view of the bankruptcy petition as an inconvenient but legitimate measure:

"[T]he very existence of such petition significantly complicates commercial negotiations and business activities in general. Moreover, if we assume that the Tax Office joined the petition in bankruptcy with the aim to speed up the performance of debtor's tax obligations (and not to dissolve the company), this action is disserviceable."

[Exh. C-102, p.1]

257. The Claimants reiterated this point of view in its opening statement at the evidentiary hearing:

"BCT does not contest the formal situation but does contest the bankruptcy was needed in that the State had to cause this in the circumstances of that time."

[Tr.M.,19-20]

258. In its Submission on the Merits, the Claimants made a statement of similar import:

"As the Republic states in its rejoinder sub D.2.1 **neither the State nor the Ministers have acted formally illegally**, as the Republic indicates in its rejoinder sub 52. But the Republic passes over the fact that in can still act in contravention of the BIT anyway, by not taking actual action where it was its obligation according to the stipulations in the articles 3 and 5. These actual measures could have been expected from both the Republic and its Ministries, with regard to its own citizens' properties as well. **Furthermore the Tax Office should have withheld an actual petition in bankruptcy, even if this was its legal right.**"

[CSM, ¶95; emphasis added]

259. As these statements show, Claimant 1 does not question the lawfulness, but the timing and the choice to file for bankruptcy as opposed to realizing pledged assets, because, in his view, "the procedure of the Tax Office Bratislava II markedly

complicated the solution of whole situation".¹³⁵ However, it is the duty of tax authorities to collect taxes and it is their prerogative to choose the means to do so. BCT repeatedly failed to comply with its promises in spite of renewed extensions. In such a situation, the tax subject cannot legitimately question the convenience of the means of collection chosen.

260. BCT was aware that a bankruptcy petition by the Tax Authority, one of BCT's largest creditors, was a possibility and thus tried to lobby against it, as is shown by the letter addressed to the Tax Director, on 11 July 2001:

"We are turning to you, in this situation, with a conviction that the dispute regarding the submission for bankruptcy will be resolved to the advantage of BCT ., and BCT . [sic], be it thanks to the help of the main shareholder or from other sources, will in principle settle its obligations towards the Board of Revenue by the end of the year 2001, as it promised. We would like to believe that you will keep your favor and your trust in BCT and we would appreciate your position that even though you are one of the biggest creditors, you are against the submission for bankruptcy against BCT.
Thank you for your previous support"

[Exh. C-85.1, p.2]

(iii) Time after the Tax Authority's joinder of the original bankruptcy petitions

261. After the Tax Authority joined the original bankruptcy petitions in March 2002, in communications with the Finance Minister and the Tax Authority, the Claimants requested further tax relief and the withdrawal of the bankruptcy petition.

262. On 3 October 2002, BCT submitted to the Tax Authority 58 new requests for the remission of the arrears of sanctions. In accordance with normal procedure, on 30 January 2003, the Tax Authority forwarded the requests to the Office of State Assistance. The Tax Authority recommended that assistance be granted for the following reasons:

"These are the arrears of the sanction character which resulted before the privatization of the company and they are a result of the non-payment of mostly old kinds of taxes.

- In the case of the tax subject the investment of the foreign capital into the Slovak Republic was realized to the year 1996 when no tax allowances by the reason of the foreign capital investment existed in our country.

- The debtor paid partially the arrears of the principals of the taxes and after several discussions with the tax subject the precondition that the arrears

¹³⁵ *Ibid.*

shall be paid under the condition of further investment of the foreign capital exists.

- The tax administrator does not want to choose the way of liquidation of the company also by the reason that the tax subject is a part of the history of Bratislava.

[Exh. R-48, p. 5]

263. In spite of this recommendation, on 10 December 2003, the Office for State Assistance denied the assistance requested on the ground that the commencement of bankruptcy proceedings barred State assistance (Exh. R-43, p. 7).

264. Shortly after the requests for assistance and long before their denial, on 15 November 2002, the Tax Authority agreed to cancel the pledge it had on the real estate and to file a request to the District Court in Bratislava withdrawing its petition for the bankruptcy of BCT subject to the following conditions:

- *1. confirmation on deposition of the part of principal for the purpose of payment the tax arrear [sic]
2. purchase contract for the real estate in question - 2 days after its conclusion
3. expert opinion for the real estate in question."

[Exh. C-98, p. 1]

265. On 21 November 2002, in a meeting with BCT, the Tax Authority confirmed that its bankruptcy petition would only be withdrawn if BCT paid the principal of the tax arrears equivalent to SKK 40,000,000 (Exh. C-99, p. 1). The Claimants stated that the payment of the outstanding principal of the tax debts was expected by the end of January 2003 due to the sale of immovable property. Later, on 14 January 2003, BCT renewed this assurance (Exh. C-102).

266. The Tribunal finds that the conditions set by the Tax Authority are unequivocal. The Claimants' argument that the minutes of the 21 November 2002 meeting constitute a *de facto* unconditional agreement to withdraw the bankruptcy petition (Exh. C-313, p. 5) is contradicted by the text of these very minutes ("the Tax Office will withdraw from the petition in bankruptcy only when the company BCT, a.s. pays the principal of the arrears of taxes, i.e. about SKK 40 million" (Exh. C-99, p. 1)). In this respect, the Tribunal concurs with the understanding of the Respondent's fact witness Mr. Š . concerning the exceptional and limited nature of these concessions on the part of the Tax Authority (Tr.M., 389-392).

