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

CASE No. ARB/97/4

CESKOSLOVENSKA OBCHODNI BANKA, A.S.
(Claimant)

versus

THE SLOVAK REPUBLIC
(Respondent)

Decision of the Tribunal on Respondent's Further
and Partial Objection to Jurisdiction

Members of the Tribunal

Judge Thomas Buergenthal, President
Professor Piero Bernardini
Professor Andreas Bucher

Secretary of the Tribunal

Ms. Margrete Stevens

Representing the Claimant

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Representing Respondent

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I. PROCEDURAL BACKGROUND

1. On May 24, 1999 this Tribunal rendered a first decision on jurisdiction (hereinafter, the "First Decision"), holding that the parties had consented in the Consolidation Agreement to ICSID jurisdiction and that, accordingly, the dispute was within the jurisdiction of the Centre and the competence of the Tribunal.

2. The First Decision describes the contractual arrangements between the parties, the object of the dispute and the procedural steps taken prior thereto. The terms, as defined therein, shall have the same meaning when used in this Decision.

3. After the First Decision was rendered, the parties filed the following memorials within the time limits fixed by the Tribunal:

Claimant:	Memorial on the Merits, dated November 15, 1999;
Respondent:	Further and Partial Objection to Jurisdiction under ICSID Rule 41, dated December 23, 1999;
Claimant:	Observations on the Slovak Republic's Further and Partial Objection to Jurisdiction, dated February 7, 2000;
Respondent:	Reply to Claimant's Observations on the Further and Partial Objection to Jurisdiction, dated March 7, 2000;
Claimant:	Rejoinder to the Slovak Republic's Further and Partial Objection to Jurisdiction, dated March 21, 2000.

4. On July 17, 2000, the Tribunal held a meeting at which the parties presented oral arguments regarding the Further and Partial Objection to Jurisdiction raised by Respondent.

II. THE PARTIES' POSITION

5. The respective positions of the parties, based on their written and oral submissions, are summarized below.

A. Respondent's position

6. Respondent asserts that Claimant's submission on the merits improperly attempts to have this Tribunal resolve a broad range of highly factual issues arising exclusively under agreements that lack an arbitra-

tion clause and involve only private parties. Specifically, Respondent contends that many of the issues raised by Claimant do not arise under the Consolidation Agreement, but under the Loan Agreement and other contracts to which the Slovak Republic is not a party. Respondent further submits that such other agreements, which it describes collectively as the "CSOB/SI Agreements", did not serve as the basis for Claimant's claims as set out in its Request for Arbitration since their scope was restricted to claims arising under the Consolidation Agreement. Respondent adds that these agreements were not the basis for the Tribunal's jurisdictional determination, and are currently the subject of proceedings in the Slovak courts.

7. Since Claimant has submitted 12 volumes of supporting materials with its Memorial on the Merits, accompanied by 22 boxes of accounting documents, Respondent considers it essential that the proceeding on the merits be suspended and a decision be rendered as to the Tribunal's jurisdiction relating to the issues raised by the CSOB/SI Agreements.

8. It is Respondent's position that Claimant should not be allowed to surreptitiously extend the scope of this arbitration beyond the Tribunal's jurisdiction. It obtained jurisdiction only with regard to the Consolidation Agreement because an ICSID arbitration clause was held to have been incorporated by reference into that agreement. According to Respondent, therefore, the Tribunal cannot be deemed to have jurisdiction to decide disputes arising under the CSOB/SI Agreements, since they differ significantly in a variety of respects from the Consolidation Agreement.

9. In further amplification of its objection to jurisdiction, Respondent emphasizes that:

   i) The Slovak Republic is party to the Consolidation Agreement, but not to any of the CSOB/SI Agreements to which only SI is a party;

   ii) Czech law and the BIT govern the Consolidation Agreement, while Slovak law governs the CSOB/SI Agreements;

   iii) None of the CSOB/SI Agreements contains an arbitration clause, which suggests that, according to the applicable rules of private

international law, Slovak courts have jurisdiction to resolve disputes arising under these agreements. One of them in fact contains an express reference to "*the court of competent jurisdiction*" and not to arbitration;

iv) The First Decision emphasized the relationship between the Loan Agreement and the Consolidation Agreement for the purposes of determining whether the dispute arose directly out of an investment. It did not do so for the purpose of determining the existence of consent by either party to arbitration or the Tribunal's jurisdiction *ratione personae*;

v) In determining that "*this dispute is within the jurisdiction of the Centre*" (First Decision, paragraph 92), the "*dispute*" is necessarily defined by reference to the claims before the Tribunal, which were all brought under the Consolidation Agreement.

