PCA Case No. 2008-13

**IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE AGREEMENT ON ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS BETWEEN THE KINGDOM OF THE NETHERLANDS AND THE CZECH AND SLOVAK FEDERAL REPUBLIC, SIGNED ON 29 APRIL 1991, ENTERED INTO FORCE ON 1 OCTOBER 1992 ("TREATY")**

-and-

THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ARBITRATION RULES ("UNCITRAL ARBITRATION RULES")

-between-

**ACHMEA B.V.
(formerly known as "Eureko B.V.")**

("Claimant")

-and-

THE SLOVAK REPUBLIC

("Respondent," and together with Claimant, the "Parties")

FINAL AWARD

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7 December 2012

Tribunal

Professor Vaughan Lowe
Professor Albert Jan van den Berg
Mr V.V. Veeder

Secretary to Tribunal

Judith Levine, Permanent Court of Arbitration

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LIST OF DEFINED TERMS

Term	Definition
2004 Liberalisation (or 2004 Reform)	See "2004 Reform" below
2004 Reform (or 2004 Liberalisation)	The series of legislative changes to the legal framework governing the health insurance market in the Slovak Republic, introduced by the Slovak Government in 2004, principally in Act No. 580/2004 Coll. and Act No. 581/2004 Coll.
2007 Reforms	The series of legislative changes to the legal framework governing the health insurance market in the Slovak Republic, introduced by the Slovak Government between 2006 and 2009 (principally in 2006 and 2007); identified variously by the Parties as the "2007 Reversal" or the "2006 Stabilisation"
amended network requirement	Amendment of Act No. 578/2004 Coll. by Act No. 653/2007 Coll. and amendment of Decree 751/2004 Coll. by Decree 504/2007 Coll. and adoption of Decree No. 640/2008 Coll., relating to the network of healthcare providers contracted with by health insurance companies; also identified by the Parties as the "Minimum Network Provision"
Award on Jurisdiction, Arbitrability and Suspension	*Eureko B.V. v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, available at: <http://www.pca-cpa.org/showpage.asp?pag_id=1414>
ban on brokers	Amendment of Sections 6(15) and 6(16) of Health Insurance Companies Act by Act No. 12/2007 Coll., relating to the use of brokers by health insurance companies; also identified by the Parties as the "Broker Provision"

Term	Definition
ban on profits	Amendment of Section 15(6) of Health Insurance Companies Act by Act No. 530/2007 Coll. and amendment of Section 86d of Health Insurance Companies Act by Act No. 594/2007 Coll., relating to the use of the "positive result of economic operations" or profit by health insurance companies; also identified by the Parties as the "Profit Provision"
ban on transfers	Amendment of Section 61 of Health Insurance Companies Act by Act No. 192/2009 Coll., relating to the sale of insurance portfolios by health insurance companies; also identified by the Parties as the "Portfolio Transfer Provision"
BIT (or Treaty)	Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed on 29 April 1991, entering into force on 1 October 1992
cap on operating expenses	The provisions of Act No. 522/2006, dated 6 September 2006, relating to the operating expenses of health insurance companies
Claimant (or Eureko)	Achmea B.V., formerly known as Eureko B.V., a Dutch private company with limited liability with its statutory seat in Amsterdam and its head office at Handelsweg 2, 3707NH Zeist, The Netherlands, Company Reg. No.: 33235189
Counter-Memorial on the Merits	Respondent's Counter-Memorial on the Merits, dated 14 February 2011
Counter-Memorial on Damages	Respondent's Counter-Memorial on Damages, dated 11 November 2011
CSFR	The Czech and Slovak Federative Republic (from 1990)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 21 February 1991, entering into force on 18 March 1992
EC Treaty	Treaty Establishing the European Community, adopted 25 March 1957, entering into force on 1 January 1958
ECJ	Court of Justice of the European Union

Term	Definition
EU	The European Union
Eureko (or Claimant)	Achmea B.V., formerly known as Eureko B.V., a Dutch private company with limited liability with its statutory seat in Amsterdam and its head office at Handelsweg 2, 3707NH Zeist, The Netherlands, Company Reg. No.: 33235189
Europska	Health Insurance Company Európska zdravotná poisťovňa, a.s. v likvidácii (joint stock company, now liquidated)
Health Care Authority	Health Care Surveillance Authority (in Slovak: Úrad pre dohľad nad zdravotnou starostlivosťou), address: Grösslingová 5, 812 62 Bratislava, The Slovak Republic
Hearing on the Intra-EU Jurisdictional Objection	Hearing on the Intra-EU Jurisdictional Objection held in London, United Kingdom, on 24 April 2010
Hearing on the Merits	Hearing on the Merits held in London, United Kingdom, from 12 to 14 December 2011
Hearing on Quantum	Hearing on Quantum held in London, United Kingdom, on 30 January 2012
Indge Letter	Letter from Claimant's Expert Witness, Mr Richard Indge, to the Tribunal, dated 7 December 2011
Intra-EU Jurisdictional Objection	Respondent's jurisdictional objection based on the Slovak Republic's membership of the EU, comprising the arguments that, as a matter of international law, EU law, Slovak law and German law, the accession of the Slovak Republic to the EU in May 2004 terminated the BIT or rendered its arbitration clause inapplicable, and accordingly that this Tribunal lacks jurisdiction
Joint Expert Report	Expert Report, dated 13 January 2012, prepared by Claimant's Expert Witness, Mr Richard Indge, and Respondent's Expert Witnesses, Mr Michael Peer and Ms Zuzana Kepková, following their meeting in Prague on 5 January 2012
Jurisdiction Counter-Memorial	Claimant's Counter-Memorial on the Intra-EU Jurisdictional Objection, dated 26 February 2010
Jurisdiction Memorial	Respondent's Memorial on the Intra-EU Jurisdictional Objection, dated 29 January 2010

Term	Definition
Jurisdiction Rejoinder	Claimant's Rejoinder on the Intra-EU Jurisdictional Objection, dated 16 April 2010
Jurisdiction Reply	Respondent's Reply on the Intra-EU Jurisdictional Objection, dated 23 March 2010
Lisbon Treaty (or TFEU)	Treaty on the Functioning of the European Union, done in Lisbon 13 December 2007, entering into force 1 December 2009
Memorial on Damages	Claimant's Memorial on Damages, dated 24 August 2011
Memorial on the Merits	Claimant's Memorial on the Merits, dated 30 July 2010, (also called "Statement of Reply" by Claimant at the time)
Ministry of Health	Ministry of Health of the Slovak Republic (Ministerstvo zdravotníctva Slovenskej republiky)
Notice of Arbitration	Claimant's Notice of Arbitration, dated 1 October 2008
Oberlandesgericht	Oberlandesgericht Frankfurt am Main (the Court of Appeal located in Frankfurt, Germany)
PCA	Permanent Court of Arbitration, serving as registry in this arbitration
Post-Hearing Briefs	Post-Hearing Briefs filed by each Party, dated 21 February 2012
Rejoinder on the Merits	Respondent's Rejoinder on the Merits, dated 10 May 2011
Reply on the Merits	Claimant's Reply on the Merits, dated 28 March 2011
repositioning of the Regulator	Amendment of Section 22 of Health Insurance Companies Act by Act No. 12/2007 Coll., relating to the functions of the Health Care Authority; also identified by the Parties as the "Health Care Authority Provision"
Respondent (or Slovak Republic)	The Slovak Republic, represented by the Ministry of Finance
Slovak Constitutional Court	The Ústavný súd Slovenskej republiky (the Constitutional Court of the Slovak Republic)

Term	Definition
Slovak Republic (or Respondent)	The Slovak Republic, represented by the Ministry of Finance
SMER	SMER – sociálna demokracia, a Slovak political party led by Mr Robert Fico
Statement of Claim	Claimant's Statement of Claim, dated 16 June 2009
Statement of Defence	Respondent's Statement of Defence, dated 30 October 2009
SZP	Spoločná zdravotná poisťovna, a.s. (joint stock company), registered seat: Ondavská 3, 820 05 Bratislava, The Slovak Republic, Company Reg. No.: 35 936 835
TEU	Treaty on European Union, signed on 7 February 1992; amended by the Treaty of Lisbon, signed on 13 December 2007; amendments entered into force on 1 December 2009
TFEU	Treaty on the Functioning of the European Union, signed on 25 March 1957 (as the Treaty establishing the European Economic Community); amended by the Treaty of Lisbon, signed on 13 December 2007; amendments entered into force on 1 December 2009
Transcript	Transcript of the Hearings on the Merits and on Quantum held on 12-14 December 2011 at 30 January 2012, respectively, in London
Treaty (or BIT)	Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed on 29 April 1991, entered into force on 1 October 1992
Tribunal	Arbitration tribunal established pursuant to Article 8 of the BIT in the present case *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic*
UNCITRAL Arbitration Rules	The United Nations Commission on International Trade Law Arbitration Rules (1976)

Term	Definition
Union Healthcare	Union zdravotná poisťovňa, a.s., registered seat: Bajkalská 29/A, Bratislava 821 08, The Slovak Republic, Company Reg. No.: 36 284 831, a wholly owned subsidiary of Eureko
Union Insurance	Union poisťovňa a.s. (joint-stock company), registered seat: Bajkalská 29/A, 813 60 Bratislava, The Slovak Republic, Company Reg. No.: 31 322 051
VCLT (or Vienna Convention)	Vienna Convention on the Law of Treaties, signed on 23 May 1969, entered into force on 27 January 1980
VZP	Všeobecná zdravotná poisťovňa, a.s. (joint stock company), registered seat: Manateyova 17, 850 05 Bratislava, The Slovak Republic, Company Reg No.: 35 937 874
ZPO	The German Code of Civil Procedure (Zivilprozessordnung), Book 10 of which contains the German Arbitration Act

I. INTRODUCTION

A. The Claimant

1. Claimant in this arbitration is Achmea B.V., a Dutch private company with limited liability, having its statutory seat in Amsterdam and its head offices in Zeist, the Netherlands. Claimant was previously known as "Eureko B.V.," until it changed its name through an amendment of the articles of association of Eureko B.V. that was executed at the occasion of the merger between Eureko B.V. and Achmea Holding N.V. on 18 November 2011 (Eureko B.V. being the surviving entity in that merger). Throughout the relevant period of events underlying the claim, Claimant was known as "Eureko" and, for convenience, the Tribunal will refer to Claimant as "**Eureko**" or "**Claimant**" throughout this Award.

2. The group of companies headed by Eureko is a financial services group that offers a range of insurance products internationally, including health insurance, life and non-life insurance, pension products, asset management and banking. Eureko operates in the Slovak Republic through two companies: (i) Union poisťovňa a.s. ("**Union Insurance**"), incorporated in 1991 by the Government of the Slovak Republic and privatised in 1992, in which Eureko acquired shares in 1997; and (ii) Union zdravotná poisťovňa, a.s ("**Union Healthcare**"), a wholly owned subsidiary of Eureko incorporated in 2006 and funded by Eureko.[1] This arbitration primarily concerns Eureko's investment in Union Healthcare.

3. Eureko is represented in this arbitration by Mr Marnix Leijten, Mr Albert Marsman, and Mr Igor Zubov of De Brauw Blackstone Westbroek N.V., Claude Debussylaan 80, 1082 MD Amsterdam, the Netherlands; and by Mr René Visser of Achmea B.V.

B. The Respondent

4. The Slovak Republic ("**Slovak Republic**" or "**Respondent**") is a sovereign State, formerly a part of the Czech and Slovak Federal Republic. It gained independence on 1 January 1993 and acceded to the European Union ("**EU**") on 1 May 2004. The

[1] Claimant's Statement of Claim, ¶¶II.2, 4-12.

Slovak Republic is a multiparty parliamentary democracy, with executive power lying with the government headed by a Prime Minister.[2]

5. Respondent is represented in this arbitration by Ms Andrea Holíková of the Slovak Republic Ministry of Finance, Štefanovicova 5, 817 82 Bratislava, the Slovak Republic; and by Dr Martin Maisner, Mr Miloš Olík, Mr David Fyrbach, Mr Martin Šubrt and Mr Ľudovít Mičinský of Rowan Legal s.r.o., Námestie slobody 11, 811 06 Bratislava, the Slovak Republic.

C. The Dispute

6. Claimant initiated this arbitration on the basis of claims that the Slovak Republic has violated the 1992 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic ("**Treaty**" or "**BIT**").[3]

7. Claimant complains that various legislative measures introduced by Respondent after a change in government in July 2006 constituted a systematic reversal of the 2004 liberalisation of the Slovak health insurance market that had prompted Eureko to invest in the Slovak Republic's health insurance sector. According to Claimant, these actions effectively destroyed the value of Eureko's investment. Claimant characterises the measures as constituting an unlawful indirect expropriation of its investment in Union Healthcare, in breach of **Article 5** of the BIT. Claimant further alleges that Respondent's conduct amounts to a violation of the BIT's standards of protection contained in its provisions on (i) fair and equitable treatment including as to non-discrimination (**Article 3(1)** of the BIT), (ii) non-impairment by discriminatory or unreasonable measures (Article 3(1) of the BIT), (iii) full protection and security (**Article 3(2)** of the BIT), and (iv) free transfer of profits and dividends (**Article 4** of the BIT).[4] Claimant seeks, *inter alia*, compensation in the vicinity of €65 million, or any other lower or higher amount of damages that the Tribunal considers as appropriate, as well as interest, tax and all costs of the proceedings.[5] Claimant also

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2 Claimant's Statement of Claim, ¶¶II.16-22.

3 Signed on 29 April 1991, entered into force on 1 October 1992 (Exhibit C-10).

4 Claimant's Statement of Claim, ¶IV; Memorial on Damages, ¶V.1.

5 Notice of Arbitration, ¶10; Claimant's Statement of Claim, ¶V.2; Claimant's Memorial on the Merits, ¶342; Claimant's Reply on the Merits, ¶277; Memorial on Damages, ¶V.1.

considers Respondent's position in this arbitration irreconcilable with developments that have taken place in the Slovak Republic since 2010 (see below at paragraph 117ff).

8. The Slovak Republic denies that it has expropriated Eureko's investment or otherwise violated any obligation—international or otherwise—purportedly owed to Eureko, that any of Eureko's claims are viable as a matter of fact or law, and that Eureko has suffered any cognizable damages or injury. Respondent asserts that it has complied fully with all applicable international legal requirements.[6] Respondent respectfully requests the Tribunal to dismiss all claims made by Claimant and to declare that Respondent (a) has not breached the BIT; and (b) has not interfered with Claimant's investment. Respondent further requests the Tribunal to award Respondent costs.

9. The Slovak Republic also initially challenged the Tribunal's jurisdiction over the dispute. A preliminary phase of these proceedings dealt exclusively with Respondent's jurisdictional objection based on the Slovak Republic's membership of the EU. In essence, Respondent had argued that, as a matter of international law, EU law, Slovak law and German law, the accession of the Slovak Republic to the EU in May 2004 terminated the BIT or rendered its arbitration clause inapplicable, and that accordingly this Tribunal lacked jurisdiction to hear the dispute (the "**Intra-EU Jurisdictional Objection**"). On 26 October 2010, the Tribunal issued its Award on Jurisdiction, Arbitrability and Suspension dismissing the Intra-EU Jurisdictional Objection, confirming that the Tribunal has jurisdiction to decide the dispute, and declining to suspend the proceedings until the European Commission and/or the European Court of Justice (the "**ECJ**") came to a decision on EU law aspects of related alleged infringement proceedings.

10. In May 2011, the Parties agreed that the remainder of the proceedings would be addressed within a single phase addressing both liability and quantum arguments. Accordingly this Award addresses Respondent's remaining objection to the Tribunal's jurisdiction *ratione materiae*, Respondent's alleged violations of the Treaty, and the damage allegedly suffered by Claimant as a result of such violations.

[6] Respondent's Statement of Defence, ¶¶1, 2, 128; Respondent's Counter-Memorial on the Merits, ¶¶2, 672.

II. PROCEDURAL HISTORY

11. This Tribunal's Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010 recounts in detail the procedural history of the arbitration from its commencement up until the date that Award was issued.[7] This Part of the Award recalls key procedural details from the early phase of the proceedings and summarises developments in the proceedings since October 2010.

A. Commencement of the Arbitration

12. Pursuant to Article 8 of the Treaty and Article 3 of the UNCITRAL Arbitration Rules, Eureko sent a Notice of Arbitration to Respondent on 1 October 2008, which Respondent received on 3 October 2008.

13. Article 8 of the Treaty provides in the relevant parts 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 months from the date either party to the dispute requested amicable settlement.
>
> [. . .]
>
> (4) The arbitration tribunal shall determine its own procedure applying the arbitration rules of the United Nations Commission for International Trade Law (UNCITRAL).
>
> (5) The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:
>
> - the law in force of the Contracting Party concerned;
> - the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;
> - the provisions of special agreements relating to the investment;
> - the general principles of international law.
>
> [. . .]

[7] *Eureko B.V. v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension ("**Award on Jurisdiction, Arbitrability and Suspension**"), 26 October 2010, available at: http://www.pca-cpa.org/showpage.asp?pag_id=1414, ¶¶10-42.

B. Constitution of the Tribunal, Language and Place of Arbitration

14. The Tribunal is composed of Professor Albert Jan van den Berg (appointed by Claimant on 17 October 2008), Mr V.V. Veeder (appointed by Respondent on 6 May 2009, as substitute for Judge Peter Tomka who resigned on 7 April 2009), and Professor Vaughan Lowe (appointed as Presiding Arbitrator on 20 December 2008).

15. The Tribunal and the Parties signed Terms of Appointment on 5 March 2009, confirming the constitution of the Tribunal and designating the International Bureau of the Permanent Court of Arbitration ("**PCA**") to act as registry in the arbitration. It was agreed that the language of the proceedings would be English.[8]

16. On 19 March 2009, following a preliminary procedural hearing in The Hague, the Tribunal issued **Procedural Order No. 1**, determining among other things, Frankfurt, Germany to be the place (seat) of the arbitration, while reserving the Tribunal's right to conduct hearings and meetings at any location considered appropriate.[9]

C. Preliminary Jurisdictional Phase

17. In accordance with Procedural Order No. 1, Claimant filed its **Statement of Claim**, with accompanying exhibits, on 16 June 2009.

18. Respondent filed its **Statement of Defence**, with accompanying exhibits, on 30 October 2009. In addition to rejecting Claimant's claims on the merits, Respondent asserted that Eureko had not presented sufficient facts to establish either jurisdiction *ratione personae* or *ratione materiae*.[10] Respondent also introduced the Intra-EU Jurisdictional Objection.[11]

19. On 3 December 2009, following a teleconference with the Parties, the Tribunal issued **Procedural Order No. 2**. In Procedural Order No. 2, the Tribunal decided to hold a preliminary jurisdictional phase dedicated to Respondent's Intra-EU Jurisdictional Objection, and set a schedule for the Parties' submissions, for requests for document disclosure and for a hearing on the Intra-EU Jurisdictional Objection. It was decided that no action needed to be taken on the question of jurisdiction *ratione personae*, and

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8 Terms of Appointment, ¶¶3, 5 and 11.

9 Procedural Order No. 1, ¶1.

10 Respondent's Statement of Defence, ¶¶125-126.

11 Respondent's Statement of Defence, ¶¶119-124.

that document production would take place on the question of jurisdiction *ratione materiae* (relating, *inter alia*, to the objective criteria of an "investment" and Claimant's compliance with Slovak law). The Tribunal also noted that there had been no agreement between the Parties on any form of consolidation of the hearings in this case with those in other pending cases against the Slovak Republic in which similar issues might arise.

20. In accordance with Procedural Order No. 2, Respondent submitted its Memorial on the Intra-EU Jurisdictional Objection on 29 January 2010 ("**Jurisdiction Memorial**") and Claimant submitted its Counter-Memorial on the Intra-EU Jurisdictional Objection on 26 February 2010 ("**Jurisdiction Counter-Memorial**"). Respondent submitted its Reply on the Intra-EU Jurisdictional Objection on 23 March 2010 ("**Jurisdiction Reply**") and Claimant submitted its Rejoinder on the Intra-EU Jurisdictional Objection on 16 April 2010 ("**Jurisdiction Rejoinder**").

21. Document production on Respondent's jurisdiction *ratione materiae* concerns took place in February and March 2010. Further correspondence amongst the Parties ensued and the Tribunal held a teleconference on 8 April 2010 after which it informed the Parties that:

> i. The Tribunal has decided not to order any disclosure at this time.
>
> ii. The Partial Award on Jurisdiction will decide only the "Intra EU" challenge.
>
> iii. The Tribunal is not minded to arrange a second jurisdictional stage devoted to the *ratione materiae* challenge if it rejects the "Intra EU" challenge.
>
> iv. Points (ii) and (iii) above are without prejudice to the right of the Respondent to raise arguments based on 'illegality' and / or 'business risk' in relation to questions of liability and / or quantum, if the case proceeds that far.
>
> v. Similarly, both Parties will be able to make fresh requests for disclosure in relation to questions of merits and / or quantum, if the case proceeds that far.

22. On 24 April 2010, a **Hearing on the Intra-EU Jurisdictional Objection** was held at the International Dispute Resolution Centre in London. The Tribunal discussed with the Parties the possibility of approaching the European Commission and the Netherlands Government to provide comments to the Tribunal.

23. On 10 May 2010, the Tribunal contacted the Director General of the Legal Service of the European Commission and the Netherlands Ministry of Economic Affairs, inviting them to provide to the Tribunal any further observations they might have on the jurisdictional question. The Netherlands Government submitted observations to the Tribunal on 23 June 2010 and on 7 July 2010 the European Commission provided its observations to the Tribunal. The Parties were given an opportunity to submit written comments, *inter alia*, on the European Commission and Netherlands Government observations on 19 July 2012.

24. On 12 July 2010, the Tribunal issued **Procedural Order No. 4**, in which among other things, recalling both Parties' desire for the expeditious and efficient resolution of the dispute, and Claimant's willingness to proceed to prepare immediately for the merits "at its own risk" without waiting for the Award on Jurisdiction to be rendered, the Tribunal set 2 August 2010 as the date by which Claimant should submit its **Memorial on the Merits**, which Claimant proceeded to do on 30 July 2010, accompanied by exhibits, four witness statements and an expert report.

25. On 16 August 2010, the Tribunal confirmed to the Parties that it considered that it had all the material needed for its deliberations on the Intra-EU Jurisdictional Objection.

26. On 26 October 2010 rendered its **Award on Jurisdiction, Arbitrability and Suspension** which included the following decisions at paragraph 293:

> For the reasons stated above, the Tribunal:
>
> (a) DISMISSES the "Intra-EU Jurisdictional Objection" advanced by Respondent and decides that it has jurisdiction over the dispute;
>
> (b) REJECTS Respondent's request to suspend the proceedings until the European Commission and/or the ECJ have come to a decision on the EU law aspects of the infringement proceedings;
>
> (c) RESERVES all questions concerning the merits, costs, fees and expenses, including the Parties' costs of legal representation, for subsequent determination; and
>
> (d) INVITES the Parties to confer regarding the procedural calendar for the merits phase of the arbitration, and to report to the Tribunal in this respect within 14 days of receipt of this Award.

D. Consent to Publication of Award

27. In November 2010, the Parties consented to make copies of the Award on Jurisdiction, Arbitrability and Suspension available to the European Commission and the Netherlands Government.

28. In May 2011, the Parties consented to make the Award on Jurisdiction, Arbitrability and Suspension available on the PCA's website and for it to be published in the International Law Reports.

E. Scheduling Matters and Renewed Suspension Request

29. Pursuant to paragraph 293(d) of the Award on Jurisdiction, Arbitrability and Suspension, the Parties conferred on scheduling matters.

30. On 26 November 2010, Respondent informed the Tribunal that it had applied to the Oberlandesgericht Frankfurt am Main (the "**Oberlandesgericht**") for a declaration of the invalidity of the Award on Jurisdiction and for a declaration that the Tribunal lacked jurisdiction to decide the dispute between Eureko and the Slovak Republic. In light of this development, Respondent requested that the Tribunal reconsider the question of suspending the proceedings pending the final decision of the Oberlandesgericht. Claimant declined to agree to a suspension and expressed its view that the matter of suspension had already been extensively debated before the issuance of the Award on Jurisdiction, Arbitrability and Suspension.

31. On 3 December 2010, following oral and written consultation with the Parties, the Tribunal issued **Procedural Order No. 5**, in which it (i) reaffirmed its jurisdiction over the case and declined to suspend the proceedings, underscoring its reasoning in paragraphs 292 and 293 of the Award on Jurisdiction, Arbitrability and Suspension, (ii) set a schedule for document production to precede the filing of Respondent's Counter-Memorial on the Merits, (iii) invited the Parties to comment on preferred venues for the hearing on the merits, and (iv) set forth a schedule for the remainder of the written proceedings. The schedule at that point envisaged a hearing on liability to be held in May 2011 and reflected an understanding between the Parties that the remaining proceedings would be bifurcated between a liability part and, to the extent necessary, a quantum part.

32. On 10 December 2010, the Parties jointly proposed that the May hearing on the Merits be held at the International Dispute Resolution Centre in London.

F. Written Proceedings on Liability

33. In accordance with Procedural Order No. 5, and following the exchange of document disclosure requests and objections, on 4 January 2011, the Tribunal issued **Procedural Order No. 6**, deciding the outstanding document requests.

34. Throughout January 2011, the Parties exchanged correspondence with the Tribunal concerning compliance with Procedural Order No. 6.

35. On 26 January 2011, Respondent informed the Tribunal of a recent development in the Constitutional Court of the Slovak Republic (the Ústavný súd Slovenskej republiky or "**Slovak Constitutional Court**"). The Slovak Constitutional Court had found that Section 15(6) of Act No. 581/2004 Coll., as amended by Act No. 530/2007 Coll. (the "ban on profits" discussed below at paragraph 96ff), was unconstitutional. Respondent asserted that the unconstitutionality of the Profit Provision alone does not establish a breach of the BIT by Respondent and noted that since the Profit Provision is no longer in force, Eureko's investment would not be hindered from generating a profit in the future. In response, on 7 February 2011, Claimant commented that although the Slovak Constitutional Court had not yet published an official opinion, the preliminary finding of the Slovak Court confirmed Eureko's position in this arbitration.

36. On 14 February 2011, in accordance with Procedural Order No. 5, Respondent submitted its **Counter-Memorial on the Merits** with accompanying exhibits and an expert report. On 2 March 2011, Respondent submitted an additional witness statement to support its Counter-Memorial on the Merits.

37. On 28 March 2011, in accordance with Procedural Order No. 5, Claimant submitted its **Reply on the Merits** with accompanying exhibits and a provisional translation of the 26 January 2011 judgment of the Slovak Constitutional Court. In its cover e-mail, Claimant expressed its views regarding aspects of the judgment, including that Respondent's Counter-Memorial on the Merits could not be reconciled with (i) the petition made by members of the then Government of the Slovak Republic to the Slovak Constitutional Court back in 2008 and (ii) the adoption and issuance of

legislation amending the "2007 Reversal" in 2010 and 2011 (discussed below at 119ff). Claimant requested Respondent to comment on these points.

38. By e-mail dated 30 March 2011, Respondent replied that Claimant's e-mail of 28 January 2011 contained "comprehensive conclusions" which it would only be able to address in its Rejoinder on the Merits.

39. On 15 April 2011, Claimant informed the Tribunal that it had obtained a translation of the full opinion of the Slovak Constitutional Court decision of 26 January 2011 and requested that the hearing on liability scheduled for May 2011 be postponed to the second half of 2011 and that such hearing address both liability and quantum issues. Claimant justified its proposal by noting that the Slovak Constitutional Court had ruled on the legitimacy of crucial pieces of legislation underlying the present arbitration and that new legislation had been submitted to the Slovak Parliament that will "fundamentally affect the scope of the arbitration." Claimant pointed to the discrepancy in the views of the Slovak Republic in the current proceedings and the public statements of its new administration. Claimant also requested the Tribunal to order the testimony of the then Slovak Minister of Finance.

40. By letter dated 21 April 2011 Respondent rejected the reasoning advanced by Claimant concerning the effect of the Slovak Constitutional Court decision, but agreed in principle to a postponement of the hearing, subject to some other adjustments to the timetable. Respondent also raised again the question of suspending the proceedings until the Oberlandesgericht ruled on the annulment, reporting that the European Commission had recently initiated "Pilot Proceedings" against Respondent because of Respondent's application of the BIT in this case.

41. During a teleconference held amongst the Parties, the PCA and the Presiding Arbitrator on 27 April 2011, it was agreed by the Parties that a hearing on the merits (covering both liability and damages) would take place in London from 12 to 16 December 2011.

42. In accordance with a request from the Tribunal, the Parties submitted a joint proposal on 6 May 2011 for the remaining procedural schedule which provided for written submissions and document production on quantum issues.

43. On 6 May 2011, Respondent, again, formally requested the suspension of proceedings pending the completion of the proceedings in the Oberlandesgericht, providing an update on the proceedings before the Oberlandesgericht, including the participation of

the Netherlands, and the interest shown by the European Commission and the Czech Republic. Respondent expressed concerns that the European Commission, having commenced proceedings against the Slovak Republic, considered Respondent to be in breach of EU law in continuing to participate in these arbitration proceedings. Respondent also considered the decision on liability to be no longer urgent in light of the ineffectiveness of the ban on profits.

44. Claimant opposed the revived request for suspension by letter dated 6 May 2011. Claimant explained that the proceedings concerned the future use of the BIT, and were therefore not relevant to the resolution of the present dispute. Eureko emphasised its desire for resolution of the present arbitration in order for Eureko to remain active in the Slovak market and to avoid "hibernating" its investment further. Claimant considered the potential new legislation not to be a valid reason to suspend the proceedings.

