UNDER THE ARBITRATION RULES
OF THE UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE

ACHMEA B.V.

(The Netherlands)

Claimant

- v -

THE SLOVAK REPUBLIC

(The Slovak Republic)

Respondent

PCA Case No. 2013-12

AWARD ON JURISDICTION AND ADMISSIBILITY

Arbitral Tribunal:

Dr. Laurent Lévy (Presiding Arbitrator)
Mr. John Beechey
Prof. Pierre-Marie Dupuy

Secretary of the Tribunal:

Mr. Magnus Jesko Langer

20 May 2014

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ABBREVIATIONS

ASH	Association of Slovak Hospitals
BIT	Bilateral Investment Treaty, without further specification the Agreement on the Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Republic of 29 April 1991, entered into force on 1 October 1992 (the "Netherlands-Slovak Republic BIT")
EU	European Union
HSA	Health Surveillance Authority
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ILC Articles	United Nations International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, Annex to General Assembly Resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I/Corr.4)
ILM	International Legal Materials
MP	Member of Parliament
NAFTA	North American Free Trade Area
Notice	Claimant's Notice of Arbitration of 6 February 2013
Objections	Respondent's Objections to Jurisdiction of 14 June 2013
OECD	Organization for Economic Cooperation and Development
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PO	Procedural Order
Rejoinder	Claimant's Rejoinder on Jurisdiction of 30 August 2013
Reply	Respondent's Reply on Jurisdiction of 2 August 2013
Response	Claimant's Response to Objections to Jurisdiction of 12 July 2013
RIAA	Reports of International Arbitral Awards
SMER	SMER-sociálna demokracia, Slovakian political party
SoC	Claimant's Statement of Claim of 5 June 2013
TFEU	Treaty on the Functioning of the European Union
Tr.	Transcript of the hearing on jurisdiction and admissibility of 15 September 2013
UNCITRAL	United Nations Commission on International Trade Law

UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties of 1969 of 23 May 1969, entered into force on 27 January 1980, 1155 *U.N.T.S.* 331
VšZP	*Všeobecná zdravotná poist'ovňa, a.s.*, the State-owned health insurer
e.g.	*Exempli gratia*, for instance
i.e.	*Id est*, that is
n.	Note
p.	Page
¶	Paragraph

I. INTRODUCTION

1. The present arbitration arises under the Agreement on the Encouragement and Reciprocal Protection of Investments of 29 April 1991 between the Kingdom of the Netherlands and Czech and Slovak Republic that entered into force on 1 October 1992 (the "Netherlands-Slovak Republic BIT", the "Treaty" or the "BIT"),[1] in connection with the operation of a health insurance provider company in the territory of the Slovak Republic.

A. THE CLAIMANT

2. The Claimant is Achmea B.V. ("Achmea" or the "Claimant"),[2] a corporation incorporated under the laws of the Kingdom of the Netherlands, with address and contact details as follows:

Mr. René Visser
Mr. Frank ter Borg
Mr. Fred Hoogerbrug
Handelsweg 2
3707 NH Zeist
The Netherlands
Tel.: + 31 30 693 7000
Fax: + 31 30 693 7225
E-mail: rene.visser@achmea.com
frank.ter.borg@achmea.com
fred.hoogerbrug@achmea.com

3. Achmea is represented by:

Mr. Marnix A. Leijten
Mr. Albert Marsman
Ms. Ellen Gerretsen
Ms. Darina Maláčová
De Brauw Blackstone Westbroek N.V.
Claude Debussylaan 80
1082 MD Amsterdam

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[1] Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic ("Netherlands-Slovak Republic BIT") (**Exh. C-1**). The BIT was signed on 29 April 1991 by representatives of the Kingdom of the Netherlands and representatives of the Czech and Slovak Federal Republic, and entered into force on 1 October 1992. After the dissolution of the Czech and Slovak Federal Republic into the Czech Republic and the Slovak Republic, the Slovak Republic confirmed in an exchange of letters dated 9 December 1994 that the BIT remained in force between the Slovak Republic and the Kingdom of the Netherlands.

[2] Before a name change on 18 November 2011, Achmea was known as Eureko B.V. This Award uses, in principle, the name Achmea, even when referring to earlier events.

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B. THE RESPONDENT

4. The Respondent is the Slovak Republic (the "Slovak Republic" or the "Respondent"; together with the Claimant, the "Parties"), with address and contact details as follows:

JUDr. Ing. Andrea Holíková
JUDr. Tomáš Jucha
Ministry of Finance of the Slovak Republic
Štefanovičova 5
P.O. Box 82
817 82 Bratislava
The Slovak Republic
Tel: +421 2 59 58 3231
Fax: +421 2 59 58 2196
E-mail: arbitration@mfsr.sk

5. The Respondent is represented in this arbitration by:

Mr. George von Mehren
Squire Sanders
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London EC2M 4YH
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Tel: +44 20 7655 1395
Fax: +44 20 7655 1001
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Mr. Mark Clodfelter
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Washington, D.C. US 20006-5350
United States of America
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C. THE ARBITRAL TRIBUNAL

6. According to the provisions of Article 8(3) of the BIT, the Arbitral Tribunal was constituted as follows:

> "The arbitral tribunal referred to in paragraph (2) of this Article will be constituted for each individual case in the following way: each party to the dispute appoints one member of the tribunal and the two members thus appointed shall select a national of a third State as Chairman of the tribunal. Each party to the dispute shall appoint its member of the tribunal within two months, and the Chairman shall be appointed within three months from the date on which the investor has notified the other Contracting Party of his decision to submit the dispute to the arbitral tribunal".[3]

7. The Arbitral Tribunal is composed of:

- Mr. John Beechey
- Prof. Pierre-Marie Dupuy

[3] Netherlands-Slovak Republic BIT, Article 8(3) (**Exh. C-1**).

▪ Dr. Laurent Lévy (Presiding Arbitrator)

8. Mr. John Beechey was appointed by the Claimant to serve as member of the Tribunal on 28 March 2013. He is a national of the United Kingdom. His address and contact details are:

Mr. John Beechey
ICC
33-43, avenue du Président Wilson
75116 Paris
France
Tel.: +33 1 49 52 28 21
Fax: +33 1 49 53 29 29
E-mail: john.beechey@iccwbo.org

9. Professor Pierre-Marie Dupuy was appointed by the Respondent to serve as member of the Tribunal on 8 April 2013. He is a national of France. His address and contact details are:

Prof. Pierre-Marie Dupuy
The Graduate Institute of
International and Development Studies
Rue du Lausanne 132
1202 Geneva
Switzerland
Tel.: +41 22 908 57 00
Fax: +41 22 908 57 10
E-mail: pierre-marie.dupuy@graduateinstitute.ch

10. The two members of the Tribunal subsequently chose Dr. Laurent Lévy, a national of the Swiss Confederation and the Federative Republic of Brazil, to serve as presiding Arbitrator of the Tribunal. Dr. Lévy accepted his appointment on 26 April 2013. His address and contact details are:

Dr. Laurent Lévy
Lévy Kaufmann-Kohler
3-5, Rue du Conseil-Général
P.O. Box 552
1211 Geneva 4
Switzerland
Tel.: +41 22 809 6200
Fax: +41 22 809 6201
E-mail: laurent.levy@lk-k.com

11. Neither Party raised any objections to the constitution of the Tribunal.

12. A Secretary of the Tribunal was appointed by the Arbitral Tribunal with the consent of the Parties. The Secretary is:

Mr. Magnus Jesko Langer
Lévy Kaufmann-Kohler
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Fax: +41 22 809 6201
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II. PROCEDURAL HISTORY

A. THE NOTICE OF ARBITRATION

13. On 6 February 2013, Achmea submitted to the Slovak Republic a Notice of Arbitration pursuant to Article 3 of the United Nations Commission on International Trade Law Arbitration Rules of 1976 (the "UNCITRAL Rules"),[4] and to Article 8 of the Treaty.[5]

B. THE FIRST PROCEDURAL HEARING AND PROCEDURAL ORDER NO. 1

14. On 28 May 2013, the Arbitral Tribunal and the Parties held an initial procedural hearing via teleconference, where they discussed a draft agenda circulated earlier, a draft Procedural Order No. 1 submitted jointly by the Parties and their proposals regarding the procedural schedule of the arbitration.

15. On 31 May 2013, the Tribunal issued Procedural Order No. 1 ("PO1"), which set out the procedural rules and the calendar for the arbitration. It also specified that the Permanent Court of Arbitration ("PCA") would act as fund holder for the deposits made by the Parties by way of advance for the costs of arbitration.[6]

C. THE WRITTEN PHASE

16. On 5 June 2013, the Claimant filed its Statement of Claim ("SoC"). The SoC was accompanied by Exhibits C-1 through C-63.

17. On 14 June 2013, the Respondent filed its Objections to Jurisdiction ("Objections"), accompanied by Exhibit R-1, and by legal authorities RLA-1 through RLA-131.

18. On 21 July 2013, the Claimant filed its Response to the Objections to Jurisdiction ("Response"), accompanied by Exhibits C-64 through C-87.

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[4] Arbitration Rules of the United Nations Commission on International Trade Law, Resolution 31/98 adopted by the General Assembly on 15 December 1976 ("1976 UNCITRAL Rules"), Article 3.

[5] Netherlands-Slovak Republic BIT, Article 8 (**Exh. C-1**).

[6] PO1, ¶ 18.1.

19. On 2 August 2013, the Respondent filed its Reply on Jurisdiction ("Reply").

20. On 3 August 2013, the Claimant filed a request for production of documents. After several exchanges between the Parties, the Tribunal ruled on the Claimant's request on 17 August 2013 by issuing Procedural Order No. 2 ("PO2").

21. On 30 August 2013, the Claimant filed its Rejoinder on Jurisdiction ("Rejoinder"), accompanied by Exhibits C-88 through C-106.

22. On 5 September 2013, in accordance with paragraph 5.6 of PO2, the Claimant introduced Exhibits C-107 through C-112, which had been obtained as a result of document production; to which the Slovak Republic responded on 11 September 2013, in particular by submitting Exhibits R-2 through R-9.

23. On 13 September 2013, the Claimant filed a submission, accompanied by Exhibit C-113, on the European Commission's decision to initiate a formal investigation procedure against the Slovak Republic concerning the compatibility of Slovak State aid given to the State-owned health insurer.

D. THE HEARING ON JURISDICTION AND ADMISSIBILITY

24. On 15 September 2013, the Parties and the Tribunal held a hearing on jurisdiction and admissibility in Amsterdam.

25. In addition to the members of the Tribunal and the Secretary of the Tribunal, the following persons attended the hearing:

On behalf of the Claimant

Mr. René Visser
Mr. Frank ter Borg

of *Achmea*; and

Mr. Marnix Leijten
Mr. Albert Marsman
Ms. Darina Maláčová
Ms. Ellen Gerretsen
Mr. Constantijn van Aartsen

of *De Brauw Blackstone Westbroek*.

On behalf of the Respondent

Deputy Minister Mr. Vazil Hudák
Ms. Andrea Holíková
Mr. Tomáš Jucha
Ms. Miriam Kiselyová

of the *Ministry of Finance of the Slovak Republic*;

Mr. George von Mehren
Mr. David Alexander
Mr. Rostislav Pekař
Ms. Maria Lokajova
Mr. Stephen Anway

of *Squire Sanders*; and

Mr. Mark Clodfelter
Mr. Constantinos Salonidis

of *Foley Hoag*.

26. During the course of the hearing, the Parties presented oral opening arguments on their respective positions with respect to jurisdiction. Messrs. Marsman and Leijten addressed the Tribunal on behalf of the Claimant and Messrs. Hudák, von Mehren, Alexander and Clodfelter on behalf of the Respondent.

E. THE POST-HEARING PHASE

27. On 16 September 2013, the Tribunal issued Procedural Order No. 3 ("PO3"), whereby it confirmed the agreement reached at the end of the hearing that there would be no post-hearing briefs. It also fixed the time limits for the submission of any corrections to the transcript and of the Parties' statements on costs.

28. On 4 October 2013, the Parties informed the Tribunal that they had reached an agreement for the extension of the time limit for the submission of their statements on costs until 11 October 2013. On that date, each Party submitted its statement.

29. On 18 October 2013, the Parties jointly submitted a corrected version of the transcript of the hearing.

30. On 29 January 2014, the Claimant sent a letter to the Tribunal informing it of new factual allegations. The Respondent objected to that course of action in its communication of 31 January 2014, on the ground that its due process rights were seriously put in jeopardy, and requested the Tribunal (i) to disregard the materials presented by the Claimant, or, (ii) if the Tribunal were to consider such materials in assessing its jurisdiction, to allow the Respondent to respond and contest the Claimant's new allegations. On 3 February 2014, the Tribunal invited the Claimant to comment on the Respondent's two proposed courses of action by 10 February 2014.

31. On 10 February 2014, the Claimant informed the Tribunal that it had no objection to allowing the Respondent to comment on its new allegations, but objected to the Respondent's primary request. Accordingly, the Tribunal proposed on 11 February 2014 to the Respondent to comment by 20 February 2014 on the content of the Claimant's letters of 29 January and 10 February 2014.

32. On 20 February 2014, the Respondent filed its comments to the Claimant's new allegations. On 25 February 2014, the Claimant again approached the Tribunal to request the Tribunal to "take appropriate measures to safeguard the integrity of the proceedings and the robustness of any awards rendered pursuant to it". In essence, the Claimant asked the Tribunal (i) to admonish the Respondent in connection with its alleged misrepresentations in connection with Exhibit R-2, (ii) to order the Respondent to bear all costs associated with these misrepresentations (including costs related to the preparation of the 29 January, 10 February and 25 February 2014 letters), and (iii) to draw appropriate inferences when assessing the other evidence submitted by the Respondent.

33. In light of this development, the Tribunal gave to the Respondent until 25 March 2014 to respond to the requests filed by the Claimant in its 25 February 2014 letter. On that date, the Respondent commented on the Claimant's new request.

III. FACTUAL BACKGROUND

34. The summary below is based on the Parties' written and oral submissions and the documentary evidence they have introduced into the record. It is presented only to the extent it is useful to frame the Tribunal's analysis of the Respondent's objections to jurisdiction. It is noted that the detailed nature of the summary that follows is explained by the fact that the Respondent has specifically objected on the ground that Achmea's claim manifestly lacks legal merit. Disputed facts are highlighted as appropriate.

A. ACHMEA'S INVESTMENT AND THE HEALTH INSURANCE MARKET IN THE SLOVAK REPUBLIC

35. The Slovak Republic acceded to the European Union on 1 May 2004. It liberalized its health care insurance market, setting up a system of regulated competition with the entry into force of Acts No. 580/2004 and 581/2004.[7] Under the new framework, health insurance companies were required to be set up as joint stock companies and were allowed to make and distribute profits to their shareholders.[8] With a view to ensuring a competitive market, clients were allowed to switch health insurance companies each year by 30 September.[9] An independent regulatory authority, the Slovak Health Surveillance Authority ("HSA"), was set up to issue operation licenses and to supervise the insurance companies' compliance with applicable regulations.[10]

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[7] SoC, ¶¶ 37 and 39. References in notes 7 to 23 are to the Statement of Claim (SoC) and to its factual content, which the Respondent does not appear to have disputed.

[8] SoC, ¶ 38.

[9] SoC, ¶ 38.

[10] SoC, ¶ 38.

36. Achmea applied for, and obtained, a license from the HSA on 13 February 2006, and on 9 March 2006, *Union zdravotná poist'ovňa a.s.* ("Union") was incorporated.[11] Achmea holds all the shares in Union.[12] Achmea invested approximately € 72 million in the form of cash capital contributions.[13]

37. On 1 January 2013, Union held a market share of 8.42% in the Slovak Republic.[14] Union has two competitors in the Slovak market: (i) *Všeobecná zdravotná poist'ovňa, a.s.* ("VšZP"), which is the State-owned (and largest) health insurer with a market share of 64.09% as of 1 January 2013; and (ii) *Dôvera zdravotná poist'ovňa, a.s.* ("Dôvera"), which is a privately-owned Dutch company holding a market share of 27.49% as of 1 January 2013.[15]

38. Achmea also holds close to 100% of the shares of *Union posit'ovňa a.s.* ("Union Commercial"), a Slovak joint stock company offering life and non-life insurance products to individual and corporate clients, including travel insurance.[16]

B. THE BAN ON PROFITS, THE BAN ON TRANSFERS AND THE FIRST BIT ARBITRATION

39. In 2006, a change of Government occurred in the Slovak Republic, with Mr. Robert Fico of the *SMER-sociálna demokracia* ("SMER") party assuming office as Prime Minister on 4 July of that year.[17] The new Government announced that it would introduce measures with respect to health insurance companies,[18] which it did by adopting Acts Nos. 530/2007 and 192/2009.[19] The first regulation "required profits from health insurance to be used for healthcare purposes only, rather than at the discretion of the company and its shareholders" ("ban on profits").[20] The second regulation provided for "a prohibition on the transfer of a portfolio of insurance contracts against payment" ("ban on transfers").[21]

40. Other measures adopted at that time included "a prohibition on the use by health insurance companies of insurance brokers, a requirement that health insurance companies contract with certain named state-owned hospitals, and an obligation for health insurers to submit their financial budgets to the Slovak government 'for

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[11] SoC, ¶ 42.
[12] SoC, ¶¶ 24 and 42.
[13] SoC, ¶ 42.
[14] SoC, ¶ 25.
[15] SoC, ¶¶ 34-35.
[16] SoC, ¶ 36.
[17] SoC, ¶ 44.
[18] SoC, ¶¶ 45-51.
[19] SoC, ¶¶ 52 and 56.
[20] SoC, ¶ 52.
[21] SoC, ¶ 56.

discussion'".[22] Through Act No. 12/2007, the Slovak Government could "discharge at will the Head of the Health Care Regulator".[23]

41. On 1 October 2008 Achmea (still known as Eureko) commenced arbitration proceedings against the Slovak Republic challenging, among others, the above-described measures.[24] The case was registered with the PCA with the reference number "PCA Case No. 2008-13" ("*Achmea I*"). On 26 October 2010, the tribunal in *Achmea I* issued an Award on Jurisdiction, Arbitrability and Suspension. In the relevant part of that decision, the Tribunal:

> "(a) DISMISSE[D] the 'Intra-EU Jurisdictional Objection' advanced by Respondent and decide[d] that it ha[d] jurisdiction over the dispute;
>
> (b) REJECT[ED] Respondent's request to suspend the proceedings until the European Commission and/or the ECJ ha[d] come to a decision on the EU law aspects of the infringement proceedings;
>
> (c) RESERVE[D] all questions concerning the merits, costs, fees and expenses, including the Parties' costs of legal representation, for subsequent determination".[25]

42. The Slovak Republic challenged this award before the *Oberlandesgericht* in Frankfurt am Main. The application was rejected on 10 May 2012. The Slovak Republic filed an appeal before the *Bundesgerichtshof* in Karlsruhe,[26] which had yet to be decided at the time of the issuance of the present Award.

43. On 7 December 2012, the tribunal in *Achmea I* issued its Final Award, in which it:

> "(a) DISMISSE[D] each of the remaining jurisdictional objections advanced by Respondent and decide[d] that it ha[d] jurisdiction over the dispute;
>
> (b) DECLARE[D] Respondent to have breached Article 3 and Article 4 of the Treaty by adopting the ban on profits and the ban on transfers;
>
> (c) ORDER[ED] Respondent to pay to Claimant damages in the sum of €22.1 million, net of any taxes that might be due to be paid by Claimant to Respondent on that sum;
>
> (d) ORDER[ED] Respondent to pay to Claimant interest on the amount of €22.1 million, as from 1 August 2011 up to the date of payment, at the Eurozone official rate for "main refinancing

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[22] SoC, ¶ 54.

[23] SoC, ¶ 55.

[24] *Eureko B.V. v. The Slovak Republic* ("*Eureko v. Slovak Republic*" or "*Achmea I*"), Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13, 26 October 2010, ¶¶ 7 and 10 (**Exh. C-2**). *See also,* SoC, ¶ 58.

[25] *Achmea I*, Award on Jurisdiction Arbitrability and Suspension, PCA Case No. 2008-13, 26 October 2010, ¶ 293 (**Exh. C-2**).

[26] SoC, ¶ 60.

operations" (as published on the website of the European Central Bank www.ecb.int) plus 2%, compounded quarterly;

(e) ORDER[ED] Respondent to pay to Claimant the amount of €220,772.74 to reimburse Claimant for costs of [the] Merits Phase of the arbitration; and

(f) ORDER[ED] Respondent to pay to Claimant the amount of €2,095,350.94 for its legal representation and assistance in the Merits Phase of [the] arbitration".[27]

44. On 31 January 2013, the Slovak Republic filed an application to set aside the Final Award before the *Oberlandesgericht* in Frankfurt am Main.[28] As of the date of the issuance of the present Award, the challenge is still pending before the German court. As of the date of the Statement of Claim, the Slovak Republic had not paid the amounts mentioned in the Final Award. To obtain enforcement, Achmea seized Slovak bank accounts in Luxemburg.[29]

45. On 15 October 2008, shortly after the arbitration in *Achmea I* commenced, the Constitutional Court of the Slovak Republic received a petition from a group of 49 deputies of the National Council of the Slovak Republic challenging the constitutionality of the ban on profits, and its conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ("ECHR"), Article 1 of its Additional Protocol and several provisions of the Treaty for the Functioning of the European Union ("TFEU").[30]

46. While *Achmea I* was still pending, the challenge was decided by the Constitutional Court on 26 January 2011. The Court ruled that the ban on profits breached the Slovak Constitution and Article 1 of the Additional Protocol to the European Convention on Human Rights.[31]

47. A new Government headed by Ms. Iveta Radičová replaced the Government of Mr. Fico on 8 July 2010. Ms. Radičová's Government announced a reversal of the ban on profits and the ban on transfers with effect from 1 August 2011. As part of the new measures of her Government, as of 1 April 2011, it was also no longer permitted to discharge the Head of the Health Care Regulator "at will".[32] Later Ms. Radičová's Government fell, and on 1 April 2012, Mr. Fico returned to office.[33]

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[27] *Achmea B.V. (formerly known as "Eureko B.V.") v. The Slovak Republic* ("*Achmea v. Slovak Republic*" or "*Achmea I*"), Final Award, PCA Case No. 2008-13, 7 December 2012, ¶ 352 (**Exh. C-32**).

[28] SoC, ¶ 66.

[29] SoC, ¶¶ 64 and 67.

[30] Decision by the Slovak Constitutional Court in case PL ÚS 3/09-378, 26 January 2011, p. 2 (**Exh. C-3**).

[31] *Id.*, p. 1.

[32] SoC, ¶¶ 72-73.

[33] SoC, ¶ 74.

