INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

EUROGAS INC. AND BELMONT RESOURCES INC.

(Claimants)

v.

SLOVAK REPUBLIC

(Respondent)

ICSID Case No. ARB/14/14

AWARD

Members of the Tribunal
Professor Pierre Mayer, President of the Tribunal
Professor Emmanuel Gaillard, Arbitrator
Professor Brigitte Stern, Arbitrator

Secretary of the Tribunal
Ms. Lindsay Gastrell

Assistant to the Tribunal
Ms. Céline Lachmann

Date of dispatch to the Parties: 18 August 2017

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TABLE OF DEFINED TERMS AND SELECTED ABBREVIATIONS

1985 Company	The term used by the Claimants to refer to EuroGas Inc., a Utah corporation incorporated in 1985
1995 Kilík Report	Ján Kilík, et al., "Final Report and the Supply Calculation, Talc – VP," 31 March 1995. (C-117/R-120)
2002 Amendment	Act No. 558/2001 Coll, amending the Mining Act, effective as of 1 January 2002
Agreement	Agreement between EuroGas II and Trustee Loveridge dated 9 August 2016, which the Bankruptcy Court approved on 28 October 2016. (C-360)
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Bankruptcy Code	United States Bankruptcy Code
Bankruptcy Court	United States Bankruptcy Court, District of Utah
Bankruptcy Proceedings	The Chapter 7 bankruptcy proceeding of EuroGas I, which was initiated in 2004, closed in 2007 and reopened in 2015
Belmont	Belmont Resources Inc., a Canadian corporation
C-[#]	Claimants' Exhibit
Canada-Slovakia BIT	The Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments, which entered into force on 14 March 2012 (C-2)
Claimants	EuroGas and Belmont
Counter-Memorial	Respondent's Counter-Memorial dated 30 June 2015
CL-[#]	Claimants' Legal Authority
DEG	Deutsche Investitions- und Entwicklungsgesellschaft GmbH, a German State-owned entity

DEG Report	Final report, issued in January 1998, regarding an independent review commissioned by DEG of the Feasibility Study (C-137)
DMO	District Mining Office in Spišská Nová Ves, Slovak Republic
Dorfner	Gebrüder Dorfner GmbH & Co. Kaolin-und Kristallquarzsand-Werke KG, a German company
Economy Agency	Economy Agency RV s.r.o., a Slovak company
ESG	EuroGas Silver and Gold Inc., a Nevada corporation
EuroGas	EuroGas Inc., a Utah corporation incorporated in 2005
EuroGas I	Term used by the Respondent (and in some places the Tribunal) to refer to EuroGas Inc., a Utah corporation incorporated in 1985
EuroGas II	Term used by the Respondent (and in some places the Tribunal) to refer to EuroGas Inc., a Utah corporation incorporated in 2005 and Claimant in this arbitration
Feasibility Study	Feasibility Study Outline, TALC – GEMERSKA POLOMA, E. Haidecker, February 1997 (C-121)
General Mining Authorization	General mining authorization issued by the DMO to Rozmin on 14 May 1997 pursuant to Article 4a of the Mining Act (C-20)
Geological Survey	Geologická služba SR, a Slovak company (GPS's successor entity)
GPS	Geologický prieskum š.p., Spišská Nová Ves, a Czechoslovakian State-owned entity
Hearing	Hearing on Jurisdiction and Merits held in Paris, France from 12 to 16 September 2016
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966

ICSID	International Centre for Settlement of Investment Disputes
Joint Resolution	Joint Unanimous Consent Resolution of the Directors of EuroGas, Inc., a Utah Corporation Dissolved in 2001 and EuroGas, Inc., a Utah Corporation Formed in 2005 Approving Proposed Class "F" Reorganization, dated 31 July 2008 (C-57)
Kloibhofer Report	A 3D model of the Extraction Area prepared by Technical Bureau DI Skacel & Kloibhofer OEG, dated 1 April 2000 (C-154)
McCallan	McCallan Oil & Gas, a U.K. company
Memorial	Claimants' Memorial dated 31 March 2015
Mining Act	Act No. 44/1988 on Protection and Utilization of Mineral Resources
Mining Area	A 4,965 square km mining area of the Gemerská Poloma deposit
MMO	Main Mining Office of the Slovak Republic
[Name] ER	Expert report of [Name]
[Name] WS	Witness statement of [Name]
ÖSTU	ÖSTU Industriemineral Consult GmbHm, an Austrian company
Purchase Price Shares	12,000,000 common shares in EuroGas referenced in the SPA
R-[#]	Respondent's Exhibit
Regional Court	Regional Court in Košice, Slovak Republic
Rejoinder	Respondent's Rejoinder dated 29 December 2015
Reply	Claimants' Reply dated 29 September 2015
Respondent	Slovak Republic
RL-[#]	Respondent's Legal Authority