45. On 27 May 2011, the Tribunal informed the Parties that it did not consider the attendance of the Slovak Finance Minister, Mr Ivan Mikloš, to be necessary for the fair and efficient conduct of the remaining proceedings of the case and declined Claimant's request to order his appearance as a witness. The Tribunal also stated that it did not consider the possibility of the initiation of proceedings by the European Commission, or the possibility of a reference of questions by the German courts to the ECJ, or Respondent's legislative program, to provide sufficient reason to suspend the proceedings. It recalled paragraphs 292 and 293 of its Award on Jurisdiction, Arbitrability and Suspension and declined to suspend the arbitration.

46. On 10 May 2011, Respondent submitted its **Rejoinder on the Merits** with accompanying exhibits and an expert report.

G. Written Proceedings on Quantum

47. On 24 August 2011, in accordance with the schedule agreed by the Parties and confirmed by the Tribunal on 19 July 2011, Claimant filed its **Memorial on Damages** accompanied by exhibits, an expert report on damages, and a supplementary witness statement.

48. On 31 August 2011, in accordance with the schedule agreed by the Parties, Respondent filed document requests relating to damages. Claimant responded to the document

requests on 5 September 2011. On 8 September 2011, Respondent replied to Claimant's objections. On 12 September 2011, the Tribunal issued **Procedural Order No. 7** granting some of Respondent's document requests, denying some of Respondent's document requests and deeming it unnecessary to decide on others.

49. On 5 October 2011, Claimant produced documents pursuant to Procedural Order No. 7. On 12 October 2011, Claimant acceded to a further document request by Respondent.

50. On 11 November 2011, in accordance with the agreed schedule, Respondent filed its **Counter-Memorial on Damages** accompanied by exhibits and an expert report.

51. On 22 November 2011, the Parties submitted the names of witnesses that they intended to call for cross-examination. Hearing attendees and other logistical matters were dealt with in correspondence dated 25 November 2011, and during a 29 November 2011 teleconference. Follow-up submissions were exchanged on 30 November 2011 and hearing arrangements were finalised on 2 December 2011.

52. One week before the scheduled hearing, on 7 December 2011, Claimant's expert witness, Mr Indge (of Ernst & Young), sent a letter to the Tribunal wishing to "revise and clarify certain areas" of his expert report dated 24 August 2011, in order to assist the Tribunal and address certain points made by Respondent's expert witnesses from KPMG (the "**Indge Letter**"). This included: (1) a revision of the administration costs in Model E of his report and the method of estimating expected dividends; (2) a correction of the data used for Appendix F, addressing an error made in his original report; and (3) a resultant amendment to the present value of Union under his Methodology 1. Mr Indge attached to his letter revised Appendices D and F.

53. By letter dated 8 December 2011, Respondent's expert witness, Mr Peer of KPMG, stated that they "would need time to understand the revised calculations relied upon by Mr Indge and to consider those changes in light of the remainder of the model." The same day, Respondent wrote to the Tribunal, requesting a postponement of the hearing to provide adequate time to react to the Indge Letter, or alternatively to proceed with the hearing but exclude the question of damages, which question should be rescheduled to a later time. Claimant wrote to the Tribunal that it considered Respondent's response disproportionate to the types of changes made in the Indge Letter and that Respondent was seeking an excuse to delay the hearing.

54. The Tribunal conveyed a message to the Parties on 9 December 2011 that it would not at that moment postpone the hearing, but would address the procedural aspects raised by the Parties on the morning of the first day of the hearing.

55. On 9 December 2011, the Parties submitted brief summaries of their main submissions.

H. Hearing on the Merits

56. From Monday, 12 December 2011 to Wednesday, 14 December 2011, a **Hearing on the Merits** was held at the International Dispute Resolution Centre in London. Present at the hearing were:

Tribunal: Professor Vaughan Lowe
Professor Albert Jan van den Berg
Mr V. V. Veeder

Claimant: *Counsel*
Mr Marnix Leijten, De Brauw Blackstone Westbroek N.V.
Mr Rogier Schellars, De Brauw Blackstone Westbroek N.V.
Mr Albert Marsman, De Brauw Blackstone Westbroek N.V.
Mr Igor Zubov, De Brauw Blackstone Westbroek N.V.

Party Representative
Mr René Visser, Eureko B.V.

Witnesses
Mr Willem van Duin
Mr Fred Hoogerbrug
Mr Bjarne Jorgen Slorup
Mr Tibor Bôrik
Mr Peter Pažitný
Mr Richard Indge

Respondent: *Counsel*
Mr Martin Maisner, Rowan Legal
Mr Miloš Olík, Rowan Legal
Mr David Fyrbach, Rowan Legal
Mr Martin Šubrt, Rowan Legal
Mr Ľudovít Mičinský, Rowan Legal
Ms Bohdana Jedličková, Rowan Legal
Ms Isabela Vršková, Rowan Legal

Party Representatives
Mr Matej Sapák, Ministry of Finance, Slovak Republic
Mr Radovan Hronsky, Ministry of Finance, Slovak Republic
Mr Matej Bobovník, Ministry of Finance, Slovak Republic

Witnesses
Professor Dr Dr Thomas Gerlinger
Mr Michael Peer, KPMG
Ms Zuzana Kepková, KPMG

Registry: Ms Judith Levine, Permanent Court of Arbitration
Ms Gaëlle Chevalier, Permanent Court of Arbitration

Court Reporter: Merrill Legal Solutions

Interpreters: Ms Brigitte Puhl
Ms Silke Schoenbuchner

57. At the outset of the hearing, the Presiding Arbitrator invited the Parties to address several outstanding procedural issues. The first was the matter of the Indge Letter and its effect on the remainder of the proceedings. After hearing from the Parties, the Tribunal decided to continue with the hearing on liability and, in the meantime, asked the expert witnesses on damages from both sides to confer about the possibility of proceeding with their testimony. The second matter concerned the presence at the hearing of two Ernst & Young employees, Ms Victoria Wall and Ms Elizabeth Perks, to assist Claimant's counsel. The Tribunal ruled that they could be present. The third matter concerned scheduling of witnesses and the fourth matter concerned the characterisation of Claimant's witness, Mr Peter Pažitný, whom the Tribunal decided could be treated as an expert witness.

58. Each Party then presented arguments on the merits and answered questions from the Tribunal. The above-listed witnesses were subject to direct examination, cross-examination, and re-direct examination as well as questions from the Tribunal, as recorded in the Transcript.

59. The Tribunal consulted further with the Parties and the expert witnesses on damages about the timing and nature of their oral evidence. It was decided that the experts would meet and produce a joint report setting out areas of agreement and disagreement, that the Parties would be offered an opportunity to comment on the joint report, and that the experts would then appear as witnesses on 30 January 2012. A draft version of Procedural Order No. 8, setting out these procedural steps, was circulated to the Parties for their review and comment.

60. At the close of the hearing, the Tribunal remarked that it had a sense "that a settlement in this case would be a good thing, in that the aims of both sides seem to be

approximately aligned, and that the black and white solution of a legal decision in which one side wins and the other side loses is not the optimum outcome in this case." The Tribunal emphasised that it was not its role to "get involved in this in any way at all" but suggested that should the Parties desire to seek out somebody who might act as a mediator or reconciliator, the Secretary-General of the PCA might be in a position to assist. The Tribunal noted that any such steps would be taken in parallel with the continuation of the case.[12] The Tribunal also kept well in mind (as it had done before and still does) that the Parties have not expressly authorised it to decide their dispute as "*amiable compositeur*" or "*ex aequo et bono*" under Article 33(2) of the UNCITRAL Arbitration Rules.

I. Further Proceedings on Quantum

61. On 16 December 2011, having consulted with the Parties, the Tribunal issued **Procedural Order No. 8**, setting out the procedural steps for the Parties' expert witnesses on damages to confer and report to the Tribunal in advance of a one-day hearing; as well as directions with respect to documenting Claimant's name change, and submitting any amendments to the hearing transcript.

62. In accordance with Procedural Order No. 8, the Parties' expert witnesses on damages exchanged correspondence and data, and then met in person in Prague on 5 January 2012. On 13 January 2012, they submitted a **Joint Expert Report** setting out their areas of agreement and disagreement, and the reasons for their disagreement.

63. On 20 January 2012, the Parties exchanged comments on the Joint Expert Report.

64. Also on 20 January 2012, Claimant submitted documents evidencing Eureko B.V.'s name change to Achmea B.V. It explained that the name change was effective through an amendment of the articles of association of Eureko B.V. that was executed at the occasion of the merger between Eureko B.V. and Achmea Holding N.V. (Eureko B.V. being the surviving entity in that merger) on 18 November 2011. Claimant attached the deed of merger and amendment of the articles of association; the filing of the name change with the commercial register; and an overview of historical information for Achmea B.V. from the commercial register.

[12] Transcript, 14 December 2011, pp. 140-142. See also pp. 45-46.

65. Pursuant to Procedural Order No. 8, on Monday, 30 January 2012, a **Hearing on Quantum** was held at the International Dispute Resolution Centre in London. Present at the hearing were:

Tribunal:	Professor Vaughan Lowe Professor Albert Jan van den Berg Mr V. V. Veeder
Claimant:	*Counsel* Mr Marnix Leijten, De Brauw Blackstone Westbroek N.V. Mr Albert Marsman, De Brauw Blackstone Westbroek N.V. Mr Igor Zubov, De Brauw Blackstone Westbroek N.V. *Witnesses* Mr Richard Indge, Ernst & Young *Other* Ms Victoria Wall, Ernst & Young Ms Elizabeth Perks, Ernst & Young
Respondent:	*Counsel* Mr Martin Maisner, Rowan Legal Mr Miloš Olík, Rowan Legal Mr David Fyrbach, Rowan Legal Mr Ľudovít Mičinský, Rowan Legal *Party Representatives* Mr Matej Sapák, Ministry of Finance, Slovak Republic Mr Matej Bobovník, Ministry of Finance of the Slovak Republic *Witnesses* Mr Michael Peer, KPMG Ms Zuzana Kepková, KPMG
Registry:	Ms Judith Levine, Permanent Court of Arbitration
Court Reporter:	Merrill Legal Solutions

66. The Presiding Arbitrator noted that Claimant had changed its name to Achmea B.V., but expressed the Tribunal's preference to continue referring to Claimant by the name "Eureko" during the hearing.

67. Claimant's counsel expressed regrets on behalf of Claimant's representative, Mr René Visser, who was unable to attend the hearing for personal reasons.

68. Each Party presented arguments on damages and answered questions from the Tribunal. The above-listed witnesses were subject to direct examination, cross-examination, and re-direct examination as well as questions from the Tribunal to the witnesses separately and collectively, as recorded in the Transcript.

69. At the close of the hearing, the Tribunal consulted with the Parties and indicated that they would request Post-Hearing Briefs as well as submissions on costs shortly after the hearing.

J. Post-Hearing Proceedings

70. On 6 February 2012, the Tribunal confirmed to the Parties its request for "concise Post-Hearing Briefs" as discussed at the hearing. In accordance with the Tribunal's directions, the Parties submitted **Post-Hearing Briefs** on 21 February 2012.

71. In accordance with the Tribunal's further directions of 18 February 2012, the Parties submitted **Submissions on Costs** on 27 February 2012. As set forth in the Parties' submissions, Claimant's costs amounted to €4,235,212.27;[*] Respondent's costs amounted to €13,102,971.21. On 28 February 2012, Claimant wrote to the Tribunal, requesting that Respondent be ordered to clarify its Submission on Costs by providing a breakdown of counsel fees by law firm and of expert fees by each individual expert. Following further correspondence from the Parties, the Tribunal requested on 7 March 2012 that both Parties update their Submissions on Costs with further details regarding counsel and expert fees and a breakdown of such costs according to the phases of the arbitration. On 12 March 2012, the Parties submitted **Revised Submissions on Costs**.

72. In accordance with the Tribunal's directions, the Parties submitted **Reply Submissions on Costs** on 16 March 2012. On 19 March 2012, Respondent wrote to the Tribunal regarding what it considered to be misrepresentations in Claimant's Reply Submission on Costs. On 20 March 2012, Claimant replied to Respondent's comments.

73. On 21 March 2012, the Tribunal informed the Parties that it considered that it had all the materials it needed for its deliberations on the outstanding issues and requested the Parties to refrain from further correspondence in the absence of a formal application by a Party to the Tribunal.

[*] This figure reflects a correction issued by the Tribunal on 14 December 2012, in accordance with Article 36 of the UNCITRAL Rules, which is incorporated into this consolidated electronic version of the Final Award.

K. Developments before the German Courts

74. The Tribunal takes arbitral notice, from the public record, of the following developments. On 10 May 2012, the Oberlandesgericht issued a decision rejecting Respondent's application for a declaration that the Award on Jurisdiction, Arbitrability and Suspension was invalid as a result of the Tribunal's lack of jurisdiction over the dispute between Eureko and the Slovak Republic.[13] The Oberlandesgericht held that Article 344 TFEU (prohibiting EU Member States from submitting a dispute concerning the interpretation or application of the TEU or TFEU to any method of settlement other than those set forth in the Treaties) was applicable only to disputes between EU Member States and not in the context of the investor-State dispute at hand. The Oberlandesgericht also declined to request a preliminary ruling from the ECJ under Article 267 TFEU, noting that the role of the ECJ in such a procedure was to address the validity of EU law in general terms, not to decide on the validity of Article 8(2) of the BIT. The Oberlandesgericht also observed that a reference to the ECJ was unnecessary as the Oberlandesgericht had no reasonable doubts regarding the interpretation of Article 344 TFEU.

75. The Tribunal understands that Respondent is appealing the aforementioned decision in the German Federal Supreme Court (the "Bundesgerichtshof") in Karlsruhe. As of the date of this Award, that Court has not determined whether to make a reference to the ECJ under Article 267 TFEU.

III. HISTORICAL AND FACTUAL BACKGROUND

76. The following summary of the historical and factual background is drawn from the Parties' pleadings and is presented to give context to Claimant's investment and alleged violations of the BIT. In the course of the Parties' submissions, however, it became apparent that the Parties differed significantly in respect of the factual implications of these developments, as well as their relevance within the framework of the BIT. The Parties' competing characterisations of the factual record, and the Tribunal's observations thereon, are presented subsequently.

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[13] Oberlandesgericht Frankfurt am Main (decision dated 10 May 2012, reference no. 26 SchH 11/10) http://www.lareda.hessenrecht.hessen.de/jportal/portal/t/1hdj/page/bslaredaprod.psml?doc.hl=1&doc.id=JURE120010262%3Ajuris-r00&documentnumber=1&numberofresults=1&showdoccase=1&doc.part=L&paramfromHL=true#focuspoint (available only in German).

A. The Independence of the Slovak Republic and its Accession to the European Union

77. Starting in 1989, Czechoslovakia (from 1990 the Czech and Slovak Federative Republic ("**CSFR**")) underwent a profound transformation from a socialist system of central economic planning to a free market economy in a democracy under the rule of law. According to the Slovak Republic (and as the Tribunal accepts), this transformation necessitated the creation of a "sufficient legal framework, which would safeguard the functioning of the new system and protection of the participating subjects."[14]

78. Integration into the European Community and Council of Europe was a priority in fostering the economic and political stability desired, while ensuring the protection of foreign entities entering a then-emerging free market.[15]

79. In 1989 Czechoslovakia initiated contact with the European Community. Negotiations resulted in the conclusion on 16 December 1991 of the European Agreement Establishing an Association between the European Community on the one hand, and the CSFR, Hungary and Poland on the other.[16] That Agreement was subject to ratification.

80. During the same period, the CSFR concluded, among other things, bilateral agreements on the promotion and protection of investments, including the BIT with The Netherlands, which was signed on 29 April 1991 and came into force from 1 October 1992.[17]

81. The CSFR became a member of the Council of Europe and a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("**ECHR**") on 21 February 1991. The ECHR has been in force for the CSFR since 18 March 1992.

82. The Slovak Republic separated from the CSFR and became an independent State on 1 January 1993. It succeeded to the CSFR-Netherlands BIT, as well as to the ECHR, as of the day of its independence. Because of the split of the CSFR, the CSFR Association Agreement of 16 December 1991 was never ratified. The Slovak Republic renegotiated its relationship with the European Community by concluding the

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[14] Respondent's Memorial on the Intra-EU Jurisdictional Objection, ¶7.

[15] Respondent's Memorial on the Intra-EU Jurisdictional Objection, ¶¶7-8.

[16] Respondent's Memorial on the Intra-EU Jurisdictional Objection, ¶¶7-9.

[17] Respondent's Memorial on the Intra-EU Jurisdictional Objection, ¶¶9-10. The Netherlands has been a member of the EU since it became party to the Treaty of Rome Establishing the European Economic Community on 25 March 1957. The Netherlands had become a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms on 31 August 1954.

Agreement Establishing an Association between the European Communities and their Member States [including The Netherlands] and the Slovak Republic on 4 October 1993. This Association Agreement has been in force since 1 February 1995.[18]

83. On 16 April 2003, the Slovak Republic signed the **Accession Treaty**,[19] and its membership of the EU became effective when the Accession Treaty entered into force on 1 May 2004.

84. On 1 December 2009, the Lisbon Treaty entered into force for all EU Member States, including the Slovak Republic and the Netherlands.

B. The Evolution of the Slovak Heath Insurance Sector

85. The Constitution of the Slovak Republic, adopted on 1 September 1992, provides in Article 40 as follows:[20]

> Every person shall have the right to protect his or her health. Through medical insurance, the citizens shall have the right to free health care and medical equipment for disabilities under the terms to be provided by law.

86. In 1993, the Slovak Republic established a mandatory and universal public health insurance system in which the payment of a dedicated healthcare levy was made the shared responsibility of employers and employees. Under this system, the State makes contributions for economically-inactive members of the population.[21] The system was created by Act No. 9/1993 Coll.[22] Initially administered by a single state-owned Health Insurer, this system was modified in 1994 by Act No. 273/1994 Coll. to permit the creation of other state-owned and private entities to perform public healthcare

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18 Respondent's Memorial on the Intra-EU Jurisdictional Objection, ¶¶12-13.

19 Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic concerning the Accession of The Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, signed on 23 September 2003, entered into force on 1 May 2004, (2003) O.J. L 236 of 23 September 2003. Available at: http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2003:236:SOM:en:HTML.

20 Respondent's Statement of Defence, ¶5. Given the language of this arbitration, all quotations from a non-English text are here given in English translation, as agreed or not disputed by the Parties.

21 Respondent's Statement of Defence, ¶6. Act No. 9/1993 Coll. (Exhibit R-2).

22 Exhibit R-2.

functions.[23] As some individuals are likely to require more healthcare expenditure than others, the system provided for the aggregation of the greater part of the funds collected, and their redistribution among the health insurance entities in accordance with a formula that reflects the different predicted needs of the policyholders of each of the separate entities. Act No. 273/1994 Coll. also prohibited the use of levied funds for non-healthcare purposes and capped the administrative expenses of health insurers at 4 percent of collected premiums.

87. By 2004, the Slovak healthcare system had accumulated a deficit of approximately SKK 26 billion.[24] The Government of the Slovak Republic contributed over SKK 20 billion to reduce the debt and set about to reform the system. This was the "**2004 Liberalisation**" (or the "**2004 Reform**") of the health insurance sector. The 2004 Reform aimed at achieving a mix of public and private investment.[25] Among the reforms, two Acts adopted on 21 October 2004 are particularly important in the context of this case: Act No. 580/2004 Coll.[26] and Act No. 581/2004 Coll.[27]

88. The most significant aspects of the 2004 Reform may be summarised as follows:

(a) health insurance companies were permitted to make profits and to dispose of profits subject to the laws applicable to other commercial entities;

(b) health care providers, including State-owned hospitals, were privatised and free to compete in the provision of health care services ordered by health insurance companies;

(c) no cap was imposed on the administration costs of health insurance companies;

(d) health insurance companies were free to compete for clients;

(e) existing health insurance companies were privatised and converted into joint stock companies;

(f) an independent Regulator, neither controlled nor under the influence of the Government, was established to supervise the health insurance sector;

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23 Respondent's Statement of Defence, ¶10. Act No. 273/1994 Coll. (Exhibit R-4). See also Claimant's Statement of Claim, ¶¶III .1-11.

24 Respondent's Statement of Defence, ¶16.

25 Claimant's Statement of Claim, ¶¶III.12-14, Acts No. 580/2004 Coll. and No. 581/2004 Coll. (Exhibits C-20 and C-21).

26 Exhibit C-20.

27 Exhibit C-21.

(g) citizens could switch between licensed health insurance companies once each year;

(h) the insurance premium for the basic level of health insurance was fixed by law;

(i) the system of premium redistribution was applied to 85.5 percent of the premiums that each health insurance company was entitled to receive from its clients;

(j) it was intended that the scope of the (mandatory) basic level health care package would be reduced and could be supplemented by any insured person who wished to pay for (voluntary) additional health insurance; and

(k) a user fee was introduced, payable by the insured on the occasion of each visit to a healthcare provider and on each prescription.[28]

89. The 2004 Reform made the Slovak health insurance market attractive to private investors, but it was unpopular with part of the population. Further, the liberalisation faced strong political opposition within parts the Slovak Parliament; and it was made the subject of a constitutional challenge.[29]

C. Eureko's Entry into the Slovak Health Insurance Market

90. Eureko has been active in the Slovak Republic since 1997, when it purchased shares in **Union Poist'ovňa a.s.** ("**Union Insurance**"), a Slovak corporation privatised in 1992 which offered a range of insurance products, including travel insurance.[30] In December 2005, shortly after the 2004 Reform, Eureko applied for a license to operate a health insurance company[31] and incorporated in the Slovak Republic a new company, **Union Healthcare** ("**Union Healthcare**"), on 9 March 2006 as a 'greenfield' operation to offer basic level healthcare insurance.[32] Union Healthcare was established with an initial investment of SKK 110 million upon incorporation and a further SKK 2,180,300,000 prior to 25 October 2006, the date of Claimant's last cash investment in Union Healthcare. By 1 January 2007, Union Healthcare had obtained a share of around 8.5 percent of the Slovak health insurance market.[33]

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28 See Exhibit C-19, C-20, C-21; Statement of Claim ¶III.14–III.22.

29 Statement of Defence ¶19–22, 27; Exhibit C-110.

30 Statement of Claim ¶¶II.9-10.

31 Claimant's Memorial on the Merits, ¶71.

32 Respondent's Statement of Defence, ¶26; Claimant's Statement of Claim, ¶¶II.11, III.15, III.24.

33 Claimant's Statement of Claim, ¶¶II.15, III. 25; Exhibit C-22.

D. Reforms in the Slovak Health Insurance Sector in 2006–2009

91. On 17 June 2006, parliamentary elections in the Slovak Republic resulted in the victory of the SMER Social Democracy party ("**SMER**"), led by Mr Robert Fico, who assumed the office of Prime Minister. Over the course of 2006 and 2007, the new Slovak Government introduced a series of changes to the legal framework governing the health insurance market. These measures were referred to by Claimant as the "2007 Reversal" and by Respondent as the "2006 Stabilisation." It will be convenient here to refer to them neutrally as the "**2007 Reforms**," despite the fact that not all of the relevant measures were adopted in 2007. It is also convenient to summarise all of the legislative reforms together, before turning to other developments.

92. **Act No. 522/2006 Coll.**, adopted on 6 September 2006, introduced a cap on the operating expenses of health insurance companies (the "**cap on operating expenses**") in the following terms:[34]

> §6a(1) A health insurance company may spend, in the relevant calendar year, for operational activities of health insurance company not more than 4% of the sum of premium prior to redistribution of premium for the relevant calendar year (the "annual sum").

The cap on operating expenses took effect from 1 January 2007 and was subsequently reduced to 3.5 percent of premium revenue by Act No. 530/2007 Coll., adopted on 25 October 2007.

93. **Act No. 12/2007 Coll.**, adopted on 12 December 2006, introduced a ban on the use by health insurance companies of brokers to sell health insurance (the "**ban on brokers**") as follows:[35]

> §6(17) A health insurance company must not carry out recruitment of insured under a mandate agreement or intermediary agreements with natural persons or legal entities for financial or non-financial consideration.
>
> §6(18) A health insurance company must not give to the insured, for receipt and acceptance of application for public health insurance, a financial reward, non-financial reward or other financial, material or immaterial benefit, to which the insured is not entitled under public health insurance.

[34] Exhibit C-40.

[35] Exhibit C-47.

The Act further gave the Government the right to remove the Chairman of the Health Care Authority, on the initiative of the Minister of Health, for reasons other than those provided by statute (the "**repositioning of the Regulator**").

94. **Government Resolution 462/2007**, adopted on 23 May 2007, instructed the Minister of Health to draft a legal regulation to ban the generation of profit from public health insurance and to reduce health insurers' operational funds from four percent to three percent; and also to submit a project for the establishment of a single health insurance company governed by public law.[36]

95. **Decree 504/2007**, adopted on 24 October 2007, ended the ability of health insurance companies to contract freely with healthcare providers and imposed a requirement that the health insurance companies contract with 34 named state hospitals for the provision of facilities (the "**amended network requirement**").[37] Decree 504/2007 was subsequently replaced by **Decree 640/2008**, which maintained and supplemented the requirements of the 2007 decree.[38]

96. **Act No. 530/2007 Coll.**, adopted on 25 October 2007, introduced a requirement that all profits from health insurance be used for healthcare purposes (the "**ban on profits**"):[39]

> §15(6) If, following the fulfilment of the requirement set in paragraph 1 letter (b) the result of economic operations in public health insurance is positive, it may be used only for payments to such extent as is set in a special regulation 25) by no later than the end of the calendar year following that calendar year for which positive result of economic operations was reported, and in a manner not posing a risk for systematic and effective fulfilment of obligation owed by the health insurance company to ensure available healthcare under this Act (paragraph 1(a)) and not contradicting the obligation of the health insurance company to make proper and timely payments for healthcare provided.

97. **Act No. 594/2007 Coll.**, adopted on 28 November 2007, supplemented the provisions of Act. No. 530/2007, in the following terms:[40]

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36 Exhibit C-37.

37 Statement of Claim ¶III.177–121.

38 Exhibit C-55.

39 Exhibit C-41.

40 Exhibit C-61.

> §86d A health insurance company shall meet its obligation to use the positive economic result generated from public health insurance to pay for healthcare under § 15 paragraph 6 for the first time in 2009, and in respect of the financial year 2008.

98. The reforms continued in 2008 and 2009. **Act No. 581/2008 Coll.**, adopted on 25 November 2008, increased from 85.5 percent to 95 percent the portion of received premiums to be redistributed among health insurance companies in accordance with the expected needs of their particular client portfolios, obliged health insurance companies to submit their budgets for scrutiny by the Government, and amended the solvency requirements imposed on health insurance companies, requiring that the financial obligations of insurers be met within 30 days.[41]

99. **Act No. 192/2009 Coll.**, adopted on 30 April 2009, ended the possibility of a health insurance company selling its insurance portfolio to another health insurance company and required that in the case of insolvency of an insurance company its portfolio must be transferred without payment to one of the two State insurance companies (the "**ban on transfers**").[42]

100. Alongside these measures, officials of the Slovak Government made a number of statements, both publicly and in the course of correspondence exchanged with Eureko. Although the Parties differ as to the meaning and significance of these statements and exchanges, their content is recounted here.

101. In August 2006, the incoming Slovak Government issued a Manifesto setting forth its positions on a wide range of issues. In relevant part, with respect to healthcare, the Manifesto provided as follows:[43]

> The Government considers health, equality in health care provision, and health care availability as the fundamental right of every citizen. Maintenance and improvement of health is the best investment for a strong economy and satisfied society. The Government considers health care to be one of its priorities. The mission of health care is the provision of care to the public using public money and therefore it has to be under public scrutiny.
>
> The Government will ensure the principle of solidarity in health care. A socially oriented state must not dispose of the responsibility for ensuring access to adequate health care to all its citizens. The scope of this care must be defined by the law and, to that extent, health care must be financed from health insurance.

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41 Exhibit C-68, C-69.

42 Exhibit C-72.

43 Exhibit C-16, pp. 33-35.

Already in 2006, the Government will cancel some fees that are not directly related to the provision of health care and ensure compensation for the providers.

The Government is aware that the discrepancy between the lack of funds and the expectations of the population can only be solved by maintaining economically and socially sustainable participation in selected types of health care. The Government considers the support of voluntary health insurance to be critical while enabling access to health care not paid from the health insurance and to a reduction of the immediate financial impact of such participation. The Government will consider the possibility of tax relief against payments of the voluntary health insurance.

[. . .]

The Government will ensure an increase of funds for health care in 2007 by increasing insurance premium payments for citizens where the payer is the state from 4% of the average wage to 5%. The Government will ensure that public spending in health care expressed in GDP percent has a growth tendency and that it respects the principle of approximation to advanced states of the European Union.

The Government will support multi-source financing of health care. It will contribute to the fund for compensation of extremely demanding procedures. The Government considers the constitutionally guaranteed system of health insurance, based on the solidarity principle, to constitute the basis of health care funding. The Government will restore the public character of the Všeobecná zdravotná poistovňa and Spoločná zdravotná poistovňa health insurance companies. The Government will enforce such a legal environment, in which all health insurance companies have equal conditions regardless of their legal form, and which prevents insurance companies from inefficient management of the funds of the insured. The Government will enforce that the amount of health insurance companies' operating costs as of 2007 be limited by law to a maximum of 4% of the mandatory health insurance premiums collected.

The Government will not admit such legislative changes in health care that could lead to damaging the reputation of the Slovak Republic by failing to ensure an adequate protection of domestic and foreign investments. The Government accepts all forms of ownership of health care facilities and it will create conditions for their multi-source financing.

The Government will revoke the present form of insurance premiums accounting.

The Government will pay maximum attention to the use of all possibilities of financing investment activities in health care, including the EU funds.

[. . .]

The Government supports decentralisation in health care management while introducing the methodological, regulatory, and control role of the state vis-à-vis all health care facilities. In hospital care, it will enforce the role of the state as the owner of faculty health care facilities, facilities with nationwide scope, and those performing special tasks in emergency situations.