C. PUBLIC STATEMENTS BY STATE OFFICIALS ON THE INTRODUCTION OF REFORMS TO THE HEALTH-INSURANCE MARKET

48. Before and after re-assuming office, Mr. Fico made public statements to the press about his intention to introduce amendments to the regulatory framework of the health insurance market. In an interview with the Slovak journal SME on 12 March 2013, he indicated that re-introducing the ban on profits was one of the priorities of his party, SMER. He further stated that the main difficulty lay in implementing such change "in compliance with [the] legislation of the European Union and with the constitution" and that he understood from his legal advisors that this could be possible.[34] On 13 April 2012, the same newspaper reported that the Prime Minister had asked the new Minister of Health, Ms. Zuzana Zvolenská, "to find a way to ban the profit and not violate the constitution at the same time".[35]

49. During a radio interview given on 30 June 2012, Mr. Fico expressed his opinion that "the state will have to solve the problem of the health insurance companies and [that the Government] should go [in] the direction towards one health insurance company".[36] He further stated that this could be done either by buying the shares from Dôvera and Union, or by expropriating and paying compensation based on the law and for public interest, as authorized by the Slovak Constitution.[37] The next day, Slovak TV 1 hosted a debate between Prime Minister Fico and Mr. Béla Bugár, a member of the Slovak Parliament ("MP") and chairman of the political party *Most-Hid*.[38] During the debate, Mr. Fico referred in the following terms to the current state of the health insurance market, and his intentions in this domain:

> "I can now imagine that we really could give an offer to private health insurance companies to sell their private health companies to the state, there will be only one health insurance company created and we wouldn't have the never ending problem with leakage of money through health insurance. We are now trying to find money for salaries of doctors and nurses, but gentlemen in private health insurance companies each year take away tens of millions of Euro as a kind of profit from public funds. Both you and me send money to some health insurance company according to the law, a public fund which should return back to healthcare, private health insurance companies can keep only 3 - 4%, it is some administration fund, they take some profit from these public funds and use it for their private purposes. Airplanes and similar things, which are typical for these owners. Therefore we think that this is the way, we can try it and I am really not against and I think that this will cause a big discussion, there are many countries in

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[34] Interview given by Mr. Fico to SME Monday entitled "I am the same Fico, I just took a lesson", 12 March 2012, p. 1 (**Exh. C-4**).

[35] Press article by SME entitled "Fico wants to ban profit of health insurers again", 13 April 2012, p. 1 (**Exh. C-5**).

[36] Transcription of interview by Mr. Fico with Rádio Slovensko for the program "Saturday dialogues", 30 June 2012, p. 1 (**Exh. C-7**).

[37] *Id.*, p. 2.

[38] Transcription of televised debate with Mr. Fico on STV1 in the program "O päť minút dvanásť" ("Five minutes to twelve") (**Exh. C-10**).

> Europe which operate on the principle of one health insurance company. But money are leaking, if there would not be leakage of money, and if they kept only 3-4%, if they only had the administration fund, let them live with it, but tens of millions [of] dollars are leaking from the profit, they do no have the right to create profit".[39]

50. During the debate, MP Bugár reacted by cautioning that implementing Mr. Fico's ideas for the health insurance market should be done in a way that would not spur legal actions against the State, as had happened before.[40] In response, Mr. Fico recalled that expropriation, by law, in the public interest and against compensation, is "a constitutional institute which is applicable in the whole world".[41] He further stated that he preferred if the Slovak Republic would buy the private health insurers' shares.[42]

51. On 19 July 2012, the Slovak news agency TASR reported that the Health Minister, Ms. Zlovenská, announced that she would "soon submit a proposal for creating a single health-care insurer", and conceded that "state acquisition of private health-insurers is one of the options".[43] The rationale given by Prime Minister Fico for the creation of a single-insurer system was "to stabilise cash flows in the health-care system in a way that would make sure that all the money flowing into health insurance serves patients".[44]

D. THE RESIGNATION OF THE HEAD OF HSA

52. Through Act No. 185/2012, which entered into force on 1 July 2012, two additional grounds for dismissal of the Head of the HSA were added to the Act on Health Insurance Companies, Act. No. 581/2004:

> "(d) if the Authority does not fulfill the duties under this statute;
>
> (e) if there are other serious reasons, in particular in the event of a deed that brings or is capable of bringing doubts over personal, moral or professional qualifications for the exercise of his office".[45]

53. Shortly before Act No. 185/2012 entered into force, the Head of the HSA, Mr. Ján Gajdoš, tendered his resignation on 28 June 2012.[46] A press release published on the

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[39] *Id.*, pp. 1-2.

[40] *Id.*, p. 2.

[41] *Id.*, p. 3.

[42] *Id.*, p. 4.

[43] Press article by TASR entitled "Zlovenská finalizing her proposal on single health insurer", 19 July 2012, p. 1 (**Exh. C-11**)

[44] *Id.*

[45] Act No. 185/2012 Coll., 1 July 2012, Article 16 (**Exh. C-9**).

[46] Press release on the website of the Health Care Regulator announcing the resignation of the Health Care Regulator (**Exh. C-6**).

HSA website purported to reproduce comments made by Mr. Gajdoš on his resignation, in which he stated that:

> "By doing this, I express my disagreement with bringing politics into HSA and making it a servant to the Ministry of Health, as the amendment that was passed and takes effect on 1 July brings. The office of the HSA Chairman, and performance of the HSA tasks, are now, in reality, becoming subordinated to the Health Minister, and the HSA ceases to be an independent authority. With this step, HSA as a control authority again misses out on a chance to objectively supervise Vseobecna zdravotna poistovna and healthcare providers that are subordinated to the Ministry of Health. This repeats the 2007 scenario in which I refuse to play a role. I think this is political hypocrisy since my stepping down has been decided a long time ago, and I will not simply stand here and watch as someone tries to come up with some artificial reasons for my resignation".[47]

E. THE INTENTION STATEMENT

54. On 20 July 2012, the Ministry of Health published a proposal for discussion within the Slovak Government in respect of its intention to introduce a unitary system of public health insurance in the Slovak Republic (the "Intention Statement").[48]

55. The Intention Statement analyzes certain assumptions for reforms to the health insurance system in the Slovak Republic, including the country's health indicators as they compare to other members of the Organization for Economic Cooperation and Development ("OECD"), and the make-up of the Slovak health insurance providers market. On the first issue, the Intention Statement notes that "[w]hile total life expectancy keeps growing in the Czech Republic in line with the trends prevailing in OECD Member States, the gap between Slovakia and the rest of OECD countries keeps widening".[49] It further states that the "below-average result and unfavourable developments are the result of a number [of] contributing factors" both stemming from the lifestyle choices of patients and from the funding and administration of the healthcare system itself.[50] On this point, the Intention Statement concludes that:

> "[t]he growing pressure on public funds and, subsequently, on health spending is currently an important motivation to introduce a more efficient utilization of the limited resources. Having regard to the unsatisfactory results achieved by the Slovak health care system, this pressure calls for a change in organization of the health care sector".[51]

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[47] *Id.*, p. 1.

[48] Proposal of intention to introduce a unitary system of public health insurance in Slovakia, with accompanying draft Government Resolution, 19 July 2012 (**Exh. C-12**).

[49] *Id.*, p. 1.

[50] *Id.*, p. 2.

[51] *Id.*, pp. 2-3.

56. In exploring alternatives for health insurance provider systems, the Intention Statement goes on to analyze 29 European countries and finds that "only three [...] have introduced legislation allowing for generation of profit on public health insurance" and that the "[u]nitary system has been introduced in 16 countries and [a] plural system not allowing for generation of profit in 10 countries".[52]

57. On the health insurance providers, the Intention Statement finds that "[t]oday, it can be stated that there are no important differences between individual health insurers in term of services offered to the insured, price policy or structure of the health care providers network".[53] It further finds that, even if there are several health insurance providers in the market, VšZP holds the most important position both in terms of market share (65.8% of the total number of insured) and in terms of the "ability to create the extent of the network of existing health care providers, or performance of health care policy through its contract policies".[54] Under these circumstances, "the importance of private health insurers to patients is much more less pronounced".[55]

58. From the above, the Statement concludes that "[i]t has been estimated that elimination of plurality from health insurance sector would significantly reduce spending for administration and management of public health insurance due to elimination of duplicities in administrative costs, and that profit would be eliminated in full".[56]

59. The Intention Statement identifies three possible "Implementation Means" for the creation of a single health insurance company in the Slovak Republic:

    (i) seeking an agreement with the shareholders of private health insurers to have the Slovak Republic take over the administration of their companies "without involvement of their owners", who would receive a certain financial compensation from the State; or

    (ii) seeking an agreement to have the shareholders of the privately-owned insurers agree to a voluntary sale of their shares or certain assets of their companies to the Slovak Republic (the "voluntary sale process"); or

    (iii) expropriation.[57]

60. On the first option, the Intention Statement notes that it "has never been tested and can be therefore viewed as a risky legal hybrid" and that "there are reasonable doubts whether this would correspond with the objective for introduction of the unitary

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[52] *Id.*, p. 4.
[53] *Id.*, p. 5.
[54] *Id.*, p. 6.
[55] *Id.*, p. 6.
[56] *Id.*, pp. 6-7.
[57] *Id.*, p. 9.

system, as the State would continue to compensate shareholders of private health insurance companies".[58]

61. The other two options are presented as part of a two-step process: the State would first offer to buy the shares or certain assets of the private insurers and, only "after futile efforts for an agreement", proceed to expropriation.[59] In this scenario, a law could be passed either before or after the decision to expropriate, outlining the procedure for these two "Implementation Means".[60]

62. In case of expropriation, the Intention Statement takes into consideration the fact that it should be carried out in accordance with the Slovak Constitution, and specifically Article 20(4) thereof. This means that it must be performed based on a law, in the public interest, to the minimum required extent, and against adequate compensation.[61] Specifically, the Statement notes that "[i]n this particular case, the public interest may be deemed the need to create a functional and efficient public health insurance mechanism".[62] The Statement ends with some considerations as to how the two preferred "Implementation Means" (*i.e.*, purchase of shares, and/or expropriation) would fare under the law of the European Union ("EU law"), and international investment protection law.[63]

63. On 23 July 2012, Achmea's CEO, Mr. Willem van Duin, sent a letter to Mr. Fico, in which he responded to the Government's public statements on the contemplated single health insurance company, including the Intention Statement, and expressed his concern as to how the announced measures would affect Union.[64] He also outlined Achmea's disagreement with the Government's stated plans in the following terms:

> "I regret that [...] your government is again considering measures intended to remove privately-owned health insurance companies such as UZP [Union] from the Slovak market. Such measures will again cause significant damages to Achmea. Moreover, there is no public interest that requires a removal of privately-owned health insurance companies from the Slovak market. Alleged differences in life expectancy between the Slovak Republic and certain other countries that existed well before the Slovak health insurance market was liberalized, and that apparently only improved since UZP entered the market, certainly do not compel the removal of privately-owned health insurance companies from the Slovak market. [...] Finally, an expropriation of privately-owned health insurance companies would appear discriminatory in that it would

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58 *Id.*, p. 10.
59 *Id.*, p. 9.
60 *Id.*, p. 9.
61 *Id.*, pp. 11-12.
62 *Id.*, p. 11.
63 *Id.*, pp. 12-16.
64 Letter from Achmea to Mr. Fico, 23 July 2012 (**Exh. C-13**).

> remove exclusively foreign-owned businesses from the Slovak market".[65]

64. He noted that the timing was particularly infelicitous, as health insurers were at that time in the midst of the acquisition campaign competing for clients before the statutory deadline of 30 September 2012.[66]

65. On 25 July 2012, the Slovak Government issued Government Resolution No. 383, approving "the intention to introduce unitary public health insurance system in the Slovak Republic", and instructing the Minister of Health "to prepare the project and ensure the performance of related acts in order to implement" this intention by 30 September 2012.[67]

66. In an interview published on the same day, Mr. Fico was quoted as saying that "in practice [the Government's unanimous approval of the Intention Statement] means that the private health insurers Dôvera and Union should leave the Slovak market".[68]

67. Several days later, on 31 July 2012, Mr. Fico responded to Achmea's 23 July 2012 letter.[69] The Prime Minister re-stated the Government's case for the reform of the health care insurance market, including its considerations on Slovak Constitutional law and EU law.[70] It further stated:

> "[T]he Government of the Slovak Republic fully respects Achmea's rights resulting to it under domestic law, and that it also considers, in relation to the intended creation of unitary health insurance system, also international liabilities of the Slovak Republic in the area of protection of cross-border investments, in particular those concerning the support and protection of investments (bilateral investment treaties) under which foreign investors exercise their claims against the Slovak Republic where they believe that their investment has been prejudiced due to the steps taken [by] the State. Nonetheless, it has to be stated that such a treaty allows for dispossession of a foreign investor of its investment for reasons of public interest, in compliance with the law and in a non-discriminatory manner, provided that the Slovak Republic will be obliged to pay to the investor without undue delay a fair compensation".[71]

68. Mr. Fico concluded his missive by stating that his Government did not believe that its public announcements and approval of the Intention Statement "might be capable of causing any damage to Achmea", and that any measures going forward would be

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[65] *Id.*, p. 2.

[66] *Id.*, p. 2.

[67] Government Resolution No. 383, approving the Intention Statement, 23 July 2012 (**Exh. C-14**).

[68] Press article by Aktuality.sk entitled "There will be only one health insurer! The government cabinet approved it", 25 July 2012 (**Exh. C-15**).

[69] Letter by Mr. Fico to Achmea, 31 July 2012 (**Exh. C-16**).

[70] *Id.*, pp. 1-2.

[71] *Id.*, p. 2.

carried out "with due regard to the maintenance and respecting of all Achmea's rights".[72]

69. During a radio interview broadcasted on 22 September 2012, Mr. Fico referred again to his Government's plans regarding the health insurance market in the following terms:

> "We are now stubbornly going to create a single health insurer, and I stand behind this project because the private health insurers take our money from the health care system by carving a huge amount of money from the public money.
>
> And if we get these insurers under the one health insurance company, then all the money that would otherwise end up in pockets, luxurious cars and luxurious houses of Dôvera and Union's owners, will end up in the health care system, then that is the concrete saving for the state".[73]

F. THE PROJECT PLAN

70. On 25 September 2012, in furtherance of the instructions contained in Government Resolution No. 383, the Slovak Ministry of Health published a proposal to implement the Intention Statement entitled "Project of implementation of a unitary system of public health insurance in the Slovak Republic" (the "Project Plan").[74]

71. The Project Plan is divided into three sections, an introduction on constitutional law provisions applicable to the provision of health care in the Slovak Republic and on studies on the effectiveness of healthcare systems,[75] an overview of the desired features of a single health insurance provider under the new system, including a section on the role of the HSA,[76] and a third section, touching on the introduction of the unitary public health insurance system. It analyzes the "pros and cons" associated with the two preferred Implementation Means identified in the Intention Statement (*i.e.*, buy-out of the private insurers and expropriation) and the "vulnerabilities", and it ends with a schedule of implementation.[77]

72. The Project Plan states the Government's desire to undo the liberalization of the health insurance market that had allowed the introduction of private companies. It notes, for example, that "the joint-stock companies present since 2005 have provided no significant argument which would – by a different quality and attitude of their

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[72] *Id.*, p. 2.

[73] Transcript of interview by Mr. Fico with Rádio Slovensko for the program "Saturday dialogues", 22 September 2012 (**Exh. C-18**).

[74] Project of Implementation of Unitary Public Health Insurance System in the Slovak Republic (**Exh. C-19**).

[75] *Id.*, pp. 3-7.

[76] *Id.*, pp. 8-19.

[77] *Id.*, pp. 20-53.

services – justify the necessity to keep their existence as a tool to provide the health needs of population in more efficient way".[78] It goes on to recall that:

> "[t]he Intention [Statement] has evaluated the facts why the new public health insurance system being administered by several health insurance companies as well as by private entities has not proved to be good",[79] and finds that "[t]he interest in ensuring the efficiency in spending such a big volume of resources through health insurance companies – where they belong to public finances – leads to the strengthening of reasons from the side of the state to terminate the existence of the plural system and to return to an economical, less-administrative and cost-effective model of financing the health care through a single public institution".[80]

73. The Project Plan, to be implemented through the so-called "Transformation Act", further describes the introduction of a unitary health insurance system as a three-step process:

    (i) first, an attempt to agree with the privately owned health insurers a "voluntary sale" of the shares;

    (ii) second, if no agreement is reached, the expropriation of the shares; and

    (iii) third, the merger of the formerly privately-owned health insurers with the state-owned insurer into a single health insurer.[81]

74. During this process, the State is to be represented either by VšZP or by a new company called *Spoločnosť pre zavedenie unitárneho system verejného poistenia, a.s.* (the "Unitization Company"), defined as a "legal entity (joint-stock company) with 100% capital participation of the State in its registered capital, established by the State only for implementing the unitarisation project".[82] Either VšZP or the new company is to conduct legal and financial due diligence, offer the non-State insurers the opportunity to enter into purchase agreements, or, if no such purchase agreement is concluded, seek expropriation and act as the expropriator.[83]

75. Throughout the unitarisation process, the existing number of insured persons is to be stabilized, because "if non-State insurers attract too many of those insured by VšZP, the State will incur damage as a result, as it would have to pay a higher compensation (purchase price) due to such 'unnatural' jump in the numbers of the insured".[84] Furthermore, should the privately-owned insurers not allow the Unitization

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[78] *Id.*, p. 8.

[79] *Id.*, p. 8.

[80] *Id.*, p. 8.

[81] *Id.*, pp. 20-42.

[82] *Id.*, pp. 32-33.

[83] *Id.*, p. 35.

[84] *Id.*, pp. 31-32.

Company to perform legal and financial due diligence, it would be free to value the insurers' shares by using governmental information.[85]

76. As to the expropriation scenario, expropriation is to be requested after three unsuccessful offers during the "voluntary sale" process; two from the Unitization Company and, in between, one counter-offer from the insurer.[86] The Project Plan defines expropriation as the "compulsory passage of the title to shares in a non-State insurer to the Expropriator".[87] It also specifies that the expropriator (*i.e.*, the entity requesting the expropriation) would be the Unitization Company, and that HSA would act as the expropriating authority.[88]

77. As to the public interest underlying the eventual expropriation, the Project Plan states that:

> "The expropriation objective will be to achieve, in the public interest, the acquisition of the title to the Expropriated Assets for implementing the objective of introducing unitary model into health insurance".[89]

78. And on the issue of compensation, it provides that:

> "The compensation for expropriation (i.e. compulsory passage of title, including a potential compulsory passage of a receivable from the non-State insurer) must be given in a way that is conformant with the Constitution, i.e. also including with international obligations binding on the Slovak Republic, in a non-discriminatory and equal manner, i.e. monies".[90]

79. The expropriation procedure is to be governed by the rules of administrative procedures, and may include an expert appraisal – whose costs shall be borne by the expropriator –, oral hearings, and deposits of the amount of compensation. The expropriation decision, which is taken by the Health Care Regulator upon application of the Unitization Company, transfers title to the shares, and must mention the amount of compensation owed. While the Project Plan indicates that that decision is not subject to appeal, is also states that "a remedy could be filed [...] with a court" with suspensive effect and that "not even the Transformation Act will eliminate the risk that the decision to expropriate might be quashed by a court of another instance".[91]

80. The final step of the process is then the immediate merger of the Unitization company with VšZP, the state-owned insurer, since this course of action would minimize the risk of constitutional and anti-trust scrutiny:

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[85] *Id.*, p. 37.
[86] *Id.*, pp. 37-38.
[87] *Id.*, p. 38.
[88] *Id.*, p. 39.
[89] *Id.*, p. 39.
[90] *Id.*, p. 39.
[91] *Id.*, p. 40.

> "The fast completion of mergers of these health insurers can be an efficient tool for lowering the risk of questioning the Unitarisation Process (or constitutional questioning of the Transformation Act) with the Constitutional Court. In the opinion of the court, the Constitutional Court does not rule on restitution of a condition caused by a law which has been already executed".[92]
>
> "[i]t is desirable for the Transformation Act to also lay down that [...] prior approval of the [...] Antimonopoly Office of the Slovak Republic will not apply to the acquisition of non-State insurer's assets by the Unitarisation Company".[93]

81. In sum, the Project Plan outlines the following "anticipated deadlines":

(i) 17 October 2012: Approval of project to introduce a unitary public health insurance system in the Slovak Republic by the Slovak Government;

(ii) By 30 November 2012: Establishment of the Unitarisation Company;

(iii) By 30 November 2012: Opening of public procurement for legal and financial consulting services related to the introduction of a unitary public health insurance system;

(iv) By 30 April 2013: Closing of public procurement to select advisor (with a duration of public procurement of 4 to 5 months);

(v) 1 May 2013: Anticipated effective date of the Transformation Act;

(vi) By 31 May 2013: Conclusion of agreements to conduct legal and financial due diligence and confidentiality along with definition of the negotiation spread for negotiations about the voluntary buyout;

(vii) By 31 October 2013: Negotiations with shareholders of non-State insurers and conclusion of share purchase agreements;

(viii) By 31 December 2013: Transfer of the Transferred Assets to the Unitarisation Company;

(ix) 1 January 2014: Introduction of the unitary system;

If negotiations on voluntary buyout fail:

(x) By 30 April 2014: Valid and executable decision to expropriate;

(xi) By 30 June 2014: Process of unifying health insurers;

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[92] *Id.*, p. 51.

[93] *Id.*, p. 38.

(xii) By 1 July 2014: Introduction of the unitary system.[94]

82. The Project Plan was subject to a "legislative commenting procedure", which lasted until 8 October 2012. Both Achmea and Union, together with other entities, such as Dôvera and a group of Slovak health policy experts, submitted their objections to the Project Plan.[95]

83. Achmea communicated its objections directly to the Prime Minister, Mr. Fico, and to the Minister of Health, Ms. Zuzana Zvolenská in a letter dated 8 October 2012 (the "8 October 2012 letter"), copying the Minister of Finance, Mr. Peter Kažimir.[96] Therein, Achmea noted that no "rational relationship" between the policy goals referred to in the Project Plan and the desire to expropriate existed; that the alleged problems in the Slovak health care system could not be blamed on Achmea's participation in its health insurance market; that the Government ignored the significant contributions that the privately-owned insurers had made to the efficiency of the health care system; and that, "[e]ven if the Slovak Republic were permitted to expropriate the privately-owned insurers, which it clearly is not, [the Slovak Republic] would be required to fully refund the future profits that it seeks ownership of, therefore leaving no financial benefit to the Slovak health care system".[97] The letter also refers to the discriminatory nature of the plan, as it targets only foreign-owned businesses, and only the health insurers, leaving other players in the health care market unaffected, such as hospitals, pharmacies or doctors.[98]

84. On 15 October 2012, the Ministry of Health submitted to the Government a written assessment of Achmea's and Union's objections.[99] The next day, a meeting was held in Bratislava with representatives from Achmea, Union and the Ministry of Health.[100]

85. On 31 October 2012, the Slovak Government approved the Project Plan, issuing Government Resolution No. 606.[101] The Government authorized the Minister of

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[94] *Id.*, p. 53.

[95] SoC, ¶ 115.