RimaMuráň	RimaMuráň s.r.o., a Slovak company
Rozmin	Rozmin s.r.o., a Slovak company
SEC	U.S. Securities and Exchange Commission
Rudný	Rudný projekt a.s, a Slovak State-owned company
Siderit	Siderit s.r.o. Nižná Slaná, a Slovak company
SPA	Share Purchase Agreement between EuroGas Inc., Belmont Resources Inc., and Rozmin s.r.o., dated 27 March 2001 (R-15)
TEC	Tombstone Exploration Corporation
Thyssen	Thyssen Schachtbau GmbH, a German company
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing
Transfer Agreement	Agreement on the Transfer of the Gemerská Poloma Mining Area between Rozmin and Geological Survey dated 11 June 1997, (C-23)
Tribunal	Arbitral Tribunal constituted on 20 January 2015
Trustee Loveridge	Chapter 7 bankruptcy trustee in the reopened Bankruptcy Proceedings
Trustee Marker	Chapter 7 bankruptcy trustee in the original Bankruptcy Proceedings
Trustee Smith	Trustee for the bankruptcy estate of Harven Michael McKenzie, a creditor of EuroGas I
U.S. Trustee	The United States Trustee (under the United States Department of Justice) who motioned the Utah Bankruptcy Court to reopen the Bankruptcy Proceedings
US-Slovakia BIT	The Treaty between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment, which entered into force on 19 December 1992 (C-1)

VCLT	Vienna Convention on the Law of Treaties, which entered into force on 27 January 1980
VSK Mining	VSK Mining s.r.o., a Slovak company

I. INTRODUCTION

1. This case concerns a dispute arising out of the Claimants' alleged interest in the Gemerská Poloma talc deposit located in the Košice region of the Slovak Republic.

2. The Claimants have submitted this dispute to arbitration under the auspices of the International Centre for Settlement of Investment Disputes ("**ICSID**") on the basis of: (a) the Treaty between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment, which entered into force on 19 December 1992 (the "**US-Slovakia BIT**");[1] (b) the Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments, which entered into force on 14 March 2012 (the "**Canada-Slovakia BIT**");[2] and (c) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

A. Parties

3. The claimants are EuroGas Inc. ("**EuroGas**"), a company incorporated under the laws of the state of Utah, United States, and Belmont Resources Inc. ("**Belmont**"), a company incorporated under the laws of Canada (together, the "**Claimants**").

4. EuroGas was incorporated on 15 November 2005 and has its registered office at 3098 South Highland Drive, Suite 323, Salt Lake City, Utah, 84106-6001. According to the Claimants, EuroGas is a continuation of another company named EuroGas Inc. that was incorporated in 1985 and administratively dissolved in 2001.[3] The Director of EuroGas is Mr. Wolfgang Rauball, a national of Germany.

[1] US-Slovakia BIT (C-1).

[2] Canada-Slovakia BIT (C-2).

[3] The Respondent refers to the Claimant EuroGas as "EuroGas II" and the previous company as "EuroGas I," whereas the Claimants refer to the Claimant EuroGas as "EuroGas" and the previous company as the "1985 Company." As noted below, the Tribunal uses the terms "EuroGas I" and "EuroGas II" in parts of this Award. The use of this terminology in this Award is without prejudice to, and in no way reflects, the Tribunal's understanding of any issue disputed by the Parties.

5. Belmont was constituted on 18 January 1978. Its corporate head office is located at 625 Howe Street, Suite 600, Vancouver, British Columbia, Canada V6C 2T6.

6. The respondent is the Slovak Republic (also referred to as the "**Respondent**"), which became an independent State on 1 January 1993. The Respondent has been an ICSID Contracting State since 26 June 1994.

B. Factual Background

7. The following summary is intended to provide a general overview of the factual background to the dispute between the Parties. It is not intended to be an exhaustive description of all facts considered relevant by the Tribunal. Further factual material will be addressed in the context of the Tribunal's analysis of the issues in dispute below.

(1) The Gemerská Poloma Talc Deposit

8. The Gemerská Poloma talc deposit, located in the Košice region of the Slovak Republic, is among the largest talc deposits in the world.[4] The existence of talc in the area was first discovered in 1988 by the Czechoslovakian State-owned entity Geologický prieskum š.p., Spišská Nová Ves ("**GPS**") while performing exploration works in search of tin.[5] The quality of the talc deposit was confirmed by additional exploration boreholes drilled between 1988 and 1992.[6]

9. In order to carry out additional exploration, GPS formally applied to the Slovak Ministry of Environment for the assignment of the exploration area, and its application was granted on 16 April 1993.[7]

[4] Memorial ¶57; Counter-Memorial ¶202; Reply ¶242; *The Slovak Spectator*, "Austrian firm to open talc mine in Gemerská Poloma in Košice region," 4 October 2011 (C-116).