10. The Respondent further contends that, notwithstanding the Tribunal's holding in its First Decision, Claimant seeks an award of sums due it from SI under the Loan Agreement, SI's indebtedness thereunder being supported by Respondent's undertaking under the Consolidation Agreement to cover SI's losses. That undertaking is characterized by Claimant's legal expert, Professor Jan Dìdiè, as a "comfort letter" according to which Respondent would have secured the debtor's (SI's) obligations. It constitutes, therefore, a second-tier obligation in respect of SI's first-tier obligation to repay its debt to Claimant under the CSOB/SI Agreements. Respondent submits that only when the courts competent to resolve the disputes arising out of the first-tier obligations have done so, will there be a liquidated amount of losses capable of constituting the subject matter of the second-tier obligation, which is the subject of this arbitration.

11. Respondent submits that it is a generally accepted principle that an arbitration clause contained in a guarantee does not extend to the primary contract. The same is deemed to be true the other way round, that is, when the clause in question is found in the primary contract and not in the guarantee. According to the Respondent, this Tribunal has jurisdiction only with regard to disputes under the Consolidation Agreement, namely, the Agreement which stipulates the second-tier obligation, and does not extend to disputes under the agreements that

govern the first-tier obligation. In the instant case, these are the Loan Agreement and the other CSOB/SI Agreements. Respondent therefore rejects the proposition that this Tribunal has jurisdiction to determine the indebtedness of SI to CSOB because those issues arise solely under the CSOB/SI Agreements.

12. Respondent contends further that in the present case there was no consent for the submission to ICSID arbitration of issues arising under the CSOB/SI Agreements. It founds this argument on the proposition that the determination of the Tribunal that the arbitration clause contained in Article 8 of the BIT was incorporated by reference into the Consolidation Agreement and cannot be construed as extending to the CSOB/SI Agreements or to any other contract. According to this view, the Tribunal's jurisdiction extends to issues involving the Slovak Republic that arise under the Consolidation Agreement and includes jurisdiction to award damages. It does not, however, apply to the determination of amounts owed by SI to CSOB under the CSOB/SI Agreements. This conclusion, according to Respondent, gains further support from the fact that, since SI is a national of the Slovak State, the Tribunal would not have jurisdiction *ratione personae* over such an entity.

13. In conclusion, while reserving its right to seek the annulment of any subsequent award on the merits on the ground that the Tribunal exceeded its jurisdiction in the First Decision, Respondent submits that, while the Tribunal has jurisdiction to decide issues arising under the Consolidation Agreement, including the existence and nature of the parties' obligations thereunder, only the Slovak courts are competent to determine the existence and amount of SI's debt to CSOB under the CSOB/SI Agreements.

B. Claimant's position

14. Claimant submits that it claimed, both in the Request for Arbitration and in its Memorial on the merits, that the Slovak Republic violated the Consolidation Agreement and that Claimant was entitled therefore to the remedies afforded by Czech law in such circumstances, including damages. Accordingly, Claimant contends that the jurisdiction of this Tribunal is not limited to the determination of Respondent's breach of the Consolidation Agreement and the resulting

liability for damages, but that it also extends to the determination of the amount of damages. This result has its basis in the principles of effectiveness and finality applicable to the matter of jurisdiction as indicated by the practice of the International Court of Justice.

15. According to Claimant, the scope of the consent to ICSID jurisdiction given under Article 25 (I) of the Convention must be determined by reference to the good faith intentions of the parties and the economic realities of the contemplated transaction. It follows that when such a transaction is to be consummated through a series of separate agreements, or is to be executed through a special purpose entity, ICSID tribunals have held that they have jurisdiction to address issues arising under those related agreements. This has been the case even where such related agreements did not contain separate consents to ICSID jurisdiction and when they were concluded between parties other than, but related to, the parties to the arbitration.

16. In support of its position, Claimant refers to the many cases decided by ICSID tribunals which exercise jurisdiction over issues arising not only under the agreement containing the parties' consent to ICSID jurisdiction, but also under other contracts concluded to carry out the contemplated investment. In rendering these decisions, the ICSID tribunals relied on the overall unity or inseparability of the relevant operation.[1] Claimant asserts further that its position finds support also in the caselaw of other non-ICSID tribunals. They based their jurisdiction to rule on issues arising under contracts related to the primary contract, which contained the parties' consent to arbitration, whenever the related contracts defined the scope of obligations arising under the primary contract.