[96] Letter from Achmea to Mr. Fico, 8 October 2012 (**Exh. C-22**); and Letter from Achmea to Ms. Zlovenská, 8 October 2012 (**Exh. C-23**). These objections were also dispatched to the chairman of the Slovak Parliament, as well as to the leaders of each one of the opposition parties in the Parliament, *see* SoC, ¶ 116.

[97] Letter from Achmea to Mr. Fico, 8 October 2012 (**Exh. C-22**), ¶ 12, bullet point 3.

[98] *Id.*, ¶ 15.

[99] Written assessment by the Ministry of Health of objections raised by Achmea in the commenting procedure in respect of the Project Plan, 15 October 2012 (**Exh. C-21**).

[100] "Minutes" of the meeting of 16 October 2012, prepared by the Slovak Ministry of Health, 6 November 2012 (**Exh. C-29**). Achmea claims that there was an agreement that the meeting would be recorded on tape and that either the audio recording or a transcript would be provided by 19 October 2012. Despite various requests, the Slovak Government only provided these "minutes". SoC, ¶¶ 123-127. *See also*, Letter from Achmea to the Ministry of Health, 23 October 2012 (**Exh. C-26**); Letter form Union to the Ministry of Health, 22 October 2012 (**Exh. C-25**); Letter from Achmea to Ms. Zvolenská including Appendix A, 22 November 2012 (**Exh. C-44**); and Letter of the Ministry of Health to Union, 6 December 2012 (**Exh. C-31**).

[101] Government Resolution No. 606, approving the Project Plan, 31 October 2012 (**Exh. C-27**).

Health to establish the Unitization Company by 30 November 2012, and instructed the Minister of Finance to provide the necessary funds. The Government also authorized the Minister of Health "to arrange for all legal and related acts as may be required for the implementation of the project for the introduction of a unitary public health insurance system in the Slovak Republic".[102]

G. THE MINISTRY OF FINANCE REPORT

86. On 12 December 2012, the Financial Policy Institute of the Slovak Ministry of Finance published a report entitled "Less health care for more money – Analysis of Slovak healthcare sector efficiency" (the "Ministry of Finance Report"), which reached the following conclusions:

    (i) No causal relationship was identified between an alleged deterioration of the Slovak health care system and the introduction of the system based on multiple health insurers;

    (ii) The private health insurance companies had in 2010 statistically significant lower costs per one insured than the State-owned insurance company, and this was not the result of the privately-owned insurers having healthier clients;

    (iii) The fixed costs incurred by the health insurance companies are not a significant source of inefficiency;

    (iv) Profits of the privately-owned health insurers that were according to the Ministry "economically unjustified", have been largely eliminated through an amendment of the rules applicable to the redistribution pool for health insurance premiums effective July 2012;[103]

    (v) There was no finding of a "strong general argument for unitary vs. pluralistic insurance company system for all OECD countries", and "[a]t the international level, the unitary system has better results in one indicator, but the effect is not robust".[104]

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[102] *Id.*

[103] On this issue, Achmea explains that "[h]ealth insurance companies in the Slovak Republic are required to deposit a certain percentage of premiums paid by their clients into a common pool, where those premiums are then redistributed to the health insurers based on the characteristics of their client portfolio. These characteristics include age, sex and economic activity, and – from July 2012 – additionally also a classification into one of the Pharmacy Cost Groups, the objective of which is to identify insured with expensive treatments. This mechanism serves to reallocate premiums to those insurers that bear the largest burden in terms of health care cost". *See* SoC, ¶ 153, n. 28.

[104] Economic analysis of the Financial Policy Institute of the Ministry of Finance of the Slovak Republic, *Less health for more money. Analysis of Slovak healthcare sector efficiency*, 12 December 2012, p. 38 (**Exh. C-45**).

H. THE IMPLEMENTATION OF THE PROJECT PLAN

87. On 20 December 2012, the press reported that the Unitization Company had been established by the Ministries of Health and Finance.[105] The Unitization Company was registered in the Slovak business register on 29 January 2013.[106]

88. Between February and May 2013, the Slovak Government announced on several occasions that the Transformation Act was being "finalized",[107] though it eventually conceded that there was likely to be a need for revision of the timeline set out in the Project Plan (see above paragraph 81).[108]

89. In its announcements to the press, the Government reaffirmed its commitment to move forward with the implementation of the unitary public health insurance system. Mr. Fico stated on 4 April 2013 that "[w]e are doing everything we can to have a single insurer".[109] Information presented by the Minister of Health to the Government in May 2013 revealed that the existence of the instant arbitration proceedings was being taken into account in the process to implement the Project Plan through the Transformation Act.[110]

> "The proposal of the Transformation Act is being evaluated also by the Ministry of Finance of the Slovak Republic together with the representatives who represent the Slovak Republic in international arbitrations related to health insurance companies. In order to minimize the risk of potential as well as already ongoing arbitration proceedings against the Slovak Republic, the Ministry of Finance

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[105] Article in Hospodárske noviny entitled "The government started the process of creating the one state-owned insurer", 20 December 2012 (**Exh. C-39**).

[106] Excerpt from the Slovak Business Register regarding the Unitization Company, 29 January 2013 (**Exh. C-46**).

[107] Information on fulfillment of the time schedule for implementation of a unitary system of public health insurance in the Slovak Republic, 6 February 2013 (**Exh. C-47**); Press article by Pravda entitled "Zlovenská prepared a law on expropriation of insurance companies", 28 February 2013 (**Exh. C-49**); Press article in Zdravotnicke Noviny entitled "The works on implementation of the single state-owned insurer are progressing", 7 March 2013 (**Exh. C-50**); Press article by Pravda.sk entitled "The project of a single health insurer is delayed, the target dates still apply, according to the Minister", 20 March 2013 (**Exh. C-52**); and Transcription of televised debate with Ms. Zvolenská on TA3 in the program "V politike" ("In the politics"), 26 May 2013 (**Exh. C-61**).

[108] Press article by Pravda.sk entitled "Kazimír: The government is not giving up its intention regarding the single health insurer", 3 April 2013 (**Exh. C-53**); Press article by SME entitled "The single health insurer might come later", 4 April 2013 (**Exh. C-54**); and Press article by SME entitled "The single health insurer is already five months delayed" (**Exh. C-56**).

[109] Press Article by SME entitled "The single health insurer might come later" (**Exh. C-54**). *See also*, Press Article by Pravda.sk entitled "Kažimír: The government is not giving up its intention regarding the single health insurer" (**Exh. C-53**); Transcription of televised debate with Ms. Zvolenská on STV1 in the program "O päť minút dvanásť" ("Five minutes to twelve"), broadcasted at 11.55 am, 12 May 2013 (**Exh. C-58**); Press article entitled "Smer's pet project runs into delays" by Slovak Spectator, vol. 19, no. 18, 13 May 2013 (**Exh. C-59**) and Transcription of televised debate with Mr. Fico on STV1 in the program "O päť minút dvanásť" ("Five minutes to twelve"), broadcasted at 11.55 am, 2 June 2013 (**Exh. C-63**).

[110] Information on fulfillment of the time schedule for implementation of a unitary system of public health insurance in the Slovak Republic, 7 May 2013 (**Exh. C-57**).

of the Slovak Republic as well as the representatives proposed recommendations for adjustments of the Act, on which they are currently working. The representatives are also currently finishing their work on the evaluation of the Transformation Act as a whole".[111]

90. On 27 May 2013, the Respondent issued a tender proposal for the public procurement for legal and economic consulting "connected with implementation of the unitary system of public health insurance in Slovak Republic".[112]

I. THE CONDUCT OF VšZP AND STATE-OWNED HOSPITALS

91. Achmea submits that VšZP had recently communicated to the Association of Slovak Hospitals ("ASH") new terms and conditions relating to the contracts between VšZP and individual State-owned hospitals.[113] The Respondent denies that VšZP played any coordinating role in these changes, and, in any event, that the conduct of VšZP could be attributed to the Slovak Republic.[114]

92. On 17 June 2013, Ing. Marcel Forai, MPH Director General of VšZP sent a communication concerning "Price offer for completed hospitalisations" to the Director of Children's University Hospital Kosice.[115] In his letter, Director General Forai sent an "offer for prices for completed hospitalizations", and indicated that VšZP would make contracts with these prices, provided that:

   (i) the provider submits a firm price offer for completed hospitalisations and separately paid performances form other insurance companies;

   (ii) the firm price offer must be at the same or higher amount, with due reflection of surcharges, for all departments for which the provider has a contract in place with health insurance companies; and

   (iii) the contract with the other health insurance company does not contain a provision on digressive price for completed hospitalisations if payments for performances are made in excess of the scope agreed in the contract.[116]

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[111] *Id.*, p. 1.

[112] Proposal for the public procurement concerning "Legal and economic consulting on the implementation of the unitary system of public health insurance in Slovak Republic", 27 May 2013, p. 9 (**Exh. C-62**).

[113] SoC, ¶ 199.

[114] Objections, ¶ 89; Reply, ¶ 111.

[115] Copy of an offer made by VšZP to a hospital, 17 June 2013, in Annex 2 of the Claimant's request for the production of documents dated 3 August 2013. It is to be noted that this document was not submitted as an exhibit; it is attached as an annex to the Claimant's document request. The Respondent objects to the admissibility of the Claimant's allegations related thereto, but not to the document as such.

[116] Annex 2 of the Claimant's request for the production of documents dated 3 August 2013.

93. The Chairman of the Board and President of the ASH convened a meeting on 26 June 2013 at the University Hospital Bratislava, whose agenda included (i) negotiations with the Chairman of the Board and Director General of VšZP, (ii) meeting(s) with officials of the Ministry of Healthcare, (iii) outcome of negotiations with the chairman of Slovak Trade Unions in Healthcare and Social Services and the current situation of healthcare facilities associated to the ASH.[117] Ms. Zlovenská (Minister of Health) and Ing. Forai (Director General of VšZP) were both invited to the meeting.[118] Representatives of 19 Slovak hospitals attended the meeting.[119]

94. In the course of the month of July 2013, 17 State-owned hospitals (of which 15 had attended the 26 June 2013 meeting) delivered termination notices to Union, effective as of 30 September 2013, although several of the relevant contracts had expiration dates of 30 June 2014.[120]

95. The Parties hold starkly opposing views on the role of VšZP and ASH in these developments, as the Respondent denies that the Ministry of Health had anything to do with the termination of the contracts. On 11 September 2013, the Respondent submitted a letter from the Ministry of Health, addressed to the Ministry of Finance, indicating that it did not issue any instruction, proposal or position regarding the contractual relationship between the hospitals and Union.[121]

IV. PRAYER FOR RELIEF

A. THE STATEMENT OF CLAIM

96. In its Statement of Claim, Achmea requests the Tribunal:

> "(i) to order the Slovak Republic to refrain from expropriating Achmea's investment in the Slovak Republic on the terms of the Project Plan or materially similar terms, subject to a financial penalty in an amount to be specified in the course of the arbitral proceedings; and
>
> (ii) to declare that the Slovak Republic has breached Article 3 of the BIT through conduct related to the impending expropriation of Achmea's investment; and
>
> (iii) to declare that the Slovak Republic has breached Article 3 of the BIT by continuously destabilizing the regulatory and investment environment in the Slovak health care sector; and

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[117] Invitation from the Association of State Hospitals in the Slovak Republic to Slovak Minister of Health Ms. Zlovenská to attend the meeting on 26 June 2013, 21 June 2013 (**Exh. C-107**).

[118] *Id.*; and Invitation from the Association of State Hospitals in the Slovak Republic to chairman of the board and general director of VšZP Mr. Marcel Forai to attend the meeting on 26 June 2013, 21 June 2013 (**Exh. C-108**).

[119] Attendance sheet from the General Meeting of ASN SR (ASH) held on 26 June 2013 in Bratislava (**Exh. C-109**).

[120] The Claimant's request for the production of documents dated 3 August 2013.

[121] Letter from the Ministry of Health to the Ministry of Finance dated 22 August 2013 (**Exh. R-2**).

(iv) to order the Slovak Republic to pay to Achmea damages and interest in amounts to be specified in the course of the arbitral proceedings, in compensation for damage suffered by Achmea as a consequence of breaches of the BIT committed by the Slovak Republic; and

(v) to order the Slovak Republic to pay all costs associated with this arbitration, including but not limited to the fees and expenses of the arbitral tribunal, the fees and expenses of any institutions that provide administrative, appointing or other assistance to these proceedings, and the fees and expenses of Achmea's legal representation, witnesses and experts; and

(vi) to award such further relief as the Arbitral Tribunal may deem appropriate".[122]

97. The Claimant also reserves its right under Article 20 of the UNCITRAL Rules to amend and supplement its claims, including the relief sought, in the course of the arbitral proceedings.[123]

B. THE RESPONDENT'S OBJECTIONS TO JURISDICTION

98. Reserving its right to further develop and expand its submission, the Slovak Republic requests:

(a) a declaration that the Tribunal does not have jurisdiction over Achmea's claims;

(b) an order that Achmea pay the costs of these arbitral proceedings, including the cost of the Tribunal and the legal and other costs incurred by the Slovak Republic, on a full indemnity basis; and

(c) interest on any costs awarded to the Slovak Republic, in an amount to be determined by the Tribunal.[124]

C. THE CLAIMANT'S RESPONSE TO THE OBJECTIONS TO JURISDICTION

99. Responding to the Respondent's objections to jurisdiction, the Claimant requests:

> "that the Tribunal decide that it has jurisdiction, and decline Respondent's request to decline jurisdiction".[125]

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[122] SoC, ¶ 228.

[123] SoC, ¶ 229.

[124] Objections, ¶ 196; and Reply, ¶ 217.

[125] Response, ¶ 142; and Rejoinder, ¶ 167.

V. ANALYSIS

100. Pursuant to PO1, the present proceedings have been bifurcated in a phase dealing with all of the Respondent's objections to jurisdiction and admissibility, and a merits phase.[126] The present ruling addresses the Slovak Republic's objections to the Tribunal's jurisdiction over Achmea's various claims.

A. INTRODUCTORY MATTERS

1. Applicable procedural law

101. The Tribunal's jurisdiction is contingent upon the provisions of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic.[127] On the applicable procedural rules, Article 8(5) of that BIT provides that "[t]he arbitration tribunal shall determine its own procedure applying the arbitration rules of the United Nations Commission for International Trade Law".[128]

102. In PO1, the Tribunal confirmed that the UNCITRAL Rules govern the present proceedings, "[s]ave as otherwise agreed by the Parties and subject to the provisions of [PO1] and any subsequent Procedural Order by the Tribunal".[129] It further stated that:

> "[f]or issues not dealt with in the Rules, the Tribunal shall apply such rules as may be agreed upon by the Parties. In the absence of any such agreement, the Tribunal shall apply such rules as it deems appropriate".[130]

2. Applicable substantive law

103. Article 33 of the UNCITRAL Rules provides that "[t]he arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute".[131]

104. For its part, Article 8(6) of the BIT provides as follows on the issue of the substantive law applicable to the dispute:

> "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;

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[126] PO1, ¶¶ 7.1 and 8.7.

[127] Netherlands-Slovak Republic BIT (**Exh. C-1**).

[128] *Id.*, Article 8(5) (**Exh. C-1**)

[129] PO1, ¶ 2.1.

[130] PO1, ¶ 2.2.

[131] 1976 UNCITRAL Rules, Article 33.

- 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".[132]

105. The Tribunal decided, in PO1, that the place of arbitration shall be Geneva, and it further clarified that "[t]his choice of the place of arbitration in no way affects the law applicable to the merits of the dispute" and that "Article 187 of the Swiss Code on Private International Law merely serves as guidance and is not a mandatory provision in these proceedings".[133]

3. Interpretative approach

106. Under the relevant provisions of the Vienna Convention on the Law of Treaties (the "Vienna Convention" or the "VCLT"),[134] which codify customary international law, the Tribunal shall interpret the provisions of the BIT in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[135]

4. Jurisdictional requirements under the Netherlands–Slovak Republic BIT

107. The Tribunal's jurisdiction is contingent upon the provisions of the BIT, Article 8 of which reads in relevant part:

> "1. All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if possible, be settled amicably.
>
> 2. Each Contracting Party hereby consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement".[136]

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[132] Netherlands-Slovak Republic BIT, Article 8(6) (**Exh. C-1**).

[133] PO1, ¶ 3.2. Article 187 of the Swiss Code on Private International Law reads as follows: "1. The arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected. 2. The parties may authorize the arbitral tribunal to rule according to equity".

[134] Vienna Convention on the Law of Treaties. Done at Vienna on 23 May 1969, entered into force on 27 January 1980, 1155 *U.N.T.S.* 331 (**Exh. RLA-32**). Both State Parties to the BIT are also parties to the Vienna Convention. The Netherlands acceded to the VCLT on 9 April 1985. Czechoslovakia acceded to the VCLT on 29 July 1987, and the Slovak Republic succeeded Czechoslovakia as a State Party on 28 May 1993.

[135] Articles 31-32 VCLT.

[136] Netherlands-Slovak Republic BIT, Article 8(1) and (2) (**Exh. C-1**).

108. Accordingly, Article 8 articulates four jurisdictional requirements. There must be (i) a dispute, (ii) between one Contracting Party and an investor of the other Contracting Party, (iii) concerning an investment, and (iv) which has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement. The Parties disagree on whether a further condition exists requiring the Claimant to show that it has a *prima facie* case on the merits. This latter point will be discussed further below under Section C.

109. It is undisputed between the Parties, that the Claimant is a Dutch national and thus a qualifying investor pursuant to Article 1(b)(ii) of the Treaty.[137] Save for one issue, it is equally undisputed that the Claimant made an investment in accordance with the Article 1(a) of the Treaty.[138] Indeed, Achmea's investment comprises the totality of Union's shares. The Respondent has not objected that such investment is not protected under the BIT. However, the Respondent objects that Achmea's indirect shareholdings in Union Commercial or other Slovak companies would not qualify as protected investments under Article 1(a) of the Treaty.[139]

110. More generally, the Respondent objects to the existence of a dispute under Article 8 of the BIT,[140] and argues as indicated above that the Claimant has failed to state a *prima facie* case.[141] The Respondent further submits that the six-month waiting period provided for in Article 8 (2) of the Treaty has not been respected.[142] Finally, it contends that Article 8 of the Treaty is incompatible with EU law, thus rendering its expression of consent contained therein inoperative.[143]

5. Jurisdiction vs. admissibility

111. Before considering the objections raised by the Slovak Republic, the Tribunal addresses, for the sake of clarity, the question of their characterization as either to the jurisdiction of the Tribunal or to the admissibility of the claims, over which there appears to be a certain disagreement between the Parties.

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[137] Article 1(b)(ii) of the BIT provides that, for the purposes of the treaty, the term "investors" comprises "natural persons having the nationality of one of the Contracting Parties in accordance with its law" (**Exh. C-1**).

[138] Article 1(a) of the BIT, for the purposes of the treaty, provides that the term "investments" shall comprise "every kind of asset invested either directly or through an investor of a third State and more particularly, though not exclusively: (i) movable and immovable property and all related property rights; (ii) shares, bonds and other kinds of interests in companies and joint ventures, as well as rights derived therefrom; (iii) title to money and other assets and to any performance having an economic value; (iv) rights in the field of intellectual property, also including technical processes, goodwill and know-how; (v) concessions conferred by law or under contract, including concessions to prospect, explore, extract and win natural resources" (**Exh. C-1**).

[139] Objections, ¶¶ 119-121; Reply, ¶¶ 151-152.

[140] Objections, ¶¶ 45-57; Reply, ¶¶ 38-76.

[141] Objections, ¶¶ 73-92; Reply, ¶¶ 90-112.

[142] Objections, ¶¶ 93-113; Reply, ¶¶ 113-143.

[143] Objections, ¶¶ 122-195; Reply, ¶¶ 153-216.

112. In essence, the Claimant submits that the Respondent waived the possibility to raise any admissibility objections to Achmea's claims because it failed to do so in its brief on its preliminary objections, as indicated in the Tribunal's letter accompanying PO1.[144] For its part, the Respondent retorts that Achmea's argumentation is irrelevant since, besides being wrong, it "elevates form over substance".[145] The UNCITRAL Rules do not entertain a distinction between objections to jurisdiction and objections to admissibility, and, in any event, the Tribunal has all latitude to qualify the objections as it deems fit, notwithstanding the fact that the Respondent has opted to label them as objections targeted at the jurisdiction of the Tribunal.[146]

113. The Tribunal first notes that the Respondent insisted on having the first phase cover both objections on grounds of jurisdiction and admissibility. It is in this light that the Tribunal ordered the Respondent to file all its objections in its first brief, failing which the Tribunal would consider that it waived its right to do so further along the proceedings. It did so in the following terms:

> "the Respondent shall file a statement containing *all and any* of its objections to the jurisdiction of this Tribunal and to the admissibility of Claimant's claims to be submitted on or before 14 June 2013, failing which the Respondent will have waived the possibility to raise any further objections thereafter".[147]

114. The Tribunal further notes that "admissibility" and "jurisdiction" are two distinct legal concepts under international law, which governs the judicial function of international courts and tribunals.[148] This distinction, which finds its origin in domestic legal systems,[149] has not been strictly enforced at the international level,[150] and has received varying treatment or even been disregarded in the investment treaty context.[151] Some investment tribunals have, in particular, pointed out that the term

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[144] Response, ¶¶ 12-14, referring to the Tribunal's letter of 31 May 2013.

[145] Reply, ¶ 30.

[146] Reply, ¶¶ 31-35. As to the substance, the Respondent submits that (i) the existence of a dispute under Article 8(1), and (ii) the six-month period under Article 8(2) are indeed jurisdictional requirements. In this, regard, it relies on *Armed Activities on the Territory of the Congo (New Application: 2002)*, ¶ 88 (**Exh. RLA-75**), and *Certain Questions of Mutual Assistance in Criminal Matters*, ¶ 48 (**Exh. RLA-24**).

[147] Tribunal's letter to the Parties dated 31 May 2013.

[148] J. Crawford, *Brownlie's Principles of Public International Law* (OUP, 2012), p. 694; G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (CUP, 1986), pp. 438-439.

[149] *Case of the Mavrommatis Palestine Concessions (Greece v. Great Britain)* ("*Mavrommatis Palestine Concessions*"), P.C.I.J., Series A, No. 2, Objection to the Jurisdiction of the Court, 30 August 1924, p. 10 (**Exh. C-64**); *Daimler Financial Services AG v. The Argentine Republic* ("*Daimler v. Argentina*"), ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶ 192 (**Exh. C-83**).

[150] *Mavrommatis Palestine Concessions*, P.C.I.J., Series A, No. 2, Objection to the Jurisdiction of the Court, 30 August 1924, p. 10 (**Exh. C-64**); *Cases concerning Certain German interests in Polish Upper Silesia (Germany v. Poland)* ("*Polish Upper Silesia*"), P.C.I.J., Series A, No. 6, Preliminary Objections, 25 August 1925, p. 19 (**Exh. C-88**).