267. The record does not indicate that the principal of the tax arrears was paid, not to speak of it being paid before the end of January 2003. Therefore, the Tribunal finds that the condition required for the withdrawal of the petition of bankruptcy was never met.
268. The Claimants further allege that the letter sent by Ms. H Director of the Tax Office of Bratislava, to the County Court of Bratislava, constituted a formal withdrawal of the bankruptcy petition previously submitted on 7 May 2003 (Exh. C-315). The letter indeed objects to the fact that the bankruptcy was adjudicated solely on the basis of the petition of the Tax Authority, when the latter's sole purpose was to join other petitions which had actually been dismissed the day before. At best, it is unclear whether the letter intended to effect a withdrawal. Having said that, the Tribunal is persuaded by the opinion of the Respondent's legal expert, that the letter in question does not meet the requirements for a withdrawal, that the Tax Authority could not have effectively withdrawn a petition once the bankruptcy had been adjudicated, and that the law authorizes the adjudication of bankruptcy on the basis of a single petition.¹³⁶ The Claimants' own legal expert report confirms the latter conclusion.¹³⁷
269. On the basis of the foregoing facts, the Tribunal considers that the conduct of the Finance Minister and of the Tax Authority appears justified and cannot be deemed to frustrate the legitimate expectations of the Claimants. Since no assurances of relief on old tax arrears had been given at the time the investment, since BCT under the Claimant's management remained an unprofitable operation that never achieved the modernization expected from the privatization, and since its tax arrears had doubled in spite of some partial payments, it was unrealistic on the part of the Claimants to expect indefinite benevolence of the Slovak State towards BCT.
270. The flexibility showed by the administration over a certain period of time did not create a right in favour of the Claimants. The fact that the State's lenient attitude ended at some point, did not constitute a treaty breach.

¹³⁶ B. , Exp. Rep., section 3.

¹³⁷ V. Exp. Rep. (Exh. C-258), p. 7.

b. Did the Claimants experience a denial of justice?

271. The Claimants label the actions of the Slovak Judiciary in the bankruptcy proceedings as "undue delay", "unfair trial", and more often as "denial of justice". They generally attribute these actions to a conspiracy of the "financial mafia" and the State organs, particularly the judge in charge of the bankruptcy proceedings. The Claimants assert that that judge was bribed by the "financial mafia" and thus failed to act impartially. They also submit that the Slovak government failed to take corrective measures against this situation.
272. Although the BIT does not specifically refer to the concept of denial of justice, the Tribunal, in line with other tribunals and established doctrine, considers it to be comprised in the FET standard.¹³⁸
273. The Tribunal notes that a claim for denial of justice under international law is a demanding one. To meet the applicable test, it will not be enough to claim that municipal law has been breached, that the decision of a national court is erroneous, that a judicial procedure was incompetently conducted, or that the actions of the judge in question were probably motivated by corruption. A denial of justice implies the failure of a national system as a whole to satisfy minimum standards.¹³⁹
274. In the present case, since the adjudication of bankruptcy against BCT was upheld by the Supreme Court, the question is whether the judicial system of the Slovak Republic breached the BIT by refusing to entertain a suit, subjecting it to undue delay, administering justice in a seriously inadequate way, or by an arbitrary or malicious misapplication of the law.¹⁴⁰ The burden of proof is on the Claimants to demonstrate such a systemic injustice.
275. The Tribunal will analyse the Claimants' allegations from a procedural and a substantive perspective. Depending on the outcome of this analysis, it will review whether local remedies were exhausted, a requirement which applies to both

¹³⁸ See for eg. *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶7.4.11; *Jan de Nul*, ¶188; *Frontier*, ¶293. See also R. Dolzer and C. Schreuer, "Principles of International Investment Law", Oxford University Press, Foundations of Public International Law series, 2008, p.142 ff.

¹³⁹ *Paulsson*, p. 81, ¶130; *Jan de Nul*, ¶209.

¹⁴⁰ *Azinian*, ¶¶102-103; *Jan de Nul*, ¶209.

substantive and procedural denial of justice, with the exception of the claim of procedural denial of justice arising from delays in the proceedings.¹⁴¹

(i) Procedural denial of justice

276. The Claimants' complain essentially about the lack of due process before the local court and the undue delay in the bankruptcy proceedings.

• Due Process

277. The Claimants denounce numerous procedural irregularities that allegedly took place in the bankruptcy proceedings. In a nutshell, the Claimants submit that the judge in charge of the file appointed a temporary trustee who was partial to A. S. and allowed that trustee to exceed its duties (by requesting a tax inspection at BCT of all its subsidiaries and asking the land registry office to prevent real estate transfers); that the judge's "active search for other creditors" was improper; and that the joinder of the bankruptcy petitions was incorrect.

278. The Claimants' main support for these allegations is the report containing the conclusions of a review of the bankruptcy file performed by the Slovak Ministry of Justice (the "Report"). The Report was elaborated as a response to an enquiry submitted by the Ambassador of the Kingdom of Belgium on behalf of Claimant 1.

279. Between 2001 and 2003, in accordance with municipal law, the Slovak Ministry of Justice had the power to inspect court records for purposes of quality control and to evaluate the conduct of judges from an ethical point of view.¹⁴²

280. It is in the exercise of this power that the Report was issued on 27 September 2001. The Report reviews the handling of the bankruptcy during the first five months of the proceedings, i.e. from 29 January 2001 (date of the filing of the first original bankruptcy petition by M. B.) to 29 June 2001 (at a time prior to the fourth original bankruptcy petition dated 22 November 2001). Given that the bankruptcy proceedings were finally closed on 12 June 2008,¹⁴³ the temporal scope of the Report appears rather limited.