17. Claimant further contends that this Tribunal has already recognized that its claims necessarily concern the entire transaction contemplated by Article 3 of the Consolidation Agreement, and that the CSOB/SI

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[1] *Holidays Inns* v. *Morocco*, as commented by P. Lalive, *The First* "*World Bank*" *Arbitration* (*Holidays Inns* v. *Morocco*). *Some Legal Problems*, 51 Brit. Y. B. Int'l L. 123 (1980); *Amco Asia et al.* v. *Indonesia*, ICSID ARB/81/1 (jurisdictional decision of Sept. 25, 1983), reprinted in 23 ILM 351, 357, 367 (1984); *SOABI* v. *Senegal*, ICSID ARB/8211 (Award of Feb, 25 1988), reprinted in 6 ICSID Rev. F.I.L.J. 119 (1991); *Tesoro Petroleum Corp*. v. *Trinidad and Tobago*, 1 ICSID Rev. F.I.L.J. 340 (1986); *Klöckner et al.* v. *Cameroon*, ICSID ARB/81/2 (Award of Oct. 21, 1983), *reprinted* in 111 J. Droit Int'l 409 (1984) and in 10 Y. B. Com. Arb. 71 (1985).

Agreements, which were designed to implement the Consolidation Agreement, are central to a determination of the scope of the rights and obligations of the Parties under that Agreement. Claimant submits that the principle that international proceedings take precedence over national court proceedings requires the exercise of ICSID jurisdiction to the exclusion of proceedings in Slovak national courts, and that the decisions of such courts concerning matters subject to ICSID jurisdiction are not binding on this Tribunal, which must render its own independent decision.

18. Claimant submits next that the evidence in this case demonstrates that the only interpretation of the Consolidation Agreement that "*takes into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged*"[2], is one that would extend this Tribunal's jurisdiction to the determination not only of the existence of Respondent's obligation but also of the precise amount of that obligation, instead of leaving the latter determination to the Slovak courts. This evidence is said to be reflected in the history of the negotiations leading to the Consolidation Agreement. Here the Slovak Republic itself referred to this Agreement as a "*master agreement*". The evidence is also to be found in the subsidiary agreement where the Slovak Minister of Finance confirms the obligations assumed by Respondent with regard to the Consolidation Agreement. The numerous cross references in the text of the subsidiary agreements to the Consolidation Agreement as well as the conduct of the parties subsequent to the conclusion of these agreements are said to further support Claimant's conclusion.

19. In reliance on the caselaw of the International Court of Justice, Claimant contends that when a tribunal has been seized of a dispute arising under an instrument over which it has jurisdiction, it is deemed to be competent to address secondary or incidental questions relating to other instruments, provided this is necessary in order to adjudicate the dispute over which it has jurisdiction. According to Claimant, the instant case is in fact such a case because the Consolidation Agreement defines Respondent's obligation in terms of SI's liability under the subsidiary agreements. It is Claimant's position that

[2] First Decision, paragraph 34 (quoting *AMCO Asia et al. v. Indonesia*, Decision on Jurisdiction of Sept. 25, 1983, 23 I.L.M. 359 (1984)).

its claims are against Respondent and not SI, and that they arise under the Consolidation Agreement, rather than the implementing or subsidiary agreements.

20. Claimant further submits that the absence of dispute resolution clauses in the implementing agreements demonstrates that the parties to these agreements considered such provisions unnecessary because the Consolidation Agreement contained the requisite arbitration clause. In this connection, Claimant suggests that questions concerning the intention of the parties regarding whether or nor they agreed to arbitration are routinely evaluated by reference to agreements at issue in other cases with similar elements. Previous ICSID decisions are thus relevant in deciding comparable issues in this case.

21. Finally, Claimant asserts that it is consistent with the obligation of Article 48 (3) of the ICSID Convention that the Tribunal's award deal with every issue submitted to it. In the present case the dispute under the Consolidation Agreement raises two principal issues, namely, (i) whether Respondent breached its obligation to cover SI's losses as contemplated by the Consolidation Agreement, and (ii) what are the damages to which Claimant is entitled under that Agreement as a consequence of such a breach. Since the dispute submitted to this Tribunal covers the transactions described in the Consolidation Agreement, Claimant submits that it is necessary for the Tribunal to examine the agreements contemplated therein. Hence, according to Claimant, this Tribunal has the requisite jurisdiction over the dispute and should reject Respondent's latest jurisdictional challenge.