[151] *See, e.g.*, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, ¶ 41; *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, ¶ 33; *Bayindir Insaat Turzim Ticarez Ve Sanayi A.Ş. v.*

and concept of "admissibility" is absent from the instruments that govern their jurisdiction, such as the relevant investment treaty and the ICSID Convention.[152]

115. The jurisdiction of a tribunal goes to the power to decide a specific dispute, whereas admissibility relates to the ability to exercise that power and speaks to the characteristics of a particular claim and whether it is fit to be heard by a tribunal. As Sir Gerald Fitzmaurice said:

> "there is a clear jurisprudential distinction between an objection to the jurisdiction of the tribunal, and an objection to the substantive admissibility of the claim. The latter is a plea that the tribunal should rule the claim inadmissible on some ground other than its ultimate merits: the former is a plea that the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim. A successful challenge to the jurisdiction stops all further proceedings in the case, or at any rate ensures that there is no finding on the merits. But an unsuccessful jurisdictional plea leaves open the possibility that a finding on the ultimate merits may still be excluded through a decision given against the substantive admissibility of the claim".[153]

116. The key element to determine the jurisdictional character of an objection is assessing whether it addresses the Parties' consent to the relevant dispute settlement mechanism, and the scope of such consent. As the ICJ considered in *Certain Questions of Mutual Assistance in Criminal Matters* that:

> "in determining the scope of the consent expressed by one of the parties, the Court pronounces on its jurisdiction and not on the admissibility of the application".[154]

117. In that case, the Court was confirming its finding in *Armed Activities on the Territory of the Congo*, that "its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them",[155] and that "any conditions to which such consent is subject must be regarded as constituting the limits thereon".[156] The Court concluded

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Islamic Republic of Pakistan ("*Bayindir v. Pakistan*"), ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶ 87; and *Pan American Energy LLC, and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, 27 July 2006, ¶ 54, where the relevant tribunals decided to forego a differentiated analysis on jurisdiction and admissibility, although the distinction may have been raised by one of the Parties.

[152] *See, e.g., L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3, Decision, 12 July 2006, ¶ 58.

[153] G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (CUP, 1986), pp. 438-439 (footnotes omitted). *See also,* J. Crawford, *Brownlie's Principles of Public International Law* (OUP, 2012), p. 694.

[154] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, ¶ 48 (**Exh. RLA-24**).

[155] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda),* Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, ¶ 88 (**Exh. RLA-75**).

[156] *Id.*

that "the examination of such conditions relates to its jurisdiction and not to the admissibility of the application".[157]

118. These considerations are equally applicable in the investment treaty context. For example, the tribunal in *Micula* found that:

> "[W]hen an objection relates to a requirement contained in the text on which consent is based, it remains a jurisdictional objection. If such a requirement is not satisfied, the Tribunal may not examine the case at all for lack of jurisdiction. By contrast, an objection relating to admissibility will not necessarily bar the Tribunal from examining the case if the reasons for the inadmissibility of the claim are capable of being removed and are indeed removed at a subsequent stage. In other words, consent is a prerequisite for the jurisdiction of the Tribunal".[158]

119. Hence, any and all objections grounded on the BIT provision that contains the State's consent to international arbitration for the solution of an investment dispute address the Tribunal's jurisdiction. This rule was expressed with particular clarity in *Daimler*:

> "[a]ll BIT-based dispute resolution provisions [...] are by their very nature jurisdictional. The mere fact of their inclusion in a bilateral treaty indicates that they are reflections of the sovereign agreement of two States – not the mere administrative creation of arbitrators. They set forth the conditions under which an investor-State tribunal may exercise jurisdiction with the contracting state parties' consent, much in the same way in which legislative acts confer jurisdiction upon domestic courts".[159]

120. While the Tribunal must, if necessary, examine issues of jurisdiction of its own volition, questions of admissibility may only be examined if they are raised by the Parties.[160] In light of the fact that the Respondent has only raised objections relating to the jurisdiction of the Tribunal, the Tribunal will accordingly not engage in its own admissibility analysis, but rather consider whether one or more of the objections already raised by the Respondent need to be re-qualified as issues of admissibility. It recalls that under paragraphs 7.1 and 8.7 of PO1,[161] the Tribunal is expressly called to decide at this stage on *both* its jurisdiction *and* the admissibility of the claims submitted.

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[157] *Id.*

[158] *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* ("*Micula v. Romania*"), ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, ¶ 64 (**Exh. C-78**).

[159] *Daimler v. Argentina*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶ 193 (**Exh. C-83**).

[160] *Micula v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, ¶ 65 (**Exh. C-78**).

[161] Paragraph 7.1 of PO1 provides: "The Parties agreed in principle that the present proceedings shall be bifurcated. Accordingly, a one-day evidentiary hearing on jurisdiction and admissibility [...] will be held"; and paragraph 8.7 provides: "The Tribunal will determine the further procedure in consultation with the Parties as necessary, following any Ruling made in respect of the objections to jurisdiction and admissibility raised by the Respondent".

121. The Tribunal will now address each objection in turn. In the making of its ruling the Tribunal has observed Article 8(7) of the BIT, as well as Articles 31 and 32 of the UNCITRAL Rules. The Tribunal notes that, in its analysis, it addresses the dispositive and outcome-determinative arguments raised by the Parties; it does not include a consideration of each and every specific argument raised by the Respondent in support of its objections, or by the Claimant in response to such objections. Even if not explicitly addressed in its ruling, the Tribunal wishes to stress that it carefully considered all of the Parties' oral and written submissions.

B. FIRST OBJECTION: THERE IS NO LEGAL DISPUTE

1. The Respondent's position

122. The Respondent submits that Achmea's expropriation claim is premature and hypothetical since there is no dispute under the Treaty. In addition, the Tribunal's decision on such a claim would not have practical and concrete consequences, and would ultimately be an impermissible advisory opinion falling outside the ambit of the Tribunal's jurisdiction. In essence, Achmea's attempt to create a "stand-by tribunal", so the Respondent argues, is an abuse of rights.

123. The Slovak Republic submits that Achmea's expropriation claim fails to qualify as a "dispute" under Article 8 of the BIT.[162] A dispute requires a "conflict of claims and rights",[163] and the existence of a dispute is a "jurisdictional threshold [that] must be met at the time of commencement of proceedings".[164]

124. The requirement that the actual controversy must be "concrete" is "well recognized in international jurisprudence" and is meant to prevent tribunals from engaging in "abstract disagreements over administrative policies" and to protect States from unnecessary litigation and from judicial interference "until the act at issue has been executed".[165]

125. The International Court of Justice ("ICJ") has stated that its contentious jurisdiction authorizes it to "pronounce judgment only in connection with concrete cases where there exists at the time of adjudication an actual controversy involving a conflict of legal interests between the parties".[166]

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[162] Objections, ¶ 45.

[163] *Black's Law Dictionary*, 6th Edition (West Publishing, 1996), p. 472 (**Exh. RLA-7**).

[164] Objections, ¶ 46; referring to *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, 14 February 2002, I.C.J. Reports 2002, ¶ 26 (**Exh. RLA-72**).

[165] Objections, ¶ 47.

[166] Objections, ¶ 48; citing *Case Concerning the Northern Cameroons (Cameroon v. The United Kingdom)*, Preliminary Objections, Judgment of 2 December 1963: I.C.J. Reports 1963, pp. 33-34 (**Exh. RLA-8**). It is to be noted that Exh. RLA-8 only contains the Unofficial Communiqué No. 63/14 dated 2 December 1963, but not the Court's ruling.

126. The requirement of concreteness has likewise been recognized in the investment arbitration context,[167] and more particularly in the expropriation context.[168] In *AES*, the tribunal held that jurisdiction depends on "legal issues in relation with a concrete situation" and that "the tribunal's determination must have some practical and concrete consequences".[169] In that case, jurisdiction was found on the basis of statutory provisions in force, including an executive decree, a national emergency law and posterior decrees of application, as well as a documented claim for compensation. The Claimant has not pointed, and cannot point, to any similar elements in the instant proceedings.[170]

127. In the *Mariposa* case, the tribunal found that "the claim came into existence only when the expropriation was enforced".[171] The same conclusion was reached in *Aminoil* and *Glamis Gold*.[172] In *Glamis Gold*, for example, the tribunal held that "mere threats of expropriation or nationalization are not sufficient to make such a claim ripe".[173]

128. In the instant case, the Project Plan is non-binding and optional, and as such "the issue is not fit for jurisdiction".[174] The Slovak Republic further submits that "no one currently knows the ultimate modalities of a possible expropriation. And yet it is precisely those modalities that will determine whether the criteria for a lawful expropriation under Article 5 of the Treaty are satisfied".[175] This is so because the Respondent can lawfully expropriate Achmea's investment under the Treaty, so long as it does so in accordance with the terms of Article 5.[176] As counsel for the Respondent presented the issue at the hearing:

> "some expropriations are lawful and some expropriations are not and therefore in order for a tribunal to judge an expropriation under article 5 you must know the facts. And you simply do not and cannot know the facts. No one does".[177]

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[167] *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, ¶ 44 (**Exh. RLA-9**).

[168] *Mariposa Development Company (Panama/USA)*, 6 R.I.A.A. 338, 27 June 1933, p. 341 (**Exh. RLA-10**).

[169] *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, ¶ 44 (**Exh. RLA-9**).

[170] Tr. 20:12-21:5.

[171] Objections, ¶ 50, referring to *Mariposa Development Company (Panama/USA)*, 6 R.I.A.A. 338, 27 June 1933, p. 341 (**Exh. RLA-10**).

[172] Objections, ¶¶ 51-52, citing *Aminoil v. Kuwait*, Final Award, 24 March 1982, 21 I.L.M. 976, p. 1026 (**Exh. RLA-11**); and *Glamis Gold v. United States*, UNCITRAL, Award, 8 June 2009, ¶ 328 (**Exh. RLA-12**).

[173] *Glamis Gold v. United States*, UNCITRAL, Award, 8 June 2009, ¶ 328 (**Exh. RLA-12**).

[174] Objections, ¶¶ 54-55.

[175] Objections, ¶ 55.

[176] Objections, ¶ 56.

[177] Tr. 13:23-14:4.

129. According to the Slovak Republic, Achmea does not deny that the existence of a dispute is an objective matter for the Tribunal to determine when considering jurisdiction.[178] And if no dispute exists, "a conclusion of incompetence or *fin de non-recevoir* must follow".[179]

130. The alleged disagreement over the potential expropriation outlined in the Project Plan is "optional, vague, and without any legal effect".[180] Given that an expropriation may be conducted in a legal manner, "an expropriation claim arises only when an expropriation law is actually applied against an investor".[181]

131. Relying on *Malicorp* and *SAUR*, together with Articles 1, 2 and 12 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("ILC Articles"),[182] the Respondent submits that for there to be a dispute there must be a claim that a violation of the Treaty has actually occurred because only then international responsibility can arise.[183]

132. In fact, contends the Respondent, Achmea has not pointed to a single investment arbitration case where allegations of a future expropriation were deemed to constitute a dispute.[184]

133. The Parties' disagreements about possible, future events are not sufficient to constitute a dispute in the absence of an allegation of a past or ongoing breach of the Treaty.[185] The Cabinet's desire to implement a unitary health insurance system is not even a "conduct" within the meaning of Articles 2 and 4 of the ILC Articles.[186]

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[178] Reply, ¶ 38, citing *United Parcel Service of American Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction, 22 November 2002, ¶ 32 (**Exh. RLA-18**), and *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Order of the Tribunal on Further Proceedings, 17 December 2007, ¶ 19 (**Exh. RLA-76**).

[179] Reply, ¶ 38, citing *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962: I.C.J. Reports 1962, pp. 319 and 328 (**Exh. C-66**).

[180] Reply, ¶ 40.

[181] Reply, ¶ 41.

[182] United Nations International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles on State Responsibility"), Annex to General Assembly Resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I/Corr.4) (**Exh. RLA-13**).

[183] Reply, ¶¶ 43-45, citing *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, ¶ 102 (f) (**Exh. RLA-77**); and *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Objections to Jurisdiction, 27 February 2006, ¶ 74 (**Exh. RLA-78**).

[184] Reply, ¶ 47.

[185] Reply, ¶ 50.

[186] Reply, ¶ 51.

134. A dispute under Article 8 of the BIT requires allegations of a past or ongoing violation, and Achmea does not allege any such violation of Article 5 of the Treaty.[187]

135. On the Claimant's reliance on the *Certain German Interests in Upper Silesia* case,[188] the Respondent argues that the instant case is different from the one decided by the Permanent Court of International Justice ("PCIJ") because Poland had actually taken a first legislative step, which the Slovak Republic has not done here.[189] Furthermore, counsel for the Respondent noted that "the statement of intention [in that case] was not just a statement of intention, it in fact had direct legal consequences. The legal consequences were that it placed a restriction on the property owner's right to alienate the property inter vivos".[190] Finally, the Respondent notes that the treaty providing for the jurisdiction of the Court, the Geneva Convention, expressly provided for a mandate to issue advisory opinions, which is absent from the BIT.[191]

136. Relying on *AES*, the Respondent maintains that one of the elements of the test of jurisdiction consists in determining "if the Tribunal's determination of the answer to be given to these issues would have some practical and concrete consequences",[192] which would not be the case in the instant arbitration.

137. Indeed, the type of relief requested – that the Slovak Republic be ordered to refrain from expropriating – "is impermissible under public international law and is too vague to have any concrete or practical consequence".[193] Under Articles 31 and 34 of the ILC Articles,[194] the remedies available against a State in international law are limited to restitution, compensation and satisfaction.[195]

138. The Tribunal "cannot impose a '*penalty*' or a pre-emptive ban on the Slovak Republic's sovereign power to legislate [...] because any relief against a State is available only *if* and *after* the State violates an international legal obligation".[196] Thus, Achmea does not have standing to bring an expropriation claim.[197] In the

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[187] Reply, ¶ 76.

[188] *Polish Upper Silesia*, P.C.I.J., Series A, No. 6, Preliminary Objections, 25 August 1925 (**Exh. C-88**); *Polish Upper Silesia*, P.C.I.J., Series A, No. 7, Merits, 25 May 1926 (**Exh. C-89**).

[189] Tr. 26:1-4.

[190] Tr. 26:5-10.

[191] Tr. 26:18-25.

[192] Objections, ¶ 58-59, referring to *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, ¶ 44 (**Exh. RLA-9**).

[193] Objections, ¶ 60.

[194] ILC Articles on State Responsibility, Articles 31 and 34 (**Exh. RLA-13**).

[195] Objections, ¶ 61. *See also,* Tr. 15:24-16:9.

[196] Objections, ¶ 62, referring to ILC Articles on State Responsibility, Articles 1, 28 and 31 (**Exh. RLA-13**).

[197] Objections, ¶ 64; Reply, ¶ 81.

Respondent's submission, the Claimant has "failed to provide any legal authority for its bold assertion that a '*financial penalty*' is a permissible remedy".[198]

139. The Claimant has asked the Tribunal to order the Slovak Republic to refrain from expropriating its investment "on the terms of the Project Plan or materially similar terms".[199] The Respondent submits that, even if the relief sought was permissible, and it is not, "the terms of the Project Plan are far too vague and optional to understand what '*[those] or materially similar terms*' could be".[200] Accordingly, the Tribunal's decision on the expropriation claim would be "too vague and would not have any practical and '*concrete*' legal consequences".[201]

140. The legal authorities cited by Achmea confirm that specific performance is a possible form of relief only as a form of restitution after a breach has occurred; the cited passages from Professor Schreuer's academic writings relate to cases in which specific performance was ordered as a form of restitution for breaches that had already occurred.[202]

141. In the Respondent's submission, the jurisdictional character of the issue of remedies has been confirmed by several tribunals, including the tribunals in *AES*, *Continental Casualty*, *Telefónica*, and *Total*.[203]

142. Given that the basis for the jurisdiction of the Tribunal is Article 8 of the Treaty, the Tribunal must consider whether this provision allows for the relief sought by Achmea.[204] Given that the expropriation claim seeks relief that is impermissible under public international law, this bars the Tribunal's jurisdiction *rationae materiae*.[205]

143. The Slovak Republic contends that the Claimant is actually asking the Tribunal to issue an advisory opinion, whose purpose as understood by the ICJ is "not to settle – at least directly – disputes between States, but to offer legal advice to the organs and

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[198] Reply, ¶ 83.

[199] SoC, ¶ 228(i).

[200] Objections, ¶ 65. *See also*, Tr. 14:22-15:15.

[201] Objections, ¶ 66.

[202] Reply, ¶ 84, referring to C. Schreuer, *The ICSID Convention: A Commentary* (CUP, 2009), pp. 1136-1138 (**Exh. C-80**); and C. Schreuer, "Non-Pecuniary Remedies in ICSID Arbitration", 20 *Arbitration International* (2004), p. 331 (**Exh. C-74**).

[203] Reply, ¶¶ 78-79, referring to *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, ¶ 44 (**Exh. RLA-9**); *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction, 22 February 2006, ¶ 60 (**Exh. RLA-88**); *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, ¶ 53 (**Exh. RLA-90**); and *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, 25 August 2006, ¶ 52 (**Exh. RLA-89**).

[204] Reply, ¶ 80.

[205] Reply, ¶ 85.

institutions requesting the opinion".[206] During the hearing, counsel for the Respondent submitted that "[n]o BIT tribunal has ever made itself available to engage in this process, nor [...] has any other investor to [his] knowledge ever asked a tribunal to do so".[207]

144. An *ex-ante* assessment of the legality of the Slovak Government's policy choice to re-introduce a unitary public health insurance system is manifestly outside the Tribunal's jurisdiction,[208] since the Slovak Republic and the Netherlands "did not agree to grant an arbitral tribunal such extraordinary jurisdiction under the Treaty".[209]

145. The Respondent rejects the Claimant's submission that, under its broad definition of "dispute", the Tribunal has jurisdiction to "*pre-assess* whether a *possible* act *would* violate Article 5 of the Treaty simply because the Slovak Republic *might* expropriate property owned by Dutch investors".[210] Article 8 of the Treaty cannot be interpreted to allow for such premature and hypothetical claims;[211] had the parties to the Treaty intended to provide for advisory opinions they would have done so.[212]

146. In fact, the phrase "all disputes" in Article 8 of the Treaty should be read in context, as provided for under the Vienna Convention.[213] According to the Respondent, "[t]he other provisions of the treaty [...] establish certain rights, they impose damages if there is a breach of those rights and indeed BIT tribunals have uniformly decided jurisdictional objections on this basis".[214]

147. Finally, the Slovak Republic submits that "Achmea is not seriously interested in pursuing the claims as stated in its Statement of Claim" and has brought them with the hope to "keep this Tribunal available long enough to instantaneously hear Achmea's future, new claims if and when the expropriation of [its] investment actually occurs" as evidenced by "[t]he striking absence of any submissions on quantum".[215] During the hearing, counsel for the Respondent expanded on this argument in the following terms:

> "Achmea clearly plans an ever moving attack on the legislative process for a standby tribunal established initially with impermissible claims so it can

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[206] Objections, ¶ 68, citing *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, ¶ 15 (**Exh. RLA-15**). It is to be noted that Exh. RLA-15 only contains the Unofficial Communiqué No. 96/23 dated 8 July 1996, but not the Court's ruling.

[207] Tr. 17:12-15.

[208] Objections, ¶ 69.

[209] Objections, ¶ 71, and Reply, ¶ 88.

[210] Reply, ¶ 86 (emphasis in the original).

[211] Reply, ¶ 89.

[212] Tr. 17:19-18:1.

[213] Tr. 18:9-19:11.

[214] Tr. 19:13-18.

[215] Objections, ¶¶ 118 and 115. *See also*, Tr. 12:7-19.

see if something ever happens that would give it a claim that would in fact justify jurisdiction".[216]

148. Citing the findings of the investment tribunals in *Phoenix Action* and *Mobil*, the Respondent contends that the abuse-of-rights doctrine is a fundamental principle of international law;[217] and refers to Lauterpacht to state that "[t]here is no right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused".[218]

149. Accordingly, the Claimant's attempt to create a "stand-by" tribunal constitutes an abusive use of the Treaty[219] and Achmea's claims should be dismissed on this ground as well.[220]

2. The Claimant's position

150. The Claimant, for its part, maintains (i), that there is a dispute between the Parties and, (ii), that there is no additional requirement of concreteness. In any event, (iii), the present dispute is concrete, while (iv), the appropriateness of the relief sought goes to the merits of the case.

151. The ICJ has defined a "dispute" as "[a] disagreement on a point of law or fact, or conflict of legal views or of interests between two persons".[221] In other words, "[i]t must be shown that the claim of one party is positively opposed by the other".[222]

152. A dispute between the Parties clearly exists, because Achmea's view is that the expropriation as contemplated in the Project Plan, if carried out, would be unlawful and would violate Article 5 of the BIT, and the Respondent holds the opposite view. Furthermore, it is in Achmea's interest to remain in the Slovak market and it is in the Respondent's interest to expropriate Achmea's investment.[223]

153. The requirement of concreteness as referred to by the Respondent is based on an erroneous interpretation of the cases it cites; in fact, there is no such requirement

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[216] Tr. 16:25-17:5.

[217] Objections, ¶ 116, referring to *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 107 (**Exh. RLA-29**); and *Mobil Corporation and Others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, ¶¶ 169 *et seq.* (**Exh. RLA-28**).

[218] Objections, ¶ 116, citing H. Lauterpacht, *Development of International Law by the International Court* (Stevens, 1958) p. 164.

[219] Objections, ¶ 114.

[220] Objections, ¶ 118.

[221] *Mavrommatis Palestine Concessions*, P.C.I.J., Series A, No. 2, Objection to the Jurisdiction of the Court, 30 August 1924, p. 11 (**Exh. C-64**).

[222] Response, ¶¶ 78-79, citing *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962: I.C.J. Reports 1962, p. 328 (**Exh. C-66**).

[223] Response, ¶ 80.

implying that an expropriation dispute can only be concrete enough for a tribunal to have jurisdiction if the expropriation in question is completed.[224]

154. Achmea submits that the "requirement of concreteness", referred to by the Tribunal in *AES*, "merely means that an arbitral tribunal in the context of the ICSID [C]onvention is not meant to be constituted only to decide a purely academic question in absence of a dispute".[225] Furthermore, quoting Schreuer, the Claimant contends that "[a]ctual or concrete damage is not required before such a party may bring legal action".[226]

155. In the *Headquarters Agreement* case, the ICJ found that there was a dispute; that the legislation in question – measures by the United States purporting to close the PLO Mission to the United Nations – had not yet been implemented did not exclude the existence of a dispute.[227]

156. *Glamis Gold* and *Aminoil*, cited by the Slovak Republic, do not support the Respondent's position, because these awards concern legal instruments requiring that damages be incurred or that the relevant contract be breached before a claim could be filed.[228]

157. In any event, even if the Tribunal finds that a requirement of concreteness does apply, the present dispute is concrete enough and Achmea has described exactly which past, present and future actions by the Slovak Republic it considers to be in violation of the BIT: "the Slovak Republic has breached the BIT and is still breaching the BIT by failing to protect Achmea's investment, and by actively taking steps to harm that investment and to unlawfully expropriate it".[229]

158. On the relief it seeks, the Claimant submits that it is a matter to be dealt with in the merits phase. It further argues that "[a]part from the fact that Achmea is requesting several types of relief that the Slovak Republic does not dispute can be granted (such as declaratory and monetary relief), Achmea is entitled within the boundaries of Article 20 of the UNCITRAL Rules to 'amend or supplement' its claims 'during the course of the arbitral proceedings'" which renders the Tribunal's jurisdiction not

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[224] Response, ¶ 83.