¹⁴¹ *Jan de Nul*, ¶195.

¹⁴² Exh. C-48, p. 2; V Exp. Rep., p. 5.

¹⁴³ RPHB, Annex A.

281. The Report rejected a number of procedural issues raised by BCT and accepted others. More generally, the Report did express doubts as to the quality of the proceedings in the following terms:

"It can not be stated without a doubt, that the standard of Court proceeding corresponds with these legal duties of a judge [i.e. to act impartially, fairly without unnecessary delays and only on the basis of determined facts in accordance with the law], and that the rule of right for fair trial was preserved".

[Exh. C-48, p.11]

282. In a letter accompanying the Report, the Minister of Justice writes of the following "facts which raise a presumption of inadequate standard of the legal proceedings":

"- the court does not proceed with the documents and evidence submitted by the participants in the proceedings on the part of the petitioners, as well as of the debtor;
- it does not investigate if the conditions for the continuing in proceedings remain in existence;
- even though it results from the filed documents that before the appointment of the preliminary trustee the claims of the petitioners lapsed, the court in proceeding appointed the preliminary trustee in order to ascertain the debtor's property."

[Exh. C-48, p.1]

283. The Tribunal has duly considered the content of the Report. While it does not take the findings lightly, it also finds that the temporal and material scope of the review is limited and that the reservations expressed about the conduct of the proceedings are not conclusive when it comes to establishing a denial of justice on the international level. Further, it notes that the Claimant's own legal expert does not offer support for its findings.

284. First, as the chronologies of the bankruptcy proceedings submitted by the Parties show, the Claimants availed themselves of the remedies available to complain about procedural errors and the alleged incompetence of the judges successively in charge of the bankruptcy. The appeal from the declaration of bankruptcy was indeed based on alleged procedural deficiencies and was ultimately dismissed by the Supreme Court. BCT also filed motions with the Supreme Court to remove Judge P from the case for lack of impartiality, as well as motions for disciplinary action against both Judge P and her successor, Judge H. These motions failed (Exh. R-145; R-178; R-179).

285. Second, the Tribunal notes that the procedural defects reflected in the Report refer to the first five months of the bankruptcy proceedings, when not all the original bankruptcy petitions had been submitted and before the original bankruptcy petitions were dismissed. The original bankruptcy petitions bore no relevance for the adjudication of bankruptcy, which was based on the petitions submitted by the Tax Authority and the municipality of Dunajská Streda. The Supreme Court confirmed the correctness of the bankruptcy adjudication, including the joinder of the Tax Authority petition to the original petitions, a procedural issue that, until the hearing on the merits, the Claimants had raised as a relevant procedural error.
286. Third and foremost, the Tribunal observes that, although the Claimants refer in their pleadings to a number of procedural irregularities in the bankruptcy proceedings, they fail to identify how these alleged irregularities violate international law. The Claimants repeatedly suggest possible connections between a number of alleged actions and certain actors but avoid explaining the causal link between the action, the treaty breach, and the occurrence of the alleged damage.
287. To sum up, the Tribunal finds that the Claimants have not demonstrated that the procedural irregularities were in fact severe improprieties with an impact on the outcome of the case, to the point that the entire procedure becomes objectionable as required by the notion of procedural denial of justice. Other than the inconclusive findings of the report of the Ministry of Justice, which are of a rather limited material and temporal scope, the Claimants offer no support for their claims.
- Duration of the proceedings
288. The Claimants also allege undue delays in the bankruptcy proceedings. However, they fail to establish such delays. Moreover, the expert evidence indicates that the Claimants did not avail themselves during the proceedings of the opportunity to complain about delays.¹⁴⁴
289. The Respondent argues that any possible delays can be explained, among other reasons, by the complexity of the case, the numerous incidental matters raised by the Claimants, which resulted in the file being unavailable to the judge for long periods of time, and BCT's refusal to cooperate with the judge and trustees in submitting reports concerning its assets.

¹⁴⁴ Tr.M., 577.

290. The Tribunal agrees with the view expressed by the *Chevron* Tribunal, cited by both Parties, that the complexity of the case, the behaviour of the litigants involved, the significance of the interests at stake, and the behaviour of the courts themselves are factors to consider in the analysis of a claim of undue delay constituting a denial of justice.¹⁴⁵ Having reviewed the expert evidence and particularly the timeline of the proceedings submitted by the Parties, the Tribunal is satisfied with the Respondent's explanations. No excessive procedural delays resulting in a denial of justice or a violation of Article 3 of the BIT have been demonstrated.

(ii) Substantive denial of justice

291. In this context, the task of the Tribunal is to determine if the outcome of the bankruptcy proceedings is discreditable and offensive to judicial propriety.¹⁴⁶ This high threshold reflects the demanding nature of a claim for a denial of justice in international law. It is indeed common ground that the role of an investment tribunal is not to serve as a court of appeal for national courts.¹⁴⁷

292. The Tribunal observes that despite the seriousness of the allegations of corruption and conspiracy to ruin the investment made against the Judiciary and other State organs, the Claimants made no serious attempt to establish that the adjudication of the bankruptcy of BCT by the Slovak Courts was so bereft of a basis in law that the judgment was in effect arbitrary or malicious. Not only is their claim contradicted by their own actions (whereby they appealed the adjudication of bankruptcy only on procedural grounds and did not question the substantive reasons for the bankruptcy), but the views of the Claimant's own legal expert supported the correctness of the proceedings for the most part. The Respondent's evidence that the legal requirements for the adjudication of the bankruptcy were met was thus not relevantly challenged. The rest of the record confirms the correctness of the bankruptcy adjudication.