The Government will ensure availability and quality of health care for all citizens and it will prevent uncontrolled and inefficient extension of the network of health care facilities. At the same time, it will support the restructuring of the network of health care facilities giving preference to the transfer of activities to the outpatient sphere – including walk-in care, to achieve purposeful specialisation and growth in

> quality and productivity of the services provided. Medically and financially highly demanding health care procedures will only be provided at accredited workplaces of selected facilities.
>
> The Government will support the creation of conditions for transparent competition of health care providers. At the same time, it will support creation of a system of a differentiated approach in establishing contractual relationships between health insurance companies and health care providers according to the criteria of efficiency and quality of health care provided.
>
> [. . .]
>
> The critical objective of the government will be to develop the health care system informatisation at all levels. The Government will ensure legislative and institutional conditions for implementation of information and communication systems that will assist in improvement of quality, cost efficiency and time availability of services. In this area, the Government will support the project of health care informatisation and gradually implement the objectives of the national eHealth strategy.
>
> An important objective of the Government will be the support of new, more transparent payment mechanisms for health care procedures.
>
> The Government will enforce substantial debureaucratisation of health care and cancel all unnecessary administration and duplicity in the activities of the Ministry of Health, Healthcare Surveillance Authority, and other institutions. In 2007, these institutions will be subject to thorough activity audit with subsequent reconsideration of the headcount only for the activities that are inevitable, necessary for the entire society, and that are prescribed by law.

102. According to Eureko, the first signs of a significant intervention by the Government in the health insurance market came in November 2006. Eureko says that it then became aware that on 9 November 2006 the chairman of the Slovak Parliament had said to a closed meeting of the 'health care club' that he believed that all public funds (including the health care levy) should be under public control, that non-State health insurance companies should not be permitted to make profits, that clients whose healthcare contributions are paid by the State should not have a free choice of insurer, and that there should be restrictions on the ownership rights of health insurance companies.[44]

103. According to Eureko, it was a report from Mr Bôrik, the CEO of Union Healthcare and a prominent and well-connected member of the Slovakian Association of Insurance Companies, that alerted Eureko to the possibility of a significant change in the system and triggered the request for a meeting between Eureko and Mr Ivan Valentovič, the Minister of Health, at short notice.[45]

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[44] Statement of Claim ¶III.38

[45] Hearing Tr. (Day 3), 14 December 2011 at 30-32.

104. On 24 November 2006, Eureko's CEO, Mr Willem AJ van Duin, met with Mr Valentovič to discuss developments in the Slovak health insurance sector. Following this meeting, Mr Van Duin wrote to the Minister as follows:[46]

> Dear Mr Minister,
>
> Herewith I would like to thank you for the time you have made available on Friday 24th November to discuss the developments on the health insurance market with me and particularly recent information we received on potential proposals to change legislation.
>
> After I have given you information on Eureko, our European insurance group with a strong presence in health insurance, I explained that Eureko is a long term investor who entered from this perspective a.o. on the Slovakian health insurance market with Union Zdravodna Poist'ovňa.
>
> Union z.p. is for many years seen in the Slovakian market as a very trustworthy insurance company with a reliable position. I informed you that Eureko has made considerable investments in the health sector and expects to have a break even situation only after a number of years with a pay back period of over 10 years. This underlines the long term approach with entering the health insurance market in Slovakia, where we foresee - as in other European countries - only marginal profits but a strong client relationship which supports our other insurance businesses.
>
> You mentioned the necessity to create stability in the market which of course we understand. But as we can see in other European countries, we feel that this stability is not by any means influenced through the ownership of the health insurance company, either private or state owned. I offered to share the knowledge that we have within Eureko with you in supporting governments, like we did before in the Netherlands, Romania and Greece.
>
> We also discussed the proposals set out in de press [sic] to change current legislation. Although we prefer not to react on articles in the press, we do see a considerable threat to developing our business as planned. I pointed out to you that possible proposals as we see now, will be in conflict with European regulations and bilateral treaties between the Netherlands and the Slovakian Republic. You will understand that, we will have to defend our investments if necessary.
>
> In spite of our discussions last Friday, to our disappointment we had to find out that on Monday 27th November a parliamentary committee discussed proposals to change current legislation which fully conflict with the interests of private health insurers and Eureko as a share holder of Union z.p, in particular. To our interpretation these proposals are very conflictive with the current legislation on which we have based the decision to commit to our investments. You will understand that - separate from controversy with EU-legislation - we will have to confront you with considerable damages claims if these proposals become legislation. In that case we will inform you later about our next steps. Of course it is still our preference that proposed changes in legislation will not take place and that the good business climate will not be affected.

[46] Exhibit C-13.

> Again, I would like to thank you for your hospitality and I value the discussions we have had. However, we are disappointed by the fact that you did not mention any of the proposed changes in legislation at all.
>
> Yours sincerely,
>
> Willem van Duin

105. On 9 December 2006, the Prime Minister, Mr Robert Fico, made the following statement:[47]

> We expect, quite legitimately, that our Minister of Health will issue decisions with respect to health insurance companies in the next year. After all, it is not normal that, for instance, health insurance companies – some of them privately owned – generate profit. Clearly, their revenues are not generated from business activities but rather from the collection of health insurance contributions, that is, from public resources.

106. On 3 January 2007, Mr Valentovič replied to Eureko's letter of 24 November 2006 as follows (the "**January 2007 Letter**"):[48]

> Dear Mr van Duin,
>
> Allow me to thank you for your letter of November 28, 2006, referring to our discussion about the development on the health insurance market.
>
> As regards to the other part of your letter about the proposals discussed in a parliamentary committee, I would like to inform you that up to now the Ministry of Health of the Slovak Republic did not present the final conception of state insured persons in state-owned health insurance companies. Currently, there are some problem solving proposals being discussed and the final resolution has not yet been adopted. I would like to assure you that the procedure of the Ministry of Health of the Slovak Republic will be in compliance with the Slovak legal system and in accordance with the EU regulations and bilateral treaties between the Slovak Republic and the Netherlands. The Ministry of Health of the Slovak Republic will adopt the optimal alternative to the benefit of the citizens of Slovakia.
>
> Yours sincerely,
>
> Ivan Valentovič

107. On 23 May 2007, Mr Valentovič made the following statements in a press conference:[49]

> Therefore the Government instructed the Minister of Health to present a draft law that would prohibit generation of profit from public health insurance and guarantee

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47 Exhibit C-24.

48 Exhibit C-27.

49 Exhibit C-33.

> that the funds coming from the public health insurance will be managed only by health insurance companies.
>
> [. . .]
>
> The Government's vision is to have "non-commercial", i.e. not profit-oriented, public health insurance companies and this differs substantially from the situation in the past.
>
> [. . .]
>
> [. . .] could one say that these steps will later, through legislative restrictions, result in the same scenario, i.e. that there will be only one insurance company?
>
> [. . .]
>
> I clearly said we have found the other way how to achieve the goal of having one public health insurance company that provides public health insurance.

108. On 26 May 2007, Prime Minister Fico made the following statement during a radio interview:[50]

> We would like to gradually achieve a situation with one health insurance company in such a way that we will create such conditions in public health insurance which will not be interesting for private health insurance companies.
>
> [. . .]
>
> We want that public health insurance – it means the basic one – will cover the standard care, which much be given free of charge to everybody, no matter what are his possibilities. If somebody wants a luxury, he should pay for it in a private health insurance company. We want to squeeze out private health insurance companies from this space, but we want to squeeze them out in a way, which is not contestable, both from the legal point of [view], and from international – legal point of [view], or political or other point of view.

109. Also on 26 May 2007 Prime Minister Fico made the following statement during a second radio interview:[51]

> [. . .]
>
> We had to take a serious note of rather significant legal objections, which referred to potential impacts of the use of constitutional concepts that the Minister of Health considered to use, in his projects, against private health insurance companies. So we have subscribed to a view that we want to gradually get to a single health insurance company, but this by creating conditions in public health insurance that will not be interesting for private health insurance companies, this is our underlying philosophy. We are still against private health insurance companies getting rich on public health insurance. It is not possible that someone has a portfolio of clients, cuts 700 million crowns from that money in profit, plus has a

50 Exhibit C-28.

51 Exhibit C-29.

> 4% as administration fund which covers expensive cars, personal assistants, comfortable office buildings and pretends to make business in this field.
>
> [. . .]
>
> Let's imagine now something like a basic mandatory [liability] insurance covering cars, and also you have say accident insurance which I may take on of my free will just for the case that I will have a crash and chop up my car. We want that public health insurance, meaning basic insurance, covers the normal standard [of care], that what everyone must get for free in healthcare system, irrespective of his or her means. If anyone wants to enjoy luxury, excessive luxury, he may pay for it in a private health insurance company. This is the same road we wanna [go], I'll tell it in good Slovak [in plain words], may I? We want to drive out private health insurance companies from this area but we want to do that taking such steps that cannot be contested legally, nor from the perspective of international law, nor politically, nor otherwise. Moreover, what's interesting that as long as we have not debated health insurance companies, all attacked us that healthcare and problem and I-don't-know what else [sic]. As soon as we have opened the issue of a single health insurance company, the whole opposition got hooked on that moment and started to defend private health insurance companies [. . .]

110. On 28 May 2007, Prime Minister Fico was quoted in the press as having stated that "[t]he Government will drive the four private health insurance companies out of the market."[52]

111. On 13 June 2008, Prime Minister Fico was quoted by the Slovak Press Agency SITA as having made the following statements:[53]

> What is the lost profit? [. . .] We will never let them profit from the money that people compulsorily send into the system.
>
> [. . .]
>
> We refuse to let plain market business principles to dominate the Slovak health care market, we view it as a public service.
>
> [. . .]
>
> We still insist that the private health insurance companies cannot cut money from the public health insurance, it is unacceptable for us and we will fight with all our might to prove that the law is in line with the constitution.

E. Eureko's Response to the 2007 Reforms

112. Eureko remained active in the Slovak Republic following the 2007 Reforms, but took a number of steps in response. Most significant in the present context was its decision to go into "hibernation" (its phrase); that is, to stop trying to expand its business and to

[52] Exhibit C-31.

[53] Exhibit C-36.

accommodate only its existing clients. Claimant says that this strategy delayed its planned growth and caused it financial loss. The hibernation strategy is described below.[54]

113. Claimant also took other steps. On 28 February 2008, Eureko filed a complaint with the European Commission. According to Eureko, this filing was made in order to impress upon the Slovak Government Eureko's view that its policies were not in line with basic EU law principles that had been a cornerstone of Eureko's confidence in deciding to invest in the Slovak Republic. The complaint led to the opening of an infringement procedure by the European Commission against the Slovak Republic under Article 226 of the EC Treaty.[55]

114. Noting that Eureko's influence on the progress and direction of this complaint procedure is "limited," that "ancillary proceedings in the European Court of Justice can by their very nature not result in a damages award," and that Eureko's damages "cannot be redressed through other EU-channels," Claimant explained that it was forced to turn to arbitration to seek redress.[56] On 4 March 2008, Eureko sent to the Prime Minister of the Slovak Republic a "trigger letter" setting out its grievances with respect to the reforms to the health insurance sector and formally notifying its intention to commence arbitration proceedings under the BIT. After attempts at amicable settlement failed, Eureko formally commenced this arbitration by a Notice of Arbitration dated 1 October 2008.[57]

F. Judicial Challenges to the 2007 Reforms

115. On 25 June 2008, 52 members of the Slovak Parliament lodged a petition with the Slovak Constitutional Court pursuant to Article 125(1)(a) of the Constitution of the Slovak Republic, challenging the compliance of the ban on profits with the Slovak Constitution, the European Convention on Human Rights, and the Treaty Establishing

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54 See below, paragraph 296 et seq.

55 Article 226 TEC provides that: "If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union." That provision is now Article 258 TFEU. The complaint procedure was registered under reference number 2008/4268.

56 Claimant's Statement of Claim, ¶¶1.17; Exhibit R-45.

57 Notice of Arbitration, Annex 1; Claimant's Statement of Claim, ¶¶1.8-14.

the European Community.[58] On 26 January 2011, the Constitutional Court adjudged that the ban on profits violated Articles 1(1), 20(1), and 35(1) of the Slovak Constitution, in relevant part, as follows:[59]

> The Constitutional Court, basing itself on legal considerations and conclusions stated in the preceding parts of this Ruling, submits that the following occurred as the consequence of Section 15(6) of the Health Insurance Companies Act:
>
> (a) Material restriction of ownership rights of private (non-State owned) health insurance companies having the nature of forced restriction of the ownership right of those health insurance companies and/or their shareholders in the form of material restriction of the possibility to dispose of their own shares as property value which are integral part of their ownership right. Concurrently, material modification of the contents of their licences for performance of the public health insurance business occurred, while legislative intervention is concerned here having a material impact on their legitimate expectations associated with the exercise of their property rights. At the same time, the legislator intervened in the property rights of private health insurance companies without providing/ensuring adequate compensation, while legal regulation is concerned having also the nature of non-genuine retroactivity which, given the circumstance in which it has been passed, the Constitutional Court does not deem necessary in terms of the objective pursued by the legislator and which is, in terms of its consequences, clearly disproportionate to the restriction of rights of the health insurance companies and their shareholders under Article 20(1) of the Constitution and Article 1 of the Additional Protocol.
>
> (b) Unconstitutional intervention in the fundamental right of private (non-State owned) health insurance companies to carry out business under Article 35(1) of the Constitution in the area of public health insurance occurred, such right having been conferred on them in the original wording of the Health Insurance Companies Act, and this was corroborated – until the effective date of the amendment to the Health Insurance Companies Act through Act No. 530/2007 Coll. – also by the procedure for application of the amendment, namely by deprivation of the possibility to decide autonomously on the manner of application of the profit earned in the area of public health insurance, while legislative measure of the nature of non-genuine retroactivity is concerned not respecting the essence and sense of the fundamental right under Section 35(1) of the Constitution and which, at the same time, was not necessary in terms of the objective pursued by the legislator and being, in terms of its consequences, clearly disproportionate with respect to the legitimate interests and legally/validly acquired rights of private (non-State owned) health insurance companies and their shareholders.
>
> (c) Occurrence of a constitutionally impermissible intervention in the general principle of State governed by law as expressed in Article 1(1) of the Constitution, including both the legal certainty principle and proportionality principle.
>
> [...]

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58 Exhibit C-75.

59 The judgment of the Court is Exhibit C-135, translated as Exhibit C-149. Cf., Part VI ("Conclusions") of the Judgment and the Court's Press Communique No. 2/2011, Exhibit C-143.

116. In essence, the Constitutional Court ruled that the ban on profits was an impermissible interference with the private health insurance companies' right of ownership and freedom to do business. Accordingly, the ban on profits ceased to have legal effect following the Court's decision.[60]

G. Political Developments in the Slovak Republic

117. On 12 June 2010, parliamentary elections resulted in a change in the Government of the Slovak Republic and the election of a new coalition headed by the new Prime Minister, Ms Iveta Radičová. Ms Radičová and other key members of her government were amongst those Members of Parliament who had brought the constitutional challenge to the ban on profits in June 2008.[61]

118. The Program Theses of the new government, released on 23 June 2010, announced the Government's intention to reverse several elements of the 2007 Reforms in the following terms:[62]

> [. . .]
>
> We will restore the possibility to create profit for health insurance companies under strictly defined conditions in a way which would not worsen the position of the state in ongoing litigations on investment protection.
>
> [. . .]
>
> We will consider increasing of the percent of premium which will not be subject to redistribution.
>
> [. . .]
>
> We will restore independency of ÚDZS [the Health Care Authority]
>
> [. . .]
>
> We will resolve the minimal network of specialised out patients healthcare and inpatient healthcare (re-evaluation of healthcare network and restructuring of network of providers).

119. Thereafter, the Government of Prime Minister Radičová began to implement its proposed changes, passing legislation on 28 December 2010 to restore the

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60 According to Respondent, the decision took effect upon publication of the judgment on 24 March 2011, pursuant to the Slovak Constitution (see Respondent's Counter-Memorial on the Merits, ¶8). According to Claimant there is a six-month delay from the date of publication of the judgment (unless rectifying legislation is introduced earlier) (see Claimant's Memorial on the Merits, ¶ 64).

61 Claimant's Memorial on the Merits, ¶¶131-34.

62 Exhibit C-124.

independence of the Healthcare Authority.[63] On 22 March 2011, the Government issued for public comment a draft law amending Act No. 581/2004 in relation to operational expenses, financial reserves, and network requirements.[64] This new legislation on health insurance was adopted on 8 July 2011 and entered force on 1 August 2011,[65] and provided as follows:

(a) health insurers were permitted to earn profits, subject to the creation and maintenance of a reserve fund to ensure the provision of healthcare to individuals on waiting lists;[66]

(b) the network requirements were amended to require that each insurer "conclude an agreement on the provision of health care in each district of the Slovak Republic within the fixed network," rather than with one provider in each group of districts;[67]

(c) the Health Care Authority was empowered to monitor diagnoses and costs in assessing redistribution rates;[68]

(d) the cap on operating expenses was amended to allow smaller insurers to spend a higher percentage of revenue on operating expenses;[69]

(e) the ban on brokers remained in place;[70]

(f) the possibility to transfer an insurance portfolio for value was restored, but insured individuals were given the opportunity to opt out of such a transfer or to select a different insurer;[71]

(g) the scrutiny of the budgets of health insurers was removed;[72] and

(h) the solvency requirements were adjusted.[73]

120. On 11 October 2011, the Government of Prime Minister Radičová fell; and in elections held on 10 March 2012, Mr Robert Fico was re-elected as Prime Minister, assuming office on 4 April 2012.

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63 Claimant's Reply on the Merits, ¶21

64 Exhibit C-137

65 Claimant's Damages Memorial, ¶II.9; Respondent's Damages Memorial, ¶7.

66 Respondent's Damages Memorial, Annex A-9, ¶¶5-7.

67 Respondent's Damages Memorial, Annex A-9, ¶9.

68 Respondent's Damages Memorial, Annex A-9, ¶11.

69 Respondent's Damages Memorial, Annex A-9, ¶14.

70 Respondent's Damages Memorial, Annex A-9, ¶16.

71 Respondent's Damages Memorial, Annex A-9, ¶20.

72 Respondent's Damages Memorial, Annex A-9, ¶22.

73 Respondent's Damages Memorial, Annex A-9, ¶25.

IV. AN OVERVIEW OF THE PARTIES' PRINCIPAL SUBMISSIONS

121. The Tribunal has considered in full the submissions made by the Parties in their written pleadings and oral arguments. The Tribunal has summarised most of those submissions below; and all of the points made by the Parties have been taken into account by the Tribunal, even though not here expressly summarised and although it is not necessary to address and decide in turn each and every one of those submissions and observations for the purpose of this Award.

122. Before turning to the specifics of the Parties' arguments, the Tribunal recalls that the Parties were requested to file brief summaries of their main submissions prior to the hearing on the merits, and each did so on 9 December 2011. It is helpful to set them out here as points of reference for the following analysis:

123. **Claimant's Summary** reads as follows:

> **1 Respondent breached the BIT**
>
> 1.1 Respondent breached Article 3(1) of the BIT: It denied Eureko's investment fair and equitable treatment by fundamentally altering the legal and business framework after Eureko had invested, and by taking measures with the ulterior and bad faith aim of eliminating privately-owned health insurers from the market.
>
> 1.2 Respondent breached Article 3(1) of the BIT: It impaired Eureko's investment by unreasonable and discriminatory measures including the cap on operating expenses, the Ban on Brokers, the Ban on Profits, an increase in the redistribution rate and EUR 65M in state-aid for VZP, all of which favoured the dominant and incumbent state-owned insurers to the detriment of Eureko's much smaller and newly-entering investment, Union Health.
>
> 1.3 Respondent breached Article 3(2) of the BIT: It denied Eureko's investment full security and protection by bringing the powerful Health Care Authority under political control, by publicly harassing Eureko's investment, by enacting unreasonable and unpredictable solvency requirements and by directing Eureko's investment to provide its budget to the state for "deliberation".
>
> 1.4 Respondent breached Article 4 of the BIT: It denied Eureko's investment the free transfer of profits and dividends through the Ban on Profits.
>
> 1.5 Respondent breached Article 5 of the BIT: It expropriated Eureko's investment in 2007 through the Ban on Profits, the ban on portfolio transfer against value, and/or the collective measures comprising the 2007 Reversal, with the admitted intent to "drive out" privately-owned health insurers from the Slovak market.
>
> 1.6 Eureko has been invited to invest in the Slovak Republic by the Slovak Minister of Health in 2004, and has received specific assurances by the Slovak Minister of Health in January 2007 that its investment would be treated in accordance with the BIT.

2 Respondent's liability is an admitted fact

2.1 Members of Respondent's present government asserted in a Constitutional Court petition that the Ban on Profits deprived Eureko of a fundamental property right, interfered with Eureko's legitimate expectations, constitutes expropriation and forms part of a scheme to drive privately-owned insurers out. In this assertion, these members of the present government were supported by a large number of other members of parliament.

2.2 Respondent's Constitutional Court has found that the Ban on Profits forcibly restricted the ownership rights of privately-owned health insurance companies, that the legitimate expectations of their shareholders had been breached, that in interfering with the ownership rights of privately-owned health insurers no compensation had been provided, and that the interference violated provisions protecting against expropriation in the Slovak Constitution and the ECHR.

2.3 Slovak state advisory bodies have warned the Slovak government not to enact the 2007 Reversal because it breaches Slovak law, international law and the BIT.

2.4 Respondent's government acknowledged that the 2007 Reversal was not necessary from a policy perspective by reversing part of the measures.

3 Eureko is entitled to damages and further relief

3.1 Eureko suffered damages as a consequence of the enactment of the 2007 Reversal, as set out in the expert report of Ernst & Young.

124. **Respondent's Summary** reads as follows:

Part A The Tribunal does not have jurisdiction to rule on the dispute

1. The BIT is not applicable due to EU law *(part D.1 Statement of Defence, part D.2 Counter-Memorial on the Merits, part H Rejoinder on Merits)*

   (a) The BIT provisions are not applicable due to supremacy, direct effect and direct applicability of EU law *(part D.2 Counter-Memorial on the Merits)*

   (b) The alleged discrimination with respect to preferential treatment of VZP is also governed by EU law *(part E.2 Counter-Memorial on the Merits)*

2. The Claimant's investment is not protected by the BIT (*ratione materiae* objection)

   (a) Claimant's investment into the portfolio of Union Healthcare is not protected by the BIT, as it has been established contrary to Slovak law *(part E.1 Counter- Memorial on the Merits, part I Rejoinder on Merits)*

   (b) Future investments, which are only planned but were not conducted, are not protected by the BIT *(paragraph 39 Rejoinder on Merits)*

Part B The Respondent has not breached any of its obligations under the BIT

3. The 2006 Stabilisation was adopted within the regulatory powers of the Respondent and thus it is not compensable *(part B.4 Statement of Defence, part D.4.1 Counter-Memorial on the Merits, part D Rejoinder on Merits)*

   (a) The health insurance system holds public character consistently *(part C.3.1 Counter-Memorial on the Merits)*

   (b) The 2004 Acts were economically and factually incorrect in some aspects *(part C.4 Counter-Memorial on the Merits, part B.4 Rejoinder on Merits)*

(c) The 2006 Stabilisation was adopted to remove risks brought by the 2004 Acts *(part C.5.2 Counter-Memorial on the Merits)*

(d) The 2006 Stabilisation pursued the public interest and proportionate to the public interest it pursues *(part D.4.1.2 and D.4.1.5 Counter-Memorial on the Merits, part D.3 and D.6 Rejoinder on Merits)*

(e) The 2006 Stabilisation was non-discriminatory and within due process without any promise to the Claimant that it will not be adopted *(part D.4.1.2 and D.4.1.3 Counter-Memorial on the Merits, part D.4 Rejoinder on Merits)*

4. The ruling of the Constitutional Court with respect to the Profit Provision does not establish international responsibility of the Respondent *(part A.2 Counter-Memorial on the Merits, part D.6.3 Rejoinder on Merits)*

(a) The Constitutional Court did not consider any individual circumstances of the present dispute.

(b) The Constitutional Court did not analyse the Profit Provision pursuant to the standards of protection under the BIT.

(c) Any possible breach of national law does not automatically imply a breach of any of the international obligations of the Respondent.

(d) The Profit Provision was effective only for two years (the Constitutional Court assessed constitutionality of a valid and effective Profit Provision whereas the Tribunal assesses, if two years of effectiveness of the Profit Provision breached the BIT).

5. There has been no deprivation or expropriation of an investment of the Claimant in the Slovak Republic *(part C.1.1 Statement of Defence, part D.4.2 Counter-Memorial on the Merits, part C Rejoinder on Merits)*

(a) The Claimant's investment has not been effectively neutralized by none of the contested provisions *(part D.4.2.2 Counter-Memorial on the Merits)*

(b) There was no loss of control with respect to the Claimant's investment *(part C.1 Rejoinder on Merits)*

(c) The Profit Provision was applicable only temporarily *(part C.2 Rejoinder on Merits)*

6. The standard of fair and equitable treatment has not been breached *(part C.1.2 Statement of Defence, part D.4.3 Counter-Memorial on the Merits, part E Rejoinder on Merits)*

(a) The 2006 Stabilisation was adopted in good faith and in public interest *(part D.4.3.2 Counter-Memorial on the Merits)*

(b) The 2006 Stabilisation was in compliance with the non-impairment standard, i.e. non-discriminatory and reasonable *(part D.4.3.4 Counter-Memorial on the Merits, part F.2 Rejoinder on Merits)*

7. The Claimant could not legitimately expect that the 2004 Acts would remain unchanged *(part D.4.3.1 Counter-Memorial on the Merits, part E.2 and E.3 Rejoinder on Merits)*

(a) The 2004 Acts were highly unpopular and were rejected both by professionals and the general public *(part B.2 Statement of Defence, part C.5.1 Counter- Memorial on the Merits)*

(b) The 2004 Acts were subject to the complaint submitted to the Constitutional Court.

(c) The Claimant incorporated Union Healthcare one month after the early elections were declared, where election polls indicated that the parties opposing the 2004 Acts were gaining popularity *(part B.3 Statement of Defence, part C.5.3.3 Counter-Memorial on the Merits, part E.2.1 Rejoinder on Merits)*

(d) Circumstances surrounding the Claimant's entrance into the health insurance sector clearly suggested adoption of the 2006 Stabilisation *(part C.5.3 Counter-Memorial on the Merits, part E.2.2 Rejoinder on Merits)*

8. The standard of full security and protection has not been breached *(part C.1.3 Statement of Defence, part D.4.4 Counter-Memorial on the Merits, part F.1 Rejoinder on Merits)*

9. The Claimant did not face any limitations as regards transfer of payments *(part C.1.4 Statement of Defence, part D.4.5 Counter-Memorial on the Merits, part F.3 Rejoinder on Merits*)

Part C The Claimant did not suffer any damage due to the 2006 Stabilisation (none of its provisions)

10. The Claimant did not bear its burden of allegation and burden of proof with respect to the alleged hibernation *(part B Counter-Memorial on Damages)*

(a) The Claimant's allegations regarding the hibernation are inconsistent and insufficient *(part B.2 Counter-Memorial on Damages)*

(b) The hibernation did not occur *(part B.2.2 Counter-Memorial on Damages)*

11. There is no causal link between the alleged breach of the BIT and the alleged damage *(part C Counter-Memorial on Damages)*

(a) The alleged hibernation was not caused by the 2006 Stabilisation *(part C.1 Counter-Memorial on Damages)*

(b) The alleged hibernation did not cause any damage to the Claimant *(part C.2 Counter-Memorial on Damages)*

(c) There is no sufficient causal link between the contested provisions of the 2006 Stabilisation, the breach of the duties by the Respondent through these provisions and the Claimant's alleged damage *(part C.3 Counter-Memorial on Damages)*

12. The alleged damage could not occur if the Claimant had not breached the Slovak law *(part C.4 Counter-Memorial on Damages)*

Part D The Claimant's calculation of damages is flawed (Part D Counter-Memorial on Damages)

13. Union Healthcare has insufficient track record for the use of DDM (DCF) method *(part D.1.1 Counter-Memorial on Damages)*

14. The profitability of the Claimant's investment is highly speculative *(part D.1.2 Counter-Memorial on Damages)*

15. The tribunals do not award damages in the cases where the claims are highly speculative or the track record is missing *(part D.1 Counter-Memorial on Damages)*

16. The assumptions underlying Mr Indge's expert report are wrong *(part C.2 Counter-Memorial on Damages*

17. Any potential damage is nil *(part D.2 Counter-Memorial on Damages)*"

125. These summaries are intended to give, for the purpose of this Award, a fair overview of the arguments raised in the Parties' respective written pleadings and at the hearings, and of the main areas of disagreement.

V. THE PARTIES' FORMAL REQUESTS FOR RELIEF

Claimant's Request for Relief

126. In its Notice of Arbitration, Claimant made the following request:[74]

> In this arbitration, Eureko primarily requests:
>
> (i) the payment by the Slovak Republic of an amount in excess of € 100 million, which amount will be specified and substantiated in the course of the arbitral proceedings, in compensation for damages suffered and to be suffered by Eureko as a result of the Slovak Republic's breach of the BIT;
>
> (ii) the payment by the Slovak Republic of all costs incurred by Eureko associated with these proceedings, including but not limited to the costs and expenses of the arbitral tribunal, all professional fees and disbursements of Eureko's counsel, witnesses and experts;
>
> (iii) Pre-award and post-award interest at a rate to be determined by the arbitral tribunal;
>
> (iv) A declaration to the effect that the Slovak Republic has breached and continued to breach its obligations under the BIT, in particular articles 3, 4 and 5 thereof;
>
> (v) An order from the arbitral tribunal to the Slovak Republic to comply with its obligations under the BIT, in particular articles 3, 4 and 5 thereof, subject to a financial penalty for non compliance with the said order to be determined by the arbitral tribunal; and
>
> (vi) Such further relief that the arbitral tribunal may deem appropriate.

