Date of decision:
May 24, 1999

INTERNATIONAL CENTRE FOR THE SETTLEMENT
OF INVESTMENT DISPUTES
Washington, D.C.

CASE No. ARB/97/4

CESKOSLOVENSKA OBCHODNI BANKA, A.S.
(Claimant)

versus

THE SLOVAK REPUBLIC
(Respondent)

Decision of the Tribunal on Objections to Jurisdiction

Members of the Tribunal

Professor Thomas Buergenthal, President
Professor Piero Bernardini
Professor Andreas Bucher

Secretary of the Tribunal

Ms. Margrete Stevens

Representing the Claimant

Mr. Charles Brower
Ms. Abby Cohen Smutny
White & Case
Washington, D.C.

Representing Respondent

Mr. Henry Weisburg
Shearman & Sterling
New York, New York

Professor Emmanuel Gaillard
Shearman & Sterling
Paris, France

and, as co-counsel

Mr. Igor Palka
Cernejova & Hrbek
Bratislava, Slovak Republic

I. PROCEDURAL BACKGROUND AND CLAIMS OF THE PARTIES

1. The Claimant in this case is the Ceskoslovenska Obchodni Banka, A.S. (CSOB), a commercial bank organized under Czech law; the Respondent is the Slovak Republic. Claimant filed its "Request for Arbitration" with the International Centre for Settlement of Investment Disputes (ICSID or Center) on April 18, 1997, charging Respondent with a breach of the "Agreement on the Basic Principles of a Financial Consolidation of Ceskoslovenska Obchodni Banka, A.S." (Consolidation Agreement), which was concluded on December 19, 1993 by the Ministry of Finance of the Slovak Republic, the Ministry of Finance of the Czech Republic, and CSOB. Claimant alleged that the breach consisted in the failure of the Slovak Republic to cover the losses incurred by the Slovenska inkasni spol. s.r.o (Slovak Collection Company), as agreed to in the Consolidation Agreement. It seeks fulfillment by Respondent of its obligations under the Consolidation Agreement and damages for the losses sustained, plus costs. The request was registered by the Centre on April 25, 1997.

2. The Consolidation Agreement, which was designed to facilitate the privatization of CSOB and its operation in the Czech and Slovak Republics after their separation, provided, *inter alia*, for the assignment by CSOB of certain non-performing loan portfolio receivables to two so-called "Collection Companies," one to be established by the Czech Republic, the other by the Slovak Republic, in their respective national territories. The Consolidation Agreement also stipulated that each Collection Company was to pay CSOB for the assigned receivables. To enable them to do so, each Collection Company was to receive the necessary funds from CSOB under the terms of separate loan agreements, such loans to be paid down in accordance with a stipulated repayment schedule.

3. The Collection Companies were established by the respective Republics as contemplated by the Consolidation Agreement. Thereafter CSOB and the newly created Slovak Collection Company concluded the "Loan Agreement on the Refinancing of Assigned Receivables" (Loan Agreement), with the effective date of December 31, 1993. Section 7 of the Loan Agreement, entitled "Security", refers to the Consolidation Agreement and declares that pursuant to the latter agreement, "the repayment of the loan including interest thereon is secured by an obligation of the Ministry of Finance of the Slovak Republic." This obligation is confirmed at the bottom of the Loan Agreement where, following the signa-

tures of the representatives of CSOB and the Slovak Collection Company, the Minister of Finance of the Slovak Republic, on behalf of his Ministry, "consents to and acknowledges the contents of this Agreement and, in particular, confirms its obligation under Section 7 of this Agreement."

4. Claimant's Request for Arbitration notes that the Czech and Slovak Republics are parties to the "Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (ICSID Convention), the Czech Republic as of April 22, 1993 and the Slovak Republic as of June 26, 1994. Claimant bases the Centre's jurisdiction over this dispute on three grounds. It contends, first, that the "Agreement between the Government of the Slovak Republic and the Government of the Czech Republic Regarding the Promotion and Reciprocal Protection of Investments" (Bilateral Investment Treaty or BIT), signed on November 23, 1992, did enter into force on January 1, 1993 and that Article 8(2) thereof confers jurisdiction on the Centre to hear this dispute.[1] Second, Claimant submits that even if the BIT had not entered into force as between the two Contracting States, it was binding on the Slovak Republic by virtue of the fact that the Slovak Foreign Ministry, in a Notice published on October 22, 1993 in the Official Gazette of the Slovak Republic, declared that the

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[1] Article 8 of the BIT reads as follows:

1. Any dispute which may arise between the investor of one Party and the other Party in relation to any investments made in the territory of such other Party, shall be subject to negotiations between the parties to the dispute.
2. If the dispute between the investor of one Party and the other Party continues after a period of three months, the investor and the Party shall have the right to submit the dispute to either:
   1) the International Center for the Resolution of Investment-Related Disputes with special regard to the applicable provisions of the Treaty on the Resolution of Investment-Related Disputes arising between States and nationals of other States, open for signature in Washington D.C. on 18 March 1965, provided, however, that both Parties are parties to such Treaty; or
   2) an arbitrator or an ad hoc international arbitration tribunal established in accordance with the arbitration rules of the United Nations Organization Committee for International Trade Law. Parties to the dispute may agree in writing upon modifications of such rules. The arbitration award shall be final and binding on both parties to the dispute.
3. The dispute shall be resolved by such agency referred to in Section 2 above as was the first one to which a proposal for the resolution of the dispute was submitted.

BIT had entered into force on January 1, 1993.[2] Finally, Claimant contends that Article 7 of the Consolidation Agreement incorporates the BIT by reference because it provides that "this Agreement shall be governed by the laws of the Czech Republic and the Treaty on the Promotion and Reciprocal Protection of Investments between the Czech Republic and the Slovak Republic dated November 23, 1992." This incorporation is said to bind the Slovak Republic regardless of whether the BIT itself entered into force.

5. In accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), this Tribunal was deemed constituted and the proceedings to have begun on August 20, 1997, the date on which the parties were notified by the Acting Secretary-General of ICSID that Professor Andreas Bucher, appointed by the Claimant, Professor Piero Bernardini, appointed by the Respondent, and Professor Thomas Buergenthal, designated as President of the Tribunal by the Centre, had accepted their appointments. On that date, the Acting Secretary-General also informed the parties that Ms. Margrete Stevens, Counsel, ICSID, would serve as Secretary of the Tribunal.

6. On October 6, 1997, the Tribunal held its first session with the parties at the seat of ICSID in Washington, D.C. At that session, the parties acknowledged that the Tribunal had been duly constituted in accordance with the relevant provisions of the ICSID Convention and the Arbitration Rules.

7. At the same session, counsel for Respondent declared that the Slovak Republic considered that the instant dispute was not within the jurisdiction of the Centre and the competence of the Tribunal and would interpose objections to jurisdiction. The President, acting in accordance with Article 41(2) of the Convention and Arbitration Rule 41(3), thereupon suspended the proceedings on the merits and, after ascertaining the views of the parties, fixed the following time limits for the written phase of

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[2] This Notice reads as follows:

> The Ministry of Foreign Affairs of the Slovak Republic announces that the Treaty on the Promotion and Reciprocal Protection of Investments between the Government of the Slovak Republic and the Government of the Czech Republic was signed in Bratislava on November 23, 1992.