293. In the course of this arbitration, the Claimant made the following statements:

"Justice was administered according to the law's standards, but contrary to what the Republic supposes, this does not mean that the BIT was not violated."

[CSM, ¶29; emphasis added]

¹⁴⁵ *Chevron Partial Award*, ¶250.

¹⁴⁶ *Jan de Nul*, ¶209.

¹⁴⁷ *Mondev*, ¶126; *Azinian*, ¶199.

"[t]he State, the ministers, the judges, the tax authorities have acted formally correct. Once again: C does not dispute broadly that formally has been acted according to the sound law in development, with the exception of, amongst others, the Act of Judge 7."

[Opening Statement, Tr.M., 14-15; emphasis added]

294. The Tribunal understands these statements to mean that the Claimants acknowledge that the bankruptcy proceedings were conducted in conformity with municipal law. Although not expressed, these statements suggest that beyond strict legality, the Claimants had reasons to believe that the actions of State organs were inspired by illicit motives due to the influence of the "financial mafia".
295. The Claimants are aware that this type of allegation is difficult to prove. Consequently, they attempt to shift the burden of proof by suggesting a general presumption of corruption in the Slovak Republic.

"Already from the very beginning of the hearings to O the state asked if he had concretely observed any bribes. That it is at least very plausible that this has happened, appears from all the mentioned proofs. Direct proof of the payment of bribes can never be given in these cases, but as has already been considered in previous ICSID decisions: one may not feel too strongly about proof in such a case. It sufficiently appears from the combined evidence above, how difficult it was for O at the beginning of the hearings to react to the question whether there were concrete indications of the judge's misconduct. It cannot possibly be expressed orally."

[CPHB, ¶¶65, 66]

"O. of course realizes that he has to carry the onus of proof for his statements. Hereby the note that he doesn't have to prove evil intent in case of Denial of Justice, which is the case here. O realizes that he probably cannot substantiate the conspiracy theory with solid evidence, but that is not necessary in this case, the more because A S 's intentions were generally known (also see S ' J). This generally known reputation must have reached judge 7, the head of the Tax Office and the trustees (also A S 's lawyer) which means that any support of it, whether it was in conformity with the law or not, implies evil intent."

[CSM, ¶92; emphasis added]

296. In light of these statements, it is clear that a claim for denial of justice must fail. The Claimants failed to provide sufficient proof of the alleged missteps of the bankruptcy proceedings. As regards a claim for a substantial denial of justice, mere suggestions of illegitimate conduct, general allegations of corruption and shortcomings of a

judicial system do not constitute evidence of a treaty breach or a violation of international law. Neither did the Claimants explain the causal link between the alleged conduct by the relevant actors and the alleged damage. The burden of proof cannot be simply shifted by attempting to create a general presumption of corruption in a given State.

297. Even accepting that irregularities did occur in the course of the proceedings, the record shows that the bankruptcy of BCT was the lawful consequence of the Claimants' persistent default on their tax debts, and no proof was found that the State organs conspired with the so-called "financial" or "bankruptcy mafia" against the investors or their investment in the Slovak Republic.
298. In light of this outcome, the Tribunal can dispense with determining whether the requirement of exhaustion of local remedies was met.

(iii) Conclusion

299. The BIT does not grant protection for mere breaches of local procedural law nor does it open an extraordinary appeal from the decisions of municipal courts. The Claimant misapprehends the obligations of the Slovak Republic under the BIT and the nature of the arbitral mechanism under the BIT.

c. Have the State organs acted in bad faith?

300. The Claimants' general allegations of a common malicious purpose behind the conduct of State organs remain speculative. In light of the financial situation of BCT at the time the investment was made and the company's subsequent business performance, particularly the substantial increase of tax arrears and persistent non-compliance with the payment schedules granted by the Tax Authority, one can see no malice in the Tax Authority joining in ongoing bankruptcy proceedings in the Finance Minister putting an end to the flexible attitude previously shown to the investor, and ultimately in the Judiciary declaring the bankruptcy of BCT.
301. In consideration of all the circumstances of the case, the Tribunal is satisfied that the State organs did not act in bad faith *vis à vis* the investor. The purpose behind the actions of the public organs involved in this case i.e. the collection of overdue taxes, was undoubtedly legitimate.

302. The Claimants further submit that there was a concerted action of State or officials and the "financial mafia" in order to trigger the bankruptcy of BCT. Again, these allegations have not been established. Instead, the Claimants suggested bribery as a possible explanation for the alleged conducts of relevant actors, and offered general reports about corruption in Slovak courts (Exh. C-254; C-255): notably, local news clippings concerning irregularities in bankruptcy proceedings handled by the Regional Court of Bratislava and disciplinary proceedings by the Slovak Ministry of Justice against members of that court (Exh. C-20; C-110; C-255), as well as reports by the European Union (Exh. C-252, p. 14) and the United States government (Exh. C-253, p.6) which mention that bribery is widespread in Slovak courts, while at the same time viewing the country as friendly to foreign investment.¹⁴⁸
303. While such general reports are to be taken very seriously as a matter of policy, they cannot substitute for evidence of a treaty breach in a specific instance. For obvious reasons, it is generally difficult to bring positive proof of corruption. Yet, corruption can also be proven by circumstantial evidence.¹⁴⁹ In the present case, both are entirely lacking. Mere insinuations cannot meet the burden of proof which rests on the Claimants.¹⁵⁰

d. Taking all of the acts of the Respondent together, was there a violation of Article 3.1 of the BIT?