127. In its Statement of Claim, Memorial on the Merits, and Reply on Merits, Claimant makes the following request:[75]

> Eureko requests the Arbitral Tribunal to render a final arbitral award in which the Slovak Republic is ordered to pay to Eureko:
>
> (i) an amount of damages that is to be fully specified and supported in the quantum phase of these proceedings;

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74 Notice of Arbitration, ¶10.

75 Claimant's Statement of Claim, ¶VI.2; *see also* Claimant's Memorial on the Merits, ¶342; Claimant's Reply on Merits, ¶277.

(ii) applicable interest on such damages; and

(iii) all costs of the arbitral proceedings, including but not limited to the costs and expenses of the Arbitral Tribunal and Eureko's costs of legal assistance, costs of other expertise and expenses.

subsequent to the completion of the second, i.e. damages, phase of these proceedings.

128. In its Post-Hearing Brief, Claimant makes the following request:[76]

> Eureko maintains its request for relief set out in § 10 of the Notice of Arbitration and §§ VI.1 and VI.2 of the Statement of Claim.

Respondent's Request for Relief

129. In its Statement of Defence, Respondent makes the following request:[77]

> The Slovak Republic requests that the Tribunal:
>
> (a) find that it lacks jurisdiction to hear this dispute;
>
> (b) issue a final award dismissing the Claimant's claim for lack of jurisdiction;
>
> (c) award the Slovak Republic reimbursement of its full costs, expenses and attorneys' fees to defend this proceeding.

130. In its Counter-Memorial, Respondent makes the following request:[78]

> The Slovak Republic respectfully request that this Tribunal: (a) decline jurisdiction of this dispute on the grounds of the objections *ratione materiae* submitted in the Counter-Memorial; or, alternatively, (b) reject the Claimant's claims in their entirety and with prejudice; and (c) order the Claimant to pay the costs of this arbitration, including the Respondent's legal representatives' fees and expenses, expert fees and expenses, and fees and expenses of the Permanent Court of Arbitration and Tribunal Members.

VI. THE TRIBUNAL'S JURISDICTION

A. The Parties' Arguments on Jurisdiction *Ratione Materiae*

Respondent's Position

131. The Slovak Republic, in accordance with Article 21(3) of the UNCITRAL Rules, raised an objection in its Statement of Defence to the Tribunal's jurisdiction *ratione materiae* over this dispute. It stated that it would challenge Eureko's assertions of "the existence

[76] Claimant's Post-Hearing Brief, ¶93

[77] Respondent's Statement of Defence, ¶129.

[78] Respondent's Counter-Memorial, ¶673. See also Respondent's Post-Hearing Brief, ¶¶75-76.

of a *bona fide* investment."[79] Respondent proceeded to seek relevant documents from Claimant in this respect in February and March of 2010. After consultations with the Parties, the Tribunal decided on 8 April 2010 to defer questions of the jurisdiction *ratione materiae* challenge to the merits phase of the case, if the case were to proceed that far.

132. Respondent develops this jurisdictional objection further in its Counter-Memorial on the Merits. Respondent recalls that the alleged investment made by Claimant relates not only to the ownership of its subsidiary, Union Healthcare, but also, according to Claimant's own statements, to Union Healthcare's portfolio. Claimant considers this portfolio as its "most precious asset."[80]

133. Respondent contends that this health insurance portfolio cannot be considered as an "asset" within the sense of Article 1(a) of the BIT.[81] According to Respondent:[82]

> the insurance portfolio is not capable of being the subject of ownership under Slovak law since a health insurance provider (i) may not dispose of the insured; (ii) may not decide if it accepts a particular insured or not; (iii) may not withdraw from a relationship with the insured; (iv) may not decide the amount and due dates of the health insurance levies; and (v) may not force the insured to leave.

134. In Respondent's view, because the health insurance portfolio represents a mere collection of applications for public health insurance whose composition is mandated by law, it cannot be protected by the BIT.[83]

135. Respondent also contends, that even if the Tribunal finds that an investment has been made, Article 8(6) of the BIT as well as international arbitral practice require that an investment has been made "in accordance with" the laws of the host State.[84] Respondent alleges that Claimant has breached three provisions of Slovak law in making its investment, and cannot now invoke the protections of the BIT:[85]

> (a) The Claimant, when establishing Union Healthcare's portfolio by means of recruiting brokers and other intermediary companies, was in breach of its duty not to provide false or misleading information, and harmed the legitimate rights of the insured.

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79 Respondent's Statement of Defence, ¶117.

80 Memorial on the Merits, ¶41, quoted in Counter-Memorial on the Merits, ¶¶633, 657.

81 Counter-Memorial on the Merits, ¶634.

82 Counter-Memorial on the Merits, ¶520.

83 Counter-Memorial on the Merits, ¶635.

84 Counter-Memorial on the Merits, ¶636.

85 Counter-Memorial on the Merits, ¶638 [footnotes omitted].

(b) The Claimant, by its aggressive campaign aiming at the acquisition of new insured, harmed the legitimate rights of the other health insurers and was in breach of the rules on fair competition.

(c) The Claimant, when recruiting brokers and other intermediary companies for the acquisition of the insured breached the rules on public procurement, as Union Healthcare is a legal entity pursuing a public function.

136. Respondent first alleges that Claimant disseminated incorrect and misleading information to beneficiaries, bribed prospective beneficiaries and benefited from illegal advantages in contravention of Act No. 581/2004 Coll., an Act making it illegal to use "untrue or misleading information, conceal important facts and offer advantages that cannot be assured, when promoting its activity."[86] Respondent contends that in 2006, 5,782 complaints were filed against Union Healthcare in connection with beneficiaries who claimed that Union Healthcare had conducted an "unauthorised" transfer of health insurers or that it had offered "false or misleading information." Respondent submits that 69 percent of these complaints were justified and that in connection with Claimant's breach of Section 6(13) of Act No. 581/2004 Coll., Claimant was fined SKK 3,000,000.[87]

137. Respondent argues next that by providing both directly, and through its brokers, "misleading information about itself and other health insurance companies" to beneficiaries, Claimant violated the Slovak Republic's competition law, which prohibits health insurance companies from breaching the standards of "economic competition."[88] As a consequence, according to Respondent, two privately owned insurance companies filed complaints against Union Healthcare, which Claimant settled. Respondent argues that the fact that Claimant concluded a settlement with the companies reveals that it "admitted" its breaches of Slovak law.[89] Respondent observes that it "can hardly imagine any other reason" why Claimant would have concluded the settlement and notes that Claimant declined the opportunity to provide the terms of the settlement agreement during document production.[90]

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86 Counter-Memorial on the Merits, ¶641, Exhibit R-71: Section 6(13) of Act No. 581/2004 Coll.

87 Counter-Memorial on the Merits, ¶642.

88 Counter-Memorial on the Merits, ¶¶646-648; Exhibit R-79: Section 41 of Act No. 513/1991 Coll., Commercial Code.

89 Counter-Memorial on the Merits, ¶¶649-650.

90 Respondent's Rejoinder on the Merits, ¶220.

138. Finally, Respondent submits that Claimant violated Respondent's mandatory procurement laws.[91] According to Respondent, all public entities are required to undergo the public procurement process for purchases exceeding a certain value. Respondent submits that Claimant breached this obligation by concluding contracts with brokers in excess of that value.[92] In doing so, Respondent argues that Claimant was able to use brokers' services to attract more beneficiaries than it could have legally obtained had it participated in the procurement process which typically takes eight months.[93]

139. Respondent concludes that because Claimant's investment has not been made in accordance with Slovak law or the principle of good faith, the Tribunal should not hear the dispute.[94]

Claimant's Position

140. Claimant argues that its insurance portfolio is a proper object of ownership and protection under the BIT, to which it "legitimately acquired" rights.[95] Claimant recalls that the explanatory note to Act 581/2004, upon which Claimant relied in making its investment, stipulated that investors could hold ownership rights in their portfolios: [96]

> Given that health insurance companies are players in the insurance market, it is possible that insurance portfolio, as a set of executed and valid insurance contracts/policies will be the subject of trading between health insurance companies.

Claimant further points out that the Slovak Constitutional Court has recently reaffirmed that an investment portfolio may be owned by an investor.[97]

141. Claimant argues that it can additionally justify its reasoning that the insurance portfolio is an asset capable of private ownership, by reference to the letter dated 23 November 2009 from the European Commission, in which the EC concluded that the ban on transfer of the insurance portfolios "constitutes a breach of the freedom of establishment guaranteed by Article 43 EC."[98]

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91 Counter-Memorial on the Merits, ¶¶652-657; Exhibit R-165: Section 9(1) of Act No. 25/2006 Coll., Public Procurement Act.

92 Counter-Memorial on the Merits, ¶655.

93 Counter-Memorial on the Merits, ¶656;

94 Counter-Memorial on the Merits, ¶662.

95 Claimant's Reply on the Merits, ¶¶76, 258.

96 Exhibit C-19, cited in Claimant's Reply on the Merits, ¶79.

97 Claimant's Reply on the Merits, ¶78; Exhibit C-135, Exhibit C-136, Exhibit C-143.

98 Claimant's Reply on the Merits, ¶80; Exhibit C-131.

142. Claimant denies that it has offered incorrect and misleading information to prospective beneficiaries.[99] First, Claimant points out that even if all 5,782 complaints against it were legitimate, this figure amounts to a marginal percentage, of only 1.25 percent, of Claimant's total portfolio which is comprised of 462,169 beneficiaries. In addition, Claimant contends that its application process rigorously screened for irregularities and that any beneficiary, who complained of the transfer or established that he or she had not applied to join Union, would have had his or her previous insurance restored.[100] Claimant further points out that although it was fined in the amount that Respondent contends, the Slovak Supreme Court has recently overturned the imposed fine.[101]

143. Claimant also denies that it has violated any competition laws in the Slovak Republic.[102] According to Claimant, the settlement with its competitors does not, contrary to Respondent's allegation, "include or imply any admission of liability on the part of either Dôvera or Union."[103]

144. Claimant also refutes Respondent's contention that it has violated any laws in its use of brokers. Claimant submits that it had instructed all of its brokers on applicable Slovak law and supplied them with a standard broker's contract that it submitted to the Tribunal and Respondent as an exhibit during the document production phase of these proceedings.[104]

145. In any case, Eureko argues that it is the *establishment* of an investment and not its *performance* that is relevant for assessing whether it is in compliance with the law of the host state and the BIT.[105] Claimant submits that its investment was established in accordance with the laws of the Slovak Republic, a fact that it claims Respondent has not disputed.[106] According to Claimant, the fact that it has a license to operate a health insurance company in the Slovak Republic, which the Slovak Republic has never challenged,[107] indicates the Slovak Republic's acceptance of its investment.[108]

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99 Claimant's Reply on the Merits, ¶¶121-126.

100 Claimant's Reply on the Merits, ¶123.

101 Claimant's Reply on the Merits, ¶270, Exhibit C-135, Exhibit C-136, Exhibit C-143, Exhibit C-144.

102 Claimant's Reply on the Merits, ¶125.

103 Claimant's Reply on the Merits, ¶126.

104 Claimant's Reply on the Merits, ¶125; Exhibit C-147.

105 Claimant's Reply on the Merits, ¶¶256-269.

106 Claimant's Reply on the Merits, ¶259.

107 Claimant's Reply on the Merits, ¶265.

Consequently, Claimant contends that even if any of the allegations advanced by Respondent are true, they would not result in Claimant's loss of protection under the BIT.[109]

146. Even if the Tribunal were to decide that it needs to determine whether the performance of the investment has been legal, Claimant points out that: (i) only breaches of fundamental norms of a legal order, and not minor infractions, may have the effect of depriving the Tribunal of jurisdiction; (ii) none of the allegations have caused the Slovak authorities to challenge Union's legality or licence since 2006; (iii) the fine has been overturned by the Supreme Court; (iv) any disputes between Union and other private health insurers are irrelevant; (v) the procurement allegations are entirely unsubstantiated and have never been investigated; (vi) in any event, all of the alleged breaches of Slovak law are subject to a limitation period of three years which would now have lapsed.[110]

B. The Parties' Arguments on Jurisdiction and the Scope of Substantive EU Law

Respondent's Position

147. Respondent raises a further objection to the Tribunal's jurisdiction based on the interaction of the BIT with the substantive provisions of EU law. Although Respondent recognises that the Tribunal has ruled that the Slovak Republic's accession to the EU has not terminated the Treaty, Respondent submits that the Tribunal nevertheless lacks jurisdiction as Articles 3, 4, and 5 of the BIT are inapplicable due to the supremacy of EU law.[111]

148. Respondent bases this objection on the Tribunal's statement, in its Award on Jurisdiction, Arbitrability, and Suspension that "[t]he Tribunal does not have jurisdiction to rule on alleged breaches of EU law as such."[112] In Respondent's view, the Tribunal recognised that the substantive protections of EU law overlap significantly

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108 Claimant's Reply on the Merits, ¶260.

109 Claimant's Reply on the Merits, ¶262.

110 Claimant's Reply on the Merits, ¶¶267-269.

111 Respondent's Counter-Memorial on the Merits, ¶401.

112 Respondent's Counter-Memorial on the Merits, ¶405, quoting Award on Jurisdiction, Arbitrability, and Suspension, ¶290. (The full quotation, given that Eureko's claims were and remain based on the BIT, reads materially as follows: "On the other hand, the Tribunal notes that its jurisdiction is confined to ruling upon alleged breaches of the BIT. The Tribunal does not have jurisdiction to rule upon alleged breaches of EU law as such ...")

with the protections offered by the BIT, that EU principles (including supremacy) apply where EU law is involved, and that the Tribunal is only entitled under the doctrine of *acte clair* to apply EU law where the application of such law is clear.[113] The ECJ, Respondent argues, has clearly ruled that the "[EEC] Treaty takes precedence over agreements concluded between Member States before its entry into force."[114] And the application of the *acte clair* doctrine, Respondent submits, follows from the Tribunal's statements in its Award on Jurisdiction that it had the power to apply EU law, but not to rule on breaches of EU law "as such."[115]

149. With respect to specific provisions of the BIT, Respondent argues (i) that the provisions on the free movement of capital are duplicated in EU law and the BIT, and the ECJ has not ruled on whether restrictions on the distribution of profits from public health insurance would breach EU law;[116] (ii) that the BIT's protection of "assets and investments" from expropriation overlaps with EU law's narrower protection of "possessions and property," but that shares in a joint stock company fall within the narrower category and are covered by EU law;[117] (iii) that the BIT's provisions on fair and equitable treatment are covered by the EU law concepts of free movement of capital, non-discrimination, freedom of establishment, and protection of legitimate expectations;[118] and (iv) that the BIT's provision on "full protection and security is partly afforded by provisions on the freedom of establishment under EU law."[119] In sum, Respondent submits that "the subject matter of the dispute is governed by EU law," which the Tribunal lacks jurisdiction to invoke due to insufficient clarity as to the manner of its application.[120]

Claimant's Position

150. Claimant submits that Respondent has mischaracterised the relationship between EU law and the substantive provisions of the BIT; in Claimant's view, the Tribunal

113 Respondent's Counter-Memorial on the Merits, ¶406.

114 Respondent's Rejoinder on the Merits, ¶208, quoting *Annunziata Matteucci v. Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium* (ECJ, 235/87), Judgement, 27 September 1988, ¶22.

115 Respondent's Rejoinder on the Merits, ¶210.

116 Respondent's Counter-Memorial on the Merits, ¶¶409-10.

117 Respondent's Counter-Memorial on the Merits, ¶¶411-14.

118 Respondent's Counter-Memorial on the Merits, ¶¶415-20.

119 Respondent's Counter-Memorial on the Merits, ¶422.

120 Respondent's Counter-Memorial on the Merits, ¶399.

retains jurisdiction to rule on claims brought pursuant to the BIT.[121] According to Claimant, the issue is not whether EU law overlaps with the protections of the BIT, but whether it is "incompatible" with the BIT under the Vienna Convention on the Law of Treaties.[122] Such "incompatibility arises *only* when one treaty prescribes or mandates conduct that, if executed, breaches the terms of a second treaty";[123] and "While EU law is superior to national law," Claimant notes, "it is not superior to other (instruments of) international law."[124] Moreover, incompatibility as a matter of treaty law is only relevant when it pertains to the actual circumstances of a dispute. According to Claimant, "[t]he mere existence of a theoretical incompatibility that is unconnected to the specific facts and circumstances at hand" will not prevent the applicability of both treaties.[125] This stems from the basic principle that "states should honour their treaty obligations to the largest extent possible."[126]

151. In Claimant's view, Respondent has not only failed to demonstrate actual incompatibility between the BIT and provisions of EU law in the circumstances of this case, but ignores the Tribunal's decision in its Award on Jurisdiction, Arbitrability and Suspension that the protections of the BIT are not incompatible with EU law.[127] Claimant further notes the Tribunal's recognition that "[f]ar from being precluded from considering EU law the Tribunal is bound to apply it to the extent that it is part of the applicable law(s) . . ."[128] Respondent's attempt to invoke the *acte clair* doctrine, Claimant argues, is an inapposite attempt to apply a doctrine developed solely to govern when national courts are required to refer questions of EU law to the ECJ, a power not granted to arbitral tribunals in any event.[129]

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121 Claimant's Reply on the Merits, ¶¶173-75.

122 Claimant's Memorial on the Merits, ¶¶304-05.

123 Claimant's Memorial on the Merits, ¶310.

124 Claimant's Reply on the Merits, ¶178.

125 Claimant's Memorial on the Merits, ¶311.

126 Claimant's Memorial on the Merits, ¶312.

127 Claimant's Reply on the Merits, ¶¶180-81.

128 Claimant's Reply on the Merits, ¶177, quoting Award on Jurisdiction, Arbitrability and Suspension, ¶281.

129 Claimant's Reply on the Merits, ¶185.

C. The Tribunal's Decision on Jurisdiction

152. The Tribunal's jurisdiction is based upon the BIT, namely the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Republic, which was signed on 29 April 1991 and entered into force on 1 October 1992. It is common ground that the Slovak Republic became a Party to that Treaty upon the dissolution of the Czech and Slovak Federal Republic, in accordance with the joint declaration made by the Netherlands and the Slovak Republic and the Czech Republic, and that as a matter of international law the Treaty was thereafter in force at all material times.

153. Respondent challenged the jurisdiction of the Tribunal on a number of grounds, set out in its Statement of Defence dated 30 October 2009. In summary, the grounds were (i) that the Tribunal lacked jurisdiction over the dispute because of the dispute's intra-EU character, which rendered it subject to the exclusive jurisdiction of the EU, and (ii) that Eureko had not presented sufficient facts to establish that the Tribunal had jurisdiction *ratione personae* and *ratione materiae*.

154. The Tribunal dismissed the first, 'intra-EU', objection to jurisdiction in its Award on Jurisdiction, Arbitrability and Suspension, dated 26 October 2010. That Award is final and binding upon the Parties, in accordance with Article 32(2) of the UNCITRAL Rules and the *lex loci arbitri*. The Tribunal accordingly rejects Respondent's jurisdictional objection based on the applicability of EU law.

155. As to the second objection to jurisdiction, in its Statement of Defence, Respondent disputed that Eureko had standing or has made an investment in the territory of the Slovak Republic.[130] Provision was made in Procedural Order No. 2, dated 3 December 2009,[131] for the disclosure of documents relating to this jurisdictional objection. Various documents were produced in accordance with these provisions.

156. In the telephone conference on 8 April 2010, Respondent confirmed that it had no *ratione personae* jurisdictional objections.[132]

157. Respondent's *ratione materiae* objection has two elements. The first element relates to the question of what may be counted as an investment. Respondent says that "The

130 Respondent's Statement of Defence, ¶¶125, 126.

131 Procedural Order No. 2, ¶3.

132 Summary of Teleconference of 8 April 2010, ¶4.

alleged investment made by the Claimant relates not only to the ownership of its subsidiary, Union Healthcare, but also, according to Claimant's own statements to Union Healthcare's portfolio,"[133] and that "[T]he health insurance portfolio cannot be considered as an "asset" in the sense of Article 1(a) of the BIT."[134]

158. Article 1(a) of the Treaty defines "investments" as:

> every kind of asset invested either directly or indirectly 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.

159. The Tribunal considers that Eureko clearly made an investment in the Slovak Republic within the meaning of Article 1(a) of the Treaty. It did so by incorporating its subsidiary company, Union Healthcare, in the Slovak Republic on 9 March 2006, in which Eureko held, and still holds, 100% of the shares.[135] That is an investment within the meaning of Article 1(a)(ii) of the Treaty. That shareholding (as well as rights derived therefrom) is a sufficient basis for the Tribunal's jurisdiction *ratione materiae*; and it follows that the Tribunal's jurisdiction under Article 8 of the Treaty exists in respect of that shareholding.

160. Having determined that Eureko made an investment in the form of its shareholding in Union Healthcare it is, strictly speaking, unnecessary to consider whether Union Healthcare's portfolio is in itself capable of constituting an "asset" for the purposes of Article 1(a) of the Treaty. As Respondent explicitly recognised, the shares of Union Healthcare were, at least from one perspective, a vehicle for the possession of the insurance portfolio.[136] Whatever value the portfolio might have had will be taken into

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133 Respondent's Counter-Memorial on the Merits, ¶633.

134 Respondent's Counter-Memorial on the Merits, ¶634.

135 See paragraph 90 above.

136 Respondent's Rejoinder on the Merits, ¶214.

account by assessing the value of Union Healthcare, which was both the investment made by Claimant and the addressee of the measures of which Claimant complains.

161. In any event, the insurance portfolio is an asset akin to goodwill, which is included in the non-exclusive list of assets in Article 1(a)(iv) of the Treaty. Both goodwill and the insurance portfolio are commercial assets that result from an investment in the cultivation of the loyalty of a pool of customers; and the very fact of the adoption of the ban on transfers indicates that as a matter of Slovak law an insurance portfolio could in principle have been sold by one insurer to another.[137]

162. The second element of Respondent's jurisdictional objection *ratione materiae* is the argument that the Tribunal lacks jurisdiction because the investment was made in violation of the law of the Slovak Republic. More specifically, it says that Union Healthcare's insurance portfolio was acquired in breach of Slovak law,[138] and that Claimant therefore cannot claim any breach of the Treaty that would relate to the portfolio and is not entitled to any damages regarding the alleged value of the portfolio.[139]

163. Respondent says that in order to acquire a large client portfolio Union Healthcare engaged in (i) the dissemination of incorrect and misleading information about other health insurers; (ii) bribing the insured; (iii) offering illegal advantages in connection with public health insurance, all contrary to Act No. 581/2004 Coll.[140] It cites in this regard the imposition by the Slovak Republic's Health Care Surveillance Authority of a number of fines on Union Healthcare,[141] in connection with reported malpractice by brokers soliciting applications for insurance on behalf of Union Healthcare,[142] and the number of complaints received by the Heath Care Surveillance Authority concerning Union Healthcare.[143]

164. Respondent also says that Union Healthcare violated the rights of other, competing, health insurers by unfair practices contrary to Section 41 of the Commercial Code, and

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137 See paragraph 99 above.

138 Respondent's Counter-Memorial on the Merits, ¶¶636-664; Respondent's Rejoinder on the Merits, ¶¶214-220.

139 Respondent's Counter-Memorial on the Merits, ¶640.

140 Respondent's Counter-Memorial on the Merits, ¶642.

141 Certain fines were cancelled on appeal: see, e.g., the decision of the Supreme Court dated 8 December 2008, Exhibit C-144.

142 See Exhibits R-155, R-166, R-167, R-168, R-169.

143 Exhibit R-170; Respondent's Counter-Memorial on the Merits, ¶643.

in 2008 settled a legal action brought against it by other insurers.[144] And further, it says that Union Healthcare failed to comply with the requirements of Slovak law concerning public procurement.[145]

165. Respondent argues that the Treaty guarantees protection only to investments that are made in accordance with the host State law. It cites Article 2 of the Treaty, which provides that "Each Contracting Party shall in its territory promote investments by investors of the other Contracting Party and shall admit such investments in accordance with its provisions of law."

166. The Tribunal construes this provision differently. Article 2 of the Treaty is concerned with the duty of each State Party to promote inward investment, and to admit investments in accordance with its law, where those investments are made by investors of the other State Party. Article 2 does not purport to qualify the definition of an investment. That definition is set out in Article 1(a) of the Treaty (set out in paragraph 158, above) which, unlike provisions in certain other bilateral investment treaties, does not contain a requirement that investments be made "in accordance with the laws and regulations" of the host State.

167. Respondent has a further argument: that "extensive and uniform" international arbitral practice establishes that "only investments made in full compliance with the laws of the host State" and made in good faith benefit from protection under a BIT.[146] It cites the awards in *Phoenix Action, Ltd. v. the Czech Republic*,[147] and *Inceysa Vallisoletana S.L. v. Republic of El Salvador* in support of its argument.[148]

168. The Tribunal is not free to rewrite the Treaty: it must interpret and apply the text adopted by the Parties; and it cannot decide their dispute as *amiable compositeur* or *ex aequo et bono* (no such authority having been granted to the Tribunal under Article 33(2) of the UNCITRAL Rules). The questions to be answered here are (i) whether it is proper to read into the definition of an investment in Article 1(a) of the Treaty a requirement that every investment within the meaning of the Treaty be made

144 Respondent's Counter-Memorial on the Merits, ¶¶646-650.

145 Respondent's Counter-Memorial on the Merits, ¶¶652-657.

146 Respondent's Counter-Memorial on the Merits, ¶637.

147 *Phoenix Action, Ltd. v. the Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶101, 106-107 (hereinafter "***Phoenix Action***").

148 *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, ¶230.

'in accordance with the laws and regulations' of the host State, or (ii) whether the undoubted principle that the Treaty must be interpreted and applied in accordance with the principle of good faith entails a similar conclusion. That is an exercise that is governed by international law and the law of treaties.

169. The rules on treaty interpretation, set out in Articles 31-33 of the Vienna Convention on the Law of Treaties,[149] are familiar. The basic rule is that the treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

170. The Treaty is intended, as its title and Preamble make clear, to record the agreement of the Parties upon the encouragement and reciprocal protection of investments. The definition of an investment in Article 1(a) does not expressly stipulate that the investment must have been made in accordance with the laws of the host State in order that the investment be protected by the Treaty. But in the view of the Tribunal, it is wholly unreasonable to suppose that the Parties could have intended to protect investments that violate, for example, a prohibition on foreign investment in a specified sector of the economy. The terms of the Treaty could not be interpreted in good faith to require such protection.

171. On the other hand, it is in the view of the Tribunal entirely reasonable to interpret the terms of Article 1(a) without reading in a requirement that there must be no infraction of the host State's law in the course of the making of the investment, if the investment is to be within the scope of the Treaty protection.

172. That distinction, between compliance with laws that limit the scope of permissible investments and compliance with each and every law of the host State, appears to underlie the decisions of other tribunals. In *Phoenix Action* the Tribunal said that:

> If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system. These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process. And it is the Tribunal's view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT.[150]

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149 Both the Netherlands and the Czech and Slovak Federal Republic were Parties to the Vienna Convention when the Treaty was signed. The Slovak Republic subsequently succeeded to the Vienna Convention.

150 *Phoenix Action*, ¶101.

173. That passage makes evident the focus of the *Phoenix Action* tribunal upon circumstances in which foreign investment in a particular sector is prohibited or restricted by the law of the host State. The illegality resulting from the violation of some such prohibition or restriction cannot, however, be equated with the illegality that is common to each and every violation of the host State's law that may occur in the context of the making of an investment. The (hypothetical) fact that a Union Healthcare broker committed a road traffic offence while driving to a client would clearly not render the investment "illegal" for the purposes of any implicit requirement of legality, although (as already stated) violation of a prohibition on foreign investment in a particular economic sector would do so.

174. Which side of the line are the violations that Union Healthcare was found or said to have committed? There is no suggestion in the present case that it was unlawful *per se* for Eureko to make an investment in the health insurance sector. Respondent's point is that some aspects of the specific manner in which the investment was made constituted violations of Slovak law. While any violation of a State's laws is a matter to be taken seriously, not all violations have or should be given the same legal consequences.

175. The Tribunal observes that Respondent has fined Union Healthcare for the misconduct of its brokers, that no action appears to have been taken in respect of the alleged breach of the rules on public procurement, and that the legal claims of other insurers arising from alleged violations of the fair competition rules were settled. More particularly, Union Healthcare has since 2006 operated under a licence granted by Respondent, and no attempt has been made to cancel or revoke that licence. It does not appear that the authorities in the Slovak Republic have taken the view that the violations referred to or alleged by Respondent (whose account is challenged by Claimant)[151] are of such a kind, or of such a degree of seriousness, as to require the cancellation or termination of the investment.

176. A tribunal should be very slow indeed to decide that the interpretation in good faith of a definition of an investment, particularly a definition that contains no express 'in accordance with the laws and regulations' stipulation, requires that the making of the investment must have involved no infraction (however peripheral or incidental) of the host State's law. The Tribunal finds no warrant for reading any such requirement into

[151] Claimant's Reply on the Merits, ¶¶267-273.

Article 1(a). Further, the Tribunal does not consider that the violations of Slovak law alleged in the present case are of a nature that fall into the same category as a violation of a prohibition on foreign investment in a particular sector. The fact that the Slovak Republic has not revoked Union Healthcare's licence is, in the view of the Tribunal, a highly significant indication that it regards the alleged violations as compatible with the continued existence of the investment and also powerful confirmation that a good faith interpretation of Article 1(a) of the Treaty does not require the exclusion of Claimant's investment from its scope.

177. The Tribunal accordingly rejects Respondent's argument that the Tribunal lacks jurisdiction because the investment was made in violation of the law of the Slovak Republic. This conclusion goes to the question of the jurisdictional objection. The present Tribunal is aware that in other cases tribunals have considered whether an investment that satisfies the jurisdictional requirements *ratione materiae* of a BIT may yet be denied protection under that BIT because, for example, the investor acted in bad faith by resorting to fraud or corruption in order to make the investment.[152] The Tribunal has considered whether the established or alleged violations of Slovak law similarly require the denial of protection to the investor under the Treaty, and it has concluded that they do not. Appropriate remedial steps have been taken by Respondent, according to its own laws, in respect of the violations; no violation of fundamental principles of probity or public policy is alleged, such as exists in cases of material corruption or deceit by an investor; and the Tribunal concludes that there is no basis for the denial of the benefits of protection under the Treaty.