Pursuant to Article 12, the Treaty became effective on January 1, 1993.

the proceedings relating to jurisdiction: (i) January 30, 1998—Respondent to file memorial on jurisdiction; (ii) April 30, 1998—Claimant to file counter-memorial on jurisdiction; (iii) July 31, 1998—Respondent to file reply; (iv) October 30, 1998—Claimant to file rejoinder. The oral hearing on jurisdiction was fixed to commence on January 4, 1999. (The opening date of the hearing was subsequently moved to January 5, 1999.)

8. By letter dated May 18, 1998 Respondent requested the Tribunal, in accordance with Article 43(a) of the Convention and Arbitration Rule 34(2), to order Claimant to produce copies of various documents Respondent alleged would provide evidence bearing on its contention that the Tribunal lacked jurisdiction to hear this dispute. By Procedural Order No.1, dated June 8, 1998, the Tribunal granted only that part of Respondent's request which sought the production by Claimant of "all documents in the custody or control of CSOB in any way relating to a guarantee and/or proposed issuance of a guarantee, whether or not a guarantee is currently in effect."

9. Between the October 6, 1997 session and the commencement of the oral phase of the proceedings on January 5, 1999 Claimant, invoking Arbitration Rule 39, requested the Tribunal on different occasions to issue provisional measures and emergency interim restraining measures in accordance with Articles 47 and 26 of the ICSID Convention, seeking the suspension of the bankruptcy proceedings pending against the Slovak Collection Company in Slovak courts. The Tribunal dealt with these requests in Procedural Orders Nos. 2, 3 and 4 of September 9, 1998, November 5, 1998 and January 11, 1999, respectively. While denying the requests for emergency interim restraining measures and deferring action on the requests for provisional measures in Procedural Orders Nos. 2 and 3, the Tribunal granted the latter relief in Procedural Order No. 4. In it the Tribunal recommended the suspension of the aforementioned bankruptcy proceedings "to the extent that such proceedings might include determinations as to whether the Slovenska inkasni spol. s.r.o. [Slovak Collection Company] has a valid claim in the form of a right to receive funds from the Slovak Republic to cover its losses as contemplated in the Consolidation Agreement at issue in this arbitration."

10. In its Memorials and in the oral phase of the proceedings, Respondent challenges the Tribunal's jurisdiction on the ground that the requirements of Article 25 (1) of the Convention for the Centre's jurisdiction and the Tribunal's competence have not been complied with in this case. To

support its contention, Respondent submits, first, that the requirement of Article 25(1) that the dispute must be "between a Contracting State and a national of another Contracting State," has not been satisfied in this case. With regard to this issue, Respondent contends: a) that CSOB is merely an agent of the Czech Republic, and b) that the subsequent assignments to the Czech Republic of CSOB's interest in the receivables, which constitute the subject matter of the dispute, transformed the Czech Republic into the real party in interest to this case.

11. Respondent's second contention is that the "consent in writing," required under Article 25(1) of the Convention for the submission of disputes to the Centre, is lacking in the instant case because: a) the BIT on which Claimant relies never entered into force; b) the notice published in the Slovak Republic's Official Gazette did not bring the BIT into force or make it part of Slovak law and, therefore, cannot constitute effective consent to arbitration; c) the clause in the BIT referring to the Consolidation Agreement, characterized by Respondent as a governing law provision, cannot be deemed to constitute effective consent unless and until the BIT enters into force; and d) even assuming the BIT was in force, the parties had not "jointly" invoked Article 8—its arbitration provision—and, moreover, the dispute did not relate to "investments" as that concept is defined in the Convention and the BIT. As for the argument that the consent to arbitration envisaged under the BIT required a joint submission, Respondent asserts that a proper reading of the Czech and Slovak texts of Article 8 of the BIT compels that conclusion.

12. Respondent's final submission under Article 25(1) focuses on the contention that the dispute was not one "arising directly out of an investment." Here Respondent contends, in the first place, that the loan to the Slovak Collection Company was not an "investment." Rather, it was an element of the inter-governmental restructuring and division of CSOB, necessitated by the dissolution of the Czech and Slovak Federal Republic (CSFR), and not an operation from which either party to the dispute was intended to receive a benefit. According to Respondent, moreover, CSOB's claims did not arise "directly" out of the loan and, therefore, cannot be deemed to arise "directly" out of an investment within the meaning of Article 25(1) of the Convention.

13. The oral phase of these proceedings commenced on January 5, 1999 and concluded on January 7, 1999.

14. Although the January 5–7, 1999 hearing was originally intended to address only the issue of jurisdiction, the Tribunal granted Claimant's motion to permit the parties also briefly to address Claimant's request for provisional measures.[3] By agreement of the parties, no witnesses were heard during this entire hearing. Instead, both parties submitted and relied on witness affidavits and expert opinions.

II. IS CLAIMANT A NATIONAL OF A CONTRACTING STATE?

15. The first ground on which Respondent challenges the jurisdiction of the Centre and the competence of the Tribunal is that Claimant does not meet that requirement of Article 25(1), which provides that the dispute must be between a Contracting State and a national of another Contracting State. According to Respondent, the instant dispute is between two Contracting States because: a) Claimant is a state agency of the Czech Republic rather than an independent commercial entity; and b) the real party in interest to this dispute is the Czech Republic.

A. National of Another Contracting State

16. The language of Article 25(1) of the Convention makes clear that the Centre does not have jurisdiction over disputes between two or more Contracting States. Instead, the dispute settlement mechanism set up by the Convention is designed to deal with disputes between Contracting States and nationals of other Contracting States. Although the concept of "national", as that term is used in Article 25(1), is in Article 25(2) declared to include both natural and juridical persons, neither term is defined as such in the Convention. The legislative history of the Convention does provide some answers, however, that bear on the issues presented in this case. It indicates that the term "juridical persons" as employed in Article 25 and, hence, the concept of "national," was not intended to be limited to privately-owned companies, but to embrace also wholly or partially government-owned companies. This interpretation has found general acceptance.

17. It follows that the question whether a company qualifies as a "national of another Contracting State" within the meaning of Article

[3] For the outcome of the Tribunal's deliberations relating to this request for provisional measures, see para. 9, *supra*.

25(1) does not depend upon whether or not the company is partially or wholly owned by the government. Instead, the accepted test for making this determination has been formulated as follows: "... for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function."[4] Both parties to this dispute accept this test as determinative.

18. The soundness of Respondent's contention that Claimant is not "a national of another Contracting State" must therefore be judged by reference to this test. Standing alone, Respondent's submission that more than 65% of CSOB's shares are owned in one form or another by the Czech Republic and that some 24% are owned by the Slovak Republic demonstrate that CSOB is a public sector rather than a private sector entity, does not address the here crucial issue. Neither does the submission that the Czech Republic's 65% stock ownership gives it absolute control over CSOB. For, as has been shown above, such ownership or control alone will not disqualify a company under the here relevant test from filing a claim with the Centre as "a national of a another Contracting State."

19. Respondent does not, however, rest this aspect of its case solely on the above arguments. It contends further that CSOB is a government agency which has been discharging essentially governmental functions throughout its existence and, more specifically, with regard to all events pertinent to this dispute. In this regard, Respondent seeks to show that since its inception CSOB has served as agent or representative of the State to the international banking and trading community, that its subsequent reorganization has not changed its status, and that, moreover, the instant dispute arises out of the functions CSOB performed in that capacity.

