

CESKOSLOVENSKA OBCHODNI BANKA, A.S.

v.

SLOVAK REPUBLIC
(ICSID CASE No. ARB/97/4)

Procedural Order No. 3

Whereas on September 9, 1998 this Tribunal denied Claimant's request, dated September 4, 1998, for emergency interim restraining measures and reserved its decision on Claimant's request, of the same date, for provisional measures until such time as it was able to consider the observations of the parties thereon (Procedural Order No. 2);

Whereas the Tribunal now has before it the observations of the parties, namely, Respondent's Reply Memorial, dated October 5, 1998; Claimant's Reply Memorial dated October 14, 1998; and Respondent's Rejoinder, dated October 19, 1998;

Whereas in denying Claimant's request for emergency interim restraining measures, the Tribunal in Procedural Order No. 2 noted, inter alia, that "this Tribunal has no reason to assume that the Bratislava Regional Court, if duly informed by the parties of the pendency of the instant arbitration, the request for provisional measures, and the international legal norms applicable thereto, would fail to suspend the September 10, 1998 hearing or defer consideration of the issues relevant to the dispute submitted to this Tribunal until such time as this Tribunal has had an opportunity to decide on the request for provisional measures";

Whereas on September 10, 1998, after being informed by Claimant of the contents of Procedural Order No. 2, the Bratislava Regional Court deferred the bankruptcy hearing until December 3, 1998 and took the Claimant's request for suspension of the bankruptcy proceedings under advisement;

Whereas in renewing its request for Provisional Measures and Emergency Interim Restraining Measures, Claimant contends that "there is at present no assurance that the Bratislava Regional Court will suspend the proceedings or that CSOB will not be obliged to appear before the Court on December 3, 1998." Claimant further submits that deferral of the bankruptcy hearing does not have the effect of suspending Claimant's obligation to substantiate its claims before the bankruptcy trustee;

Whereas Respondent submits that Claimant is not entitled to the relief requested because (a) provisional measures under Article 47 of the ICSID Convention¹ may only be granted in “compelling circumstances” or circumstances of “absolute necessity,” which are absent in the instant case; and (b) because the Respondent is not a party to the bankruptcy proceedings before the Bratislava Regional Court and because the Tribunal lacks jurisdiction over a party in those proceedings which is not subject to the control of the Respondent. The Respondent further contends that the issues before the Tribunal are not the same as those to be decided by the Bratislava Regional Court in the pending bankruptcy proceedings;

Whereas, in addition to rejecting Respondent’s contention that the grant of provisional measures under Article 47 of the ICSID Convention require more than a showing that they are necessary “to preserve the respective rights of the parties,” Claimants submit that the continuation of the bankruptcy proceedings will adversely affect its rights since some of the same issues to be decided by the Tribunal will also be decided in those proceedings, in particular, the composition of the “bankruptcy estate,” which will involve a determination of the question whether the Slovak Republic is obligated under the Consolidation Agreement to cover the losses of the Slovak Collection Company, the bankrupt entity;

Whereas the Tribunal considers that the provisional measures envisaged under Article 47 of the ICSID Convention are not exceptional measures in the sense that they require more than a showing that they are necessary to preserve the rights of the parties and, further, that the rights to be thus preserved include, in principle, the right to the exclusive remedy provided for in Article 26 of the Convention²;

Whereas the Tribunal considers that the Claimant’s request for provisional measures would be indicated if it appeared that the Bratislava Regional Court were to deal with the claim the Slovak Collection Company might have against the Slovak Republic, the Respondent in this arbitration, under the Consolidation Agreement entered into by the Claimant and the Respondent;

Whereas, however, the Tribunal has no reason to assume that the Bratislava Regional Court, having been duly informed of the instant arbitration, the request for provisional measures, and the international legal norms applicable thereto would fail to suspend the bankruptcy proceedings to the extent that such proceedings include a

¹ Art. 47: “Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.”

² Art. 26: “Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

determination as to whether the Slovak Collection Company (Slovensky inkasna spol. s.r.o.) has a valid asset in the form of a right to receive funds from the Slovak Republic to cover its losses, as contemplated by the very Consolidation Agreement at issue in the instant ICSID arbitration proceedings, and, if so, the extent of that obligation;

Whereas, although Claimant has also requested the Tribunal to recommend “that Respondent take no action of any kind that might aggravate or further undermine the dispute submitted to the Tribunal,” it has failed to demonstrate the need for such measures at this time;

Now, therefore, the Tribunal

- 1) Denies the resubmitted request for emergency interim restraining measures.
- 2) Defers the further consideration and decision Claimant’s request for provisional measures with respect to the bankruptcy proceedings before the Bratislava Regional Court pending the outcome of Claimant’s application to that Court for suspension of these proceedings and its consideration of the issues pending before this Tribunal.
- 3) Invites the parties to keep the Tribunal regularly informed concerning the status of the bankruptcy proceedings before the Bratislava Regional Court.
- 4) Rejects Claimant’s additional request that the Tribunal recommend “that Respondent take no action of any kind that might aggravate or further undermine the dispute submitted to this Tribunal.”

Ferney-Voltaire, France
November 5, 1998

Thomas Buergenthal
President of the Tribunal