[5] Counter-Memorial ¶202; Ján Kilík, Geological Characteristics of the Talc Deposit in Gemerská Poloma – Dlhá dolina, Acta Montanistica Slovaca Year Vol. 2 (1997), 1, 71-80, p. 71 (C-117).

[6] Counter-Memorial ¶205; Reply ¶242.

[7] Counter-Memorial ¶205.

10. On 21 May 1993, the Ministry of the Environment issued a "Certificate of Exclusive Mineral Deposit" on the basis of a notice filed by GPS.[8] This Certificate designated the Gemerská Poloma deposit as an "exclusive deposit" based on an exploration report showing that "[e]merging from the mineral deposit is a vein of the highest quality talc."[9]

11. By that time, the Slovak Government had begun to seek private capital from foreign investors to develop the deposit.[10] In 1992, the Government entered into discussions with Gebrüder Dorfner GmbH & Co. Kaolin-und Kristallquarzsand-Werke KG ("**Dorfner**"), a large German mining company.[11] On 18 June 1993, GPS and Dorfner executed a letter of intent to establish an association for the funding and execution of a geological survey of the deposit.[12]

12. On 28 February 1994, GPS, Dorfner, and two Slovak companies (HELL, spol. s.r.o., and MR Trading, a.s.) entered into a Contract of Association.[13] The parties agreed to assess the deposit, to prepare a feasibility study for its future commercial exploitation and, if this study yielded positive results, to incorporate a Slovak mining company to exploit the deposit.[14]

13. Dorfner subcontracted the German group Thyssen Schachtbau GmbH ("**Thyssen**") and its Austrian subsidiary ÖSTU Industriemineral Consult GmbH ("**ÖSTU**") to perform a technical evaluation of the deposit for the feasibility study.[15]

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[8] Certificate of Exclusive Mineral Deposit issued by the Ministry of Environment of the Slovak Republic, 21 May 1993 (Ref. 6.3/638-792/93) (C-118).

[9] Certificate of Exclusive Mineral Deposit issued by the Ministry of Environment of the Slovak Republic, 21 May 1993 (Ref. 6.3/638-792/93) (C-118).

[10] Memorial ¶65; Counter-Memorial ¶206.

[11] Memorial ¶65; Counter-Memorial ¶206.

[12] Counter-Memorial ¶207; Information for the Head of the Office of the Ministry of Environment of the Slovak Republic prepared by Mr. Tözsér, 8 November 1996 (R-121), point 1.

[13] Counter-Memorial ¶¶207-208; Reply ¶247; Information for the Head of the Office of the Ministry of Environment of the Slovak Republic prepared by Mr. Tözsér, 8 November 1996 (R-121), point 2.

[14] Counter-Memorial ¶208; Reply ¶247; Čorej WS ¶9; Mr. Stephan Dorfner WS ¶7; Information for the Head of the Office of the Ministry of Environment of the Slovak Republic prepared by Mr. Tözsér, 8 November 1996 (R-121), point 2.

[15] Memorial ¶69; Counter-Memorial ¶209; Reply ¶248.

14. According to the Claimants, although GPS remained involved, Dorfner was the "driving force behind the project."[16] The Claimants submit that the Respondent chose not to engage in talc exploration and financed the drilling of only one borehole after 1993.[17] The Respondent asserts that its work on the deposit continued, and the results of that work were set out in a final report on 31 March 1995 (the "**1995 Kilík Report**").[18] By then, according to the Respondent, it had fully financed 15 boreholes.[19]

15. Under Article 24(1) of the Act No. 44/1988 on Protection and Utilization of Mineral Resources (the "**Mining Act**"), an organization's right to excavate an exclusive deposit arises when the District Mining Office assigns the excavation area to it.[20] On 25 July 1996, the District Mining Office in Spišská Nová Ves (the "**DMO**") assigned a 4,965 square km mining area of the Gemerská Poloma deposit (the "**Mining Area**")[21] to GPS's successor entity,[22] Geologická služba SR ("**Geological Survey**").[23]

16. In February 1997, Dorfner, Thyssen, and ÖSTU completed the feasibility study (the "**Feasibility Study**").[24] The Feasibility Study estimated the quantity of talc in the western side of the Mining Area to be 28.9 million tons of talc and approximately 9 million tons of mineralized rock containing more than 40% of talc. It identified an area of high expected talc concentration where the deposit was planned to be opened.[25] The results were positive,

[16] Reply ¶247.