20. It cannot be denied that for much of its existence, CSOB acted on behalf of the State in facilitating or executing the international banking transactions and foreign commercial operations the State wished to support and that the State's control of CSOB required it to do the State's bidding in that regard. But in determining whether CSOB, in discharging these functions, exercised governmental functions, the focus must be on

[4] A. Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 135 Hague Rec. d. Cours 331, at 354–5 (1972).

the nature of these activities and not their purpose. While it cannot be doubted that in performing the above-mentioned activities, CSOB was promoting the governmental policies or purposes of the State, the activities themselves were essentially commercial rather than governmental in nature.

21. It also appears that beginning in the early 1990's and following the 1989 "Velvet Revolution," as the State began to transform its command economy into a market economy, CSOB took various steps to gradually throw off its exclusive economic dependence on the State and to adopt measures to enable it to function in this new economic environment as an independent commercial bank. By 1993, CSOB seemed to have basically achieved that purpose, although its competitive position continued to be adversely affected by the existence on its books of non-performing receivables. These receivables, which became the subject of the Consolidation Agreement and play a role in the instant dispute, grew out of CSOB's earlier lending activities during the State's non-market economy period. Although these activities were driven by State policies, as was true generally of economic activities during the country's command economy, the banking transactions themselves that implemented these policies did not thereby lose their commercial nature. They cannot therefore be characterized as governmental in nature. Moreover, even if one were to conclude that the non-performing assets derived from activities conducted by CSOB as an agent of the State, the measures taken by CSOB to remove them from its books in order to improve its balance and consolidate its financial position in accordance with the provisions of the Consolidation Agreement, must be deemed to be commercial in character.

22. In support of its contention that the dispute is between two Contracting States, Respondent also submits that the ultimate goal of the Consolidation Agreement was the privatization of CSOB. Characterizing privatization as a State function, Respondent argues that in concluding the Consolidation Agreement, CSOB was performing State functions and could therefore not claim to be a private investor. In this connection, Respondent submits that

> The principal ingredient in the Consolidation Agreement preparing CSOB for privatization was the proposed removal of the poor-quality assets resulting from CSOB's role in financing the Czechoslovak State's foreign trade .... The

> whole structure of Consolidated Agreement, Loan Agreement and Collection Companies, which is central to this arbitration, was thus conceived and implemented with the express purpose of facilitating CSOB's privatization. (Respondent's Reply Memorial, at 34.)

23. It cannot be denied that a State's decision to transform itself from a command economy to a free market economy involves the exercise of governmental functions. The same is no doubt true of legislative and administrative measures adopted by the State that are designed to enable or facilitate the privatization of State-owned enterprises. It does not follow, however, that a State-owned enterprise is performing State functions when it takes advantage of these State policies and proceeds to restructure itself, with or without governmental cooperation, in order to be in a position to compete in a free market economy. Nor does it follow that the measures taken by such an enterprise to achieve this objective involve the performance of State or governmental functions. In both instances, the test as to whether or not the acts are governmental or private turn on their nature.

24. There appears to be some disagreement between the parties to this case as to whether the conclusion of the Consolidation Agreement and the Loan Agreement was driven by or was part of the privatization process instituted by the Government or whether it was the result largely of CSOB's unrelated business decision to strengthen its financial position. The Tribunal does not believe that it matters which of these views is accepted, for whether CSOB's actions were or were not driven by the privatization process set in motion or facilitated by the State is not determinative of the issue to be decided. What is determinative is the nature of these acts.

25. In the instant case, the steps taken by CSOB to solidify its financial position in order to attract private capital for its restructured banking enterprise do not differ in their nature from measures a private bank might take to strengthen its financial position. It is no doubt true that CSOB's ability to negotiate the Consolidation Agreement and Loan Agreements on favorable conditions can be attributed to the interest both the Czech and Slovak Governments had in seeing CSOB survive in a free market environment and continue to provide needed banking services. But that fact does not transform the otherwise commercial or private transactions here at issue into governmental acts.

26. Finally, in support of its submission that the instant dispute is between two States Parties, Respondent contends that all the parties to the Consolidation Agreement are State entities and that they include, in addition to CSOB and the Czech and Slovak Republics, the Czech National Bank, the Czech National Property Fund and the National Bank of Slovakia. Even assuming, without deciding, that these other entities had also become parties to the Consolidation Agreement, this fact would not weaken or overcome the Tribunal's conclusions, set out in the preceding paragraphs, about the commercial character of the Consolidation Agreement or the functions CSOB performed.

27. The Tribunal concludes, accordingly, that Respondent has failed to sustain its contention that the Centre lacks jurisdiction and the Tribunal competence to hear this case on the ground that Claimant was acting as an agent of the State or discharging essentially governmental activities as far as this dispute is concerned. This is so whether or not this determination is made by reference to the date of the conclusion of the Consolidation Agreement (December 19, 1993) or the date when the Request for Arbitration was registered by the Centre (April 25, 1997).

B. Real Party in Interest

28. Respondent next points to two assignments, dated April 24, 1998 and June 25, 1998, respectively, which CSOB concluded with the Czech Ministry of Finance. These assignments, according to Respondent, have transformed the Czech Republic—the assignee—into the real party in interest to the instant arbitration by relieving CSOB of the economic risk arising from the claims relating to the Slovak Collection Company receivables. Respondent argues that the assignments require the Tribunal to dismiss the case for lack of jurisdiction because Claimant no longer has the requisite standing under Article 25(1) and because the Czech Republic is disqualified under the same provision from stepping into CSOB's shoes.

29. In view of the fact that the first assignment has been fully superseded by the second, the Tribunal needs to focus here only on the latter. In that instrument CSOB agrees to assign to the Czech Republic on a so-called "effective date" all claims CSOB has against the Slovak Collection Company relating to the receivables transferred to the latter under the Loan Agreement as well as the claims CSOB has against the Slovak Republic under the Consolidation Agreement. The "effective date" is three days

after the date on which the assignee receives in writing assignor's request for the delivery of the receivables and the rights attaching thereto. However, the assignee does not have the right to request the assignment prior to the completion of the instant arbitration proceedings.

30. The specified "consideration" which assignee is required to pay assignor consists of an amount equal to 90% of the nominal value of the receivables as of December 31, 2002. This payment is to be made within three days following the termination of the arbitration proceedings, but no earlier than the above mentioned date. If the arbitration should not be completed by December 31, 2002, assignee is required to increase that amount to a "deposit" of 100% of the agreed upon nominal value of the receivables. On the other hand, if the assignor should receive any payment in settlement of the receivables, the consideration is to be reduced by 75% of the amount so received. The assignor is entitled to 25% of any amounts received by assignee following the assignment in repayment of the assigned receivables paid after December 31, 2002, and 10% before January 1, 2003.

31. In assessing the effect of the June 25, 1998 assignment (and of the April 24,1998 assignment it superseded) on the Centre's jurisdiction to hear this dispute, the Tribunal notes, in the first place, that the Request for Arbitration in the instant case was filed on April 17, 1997 and that the case was registered on April 25, 1997. Hence, at the time when these proceedings were instituted, neither of these assignments had been concluded. Second, it is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted. Since the Claimant instituted these proceedings prior to the time when the two assignments were concluded, it follows that the Tribunal has jurisdiction to hear this case regardless of the legal effect, if any, the assignments might have had on Claimant's standing had they preceded the filing of the case.