304. Having considered the evidence discussed in the preceding sections, the Tribunal has denied the existence of treaty breaches with respect to the Respondent's acts taken separately. Assuming, for the sake of completeness, that a number of separate non-breaches can, in theory, result in a cumulative breach, this is not the case in these proceedings. Even if all relevant acts are considered together, the conduct of the Respondent does not amount to a breach of the BIT.

¹⁴⁸ Exh. C-253, "Overview", p. 1, reads as follows:
 "Since 1998, Slovakia's once troubled economy has been transformed into a business friendly State that leads the region in economic growth. In its Doing Business in 2005 Report, the World Bank named Slovakia as the world's top reformer in improving its investment climate over the last year, allowing it to join the Top 20 Economies in the world for ease of doing business. The Country's low-cost yet skilled labor force, low taxes, liberal labor code and favorable geographic location have helped it become one of Europe's favourite investment markets, leading Forbes magazine to call it the world's next Hong Kong or Ireland."

¹⁴⁹ As the tribunal in the *Rumeli* case stated, an allegation of conspiracy "must, if it is to be supported only by circumstantial evidence, be proved by evidence which leads clearly and convincingly to the inference that a conspiracy has occurred." *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan*, ICSID Case No. ARB/05/16, Award, 21 July 2008, ¶709.

¹⁵⁰ See Section IV.A.5 above.

2.3.2 Article 3.2 of the BIT (Full Protection and Security)

305. Article 3.2 of the BIT reads as follows:

"More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to the investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned."

306. The Tribunal notes that neither Party specifically addresses the content of the full protection and security standard.

307. It also notes that the factual allegations advanced by the Claimants in support of violations of Article 3.1 (FET) and 3.2 (FPS) are identical. It thus understands that the Claimants' reference to Article 3.2 of the BIT refers to the facts that were already covered in the context of Article 3.1 of the BIT.

308. In its analysis of the facts under Article 3.1, the Tribunal found no breach of FET. Given that the facts alleged are the same, and given that in the BIT full protection and security appears as a specific application of the general FET standard, the Tribunal considers it unnecessary to analyze these allegations again separately under Article 3.2. In the context of the present case, if no violation of Article 3.1 of the BIT was found, there was no violation of Article 3.2 either. In other words, the conclusions reached with respect to the conduct of the Judiciary, the Tax Authority and the Finance Ministry in connection with the breach of FET, equally apply here. The allegation of breach of the FPS standard lacks a factual basis.

3. Breach of Article 5 BIT (Expropriation)

309. Article 5 of the BIT reads as follows:

"Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:

- (a) the measures are taken in the public interest and under due process of law;
- (b) the measures are not discriminatory;
- (c) the measures are accompanied by provision for the payment of just compensation.

Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in any freely convertible currency accepted by the claimants."

310. As regards the mention of Article 5 of the BIT in connection with actions of the Respondent, the Tribunal observes that the Claimants use the word "expropriation" in a confusing manner, which seems to convey that their understanding of the word is that of an egregious act, a synonym for denial of justice.

311. For instance, as part of their conclusions on the section of their Submission on the Merits devoted to the concept of denial of justice, the Claimants make the following statements:

"In concreto, denial of justice means: violation of the BIT articles 3 part 1 and 2 and article 5. So, there is a lack of protection and the investments are not treated fairly and just. It is a matter of expropriation."

[CSM, ¶19]

"[J]udge 7 deprived (as an 'organ' her act is attributed to the Contracting Party) O , as the first link in a chain, of his properties and she also directly violated article 5 of the BIT."

[CSM, ¶64]

312. In their Submission on the Merits, the Claimants also make the following statement in the section on damages:

"117.

In this procedure the question is repeatedly asked, which violations of the BIT are to be attributed to which losses.

It was repeatedly remarked above, that it is a matter of direct, but also of creeping expropriation, which *cannot be considered apart from the Denial of Justice and the discriminatory acts by the organs*, and that the mutual connections exist in an unbroken period of time. Expropriation is a violation of the BIT, which has caused a total loss and thus makes a separation pointless."

[CSM, ¶117; emphasis added]

313. This idiosyncratic interpretation of the word "expropriation" is confirmed by the fact that the Claimants do not offer a rationalization or explanation on how the acts about which they complain constitute an expropriation. For example, when referring to the acts of the Tax Authority in their post-hearing submission, the Claimants limit themselves to asserting that the tax authorities "collaborated with an act of expropriation (Article 5 of the BIT) via an unnecessary bankruptcy, an act which caused all the damage, which made the Tax Office the 3rd link in the chain of Evil". The Claimants do not explain this assertion, neither do they include this concept in the conclusions of the section. The word "expropriation" is mentioned only on two other occasions in the brief:

"107.

Apart from the unique character, there was consequently no good reason for the tax authorities to request bankruptcy at that moment, so *there's talk of an act of expropriation* by doing this nevertheless."

"135.