III. ANALYSIS AND CONCLUSIONS

22. This further challenge to the jurisdiction of the Tribunal and the arguments advanced by the parties make it necessary for the Tribunal to spell out the precise scope of the jurisdictional determination it made in the First Decision. In this connection, the Tribunal recalls that in paragraph 92 of the First Decision it ruled that "...this dispute is within the jurisdiction of the Centre and the competence of the Tribunal..."

23. Claimant is correct in asserting that the reference in the First Decision to "this dispute" applies to the manner in which the Claimant has

presented its claims. In its Request for Arbitration, Claimant requested that a final award be issued

"*(a) Declaring that the Slovak Republic without legal justification has breached its obligations to CSOB under the Consolidation Agreement by failing and refusing to cover losses made by the Slovak Collection Company;*
(b) Requiring the Slovak Republic to fulfil its obligations to CSOB under the Consolidation Agreement to cover losses made by the Slovak Collection Company in an amount sufficient to discharge its debt to CSOB;
(c) Granting to CSOB any and all of the damages suffered by it as a result of the Slovak Republic's failure and refusal to fulfil its obligations to CSOB under the Consolidation Agreement to cover losses made by the Slovak Collection Company; and
(d) Granting to CSOB all of the costs of the arbitration, including the arbitrator's fees and the administrative costs fixed by ICSID, the expenses of the arbitrators, the fees and expenses of any experts, and the legal costs incurred by the parties (including fees of counsel)".

The Tribunal confirms its jurisdiction regarding the dispute as so framed by Claimant to the extent that the same arises under the Consolidation Agreement and is to be settled according to its provisions, including its governing law clause.

24. The relief requested by Claimant in its Memorial on the merits reads as follows:

"For the reasons stated above, CSOB respectfully requests the Tribunal to award it as compensation for the damages it has incurred due to the Slovak Republic's breach of the Consolidation Agreement the following:

1. The sum of SKK 24,659,907,271, being equal to the principal and interest due to June 30, 2000 under the SI Loan Agreement;

2. The sum of SKK 9,064,537,958, being the additional losses of CSOB it may claim pursuant to Section 379 *et seq.* of the Commercial Code of the Czech Republic, measured by the Slovak Government bond yield to June 30, 2000;

3. The additional sums due when the damages under 1 and 2 above are carried forward from June 30, 2000 to the date of the award to be issued in this case;

4. Such additional sums as may be calculated and submitted to the Tribunal prior to the closure of this proceeding representing CSOB's further damages, including lost productive management time and professional fees and expenses incurred relating to

   a. all proceedings relating to SI's bankruptcy;

   b. obtaining, documenting, implementing and maintaining Czech shareholder financial support of the Bank;

   c. this proceeding; and

   d. otherwise asserting its rights under the Consolidation Agreement;

5. interest at a rate (or rates) to be determined on all sums awarded from the date of the award until the date it is paid."

25. The determination of the precise scope of its jurisdiction as established by the Tribunal in its First Decision must be made by reference to the consent of the parties to ICSID jurisdiction under Article 25 (1) of the ICSID Convention. The Tribunal's decision on this subject will be guided by the principles set out in paragraph 34 of the First Decision, which reads as follows:

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

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

> ments the parties may be considered as having reasonably and legitimately envisaged." (Emphasis supplied)]

26. After full consideration of the arguments and authorities submitted by the parties, the Tribunal concludes that an analysis of what may be deemed to be "*the common will of the parties*", as that phrase is used in paragraph 34, indicates that the Tribunal was not granted jurisdiction also with respect to the CSOB/SI Agreements.

27. In reaching the foregoing conclusion, the Tribunal notes, in the first place, that each case must be assessed by reference to its specific facts. Unlike the prior cases to which Claimant has referred, the parties in the instant case have not provided for a separate and express dispute resolution clause. The Tribunal did find, however, that the reference to the BIT in the Consolidation Agreement constituted an incorporation by reference into the Consolidation Agreement of Article 8 of the BIT which provides for international arbitration. This conclusion, while fully justified as an interpretation of the common will of the parties, imposes a measure of restraint on the Tribunal when it is called upon to identify, once again by a process of interpretation, what types of disputes the parties actually intended to have covered by their arbitration agreement.

28. In the First Decision, the Tribunal has held that the CSOB's claim and the related loan facility made available to SI qualify as investments within the meaning of the ICSID Convention and the BIT (paragraph 91). This does not mean, however, that the Tribunal thereby automatically acquires jurisdiction with regard to each agreement concluded to implement the wider investment operation. Other requirements have to be met for such jurisdiction to be established. That is, the fact that the agreement to arbitrate referred to in the First Decision must be construed in good faith does not necessarily mean that the interpretation of the consent of the parties under Article 25 (1) of the ICSID Convention must in each case be deemed to extend to any and all agreements comprising the entire transaction.