32. In the light of what has just been said, it is not really necessary for the Tribunal to address Respondent's contention that the assignments here in question transformed the Czech Republic into the real party in interest because it became, for all practical purposes, the beneficial owner of the disputed claims and because Claimant, as a result, no longer has a real economic interest in the outcome of these proceedings. But even if the Tribunal, for purposes of the argument, were to accept this contention, it would

not follow that this case would have to be dismissed for lack of jurisdiction. This conclusion is compelled by the consideration that absence of beneficial ownership by a claimant in a claim or the transfer of the economic risk in the outcome of a dispute should not and has not been deemed to affect the standing of a claimant in an ICSID proceeding, regardless whether or not the beneficial owner is a State Party or a private party. It must be emphasized, moreover, that the second assignment does not deprive claimant of an interest in the outcome of the case because the assignment becomes effective only after these proceedings terminate and because the assignor remains entitled to a share (either 25 or 10%) of the amount received by the assignee.

III. IS THERE CONSENT TO ICSID JURISDICTION?

33. Under the system created by the ICSID Convention, consent by both parties is an indispensable condition for the exercise of the Centre's jurisdiction under Article 25(1). The Convention only requires that consent be in writing, leaving the parties otherwise free to choose the manner in which to express their consent. Although the most common form of consent is an agreement recorded in a single instrument, other expressions of consent are equally valid, provided they are in writing.

34. In determining how to interpret agreements to arbitrate under the ICSID Convention, the Tribunal is guided by an ICSID decision which held that

> a convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly* or *liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties.... Moreover, ...any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged.[5]

35. The question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to

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[5] Amco Asia et al. v. Indonesia, Decision on Jurisdiction of September 25, 1983, 23 I.L.M. 359 (1984).

national law. It is governed by international law as set out in Article 25(1) of the ICSID Convention.

36. In the instant case, Claimant invokes ICSID jurisdiction by pointing to three independent bases of consent, namely: a) the Bilateral Investment Treaty (BIT) as an international treaty in force between the two States; b) the notice published by the Ministry of Foreign Affairs of the Slovak Republic in the Official Gazette on October 22, 1993 (the "Notice"), announcing the entry into force of the BIT on January 1, 1993; and c) the reference to the BIT in the Consolidation Agreement.

A. The BIT

37. The question whether the BIT is in force is relevant in the instant case since Article 8 of the BIT contains an ICSID arbitration clause. If the BIT entered into force on January 1, 1993 or on some other date, the Slovak Republic would be bound by the consent so given, because Article 8 provides for the settlement of investment disputes at the option of the party initiating the arbitration proceedings, either under the ICSID Convention or the arbitration rules of the United Nations Commission on International Trade Law ("UNCITRAL").

38. Since Claimant by its Request for Arbitration, dated April 18, 1997, submitted the instant dispute to ICSID, Claimant would be deemed to have accepted ICSID jurisdiction on that date, Respondent having already unequivocally consented to it. The exchange of consents in this form would satisfy the requirement of a "written consent" under Article 25(1) of the ICSID Convention. This type of consent has been accepted as a valid submission to the Centre's jurisdiction in the first case brought by an investor under a bilateral investment treaty,[6] and has found acceptance in subsequent practice.[7]

39. The elements of proof presented by Claimant and Respondent on the question whether the BIT has entered into force are by no means conclusive enough to permit a definite answer. Article 12 of the BIT provides

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[6] Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, 4 ICSID Rep. 245, 30 I.L.M. 577 (1991).

[7] C. Schreuer, "Commentary on the ICSID Convention: Article 25," 11 ICSID Rev.—Foreign Investment L. J. 441 (1996).

that "each Party shall give notice to the other Party of the completion of the constitutional formalities required for this Agreement to enter into force". In the Tribunal's view, this language shows that the parties were aware and mutually recognized that the signature of the BIT by the two heads of government was not sufficient to bring the treaty into force and that further formalities were required under the respective constitutions. Whether or not such constitutional formalities needed to be complied with as a matter of domestic law—an issue on which the parties disagree—is relatively immaterial, considering the above-quoted stipulation included in the "Entry into force" provision of the BIT. This provision must be deemed to have some meaning as required under the principle of effectiveness (*effet utile*). It may, consequently, not be disregarded as contemplating a mere procedural formality not affecting the coming into force of the BIT. This is so particularly when the language is read in the light of Article 24(1) of the Vienna Convention on the Law of Treaties (the "Vienna Convention"), which provides that "a treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree." The Tribunal notes, in this connection, that the Parties agree that no such exchange of notices has taken place. The documents on file in this case indicate, moreover, that this is also the position of the Czech Republic.

40. In its pleadings, Claimant has made reference to Article 46 of the Vienna Convention. Under that provision a State's right to invoke the fact that its consent to be bound by a treaty violates a provision of its internal law regarding competence to conclude treaties is limited to cases in which such violation was manifest, that is, "if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith". However, this provision deals with the "Invalidity of Treaties", whereas the Slovak Republic claims that the BIT never came into force due to the non-compliance with its Article 12. The Slovak Republic does not claim that the treaty is invalid, although that assertion was made in the corrective notice published by the Slovak Ministry of Foreign Affairs in the Official Gazette on November 20, 1997.

41. The second sentence of Article 12 of the BIT provides that the treaty shall come into force as of the date of the division of the two Republics. Claimant contends that this provision should prevail over the above-quoted procedural formalities calling for the exchange of notices signalling the completion of the constitutional requirement found in the

first sentence of Article 12, especially because both States knew that the division would occur on January 1, 1993. Respondent submits, on the other hand, that this provision should be interpreted to mean that once the exchange of notices contemplated by the first sentence had taken place, the treaty would be effective as of the date of division, the division being another condition for the coming into force of the BIT. In the Tribunal's view, Respondent's interpretation is more consistent with the requirements of the principle of effectiveness than is Claimant's submission on that subject.

42. The numerous declarations issued by different authorities of the two States in various circumstances and the expert opinions which have been produced by both parties, expressing conflicting views regarding the coming into force of the BIT, are not particularly helpful due to the fact that they are inconclusive and contradictory. Little would therefore be gained by reviewing them. Equally unhelpful would be an analysis of the question whether the BIT can be characterized as a "Governmental Treaty" (not requiring approval by Parliament nor Presidential ratification) or a "Presidential Treaty" (subject to such approval). This is so because the wording of Article 12 of the BIT does not fit into one or the other of these categories of treaties.

43. The Tribunal accordingly holds that the uncertainties relating to the entry into force of the BIT prevent that instrument from providing a sound basis upon which to found the parties' consent to ICSID jurisdiction.