[225] Response, ¶ 83, referring to *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, ¶ 43 (**Exh. RLA-9**).

[226] Response, ¶ 84, citing C. Schreuer, "*What is a legal dispute?*", in I. Buffard, J. Crawford, A. Pellet, S. Wittich (eds.), *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner* (Koninklijke Brill NV, 2008), p. 970 (**Exh. C-79**).

[227] Response, ¶ 85, citing *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, I.C.J. Reports 1988, ¶¶ 42-43 (**Exh. C-68**).

[228] Response, ¶ 87, referring to *Glamis Gold v. United States*, UNCITRAL, Award, 8 June 2009, ¶¶ 52 and 309 *et seq.* (**Exh. RLA-12**); and *Aminoil v. Kuwait*, Final Award, 24 March 1982, 21 I.L.M. 976, p. 1026 (**Exh. RLA-11**).

[229] Response, ¶¶ 88-89.

contingent on whether or not it can grant one of the several types of relief requested in the Statement of Claim.[230]

159. The Claimant furthermore submits that, contrary to the Respondent's assertions, it is not seeking a legal opinion from the Tribunal.[231] It also rejects the Slovak Republic's submission that Achmea is attempting to create a "stand-by" tribunal.[232]

160. In fact, there is no applicable rule that prohibits the Tribunal from ordering the relief sought by Achmea.[233] The Claimant submits that "[p]ermitting arbitral penalties is part of the contemporary tendency to reinforce the effectiveness of the arbitral process".[234] It also quotes from Schreuer, who has said that "[t]he ability to order specific performance is a power that is inherent in a tribunal's jurisdiction"[235] and that "[t]here is no doubt that an obligation imposed by an award that is expressed not in monetary terms but in terms of an obligation to perform a particular act or to refrain from a certain course of action is equally binding and gives rise to the effect of *res judicata*".[236]

161. Contrary to the Slovak Republic's allegations, Article 5 of the BIT does not guarantee its right to expropriate foreign investments; rather, it forbids the Respondent from expropriating and provides "an exception to the prohibition [...] under specific and very narrowly defined circumstances".[237]

3. Discussion

162. The Slovak Republic's first objection relates to the purported absence of a legal dispute. The existence of a dispute is a specific requirement for the Tribunal to have jurisdiction under the Treaty.

163. Article 8 (1) and (2) of the Treaty provides as follows:

> "1. All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if possible, be settled amicably.
>
> 2. Each Contracting Party hereby consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six

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[230] Response, ¶ 19.

[231] Response, ¶ 132.

[232] Response, ¶ 133.

[233] Response, ¶ 135.

[234] Response, ¶ 136.

[235] Response, ¶ 135, citing C. Schreuer, "Non-Pecuniary Remedies in ICSID Arbitration", 20 *Arbitration International* (2004), p. 331 (**Exh. C-74**).

[236] Response, ¶ 135, citing C. Schreuer, *The ICSID Convention: A Commentary* (CUP, 2009), pp. 1136-1138 (**Exh. C-80**).

[237] Response, ¶¶ 140-141.

months from the date either party to the dispute requested amicable settlement".[238]

164. While the Claimant argues that the expression "all disputes" is broad and that, under either definition advanced by the Parties in this instance, Achmea's disagreement with the Slovak Republic qualifies as a dispute under the BIT, the Respondent retorts that a dispute within the meaning of Article 8 "requires an allegation that a breach of the Treaty *has occurred*".[239] Furthermore, the Slovak Republic also argues that Achmea's claims have no plausible chance to succeed on the merits.

165. The Treaty does not define the term "dispute". Article 8(1) provides that "all disputes" concerning an investment shall if possible be settled amicably. Article 8(2) provides in relevant part that any dispute that could not be settled amicably, can be submitted to an arbitral tribunal constituted in accordance with Article 8(3) and (4).

166. Black's Law Dictionary defines "dispute" as "[a] conflict or controversy; a conflict of claims of rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other".[240]

167. The notion of dispute was discussed at length by the Permanent Court of International Justice (the "PCIJ") and its successor, the International Court of Justice (the "ICJ"). In *Mavrommatis*, the PCIJ defined a dispute as "[a] disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".[241] The ICJ clarified that the assessment of whether a dispute exists must be subject to an objective determination.[242] It is not sufficient that the Claimant alleges the existence of a dispute,[243] nor is it sufficient for the Respondent to deny the existence of a dispute.[244] In the *South West Africa* cases, the ICJ further indicated that a mere conflict of interests is not sufficient, but that "[i]t must be shown that the claim of one party is positively opposed by the other".[245] Finally, the ICJ also held that "[t]he

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[238] Netherlands-Slovak Republic BIT, Article 8(1) and (2) (**Exh. C-1**).

[239] Reply, ¶ 39.

[240] *Black's Law Dictionary*, 6th Edition (West Publishing, 1996), p. 472 (**Exh. RLA-7**).

[241] *Mavrommatis Palestine Concessions*, P.C.I.J., Series A, No. 2, Objection to the Jurisdiction of the Court, 30 August 1924, p. 11 (**Exh. C-64**).

[242] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, ICJ, Advisory Opinion, 30 March 1950, p. 74; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2007, ¶ 138. In the context of investment arbitration, *see*: *United Parcel Service of American Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction, 22 November 2002, ¶ 34 (**Exh. RLA-18**); *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Order of the Tribunal on Further Proceedings, 17 December 2007, ¶ 19 (**Exh. RLA-76**).

[243] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962: I.C.J. Reports 1962, p. 328 (**Exh. C-66**).

[244] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, 30 March 1950, I.C.J. Reports 1950, p. 74 (**Exh. C-65**).

[245] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962: I.C.J. Reports 1962, p. 328 (**Exh. C-66**).

existence of a dispute does not depend on the objective validity of the claims".[246] For instance, in the *East Timor* case, the Court held that by virtue of Australia's denial of the complaints formulated, rightly or wrongly, by Portugal, there was a legal dispute.[247]

168. A dispute may involve a complaint of fact or law. There is no need to delve into the question of what a dispute of fact means. A disagreement on a point of law may relate to the existence, interpretation or application of a legal provision. It appears from the case law of the ICJ and its predecessor that the existence of a dispute is readily acknowledged where a claimant submits specific and argued claims, which are denied by a respondent.[248] Hence, for the Tribunal to have jurisdiction, it suffices if it is established that there is a conflict of legal views between the Parties, whether the Claimant will seek from the Respondent a relief arising from the existence of legal rights rather than only factual interests which would not be legally protected. In turn, this will beg a second question, namely whether the dispute concerns an investment and is thus not of a political or commercial nature. In the present instance, the issue goes to whether Achmea formulated claims of a "legal nature" which were denied or rejected by the Respondent prior to the institution of these proceedings.

169. There can be no doubt that the Parties have stated opposing views on the Respondent's conduct and its impact on the Claimant's rights under the Article 5 of the BIT. According to the Claimant, the Slovak Republic has engaged in conduct, through the adoption of the Intention Statement, the Project Plan and the draft Transformation Act, including government resolutions approving such documents and public statements related thereto, which it believes warrants redress under the BIT.[249]

170. On 23 July 2012, Achmea's chairman, Mr. Willem van Duin, signified his concern about announcements that the Slovak Republic was considering gaining control of Union "through an expropriation, or measures similarly designed to force Achmea to abandon control over its investment".[250] He also indicated that "[s]uch measures will again cause significant damage to Achmea".[251] He further specified that there was no public interest justifying the removal of privately-owned health insurance companies from the Slovak market and that such removal would appear discriminatory since it would only target foreign-owned businesses.[252] The Slovak Government responded to this letter on 31 July 2012 by referring to its principled right under the BIT to expropriate foreign investors of their investment, and opining that the Government's

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[246] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, ¶ 329.

[247] *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, ¶ 22.

[248] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, ¶ 326.

[249] SoC, ¶¶ 213-217; Response, ¶ 80.

[250] Letter of Achmea to His Excellency Mr. Robert Fico, 23 July 2012, p. 1 (**Exh. C-13**).

[251] *Id.*, p. 2.

[252] *Id.*

statements or its approval of the Intention Statement are not capable of causing harm to Achmea:

> "[I]t has to be stated that such a treaty [*i.e.*, the BIT] allows for dispossession of a foreign investor of its investment for reasons of public interest, in compliance with the law and in a non-discriminatory manner, provided that the Slovak Republic will be obliged to pay to the investor without undue delay a fair compensation.
>
> The Government of the Slovak Republic does not believe that its statements and approval of the intention to implement a unitary public health insurance system in the Slovak Republic might be capable of causing any damage to Achmea".[253]

171. In the 17 December 2012 letter addressed to the Prime Minister of the Slovak Republic, Achmea summarized its dispute with the Slovak Republic as follows:

> "In essence, this dispute concerns your government's unjustified determination to remove Achmea's operations from the Slovak public health insurance market, despite the fact that Achmea – as Achmea has communicated on several occasions – wishes and is entitled to continue these operations. The removal of Achmea's investment by way of an expropriation as contemplated in the Project Plan clearly violates the BIT and other applicable law; and so do the negotiations contemplated in the Project Plan for a so-called 'voluntary buy-out' of Achmea's investment which – even if Achmea would want to enter into such negotiations (which it does not) – are manifestly unfair and not voluntary at all, since they would be conducted under the threat that Achmea's investment will be expropriated if no agreement is reached".[254]

172. Furthermore, in its Notice of Arbitration, Achmea specified that:

> "A dispute exists between Achmea and the Slovak Republic concerning Achmea's investment. The dispute in essence concerns the Slovak Republic's determination to remove Achmea's investment from the Slovak health insurance market [...], whereas Achmea wishes to retain and continue its investment in the Slovak health insurance market [...]
>
> The dispute between Achmea and the Slovak Republic pertains to the BIT. The expropriation of Achmea's investment contemplated by the Slovak Republic should comply with Articles 5 and 3 of the BIT, which it does not".[255]

173. Achmea's legal position was consistently denied by the Slovak Republic, arguing first and foremost that the Slovak Republic is entitled within the limits of Article 5 of the BIT to make use of its sovereign prerogative to expropriate foreign assets. That a dispute exists between the Parties on the proper interpretation of Article 5 became

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[253] Letter from the Prime Minister of the Slovak Republic, His Excellency Mr. Robert Fico, to Achmea, 31 July 2012, p. 2 (**Exh. C-16**).

[254] Letter of Achmea to His Excellency Mr. Robert Fico, 17 December 2012, ¶ 5 (**Exh. C-38**).

[255] Notice, ¶¶ 150-151.

overwhelmingly apparent at the hearing, where both Parties adopted diametrically opposed interpretations of that provision. While the Slovak Republic insisted on its principled right to expropriate foreign assets in accordance with the conditions set out in Article 5 of the BIT, the Claimant argued that this provision enshrined a prohibition of expropriation, entailing a series of legal consequences in terms of available relief. For the Claimant, the Slovak Republic was:

> "trying to prohibit effective enforcement of a BIT provision that prohibits expropriation. If you look at article 5 it says, 'neither contracting party shall expropriate unless', and that is a prohibition. Any effective enforcement of that prohibition requires that we have the right to submit to your tribunal any arguments that we have on that prohibition before that prohibition is breached".[256]

174. And the Claimant continued:

> "the principal rule of article 5 is, and it starts that way if you read the article: neither party shall expropriate. Then there is an unless clause which says 'unless' and then follow three conditions that have to be complied with. Our submission is that is a clear prohibition, there is one exception, they are permitted to demonstrate that that exception applies, they can do that, but unless and until they have done so the principal rule, the starting point, the words that the article starts out with, apply in full force".[257]

175. Arguing the contrary, the Respondent stated that:

> "it is our submission, clearly, that nothing in the treaty should prevent the Slovak Republic from engaging in that discussion, from engaging in consideration of the issue, and in fact all other issues related to the possibility of a unitary system.
>
> Now, then I think I heard, well, they haven't explained what the public purpose is. There is no statement of public purpose in these documents that we have looked at. In the documents so far, what is the obligation to state the public purpose? There is no obligation at this point".[258]

176. The foregoing clearly shows that the two Parties hold radically opposing views on the proper interpretation of Article 5 of the BIT. Accordingly, the Tribunal finds that a dispute exists between the Parties.

177. The Tribunal is not convinced by the Respondent's attempt to add requirements under the heading of the existence of a dispute. It is the Respondent's submission that for a dispute to exist (i) the Claimant must have alleged that a breach has already occurred; (ii) the Claimant bears the burden of showing that the actual controversy is concrete; and (iii) the relief sought must be permissible.

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[256] Tr. 106:10-19.

[257] Tr. 107:25-108:12.

[258] Tr. 180:4-16.

178. The Respondent argued that "[a] *'dispute'* within the meaning of Article 8 requires an allegation that a breach of the Treaty *has occurred*".[259] In particular, a disagreement on possible future conduct is not sufficient to constitute a dispute "in the absence of an allegation of a past or ongoing breach of the Treaty".[260] The Respondent relied in this respect on *Malicorp v. Egypt*, where the tribunal held that the allegation of a treaty breach is a jurisdictional requirement,[261] and on *SAUR v. Argentina*, where the tribunal held that "si les lois à caractère général et leur application concrète par les autorités argentines constituent une violation des droits conférés à un investisseur étranger par le Traité Bilatéral, alors un différend d'ordre juridique prend effectivement naissance entre un investisseur et le pays d'accueil".[262]

179. The Respondent called attention to the fact that Achmea acknowledged that it was not yet expropriated of its investment. Achmea only claims that if the expropriation were carried out on the terms of the Project Plan or on materially similar terms, then it would breach Article 5 of the BIT. Hence, Achmea acknowledged that no breach of Article 5 had yet occurred.

180. In the view of the Tribunal, the question of whether the Claimant alleged a breach of Article 5 of the BIT is of little relevance for the determination of whether a dispute on the interpretation and application of Article 5 exists. Indeed, the Respondent conflates the question of the existence of a legal dispute and the law of international responsibility.[263] It does not follow from the fact that international responsibility can arise only after an internationally wrongful act has occurred, that an internationally wrongful act is required for a legal dispute to exist. In other words, the allegation of a breach is not a constitutive element of the notion of legal dispute but rather a requirement for liability to arise. In any event, the Tribunal notes that the Claimant has alleged that the Slovak Republic was obliged under Article 5 of the Treaty to state a public interest in the Project Plan, and that a failure to do so warrants review by the present Tribunal. Whatever the outcome of that argument, at the present juncture, the Tribunal cannot but find that there is a legal dispute between the Parties on the correct interpretation of Article 5 of the Treaty.

181. Moreover, the cases relied upon by the Respondent are of no help here. *Malicorp* is inapposite to the extent that the tribunal in that case enumerated various jurisdictional requirements, amongst which were the existence of a dispute, and, additionally, the

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[259] Reply, ¶¶ 39, 43.

[260] Reply, ¶ 50.

[261] *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, ¶ 102(f) (**Exh. RLA-77**).

[262] *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Objections to Jurisdiction, 27 February 2006, ¶ 74 (**Exh. RLA-78**) ("if laws of a general nature and their concrete application by the Argentine authorities constitute a breach of rights conferred to a foreign investor by the Bilateral Treaty, then a dispute of a legal nature effectively comes into existence between the investor and the host State", unofficial translation).

[263] *See*, in particular, Reply, ¶ 45.

allegation of a breach of the bilateral investment treaty.[264] Hence, it is incorrect to conclude that the allegation of a breach is a constitutive element of a legal dispute. As regards *SAUR*, the Tribunal is also unconvinced of its relevance here. In that case, the tribunal held that it did not fall within the ambit of its jurisdiction to adjudicate measures of general application, such as legislative acts or instruments implementing them, unless such "general laws and their specific implementation [...] violate the rights conferred on the foreign investor under the bilateral treaty", at which time one could consider that a dispute of a legal nature arises.[265] While the Tribunal agrees with the general conclusion reached by the tribunal in *SAUR*, it does not believe that this question has to be resolved at the stage of determining whether a legal dispute exists (which the *SAUR* tribunal in any case found to exist in that particular instance). Deciding on a "general law" is not the remedy sought in this arbitration, but would rather be a step in the Tribunal's reasoning to adjudicate on the Claimant's requested relief. Hence, if at all, such issue would rather arise at the stage of the so-called *prima facie* test to which the Tribunal will revert below.

182. The Respondent also relied on the *Northern Cameroons* case to argue that a dispute only exists if the Claimant can show that the actual controversy is "concrete". The Tribunal is of the view that the Respondent's reading of a concreteness requirement into the notion of dispute is unsupported by the authorities it relies on. In *Northern Cameroons*, the ICJ held that

> "[t]he function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function".[266]

183. However, prior to that, the Court first held that a legal dispute existed between Cameroon and the United Kingdom when proceedings were instituted, in light of "the opposing views of the Parties as to the interpretation and application of relevant articles of the Trusteeship Agreement".[267] It then indicated that some circumstances may warrant the Court to refuse to exercise its jurisdiction, notably in pursuance of its

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[264] *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, ¶ 102(d) and (f) (**Exh. RLA-77**) ("[T]he jurisdiction of an arbitral tribunal [is] subject to a certain number of conditions [...]: d) *A legal dispute*. [...] f) *An alleged violation of the Treaty*").

[265] *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Objections to Jurisdiction, 27 February 2006, ¶ 74 (**Exh. RLA-78**).

[266] *Case Concerning the Northern Cameroons (Cameroon v. The United Kingdom)*, Preliminary Objections, Judgment of 2 December 1963: I.C.J. Reports 1963, pp. 33-34 (**Exh. RLA-8**). It is to be noted that Exh. RLA-8 only contains the Unofficial Communiqué No. 63/14 dated 2 December 1963, but not the Court's ruling.

[267] *Id.*, p. 27.

duty to safeguard its judicial function.[268] Since the dispute had become moot in the course of the proceedings, the Court held that "to adjudicate on the merits would be inconsistent with its judicial function".[269] Hence, this decision does not support the Respondent's reading of a specific concreteness requirement into the existence of a legal dispute.

184. The Respondent's reliance on *AES v. Argentina* is equally unavailing. The Respondent argued that investment treaty tribunals have recognized that "a claim must be sufficiently concrete for the Tribunal to have jurisdiction to adjudicate the claim".[270] In particular, the *AES* tribunal held that:

> "the true test of jurisdiction consists in determining
>
> (a) whether, in its claim, AES raises some *legal* issues in relation with a concrete situation, and
>
> (b) if the Tribunal's determination of the answer to be given to these issues would have some practical and concrete consequences".[271]

185. Here again, this ruling needs to be put in its proper context. It is true that the *AES* tribunal expressed the foregoing opinion in the context of its analysis on the existence of a dispute. That said, the tribunal held that in the specific context of the ICSID framework, two elements needed to be met for a dispute to be considered as having a legal nature: "The first deals with the intrinsic definition of what is a legal dispute; the second deals with the inherent logic which presided over the creation of ICSID".[272] As regards the first element, i.e. the intrinsic definition of a dispute, the tribunal quotes the classic *Mavrommatis* definition. As regards the second element, i.e. the inherent logic underlining the creation of ICSID, the tribunal quotes Professor Schreuer's opinion that a dispute must have some practical relevance and cannot be purely theoretical.[273] On that basis, the tribunal made the abovementioned determination on what it qualifies as the "true test of jurisdiction" by reading a two-pronged concreteness requirement into the notion of legal dispute, only to then reach the conclusion that "AES' claim seems *prima facie* a substantial one".[274]

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[268] *Id.*, p. 37 ("Even if [...] the Court finds that it has jurisdiction, it is not obliged to exercise it in all cases"). *See, id.*, p. 38.

[269] *Id.*, p. 37. *See, id.*, p. 38 ("The Court must discharge the duty to which it has already called attention – the duty to safeguard the judicial function. Whether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute submitted to it, circumstances that have since arisen render any adjudication devoid of purpose. Under these conditions, for the Court to proceed further in the case would not, in its opinion, be a proper discharge of its duties").

[270] Response, ¶ 49.

[271] *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, ¶ 44 (**Exh. RLA-9**).

[272] *Id.*, ¶ 43.

[273] *Id.*, ¶ 43, citing C. Schreuer, *The ICSID Convention: A Commentary* (CUP, 2001), p. 102, ¶ 36.

[274] *Id.*, ¶ 45.

186. Whatever the merits of the *AES* tribunal's analysis on this particular point, it does not support the Respondent's interpretation. Indeed, the tribunal referred to the "intrinsic definition of a dispute", and then added a supplementary consideration which it held to be specific to the ICSID framework. On this basis, the *AES* decision must be distinguished from the present case, where the Tribunal should not deviate from the definition developed in the jurisprudence of the ICJ and its predecessor referred to above. It also appears that the introduction of a concreteness requirement into the definition of a legal dispute conflates the question of the existence of a dispute with the *prima facie* test developed by various investment tribunals, a separate question to which the Tribunal will revert further below.

187. Finally, elaborating on its argument that a dispute can only exist if the Claimant alleges that a breach has already occurred, the Respondent argued that the relief sought by the Claimant is impermissible. For the Respondent, remedies in international law are "strictly reparatory", and damages are the only remedy available to the Claimant under the BIT. Accordingly, the Tribunal cannot order the Respondent to refrain from expropriating Achmea nor impose a penalty as requested by the Claimant. For its part, the Claimant answered that the question of available remedies is not a question for the jurisdictional stage, and even less so a constitutive element of the definition of a legal dispute. The Tribunal agrees with the Claimant.

188. In sum, the Tribunal finds that there is a conflict of legal views opposing the Parties regarding the interpretation and application of Article 5 of the BIT. Hence, the Tribunal finds that a dispute in the sense of Article 8 of the BIT exists. The Respondent's first jurisdictional objection is accordingly dismissed.

C. SECOND OBJECTION: ACHMEA FAILED TO STATE A *PRIMA FACIE* CASE

1. The Respondent's position

189. Relying on the decisions of the investment tribunals in *UPS*, *Telenor*, *Impregilo*, *Saipem*, and *Abaclat*, the Respondent contends that Achmea has the burden to make a *prima facie* showing of a violation of the Treaty.[275] A failure to do so results in the dismissal of its claims for lack of jurisdiction.[276] This test, which is routinely applied by

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[275] Objections, ¶¶ 73-77; Reply, ¶¶ 91-95, referring to *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction, 22 November 2002, ¶ 33 (**Exh. RLA-18**); *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 15 September 2006, ¶ 102 (**Exh. RLA-19**); *Impregilo S.p.A. v. Islamic Republic of Pakistan* ("*Impregilo v. Pakistan*"), ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶ 254 (**Exh. RLA-16**); *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ¶ 86 (**Exh. RLA-20**); *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 303 (**Exh. RLA-94**).