We refer to what was remarked by O in previous records with regard to the *creeping expropriation*, but also to the *Lauder* case, published on the internet http://www.mfcr.cz/cps/rde/xbcr/mfcr/PartialAward_pdf.pdf, Stockholm 3rd September 2001 in paragraph 583."

[CPHB, ¶107, 135; emphasis added]¹⁵¹

314. Prior submissions by the Claimants do not contain clear and specific allegations of expropriation regarding the acts of the Tax Authority. For example, in their Submission on the Merits, the Claimants make the following claim, in relation to the Director of Tax Authority of Bratislava II for the period of 1 June 1999 - 20 May 2002, Mr. E :

"Direct violation of the articles 3, par. 1 and 2 and article 5 of the BIT 78.

The unlawful attitude of the Tax Office was elaborately dealt with above. She, B anyhow, knew exactly about the bad intentions of A S and helped A S with the realization of them.

Apart from the general knowledge about A S's intention, we refer to the fact that the Tax Office was informed via the letter of BCT on 11th July 2001 to B , in which the entire background of the petitions in bankruptcy from the side of A S : was depicted and help in the procedure was asked for in vain, because the tax authorities of Bratislava II were always mentioned as support requirer.

[...]

B should, informed [sic] about the abuse of law by A S : never have supported its unlawful actions. By doing so, the Tax Office acts unlawfully and in violation of the BIT, articles 3 and 5 [sic].

[CSM, ¶78; emphasis in original]

315. The expression "creeping expropriation" in particular, does not appear in previous submissions by the Claimants, except for their Submission on the Merits which quotes *Tecmed v. Mexico* and makes the following comments:

"91. [T]he Republic is responsible [...] also for its Ministers, who cause a similar *creeping expropriation* by remaining silent, where protection was needed.

The state is to blame [...] because it did not actively intervene in this *creeping expropriation process*".

...

¹⁵¹ The source indicated in CPHB, ¶135 does not actually correspond to the *Lauder* case, but to *CME Czech Republic BV v Czech Republic*, Ad hoc - UNCITRAL Arbitration Rules, Partial Award and Separate Opinion, 13 September 2001.

117. It was repeatedly remarked above, that it is a matter of direct, but also of *creeping expropriation*, which cannot be considered apart from the Denial of Justice and the discriminatory acts by the organs, and that the mutual connections exist in an unbroken period of time. Expropriation is a violation of the BIT, which has caused a total loss and thus makes a separation pointless."

[CSM, ¶¶91,177; emphasis added]

316. In their post-hearing brief, after characterizing the acts of the Judiciary as a violation of Article 3 of the BIT, the Claimants add that "[f]urthermore the judge's actions come down to wrongful expropriation of a public body".¹⁵² Other than this phrase and a quote of Article 5 of the BIT, the Claimants limit their claim of expropriation concerning the acts and omissions of the Judiciary to the following phrase:

"69. By her way of acting the judge has caused the total damage, *casu quo* formed the first link in the chain of Evil by her actions, she was a part of the creeping expropriation with, as a consequence, a total damage as formulated in the records, so that a discussion about the direct damage does not have much sense."

[CPHB, ¶69]

317. Finally, in relation to the actions of the Finance Minister, the Claimants make in their post-hearing brief the allegation that "the actions of the Minister constitute a violation of art. 3 of the BIT... but also of art. 5 of the BIT", after which the text of the provision is transcribed, followed by the phrase "[b]y this the Minister has caused the total-damage".¹⁵³ The allegation that the acts of the Finance Minister violated Article 5 of the BIT had not been made in earlier submissions.
318. Given the brevity of the allegation of the Claimants concerning expropriation, the Respondent limited its response to emphasizing the vagueness of this claim.¹⁵⁴
319. The Tribunal has reviewed the entire record and considers that the claim for expropriation is not substantiated. The fleeting mention of the word "expropriation" without an explanation, or a literal quotation of another case cannot stand in lieu of an allegation of specific facts giving rise to a treaty breach. "Labelling" - as an investment tribunal once wrote - "is no substitute for analysis".¹⁵⁵

¹⁵² CPHB, ¶68.

¹⁵³ CPHB, ¶¶133-134.

¹⁵⁴ RPHB, ¶20.

¹⁵⁵ *Azinian*, ¶90.

320. In a non-legal manner of speaking, the liberal use of the term "expropriation" or the expression "creeping expropriation" may help an ordinary person with no knowledge of the law to convey the feeling of having suffered an extraordinarily unjust behaviour. However, in a legal brief, a rationalization is necessary if acts that have been previously characterized as undue delay, unfair trial, discriminatory treatment, or denial of justice¹⁵⁶ – even as a human rights violation¹⁵⁷ – are to be considered also as an "expropriation" in the technical sense of the word. The random "sprinkling" throughout the pleadings of a strong term with a well defined legal meaning such as "expropriation" or "creeping expropriation" does not transform that term by itself into an allegation of facts founding a treaty violation.¹⁵⁸ In other words, the Claimants have not discharged the burden of allegation of a treaty breach involving expropriation.¹⁵⁹
321. This being so, the Tribunal's analysis of the allegations related to a breach of fair and equitable treatment and the negative conclusion reached in this respect show that there can be no successful invocation of an expropriation under the facts of this case. For the avoidance of doubt, the Tribunal holds that if no breach of Article 3 of the BIT was found, Article 5 was not violated either.