B. The Notice

44. ICSID practice also indicates that the exchange of written consents required for ICSID jurisdiction can be satisfied not only by the mutual acceptances of bilateral investment treaties, but also by other forms of acceptances. Many investment laws of developing countries provide for the State's acceptance of ICSID jurisdiction (or for alternative dispute resolution methods) for disputes with the investor arising out of a particular investment. Under some laws the offer is deemed to be accepted as soon as the foreign investor files an investment application pursuant to such a law, regardless of whether the application includes a reference to the arbitration provision contained in the law. The aforementioned laws differ from the present case in that the offer of consent by the Slovak State is not contained in a domestic legislative act (or an international treaty in force for

that State) but, rather, in a notice of the Ministry of Foreign Affairs of the Slovak Republic, published in the Official Gazette, announcing that the BIT had entered into force on January 1, 1993.[8]

45. Respondent contends that the publication of the BIT in the Official Gazette did not result in its entry into force, nor give that treaty any other legal effect under Slovak law. Claimant, on the other hand, considers the publication to constitute a sufficient basis upon which to found the Slovak Republic's consent to ICSID jurisdiction, even if the underlying legal instrument (the BIT) did not enter into force. In this connection, it should be noted that if the Notice were to be held to constitute a valid offer by the Slovak State to submit to international arbitration, the corrective notice published by the Slovak Ministry of Foreign Affairs in the Official Gazette on November 20, 1997, asserting the invalidity of the BIT, would be of no avail to Respondent, since Claimant accepted the offer in the Request for Arbitration filed prior to the publication of the corrective notice.

46. It must now be determined whether the original Notice published in the Official Gazette provides a sufficient basis for holding the Slovak State to be bound under Article 8 of the BIT. Even if the Notice were to be characterized as a unilateral declaration by the Slovak State, it still needs to be asked whether it was "the intention of the State making the declaration that it should become bound according to its terms", as required by the international law principles applicable to unilateral declarations.[9] Pursuant to these principles, unilateral assumption of the contractual obligations is "not lightly to be presumed..." and requires "a very consistent course of conduct."[10] As noted by one authoritative source, "while the principle applied by the [International] Court [of Justice]—that a unilateral declaration may have certain legal effects—is not new, when the declaration is not directed to a specific state or states but is expressed *erga omnes*, as here, the detection of an intention to be legally bound, and of the structure of such intention, involves very careful appreciation of the

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[8] See note 2, *supra*.

[9] Nuclear Tests Case (Australia v. France), I.C.J. Reports 1974, p. 253, at 274. *See also* Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), I.C.J. Reports 1986, p. 14, at 13 Nuclear 2.

[10] North Sea Continental Shelf Cases, I.C.J. Reports 1969, p. 4, at 25.

facts."[11] Given this standard, the Tribunal considers that the Slovak Republic's intention to be bound by the treaty through the Notice has not been established. This is so particularly when it is recalled that the entry into force of the treaty appears to have been conditioned on an exchange of notices which, as we have seen did not take place. (*See* para. 39, *supra*.)

47. The Tribunal must now turn to the question whether the Slovak State is estopped because of the Notice from denying that it is bound by the arbitration offer under the BIT. An essential element of estoppel is that "there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement".[12] Claimant nowhere alleges that it was misled by Respondent or that it relied on any allegedly misleading statements by Respondent and that it was prejudiced as a consequence of such reliance. Instead, it is clear from a draft of the Consolidation Agreement, prepared by CSOB after the date of the Notice, that it relied neither on the BIT being in force nor on the fact that Article 8 thereof had become binding on the Slovak State. In that draft, CSOB initially proposed arbitration in Prague and referred to the BIT "after it is ratified." (*See* para. 50, *infra*.)

48. Since the second basis for consent to ICSID jurisdiction has not been established, the Tribunal must now examine Claimant's third basis for establishing such consent.

C. The Consolidation Agreement

49. The Consolidation Agreement, entered into between the parties to these proceedings (the question of identifying all parties to the Agreement being immaterial for the purposes of the present analysis), provides in the relevant part of Article 7 that "this Agreement shall be governed by the laws of the Czech Republic and the Treaty on the Promotion and Mutual Protection of Investments between the Czech Republic and the Slovak Republic dated November 23, 1992." It must, therefore, be determined whether this reference to the BIT must be deemed to constitute acceptance by the Slovak Republic of ICSID jurisdiction. Specifically, the ques-

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[11] I. Brownlie, *Public International Law* 638–39 (4th ed. 1990).

[12] Brownlie, *supra*, at 641. *See also* B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 141 *et. seq.* (1987)

tion to be resolved is whether the consent required under the ICSID Convention can be satisfied by a reference to a treaty that is not in force on the international plane.

50. The parties have expressed conflicting views regarding the significance of the reference to the BIT in the Consolidation Agreement. Claimant contends that it is immaterial whether the reference is characterized as a choice-of-law clause or an incorporation by reference. To Claimant, the decisive question is whether the provision can be interpreted as an agreement to submit to ICSID jurisdiction. Relying on the text of the clause and its reference to the BIT, Claimant contends that it constitutes an incorporation by reference of ICSID jurisdiction. Respondent submits that the reference to the BIT is made in the context of a choice-of-law provision, with both Czech law and the BIT equally governing the interpretation of the contract. Since the BIT never came into force, the reference to it should be disregarded. Respondent further contends that even if Article 7 of the Consolidation Agreement were to be interpreted as an incorporation by reference, the reference itself cannot be deemed to amount to consent to arbitration. In support of this contention, Respondent points, *inter alia*, to the UNCITRAL's Model Law on International Commercial Arbitration of June 21, 1985, whose Article 7(2) states in part: "The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

51. The negotiating history of the provision under examination offers elements permitting the Tribunal to determine the parties' common intent regarding the issue here under consideration. The documents submitted by the parties show that the Consolidation Agreement was the subject of various drafts due to changes requested by Respondent. This latter circumstance provides a sufficient basis for rejecting Respondent's argument that the *contra proferentem* rule should be applied against Claimant by holding that the reference to the BIT in Article 7 of the Consolidation Agreement does not embody consent to ICSID jurisdiction.

52. It is uncontested and fully borne out by the record that in reply to a draft of the Consolidation Agreement submitted by the Slovak Republic on or about November 15, 1993, containing neither a governing law clause nor a dispute-settlement provision, CSOB proposed various drafts in the period between November 15–December 17, 1993, including a

governing law provision referring to Czech law only and an arbitration clause referring disputes to the Arbitration Tribunal of the Chamber of Commerce and Industry in Prague. The latter reference was not accepted by Respondent. After further revisions the parties agreed to a final draft, which included the following provision: "This agreement shall be governed by the laws of the Czech Republic and the Treaty on the promotion and mutual protection of investments between the Czech Republic and the Slovak Republic after it is ratified." The final draft of the Consolidation Agreement makes no express reference to arbitration or to any other method of dispute settlement, but before it was signed on December 17/19, 1993, the above provision was amended by deleting the words "after it is ratified" and by replacing it with the date of the signature of the BIT.

53. The parties have given different explanations for this amendment. For the purposes of the present analysis, it is relevant to note, first, that the issue of the settlement of disputes through arbitration was raised in the negotiations leading up to the conclusion of the Consolidation Agreement; that a clause proposed by CSOB on that subject was rejected by the Slovak Republic; and that the final text as agreed by the parties contains no separate arbitration clause, although it does make reference to the BIT which provides for a dispute settlement method that permits resort either to the ICSID Convention or the UNCITRAL arbitration rules. Second, the reference in the final draft to the BIT "after it is ratified" would have justified the conclusion that the acceptance of the arbitration provision was conditioned upon the BIT's coming into force at international level; however, the phrase relating to ratification was eliminated from the signed text.