[276] Objections, ¶ 75, referring to *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 15 September 2006, ¶ 102 (**Exh. RLA-19**).

investment tribunals, was set forth by Judge Higgins in her separate opinion in *Oil Platforms*.[277] This test applies "under all investor-State arbitration clauses".[278]

190. The Slovak Republic further submits that "[e]arly dismissal of a claim for which there is no *prima facie* merit fosters judicial economy".[279] As stated in *Impregilo*, such early dismissal seeks to prevent "courts and tribunals [from being] flooded with claims which have no chance of success, or may even be of an abusive nature".[280]

191. In the instant case, "[e]ven if Achmea's factual allegations were assumed to be true – and they are not – those facts are not capable of constituting a violation of the Treaty".[281]

192. Achmea's expropriation claim fails on the merits because no unlawful expropriation has occurred.[282] The Slovak Republic maintains that "[i]t is a basic principle of public international law that preparatory conduct does not constitute a breach unless it is specifically prohibited by an applicable rule".[283] Article 5 of the BIT only prohibits measures depriving Achmea of its investments that do not meet the criteria for a lawful deprivation set out therein; the Respondent argues that, however, "[n]othing in Article 5 would prohibit the *preparation* of such measures".[284] As stated in *Gabčíkovo-Nagymaros*, preparatory conduct is not to be confused with the actual breach.[285]

193. A *prima facie* cause of action is a basic precondition of the Tribunal's jurisdiction *rationae materiae*.[286] In *Continental Casualty*, the tribunal held that "[t]he object of the investigation is to ascertain whether the claim, as presented by the Claimant, meets the jurisdictional requirements, both as to the *factual subject matter* at issue, as to the *legal norms* referred to as applicable and having been allegedly breached, and as to

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[277] Objections, ¶ 73, citing *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Report 1996, Separate Opinion of Judge Higgins, p. 226, ¶ 32 (**Exh. RLA-17**).

[278] Reply, ¶ 94, referring to *Impregilo v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶¶ 109, 237-254 (**Exh. RLA-16**); *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, 25 August 2006, ¶ 28, n. 12 and ¶ 52 (**Exh. RLA-89**); and *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, ¶¶ 37 and 47 (**Exh. RLA-95**).

[279] Objections, ¶ 76.

[280] Tr. 45:11-16, referring *Impregilo v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶ 254 (**Exh. RLA-16**).

[281] Objections, ¶ 79.

[282] Objections, ¶ 80.

[283] Objections, ¶ 81.

[284] Objections, ¶ 82.

[285] Objections, ¶ 83, referring to *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, ¶ 79 (**Exh RLA-21**). *See also*, Tr. 47:4-12.

[286] Reply, ¶ 91.

the *relief* sought".[287] This test should apply here, and the Claimant fails on all three counts.

194. In reliance on *Continental Casualty* and *Railroad Development*, the Slovak Republic argues that a "measure" does not exist until legislation is enacted and/or published, thus becoming legally effective.[288] Here, the Project Plan does not have any "outward" legal effect since it was adopted by the Cabinet in the form of a resolution and only affects the Minister of Health, requiring her to prepare a draft bill. Hence, the resolution is "an internal normative act that does not affect the rights of non-government entities".[289] This is further confirmed by the fact that a draft bill cannot be challenged before the Constitutional Court of the Slovak Republic.[290] In the instant case, the Tribunal does not have the power to adjudicate *ex ante* the enactment of a possible law.[291]

195. As to Achmea's assertion that "it knows with certainty that the expropriation, if it happens, will be unlawful", it is not supported by any evidence.[292] In sum, the Claimant failed to show a *prima facie* case on the merits, and therefore Achmea's expropriation claim falls outside the Tribunal's jurisdiction *rationae materiae*.[293]

196. As to Achmea's non-expropriation claims, they lack *prima facie* merit on the ground of the "stunning absence of any quantitative analysis".[294] Given that proceedings were bifurcated and not trifurcated, the Claimant was to quantify its claims in the Statement of Claim.[295] Having failed to do so, the Tribunal should find that it has no jurisdiction to hear these claims. In any event, in view of the fact that Achmea's client base actually grew following the September 2012 acquisition campaign, to the detriment of the other two competitors VšZP and Dovera, Achmea's claim that it actually suffered any damage does not withstand scrutiny.[296]

197. The Respondent maintains that the central issue here is that Achmea's non-expropriation claims are all "ancillary" to the potential expropriation of its investment.[297] The Slovak Republic's right lawfully to expropriate Achmea's

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[287] *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction, 22 February 2006, ¶ 60 (**Exh. RLA-88**) (emphasis added by the Respondent).

[288] Reply, ¶¶ 97-98, citing *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction, 22 February 2006, ¶ 92 (**Exh. RLA-88**), and *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, ¶ 136 (**Exh. RLA-96**).

[289] Reply, ¶ 99.

[290] Reply, ¶ 100.

[291] Reply, ¶ 101.

[292] Reply, ¶ 103.

[293] Reply, ¶ 104.

[294] Objections, ¶¶ 85-86.

[295] Reply, ¶ 106; Tr. 49:4-50:1.

[296] Tr. 50:1-51:5.

[297] Reply, ¶ 107.

investment would be rendered nugatory if preparatory conduct in the process could constitute a violation of Article 3.[298] Achmea's claim that announcements related to the preparation of legislation for the establishment of a unitary health insurance system violate the Treaty is contrary to the principle that preparatory work does not violate international law,[299] and to the Slovak Republic's right under Article 5 of the BIT and customary international law lawfully to expropriate Achmea's investment.[300]

> "The government's announcement of a plan to proceed with legislation to enable expropriation is inextricably linked to the appropriation itself and it cannot be independently actionable".[301]

198. To announce the Project Plan was a basic requirement of a transparent democratic legislative process. The BIT – which was executed between two democratic States – cannot be interpreted to render such conduct internationally wrongful.[302]

199. As to the alleged changes to the regulatory framework, there is no complaint of any actual change. The Claimant rather complains of "public statements of the *intention* to re-introduce the unitary health insurance system".[303] Such public statements of intentions are an inherent part of the democratic legislative process and thus cannot be interpreted as breaching the Treaty.[304] They have no legal effect and cannot affect Achmea's rights.[305] Accordingly, "this claim is wholly unsubstantiated".[306]

200. The Claimant's allegations regarding the conduct of the state-owned VšZP *vis-à-vis* the association of hospitals, ASH, "is likewise *prima facie* without legal merit" because "[t]he Slovak Republic is not internationally liable for the conduct of VšZP [... n]or has Achmea shown that VšZP acted in the exercise of [...] sovereign powers, which is a precondition for any violation of Article 3".[307] Mere ownership is not sufficient for purposes of attribution.[308] In any event, the Slovak Government gave no instructions to VšZP or any of the State-owned hospitals regarding Union.[309] It produced in that regard a letter of the Ministry of Health indicating that it "did not issue any instruction,

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[298] Reply, ¶¶ 107-108, citing *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, ¶ 124 (**Exh. RLA-77**).

[299] Objections, ¶ 87.

[300] Objections, ¶ 88; Reply, ¶ 107.

[301] Tr. 46:18-22.

[302] Reply, ¶ 110.

[303] Objections, ¶ 90.

[304] Objections, ¶ 90.

[305] Objections, ¶ 91.

[306] Reply, ¶ 109.

[307] Objections, ¶ 89, referring to *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Jurisdiction, 29 May 2009, ¶ 125 (**Exh. RLA-22**). *See also*, Reply, ¶ 111; Tr. 57:8-15.

[308] Tr. 56:14-19.

[309] Tr. 53:21-55:14.

proposal or position" in connection with the contractual relationship between the Slovak hospitals and Union.[310]

201. In sum, Achmea's secondary claims are largely based on statements made by certain individuals of the Government about a possible future law. These political statements cannot violate the Treaty. Furthermore, "Achmea did not even *allege* – much less *prove* – specific damages".[311]

2. The Claimant's position

202. It is the Claimant's submission that there is no jurisdictional requirement under the Treaty to state a *prima facie* case. In any event, should such a requirement exist, Achmea has sufficiently shown that it has a *prima facie* cause of action.

> "Achmea has shown a *prima facie* case of breach of the Treaty. More importantly, however, there is no jurisdictional requirement for Achmea to state a *prima facie* case at all under the Treaty".[312]

203. The cases cited by the Slovak Republic supporting the existence of such a requirement "involve arbitration clauses that qualify the types of disputes that may be submitted to arbitration".[313] For example, *Saipem* dealt with a clause that covered only disputes relating to compensation for expropriation or similar measures. In *Telenor*, a clause allowing for the arbitration of disputes as to the amount or payment of compensation for expropriation and other similar measures was at issue. In *Oil Platforms*, the arbitration clause extended to a "dispute [...] as to the interpretation or application of the [relevant] Treaty". And finally, in *Impregilo* there was a discussion as to who the parties to the dispute were.[314] Achmea submits that, consequently, the determination of jurisdiction in those cases required an assessment of whether the dispute was of the type covered by the relevant arbitration clauses.[315]

204. In the instant case, by contrast, "no particular limitation as to the type of dispute that may be submitted to arbitration applies" because Article 8 of the BIT covers "all disputes" between a Contracting Party and an investor of the other Party concerning an investment of the latter.[316] Hence, there is no need for a *prima facie* test here.

205. As to the Respondent's argument that Achmea failed to quantify its damages in the Statement of Claim, the Claimant retorts that neither Article 18 of the UNCITRAL Rules, nor PO1, require Achmea to quantify its damages in the Statement of Claim.[317]

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[310] Letter from the Ministry of Health to the Ministry of Finance dated 22 August 2013 (**Exh. R-2**). *See also*, Tr. 53:24-54:19.

[311] Reply, ¶ 105.

[312] Response, ¶ 22.

[313] Response, ¶ 23.

[314] Response, ¶ 23.

[315] Response, ¶ 24.

[316] Response, ¶ 25.

[317] Response, ¶ 138.

Achmea will quantify its damages when appropriate, that is in the merits phase. In any event, the quantification of the Claimant's damages is not relevant for the decision on jurisdiction and admissibility.[318]

3. Discussion

a) *The applicable standard*

206. The Tribunal's jurisdiction *ratione materiae* is limited to disputes concerning an investment, as required by Article 8 of the BIT. Since the Claimant does not raise any dispute regarding an investment approval or an investment agreement, but places itself exclusively under the umbrella of the BIT, an essential element of the Tribunal's jurisdiction *ratione materiae* is to determine whether the claims put forward by the Claimant are capable of coming within the reach of these provisions. The so-called *prima facie* test has been applied by numerous international courts and tribunals. In *Mavrommatis*, the PCIJ held that prior to engaging in the merits of the case it had to ascertain whether the claim was capable of coming within the reach of the provisions of the Mandate:

> "The Court, before giving judgment on the merits of the case, will satisfy itself that the suit before it, in the form in which it has been submitted and on the basis of the facts hitherto established, falls to be decided by application of the clauses of the Mandate".[319]

207. In *Ambatielos*, the ICJ indicated that:

> "The Court must determine, however, whether the arguments advanced by the Hellenic Government in respect of the treaty provisions on which the Ambatielos claim is said to be based, are of a sufficiently plausible character to warrant a conclusion that the claim is based on the Treaty. It is not enough for the claimant Government to establish a remote connection between the facts of the claim and the Treaty of 1886".[320]

208. Judge Rosalyn Higgins further spelled out the so-called *prima facie* test in her separate opinion in *Oil Platforms*:

> "The only way in which, in the present case, it can be determined whether the claims of [the applicant] are sufficiently plausibly based upon the 1955 Treaty is to accept pro tem the facts as alleged by [the claimant] to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes – that is to say, to

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[318] Response, ¶ 139.

[319] *Mavrommatis Palestine Concessions*, P.C.I.J., Series A, No. 2, Objection to the Jurisdiction of the Court, 30 August 1924, p. 16 (**Exh. C-64**).

[320] *Ambatielos case (merits: obligation to arbitrate)*, Judgment, 19 May 1953, I.C.J. Reports 1953, p. 18.

see if on the basis of [the claimant's] claims of fact there could occur a violation of one or more of them".[321]

209. Numerous investment tribunals have also sought to establish at the jurisdictional stage whether the facts as alleged by the Claimant, if established, "are capable of coming within those provisions of the BIT which have been invoked".[322] For instance, the tribunal in *UPS v. Canada* held that it:

> "must conduct a prima facie analysis of the NAFTA obligations, which UPS seeks to invoke, and determine whether the facts alleged are capable of constituting a violation of these obligations".[323]

210. In *Telenor*, it was held that:

> "The onus is on the Claimant to show what is alleged to constitute expropriation is at least capable of doing so. There must, in other words, be a *prima facie* case that the BIT applies".[324]

211. In that case, the tribunal's jurisdiction was limited to claims of expropriation. Since the claimant failed to put forward a claim of expropriation in its written submissions, the tribunal found that the facts as asserted could not support a *prima facie* claim of expropriation.[325]

212. And in *Saipem*, the tribunal indicated that it would apply:

> "a *prima facie* standard, both to the determination of the meaning and scope of the relevant BIT provisions and to the assessment whether the facts alleged may constitute breaches of these provisions. In doing so, the Tribunal will assess whether Saipem's case is reasonably arguable on its face. If the result is affirmative, jurisdiction will be established, but the existence of breaches will remain to be litigated on the merits".[326]

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[321] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Report 1996, Separate Opinion of Judge Higgins, p. 226, ¶ 32 (**Exh. RLA-17**).

[322] *Impregilo v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶ 254 (**Exh. RLA-16**).

[323] *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction, 22 November 2002, ¶ 33 (**Exh. RLA-18**).

[324] *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 15 September 2006, ¶ 68 (**Exh. RLA-19**).

[325] *See also*, *Micula v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, ¶ 67 (**Exh. C-78**).

[326] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ¶ 91 (**Exh. RLA-20**). *See further, Pan American Energy LLC, and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, ¶ 51 ("the claims made in the present case must be taken as they are by the Tribunal at this stage of the proceedings, whose only task it is, in the present phase of the proceedings, to determine whether, as formulated, they fit into the jurisdictional parameters set out by the relevant treaty instrument or instruments").

213. Finally, in *Chevron v. Ecuador III*, the tribunal made the following instructive observations:

> "The practical difficulty arises from the use of the Latin phrase 'prima facie'. In the Tribunal's view, it does not mean, at this early procedural stage, that the Claimants must satisfy the Tribunal that their case, as now pleaded, would necessarily prevail on the merits if this arbitration were to proceed beyond the jurisdictional stage. Nor can it mean, in a heavily adversarial procedure with both sides here making very extensive submissions and submitting numerous exhibits, that the Tribunal should only investigate the apparent surface of the Claimants' case on the merits. In other words, the jurisdictional stage of this arbitration cannot take the form of a preliminary hearing on the merits; but, conversely, the Claimants must establish that their case is sufficiently serious to proceed to a full hearing on the merits.
>
> The Tribunal specifically rejects as imposing too high a prima facie standard the Respondent's submission at the Jurisdiction Hearing that the Claimants must already have established their case with a 51% chance of success, i.e. on a balance of probabilities [...]; and the Tribunal prefers, to this extent, the Claimants' submissions that their case should be 'decently arguable' or that it has 'a reasonable possibility as pleaded'".[327]

214. The Claimant's attempt to distinguish the cases mentioned above from the present case must be rejected. Since the Tribunal's ambit of jurisdiction is limited to rule on disputes involving the interpretation and application of the provisions of the BIT, and the Claimant invokes the application of various provisions of the BIT, it behooves the Tribunal to assess at this stage if the facts as alleged by the Claimant are susceptible of coming within the reach of the provisions of the BIT. In this regard, whether the scope of the BIT arbitration clause is large or restricted, will not cause a difference of approach even if, in practice, the Claimant may have to show more in order to prove *prima facie* compliance with a more restrictive arbitration clause. Using the Claimant's own words, "a determination about jurisdiction will involve an assessment of whether the dispute is of the type referred to in the arbitration clause".[328] What will vary is not that requirement but rather its extent in view of the wider or narrower ambit of that clause, even if that clause covers all disputes, *i.e.* implicitly all disputes covered by the BIT.

215. The Tribunal thus finds that at the jurisdictional stage, the Claimant must not only establish that the jurisdictional requirements of the Treaty are met, which includes

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[327] *Chevron Corp., Texaco Petroleum Co. v. The Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, ¶¶ 4.7-4.8. The tribunal added that "the Tribunal's general approach in deciding the Respondent's jurisdictional objections under the prima facie standard here requires an assumption of the truth of the relevant facts alleged by the Claimants in the Notice of Arbitration (subject to the qualifications described above), excluding however a disputed fact uniquely relevant to the existence or exercise of the Tribunal's jurisdiction. As to such disputed fact, the Tribunal is required either [to] finally decide the factual issue here (if it can) or address it later pursuant to Article 21.4 (second sentence) of the UNCITRAL Arbitration Rules", ¶ 4.11.

[328] Response, ¶ 24.

proving the facts necessary to meet these requirements, but also that it has a *prima facie* cause of action under the Treaty, that is, that the facts it alleges are capable of falling under the relevant provisions of the BIT. This standard could itself be more or less strict and for instance be phrased as "capable of falling within the reach of the provision" or "susceptible of constituting a breach of the provision". It is, however, not necessary to decide on this issue and applying the more expansive approach outlined above results in a test that, in this arbitration, will strike a proper balance between a more exacting standard which would call for examination of the merits at the jurisdictional stage,[329] and a less exacting standard which would confer excessive weight to the Claimant's own characterization of its claims.

216. The *prima facie* test thus entails two consequences. First, the facts alleged by the Claimant are in principle accepted to be true *pro tem*, without prejudice to any further examination of the same facts which may be relevant at a further stage of the proceedings.[330] To paraphrase *Salini v. Jordan*, the Claimant is free to advance facts it relies upon and claims it advances in the way it thinks appropriate.[331] That facts are assumed to be true for jurisdictional purposes derives from the circumstance that the Claimant filed one submission containing allegations of fact and law relevant for the merits, and the Respondent only filed submissions relating to its jurisdictional objections. Hence, the Parties have not had a proper opportunity to provide the Tribunal with their views on the pertinence of the facts alleged by the Claimant so far, and even less to supply evidence about such facts.

217. Second, the onus is on the Claimant to show that the substantive BIT provision which is relied upon is susceptible of finding application to the alleged facts. In other words, the claim as formulated by the Claimant must be capable of coming within the reach of the relevant provision. As recalled in *Siemens*, the Tribunal is not called upon to enquire at this stage whether the claims made under the Treaty are well founded, as this issue is properly reserved for the merits.[332]

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[329] For instance, the ICJ held that "[i]n the present phase it concerns the competence of the Court to hear and pronounce upon this dispute. This issue being thus limited, the Court will avoid not only all expression of opinion on matters of substance, but also any pronouncement which might prejudge or appear to prejudge any eventual decision on the merits". *Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland)*, Judgment, Jurisdiction of the Court, 2 February 1973, I.C.J. Report 1973, ¶ 12. *See also*: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, ¶ 11.

[330] It is to be noted that the Respondent agreed that for jurisdictional purposes it was willing to accept that the Tribunal regard the facts as alleged by the Claimant to be true *pro tem*, thus defusing any controversy over facts for the present exercise. *See* Objections, ¶¶ 13, 73, citing the separate opinion of Judge Higgins in: *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Report 1996, Separate Opinion of Judge Higgins, p. 226, ¶ 32 (**Exh. RLA-17**).

[331] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, ¶ 136.

[332] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, ¶ 180.

218. While the Tribunal thought it inappropriate to include a concreteness requirement into its analysis on the existence of legal dispute, it is of the view that greater weight should be given to such a criterion at this juncture. As stated by the tribunal in *AES v. Argentina*, the Claimant must raise in its claims "some legal issues in relation with a concrete situation" and the Tribunal's determination must have "some practical and concrete consequences".[333] Indeed, it seems appropriate for the Claimant to show that the facts it alleges are connected in law to the provisions it relies on to obtain relief and that a pronouncement of this Tribunal would clarify the legal situation between the Parties.

219. Whereas the Respondent only challenged the existence of a dispute regarding Achmea's expropriation claim, the Respondent objected to all of Achmea's claims on the ground that they manifestly lack legal merit. The Tribunal will therefore now engage in the analysis of each claim separately.

220. For the sake of completeness, the Tribunal wishes to refer to the Swiss Federal Tribunal's jurisprudence on so-called "facts having double relevance", namely those facts that a tribunal may have to subsume both at the jurisdictional and the merits stages of a dispute resolution procedure. That doctrine allows courts and tribunals to uphold jurisdiction if the facts as presented by the claimant are reasonably probable. However, this doctrine will not apply in arbitration given that it would be "excluded to force a party to be bound by what a tribunal should decide on its disputed rights and obligations if a binding arbitration agreement is not covering them".[334] The Parties have rightly not referred to this case law which might not apply to investment disputes, even when seated in Switzerland. Moreover, the issue here is not whether the arbitration agreement does indeed bind the Parties or whether it would extend to disputes about expropriation or the other alleged breaches but rather whether, *prima facie*, there are established facts which raise arguable issues under the BIT. In other words, the actual dispute goes to legal matters rather than factual differences.

b) *The expropriation claim (Article 5 of the BIT)*

221. In its Statement of Claim, the Claimant requested the Tribunal:

> "to order the Slovak Republic to refrain from expropriating Achmea's investment in the Slovak Republic on the terms of the Project Plan or materially similar terms, subject to a financial penalty in an amount to be specified in the course of the arbitral proceedings".[335]

222. While Achmea argues that it is entitled to the relief it seeks, *i.e.* (i) an order enjoining the Slovak Republic to refrain from expropriating Achmea's investment "on the terms of the Project Plan or materially similar terms" and (ii) subject to a financial penalty,

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[333] *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, ¶ 44 (**Exh. RLA-9**).

[334] *See, e.g.*, FT 121 III 495.

[335] SoC, ¶ 228(i).

the Respondent objects first, that Achmea's claim is premature, because its investment was not expropriated and thus patently fails to survive the *prima facie* test, and secondly, that the relief sought is impermissible. For the Respondent, the facts as alleged are incapable of constituting a breach of Article 5.

223. On the one hand, Achmea claims that if the expropriation were to be carried out "on the terms of the Project Plan or materially similar terms" it *would* breach Article 5 of the Treaty. On the other hand, Achmea submits that Article 5 contains a general prohibition to expropriate Dutch assets, thus entitling Achmea to seek arbitral review of the expropriation process initiated by the Slovak Republic. More specifically, Achmea submits that the Slovak Republic can only expropriate its assets if the Slovak Republic states a valid public purpose; a failure to do so would warrant arbitral review.

224. In light of the Parties' submissions, the Tribunal is faced with the question of whether Achmea's expropriation claim is capable of falling within the provisions of the Treaty. Obviously, it cannot be said, and no one contends, that expropriation is *per se* extraneous to the Treaty; quite to the contrary, Article 5 of the Treaty specifically deals with the issue of expropriation, and sets a specific standard to be observed by the Contracting Parties.