29. In the instant case, there are good reasons that militate against extending the scope of the parties' agreement to arbitrate beyond the Consolidation Agreement. The CSOB/SI Agreements have not been signed by the same entities which are parties to the Consolidation

Agreement. Moreover, national courts have shown considerable restraint in extending the reach of an arbitration agreement beyond the signatories' sphere. In taking this position, these courts have relied on the principle of the relative effects of a contract (*tertio neque nocet neque prodest*) as well as on the contractual basis of arbitration as a dispute resolution method.[3]

30. The Tribunal does not accept the contention that the absence of an arbitration clause in the CSOB/SI Agreements supports the conclusion that the parties thereto considered the arbitration agreement of the Consolidation Agreement to be applicable also to disputes between them. The absence of such a clause may in fact be deemed to reflect the intent to leave the resolution of disputes to the competent national courts. In this respect, it is significant that one of these agreements, viz., the Agreement to Conclude Future Agreements on the Assignment of Certain Receivables Under Off-Balance Sheet Instruments between CSOB and SI (Article III), makes a specific reference to "*a court of competent jurisdiction*".

31. The principle of effectiveness and finality of jurisdiction, invoked by Claimant with reference to the practice of the International Court of Justice, cannot override the basic rule that arbitral jurisdiction is based on the consent of the parties. Moreover, this Tribunal lacks competence *ratione personae* to decide with *res judicata* effect issues arising out of the CSOB/SI Agreements. This is so because, on the one hand, SI is not bound by an agreement to submit disputes arising under these Agreements to ICSID jurisdiction and is not a party to the dispute pending before this Tribunal. On the other hand, Respondent is not a party to the CSOB/SI Agreement

32. For the reasons stated above, the Tribunal confirms its First Decision and holds that its competence covers, and is confined to, issues arising out of the Consolidation Agreement.

33. For the guidance of the parties in the merits phase of these proceedings, the Tribunal reiterates that it has jurisdiction to determine the validity, nature and scope of Respondent's obligation to cover SI's

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[3] Cohen D., *Arbitrage et Groupes de Contrats*, Rev. Arb. 1997, p. 502.

losses as provided by Article 3(II) of the Consolidation Agreement, to establish whether Respondent has breached that obligation, and to assess damages, if any, payable by Respondent to CSOB for any such breach.

34. According to paragraph 61 of the First Decision, CSOB's claim based on Article 3 of the Consolidation Agreement requests the Tribunal to analyze the rights and obligations set forth therein, as well as the question whether CSOB is entitled to damages due to the breach of the obligations alleged to have been committed by the Slovak Republic. In Article 3(II) of the Consolidation Agreement, the Slovak Republic undertook to cover SI's losses resulting from the operating costs and the schedule of payments for the receivables assigned by CSOB to SI, including payment of interest. The more concise wording of Section 7 of the Loan Agreement provides that "the repayment of the loan including interest thereof is secured by an obligation of the Ministry of Finance of the Slovak Republic". At the bottom of that Agreement, the Ministry of Finance confirmed its obligation under Section 7, which refers expressly to the Consolidation Agreement as the legal basis for the Ministry's undertaking.

35. It follows that if the determination of SI's losses and the amount of SI's indebtedness to CSOB were to be left to the national courts, as contended by Respondent, the determination of the amount of the Republic's alleged obligation to secure the repayment of the loan would be excluded from the scope of the arbitration agreement contained in the Consolidation Agreement and, hence, also from the competence of this Tribunal. The ICSID Convention does not require an ICSID tribunal to accept the binding effect of national court decisions. By contrast, Article 26 of the Convention states that "[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy". The Tribunal's competence must include, therefore, the determination of the Slovak Republic's obligation, if any, to secure the repayment of CSOB's loan, as well as, the amount of CSOB's damages, if any, due to the breach of that obligation. This competence, as recognized by Article 26 of the Convention, is exclusive of any other remedy. Accordingly, Slovak national courts may not retain jurisdiction over issues arising under the Consolidation Agreement.

IV. DECISION

36. For all the above reasons, the Tribunal unanimously rejects the Slovak Republic's Further and Partial Objection to Jurisdiction under ICSID Rule 41, and decides to continue the proceedings on the merits pursuant to a pleading schedule to be fixed in due course.

Thomas Buergenthal

Piero Bernardini *Andreas Bucher*

[Date: December 1, 2000]