54. The negotiating history of the clause under consideration thus indicates that the issue of the dispute settlement method had been discussed by the parties and that the proposal to resort to domestic arbitration in the Czech Republic had been rejected by the Slovak party. These considerations support Claimant's contention that the parties eventually agreed on international arbitration. In the absence of a separate dispute resolution provision, the reference to the BIT satisfies the requirement that international arbitration, as specified in its Article 8, is the agreed dispute resolution mechanism. This reference cannot be understood to mean that the contested provision was intended to deal exclusively with the governing law question, as Respondent contends, if only because by eliminating the phrase relating to the BIT's ratification, the parties made

the reference to the BIT and to the consent to arbitration expressed by it effective and unconditional. As a matter of fact, the elimination of the phrase may be deemed to indicate either that the parties were convinced that the BIT was already in force (the Notice announcing the BIT's status had appeared less than two months before) or, what is more likely, that they intended the reference to the BIT to be a valid expression of consent for purposes of their contract, including the provision for the settlement of disputes, independently of the BIT's entry into force on the international plane.

55. The Tribunal concludes, therefore, that by referring to the BIT, the parties intended to incorporate Article 8 of the BIT by reference into the Consolidation Agreement, in order to provide for international arbitration as their chosen dispute-settlement method. The soundness of this conclusion is confirmed by the fact that the provisions of the BIT were well known to the negotiators for both parties.

56. Respondent also contends that even if the BIT is held to be applicable, its dispute-settlement mechanism under Article 8 can be invoked only by means of a joint submission of the dispute by the parties either to an ICSID arbitration tribunal or to a tribunal established under the UNCITRAL arbitration rules. Since Claimant has not sought ICSID arbitration jointly with Respondent, the latter submits that the requirements of Article 8 of the BIT have not been satisfied.

57. Respondent's contention, which is based on its translation of the Czech and Slovak texts of Article 8, has been convincingly refuted by expert evidence presented by Claimant. The Tribunal also notes that in its last submission, Respondent itself admits that the wording of Article 8 is "ambiguous." Moreover, a holding that the parties must submit their dispute to arbitration jointly would amount to a finding that the terms of Article 8 of the BIT, even if otherwise effective for purposes of ICSID jurisdiction, do not provide for binding arbitration unless the parties agree to arbitration if and when a dispute arises. As correctly pointed out by Claimant, such an interpretation would leave investors without the protection afforded by international arbitration, contrary to the main objective of bilateral investment treaties. The fact that some such treaties may contain provisions for joint submission of disputes to arbitration does not compel the conclusion that provisions whose wording is at best ambiguous must be interpreted in like manner. Such a construction of the terms of a

treaty would be incompatible with the applicable international rules for the interpretation of these types of agreements. (Vienna Convention, art. 31(1).)

58. The Tribunal notes, furthermore, that Article 8(3) of the BIT provides that whichever of the two dispute-settlement facilities envisaged under Article 8(2)—ICSID or the UNCITRAL rules—first receives a dispute shall resolve it. The language of this provision makes sense only if it is predicated on the assumption that each party to a dispute has the right separately to initiate the arbitration proceedings.

59. For all the above reasons, the Tribunal holds that the parties have consented in the Consolidation Agreement to ICSID jurisdiction and that the date of such Agreement is, for all relevant purposes, the date of their consent. Since each party may separately institute the arbitration proceedings, Claimant was entitled to elect ICSID jurisdiction.

IV. IS THERE A LEGAL DISPUTE ARISING OUT OF AN INVESTMENT?

60. The Tribunal must now consider the objection raised by the Slovak Republic in which it challenges the jurisdiction of the Centre and the Tribunal's competence in this case on the ground that the dispute between the Parties is not a "legal dispute arising directly out of an investment" as required by Article 25(1) of the Convention.

61. The Slovak Republic stresses the political nature of the instant dispute and its close link with the dissolution of the former Czech and Slovak Federal Republic, but it does not question the legal nature of the dispute. CBOS's claim is based on Article 3 of the Consolidation Agreement. The Tribunal must therefore analyze the rights and obligations set forth therein, as well as the question whether CSOB is entitled to damages due to the breach of the obligations alleged to have been committed by the Slovak Republic. CSOB does not seek a determination relating to the division of assets and liabilities between the two Republics, a subject expressly excluded from the scope of the BIT by its Article 11. While it is true that investment disputes to which a State is a party frequently have political elements or involve governmental actions, such disputes do not lose their legal character as long as they concern legal rights or obligations or the consequences of their breach. Given these considerations, the Tribunal is satisfied that CSOB's claim is legal in character.

62. The Slovak Republic bases its objection to the jurisdiction of the Centre and the competence of this Tribunal on the ground that the dispute in the instant case is not related to an "investment" and, moreover, that it does not arise "directly" out of an investment within the meaning of Article 25(1) of the Convention.

63. It is common ground that the Convention does not define the term "investment" and that various proposals to define it during the drafting negotiations failed. This fact is reflected in the Report of the Executive Directors of the World Bank, which noted that:

> 27. No attempt was made to define the term "investment" given the essential requirements of consent by the parties, and the mechanisms through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).[13]

64. This statement also indicates that investment as a concept should be interpreted broadly because the drafters of the Convention did not impose any restrictions on its meaning. Support for a liberal interpretation of the question whether a particular transaction constitutes an investment is also found in the first paragraph of the Preamble to the Convention, which declares that "the Contracting States [are] considering the need for international cooperation for economic development, and the role of private international investment therein." This language permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention.

65. It is worth noting, in this connection, that a Contracting State that wishes to limit the scope of the Centre's jurisdiction can do so by making the declaration provided for in Article 25(4) of the Convention. The Slovak Republic has not made such a declaration and has, therefore, submitted itself broadly to the full scope of the subject matter jurisdiction governed by the Convention.

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[13] 1 ICSID Rep. 28 (1993)

66. It follows that an important element in determining whether a dispute qualifies as an investment under the Convention in any given case is the specific consent given by the Parties. The Parties' acceptance of the Centre's jurisdiction with respect to the rights and obligations arising out of their agreement therefore creates a strong presumption that they considered their transaction to be an investment within the meaning of the ICSID Convention.

67. The Tribunal must accordingly attach considerable significance to the reference made in Article 7 of the Consolidation Agreement to the BIT and thus to the ICSID arbitration clause contained therein (Article 8). The Parties' acceptance of the relevance and applicability of the BIT to the Consolidation Agreement expresses their view that the latter transaction relates to an investment within the meaning of the BIT. The contrary conclusion would deprive the reference to the BIT in Article 7 of the Consolidation Agreement of its meaning or *effet utile*.

68. The Slovak Republic is correct in pointing out, however, that an agreement of the parties describing their transaction as an investment is not, as such, conclusive in resolving the question whether the dispute involves an investment under Article 25(1) of the Convention. The concept of an investment as spelled out in that provision is objective in nature in that the parties may agree on a more precise or restrictive definition of their acceptance of the Centre's jurisdiction, but they may not choose to submit disputes to the Centre that are not related to an investment. A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties' consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT.

69. CSOB's claim is based on the allegation that the Slovak Republic breached its obligation under the Consolidation Agreement by failing and refusing to cover the losses incurred by the Slovak Collection Company. Viewed in isolation, this undertaking does not involve any spending, outlays or expenditure of resources by CSOB in the Slovak Republic. Standing alone, therefore, it does not constitute an investment.