225. But the way in which the Claimant has formulated its expropriation claim leads the Tribunal to engage in two lines of legal inquiry. First, the Tribunal must ascertain whether Article 5 can be interpreted as containing a general prohibition to expropriate, as argued by the Claimant, or whether it circumscribes the right to expropriate to specific conditions, as argued by the Respondent. In light of the response given to this preliminary question, the Tribunal will then be in a position to ascertain whether Achmea's claim is capable of coming within the reach of that provision.

226. The Tribunal is well aware that the interpretation of Article 5 is a matter which could be dealt with at the merits stage. On the one hand, the Tribunal recalls that it is empowered to join the present objection to the merits pursuant to Article 21(4) *in fine* of the UNCITRAL Rules. This would be the appropriate course if the objection did not possess an exclusively preliminary character or if rendering a decision on the jurisdictional objection would entail the risk of prejudging the merits.[336] An apposite example here is *Tradex Hellas*, where the tribunal joined the jurisdictional objection relating to the expropriation claim to the merits. It stated that:

> "The Tribunal notes that the question of whether the alleged conduct of Albania can be considered an expropriation is on one hand relevant under Art. 8 (2) for the jurisdiction of the Tribunal and is on the other hand the decisive issue relevant under Articles 4 and 5 of the 1993 Law or Articles 9 and 10 of the 1992 Law to decide on the merits of Tradex's claim. At least it cannot be

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[336] *Panevezys-Saldutiskis Railway*, P.C.I.J., Series A/B, No. 75, Order of 30 June 1938, p. 56; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, ¶ 39.

> excluded that under certain circumstances it would be considered an expropriation if a state permits the deprivation of land use from a joint venture based on foreign investment or fails to grant protection against interference if a legal duty for protection can be found to exist. But the Tribunal feels a further examination of this matter in the context of establishing jurisdiction according to Art. 8 (2) would be so closely related to the further examination of the merits in this case that this jurisdictional examination should be joined to the merits".[337]

227. However, in light of the conceptually radically opposed interpretations adopted by the Parties on the scope of Article 5 of the Treaty, touching upon fundamental questions of the Tribunal's jurisdiction, and the full opportunity the two Parties have had to put their respective cases on these matters pertaining to jurisdiction, the Tribunal is of the view that a preliminary assessment is warranted, indeed necessary, at this stage.

228. That the Tribunal may engage in a preliminary interpretation of the nature and scope of a substantive provision for purposes of jurisdiction, has been recognized in numerous cases. For instance, in the *ICAO Council* case, the ICJ indicated that:

> "many cases before the Court have shown that although a decision on jurisdiction can never directly decide any question of merits, the issues involved may be by no means divorced from the merits. A jurisdictional decision may often have to touch upon the latter or at least involve some consideration of them. This illustrates the importance of the jurisdictional stage of a case, and the influence it may have on the eventual decision on the merits".[338]

229. In the *South West Africa* cases, the ICJ held that:

> "It may occur that a judgment on a preliminary objection touches on a point of merits, but this it can do only in a provisional way, to the extent necessary for deciding the question raised by the preliminary objection".[339]

230. The *Certain German interests in Polish Upper Silesia* case, on which both Parties relied in their submissions, is particularly apposite here. In that case, the PCIJ had to decide whether a notification of the intent to expropriate fell within the ambit of its jurisdiction. The Court found that the jurisdictional enquiry may indeed impinge on the merits, while at the same time stressing that it did not purport to make a definitive finding on the merits :

> "The Court, therefore, for the purposes of the decision for which it is now asked, considers that it must proceed to the enquiry above referred to, even if this enquiry involves touching upon subjects belonging to the merits of the case; it is, however, to be clearly understood that nothing which the Court says in the present judgment can be regarded as restricting its entire freedom to

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[337] *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996, in: 14 *ICSID Review – Foreign Investment Law Journal* (1999), p. 185.

[338] *Appeal Relating to the Jurisdiction of the ICAO Council*, Judgment, I.C.J. Reports 1972, ¶ 18(c).

[339] *South West Africa, Second Phase*, Judgment, I.C.J. Reports 1966, ¶ 59.

> estimate the value of any arguments advanced by either side on the same subjects during the proceedings on the merits".[340]

231. With these considerations in mind, the Tribunal now engages in its analysis of the Parties' respective positions in order to determine whether the claim, as articulated by Claimant, is capable of falling under Article 5 of the BIT. This provision provides 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:
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> a) the measures are taken in the public interest and under due process of law;
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> 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 any undue delay, to the country designated by the claimants concerned and in any freely convertible currency accepted by the claimants".[341]

232. The Respondent submits that Article 5 enshrines the right of each Contracting State to expropriate the investment of nationals of the other Contracting State, subject to the conditions specified therein. Since no expropriation has taken place, Article 5 cannot serve as a foundation of Achmea's claim, nor of the Tribunal's jurisdiction.

233. If the Respondent's interpretation were correct, there is no doubt that the Tribunal would not have the power at this time to entertain Achmea's expropriation claim and would have to uphold the Respondent's objection on this point. A series of arbitral decisions confirm that tribunals have not been willing to uphold jurisdiction in cases where the expropriation claim was premature. In *Mariposa Development Company v. Panama*, the tribunal held, as a matter of "practical common sense", that an expropriation claim only becomes ripe and actionable once the expropriation had been enforced. It was not sufficient to attack an enacted piece of legislation seeking the expropriation of foreign-held assets.

> "Practical common sense indicates that the mere passage of an act under which private property may later be expropriated without compensation by judicial or executive action should not at once create an international claim on behalf of every alien property holder in the country. There should be a locus penitentiae for

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[340] *Polish Upper Silesia*, P.C.I.J., Series A, No. 6, Preliminary Objections, 25 August 1925, pp. 15-16 (**Exh. C-88**).

[341] Netherlands-Slovak Republic BIT, Article 5 (**Exh. C-1**).

> diplomatic representation and executive forbearance, and claims should arise only when actual confiscation follows".[342]

234. While it is true that this decision is more than 80 years old, which is apparent from the central role accorded to diplomatic representations, the general principle underlying the decision, i.e. that an expropriation claim only becomes ripe once the taking has occurred, has been followed with approval by various other tribunals. In *Aminoil*, the tribunal rejected the claimant's attempt to challenge a law nationalizing Aminoil's oil concession. It found that it could only entertain an expropriation claim after some concrete steps had been taken:

> "[T]he possibility (prior to the issuing of Decree No. 124) of seizing an arbitral tribunal with the particular question over which the Parties had failed to come to an understanding [...] did not exist, because unless and until the Government took some concrete step – such as nationalization – in consequence of that failure, there would have been no definite complaint with which to seize any arbitral tribunal".[343]

235. The Tribunal in *Glamis Gold* also had no hesitation to hold that mere threats of an expropriation are not sufficient to warrant arbitral review under the Article 1110 NAFTA:

> "In the determination of whether the Tribunal has subject matter jurisdiction to decide the Article 1110 claims before it, the Tribunal begins from the premise that a finding of expropriation requires that a governmental act has breached an obligation under Chapter 11 and such breach has resulted in loss or damage. NAFTA Article 1117(1) establishes standing for an investor of a State Party to bring a claim for harm done to its subsidiary in the territory of another State Party under the investment provisions of Chapter 11. Through the language of Article 1117(1), the State Parties conceived of a ripeness requirement in that a claimant needs to have incurred loss or damage in order to bring a claim for compensation under Article 1120. Claims only arise under NAFTA Article 1110 when actual confiscation follows, and thus mere threats of expropriation or nationalization are not sufficient to make such a claim ripe; for an Article 1110 claim to be ripe, the governmental act must have directly or indirectly taken a property interest resulting in actual present harm to an investor".[344]

236. This line of cases is unanimous in holding that an expropriation claim is too hypothetical, and thus premature as long as no taking has occurred. The fact that the *Glamis* case was arbitrated under NAFTA rules, which specifically require an allegation of a breach of a NAFTA rule and also to have suffered a loss or damage in order to bring a claim for compensation, does not change the fundamental principle

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[342] *Mariposa Development Company (Panama/USA)*, 6 R.I.A.A. 338, 27 June 1933, p. 341 (**Exh. RLA-10**).

[343] *Aminoil v. Kuwait*, Final Award, 24 March 1982, 21 I.L.M. 976, p. 1026 (**Exh. RLA-11**).

[344] *Glamis Gold v. United States*, UNCITRAL, Award, 8 June 2009, ¶ 328 (**Exh. RLA-12**).

that an expropriation claim only becomes ripe if concrete steps have been taken which have the effect of a taking.

237. In the present case, the Slovak Republic has engaged in a process of unification of the Slovak health insurance sector. While the sector was liberalized in 2004, allowing foreign investors such as Achmea to enter the market, subsequent Governments have struggled with the question of how to regulate the health insurance sector efficiently. The present Government announced during its election campaign and when taking power in the Spring of 2012 that it would unitize the health insurance market. On that basis, it launched the political process through an Intention Statement in July 2012, setting out the general lines of the process. In October 2012, the Project Plan was adopted, which contemplates a voluntary sale process, and if that fails the expropriation of Union. In the Project Plan, the Slovak Government tasked the Ministry of Health to prepare a draft law setting out the regulatory framework of the unitization process. A draft Transformation Act was purportedly prepared in July 2013. The Tribunal is not apprised, at the time of issuing its ruling on the Respondent's jurisdictional objections, of the exact stage at which the unitization process is, but it does not seem that this draft law has even been circulated for preliminary comments by the Ministry of Health to other involved ministries.

238. As the Slovak Republic has made abundantly clear in its submissions, the process is still in its infancy stages, since no draft bill has as of yet been submitted to the Slovak legislature.[345] Hence, at this moment, it is still entirely speculative if, when, and under which conditions the purported expropriation of Achmea's investment is to take place. Under these conditions, if the Respondent's interpretation of Article 5 is correct, i.e. a provision enshrining the principled right of the Slovak Republic to expropriate Dutch-held assets, subject to specific conditions, the fulfillment of which could be reviewed by an arbitral tribunal once an expropriation has occurred, then the Tribunal would have to find that it lacks jurisdiction over the present claim.

239. The Claimant has, however, put forward an interpretation of Article 5, which would, if upheld, allow the Tribunal to review the conformity of the expropriation process as it advances, prior to the actual taking. To be clear, the Claimant has not put forward a claim of an actual taking. It remains in full control of its investment. It is the Claimant's primary contention that it wants to remain in possession and control of its investment, which explains why it seeks an injunction from the Tribunal ordering the Respondent to refrain from expropriating Achmea's investment, subject to a financial penalty in case of non-compliance.

240. The Claimant submits the following interpretation of Article 5 of the Treaty. The negative formulation of Article 5 suggests that this provision prohibits each

[345] The Respondent indicated the following on the current status of the Project Plan: "Project Plan is at the earliest stage of the legislative process. It *may or may not* approximate the terms of a future draft bill, which *may or may not* be enacted into a law by the Slovak Parliament through a standard democratic process. It is not known whether and, if so, how an administrative authority authorized by such a law would carry it out". *See*, Objections, ¶ 42; Reply, ¶¶ 1-8.

Contracting State to expropriate the assets held by a national of the other Contracting State, unless specific conditions are all met.

> "The Slovak Republic's interpretation of a rule prescribing 'X shall not do Y, unless [ ]' as in fact meaning 'X has the right to do Y' goes beyond the most creative interpretation techniques".[346]

241. Had the Contracting States intended to recognize a right to expropriate, they could have used clear and affirmative language. Instead, they sought to devise a "regime" treating their respective investors more favorably than other aliens "in line with the BIT's purpose which is the 'encouragement and reciprocal protection of investments'".[347] In light thereof, the Claimant argues that the Project Plan fails to state any public interest which would warrant engaging in the process of expropriation. Failing to do so gives Achmea a cause of action under Article 5 to make sure that the expropriation process as contemplated in the Project Plan, or any other plan on materially similar terms, is halted by the present Tribunal.

242. For this interpretation of Article 5, based up to here on the wording of the provision and object and purpose of the BIT, the Claimant additionally relies on two external elements. First, the Claimant calls attention to *Certain German Interests in Polish Upper Silesia*,[348] where the PCIJ "found that a publication of the Polish Government's intent to expropriate was sufficient to render a claim to 'obtain an order suspending expropriation proceedings and a declaration that such proceedings are illegal' admissible".[349]

243. The Claimant also pointed to the dispute settlement provision of the Austria-Slovak Republic BIT, which was under scrutiny in *Euram Bank*, and where it was held that this provision limits the tribunal's jurisdiction to disputes concerning the amount of payment of a compensation.[350] Since Article 8 of the present BIT extends to "all disputes", and is not limited to the payment of compensation, the Claimant argues that the present Tribunal is empowered to review the expropriation process (as contemplated in the Project Plan) before the taking actually takes place, and, if need be, order the Respondent to refrain from expropriating Achmea's investment.

244. The Tribunal does not find the Claimant's argumentation to be persuasive. General customary international law recognizes the sovereign prerogative of States to regulate the economic activities taking place in their territory. The international community of States recognized in General Assembly Resolution 1803(XVII) on "Permanent Sovereignty Over Natural Resource" of 14 December 1962 the sovereign

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[346] Rejoinder, ¶ 43.

[347] Rejoinder, ¶ 45.

[348] *Polish Upper Silesia*, P.C.I.J., Series A, No. 6, Preliminary Objections, 25 August 1925 (**Exh. C-88**). *See also*: *Polish Upper Silesia*, P.C.I.J., Series A, No. 7, Merits, 25 May 1926 (**Exh. C-89**).

[349] Rejoinder, ¶ 38 (footnote omitted).

[350] Tr. 106:14-107:5.

right of States to expropriate foreign-held assets in their territory, if the expropriation is made in the public interest, according to due process of law, and against compensation. The resolution provides in relevant part as follows:

> "Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law".[351]

245. This right, which the Tribunal considers to be strongly established in customary international law, has been recalled in numerous international instruments, most notably milestone resolutions of the General Assembly of the United Nations. It is true that the exact scope of the requirements which make an expropriation lawful have been hotly debated in the past decades, but the core principle under international customary law has remained untouched, i.e. that a State may expropriate foreign-held assets.

246. According to the prevalent view, the sovereign prerogative to expropriate foreign-held assets was confirmed and further specified in bilateral investment treaties adopted since the 1960s and other instruments dealing with the same subject matter. Bilateral investment treaties further specify for instance that expropriation may not be discriminatory and they clarify what standard of compensation is to be adopted. To the knowledge of the Tribunal, it has never been argued that the negative formulation employed in the expropriation clauses contained in most BITs, and indeed also in Article 5 of the present Treaty, entails an express reversal, as opposed to a specification, of the customary right of States to expropriate foreign-held assets located in their territory. The Tribunal does not believe it to be the case here either.

247. A negative formulation of the right to expropriate is commonly adopted in a wide range of bilateral investment treaties, not to prohibit expropriation, but more appropriately strictly to circumscribe that right to the requirements set out in these provisions. In this regard, the *Certain German Interests in Polish Upper Silesia* case must be distinguished.[352] That case turned in part around the interpretation of Article 15 of the Germano-Polish Convention concerning Upper Silesia of 15 May 1922, which required the Polish Government to give notice of its intention to expropriate a "large estate", as defined under the Convention, prior to a specified date. Without going into the details, Germany argued that ten notices of the Polish Government had not been made in conformity with Articles 9(3)(2), 12(1), 13(2) and 17 of the Convention, *inter alia* arguing that several estates were not liable to expropriation,

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[351] General Assembly Resolution 1803(XVII) on Permanent Sovereignty Over Natural Resources, 14 December 1962, ¶ 4.

[352] *Polish Upper Silesia*, P.C.I.J., Series A, No. 6, Preliminary Objections, 25 August 1925, p. 11 (**Exh. C-88**). *See also*: *Polish Upper Silesia*, P.C.I.J., Series A, No. 7, Merits, 25 May 1926, p. 24 (**Exh. C-89**).

because they did not fulfill the requirements set out in these provisions.[353] Besides holding that there was an "undeniable difference of opinion" on the proper interpretation of these provisions (and thus falling within the Court's jurisdiction under Article 23 of the Convention), the Court held Poland's objection to be ill-founded, since Article 20 and 16 of the Convention entailed that once a notice of expropriation was issued, the assets could no longer be freely alienated, thus placing a serious restriction on property rights. Having concrete legal effects, the notice came within the jurisdictional purview of the Court.

> "The Polish objection is not sound, not only because the right of complaint granted by Poland to the owners is a matter of domestic concern which cannot be used in argument against Germany, but also because, according to Article 20, directly notice has been given, expropriation is possible under the Geneva Convention without any restriction as to time, and thus becomes for the owner a menace which may continue for two years; and finally because under the terms of the same Article 20 and of Article 16, once notice has been given, the owner cannot without the consent of the Polish Government, alienate *inter vivos* either the estate to be expropriated or its accessories, so that the giving of notice places serious restrictions on rights of ownership".[354]

248. There are thus three fundamental differences between that case and the present one. First, the Germano-Polish Convention expressly, and very specifically categorized various properties according to their destination, their size, and their ownership. Properties fulfilling certain characteristics could expressly be expropriated (subject to certain conditions), while others were *a contrario* excluded from the various regimes designed in that Convention. In the present case, there is no language allowing to discern a specific expropriation regime set out in the Treaty beyond the general requirements deriving from customary international law. Second, the Germano-Polish Convention mandates the notification of an intention of expropriation, an obligation the observance of which would normally fall under the power of review of the Court under Article 23 of the Convention. No such specific requirement is to be found in the Treaty presently under review. Finally, and most importantly, a notice of the intention to expropriate carries an important legal consequence with it under the Germano-Polish Convention, i.e. that the owner who has been put on notice can no longer alienate his property without the consent of the Polish Government. Here again, no such legal consequence is expressed or implied in the BIT. The Claimant indicated at the hearing that the announcement of the Intention Statement and the Project Plan, as well as the adoption of the latter, had the consequence of grossly hindering its ability to sell its investment to a willing buyer at a fair market value. Whatever the merits of that argument, the Tribunal can only observe first, that such a hindrance would not in general qualify as a taking, i.e. an expropriation, and second, that an alleged *de facto* impediment is not to be equaled with a *de jure* impediment, only the latter being susceptible of judicial or arbitral review. For these reasons, the Tribunal

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[353] *Polish Upper Silesia*, P.C.I.J., Series A, No. 6, Preliminary Objections, 25 August 1925, p. 22 (**Exh. C-88**).

[354] *Id.*, pp. 25-26.

does not find the *Certain German Interests in Polish Upper Silesia* case to support the Claimant's argument.

249. As regards the Claimant's reliance on the Austria-Slovak Republic BIT, it patently fails in all respects. It does not follow from the fact that in that BIT the jurisdiction of a tribunal is limited to the amount of compensation, thus excluding even a review of the lawfulness of the expropriation itself, that an expropriation provision as formulated in Article 5 of the Treaty automatically empowers the Tribunal, absent more specific language, to review the stated intention or the possible, yet hypothetical, process of expropriation in which the Slovak Republic seemingly engaged.

250. Finally, the Claimant has also sought to convince the Tribunal of its position by stating that the Slovak Republic announced its intention to expropriate Achmea's investment, while at the same time failing to provide a public interest justifying such course of action. The Tribunal does not need to, and cannot, make any finding on the existence of a public interest supporting the Slovak Government's expressed will to unify its health insurance system, as indeed that would impinge on the merits. However, it must make an assessment of whether Article 5 mandates the Respondent to state a public interest at the outset of the political process eventually leading to the adoption of a piece of legislation contemplating the expropriation of Achmea's investment. On its face, Article 5 does not mandate such an obligation on the part of the Slovak Republic. The Tribunal reads Article 5 to mean on its face that if the expropriation is to be considered lawful, it must have been made in pursuance of a public interest and that analysis is an exercise to be undertaken once the expropriation has occurred. As rightly pointed out by the Respondent, the Slovak Republic acknowledges so much in its Project Plan, where it is stated that:

> "A law will define the expropriation objective and conditions. The expropriation objective will be to achieve, in the public interest, the acquisition of title to the Expropriated Assets for implementing the objective of introducing unitary model into health insurance. The expropriation process will only take place provided that the expropriation objective could not be reached by agreement with a shareholder of the non-State insurer, *and the expropriation will be possible only to achieve the objective (set by law) and in the public interest, which would need to be proven in the expropriation proceedings in a manner prescribed by law*" (emphasis added).[355]

251. On the basis of the foregoing, the Tribunal is of the view that the Claimant has failed to state a *prima facie* case for its Article 5 claim. Accordingly, the Respondent's objection is upheld. This conclusion is all the more important, since, in its view, the Tribunal is not empowered to intervene in the democratic process of a sovereign State, and cannot do so absent very specific language to that effect. The design and implementation of its public healthcare policy is for the State alone to assess and the State must balance the different and sometimes competing interests, such as its duty to ensure appropriate healthcare to its population and its duty to honor its

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[355] Project of Implementation of Unitary Public Health Insurance System in the Slovak Republic, p. 39 (**Exh. C-19**).

international investment protection commitments. The Tribunal is being invited to engage in a speculative exercise, looking into the future to examine a State conduct that has not yet materialized and whose features may not be determined with certainty at this stage. The Tribunal concludes that that is impermissible under the BIT and thus falls outside the ambit of the Tribunal's jurisdiction.

c) *The non-expropriation claim (Article 3 of the BIT)*

252. The Parties disagree on whether the Claimant filed various Article 3 claims, as argued by the Respondent, or whether it filed a single claim encompassing a succession of facts. Regarding its submissions under Article 3 of the BIT, the Claimant requested the Tribunal:

> "(ii) to declare that the Slovak Republic has breached Article 3 of the BIT through conduct related to the impending expropriation of Achmea's investment; and
>
> (iii) to declare that the Slovak Republic has breached Article 3 of the BIT by continuously destabilizing the regulatory and investment environment in the Slovak health care sector".[356]

253. For its part, the Respondent indicated that, in its view, Achmea asserted three Article 3 claims in its Statement of Claim:

> "[First], Achmea claims that Slovakia '*denied Achmea's investment fair and equitable treatment, and has impaired it by unreasonable or discriminatory measures, by repeatedly communicating its desire to expropriate Union during the 2012 client acquisition campaign.*'
>
> [Second], Achmea seems to claim that Slovakia violated Article 3 of the Treaty through the alleged recent conduct of the State-owned health insurance company *Všeobecná Zdravotná Poisťovňa* ("VšZP") vis-à-vis the Association of Slovak Hospitals ("ASH").
>
> [Third], Achmea claims that Slovakia denied Achmea fair and equitable treatment by failing to provide a stable and predictable regulatory framework because of statements that it wishes to reintroduce a unitary health insurance system".[357]

254. It may not be indispensable to determine whether the Claimant filed several discrete Article 3 claims or whether these could be subsumed as a single claim. It remains certain that, in a single arbitration proceeding, the Claimant is praying for a unitary relief basing its unitary request on three (or four) allegedly discrete sets of facts. Whether such sets of facts are examined separately or as a possible general pattern of the Respondent's conduct is going more to the presentation of the Tribunal's analysis than to its substance, namely the merits of the claim(s): the Tribunal is of the view that Achmea lodged a single Article 3 claim comprising four separate limbs.