4. Final conclusion

322. On the basis of the foregoing analysis, the Tribunal concludes that the actions of the organs of the Slovak Republic, whether considered together or separately, do not amount to a breach of Article 3 (neither under paragraph 1 nor under paragraph 2) of the BIT; nor do they amount to a breach Article 5 of the BIT.
323. In reaching this conclusion, the Tribunal does not ignore that the Claimants lost their investment in the Slovak Republic and that they allege that this occurrence affected their reputation in other countries. However unfortunate these alleged losses may have been, they were part of the risk that the investors assumed when they acquired the shares of a heavily indebted company in need of substantial injections of capital. A BIT does not offer protection against this type of business risk.

¹⁵⁶ CSM, ¶19.

¹⁵⁷ CRep., ¶15; CSM, p. 18, ¶3.

¹⁵⁸ *Marvin Roy Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award on Merits and Separate Opinion, 16 December 2002, ¶112.

¹⁵⁹ *Link-Trading Joint Stock Company v. Moldova*, Ad hoc - UNCITRAL Arbitration Rules, Final Award, 18 April 2002, ¶¶87, 91.

D. COSTS

1. Parties' Costs statements

324. On 30 September 2011, the Claimants made their submission of costs, accompanied by a detailed statement of "external costs", as follows:

"A.

Activities by GLDK-lawyers, starting in January 2006, consisting of
client conferences,
file study
jurisprudence study
contact Asser Institute
contact with Czech and Slovak lawyers
trip with client to Bratislava Ministry for consultation and arrangement attempt at
the invitation of the Ministry
correspondence with the arbitrators
composition and study of the records
consultation of accountant, notary public
legislation study, jurisprudence Oxford University
session attendances

Total € 1.461.855,00

B.

Claimant's external costs (see attached specification) € 237.606,76

C.

Advance payment to Arbitrators € 400.000,00"

325. The Claimants' request for relief on costs is contained in their post-hearing brief, which, in relevant part, reads as follows:

"5.

To sentence the state in the costs of the trial, including the costs made by O, for judicial costs and advances."

[CPHB, ¶190]

326. On 12 September 2011, the Respondent made its submission of costs, accompanied by a statement prepared by the Ministry of Finance, as follows:

"The costs of the Respondent in these arbitration proceedings representing the total amount of EUR 12.839.240,48 (twelve millions eight hundred thirty nine thousands and two hundred and forty Euros and 48 cents).

The total amount of the Respondent's costs has been calculated as follows:

- a. Advance payments paid to the Arbitral Tribunal EUR 400.000,00;
- b. Respondent' costs of the arbitration EUR 12.439.240,48

Please find attached Statement of Respondent's costs prepared by the Ministry of Finance of the Slovak Republic with the more detailed description of particular costs.

With regard to the Article 293(d) of the Respondent's Post-hearing Brief dated 20 May 2011 (and Respondent's previous submissions), the Respondent proposes the Claimants are ordered to pay these Respondent's costs of the arbitration proceedings in amount of EUR 12.839.240,48 within 30 days from delivery of the award."

327. The Respondent request the following relief in relation to costs:

"The Respondent shall be awarded the costs of the arbitration and its legal representation."

[RPHB, ¶293]

2. Costs of the Proceedings

328. At the beginning of the arbitration, the Parties paid a first advance of EUR 100'000 each, i.e., a total of EUR 200'000. On 15 September 2009, the remainder of such advance, EUR 181'301.26, was transferred by Dr. Briner to the trust account of Prof. Kaufman-Kohler. Subsequently, the Parties paid further advances: a second advance of EUR 100'000 each, i.e., a total of EUR 200'000 in July 2010; a third advance of EUR 135'000 each, i.e., a total of EUR 270'000 in April 2011; and a fourth advance of EUR 65'000 each, i.e., a total of EUR 130'000 in September 2011 (for the Respondent) and in October 2011 (for the Claimants). The total amounts to EUR 800'000.

329. In addition, the Parties have advanced costs for court reporting and interpretation at the hearings amounting to EUR 11'630 for the Claimants and to EUR 22'396.46 for the Respondent. Particularly, in connection with the hearing on jurisdiction held in Geneva on 17 November 2009, the Parties advanced GBP 1'002.35 each, that is a total of GBP 2004.70 for the services of B. . R. (court reporters), i.e., EUR 2'218.20 (at the exchange rate of 1.1065¹⁶⁰). In connection with the hearing on the merits held in Geneva from 11 to 13 January 2011, the Parties advanced GBP 4'442.10 each, that is a total of GBP 8'884.20, for the services of B. R. (court reporters), i.e., EUR 10'221.27 (at the exchange rate of 1.1505¹⁶¹). Further, the Claimants advanced

¹⁶⁰ The exchange rate used is the one of 9 March 2010, i.e., the date of the court reporter's invoice (source www.xe.com).

¹⁶¹ The exchange rate used is the one of 23 March 2011, i.e., the date of the court reporter's invoice (source www.xe.com).

CHF 7'025.40 and the Respondent CHF 21'006.00 for the services of Intercongress (interpreters), i.e., a total of EUR 21'586.98 (at the exchange rate of 0.7701¹⁶²).