70. Claimant argues, however, that the loan made to the Slovak Collec-

tion Company qualifies as an investment and that the actual dispute is therefore within the Centre's jurisdiction and the competence of this Tribunal. The Slovak Republic rejects the view that CSOB's loan is an investment and contends that the dispute does not arise directly out of the Loan Agreement. It submits that the dispute is concerned exclusively with the purported obligation of the Slovak Republic to cover the losses of the Slovak Collection Company.

71. The Slovak Republic's argument calls for an analysis of the meaning of the word "directly" as used in that part of Article 25(1) of the Convention which reads as follows: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, ...". Here it is relevant to note that in the *Fedax* case the Tribunal stated:

> It is apparent that the term "directly" relates in this Article to the "dispute" and not to the "investment". It follows that jurisdiction can exist even in respect of investments that are not direct, so long as the dispute arises directly from such transaction. This interpretation is also consistent with the broad reach that the term "investment" must be given in the light of the negotiating history of the Convention.[14]

72. The Tribunal agrees with the interpretation adopted in the *Fedax* case. An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.[15]

73. The Preamble of the Convention confirms the foregoing interpretation. Here, after "considering the need for international cooperation for economic development, and the role of private international investment

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[14] Fedax N.V. v. Republic of Venezuela, Decision on Objections to Jurisdiction, July 11, 1997, 37 I.L.M. 1378, at para. 24 (1998).

[15] *See ibid.*, paras. 25 and 26, and cases cited therein.

therein," the Contracting Parties bear "in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States."

74. The foregoing analysis indicates that the term "directly", as used in Article 25(1) of the Convention, should not be interpreted restrictively to compel the conclusion that CSOB's claim is outside the Centre's jurisdiction and the Tribunal's competence merely because it is based on an obligation of the Slovak Republic which, standing alone, does not qualify as an investment.

75. Hence, in deciding whether the obligation referred to in CSOB's requested relief forms part of an investment, the Tribunal has to determine whether the purported obligation of the Slovak Republic forms an integral part of a transaction which qualifies as an investment. The Slovak Republic's undertaking to cover the losses incurred by the Slovak Collection Company is closely linked to the loan provided by CSOB pursuant to Article 3 of the Consolidation Agreement and the provisions of the Loan Agreement. This loan was basically designed to secure the refinancing of the Collection Company up to an amount corresponding to the payment by the Company of the value of the receivables assigned by CSOB on the basis of the schedule of payments covering the years 1995 to 2003. As stated in Article 3 of the Consolidation Agreement, it follows from the nature of the assigned receivables, which are qualified therein as "non-performing", that the Collection Company will incur a loss resulting from the operating costs of the Company and the schedule of payments, including interests, due to CSOB and the amounts eventually recovered from those described as "non-performing" debtors. The purpose of the Slovak Republic's obligation to cover the loss of the Collection Company is therefore to allow this Company to meet its obligation towards CSOB under the schedule of payments based on the Loan Agreement. Given this close link, the dispute arising out of the alleged breach of the Slovak Republic's obligation is closely related to the loan made by CSOB to the Slovak Collection Company.

76. The Slovak Republic submits that loans as such do not qualify as investments under Article 25(1) of the Convention, nor under Article 1 of the BIT. It contends further that the loan in the instant case is not an investment because it did not involve a transfer of resources in the territory of the Slovak Republic. As to the first point, the Tribunal considers

that the broad meaning which must be given to the notion of an investment under Article 25(1) of the Convention is opposed to the conclusion that a transaction is not an investment merely because, as a matter of law, it is a loan. This is so, if only because under certain circumstances a loan may contribute substantially to a State's economic development. In this connection, Claimant correctly points out that other ICSID Tribunals have affirmed their competence to deal with the merits of claims based on loan agreements.[16]

77. In support of its conclusion that the CSOB loan qualifies as an investment under the BIT, Claimant points to Article 1(1), which reads in part as follows:

> 1. 'Investment' shall mean any asset invested or obtained by an investor of one Party in the territory of the other Party in accordance with the laws of the other Party, including, without limitation: ...
>
> c) monetary receivables or claims to any performance related to an investment; ...
>
> e) any rights under an act or under any contract, license or permit issued under an act, including any concession to search for, cultivate or exploit natural resources.

Although loans are not expressly mentioned in this list, terms as broad as "assets" and "monetary receivables or claims" clearly encompass loans extended to a Slovak entity by a national of the other Contracting Party. Loans as such are therefore not excluded from the notion of an investment under Article 1(1) of the BIT. It does not follow therefrom, however, that any loan and, in particular, the loan granted by CSOB to the Slovak Collection Company meets the requirements of an investment under Article 25(1) of the Convention or, for that matter, under Article 1(1) of the BIT, which speaks of an "asset invested or obtained by an investor of one Party in the territory of the other Party".

78. The Slovak Republic contends that the CSOB loan does not constitute an investment. It defines an investment essentially as the acquisition

[16] See, *e.g.*, the *Fedax* case, paras. 22 and 29, *supra*.

of property or assets through the expenditure of resources by one party (the "investor") in the territory of a foreign country (the "host State"), which is expected to produce a benefit on both sides and to offer a return in the future, subject to the uncertainties of the risk involved. While the Slovak Republic argues that the CSOB loan does not meet any elements of the above definition, CSOB submits that its loan qualifies as an investment thereunder. The Tribunal notes, in this connection, that while it is undisputed that CSOB's loan did not cause any funds to be moved or transferred from CSOB to the Slovak Collection Company in the territory of the Slovak Republic, a transaction can qualify as an investment even in the absence of a physical transfer of funds.[17]

79. Claimant argues that the loan provided the Slovak Collection Company with the funds necessary to settle the purchase price of the assigned receivables, and that these funds therefore represented an asset acquired by CSOB in the territory of the Slovak Republic. An analysis of the particular circumstances of this transaction indicates, however, that while CSOB's receivables against the Slovak Collection Company had a defined value, as determined in the loan agreement and the schedule of payments agreed upon by the Parties, these receivables had no corresponding value for the Slovak Collection Company. Indeed, the price to be paid by the Company to CSOB, that is, the return-payment of the advances received from CSOB under the loan facility, had a value far above the expected recovery from the collection of the assigned non-performing receivables. To that extent, CSOB's loan did not involve any spending or outlay of resources in the territory of the Slovak Republic.

80. The contractual scheme embodied in the Consolidation Agreement shows, however, that the CSOB loan to the Slovak Collection Company is closely related to and cannot be disassociated from all other transactions involving the restructuring of CSOB. As stated in the first part of Article 1, the Consolidation Agreement was designed to provide for "the implementation of the project of the second phase of CSOB's transformation," and further:

> This process shall consist primarily of a financial consolidation of CSOB in preparation for the future privatization of

[17] *Ibid*., at para. 41, *supra*.

> CSOB. The consolidation of CSOB shall involve the improvement of CSOB's balance by the disposal of non-performing assets of CSOB to such level as agreed herein.

Those provisions of Article 1 that deal with the objects to be achieved show that the Agreement constituted the legal framework for a "consolidation process" consisting of several interrelated actions, as defined in the second part of Article 1:

> The following actions shall be taken as part of the consolidation process:
>
> I. An increase in the registered capital of CSOB;
>
> II. Improvement of the balance of CSOB, comprising:
>
> (a) the coverage of a part of the Non-Performing Assets of CSOB (as defined below) out of the profit and reserves;
>
> (b) the establishment of Collection Companies and the transfer of the Non-Performing Assets to such Collection Companies.
>
> III. The privatization of CSOB.