178. Respondent also argued that "future investments, which are only planned but were not conducted, are not protected by the BIT." It says that "the BIT does not protect investments which never occurred, and much less still, the profits that these hypothetical investments could have generated.[153]

179. The Tribunal considers that this is a question of the existence or quantum of any recoverable loss, rather than of jurisdiction. The question might typically arise in the context of a claim for loss of expected profits; and in that context distinctions might have to be drawn between a continuing investment in the planned development of an

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152 *World Duty Free v. Kenya*, Award, ICSID Case No. ARB/00/7, 4 October 2006; *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008.

153 Respondent's Rejoinder on the Merits, ¶39.

existing project and an investment in a new and distinct project. But it is not necessary to consider such questions in the present context, because the Tribunal has already satisfied itself that it has jurisdiction on the basis of the investment made by Claimant. It accordingly rejects this argument in so far as it is raised as an objection to jurisdiction.

180. The Tribunal accordingly rejects all of Respondent's objections to its jurisdiction.

VII. THE PARTIES' CHARACTERISATION OF THE FACTUAL RECORD

181. While the Parties are in agreement with respect to the basic content of the Slovak legislation introduced in 2004 and 2006/2007 and set forth in the above statement of facts (see above at paragraph 76ff), they differ significantly with respect to the implications of these developments. In particular, they differ as to the degree to which the 2004 Reform marked a departure from the Slovak Republic's previous health insurance framework; the policy underpinnings of the 2004 Reform and the relation between the 2004 Reform and Claimant's decision to invest in Union Healthcare; and the political landscape which led to the reversal of the 2004 legislation in the 2007 Reforms. The following sections summarise their respective accounts.

A. The Parties' Characterisation of the 2004 Reform

Claimant's Position

182. According to Claimant, the series of legislative reforms enacted in 2004 represented a "fundamental change" in the legal framework regulating health insurance in the Slovak Republic, introducing a "wide ranging" and "competitive market place in which profits could be made" and health insurers would operate as commercial businesses.[154] In Claimant's view, this transformation involved (i) permitting companies to use their discretion in the distribution of profits, including in distributing surpluses as dividends; (ii) giving companies the opportunity to make independent decisions regarding the allocations of their budgets, such as the relative amounts to be dedicated to administrative and other fixed costs; and (iii) allowing companies to compete for clients.[155] In Claimant's view, the 2004 Reform envisaged the overhaul of a heavily indebted public health insurance system and its replacement with a private and

[154] Claimant's Memorial on the Merits, ¶20.

[155] Claimant's Statement of Claim, ¶III.16.

competitive one. Competition within this system was managed through the creation of "an independent Health Care Authority with a fully independent executive board."[156]

183. Claimant contends that in light of Respondent's accession on 1 May 2004 to the European Union and its adoption of the Euro on 1 January 2009,[157] the changes seemed to represent a "natural evolution in the development of a health care system" which Claimant regarded as "irreversible."[158] These reforms, Claimant submits, were "instrumental in making investment in the Slovak health insurance sector attractive to Eureko."[159]

Respondent's Position

184. Respondent disagrees with Claimant's characterisation of both the scope and objective of the 2004 Reform. In Respondent's view, the 2004 Reform was never intended to replace the public health insurance framework of the Slovak Republic with a private, competitive one.[160] Rather, Respondent contends that Slovak public health insurance has always operated in accordance with certain "fundamental principles"[161] which have not significantly changed since 1993 (being the date when Respondent became an independent State).[162] In short, this comprises a system in which citizens are mandatorily insured and pay health insurance levies in an amount fixed by statute (with the State paying the levies for a portion of the population). The extent of coverage provided is established by law; insurers are not free to reject applicants; and the relationship between insurer and insured is based on statute, not contract.

185. Rather than change these characteristics entirely, Respondent considers that the 2004 Reform aimed to introduce "a number of limited amendments into the healthcare insurance system to enhance managed competition within the system,"[163] and to redress inefficiencies which had accumulated in its operation over the years, specifically, a large accumulated deficit[164] and a lack of transparency.[165] In Respondent's view,

156 Claimant's Memorial on the Merits, ¶¶38, 44.

157 Claimant's Statement of Claim, ¶19.

158 Claimant's Memorial on the Merits, ¶65.

159 Claimant's Statement of Claim, ¶III.15.

160 Counter-Memorial on the Merits, ¶112-115.

161 Respondent's Statement of Defence, ¶14.

162 Counter-Memorial on the Merits, ¶27.

163 Counter-Memorial on the Merits, ¶27.

164 Respondent's Statement of Defence, ¶16.

Claimant greatly exaggerates the magnitude of the changes introduced, as the majority of legislation either amended already existing provisions or introduced minor changes.

186. Respondent contends that Claimant is mistaken in its assumption that the conversion of public health insurance providers into joint stock entities had as its purpose the creation of companies "capable of generating profit and functioning in a competitive environment."[166] Instead, Respondent argues, the 2004 Reform had the more modest goal of forcing health insurance companies to improve budget transparency by introducing balance sheet accounting requirements and corporate governance rules.[167] In support of its argument, Respondent submits that under Slovak law, the legal difference between a health insurer "'*sui generis*' and a health insurer as a joint stock company, relates to the accounting methods used by joint stock companies and the manner in which they manage the premiums they hold."[168] In Respondent's view, this is merely a technical difference which does not speak to the fundamental character and purpose of a health insurance company: the Slovak Commercial Code provides that a joint-stock company may function for a purpose other than the generation of profits, with the provision of public health insurance being one such purpose.[169] Respondent argues that the "privatisation of health insurers never occurred, nor should it have occurred."[170]

187. Respondent submits that Claimant also exaggerates the independence of the Health Care Authority. Respondent notes that the Authority had always been responsible to the Ministry of Health, which decides policy, and that the Authority is merely an organ for implementing the policy of the Ministry of Health and "executing the surveillance of the sector under strict conditions set by law and as such is not independent."[171] Respondent observes that in light of the backgrounds of the individuals previously appointed to the post, Claimant should have been on notice that the Authority was not politically independent.[172]

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165 Respondent's Statement of Defence, ¶17.

166 Counter-Memorial on the Merits, ¶112.

167 Counter-Memorial on the Merits, ¶113.

168 Counter-Memorial on the Merits, ¶116.

169 Counter-Memorial on the Merits, ¶117.

170 Counter-Memorial on the Merits, ¶125.

171 Counter-Memorial on the Merits, ¶128.

172 Counter-Memorial on the Merits, ¶130.

188. Finally, Respondent argues that Claimant makes other errors in its description of the changes introduced by the 2004 Reform. Respondent contends that (i) insurance companies always had the option of selectively contracting with health care providers, as long as the provider was properly licensed;[173] (ii) beneficiaries did not gain the right to switch insurance companies once a year with the introduction of the 2004 Reform, because the right had existed in the Slovak system since 1995, and could be exercised once every six months instead of once a year as under the 2004 Reform;[174] and (iii) the scope of the mandatory health package was never actually reduced.[175]

B. Eureko's Investment and the Political Situation in 2004 and 2006

Claimant's Position

189. Claimant contends that in deciding to invest in the Slovak Republic, it "acted upon a well thought-out identification of an opportunity to invest,"[176] and the expectation that the 2004 Reform would constitute an enduring change. Claimant submits that this expectation was justified by its experience in other European markets and by statements from the Slovak Health Minister, Mr Rudolf Zajac, made prior to Eureko's investment.[177] Claimant refers to the testimony of Mr Willem van Duin, then a member of Eureko's board, that:[178]

> Eureko was prepared to further invest in the Slovak Republic because it was confident that it had acquired sufficient knowledge of the country, market and legislative framework to be confident that the making of a long term investment – which is the nature of investments in the insurance industry – would be opportune and pay off. In this respect, Eureko took into account the Slovak Government's statements, the Slovak Republic's EU aspirations and later EU membership, the EU and national legal framework and also the manner in which it would be able to take recourse if the investments would be impaired.

190. Claimant submits that its decision to invest closely followed the adoption of the 2004 Reform.[179] According to Claimant, interviews with Slovak officials conducted near the time of its investment shed light on the Slovak Republic's intentions in

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173 Counter-Memorial on the Merits, ¶¶131-134.

174 Counter-Memorial on the Merits, ¶¶135-136.

175 Counter-Memorial on the Merits, ¶139.

176 Claimant's Memorial on the Merits, ¶64.

177 Claimant's Memorial on the Merits, ¶64.

178 Claimant's Memorial on the Merits, ¶78; Witness Statement by Mr. Willem van Duin (Exhibit CW-1), ¶11.

179 Claimant's Memorial on the Merits, ¶70.

enacting the 2004 legislation. Claimant recounts a "specific invitation" to invest made by Minister Zajac in December 2004, during which he "made considerable efforts to explain the basis of the new health care legislation."[180] In public statements in 2005, Minister Zajac further emphasised that the 2004 Reform was intended to "open doors for private investors into state-owned health insurance companies."[181]

191. Claimant concedes that it expected a return on its investment that would be "marginal in terms of percentage of premium income," but argues that this was nonetheless an appealing prospect insofar as premium amounts were generally substantial.[182] Although cross-selling the products of Union Insurance was an element of Eureko's anticipated business model, Claimant submits that it had planned for Union Healthcare to provide "independent profit generation."[183] According to Claimant, the yearly profits attributable to cross-selling never exceeded €105,000.[184]

192. Claimant filed for registration with the Slovak Healthcare Authority in 2005, before "the elections and any announcement thereof"[185] and further maintains that the prospect of elections in 2006 did not upset its calculations.[186] The outcome of an election is never certain[187] and, according to Claimant, "SMER itself focused on the abolishment of user fees" during its campaign, rather than more fundamental changes.[188] Most of SMER's potential coalition partners did not oppose at least the core provisions of the 2004 Reform[189] and a majority of the ultimate coalition was comprised of parties that had supported the 2004 Reform.[190] It was not until December 2006, Claimant argues—after it had established Union Healthcare and made a substantial investment—that Eureko could have appreciated the extent of the changes being contemplated.[191] On 9 December 2006, the Chairman of the Slovak Parliament, Mr Paška, publicly

180 Claimant's Memorial on the Merits, ¶81.

181 Claimant's Memorial on the Merits, ¶37.

182 Claimant's Memorial on the Merits, ¶81; Claimant's Reply on the Merits, ¶¶108-110.

183 Claimant's Memorial on the Merits, ¶84; Claimant's Reply on the Merits, ¶¶131-134.

184 Claimant's Memorial on the Merits, ¶84; Claimant's Reply on the Merits, ¶¶131-134.

185 Claimant's Memorial on the Merits, ¶90.

186 Claimant's Reply on the Merits, ¶36.

187 Claimant's Reply on the Merits, ¶34.

188 Claimant's Memorial on the Merits, ¶93; Claimant's Reply on the Merits ¶37.

189 Claimant's Memorial on the Merits, ¶94.

190 Claimant's Memorial on the Merits, ¶94; Claimant's Reply on the Merits ¶37.

191 Claimant's Statement of Claim, ¶III.37; Claimant's Memorial on the Merits, ¶102; Claimant's Reply on the Merits, ¶35.

expressed the position that "all public funds should be under public control."[192] Prior to that point, Claimant observes, the coalition manifesto stated that the Government would not fundamentally alter the legal framework established by the 2004 Reform;[193] and, upon request by Eureko, the acting Slovak Minister of Health, Mr Valentovič, confirmed that "no systemic changes were imminent that would be at odds with Eureko's interests as an investor in the Slovak health insurance sector."[194]

Respondent's Position

193. Respondent submits that, in light of all the circumstances, Claimant could not reasonably have believed that the 2004 Reform would remain in effect and that any such belief indicates a lack of due diligence.[195] The 2004 Reform, Respondent notes, was extremely unpopular[196] and by the time of the 2006 election, political parties opposing the 2004 Reform had a "20% lead over parties who had supported the 2004 Acts."[197] In Respondent's view, Claimant understates the predictability of the changes that were made with the 2007 Reforms and overstates the importance of the reassurances it claims to have received from the Respondent as regards the 2004 Reform. According to Respondent, "Union Healthcare could have, and should have terminated its activities to avoid the consequences of expected regulation."[198]

194. First, Respondent contests the timeline of Claimant's investment. Although Claimant may have contemplated investing in 2004 and 2005, Respondent argues that Claimant did not in fact establish any investment before it obtained the "licence to perform public health insurance" on 13 February 2006.[199] Union Healthcare, in turn, was registered only on 9 March 2006;[200] and Claimant did not insure beneficiaries until

192 Claimant's Statement of Claim, ¶III.38.

193 Claimant's Memorial on the Merits, ¶94;. Claimant's Statement of Claim, ¶¶I.23-24; Claimant's Reply on the Merits, ¶37, 42.

194 Claimant's Memorial on the Merits, ¶94; Claimant's Reply on the Merits ¶42.

195 Counter-Memorial on the Merits, ¶50.

196 Counter-Memorial on the Merits, ¶49.

197 Counter-Memorial on the Merits, ¶369.

198 Counter-Memorial on the Merits, ¶365.

199 Counter-Memorial on the Merits, ¶360.

200 Counter-Memorial on the Merits, ¶361.

September 2006, a date significantly later than the call for early elections which had been made on 9 February 2006.[201]

195. Second, Respondent argues that Claimant misconstrues the significance of comments made by Mr Zajac, as well as the importance of Mr Zajac's presentations on the 2004 Reform.[202] Mr Zajac's presentations, Respondent contends, were nothing more than a public description of how the new system would function and were not an attempt to induce foreign investors into the Slovak market.[203] Respondent similarly discounts the importance of the January 2007 Letter from the former Minister of Health Mr Valentovič, insofar as it was written significantly after Claimant had made its investment.[204]

196. Third, Respondent submits that changes were to be expected in light of the Slovak political landscape. Respondent disagrees with Claimant's assessment that the main coalition partners of the new Government "were in favour of a stability [sic] of at least the key pillars of the 2004 Liberalisation."[205] The final coalition, Respondent contends, included 85 members out of 150 in Parliament who were against the 2004 Reform.[206] In Respondent's view, "only a blind businessman would have believed that such a coalition would allow public health insurers to retain the ability to distribute dividends from insurance levies."[207]

197. All of these assessments, Respondent argues, are confirmed by Claimant's March 2006 Business Plan, which reveals an awareness of impending changes in the investment climate.[208] Respondent cites the following excerpts from Claimant's 2006 plan:[209]

> One could argue that due to the parliamentary elections in June 2006 it would be better to wait and see what changes a new government would introduce to the healthcare system before deciding whether to enter or not.
>
> [. . .]

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201 Counter-Memorial on the Merits, ¶367.

202 Counter-Memorial on the Merits, ¶126; Reply on the Merits ¶29.

203 Counter-Memorial on the Merits, ¶126.

204 Counter-Memorial on the Merits, ¶390.

205 Counter-Memorial on the Merits, ¶374.

206 Counter-Memorial on the Merits, ¶375.

207 Counter-Memorial on the Merits, ¶376.

208 Respondent's Statement of Defence, ¶¶96.

209 Respondent's Statement of Defence, ¶30; Exhibit C-14, pp. 1, 9.

> Political intervention after June 2006 elections could make the health insurance market less attractive and in the extreme see a renationalisation.

On the basis of this excerpt, Respondent argues that Eureko's assertion that it did not anticipate a changed legislative framework is "at best, disingenuous."[210]

C. Characterising the 2007 Reforms

Claimant's Position

198. According to Claimant, the 2007 Reforms represent a "comprehensive policy with the ultimate aim to drive private investors out of the Slovak health insurance sector."[211] The measures represented a "turning of the tide" and revealed a "new attitude towards health insurance."[212] In enacting these measures, Claimant contends the Government intended to re-concentrate control of the health insurance sector with the state,[213] ultimately by establishing a single, public health insurance provider.[214] Claimant points in particular to the rhetoric of Prime Minister Fico, to his statements that it is "not normal" for health insurance companies to make a profit,[215] and to his professed intention to "drive out private health insurance companies."[216]

199. Claimant disputes that this shift in the investment climate from "highly favourable" to "extremely hostile" was underpinned by any economic rationale.[217] In general, Claimant submits that Respondent's policy explanation for the change amounts to "unsupported assertions about cost overruns and escalation in the health care system, destabilising effects of the 2004 Reforms and various forms of illegal conduct and misbehaviour by private parties active in the Slovak Health Insurance Market."[218] Respondent further, in Claimant's view, resorts to "discrediting Eureko's general economic and business understanding" through assertions that are themselves

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210 Respondent's Statement of Defence, ¶30.

211 Claimant's Memorial on the Merits, ¶103.

212 Claimant's Statement of Claim, ¶III.32.

213 Claimant's Statement of Claim, ¶III.36.

214 Claimant's Statement of Claim, ¶¶III.44 and III.48.

215 Claimant's Statement of Claim, ¶III.39.

216 Claimant's Memorial on the Merits, ¶105.

217 Claimant's Statement of Claim, ¶III.56.

218 Claimant's Reply on the Merits, ¶138.

"defamatory."[219] Rather than engage with what it considers to be speculative arguments, Claimant submits that it is "not necessary to debate the economic rationale of the health care system at length."[220] According to Claimant, the Parties are in agreement that consideration of the policy rationale for the 2007 Reforms is unnecessary to the matter before the Tribunal.[221]

Respondent's Position

200. Respondent disputes both Claimant's characterisation of the 2007 Reforms and the assertion that the Tribunal need not examine the policy rationale behind the Reforms. The reasonableness of the changes, Respondent argues, relates directly to the question of Claimant's expectations and Respondent's contention that the measures fall within the ambit of Respondent's regulatory discretion. In Respondent's words, "[a] proper and legitimate health insurance policy outlines what is commonly acceptable in a country that has a public health insurance system and on which a reasonable investor should count."[222]

201. The 2007 Reforms, Respondent argues, were crafted to address problems arising from the 2004 Reform "that jeopardised the whole system."[223] The effort took place against the background of what remained after 2004 a *public* health care system—not a privatised one—insofar as health insurance remained the subject of a mandatory government levy. The Slovak Republic, accordingly, remained responsible for the system. According to Respondent, "[t]he fact that the health insurance system continued to exist as a public health insurance system during the period of effectiveness of the 2004 Acts is of enormous importance in deciding what changes Respondent is entitled to make in this field."[224]

202. Respondent submits that the 2004 Reform attempted to introduce a system of managed competition, yet failed to appreciate the need for managed competition in health insurance "to be heavily regulated to avoid adverse risks," in particular the risk that "a health insurer will maximise its efforts to cut costs at the expense of the quality of

219 Claimant's Reply on the Merits, ¶168.

220 Claimant's Reply on the Merits, ¶163.

221 Claimant's Reply on the Merits, ¶163.

222 Respondent's Rejoinder on the Merits, ¶51.

223 Counter-Memorial on the Merits, ¶183.

224 Respondent's Rejoinder on the Merits, ¶59.

health care."[225] Among the defects of the 2004 Reform identified by Respondent was the introduction of a profit provision into an underfinanced system in which the generation of profits was structurally impossible without adverse effects.[226] Because health insurance levies were fixed by law, insurers' only options to reduce expenditures were to lower the prices paid to health care providers, limit the provision of health care by providers, or employ marketing to acquire a healthier portfolio of insurees.[227] Respondent takes particular issue with the contracts entered into with health insurance providers, which imposed annual limits on the amount of care that would be covered and employed a "degressive rate," reimbursing providers at a lower marginal rate as additional patients were cared for. Respondent characterises these practices as "unsafe," leading to the generation of profits "to the detriment of patients who are not provided with care despite having paid their levies" or to health care providers who may go uncompensated for duly provided care.[228] The ban on profits was introduced in 2007 in response to the failure of elements in the 2004 Reform to enforce a duty to provide continuous care.[229] Notably, Respondent observes, comparable systems (in which multiple health insurers are permitted, but prevented from generating profits) are found in other European countries.[230]

203. Respondent further draws attention to the amended network requirements of the 2004 Reform, which gave insurers greater flexibility in contracting with health providers. The effect of this provision, Respondent argues, was to give insurers a "disproportionately strong bargaining position" vis-à-vis providers.[231] This weakened the position of providers to the extent that they had no choice but to accept disadvantageous contracts that drove up debts among providers. Respondent emphasises that the 2004 network requirements were based on specialisation, rather than facility, making it difficult for providers to offer coordinated care; while an insurer's network would include a full range of specialists, they would be scattered at

225 Respondent's Counter-Memorial on the Merits, ¶¶148-49.

226 Respondent's Counter-Memorial on the Merits, ¶¶153-58.

227 Respondent's Counter-Memorial on the Merits, ¶174.

228 Respondent's Counter-Memorial on the Merits, ¶¶175-78.

229 Respondent's Counter-Memorial on the Merits, ¶¶196-98; Respondent's Rejoinder on the Merits, ¶94.

230 Respondent's Counter-Memorial on the Merits, ¶78.

231 Respondent's Counter-Memorial on the Merits, ¶202

different facilities throughout a region and unable to work together.[232] Additionally, Respondent submits that insurers prioritised cost over quality in placing contracts with health providers.[233] The amended network requirements, in Respondent's view, were created to address these problems.[234] However, while health insurance companies were obliged to contract with a specific "minimum network" of health care providers under the 2007 Reforms, Respondent notes that this did not prevent them from recommending doctors and specialists outside the minimum network to their insured.[235]

204. Other aspects of the 2007 Reforms, Respondent argues, were equally in the public interest and directed at identified problems stemming from the 2004 Reform. The cap on operating expenses was intended to halt a "wasteful drain of public resources from the public health insurance system" and address a situation in which the private insurers all indicated substantially higher operating costs than the State-owned insurance companies.[236] The ban on brokers sought to remedy what Respondent characterises as the large number of complaints concerning the unfair or illegal practices of brokers.[237] Adjusting the percentage of health insurance levies subject to redistribution, Respondent argues, was an appropriate response to the efforts of insurers to attract a healthier (and accordingly, more profitable) portfolio, notwithstanding their obligation to accept any applicant. Redistribution rates in the Slovak Republic have changed many times previously, and a number of European states in fact redistribute 100 percent of health insurance levies. Finally, according to Respondent, the ban on transferring insurance portfolios was justifiably intended to protect patients' rights, preventing the situation in which an individual might be transferred involuntarily from one insurer to another and forced in the process to change doctors to those in the network of the new insurer.[238] The ban does not, Respondent emphasises, prevent the transfer of an insurer's interest in other ways that preserve established relationships between patients and their doctors.[239]

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232 Respondent's Counter-Memorial on the Merits, ¶205.

233 Respondent's Counter-Memorial on the Merits, ¶202.

234 Respondent's Counter-Memorial on the Merits, ¶¶279-83.

235 Counter-Memorial on the Merits, ¶286.

236 Respondent's Counter-Memorial on the Merits, ¶¶213, 289.

237 Respondent's Counter-Memorial on the Merits, ¶¶302-04.

238 Respondent's Counter-Memorial on the Merits, ¶310.

239 Respondent's Counter-Memorial on the Merits, ¶¶311-12.

205. For a further group of the 2007 Reforms, Respondent denies that they in fact represent significant changes. In Respondent's view, the office of the Chairman of the Health Care Authority was not politicised by the 2007 Reforms; Respondent notes that the Regulator was at all times a political appointee and submits Claimant exaggerates the independence of the Regulator under the 2004 Reform.[240] Similarly, Respondent contends that enhancing budget scrutiny over insurance companies did not significantly change Claimant's existing legal obligations to report on its business[241] and amounted to nothing more than an additional "administrative duty" on Claimant.[242] Even before the 2007 Reforms, Claimant had been required to send an annual "[r]eport on the fulfilment of the budget for the other subjects of public administration" to the State Treasury.[243] Finally, Respondent notes, the solvency requirements of the 2007 Reforms "merely serve[] to confirm the fulfilment of the Claimant's previously existing obligation to cover its due liabilities."[244] Only in the event that Claimant neither challenges nor pays an invoice is the mechanism for solvency sanctions triggered.[245]

D. The Significance of the Slovak Constitutional Court Decision

Claimant's Position

206. In striking down the ban on profits, Claimant submits that the Constitutional Court's decision of 26 January 2011 effectively established a breach of the BIT.[246] Equally important, Claimant argues, the Constitutional Court confirms three aspects of the factual record: (i) that the 2004 Reform was intended to establish a competitive environment in which health insurers would act as entrepreneurs on a profit basis; (ii) that this constituted a significant change in the nature of the Slovak healthcare framework;[247] and (iii) that the 2007 Reforms were not carried out in a legitimate fashion within the margin of appreciation for regulatory measures.[248]

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240 Counter-Memorial on the Merits, ¶330.

241 Counter-Memorial on the Merits, ¶¶333-337.

242 Counter-Memorial on the Merits, ¶337.

243 Counter-Memorial on the Merits, ¶336.

244 Respondent's Counter-Memorial on the Merits, ¶345.

245 Counter-Memorial on the Merits, ¶347.

246 Claimant's Reply on the Merits, ¶62.

247 Claimant's Reply on the Merits, ¶62.

248 Claimant's Reply on the Merits, ¶205.

Respondent's Position

207. Respondent submits that the Constitutional Court decision striking down the ban on profits is only significant insofar as the ban on profits is no longer applicable. The standard of protection under the BIT, however, "differs from the protection of the Constitution applied by the Court" and no conclusions with respect to the BIT follow automatically from the decision.[249] The difference stems, in Respondent's view, from the fact that the Constitutional Court approached the matter from the perspective of protecting the Slovak legal order, whereas this Tribunal is asked to consider more specifically "whether the Claimant's investment was impaired by the conduct of the state in breach of the BIT."[250] The Constitutional Court, Respondent notes, did not consider the facts of the present case, and its finding of a restriction of property rights is, in Respondent's view, more limited than expropriation and without an analogue under the BIT.[251]

208. According to Respondent, the Constitutional Court's decision further establishes the constitutionality of other measures of which Claimant complains – in particular the cap on operating expenses, the solvency requirements, and the changes in the percentage of insurance premiums subject to redistribution.[252]

VIII. THE TRIBUNAL'S OBSERVATIONS ON THE WITNESS TESTIMONY

209. In witness statements submitted with the Parties' pleadings and during the hearings held in December 2011 and January 2012, the Tribunal received the testimony of a number of individuals involved in the events underlying the Parties' dispute in this arbitration.

210. The following witnesses appeared at the hearing on behalf of Claimant: Mr Willem van Duin, Chairman of the Executive Board of Eureko; Mr Fred Hoogerbrug, Director of European Affairs of Eureko, and former member of Union Insurance's Supervisory Board; Mr Tibor Bôrik, Chairman of the Managing Board of Union Healthcare; Mr Bjarne Slorup, who served as a board member of Union Insurance, and by Government invitation as a board member of state-owned insurance company VZP, and on the

249 Respondent's Rejoinder on the Merits, ¶119.

250 Respondent's Rejoinder on the Merits, ¶120.

251 Respondent's Rejoinder on the Merits, ¶¶122, 125.

252 Respondent's Rejoinder on the Merits, ¶118.

managing board of Union Healthcare during the "hibernation"; Mr Peter Pažitný a former advisor to the Slovak Health Minister during the design and implementation of the 2004 Reforms, presented as an expert witness on the Slovak health insurance sector; and Mr Richard Indge, of Ernst & Young, presented as an expert witness on damages. The following witnesses appeared at the hearing on behalf of Respondent: Professor Dr Dr Thomas Gerlinger, an expert witness in international comparative health care systems; and Mr Michael Peer and Ms Zuzana Kepková of KPMG, who provided expert witness testimony on damages. The Tribunal is grateful to all of these witnesses for their participation. The following section will address one aspect of the witness testimony that the Tribunal found particularly helpful.

211. Eureko's CEO, Mr Willem van Duin, testified before the Tribunal on 14 December 2011. He started working for Eureko in 1987, and was appointed to the Executive Board in 2004, becoming its Vice-Chairman on 1 October 2008 and Chairman on 10 February 2009. Prior to taking on this overall responsibility for Eureko he was supervisory director of a number of Eureko entities, including Union Insurance and Union Healthcare. The Tribunal considered him to be a candid and impressive witness, who was clearly knowledgeable and experienced in health insurance, and also well qualified to explain decisions taken by Eureko during the relevant period. His testimony, in his witness statement and particularly before the Tribunal, put the documentary evidence in the case into much clearer perspective.[253] The Tribunal records that much of Mr Van Duin's testimony was not specifically challenged by Respondent, which limited itself (from its own choice) to a very short cross-examination at the hearing in December 2011. The Tribunal accepts, as factually accurate and credible, the testimony of Mr Van Duin.

212. In his testimony, Mr Van Duin explained that it was the knowledge (known to him personally at the time) that Slovakia was moving to a private health insurance system, of a kind with which Eureko was familiar, that was the key to Eureko's decision to enter into concrete discussions regarding its entry into the Slovakian market.[254]

213. At around this time Eureko was also considering entry into certain other east European markets, but concluded that the regimes in those countries, and the future developments

253 Witness Statement, 15 July 2010; Hearing Tr. (Day 3), 14 December 2011 at 1-56.

254 Hearing Tr. (Day 3), 14 December 2011 at 8–13.

that the respective Governments had in mind, were not such as to make investment in those markets attractive.[255]

214. Eureko was aware of the unpopularity of the Slovak reforms and of the risk of a change of policy following the elections in the Slovak Republic, which were known at the time to be imminent. Eureko considered that those risks were not so great as to require postponement of its entry into the market. The point was made in Eureko's March 2006 Business Plan: [256]

> it is our judgement that even a social-democratic lead government would not undo the unpopular, but necessary health reform. It is our judgement that they would change the most unpopular elements, but leave the basic structures in place.