330. The arbitration costs advanced by the Parties thus amounts to an aggregate of EUR 834'026.46 (EUR 800'000 + EUR 11'630 + EUR 22'396.46). The Claimants have advanced EUR 411'630 (EUR 400'000 + EUR 11'630) and the Respondent has advanced EUR 422'396.46 (EUR 400'000 + EUR 22'396.46).
331. The Tribunal has incurred expenses in a total amount of EUR 42'232.48 including expenses for hearing rooms, travel, lodging and bank charges.
332. The members of the Tribunal have collectively spent a total of 1'440 hours as follows: Dr. Briner 37 hours; Dr. Vojtěch Trapl 340 hours; Prof. Mikhail Wladimiroff 344 hours; and Prof. Kaufmann-Kohler 719 hours. It was agreed that the Tribunal's time would be compensated at an hourly rate of EUR 500 exclusive of VAT, where applicable. The total arbitrator fees (excluding VAT) amount to EUR 720'000.
333. The total costs of the proceedings are thus EUR 796'258.93, detailed as follows:

Expenses for court reporters	EUR 12'439.47
Expenses for interpreters	EUR 21'586.98
Tribunal expenses	EUR 42'232.48
Tribunal fees, excluding VAT	<u>EUR 720'000.00</u>
Total	EUR 796'258.93

334. Consequently, the Tribunal notes that there is a surplus of EUR 37'767.53 (i.e. EUR 834'026.46 [total advances] less EUR 796'258.93 [total arbitration costs]).
335. In addition, the applicable VAT (Prof. Mikhail Wladimiroff and Dr. Vojtěch Trapl) amounts to EUR 69'985.50. In its letter dated 30 March 2012, the Tribunal requested the Parties to settle this amount in equal parts, i.e. EUR 34'992.75 each. On 3 April 2012, payment was made by the Claimants and on 17 April 2012 by the Respondent.

¹⁶² The exchange rate used is the one of 20 January 2011, i.e., the date of the interpreter's invoice (source www.xe.com). Under PO No 16, para. 2.9, "the costs will be advanced by the Party calling the witness who needs interpretation, without prejudice to the final allocation".

3. Allocation of costs

336. The present proceedings are governed by the UNCITRAL Rules, Articles 40(1) and (2) which, in relevant part, read as follows:

"Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable."

337. The UNCITRAL Rules thus adopt the rule "costs follow the event" with respect to the costs of the arbitration and confer broad powers to the Tribunal in connection with the Parties' costs.

338. With respect to the arbitration costs and VAT (as opposed to the Parties' legal and other costs), the Claimants did not succeed on their claims. Therefore, they shall bear the arbitration costs and VAT expenses advanced by the Respondent. As stated above, the arbitration costs advanced by the Respondent amount to EUR 422'396.46. The surplus of advances, i.e. EUR 37'767.53, will be returned to the Respondent. Therefore, the Tribunal directs the Claimants to pay to the Respondent the balance, i.e., EUR 384'628.93 (EUR 422'396.46 less EUR 37'767.53). Additionally, the Tribunal directs the Claimants to reimburse the VAT expenses advanced by the Respondent, i.e. EUR 34'992.75.

339. On the other hand, the costs of legal representation and other costs incurred by the Parties call for a number of observations. First, the discrepancy between the amounts expended is striking. One party has invested a lot into this case, the other much less. Each one made its choices and bears the consequences. The Tribunal does not consider that one should necessarily pay for the choice of the other. Second, the deficiencies in the presentation of the Claimants' case¹⁶³ have made the resolution of this dispute unusually burdensome for the Tribunal and presumably also for the Respondent. At the same time, the Tribunal stresses the Parties' cooperative attitude throughout the arbitration. Third, in the exercise of their discretion in cost matters, investment tribunals often rule that each party bears its

¹⁶³ See Section IV.C.1.1 above.

own costs. Sometimes, more under ICSID than UNCITRAL Rules, they even decide that the arbitration costs should be borne equally, even where one party has undoubtedly prevailed. In light of Article 40(1) and of the clear outcome of this case, the Tribunal does not find this latter solution appropriate, which is the reason why it determined that the Claimants will bear the entirety of the arbitration costs.

340. The situation is different for the party costs for which the Tribunal enjoys wide discretion under Article 40(2). Having pondered all the elements set out in the preceding paragraph, the Tribunal considers it fair that the Claimants pay to the Respondent an amount of EUR 2'000'000 as contribution to party costs. This is in the range of the amount which the Claimants expended for the presentation of their own case.

V. RELIEF

341. For the reasons set forth above, the Tribunal makes the following decision:
- (i) The Claimants' requests for an "interlocutory decree" on liability and continuation of the proceedings and for the appointment of tribunal-appointed quantum experts are denied;
 - (ii) The Respondent has not breached the fair and equitable treatment standard of Article 3.1 of the Treaty;
 - (iii) The Respondent has not breached the full security and protection standard of Article 3.2 of the Treaty;
 - (iv) The Respondent has not breached the prohibition of expropriation of Article 5 of the Treaty;
 - (v) The Claimants shall bear the arbitration costs, which amount to EUR 796'528.93, and related VAT of EUR 69'985.50. Considering the return of the excess funds by the Tribunal to the Respondent and the Claimants' own advances, the Claimants shall pay to the Respondent EUR 384'628.93 and related VAT expenses in the amount of EUR 34'992.75 within 30 days of the notification of this award;
 - (vi) The Claimants shall pay EUR 2'000'000 to the Respondent as contribution to its legal and other costs incurred in connection with this arbitration within 30 days of notification of this award; and
 - (vii) All other claims are dismissed.

Place of arbitration: Geneva

Date: 23 April 2012


Prof. Mikhail Wladimiroff


Dr. Vojtěch Trapl


Prof. Gabrielle Kaufmann-Kehler