The assignments of a part of CSOB's non-performing receivables to the respective Collection Company to be established in each Republic was thus an integral part of the whole process. This transfer improved CSOB's balance by crediting CSOB with payments equivalent to "the nominal value of the assigned receivables, including any interest accrued until the time of the assignment", whereas the Collection Company had to suffer the loss resulting "from the nature of the assigned receivables." (Article 3.)

81. The sole or exclusive purpose of the CSOB loan was to ensure the refinancing by the Collection Company of CSOB. The loan facility was therefore a mere instrument in ensuring the payment by the Collection Company of the nominal value of the assigned receivables, which was part of the improvement of CSOB's balance. This close link is further evidenced by the fact that CSOB's loan to the Collection Companies is part of the Consolidation Agreement concluded between CSOB and the Republics. (Article 3.) Similarily, the Slovak Republic's undertaking to

compensate its Collection Company for the losses made as a consequence of unsuccessful recoveries of the non-performing assets was instrumental to ensuring the refinancing of CSOB and thus to covering the payment of the assigned receivables up to their nominal value. This obligation of the Slovak Republic is also included in the terms of the Consolidation Agreement (Article 3) and referred to in Article 7 of the Loan Agreement.

82. The Slovak Republic's undertaking and the CSOB loan form an integrated whole in the process defined in the Consolidation Agreement. Hence, individual transactions comprising it may still meet the requirements of an investment under the Convention, provided the overall operation for the consolidation of CSOB, to which it is closely connected, qualifies as an investment.

83. The basic feature of the Consolidation Agreement was not the financial consolidation of CSOB as such, but the development of the role and activities of CSOB in both Republics. When considering the implementation of the second phase of CSOB's transformation, the parties to the Agreement referred to:

> The special position and role of CSOB in managing the central foreign exchange source for both Republics and in performing foreign banking transactions, and the extraordinary role that CSOB plays in the economy of both Republics. ... (Article 1.)

The second phase was to render CSOB more attractive to potential new shareholders from the private sector and thus prepare for the future privatization of CSOB. The ultimate goal of this process was to enable CSOB to exercise fully its role and to develop its activities in both Republics within the framework of a market economy.

84. The Slovak Republic is correct in submitting that both Republics undertook to initiate this process and to ensure the capital increase of CSOB as well as the funding necessary to cover the losses of the Collection Companies and, consequently, the refinancing of CSOB. These important financial contributions to the benefit of CSOB are not investments within the meaning of the Convention, for they do not involve investments made in a Contracting State by a national of another Contracting State. This conclusion does not, however, resolve the issue whether or not CSOB

qualifies as an "investor" under the Consolidation Agreement. To answer that question, the Tribunal must focus on CSOB's role in achieving the ultimate goal of the Agreement, irrespective of whether or not the funds required to allow CSOB to exercise this role were provided by the Republics.

85. The function attributed to CSOB in the Consolidation Agreement was, as stated in the heading of Article 5, the "Development of CSOB in the Czech Republic and the Slovak Republic". According to the first sentence of this provision, "[t]he development of CSOB in the Czech Republic and in the Slovak Republic shall reflect the needs of the Company and the interest of the shareholders in maximizing the value of CSOB." This development was designed to improve what Article 1 qualifies as "the extraordinary role that CSOB plays in the economy of both Republics."

86. The drafting history of the Consolidation Agreement shows that the Slovak Republic wished to ensure that CSOB would maintain and extend its activities on its territory. This conclusion finds support in the Slovak insistence on this point during the negotiations of the Agreement:

> The Slovak party demands guarantees of sound development of CSOB in the Slovak Republic, and makes the compensation of the collection company's losses conditional upon the honoring of such guarantees.[18]

87. The Consolidation Agreement provides basically for the development of CSOB's activities in both Republics. A particular consideration was given to CSOB's role in the Slovak Republic in two respects. First, pursuant to the last sentence of Article 5, the Czech National Bank (CNB), in consultation with the Ministry of Finance of the Czech Republic, "shall enable CSOB to develop business in the Slovak Republic in line with the above principle by issuing a general foreign-exchange licence". Second, the parties provide in Article 6 for the establishment of a CSOB subsidiary domiciled in the Slovak Republic that would take over the entire range of banking services provided by the CSOB branch network in the Slovak Republic and enable CSOB to reduce its equity interest below 50%. Although this subsidiary has not as yet been created, there can be no

[18] Minutes of Interdepartmental Discussion of the Project of CSOB's Restructuring as Part of the Preparation for CSOB's Privatization on October 21, 1993.

doubt that the parties intended to strenghten CSOB as a leading entity in the Slovak banking sector. Since the Loan Agreement was concluded by CSOB's branch in Bratislava, CSOB's accounts receivable were recorded in the accounting books of that branch. They were to be paid in Slovak currency and constituted a working asset designed to enable CSOB to engage in business activities through its Slovak branches.

88. In the Tribunal's view, the basic and ultimate goal of the Consolidation Agreement was to ensure a continuing and expanding activity of CSOB in both Republics. This undertaking involved a significant contribution by CSOB to the economic development of the Slovak Republic; it qualified CSOB as an investor and the entire process as an investment in the Slovak Republic within the meaning of the Convention. This is evident from the fact that CSOB's undertakings include the spending or outlays of resources in the Slovak Republic in response to the need for the development of the Republic's banking infrastructure.

89. The Tribunal concludes, moreover, that the requirements spelled out in Article 1(1) of the BIT for a qualifying investment are also met in the instant case. This must have been the view of the parties when they accepted a reference to the BIT in Article 7 of the Consolidation Agreement. The contrary conclusion would deprive this reference to the BIT of any meaning (*cf*. para. 67). Furthermore, CSOB's activity in the Slovak Republic and its undertaking to ensure a sound banking infrastructure in that country compel the conclusion that CSOB qualifies as the holder of an "asset invested or obtained" in the territory of the Slovak Republic within the meaning of Article 1(1) of the BIT, including "movable and immovable property and any other encumbrances, including any mortgages, liens, guarantees, and similar rights" (Art. 1(1)(a)) and "monetary receivables or claims to any performance related to an investment" (Art. 1(1)(c)).

90. Finally, applying the definition of an investment proffered by the Slovak Republic (para. 78, *supra*), it would seem that the resources provided through CSOB's banking activities in the Slovak Republic were designed to produce a benefit and to offer CSOB a return in the future, subject to an element of risk that is implicit in most economic activities. The Tribunal notes, however, that these elements of the suggested definition, while they tend as a rule to be present in most investments, are not a

formal prerequisite for the finding that a transaction constitutes an investment as that concept is understood under the Convention.

91. The Tribunal concludes, accordingly, that CSOB's claim and the related loan facility made available to the Slovak Collection Company are closely connected to the development of CSOB's banking activity in the Slovak Republic and that they qualify as investments within the meaning of the Convention and the BIT.

V. DECISION

92. For all the above reasons, the Tribunal unanimously decides that this dispute is within the jurisdiction of the Centre and the competence of the Tribunal. Accordingly, the Tribunal will issue the necessary Order for the continuation of the proceedings on the merits.

Thomas Buergenthal Piero Bernardini Andreas Bucher