215. Mr Van Duin was asked about the basis on which, at the time when Eureko made its investments in the Slovak Republic, he was satisfied that there was no significant chance of a reversal of the health insurance policy of the Government of the Slovak Republic over the life of the investment. He replied as follows:[257]

> It's hard to explain why I did not think what I didn't think. But we made an assessment. And in those days when the changes were implemented, and based on the meetings we had, we were confident that that would be the way to go forward. So there was no reason for us to think that that would change so dramatically at such a short time.

216. Answering questions from the Tribunal, Mr Van Duin stated that Eureko would have been able to modify its operations so as to work with the reforms regarding the cap on administrative expenses,[258] the ban on brokers,[259] the network requirements,[260] and the solvency requirements.[261] Similarly, Eureko could have accommodated the obligation to submit its budgets to the Government.[262]

217. On the other hand, asked if Eureko could have worked with the ban on profits, Mr Van Duin said "No. If we would have known in advance I would not have made any

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255 Hearing Tr. (Day 3), 14 December 2011 at 7–11.

256 Exhibit C-14, p. 1.

257 Hearing Tr. (Day 3), 14 December 2011 at 30.

258 Hearing Tr. (Day 3), 14 December 2011 at 12–14, 16.

259 Hearing Tr. (Day 3), 14 December 2011 at 12, 14, 16.

260 Hearing Tr. (Day 3), 14 December 2011 at 16, 17.

261 Hearing Tr. (Day 3), 14 December 2011 at 17.

262 Hearing Tr. (Day 3), 14 December 2011 at 17, 18.

proposals to invest in Slovakia."[263] He took the same view of the ban on transfers of insurance portfolios.[264] The combined effect of those measures was that Eureko could neither remain active and making profits in the Slovak Republic, nor sell its business and withdraw from the Slovak Republic.

218. In practical terms, after the 2007 Reforms Eureko's only possibility of earning income from its operations in Slovakia arose from its right to take out operating expenses up to the permitted maximum, and the possibility of extracting further value from its investment in Slovakia by using its reputation there to sell other forms of insurance.

219. Eureko accordingly had to decide whether to try to expand its health insurance business despite the 2007 Reforms (and if so, how) along the lines that it had planned, or to put its operations into some sort of suspension, servicing existing clients but not seeking to expand its client base.

IX. LIABILITY AND THE MERITS

A. The Parties' Arguments on Liability and the Merits

1. Expropriation

220. Article 5 of the BIT provides as follows:[265]

> Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments, unless the following conditions are complied with:
>
> (a) the measures are taken in the public interest and under due process of law;
>
> (b) the measures are not discriminatory;
>
> (c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in any freely convertible currency accepted by the claimants.

263 Hearing Tr. (Day 3), 14 December 2011 at 19; cf., Hearing Tr. (Day 3), 14 December 2011 at 20–22.

264 Hearing Tr. (Day 3), 14 December 2011 at 22.

265 Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, Art. 5 (Exhibit C-10).

Claimant's Position

221. Eureko submits that the definition of expropriation under the BIT is broad and encompasses "indirect expropriation" that does not require a finding that legal title has been transferred to others.[266] Whether governmental action qualifies as indirect expropriation depends, according to Claimant, on the "intensity of interference," and whether such action extends beyond "normal regulatory influence" and affects "the core of the of essential attributes of property." [267] Arbitral tribunals evaluating this question in other matters, Claimant submits, have generally applied three tests.

222. First, Claimant notes, tribunals have examined "whether events demonstrate that the owner was deprived of fundamental rights of ownership."[268] This standard was applied by the tribunals constituted in *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran et. al.*; *Wena Hotels Limited v. Arab Republic of Egypt*;[269] *CME Czech Republic B.V. v. Czech Republic*;[270] *Generation Ukraine, Inc. v. Ukraine*;[271] *Occidental Exploration and Production Co. v. Republic of Ecuador*;[272] *CMS Gas Transmission Co. v. Argentine Republic*;[273] *Biwater Gauff Ltd. v. Tanzania*;[274] *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. Mexico*;[275] and *Azurix v. Argentine Republic*.[276]

223. Second, Claimant argues, tribunals have considered whether the "enjoyment or benefit of the asset is effectively neutralised."[277] Such a standard was applied by the tribunals

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266 Claimant's Statement of Claim, ¶¶IV.16-17; Claimant's Memorial on the Merits, ¶147.

267 Claimant's Statement of Claim, ¶¶IV.26, IV.29; Claimant's Memorial on the Merits, ¶147.

268 Claimant's Memorial on the Merits, ¶148, quoting *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran et. al*. 6 Iran-United States C.T.R. 210,225.

269 *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No.ARB/98/4, Award, 8 December 2000, ¶99 (hereinafter "***Wena Hotels Ltd.***").

270 *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL (Czech/Netherlands BIT), Partial Award, 13 September 2001, ¶608 (hereinafter "***CME***").

271 *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No ARB/00/9, Partial Award, 16 September 2003, ¶20.23.

272 *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, ¶88 (hereinafter "***Occidental***").

273 *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶262 (hereinafter "***CMS Gas Transmission Co.***").

274 *Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶509 (hereinafter "***Biwater Gauff***").

275 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, ¶245.

276 *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶322 (hereinafter "***Azurix***").

277 Claimant's Memorial on the Merits, ¶150.

in *Lauder v. Czech Republic*;[278] *Occidental*;[279] *BG Group Plc v. Argentina*;[280] *Toto Construzioni Generali S.p.A. v. Republic of Lebanon*;[281] *CMS Gas Transmission Co.*;[282] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*;[283] and *CME*.[284]

224. Third, Claimant submits, tribunals have evaluated the actions complained of "against what may be described as a catalogue of measures that are considered to qualify as indirectly expropriatory."[285] Such "catalogue," Claimant observes, has included restrictions on the distribution of dividends to shareholders in the decisions taken by tribunals in *Pope & Talbot Inc. v. Canada*;[286] *PSEG Global et. al. v. Turkey*;[287] *Walter Bau v. Thailand*;[288] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*;[289] *Sempra Energy International v. Argentine Republic*;[290] and *BG Group*.[291]

225. In evaluating governmental conduct against these standards, Claimant argues, a finding of expropriatory intent is not required, although it may "weigh in favour of showing a measure to be expropriatory."[292] Although expropriation may be lawful when taken in the public interest, in a non-discriminatory fashion, and accompanied by compensation,

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278 *Ronald S. Lauder v. Czech Republic*, UNCITRAL (Czech/U.S. BIT), Award, 3 September 2001, ¶200 (hereinafter "***Lauder***").

279 *Occidental*, ¶84.

280 *BG Group Plc v. Argentina*, UNCITRAL (Argentina/UK BIT), Final Award, 24 December 2007, ¶264 (hereinafter "***BG Group***") (*annulled* Republic of Argentina v. BG Group, 665 F.3d 1363 (DC Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3070 (U.S. July 27, 2012) (No. 12-138)).

281 *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction of 11 September 2009, ¶183.

282 *CMS Gas Transmission Co*., ¶262.

283 *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, ¶198 (hereinafter "***LG&E***").

284 *CME*, ¶604.

285 Claimant's Memorial on the Merits, ¶153.

286 *Pope & Talbot Inc. v. The Government of Canada*, Interim Award, 26 June 2000, ¶100.

287 *PSEG Global et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, ¶278.

288 *Walter Bau v. Thailand*, Award, 1 July 2009 ¶10.16.

289 *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶245 (hereinafter "***Enron***").

290 *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶284 (hereinafter "***Sempra***").

291 *BG Group*, ¶271.

292 Claimant's Memorial on the Merits, ¶158, quoting *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶7.5.20 (hereinafter "***Vivendi***").

Claimant submits that an evaluation of lawfulness should "only be done after it has been held that an expropriation has occurred."[293]

226. On the facts of this case, Claimant argues that Respondent's actions have amounted to an "intense interference" such that "a substantial deprivation has taken place."[294] In Claimant's view, it has been "strongly and profoundly affected" in both its manner of conducting business in the Slovak Republic and in its ability to realise returns or profits on its investment.[295] According to Claimant, the ban on profits and the ban on the transfer of insurance portfolios each independently meet the threshold for expropriation. Additionally, Claimant submits that the "effect of all measures that form part of the 2007 Reversal" collectively constitutes expropriation.[296]

227. In Claimant's view, the ban on profits meets all three commonly-used tests for expropriation. The ban "constitutes a manifest deprivation of a fundamental ownership right," thereby meeting the first standard for expropriation.[297] The ability to distribute profits as dividends, Claimant notes, along with supervision of the company through its boards, is one of the two fundamental rights deriving from shareholding in a Slovak joint-stock company.[298] Equally, Claimant argues, the ban on profits has met the second standard by neutralising "the benefit and enjoyment of shares in Union Healthcare."[299] The right to receive a dividend is a principal benefit of holding shares and the ban on profits has rendered such share unmarketable, removing shareholders' "ability to convert the investment into cash."[300] Respondent's actions, Claimant contends, have made it inconceivable that a "commercial entity considering a presence in the Slovak health insurance market" would purchase Union Healthcare.[301] Claimant rejects the relevance of the sale of shares in another insurance company during the summer of 2009, noting it may rather reflect speculation that the ban on profits would

293 Claimant's Memorial on the Merits, ¶161.

294 Claimant's Statement of Claim, ¶¶IV.24-29.

295 Claimant's Statement of Claim, ¶IV.24; Claimant's Reply on the Merits, ¶¶210-211.

296 Claimant's Memorial on the Merits, ¶143.

297 Claimant's Memorial on the Merits, ¶169.

298 Claimant's Memorial on the Merits, ¶169.

299 Claimant's Memorial on the Merits, ¶173.

300 Claimant's Memorial on the Merits, ¶¶173-74.

301 Claimant's Statement of Claim, ¶IV.25

be reversed, rather than the existence of a market.[302] Claimant also discounts the relevance of its continued ability to cross-sell other insurance products from Union Insurance, arguing that this was never a major element of its business plan or source of profit.[303] Finally, Claimant notes that, in impeding the distribution of dividends to shareholders, the ban on profits falls squarely in the "catalogue of measures" that other tribunals have considered to constitute indirect expropriation.[304]

228. In the alternative, Claimant submits that the ban on portfolio transfer also constitutes expropriation.[305] An insurance portfolio is by far the most "precious asset" of a health insurance company and a "primary determinant for its profitability."[306] Union's portfolio was acquired at significant effort and expense, Claimant argues, and its value has been "wiped out," constituting a "gross interference with ownership rights."[307]

229. Finally, Claimant asserts that the actions taken by Respondent in the 2007 Reforms collectively amount to "creeping expropriation". The net effect of these measures is to reinforce the ban on profits and the prohibition on the sale of portfolios and to further restrict "Union Healthcare's ability to generate and distribute profits."[308] Although expropriatory intent is not required for a finding of expropriation, Claimant concurs with the position of the tribunal in *Vivendi* that such intent is relevant.[309] Here, Claimant notes, Respondent's course of action was motivated by the goal of "creat[ing] such conditions in public health insurance which will not be interesting for private health insurance companies."[310] Claimant references the Slovak Republic's Government Resolution 462/2007, arguing that it demonstrates that the Slovak Republic deliberately aimed at reducing the value of investment in private insurance companies.[311] In addition, Claimant relies on statements made by members of the

302 Claimant's Memorial on the Merits, ¶¶175-80.

303 Claimant's Memorial on the Merits, ¶¶183-186.

304 Claimant's Memorial on the Merits, ¶187.

305 Claimant's Memorial on the Merits, ¶190; Claimant's Reply on the Merits, ¶214.

306 Claimant's Memorial on the Merits, ¶¶190-92.

307 Claimant's Memorial on the Merits, ¶¶193-94.

308 Claimant's Memorial on the Merits, ¶197.

309 Claimant's Memorial on the Merits, ¶158.

310 Claimant's Memorial on the Merits, ¶196.

311 Claimant's Statement of Claim, ¶¶IV.31-35.

Slovak Government, in particular the Government's promise that it would "drive out private health insurance companies" from the market.[312]

230. Having argued that its interest in Union Healthcare was expropriated within the meaning of Article 5 of the BIT, Claimant further submits that this expropriation was unlawful. Eureko received no compensation as required by Article 5(c) and, accordingly, Claimant submits that it need not establish that the taking was not in the public interest or was discriminatory. Claimant notes, in any event, that members of the Slovak Parliament (including members of the Government between June 2010 and April 2012) argued successfully before the Slovak Constitutional Court that elements of the 2007 Reforms were unconnected to the public interest and discriminatory.[313] The Constitutional Court's decision, Claimant submits, also reaffirmed that the distribution of dividends is "undoubtedly one of the fundamental rights of shareholders"[314] and deemed the ban on the distribution of profits to be expropriatory, unconstitutional, and a violation of the European Convention on Human Rights.[315]

Respondent's Position

231. Respondent objects to the Tribunal's jurisdiction over this claim on the grounds that Article 5 of the BIT is superseded by or inapplicable under EU law (see above at paragraph 147ff).

232. With respect to the standard applicable to claims of indirect expropriation under the BIT, Respondent submits that expropriation can only occur if the adopted measure is (i) "not within the regulatory powers of the state" and (ii) "constitutes an effective neutralisation of the investment."[316] According to Respondent, whether an investment has been "effectively neutralised" depends upon whether it has been subjected to a "substantial deprivation."[317] In support of this standard, Respondent notes the decisions of arbitral tribunals in *Methanex v. United States*;[318] *Saluka v. Czech Republic*,[319] and *CMS Gas Transmission Co.*[320]

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312 Claimant's Memorial on the Merits, ¶199.

313 Claimant's Reply on the Merits, ¶210.

314 Claimant's Reply on the Merits, ¶210.

315 Claimant's Reply on the Merits, ¶197.

316 Respondent's Counter-Memorial on the Merits, ¶496.

317 Respondent's Counter-Memorial on the Merits, ¶497.

318 *Methanex Corporation v. United States of America*, Final Award, 3 August 2005.

233. In assessing whether a substantial deprivation has occurred, Respondent argues that the "most decisive" factors considered by arbitral tribunals are the effect of measures on the value of an investment and control over it, and the duration of the measures in question.[321] Respondent relies upon the decisions in *Waste Management, Inc. v. United Mexican States*;[322] *Marvin Feldman v. Mexico*;[323] *Azurix v. Argentine Republic*;[324] *CMS Gas Transmission Co.*;[325] *LG&E*;[326] and *S.D. Myers, Inc. v. Canada*.[327] In Respondent's view, Claimant understates the severity of the interference that must have occurred to support a finding of expropriation. In relying on a series of arbitrations involving Argentina, Respondent notes, Claimant neglects the critical fact that none of the tribunals in *Sempra*, *CMS Gas Transmission Co.*, *Enron*, *Azurix*, or *LG&E* actually found expropriation to have occurred, notwithstanding the "sudden, drastic and comprehensive dismantling of the legal and regulatory framework . . . resulting from the 2001 economic crisis in Argentina."[328] Respondent further notes the high threshold for expropriation identified by the European Court of Human Rights in its decision in *Sporrong and Lönnroth v. Sweden*, declining to find expropriation where the ability to make use of the property in question remained, even though the right had "lost some of its substance."[329]

234. Turning to the breaches alleged by Claimant, Respondent denies that it has expropriated Eureko's investment.[330] In Respondent's view, Claimant cannot establish that its investment was subject to a substantial deprivation and neutralised insofar as:[331]

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319 *Saluka Investments B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL (Czech/Netherlands BIT), Partial Award, 17 March 2006 (hereinafter "***Saluka***").

320 *CMS Gas Transmission Co.*, ¶262.

321 Respondent's Rejoinder on the Merits, ¶27.

322 *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Final Award, 30 April 2004, ¶159 (hereinafter "***Waste Management***").

323 *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award on Merits, 16 December 2002, ¶152 (hereinafter "***Feldman***").

324 *Azurix*, ¶322.

325 *CMS Gas Transmission Co.*, ¶¶263-64.

326 *LG&E*, ¶193.

327 *S.D. Myers, Inc. v. Canada*, Partial Award, 13 November 2000, ¶283 (hereinafter "***S.D. Myers***").

328 Respondent's Statement of Defence, ¶64.

329 Respondent's Rejoinder on the Merits, ¶29, quoting *Sporrong and Lönnroth v. Sweden* (ECHR, Application nos. 7151/75, 7152/75), Judgment, 23 September 1982, ¶63.

330 Respondent's Statement of Defence, ¶¶56-80

331 Respondent's Counter-Memorial on the Merits, ¶500.

(a) the Claimant is still successfully providing public health insurance;

(b) the Claimant conducts business in the area of supplementary health insurance;

(c) the Claimant benefits from cross-selling effects;

(d) the Claimant has never met the conditions for the application of the Profit Provision; and;

(e) the Profit Provision is no longer effective.

Respondent considers allegations of expropriatory intent and Claimant's reliance on *Vivendi* to be inapposite, arguing instead that the actions of the Slovak Republic comprised "general, non-discriminatory legislative measures."[332]

235. According to Respondent, the restriction on profits cannot form the basis for a claim of expropriation because the provision has since been repealed and because Claimant, during the time it was in effect, never generated sufficient profits for it to have legally distributed a dividend pursuant to the Slovak Commercial Code.[333] Expropriation, Respondent asserts, "must always concern existing property"—not a hypothetical right to distribute dividends.[334] In any event, Respondent argues, the decision in *LG&E* establishes that "expropriation must be permanent,"[335] and *Azurix* makes clear that a "substantial deprivation occurs only when an investor has been deprived of *all attributes* of the ownership of its investment."[336] In turn, *Feldman* establishes that no expropriation will occur where "[t]he Claimant is free to pursue other continuing lines of business activity."[337] Even if effective, the restriction on profits never removed Claimant's ownership of Union Healthcare, which continued to operate throughout the relevant period, nor restricted its ability to market supplementary insurance or to engage in cross-selling.[338]

236. Similarly, Respondent submits that the restriction on the transfer of insurance portfolios cannot be considered to have restricted fundamental ownership rights or to have effectively neutralised Claimant's investment. In particular, Respondent notes that

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332 Respondent's Statement of Defence, ¶66.

333 Respondent's Counter-Memorial on the Merits, ¶¶509-13

334 Respondent's Counter-Memorial on the Merits, ¶510.

335 Respondent's Rejoinder on the Merits, ¶33, quoting *LG&E*, ¶193.

336 Respondent's Counter-Memorial on the Merits, ¶508 (emphasis in original).

337 Respondent's Statement of Defence, ¶67.

338 Respondent's Counter-Memorial on the Merits, ¶508.

restricting the sale of insurance portfolios did not prevent Claimant from transferring its portfolio through other means that would have included the transfer of contractual obligations entered into with healthcare providers, thereby maintaining continuity and protecting the rights of the insurees. Claimant could have effected such a transfer, Respondent submits, "by means of a (i) transfer of undertaking; (ii) transfer of shares; or (iii) transformation."[339] Further, Respondent contends that a health insurance portfolio is not capable of being the subject of ownership and that, in any event, Claimant's portfolio was acquired in violation of Slovak law (see above at paragraph 131ff).[340]

237. Finally, Respondent is of the view that Claimant's argument that actions taken by the Slovak Republic collectively amount to expropriation is undeveloped. According to Respondent, Claimant fails to explain "which fundamental rights of ownership it was supposedly deprived of."[341] In Respondent's view, Claimant only elaborated on the restriction on the use of brokers, which is insufficient insofar as the possibility of using other marketing practices remained.[342]

238. Although Respondent denies that any substantial deprivation of Claimant's investment occurred, Respondent further argues that a finding to the contrary would still fall short of expropriation because the Slovak Republic's actions were "adopted within the ambit of the Respondent's regulatory powers."[343] As set forth previously in the Parties' characterisation of the factual record (see above at paragraph 201ff), Respondent contends that the measures taken by the Slovak Republic in 2006 and 2007 were broadly in the public interest and were intended to remedy genuine problems within the Slovak health care sector. Viewed in the context of alleged expropriation, Respondent quotes the arbitral tribunal in *Saluka* for the proposition that:[344]

> It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.

339 Respondent's Counter-Memorial on the Merits, ¶518.

340 Respondent's Counter-Memorial on the Merits, ¶519-20.

341 Respondent's Counter-Memorial on the Merits, ¶523.

342 Respondent's Counter-Memorial on the Merits, ¶525.

343 Respondent's Rejoinder on the Merits, ¶26.

344 Respondent's Counter-Memorial on the Merits, ¶433, quoting *Saluka*, ¶255.

Arbitral tribunals in *Feldman*,[345] *LG&E*,[346] *Telenor Mobile Communications A.S. v. Republic of Hungary*,[347] and *Too v. Greater Modesto Insurance Associates*,[348] Respondent notes, have reached the same conclusion.[349] Accordingly, Respondent argues, the Slovak Republic is "entitled and obliged to regulate its public health insurance system and to freely choose from the commonly acceptable public health insurance system models."[350]

239. In evaluating whether a measure falls within the regulatory powers of the Slovak Republic, Respondent submits, the Tribunal should respect the legislature's assessment of the public interest "unless that judgement be *manifestly without reasonable foundation*."[351] Similarly, Respondent invokes the decisions of the tribunals in *Feldman* and *Saluka* for the proposition that governmental measures need not be strictly proportionate to the interest they are intended to serve.[352] Should the Tribunal consider proportionality relevant, however, Respondent submits that liability would exist only where "the State's action is *obviously disproportionate* to the need being addressed."[353] Based on the link to the public interest established by the factual record, Respondent submits that Claimant has "failed to prove that the 2006 Stabilisation was not adopted within the regulatory powers framework"[354] and correspondingly failed to establish expropriation pursuant to Article 5 of the BIT.

2. Fair and Equitable Treatment

240. Article 3(1) of the BIT provides as follows:

> 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.

345 *Feldman*, ¶112.

346 *LG&E*, ¶195.

347 *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, ¶64.

348 *Too v. Greater Modesto Insurance Associates*, Award, 29 December 1989, 23 Iran-United States Cl. Trib. Rep. 378.

349 Respondent's Counter-Memorial on the Merits, ¶433.

350 Respondent's Rejoinder on the Merits, ¶53.

351 Respondent's Rejoinder on the Merits, ¶65, quoting *James and others v. The United Kingdom* (ECHR, Application No. 8793/79), 21 February 1986, ¶46 (emphasis added by Respondent).

352 Respondent's Rejoinder on the Merits, ¶106.

353 Respondent's Rejoinder on the Merits, ¶107, quoting *LG&E*, ¶195.

354 Respondent's Rejoinder on the Merits, ¶140.

Claimant's Position

241. According to Claimant, the obligation to provide fair and equitable treatment is broad and overarching, encompassing the obligation that the host State "honour legitimate expectations," "act transparently," and abstain from "arbitrary treatment of investments."[355] Claimant does not accept Respondent's contention that the content of fair and equitable treatment is determined by customary international law and the international minimum standard.[356] In the context of these proceedings, Claimant invokes two elements that it identifies as part of the fair and equitable treatment standard: (i) the obligation to provide a stable and predictable legal framework, and (ii) the obligation to act in good faith with respect to investments of investors.

242. Drawing on the decisions of arbitral tribunals in *Metalclad Corporation v. Mexico*,[357] *CMS Gas Transmission Co.*,[358] *Occidental*,[359] *Enron*,[360] *LG&E*,[361] and *Técnicas Medioambientales Tecmed, S.A. v. Mexico*,[362] Claimant submits that the obligation to provide a stable and predictable legal framework is a standard element of fair and equitable treatment.[363] In the words of the *Metalclad* tribunal, this requirement forbids State action "which entirely transforms or alters the legal or business environment" in which the investment was made.[364] The standard, Claimant contends, is encompassed within the understanding of fair and equitable treatment irrespective of the precise wording of the treaty in question.[365] According to Claimant, the obligation imposed on the host State is also linked to legitimate expectations. Although a State is not barred from introducing any change to its laws and regulations, it may not "by amending its

355 Claimant's Memorial on the Merits, ¶212.

356 Claimant's Reply on the Merits, ¶224.

357 *Metalclad Corporation v. Mexico*, ICSD Case No. RB(AF)/97/1, Award, 30 August 2000, ¶99 (hereinafter "***Metalclad***").

358 *CMS Gas Transmission Co.*, ¶¶274, 276.

359 *Occidental*, ¶191.

360 *Enron*, ¶259

361 *LG&E*, ¶131.

362 *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶154 (hereinafter "***Tecmed***").

363 Claimant's Memorial on the Merits, ¶¶213-17.

364 Claimant's Memorial on the Merits, ¶214.

365 Claimant's Memorial on the Merits, ¶216.

legal framework exceed what the investor justifiably expected at the time of making its investment."[366]

243. In Claimant's view, the 2004 Reform established a legal framework based upon competition among joint stock insurance companies. The central features of this framework were the ability to dispose of profits, in particular to shareholders; the development of insurance portfolios through brokers, creative marketing, and portfolio trading; limited governmental involvement in the market through an independent Health Care Authority; and market determination of contracts with healthcare providers and the efficient level of operating expenses.[367] In 2006 and 2007, Claimant submits, each element of this framework was significantly changed by new legislation, introducing legal uncertainty and removing its ability to generate a return on investments in the health insurance sector.[368] Not only was this a fundamental change, Claimant argues, but it exceeded what Claimant justifiably could have expected at the time. Eureko should not, Claimant asserts, have expected measures in contravention of the Slovak Constitution, EU law, or the BIT; nor should it have assumed that an election would lead to fundamental reforms "for the purpose of removing all private capital from the [health insurance] sector."[369] Claimant points to its March 2006 Business Plan and the testimony of Eureko's witnesses for evidence of its actual expectations at the time, and to the Slovak Government's August 2006 Manifesto and the statements of Mr Valentinovič in November 2006 and January 2007 for "explicit assurances from the Slovak Republic that it would not enact fundamental changes to the health insurance system."[370]

244. Turning to the obligation to act in good faith, Claimant draws on the decisions in *Tecmed*,[371] *Siemens A.G. v. Argentina*,[372] and *Waste Management*[373] for the proposition that good faith is an underlying and integral aspect of fair and equitable treatment.[374] In

366 Claimant's Memorial on the Merits, ¶217.

367 Claimant's Memorial on the Merits, ¶¶227-31.

368 Claimant's Memorial on the Merits, ¶¶236-39.

369 Claimant's Memorial on the Merits, ¶¶246-47, 249.

370 Claimant's Memorial on the Merits, ¶¶242-43, 248.

371 *Tecmed*, ¶153.

372 *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, ¶308.

373 *Waste Management*, ¶138.

374 Claimant's Memorial on the Merits, ¶¶218-21.

particular, Claimant argues, the State should "not deliberately . . . set out to destroy or frustrate the investment by improper means."[375] Moreover, Claimant submits, not only does the duty of fair and equitable treatment require that a host state refrain from interfering with an investment once made, it also confers on the host state an "obligation to act" in a manner that positively fosters the investment.[376]

245. In Claimant's view, the Slovak Republic's bad faith is demonstrated by the absence of a genuine public motive behind the 2007 Reforms and by its objective of driving private health insurers from the Slovak market. According to Claimant, the Slovak Republic sought a single, publicly-owned health insurance company, but could not directly expropriate private health insurers.[377] Accordingly, Respondent sought to "make the lives of privately-owned health insurance companies so miserable that they would exit the market 'voluntarily'."[378] These objectives, Claimant submits, are evident from the statements made by members of the Slovak Government at the time of the 2007 Reforms and by the position taken by members of the Slovak Parliament in their 2008 petition to the Slovak Constitutional Court.[379] Even in the face of repeated complaints and legal action, Claimant submits, the Slovak Republic has "not even paused to seriously discuss the intrusion of Eureko's rights or even acknowledged the consequences of its policies."[380]

Respondent's Position

246. Respondent objects to the Tribunal's jurisdiction over this claim on the grounds that Article 3(1) of the BIT is superseded by or inapplicable under EU law (see above at paragraph 147ff).

247. In the event that the Tribunal has jurisdiction, Respondent contends that the standard of fair and equitable treatment required by Article 3(1) of the BIT is limited to the international minimum standard required by customary international law.[381] Drawing

375 Claimant's Memorial on the Merits, ¶220, quoting *Waste Management*, ¶138.

376 Claimant's Statement of Claim, ¶¶IV.61-62, citing *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (hereinafter "***MTD v. Chile***"), ¶113.

377 Claimant's Memorial on the Merits, ¶¶253-54.

378 Claimant's Memorial on the Merits, ¶257.

379 Claimant's Memorial on the Merits, ¶¶254-59.

380 Claimant's Statement of Claim, ¶IV.76.

381 Respondent's Counter-Memorial on the Merits, ¶535.

on the decisions in *Saluka* and *Genin et. al. v. Estonia*,[382] Respondent submits that evaluating governmental conduct under this standard involves a process of "weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other."[383] As set forth in the discussion of expropriation (see above at paragraph 238ff), Respondent considers the 2007 Reforms to fall well within the ambit of the Slovak Republic's regulatory powers.

248. Respondent rejects the proposition that either or both Article 3(1) of the BIT specifically and the standard of fair and equitable treatment generally includes any obligation to maintain a stable legal environment. The arbitral decisions relied upon by Claimant, Respondent notes, arose from investment treaties that specifically provided for the maintenance of a stable framework and are, accordingly, inapposite to the BIT at issue in this arbitration.[384] On the contrary, Respondent argues, the Slovak Republic has a sovereign right to develop its legal framework and, as noted by the Tribunal in *AES v. Hungary*, "a legal framework is by definition subject to change as it adapts to new circumstances day by day."[385] The BIT, in Respondent's view, "is not a shield against any risks resulting from changes of the legal and business framework of the host state," and Respondent denies that it made any more specific commitment to refrain from changing its laws.[386] In the absence of such a commitment, the expectation that laws can and will evolve should be within the expectation of "any reasonably informed business person."[387]

249. Although Respondent denies that it was under an obligation to refrain from changing the legal framework governing health insurance, Respondent further disputes that the 2007 Reforms constituted such a change,[388] in particular when viewed in light of Claimant's legitimate expectations at the time.[389] In assessing the scope of legitimate

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382 *Genin and others v. Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, ¶367 (hereinafter "***Genin***").

