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

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

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

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

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

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

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

[207] Tr. 17:12-15.

[208] Objections, ¶ 69.

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

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

[211] Reply, ¶ 89.

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

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

[214] Tr. 19:13-18.

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

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

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

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

2. The Claimant's position

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

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

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

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

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

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

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

[219] Objections, ¶ 114.

[220] Objections, ¶ 118.

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

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

[223] Response, ¶ 80.

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

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

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

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

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

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

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[224] Response, ¶ 83.

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

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

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

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

[229] Response, ¶¶ 88-89.

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

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

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

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

3. Discussion

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

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

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

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[230] Response, ¶ 19.

[231] Response, ¶ 132.

[232] Response, ¶ 133.

[233] Response, ¶ 135.

[234] Response, ¶ 136.

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

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

[237] Response, ¶¶ 140-141.

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

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

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

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

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

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

[239] Reply, ¶ 39.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[252] *Id.*

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

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

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

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

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

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

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

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

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

[255] Notice, ¶¶ 150-151.

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

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

174. And the Claimant continued:

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

175. Arguing the contrary, the Respondent stated that:

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

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

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

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[256] Tr. 106:10-19.

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

[258] Tr. 180:4-16.

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

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

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

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

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[259] Reply, ¶¶ 39, 43.

[260] Reply, ¶ 50.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[270] Response, ¶ 49.

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

[272] *Id.*, ¶ 43.

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

[274] *Id.*, ¶ 45.

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

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

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

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

1. The Respondent's position

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

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

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

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

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

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

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

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

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

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

[279] Objections, ¶ 76.

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

[281] Objections, ¶ 79.

[282] Objections, ¶ 80.

[283] Objections, ¶ 81.

[284] Objections, ¶ 82.

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

[286] Reply, ¶ 91.

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

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

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

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

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

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

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

[289] Reply, ¶ 99.

[290] Reply, ¶ 100.

[291] Reply, ¶ 101.

[292] Reply, ¶ 103.

[293] Reply, ¶ 104.

[294] Objections, ¶¶ 85-86.

[295] Reply, ¶ 106; Tr. 49:4-50:1.

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

[297] Reply, ¶ 107.

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

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

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

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

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

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

[299] Objections, ¶ 87.

[300] Objections, ¶ 88; Reply, ¶ 107.

[301] Tr. 46:18-22.

[302] Reply, ¶ 110.

[303] Objections, ¶ 90.

[304] Objections, ¶ 90.

[305] Objections, ¶ 91.

[306] Reply, ¶ 109.

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

[308] Tr. 56:14-19.

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

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

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

2. The Claimant's position

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

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

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

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

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

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

[311] Reply, ¶ 105.

[312] Response, ¶ 22.

[313] Response, ¶ 23.

[314] Response, ¶ 23.

[315] Response, ¶ 24.

[316] Response, ¶ 25.

[317] Response, ¶ 138.

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

3. Discussion

a) *The applicable standard*

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

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

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

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

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

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

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[318] Response, ¶ 139.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[328] Response, ¶ 24.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[335] SoC, ¶ 228(i).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

231. With these considerations in mind, the Tribunal now engages in its analysis of the Parties' respective positions in order to determine whether the claim, as articulated by Claimant, is capable of falling under Article 5 of the BIT. This provision provides as follows:

> "Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:
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> a) the measures are taken in the public interest and under due process of law;
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> b) the measures are not discriminatory;
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> c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without any undue delay, to the country designated by the claimants concerned and in any freely convertible currency accepted by the claimants".[341]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[346] Rejoinder, ¶ 43.

[347] Rejoinder, ¶ 45.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[356] SoC, ¶ 228(ii)-(iii).

[357] Objections, ¶ 78.

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

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

> "1. Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors".[361]

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

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

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[358] SoC, ¶ 190.

[359] SoC, ¶ 195.

[360] SoC, ¶ 201.

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

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

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

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

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

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[363] SoC, ¶ 192.

[364] SoC, ¶ 195.

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

[366] SoC, ¶ 87.

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

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

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

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

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

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

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

[370] *Id.*, point 2.2.

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

[372] *Id.*, point 3.6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. COSTS

A. THE PARTIES' COSTS STATEMENTS

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

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[377] SoC, ¶¶ 199-200.

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

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

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

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

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

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

[379] SoC, ¶ 228, point (v).

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

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

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

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

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

B. THE COSTS OF THE PROCEEDINGS

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

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

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

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

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

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

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

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

C. THE ALLOCATION OF COSTS

286. Article 40(1) and (2) of the UNCITRAL Rules read as follows:

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

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

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

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

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

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

VII. DECISION

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

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

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

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

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

Seat of the arbitration: Geneva, Switzerland

Date: 20 May 2014

Mr. John Beechey
Co-arbitrator

Professor Pierre-Marie Dupuy
Co-arbitrator

Dr. Laurent Lévy
Presiding Arbitrator