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[356] SoC, ¶ 228(ii)-(iii).

[357] Objections, ¶ 78.

First, Achmea claims that "[i]f carried out, the process under which Achmea would be asked to 'voluntarily sell' its investment to the Slovak Republic violates Article 3(1) of the BIT".[358] Second, Achmea claims that the Slovak Republic "denied Achmea's investment fair and equitable treatment, and has impaired it by unreasonable or discriminatory measures, by repeatedly communicating its desire to expropriate Union during the 2012 client acquisition campaign".[359] Third, Achmea claims that "the Slovak Republic's many statements since 2006 [and] intentions are incompatible with the requirement of fair and equitable treatment as expressed in Article 3 of the BIT" to ensure a stable and predictable legal framework.[360] Fourth, Achmea claims that the conduct of VšZP in relation to Union's contractual arrangements with the State-owned hospitals is attributable to the Slovak Republic and is in breach of Article 3 of the Treaty.

255. Article 3(1) of the Treaty reads as follows:

> "1. Each Contracting Party shall ensure fair and equitable treatment to the investments of 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".[361]

256. The validity of these four limbs of Achmea's Article 3 claim, based on a *prima facie* assessment of the facts as exposed by the Claimant, may better and will be assessed separately. The first limb of the claim relates to the voluntary sale process contemplated in the Project Plan. In light of the Parties' pleadings, the Tribunal need not spend much time on this first limb. Indeed, the Claimant did not expand any further on this particular issue beyond its Statement of Claim. The Tribunal understands the Claimant's argument to be that the voluntary sale process as contemplated in the Project Plan *would* violate Article 3 of the Treaty, and not that a Treaty breach has already occurred.[362] As such, this part of the claim fails to meet the *prima facie* test. The Tribunal further notes that the Claimant has not provided any evidence suggesting that the process has been set in motion so that this claim would fail in any circumstances.

257. There remains, however, one argument to be addressed in this connection and thus at this juncture. The Claimant indicates that the Project Plan contemplates the commencement of the voluntary sale process after the 2013 acquisition campaign, but on the basis of a number of clients stabilized at the level of the 2012 acquisition campaign. This circumstance "would clearly disadvantage Achmea" since it

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[358] SoC, ¶ 190.

[359] SoC, ¶ 195.

[360] SoC, ¶ 201.

[361] Netherlands-Slovak Republic BIT, Article 3(1) (**Exh. C-1**).

[362] SoC, ¶ 190. The Claimant entitled the section relating to this particular claim: "Violations in respect of the contemplated 'voluntary sale' process"; but then immediately argues that *if carried out*, the voluntary sale process "violates Article 3(1) of the BIT".

traditionally gained market share during acquisition campaigns.[363] Here again, this argument fails since Achmea has not alleged that such a measure has been put into effect. The mere fact that the Project Plan envisages such a scenario is insufficient to meet the *prima facie* test. Thus, the Claimant's proffered set of facts would be insufficient to constitute an actual breach of the Treaty standard. Accordingly, the Tribunal finds that this part of the claim falls outside of its jurisdiction.

258. The second and third limbs of Achmea's claim relate to announcements, as well as several measures, which the Slovak Republic came up with in connection with its intention to expropriate Achmea's investment. According to the Claimant, the Slovak Republic engaged in unreasonable and discriminatory measures which allegedly harmed Achmea's investment, notably "by repeatedly communicating its desire to expropriate Union during the 2012 client acquisition campaign",[364] thus impacting Union's business, especially the number of clients it could have attracted had such announcements not been made. In this regard, the Claimant points to (i) the Intention Statement, (ii) the Project Plan, (iii) various statements of public officials, and (iv) two governmental resolutions approving respectively the Intention Statement and the Project Plan.[365] The Claimant complains that the Intention Statement puts a certain level of blame on private health insurers for the low life expectancy in the Slovak Republic, thus setting in train the process of driving Achmea out of the health insurance market.[366] The Claimant complains further that the Project Plan was published in the last week of the acquisition campaign, thus willfully harming Achmea's attempts to gain more market share. Finally, as regards the statements made in the Slovak press, the Claimant points to various statements of high-ranking officials who publicly affirmed that the political decision to create a unitary health insurance system had been taken and was irreversible. The Claimant also refers to a press interview given by the Prime Minister, Mr. Robert Fico, where he stated that "in practice this means that private health insurers Dôvera and Union should leave the Slovak market".[367]

259. The Respondent qualifies this claim to be "ancillary" to the expropriation claim, and therefore not to be entertained by the Tribunal.[368] This is especially so because preparatory work of an internationally wrongful act, which the proposed expropriation by no means purports to be, is in any circumstances not unlawful under international

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[363] SoC, ¶ 192.

[364] SoC, ¶ 195.

[365] Government Resolution No. 383, 25 July 2012 (**Exh. C-14**); and Governement Resolution No. 606, 31 October 2012 (**Exh. C-27**).

[366] SoC, ¶ 87.

[367] Press article by Sme entitled "There will be only one health insurer! The government cabinet approved it", 25 July 2012 (**Exh. C-15**).

[368] That said, the Respondent understands that the factual basis for the Article 5 and Article 3 claims are fundamentally different: "I ask the tribunal to remember what Achmea has said about its claims. Their claim under article 3 of the treat[y], the fair and equitable claim, is based on events that have purportedly already occurred. In contrast, their article 5 claim, expropriation, is based on events that have not occurred". Tr. 10:23-11:4.

law. In addition, the Respondent argues that mere intentions or political statements in the midst of a democratic process cannot be the basis of an Article 3 claim.

260. While no expropriation of Union has yet taken place, it is clear that the matters upon which the Claimant relies in support of the second and third limbs of its Article 3 claim, based on an alleged breach of the FET standard, have already occurred. Both the second and third limbs are based upon declarations and statements made by Slovak officials, as well as two resolutions, regarding the intention to create a unitary health insurance system, and which anticipate an eventual expropriation of Union. The Tribunal accepts that, in certain circumstances, conduct of a State in anticipation of an expropriation might amount to a breach of its obligation to respect the FET standard. For the reasons developed below and on the basis of a *prima facie* review of the evidence filed by the Claimant, the Tribunal is not persuaded that this is such a case.

261. The announcements made by, and on behalf of, the Slovak Republic did not amount to more than expressions of intent, which had yet to be made effectual. In particular, these announcements required to be translated into legislation and in any event, were premised on the basis that were an expropriation to result, it would be made with due respect to the compensation terms of the BIT. As regards the Intention Statement, it discusses the possibilities of introducing a unitary public health care system in the Slovak Republic, *inter alia* in light of EU law and the right to protection of investments.[369] In this latter regard, the Intention Statement indicates that any potential expropriation of Union would have to comply with the conditions set out in the BIT, amongst which paying "fair compensation without undue delay".[370] Similarly, the Project Plan sets out the general framework for the contemplated implementation of a unitary public health insurance system in the Slovak Republic.[371] An eventual expropriation of non-State owned health insurers is contemplated as a measure of last resort to be adopted in conformity with the Slovak Constitution and international law.[372]

262. As regards the two resolutions referred to by the Claimant, they do not show any *prima facie* evidence of any conduct falling below the FET standard. Government Resolution No. 383 of 25 July 2012 approves "the intention to introduce unitary public health insurance system in the Slovak Republic".[373] It also instructs the Minister of Health to prepare a project along these lines by 30 September 2012, thus denying the Claimant's argument that the publication of the Project Plan in the last week of September 2012 was willfully intended to harm Union. For its part, Government

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[369] Proposal of intention to introduce a unitary system of public health insurance in Slovakia ("Intention Statement"), 19 July 2012 (**Exh. C-12**).

[370] *Id.*, point 2.2.

[371] Project of implementation of a unitary system of public health insurance in the Slovak Republic ("Project Plan"), 25 September 2012 (**Exh. C-19**).

[372] *Id.*, point 3.6.

[373] Government Resolution No. 383, 25 July 2012 (**Exh. C-14**).

Resolution No. 606 of 31 October 2012 approving the Project Plan indicates that the implementation of the unitary system to public health insurance is to be achieved preferably through a voluntary buyout of the shares in non-State owned health insurers, or, in the last resort, through expropriation.[374]

263. The Claimant has not brought either any sufficient *prima facie* evidence that the actions of the Slovak Republic preparatory to any planned taking of Union are somehow beyond any norm, which might otherwise render those preparations susceptible to attack as a breach of the State's obligations to afford fair and equitable treatment to the Claimant. The Respondent argues that the announcement of the Project Plan was 'a basic requirement for a transparent democratic legislative process'. On the face of it, it seems to the Tribunal that the Slovak Republic has observed the formalities, however uncompromising the terms of some of the public statements of senior officials. Neither has the Claimant demonstrated enough of a case to enable the Tribunal to say that the actions and public pronouncements of the Slovak Government have been such as to destabilize the investment and regulatory environment.

264. The third limb of the claim relates to the purported regulatory instability associated with the expropriation process, most notably through the various statements made in the Slovak press and the two resolutions to which the Tribunal has referred above. *Mutatis mutandis,* this element of Claimant's Article 3 claim, as it also deals with statements made by Slovak officials and the two resolutions, calls for the same observations on the part of the Tribunal. Furthermore, as the Respondent has noted, the Claimant has been unable to refer to a single instance of regulatory change prejudicial to Achmea.

265. As a consequence, for all the reasons indicated above, the Tribunal considers that the Claimant has not demonstrated a *prima facie* basis for the second and third limb of its Article 3 claim.

266. Finally, the fourth limb of the claim relates to the conduct of VšZP, the Association of Slovak Hospitals ("ASH"), and the 17 State-owned hospitals. The Respondent raises two separate issues in this regard. First, the Respondent asserts that the Claimant failed to establish a link of attribution between the Slovak Government and these State-owned entities, in particular since they do not belong to the governmental apparatus and do not exercise elements of governmental authority. Mere State-ownership is insufficient to establish attribution, and thus the Tribunal's jurisdiction does not extend to the conduct of these entities. Second, the Respondent criticizes that the Claimant did not specify in its Statement of Claim which conduct of the State-owned hospitals would breach the Treaty. Since the Tribunal must assess its jurisdiction at the time of the Statement of Claim, it should disregard any alleged facts subsequent to the Statement of Claim, in particular the meeting of 17 hospitals on 26

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[374] Governement Resolution No. 606, 31 October 2012 (**Exh. C-27**).

June 2013 and various statements of the Minister of Health brought to the attention of the Tribunal on 29 January 2014.

267. It is an accepted principle of international law that jurisdiction must exist on the day of the institution of proceedings. As stated by the ICJ:

> "The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed".[375]

268. In the realm of investment arbitration, numerous arbitral tribunals have also indicated that jurisdiction must exist on the day of the institution of proceedings. For instance, in *Goetz v. Burundi*, the tribunal held that:

> "Quant à la compétence du Tribunal et à la recevabilité de la requête, elles s'apprécient, selon le principe rappelé récemment par la Cour internationale de Justice, à la date du dépôt de la requête".[376]

269. As appears from these decisions, an international tribunal's jurisdiction must exist on the day of the institution of proceedings, that is, for present purposes and pursuant to Article 3(2) of the UNCITRAL Rules, the date on which the Notice of Arbitration is received by the Respondent. It is undisputed that Achmea did not raise the conduct of VšZP or any State-owned hospitals in its Notice of Arbitration. The first time Achmea

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[375] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, 14 February 2002, I.C.J. Reports 2002, ¶ 26 (**Exh. RLA-72**). *See further: Nottebohm case*, Preliminary Objection, Judgment, I.C.J. Reports 1953, p. 122 ("Once the Court has been regularly seised, the Court must exercise its powers, as theses are defined in the Statute. After that, the expiry of the period fixed for one of the Declarations on which the Application was founded is an event which is unrelated to the exercise of the powers conferred on the Court by the Statute, which the Court must exercise whenever it has been regularly seised and whenever it has not been shown, on some other ground, that it lacks jurisdiction or that the claim is inadmissible"); *Case concerning the right of passage over Indian Territory*, Preliminary Objections, Judgment, 26 November 1957, I.C.J. Reports 1957, p. 142 ("It is a rule of law generally accepted, as well as one acted upon in the past by the Court, that, once the Court has been validly seised of a dispute, unilateral action by the respondent State in terminating its Declaration, in whole or in part, cannot divest the Court of jurisdiction"); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, Judgment, 27 February 1998, I.C.J. Reports 1998, ¶ 38 ("In accordance with its established jurisprudence, if the Court had jurisdiction on that date [filing of the Application], it continues to do so; the subsequent coming into existence of the above-mentioned resolutions cannot affect its jurisdiction once established").

[376] *Antoine Goetz and Others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, ¶ 72 ("As to the competence of the Tribunal and the admissibility of the request, they are analysed, according to the principle recently recalled by the International Court of Justice, at the date of the filing of the request", unofficial translation). *See also*: *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶ 178 ("the tribunal's jurisdiction which, according to the long-established jurisprudence of international tribunals of all kinds, is fixed as of the time the proceedings are commenced, and is not subject to *ex post facto* alteration").

expressly mentioned VšZP and the State-owned hospitals in connection with an alleged prejudice suffered by Achmea, was in its Statement of Claim.[377]

270. In these circumstances, the Tribunal has no difficulty in finding that the fourth limb of Achmea's Article 3 claim falls outside the Tribunal's jurisdiction, since no specific conduct of VšZP or the State-owned hospitals is complained of in Achmea's Notice of Arbitration. Even if the Tribunal were minded to uphold jurisdiction over the fourth limb of the Article 3 claim as formulated for the first time in the Statement of Claim, that limb would nonetheless fail to satisfy the requirements of a valid claim. This derives from the fact that the Statement of Claim fails to point with sufficient specificity to any event or conduct of VšZP, or of the State-owned hospitals, having allegedly caused a prejudice to Achmea's investment.

271. As regards (i) the purported meeting held on 26 June 2013 between VšZP and several State-owned hospitals, and (ii) the rescission by several State-owned hospitals of their contracts with Union, these events postdate not only the Notice of Arbitration but also the Statement of Claim, and thus patently fall outside the Tribunal's jurisdiction. The Tribunal is further of the view that Achmea may in fact have called the Tribunal's attention in its Statement of Claim to the purported conduct of VšZP or of the State-owned hospitals in an attempt to prevent these organisms to interfere with Achmea's contractual relations with these State-owned hospitals. But this course of action is not one that this Tribunal can entertain, since it does not fall within its jurisdiction to entertain preventive actions. Indeed, the Tribunal accepts the Slovak Republic's argument that it did not consent to arbitrate disputes seeking preventive actions, but that its consent only extends to disputes dealing with alleged breaches of the BIT that have already occurred at the time of the institution of arbitral proceedings. Accordingly, the Tribunal finds that it lacks jurisdiction over the fourth limb of Achmea's claim.

272. In conclusion, the Tribunal upholds the Respondent's objections to the claim raised by the Claimant under Article 3 of the Treaty.

273. Having found that the Tribunal lacks jurisdiction on both the expropriation claim and the FET claim, it is unnecessary to address the Respondent's further objections to the Tribunal's jurisdiction.

VI. COSTS

A. THE PARTIES' COSTS STATEMENTS

274. In accordance with Section III.4 of PO3, and within the modified time-limit agreed by the Parties, each Party submitted its statement on costs.[378] The Claimant made its submission on costs as follows:

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[377] SoC, ¶¶ 199-200.

Item	Amount
- Fees and costs De Brauw Blackstone Westbroek N.V. (arbitration counsel Achmea) in relation to the arbitration (incl. VAT)	EUR 547,725.78
of which is estimated to relate to the jurisdictional phase	EUR 222,768.90
- Fees and costs Kinstellar Bratislava (local Slovak counsel Achmea) in relation to the arbitration (incl. VAT)	EUR 23,826.78
- Costs for court reporters advanced by Achmea	GPB 3,041.71
- Cost deposits made by Achmea to the PCA	EUR 200,000.00
Sum	EUR 771,552.56 and BGP 3,041.71

275. In its Statement of Claim, the Claimant requests the following relief in relation to costs:

> "to order the Slovak Republic to pay all costs associated with this arbitration, including but not limited to the fees and expenses of the arbitral tribunal, the fees and expenses of any institutions that provide administrative, appointing or other assistance to these proceedings, and the fees and expenses of Achmea's legal representation, witnesses and experts".[379]

276. In its costs submission, the Claimant specified that it requests the Tribunal "to order the Slovak Republic to bear Achmea's costs which relate to the jurisdictional phase of this arbitration".[380]

277. The Respondent made its submission on costs as follows:

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[378] Claimant's Costs Submission of 11 October 2013; Respondent's Costs Submission of 11 October 2013.

[379] SoC, ¶ 228, point (v).

[380] Claimant's Costs Submission of 11 October 2013, p. 2.

External Fees and Costs	Counsel Fees	EUR 768,587.50
	Counsel Travel Costs	EUR 34,369.41
	Subcontractor Service	EUR 299,958.20
	Other Services (translator, courier)	EUR 15,042.94
	VAT 20% for the Total External Fees and Costs	EUR 223,591.61
Internal Costs	Travel Costs of Ministry of Finance	EUR 7,137.30
Total Costs	Total internal and external costs	EUR 1,348,686.96
Costs for court reporters		GBP 3,041.71
Tribunal's Deposit		EUR 200,000.00
TOTAL Expenses		EUR 1,548,686.96 + GBP 3,041.71

278. The Respondent requests the following relief in relation to costs:

> "(b) an order that Achmea pay the costs of these arbitral proceedings, including the cost of the Tribunal and the legal and other costs incurred by the Slovak Republic, on a full indemnity basis; and
>
> (c) interest on any costs awarded to the Slovak Republic, in an amount to be determined by the Tribunal".[381]

[381] Respondent's Costs Submission of 11 October 2013, p. 2.

B. THE COSTS OF THE PROCEEDINGS

279. Each Party paid an advance of EUR 200,000, i.e. a total of EUR 400,000. In addition, the Parties have advanced costs for court reporters at the jurisdictional hearing amounting to GBP 3,041.71 each, i.e. a total of GBP 6,083.42.

280. The arbitration costs advanced by the Parties thus amount to an aggregate of EUR 400,000 + GBP 6,083.42, each Party advancing half of these amounts.

281. The Tribunal has incurred expenses in a total amount of EUR 12,809.62, including expenses for travel, lodging and bank charges.

282. The Members of the Tribunal have collectively spent a total of 474.25 hours as follows: Mr. John Beechey 105.75 hours; Prof. Pierre-Marie Dupuy 72 hours; and Dr. Laurent Lévy 296.5 hours. In addition, the Secretary of the Tribunal has spent a total of 183.5 hours. It was agreed in paragraph 19.1 of PO1 that the Tribunal's time would be compensated at an hourly rate of CHF 700 (seven hundred Swiss francs), and that the Secretary's time would be compensated at an hourly rate of CHF 350 (three hundred and fifty Swiss francs). The total fees of the Arbitral Tribunal amount to CHF 396,200, amounting to EUR 324,549.66.

283. The PCA has charged fees in the amount of EUR 2,362.50 for the administration of the funds deposited by the Parties by way of advance.

284. The total costs of the proceedings are thus EUR 339,721.78 + GBP 6,083.42, detailed as follows:

Expenses for court reporters	GBP 6,083.42
Tribunal expenses	EUR 12,809.62
Tribunal fees	EUR 324,549.66
Administrative expenses	EUR 2,362.50
Total	EUR 339,721.78 + GBP 6,083.42.

285. Consequently, the Tribunal notes that there is a surplus of EUR 60,278.22 (i.e. EUR 400,000 + GBP 6,083.42 [total advances] less EUR 339,721.78 + GBP 6,083.42 [total arbitration costs].

C. THE ALLOCATION OF COSTS

286. Article 40(1) and (2) of the UNCITRAL Rules 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".

287. 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.

288. With respect to the costs of arbitration, the Claimant did not succeed in establishing the jurisdiction of the present Tribunal. Accordingly, the Claimant shall bear the costs of arbitration advanced by the Respondent. As indicated above, the costs of arbitration advanced by the Respondent amount to EUR 200,000 + GBP 3,041.71. The surplus of the advances, i.e. EUR 60,278.22, will be returned to the Respondent. Therefore, the Tribunal directs the Claimant to pay the Respondent the balance as of the date of the present award, i.e., EUR 139'721.78 (EUR 200,000 less EUR 59,894.18) + GBP 3,041.71.

289. As regards the costs of legal representation and other costs incurred by the Parties, it is the considered opinion of the Tribunal that, in light of all the circumstances of the present case, the Claimant shall bear 75 percent of all of the Respondent's costs of legal representation, i.e. an amount of EUR 1,011,515.22.

290. Finally, the Claimant shall pay no pre-award interest but post-award simple interest on the Respondent's costs computed at 6 month Euro LIBOR + 2 % per annum from the date of the award until payment in full.

VII. DECISION

291. For the reasons stated above, the Tribunal decides that:

    a. it does not have jurisdiction over Achmea's claims;

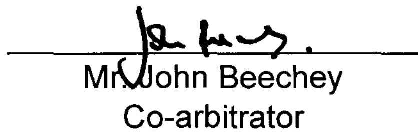
    b. the Claimant shall bear the arbitration costs, which amount to EUR 339,721.78 + GBP 6,083.42 within 30 days of the notification of this award;

    c. the Claimant shall pay EUR 1,011,515.22 to the Respondent as contribution to its legal and other costs incurred in connection with this arbitration within 30 days of the notification of this award;

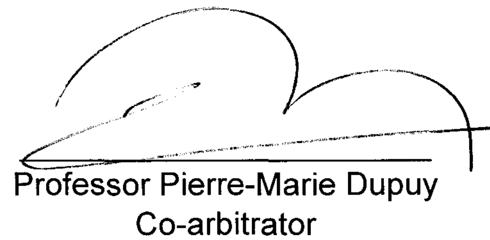
    d. the Claimant shall pay post-award simple interest on the Respondent's costs computed at 6 month Euro LIBOR + 2% per annum from the date of the award until payment in full.

Seat of the arbitration: Geneva, Switzerland

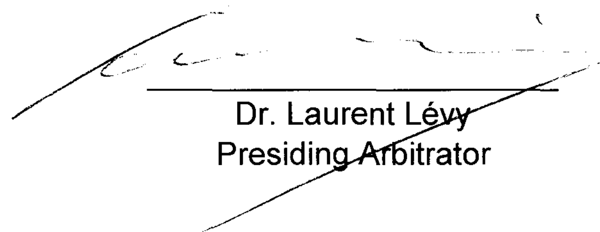
Date: 20 May 2014



Mr. John Beechey
Co-arbitrator



Professor Pierre-Marie Dupuy
Co-arbitrator



Dr. Laurent Lévy
Presiding Arbitrator