383 Respondent's Counter-Memorial on the Merits, ¶532, quoting *Saluka*, ¶306.

384 Respondent's Counter-Memorial on the Merits, ¶537.

385 Respondent's Counter-Memorial on the Merits, ¶540, quoting *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶9.3.29 (hereinafter "***AES v. Hungary***").

386 Respondent's Counter-Memorial on the Merits, ¶¶541-42.

387 Respondent's Counter-Memorial on the Merits, ¶542.

388 Respondent's Counter-Memorial on the Merits, ¶574.

389 Respondent's Counter-Memorial on the Merits, ¶¶544-46.

expectations, Respondent invokes the holding of the tribunal in *Duke Energy*, to the effect that:[390]

> To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also *the political, socioeconomic, cultural and historical conditions prevailing in the host State*. In addition, such expectations *must arise from the conditions that the State offered the investor and the latter must have relied upon* them when deciding to invest.

Legitimate expectations, Respondent emphasises "cannot be solely the subjective expectations of the investor," but must be reasonable and based on an objective assessment of the circumstances.[391]

250. In Respondent's view, Eureko's expectations could never have been legitimate because it was clear when Claimant made its investment that an imminent legislative change would likely take place[392] and because Claimant failed to exercise due diligence. According to Respondent, Eureko's March 2006 Business Plan cannot evidence legitimate expectations as it was not prepared at the time Claimant established Union Healthcare.[393] Indeed, Respondent argues, Claimant has not submitted any contemporaneous analysis of the 2004 Reform, or evidence that it conducted such analysis.[394] Moreover, by the time Claimant began incurring expenses in developing Union's insurance portfolio in May 2006, Respondent submits that the publicly available information made clear that "SMER would win the 2006 elections and that public health insurance policy would be changed."[395]

251. Turning to Claimant's allegations of bad faith, Respondent submits that the factual record establishes that Respondent's intent was solely "to regulate the existing public health insurance system" and that the measures taken were legitimately within the scope of its regulatory discretion.[396] In Respondent's view, the individual statements upon which Claimant relies for its narrative of bad faith "are misquoted and largely

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390 Respondent's Statement of Defence, ¶90 quoting *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (emphasis added by Respondent).

391 Respondent's Counter-Memorial on the Merits, ¶547, quoting *Saluka*, ¶304.

392 Respondent's Statement of Defence, ¶¶93-94.

393 Respondent's Counter-Memorial on the Merits, ¶547.

394 Respondent's Counter-Memorial on the Merits, ¶¶549-53.

395 Respondent's Counter-Memorial on the Merits, ¶560.

396 Respondent's Counter-Memorial on the Merits, ¶582.

taken out of context" and "constitute standard political proclamations that are used in the Slovak media."[397] Such statements are insufficient to overcome the policy record of a series of measures aiming to address genuine problems with the outflow of funds from the health care system, the increasing indebtedness of health care providers, and infringements on patients' rights.[398]

3. Unreasonable and Discriminatory Treatment

252. In addition to ensuring fair and equitable treatment, Article 3(1) of the BIT provides that the Parties "shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors."

Claimant's Position

253. Claimant submits that its investment was impaired by both discriminatory and unreasonable measures. Claimant identifies five measures that it considers to have been discriminatory and thereby prohibited by the BIT. First, Claimant submits that the restrictions on operating expenses as a percentage of premium incomes disproportionately favoured large insurance companies, such as the State-owned VZP.[399] Second, Claimant argues that the increase in the percentage of premium income that was subject to redistribution was discriminatory in that it favoured those insurance companies that were net beneficiaries of the redistribution system, in particular VZP.[400] Third, Claimant contends that the prohibition on the use of brokers disproportionately affected new entrants to the health insurance market.[401] Fourth, Claimant notes that the Slovak Republic provided VZP with a capital injection of €65.1 million, and financed this by lowering premiums for those individuals covered by the State, to the detriment of other insurers.[402] Fifth, Claimant submits that the ban on profits was discriminatory in favour of State-owned health insurers that are not profit-motivated.[403] In assessing the effects of these five measures, Claimant emphasises that

397 Respondent's Counter-Memorial on the Merits, ¶¶441, 443.

398 Respondent's Counter-Memorial on the Merits, ¶¶447-64.

399 Claimant's Memorial on the Merits, ¶¶283-84.

400 Claimant's Memorial on the Merits, ¶285.

401 Claimant's Memorial on the Merits, ¶286.

402 Claimant's Memorial on the Merits, ¶287.

403 Claimant's Memorial on the Merits, ¶288.

"although measures may formally apply to all parties, the effects and intended application of the measures can be discriminatory."[404] In Claimant's view, such discriminatory effect is a breach of Article 3(1) of the BIT.[405]

254. In addition to discriminatory measures, Claimant contends that its investment was subjected to unreasonable measures. In Claimant's view, the intent to "drive privately-owned insurers out of the market" was both egregious and unquestionably unreasonable.[406] Claimant also submits that the ban on profits was unreasonable, both because it "completely destroys private investors' most basic rationale for making an investment" and because it limited the ability of insurers to earn profits from what the Slovak Republic has insisted were "public" funds while permitting health care providers and other actors to continue to do so.[407]

Respondent's Position

255. Respondent objects to the Tribunal's jurisdiction over this claim on the grounds that Article 3(1) of the BIT is superseded by or inapplicable under EU law (see above at paragraph 147ff).

256. In the event that the Tribunal has jurisdiction, Respondent denies that it acted in a discriminatory or unreasonable manner. In Respondent's view, "[t]he state is entitled to adopt . . . measures resulting in different treatment, if such different treatment is justified by legitimate public policy and pursued in a reasonable manner."[408] Respondent looks to the tribunal decisions in *Genin*,[409] *S.D. Myers*,[410] and *Saluka*[411] in support of this standard.

257. Turning to the measures themselves, Respondent notes that "[a]ll measures contested by the Claimant apply in the same manner to all health insurers."[412] The redistribution provision, for instance, operates identically with respect to all insurers, and "merely

404 Claimant's Reply on the Merits, ¶239.

405 Claimant's Reply on the Merits, ¶239.

406 Claimant's Memorial on the Merits, ¶291.

407 Claimant's Memorial on the Merits, ¶292.

408 Respondent's Counter-Memorial on the Merits, ¶589.

409 *Genin*, ¶368.

410 *S.D. Myers*, ¶246.

411 *Saluka*, ¶460.

412 Respondent's Counter-Memorial on the Merits, ¶590.

requires that every health insurer obtains a reasonable amount of the whole sum of collected health insurance levies."[413] The effect of restrictions on brokers and profits, Respondent emphasises, is the same for all health insurers. With respect to the limitation of operating expenses, Respondent denies that this favours larger insurers; the State-owned SZP was able to maintain the limit with a portfolio of insured similar to that held by Union. Finally, Respondent asserts that as the owner of VZP, it is entitled to support it financially, just as Claimant may raise capital on behalf of Union. Quoting *Saluka*, Respondent contends that "[t]he 'fair and equitable treatment' standard cannot easily be assumed to include a general prohibition of State aid."[414]

258. As regards the measures Claimant alleges to be unreasonable, Respondent argues, citing *Saluka*, that the relevant question is whether the measures "bear a reasonable relationship to some rational policy."[415] In Respondent's view, the factual record establishes a reasonable connection between the 2007 Reforms and the Slovak Republic's efforts to address inefficiencies in the provision of health care to the public.[416] Respondent also recalls its arguments (see above at paragraph 239ff) regarding the proportionality of the 2007 Reforms in relation to the public interest.[417]

4. Full Protection and Security

259. Article 3(2) of the BIT provides as follows:

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

Claimant's Position

260. Claimant submits that its investment was denied full protection and security by the Slovak Republic. In interpreting this standard, Claimant contends that full protection and security is not limited to physical security.[418] In Claimant's view, this interpretation is supported in the jurisprudence of other arbitral tribunals, notably in

413 Respondent's Counter-Memorial on the Merits, ¶592.

414 Respondent's Counter-Memorial on the Merits, ¶660, quoting *Saluka*, ¶445.

415 Respondent's Counter-Memorial on the Merits, ¶597, quoting

416 Respondent's Counter-Memorial on the Merits, ¶¶597-600.

417 Respondent's Counter-Memorial on the Merits, ¶600.

418 Claimant's Memorial on the Merits, ¶264.

Azurix;[419] *Biwater Gauff*;[420] *National Grid, plc v. The Argentine Republic*;[421] and *Vivendi*.[422] It also follows logically, for Claimant, from the interpretation of the treaty itself. The treaty, Claimant notes, extends full protection and security to all covered investments, including several non-physical categories that clearly cannot be protected by the provision of physical security.[423] Equally, Claimant notes that the BIT employs encompassing language—*full* protection and security—that would be at odds with a significant implicit limitation.[424] Following the reasoning adopted in *Biwater Gauff*, Claimant submits that there is "no rationale for limiting the application of a substantive protection of the Treaty to a category of assets—physical assets—when it was not restricted in that fashion by the Contracting Parties."[425]

261. In substance, Claimant argues that the legal security of its investment and the investment environment were damaged by the introduction of full government control over the Health Care Authority. The Authority has the power to terminate Union's business, impose "crippling fines," and intrude on its operations through on-site inspections.[426] Such threats are not hypothetical, Claimant contends, given the actual use of government influence in the replacement of the heads of the Authority's boards, which has "critically undermined the credibility of the Health Care Authority."[427] Claimant further submits that the harassment it faced from high officials of the Slovak Government in the form of disparaging press statements would "fatally poison any due diligence" by a party considering investment in the health insurance sector and "is irreconcilable with the duty to provide a secure investment environment."[428]

Respondent's Position

262. In interpreting Article 3(2) of the BIT, Respondent relies upon the holding reached in *Saluka*, and asserts that full protection and security guarantees "more specifically the

419 *Azurix*, ¶408.

420 *Biwater Gauff*, ¶729.

421 *National Grid plc v. Argentine Republic*, UNCITRAL (Argentina/UK BIT), Award, 3 November 2008, ¶187 (hereinafter "***National Grid***").

422 *Vivendi*, ¶¶7.4.15, 7.4.17.

423 Claimant's Memorial on the Merits, ¶266.

424 Claimant's Memorial on the Merits, ¶268.

425 Claimant's Memorial on the Merits, ¶269.

426 Claimant's Memorial on the Merits, ¶275.

427 Claimant's Memorial on the Merits, ¶¶274-75.

428 Claimant's Memorial on the Merits, ¶¶279-80.

physical integrity of an investment against interference by use of force."[429] Even if the standard might sometimes reach beyond physical security, Respondent emphasises that it "does not represent an absolute protection against physical or legal interventions"[430] and urges the Tribunal to follow the approach adopted in *AES v. Hungary*, limiting protection where a State's right to regulate is exercised in a reasonable manner in pursuit of rational public policy goals.[431] In the event the Tribunal interprets Article 3(2) to extend beyond physical security, however, Respondent argues that it would be covered by the provisions of EU law on freedom of establishment and that accordingly the Tribunal would lack jurisdiction over this claim (see above at paragraph 147ff).[432]

263. Turning to Claimant's contentions, Respondent notes that Claimant has not alleged any physical interference with its investment. Respondent further argues that Claimant has not shown that its investment was actually impacted by the conduct of which it complains. According to Respondent, "Claimant did not substantiate any actions that were taken by the Health Care Authority against its investment."[433] Moreover, Respondent notes, many competencies of the Health Care Authority existed prior to the 2007 Reforms and, even afterwards, Claimant retained recourse to appeal the decisions of the Authority to the Slovak courts.[434] In Respondent's view, the structure of the Health Care Authority was within the Slovak Republic's discretion to organise at it saw fit, provided that the results where not discriminatory or arbitrary, and Claimant has failed to establish such an occurrence.[435] Similarly, with respect to statements in the press, Respondent submits that Claimant has not identified any insured whose departure from Union Healthcare followed from the media portrayal of private health insurers, or that any sale was actually thwarted. "Unfounded and speculative assertions," Respondent submits, are insufficient.[436]

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429 Respondent's Counter-Memorial on the Merits, ¶604.

430 Respondent's Counter-Memorial on the Merits, ¶605.

431 Respondent's Counter-Memorial on the Merits, ¶603, quoting *AES v. Hungary*, ¶13.3.2.

432 Respondent's Counter-Memorial on the Merits, ¶¶423-24.

433 Respondent's Counter-Memorial on the Merits, ¶608.

434 Respondent's Counter-Memorial on the Merits, ¶610.

435 Respondent's Counter-Memorial on the Merits, ¶611 n. 440, citing *Genin*, ¶370; *Lauder*, ¶242.

436 Respondent's Counter-Memorial on the Merits, ¶¶614-15.

5. Restrictions on Transfer

264. Article 4 of the BIT provides as follows:

> Each Contracting Party shall guarantee that payments related to an investment may be transferred. The transfers shall be made in a freely convertible currency, without undue restriction or delay. Such transfers include in particular though not exclusively:
>
> (a) profits, interests, dividends, royalties, fees and other current income;
>
> (b) funds necessary
>
> i. for the acquisition of raw or auxiliary materials, semi-fabricated or finished products, or
>
> ii. for the development of an investment or to replace capital assets in order to safeguard the continuity of an investment;
>
> (c) funds in repayment of loans;
>
> (d) earnings of natural persons;
>
> (e) the proceeds of sale or liquidation of the investment.

Claimant's Position

265. Claimant submits that Respondent has unequivocally violated Article 4 of the BIT as a result of the introduction of the ban on the distribution of profits.[437] In interpreting this provision, Claimant points to the Explanatory Note of the BIT, which explains that Article 4 is intended to guarantee the "completely free transfer of funds,"[438] which is obviously contravened by restrictions on transfer. This breach has occurred, Claimant argues, irrespective of whether the investment in Union Healthcare has actually generated profits.[439] Nor is it relevant, in Claimant's view, that the Slovak Constitutional Court has struck down the ban on profits, as damages remain from the period in which the restriction remained in force.[440]

266. In Claimant's view, Respondent's defence—that insurance premiums represent "public monies" and are therefore not "payments related to an investment"—is "incomprehensible."[441] Claimant notes that insurance premiums are private before they are paid by employees and private once they are paid to health care providers and

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437 Claimant's Statement of Claim, ¶IV.109; Claimant's Memorial on the Merits, ¶¶292-300; Claimant's Reply on the Merits, ¶¶244-252.

438 Claimant's Statement of Claim, ¶IV.112; *see also* Exhibit C-11, p. 4.

439 Claimant's Statement of Claim, ¶IV.117.

440 Claimant's Reply on the Merits, ¶249.

441 Claimant's Memorial on the Merits, ¶296.

suggests that Respondent's scenario would consider premiums to be public monies only during the time they are held by an insurance company.[442] Claimant considers this argument to be "obviously irrational" and submits that, in any event, premiums were clearly not considered public funds under the legislation in place when Eureko made its investment.[443]

Respondent's Position

267. Respondent objects to the Tribunal's jurisdiction over this claim on the grounds that Article 4 of the BIT is superseded by or inapplicable under EU law (see above at paragraph 147ff).

268. In the event that the Tribunal has jurisdiction, Respondent submits that a restriction on issuing dividends cannot "be recharacterised by Eureko as a restriction on transfer."[444] Claimant has always been free to transfer any asset that may be distributable to shareholders. In Respondent's view, "[w]hile Eureko may disagree with the regulatory standard that limits Union Healthcare's ability to declare dividend payments, that standard is unrelated to the very different issue addressed by Article 4 of the BIT."[445]

269. Further, Respondent submits that health insurance premiums are to be considered public monies insofar as they are levied as a tax in an amount determined by the State. Because the collection of health insurance premiums is governed by public law, so too is their distribution.[446] Respondent could and did regulate the uses to which such public monies could be put during the time they were held by insurers. The determination that the "remainder of the public health insurance levies would be used to cover health care, the original purpose for which these funds were levied," was well within the legitimate scope of Respondent's regulatory authority.[447]

270. In any event, Respondent argues, Eureko was never in a position to distribute a dividend from insurance levies, and thus cannot have been harmed within the scope of this portion of the BIT.[448]

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442 Claimant's Memorial on the Merits, ¶299.

443 Claimant's Memorial on the Merits, ¶¶301-302.

444 Respondent's Statement of Defence, ¶¶110-11.

445 Respondent's Statement of Defence, ¶110.

446 Respondent's Counter-Memorial on the Merits, ¶¶621-22.

447 Respondent's Counter-Memorial on the Merits, ¶623.

448 Respondent's Counter-Memorial on the Merits, ¶626.

B. The Tribunal's Decision on Liability and the Merits

1. The Investment

271. As is apparent from the paragraphs above, the Tribunal has concluded that Eureko's investment in the Slovak Republic consists of its 100% shareholding in Union Healthcare (as well as rights derived therefrom).[449]

2. The Applicable Law

272. Article 8 (6) of the Treaty provides that

> The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:
>
> - the law in force of the Contracting Party concerned;
> - the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;
> - the provisions of special agreements relating to the investment;
> - the general principles of international law."

273. In the jurisdictional phase of this arbitration the relevance of EU law was considered. In its Award on Jurisdiction, Arbitrability and Suspension dated 26 October 2010, at paragraphs 287-290, the Tribunal decided that questions of the applicability of EU law would be addressed at the merits stage. The Tribunal reaffirms its analysis in that award of the relationship between EU law, the Treaty, and the role and jurisdiction of the Tribunal.

274. The Tribunal has considered whether there are any issues of EU law that bear upon its decision or its reasoning in relation to claims that Respondent has acted in violation of its obligations under the Treaty. Respondent maintained its position that the Treaty is inapplicable because of the operation of EU law.[450] Its reasoning, in essence, was that:[451]

> if the same subject is regulated by both EU law and national law (the BIT), EU law prevails. Therefore, the Tribunal would be actually deciding on a breach of EU law by the Slovak Republic.

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449 See paragraphs 90, 157-161, above.

450 See *part D.1 Statement of Defence; part D.2 Counter-Memorial on the Merits; part H Rejoinder on Merits.*

451 Respondent's Counter-Memorial on the Merits, ¶409.

275. The Tribunal does not accept this analysis. Neither Party in the present case argued that any specific provision of EU law bore upon the case in a manner that would affect the decision or reasoning of the Tribunal under this particular BIT. Having considered the position, the Tribunal is satisfied that no such question of EU law arises, and that it may apply the terms of the Treaty without exceeding its jurisdiction and without misapplying the applicable law.[452]

276. In the present case, the Treaty sets out standards of treatment that the Contracting Parties have expressly agreed to apply to investors of the other Contracting Party. Insofar as they are applicable to the facts in the present case, nothing in those Treaty standards is in conflict with any provision of EU law. Nothing in this Award amounts to, or implies, a decision that Respondent or Claimant has acted in conformity with EU law or contrary to EU law in any respect. This Award has no bearing upon any question of EU law. This Award relates only to the compliance by Respondent with the terms of the obligations it has assumed under the agreement that it made in the Treaty in relation to its treatment of a class of persons of which Claimant is a member; and this Award is rendered pursuant to a procedure to which the Contracting Parties agreed in Article 8 of the Treaty, and which Claimant accepted in its Notice of Arbitration dated 1 October 2008.

277. Claimant alleges violations by Respondent of Articles 3, 4 and 5 of the Treaty.

3. Fair and Equitable Treatment and Article 3 of the Treaty

278. Claimant alleges a violation of its rights under Article 3(1) of the Treaty, which reads as follows:

> 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.

279. The Tribunal considers that the removal of the right to generate profits, coupled with a ban on the transfer of the portfolio, effectively deprived Claimant of access to the commercial value of its investment. The investment could neither be maintained so as

[452] The closest that the argument comes to EU Law appears to be the point at which the Respondent argues that the duty of fair and equitable treatment does not extend to questions concerning State aid: see paragraph 257 above. The Tribunal does not need to address that question.

to generate profits nor be sold. There was no way in which Claimant could recover the commercial value of its investment.

280. The Tribunal is satisfied that the ability to distribute profits (and even more, the ability to distribute profits coupled with the ability to transfer a client portfolio for value) was as a matter of fact an essential precondition of Eureko's decision to invest in the Slovak Republic. It accepts the evidence of Mr Van Duin that, had Eureko's management been aware of a real possibility that a ban on profits (and subsequently a ban on transfers) was about to be introduced by the Government, the investment in the Slovak Republic would not have been made at all. It accepts also that, while Eureko's management were aware of the possibility of far-reaching reforms being introduced in the organisation of health insurance in the Slovak Republic after the 2007 election, they were not aware that such reforms would include a ban on profits and a ban on transfers that would prevent the realisation of any profits from their investment.

281. The Tribunal is also satisfied that the imposition of the ban on profits and the ban on transfer of the portfolio were measures that self-evidently and unequivocally put Eureko's investment into a situation that was incompatible with the most basic notions of what an investment is meant to be, and that the imposition of those measures upon the investment after it had been made was incompatible with the obligation to accord the investment fair and equitable treatment under the Treaty. To characterise expenditure on the establishment of a business operation in another State as an 'investment' necessarily implies the right to enjoy the possibility of a return on the investment, if it proves profitable. Locking in accrued profit is incompatible with that right. The Tribunal returns below to the question of the consequences of this incompatibility.

282. This decision by the Tribunal fixes the date at which the violation occurred as 25 October 2007. That is the date on which the ban on profits was introduced by law and the date on which it became necessary for Claimant to take steps to protect its position, even though the implementation of the ban on profits followed later, in financial year 2008.[453]

283. Claimant argued that Respondent had acted in breach of the duty not to impair, by unreasonable or discriminatory measures, the operation, management, use, enjoyment

[453] See **Act No. 594/2007 Coll.**, adopted on 28 November 2007; Exhibit C-61.

or disposal of the investment. The Tribunal has found that the adoption of the ban on profits on 25 October 2007 was a violation of the fair and equitable treatment provision in Article 3(1) of the Treaty. It also finds that the ban on transfers in Act No. 192/2009 Coll.,[454] consolidated that violation, although it is not clear that Claimant could in practice have recovered any of its investment by transferring its portfolio after the ban on profits – it is difficult to see why any other investor would have paid to put itself into Claimant's shoes. The Tribunal, having regard to the evidence of Mr Van Duin, does not find that the other measures adopted by Respondent as part of the 2007 Reforms constituted separate violations of Article 3(1), as Mr Van Duin had indicated that Eureko could work with those measures.[455]

284. Claimant argued that there was also a violation of Article 3(2) of the Treaty, which requires each Contracting Party to accord "full protection and security" to the investment. Where, as here, the complaint is essentially that the investment was not protected against government policies, the question whether there has been a breach of the Treaty is inseparable from the question whether the policies in question were fair and equitable. The Tribunal sees no need in the circumstances of this case to consider the claim under Article 3(2) separately from the claim under Article 3(1). It regards its decision in respect of the claim under Article 3(1) as disposing of both claims.

4. The Free Transfer of Payments and Article 4 of the Treaty

285. Claimant also alleges that Article 4 of the Treaty was breached. Article 4 reads as follows:

> Each Contracting Party shall guarantee that payments related to an investment may be transferred. The transfers shall be made in a freely convertible currency, without undue restriction or delay. Such transfers include in particular though not exclusively:
>
> (a) profits, interests, dividends, royalties, fees and other current income;
>
> (b) funds necessary
>
> i. for the acquisition of raw or auxiliary materials, semi-fabricated or finished products, or
>
> ii. for the development of an investment or to replace capital assets in order to safeguard the continuity of an investment;
>
> (c) funds in repayment of loans;

454 Exhibit C-72.

455 See paragraphs 216 and 217 above.

(d) earnings of natural persons;

(e) the proceeds of sale or liquidation of the investment."

286. The Tribunal finds that the ban on profits was inconsistent with Respondent's obligations under this Article. In principle, any losses arising from the application of that ban to Claimant would be recoverable in damages. In the present case, however, the facts are such that the violation and the injury arising from the temporary adoption of the ban on profits are subsumed within the violation and the injury arising from the breach of the 'fair and equitable treatment' obligation. The Tribunal accordingly records that Respondent was in breach of Article 4, but it is not necessary to consider the question of losses arising from that breach any further.

5. Expropriation and Article 5 of the Treaty

287. Article 5 reads as follows:

> Neither Contracting party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:
>
> (a) the measures are taken in the public interest and under due process of law;
>
> (b) the measures are not discriminatory;
>
> (c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in any freely convertible currency accepted by the claimants."

288. This provision provides protection against expropriation; but not all provisions against expropriation have the same scope and legal effect. Article 5, for example, protects only against the direct or indirect *deprivation* of an investor of its investment. While some measures that interfere with the enjoyment by an investor of its rights of ownership of an investment may be so severe as to amount in law to such a deprivation, not all measures of interference are capable of doing so. In the present case the ban on profits, if maintained, would have violated Article 5. But the ban was declared unconstitutional by the Constitutional Court of the Slovak Republic.

289. This might be argued to amount to a 'temporary expropriation'; but this controversial label is particularly unhelpful in this case. There is an important distinction between

(i) a 'deprivation' for what is from the outset intended to be a limited (and relatively short) period, and (ii) a 'deprivation' that is intended at the time of its adoption to be permanent but which, in the event, is in fact reversed after a relatively short period of time. Deprivations of the former kind would not ordinarily amount to an expropriation, although they may amount to interferences with the property-owner's rights that violate other protections under a treaty, such as a provisions protecting against discriminatory treatment or against treatment that is not fair and equitable.[456]

290. In the present case, however, the 'deprivation' was temporary because of a reversal of a policy that had been enshrined in law and was intended to operate indefinitely. The imposition of the ban on profits was reversed by the Constitutional Court as a result of an application, made on 15 October 2008 and supplemented on 13 February 2009, by a group of Deputies of the National Council of the Slovak Republic (the Parliament of the Slovak Republic). That application was made about 12 months after the ban on profits, and in the wake of internal Governmental memoranda that questioned the legality of the ban on profits.[457]

291. Had this present BIT case been decided before the decision of the Constitutional Court and the declaration that the ban on profits was unconstitutional, it is likely that this Tribunal would have held that there was a 'permanent' deprivation that could amount to an expropriation in violation of Article 5 of the Treaty. The question is, therefore, whether such a temporary deprivation should be treated differently now that the Constitutional Court has given its decision.

292. In the view of the Tribunal, the facts must be taken as they exist at the time of the hearing. The declaration of unconstitutionality by the Constitutional Court cannot be ignored. While there is no duty to exhaust local remedies under the Treaty, there is no reason to ignore such remedies as have in fact been obtained. Although the episode did constitute a temporary interference with the investment and cause injury to the investor, it is not to be regarded as having resulted in a permanent deprivation of the investor of its investment. It was a wrong corrected by the proper operation of checks and balances within the Slovak legal system. This analysis is consistent with the approach adopted by other tribunals to the question of the necessary characteristics of an

456 See, for example, *LG & E*, ¶¶132-9, 193, 200, 267; *Tecmed*, ¶¶116, 151, 174, 201.

457 See the memorandum of the Ministry of Justice, 12 June 2007, Exhibit C-63, and the memorandum of the Legislative Board, 10 July 2007, Exhibit C-64.

expropriation and the significance of the permanence of interference with property rights.[458]

293. In the circumstances of the present case, therefore, the Tribunal finds that there is no violation of Article 5 of the Treaty. Losses arising from the 2007 Reforms prior to their reversal are fully, and appropriately, accommodated within the finding that there was a violation of the 'fair and equitable treatment' provision in Article 3(1) of the Treaty arising from the ban on profits.

294. Nothing in these findings of the Tribunal should be taken to suggest that the Treaty is hostile towards particular policies on the provision of healthcare facilities. The Contracting Parties are free to adopt the policies that they choose. The Treaty focuses on the manner in which policies may be changed and implemented, not on the policies themselves. The decision in a case such as the present could be very different if, for example, reforms had been introduced in a phased manner together with provision for the compensation of any private health insurance providers who were caused loss by the reforms. Indeed, the Contracting Parties could go further, and exclude health care altogether from the coverage of the BIT if they so wish. But as long as the provisions of the Treaty remain in force and applicable, they must be respected. That is what the Governments of the Contracting Party intended when they chose to conclude the Treaty, for what they judged to be the benefit of their States and their nationals.

295. In light of the foregoing, the Tribunal has determined that Respondent has breached Articles 3 and 4 of the Treaty. Accordingly, Claimant is entitled to damages. This subject will be discussed below.

X. THE CALCULATION OF DAMAGES

A. The Parties' Arguments on Damages

1. Causation, Mitigation and Eureko's "Hibernation" Strategy

Claimant's Position

296. According to Claimant, the damages incurred by Eureko were caused by the Slovak Republic's introduction of the 2007 Reforms. The Slovak Republic sought to drive

[458] See, for example, *LG & E*, ¶¶193, 200; *Tecmed*, ¶116.

private health insurers from the Slovak market and amended its legislation to do so.[459] In response, Claimant states that it adopted a "hibernation strategy," based upon "(i) a strong reduction in marketing efforts and expenses, (ii) a reduction in benefits offered to insured above the statutory minimum coverage and (iii) a reduction in operating costs, for instance, by decreasing IT expenses."[460]

297. In Claimant's view, hibernation was a reasonable mitigation strategy that reduced the damages Eureko would otherwise have suffered by leaving the Slovak Republic and abandoning its investment.[461] Contrary to Respondent's argument, Claimant does not consider hibernation to have been part of the cause of the damages inflicted on it, but rather a response on Eureko's part to harm that was fully manifest once the 2007 Reforms were introduced.[462]

Respondent's Position

298. Respondent contests both the existence of the alleged hibernation strategy and any alleged causal link between the 2007 Reforms, any alleged hibernation, and any harm allegedly inflicted on Eureko.[463] Respondent notes that the hibernation strategy was described only late in the proceedings, in the additional witness statement of Mr Bjarne Jorgen Slorup, and the alleged decision is not supported by any contemporaneous documentary evidence.[464] On the contrary, Respondent argues, Union Healthcare's annual reports from this period state that the company had not changed its long term strategy, and Union Healthcare attempted to purchase the insurance portfolio of EZP in mid-2008. Moreover, Respondent outlines, Claimant continued to introduce benefits above the statutory minimum level of coverage,[465] increased its marketing budget in 2008,[466] and continued to increase IT expenditures throughout the relevant period.[467] In

459 Claimant's Damages Memorial, ¶¶II.2-3.

460 Claimant's Damages Memorial, ¶II.6.

461 Claimant's Damages Memorial, ¶II.3.

462 Hearing Tr. (Day 1), 12 December 2011 at 73:11 to 74:16.

463 Respondent's Damages Memorial, ¶34.

464 Respondent's Damages Memorial, ¶44.

465 Respondent's Damages Memorial, ¶¶47-49.

466 Respondent's Damages Memorial, ¶¶50-54.

467 Respondent's Damages Memorial, ¶¶55-56.

the face of this contrary evidence, Respondent submits, Claimant has offered only highly general assertions of the cost reductions allegedly comprising the hibernation.[468]

299. In Respondent's view, Eureko's alleged hibernation forms part of the causal chain between the 2007 Reforms and any harm suffered by Eureko. Relying on the jurisprudence of the Iran-U.S. Claims Tribunal and the decisions of tribunals in *Biwater Gauff*[469] and *S.D. Myers*,[470] Respondent argues that Claimant has failed to establish the requisite degree of proximate causation.[471] Even if a decision to place Union Healthcare in hibernation was taken and carried out, Respondent submits, Claimant has failed to draw a link between the legislative actions of the Slovak Republic and that decision. The cap on operating expenses, the ban on brokers, and the repositioning of the Regulator all took place significantly before, and do not appear to have triggered, the alleged decision to hibernate.[472] In contrast, the amended solvency requirements, amended redistribution rate, and ban on transfers were all introduced after the decision to hibernate was allegedly taken.[473] Claimant, Respondent notes, identifies the ban on profits as the trigger for its decision to hibernate,[474] but in Respondent's view, Claimant was legally obliged by the cap on operating expenses to lower its expenditures in any event.[475] Not only is the causal link not proven, Respondent submits, but there were "many other reasons" why Claimant may have sought to reduce its expenses, including general attention to efficiency, economic crisis, losses by Claimant's holding company outside the Slovak Republic, and ordinary business decision-making.[476]

2. "Duty" to Mitigate

Claimant's Position

300. Claimant contends that its hibernation strategy was intended to mitigate the damages caused by the 2007 Reforms, but notes Respondent's position that Eureko should have

468 Respondent's Damages Memorial, ¶¶39-40.

469 *Biwater Gauff*, ¶779.

470 *S.D. Myers*, ¶316.

471 Respondent's Damages Memorial, ¶¶57-60.

472 Respondent's Damages Memorial, ¶65.

473 Respondent's Damages Memorial, ¶70.

474 Respondent's Damages Memorial, ¶64.

475 Respondent's Damages Memorial, ¶73.

476 Respondent's Damages Memorial, ¶79.

terminated its operations prior to 30 September 2006 in anticipation of coming legislative changes.[477] In Claimant's view, this argument "makes no sense" as Eureko would then been entitled to the full value of its investment, or €144.9 million—more than it now seeks.[478] Claimant further submits as a factual matter that it could not have anticipated the 2007 Reforms and should not have had to anticipate a breach of the BIT.[479]

301. In any event, Claimant argues, the duty to prove a failure to mitigate lies with the Party raising the defence. Citing the holdings of the tribunals in *AIG v. Kazakhstan*,[480] and *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*,[481] Claimant contends that this burden is a high one: not every failure to accurately assess risks gives rise to a mitigation defence and a plausible explanation for a claimant's actions will suffice.[482]

Respondent's Position

302. Respondent submits that the 2007 Reforms were predictable—and were, in fact, anticipated by Claimant—well before Eureko made its investment in Union Healthcare (see above at paragraph 193). Early elections had already been called in February 2006, before the incorporation of Union, and "[a]t any point prior to 30 September 2006, Union Healthcare could have, and should have terminated its activities, to avoid the consequences of the expected regulation."[483]

3. The Calculation of Damages

Claimant's Position

303. Claimant submits that the standard for calculating damages in international law is set out generally in the decision of the Permanent Court of International Justice in its *Factory at Chorzów* decision as follows:[484]

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477 Claimant's Damages Memorial, ¶III.7.

478 Claimant's Damages Memorial, ¶III.8.

479 Claimant's Damages Memorial, ¶III.8.

480 *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, ¶10.6.5 (3).

481 *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶170.

482 Claimant's Damages Memorial, ¶¶III.13-14.

483 Respondent's Counter-Memorial on the Merits, ¶365.

484 *Factory at Chorzów (Merits)*, Judgment of 13 September 1928, P.C.I.J. Series A, No. 17 at p. 47.

> Reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed.

This standard, Claimant argues, has been subsequently incorporated into the Articles on State Responsibility developed by the International Law Commission[485] and applied by arbitral tribunals in cases such as *Vivendi*.[486]

304. Relying on the Expert Report of Mr Richard Indge (of Ernst & Young), Claimant outlines two calculation methods, both based upon a discounted dividend model (a form of discounted cash flow modelling), and a third method as a 'reasonableness check'. Claimant submits that discounted cash flow represents the approach to damages adopted in most investment treaty arbitrations.[487]

305. *Methodology 1*. The first method offered by Claimant is based on a comparison between the dividends that Eureko would have received in the absence of the 2007 Reforms ("**Model E**") and the dividends that it anticipates receiving now that the 2007 Reforms have been both enacted and reversed ("**Model A**"). For the purposes of this calculation, Claimant dates the 2007 Reforms to 25 October 2007, the date of the ban on profits, notwithstanding that certain measures were introduced before that date.[488] Claimant treats the 2007 Reforms as having ended on 1 August 2011, the date on which the further reforms adopted in July 2011 entered into force.[489] Claimant's first methodology assesses the damages suffered by Eureko to be €47 million.[490]

306. *Methodology 2*. Claimant's second method is based on a comparison between the value of Eureko's investment before the 2007 Reforms and its value at 1 August 2011. Claimant's 1 August 2011 valuation is based upon dividends anticipated in the Model A calculation and amounts to €138.7 million. Claimant's pre-2007 Reforms valuation is based on a model prepared by Union's Management Board and Eureko's Group Strategy and Performance Group to reflect Claimant's legitimate expectations at 24 October 2007 ("**Model 2007**"). Although both models are based upon a scenario in which the 2007 Reforms did not take place, Model 2007 differs from Model E in that it

485 Claimant's Damages Memorial, ¶III.2

486 *Vivendi*, §8.2.7.

487 Claimant's Damages Memorial, ¶III.6.

488 Claimant's Damages Memorial, ¶IV.6.

489 Claimant's Damages Memorial, ¶IV.3.

490 Claimant's Damages Memorial, ¶IV.5.

reflects assumptions for other factors as at October 2007, rather than actual events and the revised assumptions forecast in 2011 in Model E.[491] Model 2007 assesses the value of Claimant's investment in October 2007 at €144.9 million, an amount that is then uplifted to reflect anticipated returns between October 2007 and August 2011. Applying three possible rates, this results in a value of €203.4 to €189.5 million and a resulting loss, as a result of the 2007 Reforms of €64.7 to €50.8 million.[492]

307. *Methodology 3.* Claimant verifies the reasonableness of its two methodologies against a simplified methodology representing the borrowing cost of the €72 million which Eureko invested in Union Healthcare. Although not reflective of actual damages, Claimant submits that at the 7.375 to 8.375 percent rate allegedly applicable to Eureko's debts, its damages should amount to no less than its borrowing cost of €22.1 to €25.5 million.[493]

308. Claimant identifies a discount factor of 9.4 percent and claims compound interest at that rate, irrespective of the method adopted.[494] Claimant further notes that it may be subject to taxes on damages that would not have been applicable to dividends and requests an order that Respondent bear any taxes owed as a result of awarded damages.[495]

309. Evaluating its models, Claimant rejects the points of disagreement raised by Respondent (see below at paragraph 312). Specifically, Claimant contends that its models do account for the lapse of newly acquired policyholders[496] and that its prediction of gradually decreasing broker commissions reflects Union Healthcare's decreasing reliance on brokers at it gained market share and recognition.[497] Claimant similarly defends its ratio of premium income to claims, noting that Respondent seeks to apply the average rate among Slovak health insurers. In effect, Claimant argues, this negates the very efficiencies Eureko entered the market in order to create and takes as a starting point that no greater efficiency was possible.[498] Next, Claimant defends the omission

491 Expert Report of Richard Indge, ¶7.8.

492 Expert Report of Richard Indge, ¶7.21-25.

493 Claimant's Damages Memorial, ¶IV.16.

494 Claimant's Damages Memorial, ¶IV.18.

495 Claimant's Damages Memorial, ¶IV.20.

496 Joint Expert Report, pp. 9-10.

497 Joint Expert Report, pp. 13-14; Hearing Tr., 30 January 2012 at 23:24 to 24:6.

498 Hearing Tr., 30 January 2012 at 21:9 to 22:15.

of a small company premium in calculating discount rates, arguing that Union Healthcare is not, in fact, a small company, but is backed by the much larger Eureko group.[499] Finally, Claimant defends its use of a single date—2024—for calculating the terminal value in Models A and E. As a "matter of pure logic," Claimant argues, terminal value, being the "value of the company beyond a point that can reasonably be estimated" should end at the same year for both models.[500] Moreover, Claimant submits, its first calculation method requires the use of a single terminal value for both models to avoid capturing growth relating only to the underlying economic assumptions of the models.[501]

310. On the whole, Claimant considers the outcome reached by Respondent's expert witnesses on damages to be "simply not credible."[502] Claimant notes that Respondent's methods would value Union Healthcare at negative €96.1 million in October 2007 and would treat the effect of the 2007 Reforms as beneficial to Claimant, preventing it from losing still further amounts of money.[503] This amounts, in Claimant's view, to a statement that Union Healthcare was financially doomed, a position Claimant considers irreconcilable with the factual record. Moreover, Claimant notes, KPMG—the same accounting firm preparing Respondent's expert report—had previously audited Claimant, treated it as a going concern, and never raised concerns regarding its viability.[504]

Respondent's Position

311. Respondent objects to the damages methodology employed by Claimant and its expert. In Respondent's view, the use of the discounted dividend model is inappropriate in light of the short period of Claimant's investment prior to the alleged breach and its lack of a track record of profitability. Respondent notes that arbitral tribunals in *Metalclad*,[505] *Wena Hotels Ltd.*,[506] and *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*[507] all declined to apply a discounted cashflow

499 Hearing Tr., 30 January 2012 at 20:20 to 21:8.

500 Hearing Tr., 30 January 2012 at 19:19 to 20:5.

501 Claimant's Post-Hearing Brief, ¶¶70-73.

502 Hearing Tr., 30 January 2012 at 10:20.

503 Hearing Tr., 30 January 2012 at 10:18 to 13:12.

504 Hearing Tr., 30 January 2012 at 17:21 to 18:22.

505 *Metalclad*, ¶¶120-21.

506 *Wena Hotels Ltd.*, ¶123.

507 *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1990, ¶188.

method where the claimant in those matters lacked a record of past performance.[508] According to Respondent, this is "exactly the case of Union Healthcare," and Claimant itself bases its claim on models, rather than any established track record. Of the arbitrations noted by Claimant, Respondent observes that the *Vivendi* tribunal ultimately declined to apply a discounted cashflow model on the grounds that future profitability was insufficiently established.[509] Respondent submits that the same situation prevails here and that Claimant has not established a likelihood of profitability.[510]

312. Examining Claimant's models, Respondent notes a number of points of disagreement, the most significant of which are recounted here. First, Respondent argues that Claimant's second method and its use of Model 2007 are inappropriate insofar as Model 2007 does not take into account the 2008 financial crisis.[511] Accordingly, the second method compensates Claimant for events not related to legislative or other actions by the Slovak Republic.[512] Respondent further questions the fact that all three models were prepared with the involvement of Claimant's personnel and objects particularly to the fact that Claimant's expert witness (Mr Indge) did not "carry out a full verification of the assumptions" underlying Model 2007.[513]

313. Second, Respondent believes that Claimant's models overstate the projected growth of Union Healthcare's portfolio, in particular by understating the lapse rates of new policyholders. Respondent submits that the structure of Model 2007 omits lapse rates entirely from the calculation thereby omitting the costs of acquiring replacement policyholders and invalidating the results.[514] Respondent also considers the lapse rates used in Model E to be low in light of the use of brokers projected therein, as broker-acquired policy holders lapse at a significantly higher rate than individuals acquired through an insurer's own network.[515]

314. Third, Respondent disagrees with the estimate employed in Model E that average broker commissions per policyholder acquired would have decreased significantly over

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508 Respondent's Damages Memorial, ¶¶132-33.

509 Respondent's Damages Memorial, ¶¶138-39, citing *Vivendi*, ¶¶8.3.4, 8.3.5, 8.3.8.

510 Respondent's Damages Memorial, ¶¶140-42.

511 Expert Report of Michael Peer and Zuzana Kepková, ¶5.1.6.

512 Joint Expert Report, p. 3.

513 Joint Expert Report, p. 3.

514 Respondent's Post-Hearing Brief, ¶64; Joint Expert Report, p. 9-10.

515 Expert Report of Michael Peer and Zuzana Kepková, ¶¶6.2.14 to 6.2.19.

time. Respondent considers that, had brokers remained permitted, new entrants to the market and the use of brokers by Union Healthcare's competitors would have maintained broker fees at a stable level.[516]

315. Fourth, Respondent does not consider Claimant's projected ratio between its income from insurance premiums and its expenditures on health care to be reasonable. In Respondent's view, the primary driver of the claims ratio in the long term is the ageing of the Slovak population, which would not support a decreasing rate.[517] Moreover, Respondent argues, the poor state of the Slovak health sector would not suggest that significant reductions in expenditures, if achievable, would be sustainable in the long term.[518]

316. Fifth, Respondent disagrees with the discount rate of 9.4 percent applied by Claimant. In particular, Respondent disagrees with the use of a single discount rate in all three models, notwithstanding the differing circumstances prevailing in 2007 and 2011,[519] and the omission of a small company premium reflecting the scope of Union Healthcare's operations. Respondent considers a small company premium to be standard in valuation in the Slovak Republic.[520]

317. Finally, Respondent rejects the approach to terminal value adopted in Claimant's models. According to Respondent's experts, Claimant applies a terminal value, ending the model, at the point where a stable number of policyholders is reached in the case of Model A and Model 2007 (in the years 2024 and 2016, respectively), but continues Model E for six additional years after reaching a stable number of policyholders. In Respondent's view, Model E should end in 2018, rather than 2024, reducing the ultimate loss under the first calculation method by €44.5 million.[521]

318. Respondent did not expressly challenge Methodology 3 except insofar as it was affected by the challenges raised to Methodologies 1 and 2.

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516 Expert Report of Michael Peer and Zuzana Kepková, ¶¶6.5.1 to 6.5.6; Joint Expert Report, p. 13.

517 Expert Report of Michael Peer and Zuzana Kepková, ¶6.7.3.

518 Expert Report of Michael Peer and Zuzana Kepková, ¶6.7.6; Joint Expert Report, pp. 12-13.

519 Joint Expert Report, p. 5.

520 Expert Report of Michael Peer and Zuzana Kepková, ¶¶6.10.14 to 6.10.15; Joint Expert Report, p. 4.

521 Joint Expert Report, pp. 5-6.

B. The Tribunal's Decision on Damages

1. The "Hibernation" and Mitigation of Damages

319. The question of the extent of the loss caused by Respondent's breach of its Treaty obligations, for which Respondent is liable, remains. Respondent argued that no losses were caused by measures taken by Respondent. In essence, it claimed that it was Claimant's own choice to put its operations into 'hibernation'.

320. The Tribunal does not accept Respondent's view of the matter. The Tribunal accepts that Claimant reasonably regarded the 2007 Reforms (and particularly the cap on operating costs, the ban on profits and the ban on transfers) as putting it in a position in which it might be unable to recover its existing investment and any further sums invested in its business plans in Slovakia. The suspension (or "hibernation") of its operations in Slovakia was a reasonable response to that situation, and one that does not break the chain of causation and responsibility in this case. The suspension was a reasonable defensive measure, intended to minimise the risk of further losses. The Tribunal takes this view both from the perspective of questions of liability and causation, and from the perspective of the determination of compensation payable.[522] The Tribunal rejects Respondent's submission that Claimant failed to mitigate its loss.

2. Calculation of Compensation

321. The Tribunal has found that the 2007 Reforms violated Article 3(1) of the Treaty. It has found that the 2007 Reforms violated Article 4 of the Treaty, but that the violation and the injury are subsumed within the violation and the injury arising from the breach of the 'fair and equitable treatment' obligation in Article 3, and that it is not necessary to consider them further. It has also found that there was no violation of Article 5 of the Treaty. Accordingly, the task is to quantify the losses for which compensation is due under Article 3(1) of the Treaty.

322. In principle, according to the well-established approach reflected in the *Chorzów Factory* case[523] and in the ILC Articles on State Responsibility,[524] Respondent is under an obligation "to compensate for the damage caused"[525] by its breach of the Treaty.

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522 See Article 39 of the ILC Articles on State Responsibility.

523 (1928) PCIJ, Series A, No. 17, p. 47.

524 Articles 35, 36, 39.

323. It is for Claimant to prove its case regarding the 'damage caused'. That said, the requirement of proof must not be impossible to discharge. Nor must the requirement for reasonable precision in the assessment of the quantum be carried so far that the search for exactness in the quantification of losses becomes disproportionately onerous when compared with the margin of error.

324. In the present case, Claimant put forward a number of different methodologies. Two were based upon calculations of the value of the business and the estimated impact upon that value of the 2007 Reforms.

325. That approach is often used in the case of an expropriation, to put a value on that which has been taken. Here, there is no 'deprivation' or expropriation. Further, the investment was in its early stages, in years that saw the very considerable disruption caused by various global economic crises. With a very short track record it is difficult to extrapolate to a robust estimate of the probable future value of Claimant's investment. It is also difficult to separate out the effect of the ban on profits and the ban on transfers from the effect of other measures, which the Tribunal has not found to constitute breaches of the Treaty.

326. Perhaps most importantly, since Claimant's losses were the costs of defending its position against what proved to be temporary measures in breach of the Treaty, it is right to focus upon what those costs were.

327. In its Post-Hearing Brief, Claimant said:

> Claimant's Methodology 3, which assesses Eureko's damages from a conservative borrowing cost perspective and estimates damages in the amount of EUR 22.1M – 22.5M, has been left uncontested by Respondent. It calculates solely Eureko's costs for funding Union during the time that its business was delayed as a consequence of the 2007 Reversal, and does not account for the return that Eureko – like any other investor – would require over and above the funding cost.[526]

328. The rationale of this methodology, used by Claimant as a "reasonableness check" on the results gained from its methodologies based upon the valuation of the business, was that the sum represents the borrowing cost of the capital tied up in Eureko during the time that the ban on profits was in force.[527] Claimant set that period as from

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525 Article 36 of the ILC Articles on State Responsibility.

526 Claimant's Post-Hearing Brief, ¶14.

527 See Claimant's Memorial on Damages, ¶¶IV.15, IV.16.

25 October 2007 to 1 August 2011, the date when new legislation on health insurance entered into force.

329. Claimant may recover lost ground, and at some point in the future reach the same position on the market that it would have reached in the absence of the 'hibernation' that it adopted during the ban on profits. That possibility cannot be predicted with sufficient certainty. Moreover, profits ploughed back into healthcare are not profits dissipated or seized by the State without benefit flowing to Claimant. But in any event, some losses will not be recovered within the foreseeable future; and even if they are recovered in the future that recovery will not compensate for the loss of the present value of the monies.

330. Faced with a freeze imposed by law, locking its investment in the Slovak Republic into that country, and without the possibility of being able to transfer any profits out of the State, the investment became essentially 'lost'. Hibernation was an entirely reasonable response by Claimant; and the cost of that hibernation is the loss that it suffered as a result of Respondent's failure to comply with its Treaty obligations. It is that cost that should be the quantum of compensation.

331. As to what that cost was, Claimant has calculated that the borrowing cost of the invested capital was not less than €22.1 million.[528] The sum is derived from the application of a borrowing rate achieved by Eureko on a senior debt issue of €750m in 2009 of 7.375%.[529] The actual calculation was not contested by Respondent.

332. The Tribunal regards that sum as a reasonable approximation to the cost of the 'standstill' that was triggered by the 2007 Reforms and specifically by the ban on profits.

333. The Tribunal accordingly awards Claimant damages in the sum of €22.1 million, to be paid by Respondent net of any taxes that might be due to be paid by Claimant to Respondent on that sum.

528 Exhibit CE-2, § 8.10.

529 Exhibit CE-2, § 7.22.

334. As is common practice in the present type of investment arbitration, interest, compounded quarterly, will be payable on that sum as from 1 August 2011, up to the date of payment, to ensure full reparation.[530] The German Arbitration Act is also silent with respect to interest. The Treaty itself contains no specific provision on interest, but the applicable law provision in Article 8(5) refers to "the law in force of the Contracting Party concerned" and "principles of international law." Claimant requested pre-award and post-award interest "at a rate to be determined by the arbitral tribunal."[531] In its Memorial on Damages Claimant suggested "compound interest at a rate of 9.4% per year as of 1 August 2011" (based on what Mr. Indge had assessed as the time value of money in the context of determining a discount rate) or "any lower or higher interest that the Tribunal considers appropriate."[532] Respondent did not comment on interest rates. In these circumstances, the Tribunal has the power under international law to award interest, and discretion to determine a reasonable rate of interest, in order to ensure full reparation. The Tribunal has considered a range of interest rates including Euribor, Eurozone official and market rates, and the statutory rates for unpaid debts under German, Slovak and Netherlands law, and has decided that interest shall be applied at the Eurozone official rate for "main refinancing operations" (as published on the website of the European Central Bank www.ecb.int) plus 2%, compounded quarterly.

3. Other Relief

335. The Tribunal declares that the Slovak Republic breached its obligations under Article 3(1) and Article 4 of the BIT by adopting the ban on profits, and later by adopting also the ban on transfers. The Tribunal declines to make an order as requested by Claimant[533] concerning future compliance with the Treaty by Respondent. It is not for the Tribunal to grant relief on the basis of speculations about the future conduct of the Parties. Nonetheless, the Tribunal notes that the Treaty remains in force.

336. The requests for relief made by Respondent are dismissed.

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530 See, for example, Article 38 of the ILC Articles on State Responsibility; *Azurix*, ¶440; *LG&E*, ¶¶ 54-56, 103-105; *MTD v. Chile*, ¶251; and *Wena Hotels Ltd.* ¶¶128-129.

531 See paragraphs 126-128, above.

532 Claimant's Memorial on Damages, ¶IV.17-19.

533 See paragraphs 126-128, above.

XI. COSTS

337. The Tribunal observes that the Treaty contains no provisions on the allocation of the costs of arbitration arising out of an "investment dispute" (as opposed to a dispute concerning the Treaty's interpretation or application). The provisions regarding the Tribunal's decision in the matter of costs are instead to be found in Articles 38 to 40 of the UNCITRAL Arbitration Rules. Article 38 of the UNCITRAL Arbitration Rules defines the "costs of arbitration" as follows:

> The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:
>
> *(a)* The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
>
> *(b)* The travel and other expenses incurred by the arbitrators;
>
> *(c)* The costs of expert advice and of other assistance required by the arbitral tribunal;
>
> *(d)* The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
>
> *(e)* The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
>
> *(f)* Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

338. Meanwhile, paragraphs 1 and 2 of Article 40 of the UNCITRAL Arbitration Rules provide the criteria to be applied by the Tribunal in awarding costs:

> 1. 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.
>
> 2. 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.

339. The Parties deposited with the PCA a total of €800,000.00 (€400,000.00 by Claimant; €400,000.00 by Respondent) to cover the costs of arbitration.

340. The fees of Professor Albert Jan van den Berg, the arbitrator appointed by Claimant, amount to €205,583.33 (€78,750.00 for the period up to the issuance of the Award on Jurisdiction, Arbitrability and Suspension (the "**Jurisdiction Phase**"); and €126,833.33 for the subsequent period up until the issuance of this Final Award (the "**Merits Phase**"). His expenses amount to €6,800.08 (€2,287.17 for the Jurisdiction Phase and €4,512.91 for the Merits Phase, reflecting in particular travel to and accommodation in London for hearings and deliberations).

341. The fees of Judge Peter Tomka, the arbitrator originally appointed by Respondent, amount to €5,000.00 (for the Jurisdiction Phase only). Judge Tomka incurred no expenses. The fees of Mr V.V. Veeder, the arbitrator appointed by Respondent following the resignation of Judge Tomka, amount to €100,250.00 (€25,000.00 for the Jurisdiction Phase and €75,250.00 for the Merits Phase). Mr. Veeder's expenses amount to €434.65 (€22.00 for the Jurisdiction Phase and €412.65 for the Merits Phase).

342. The fees of Professor Vaughan Lowe, the Presiding Arbitrator, amount to €209,567.50 (€79,437.50 for the Jurisdiction Phase and €130,130.00 for the Merits Phase). His expenses amount to €1,328.86 (€1,193.86 for the Jurisdiction Phase and €135.00 for the Merits Phase).

343. Pursuant to the Terms of Appointment and the agreement of the Parties, the International Bureau of the PCA was designated to act as Registry in this arbitration. The PCA's fees for registry services amount to €79,470.00 (€33,877.50 for the Jurisdiction Phase and €45,592.50 for the Merits Phase).

344. Other tribunal costs, including court reporters, hearing rooms, meeting facilities, travel, bank charges, and all other expenses relating to the arbitration proceedings, amount to €70,742.67 (€12,063.59 for the Jurisdiction Phase and €58,679.08 for the Merits Phase).

345. Based on the above figures, the combined tribunal costs, comprising the items covered in Articles 38(a) to (c) of the UNCITRAL Arbitration Rules, total €679,177.09 (€237,631.62 for the Jurisdiction Phase and €441,545.47 for the Merits phase).

346. These tribunal costs are deducted from the deposit, and any unexpended balance shall be returned to the Parties in accordance with Article 41(5) of the UNCITRAL Rules.

347. The principle governing the awarding of the costs of arbitration, according to Article 40(1) of the UNCITRAL Arbitration Rules, is that an arbitral tribunal shall determine that the costs shall be borne by the unsuccessful party, unless it finds an apportionment of the costs between the parties to be reasonable under the circumstances of the case. With respect to the costs of legal representation and assistance (Article 38(e)), Article 40(2) of the UNCITRAL Arbitration Rules provides that the arbitral tribunal, taking into account the circumstances of the case, is free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable. Articles 40(1) and (2) grant wide discretion to an arbitration tribunal in awarding the costs of arbitration.

348. The Tribunal is aware of a certain practice in investment treaty arbitration that each party bears its own costs and that the parties divide tribunal costs equally. That practice is not binding on this Tribunal, which prefers the more recent practice in investment arbitration of applying the general principle of "costs follow the event," save for exceptional circumstances, such as when concerns regarding access to justice are raised. That approach is the more compelling one in the present case which is governed by the UNCITRAL Arbitration Rules that expressly contemplate the rule of "costs follow the event" in Article 40(1) by its emphasis on "success" or lack thereof. This conclusion is reinforced by the fact that both sides in this case indeed argue that the unsuccessful side in this arbitration should have to bear the full amount of tribunal costs as well as the other side's costs of legal representation. Further, Section 1057 of the German Arbitration Act provides for an arbitral tribunal to "allocate costs, including those incurred by the parties necessary for the proper pursuit of their claim or defence," and that an arbitral tribunal shall do so "at its discretion and take into consideration the circumstances of the case, in particular the outcome of the proceedings."[534]

349. In the present case, Claimant has succeeded in a substantial part of its claim on the merits. Moreover, it has done so on the basis that the ban on profits, which had been found unconstitutional by the Constitutional Court of the Slovak Republic in January 2011, was a violation of the Treaty. As these costs concerning liability and damages in the Merits Phase have been incurred in order to recover losses arising from the violation of the Treaty, the Tribunal considers that they should in principle be paid by Respondent. The same is true in respect of the Tribunal and administrative costs for the Merits Phase.

[534] German Code of Civil Procedure (Zivilprozessordnung, or "**ZPO**"), Book 10.

350. The Jurisdiction Phase, in contrast, raised a difficult and novel question in the form of the Intra-EU Jurisdictional Objection. In respect of that phase, each Party should bear its own costs and one-half of the Tribunal costs.

351. On the basis of the figures set out in the Revised Costs Submissions of 12 March 2012, Respondent is accordingly directed to pay to Claimant the sum of €2,905,350.94. This amount represents Claimant's fees and expenses of legal representatives and experts for the liability and quantum phases of the case. The Tribunal considers such costs to have been reasonably incurred and reasonable in amount.

XII. DECISION

352. For the reasons stated above, the Tribunal:

(a) DISMISSES each of the remaining jurisdictional objections advanced by Respondent and decides that it has jurisdiction over the dispute;

(b) DECLARES Respondent to have breached Article 3 and Article 4 of the Treaty by adopting the ban on profits and the ban on transfers;

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

(e) ORDERS Respondent to pay to Claimant the amount of €220,772.74 to reimburse Claimant for costs of this Merits Phase of the arbitration; and

(f) ORDERS Respondent to pay to Claimant the amount of €2,905,350.94 for its legal representation and assistance in the Merits Phase of this arbitration.

Place of Arbitration: Frankfurt, Germany

Date: 7 December 2012

Professor Albert Jan van den Berg
Co-Arbitrator

Mr V.V. Veeder
Co-Arbitrator

Professor Vaughan Lowe
Presiding Arbitrator