[17] Memorial ¶64; Rozložník WS ¶10; Reply ¶245.

[18] Counter-Memorial ¶210; Ján Kilík, et al., "Final Report and the Supply Calculation, Talc – VP," 31 March 1995, pp. 73–74, (C-117/R-120).

[19] Counter-Memorial ¶210.

[20] Section 24(1) of the Act No. 44/1988 Coll. on the Protection and Utilization of Mineral Resources, as amended (R-166).

[21] Respondent uses the term "Excavation Area."

[22] Due to reorganization of the state administration, on 1 January 1996, GPS ceased to exist and Geological Survey became its legal successor. Čorej WS ¶16.

[23] Memorial ¶71; Counter-Memorial ¶213; Decision of the Ministry of Environment of the Slovak Republic, 13 November 1995 (Ref. 2204/95-min) (C-120).

[24] Feasibility Study Outline, TALC – GEMERSKA POLOMA, E. Haidecker, February 1997 (C-121).

[25] Memorial ¶¶73-74; Feasibility Study Outline, TALC – GEMERSKA POLOMA, E. Haidecker, February 1997, p. 10 (C-121).

but the conceptual nature of the Feasibility Study meant that these findings would need to be confirmed and further assessment and mapping performed.[26]

(2) Establishment of Rozmin

17. Rozmin s.r.o. ("**Rozmin**") was incorporated under the laws of the Slovak Republic on 7 May 1997.[27] At its founding, Rozmin was owned by Dorfner (32.5%), Thyssen (through its subsidiary ÖSTU) (24.5%), and the Slovak company RimaMuráň s.r.o. ("**RimaMuráň**") (43%).[28]

18. Immediately upon its incorporation, Rozmin applied to the DMO for a general mining authorization pursuant to Article 4a of the Mining Act. The DMO issued this authorization on 14 May 1997 (the "**General Mining Authorization**").[29] It was valid for an indefinite period and allowed Rozmin to carry out mining activities on exclusive deposits in the Slovak Republic subject to its compliance with other statutory and regulatory requirements.[30]

19. On 5 June 1997, the DMO approved the transfer of the Mining Area from Geological Survey to Rozmin. Geological Survey and Rozmin then entered into an "Agreement for the Transfer of the Gemerská Poloma Mining Area" dated June 11, 1997 (the "**Transfer Agreement**").[31] The transfer was certified by the DMO on 24 June 1997.[32]

20. The Transfer Agreement provided *inter alia* that "all rights and obligations concerning this mining area shall be transferred on to the acquirer." Accordingly, Rozmin was bound by the terms of the original assignment of the Mining Area to Geological Survey under the

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[26] Memorial ¶76; Counter-Memorial ¶215.

[27] Memorandum of Association on the Establishment of the Company Rozmin s.r.o., 7 May 1997 (C-21).

[28] Memorial fn. 99; Counter-Memorial ¶217.

[29] Mining Authorization issued by the District Mining Office, 14 May 1997 (C-22); Memorial ¶79; Counter-Memorial ¶218.

[30] Mining Authorization issued by the District Mining Office, 14 May 1997 (C-22); Memorial ¶79; Counter-Memorial ¶218.

[31] Agreement on the Transfer of the Gemerská Poloma Mining Area, dated June 11, 1997 (C-23).

[32] Certificate on acquisition of rights to the mining area issued by the District Mining Office, 24 June 1997 (Ref. 1520-465-V/97). (C-24).

Decision of 25 July 1996. The Respondent argues that these terms included a requirement that the assignee "open[] works at the deposit Gemerská Poloma … not later than on 31 July 1998."[33] The Claimants accept that the decision "arguably contained" this requirement but contend that it in no way makes the validity of the assignment conditional upon works starting by that date.[34]

(3) Rozmin's Initial Activities

21. Throughout 1997, Rozmin secured various required licences and authorizations. It obtained, for example, a Trade License for the performance of mining activities,[35] written consents from the Ministry of Health[36] and other state entities, and a Decision on the Assignment of an Exploration Area from the Ministry of the Environment, assigning to Rozmin an additional exploration area nearby the Mining Area.[37]

22. Rozmin also purchased the Feasibility Study from Thyssen and Dorfner.[38]

23. At the same time, Rozmin and its shareholders were seeking investors to finance the next phase of the project.[39] As part of these efforts, it consulted the German State-owned company Deutsche Investitions- und Entwicklungsgesellschaft GmbH ("**DEG**"). DEG commissioned an independent review of the Feasibility Study, and the final report was issued in January 1998 ("the **DEG Report**"), concluding that the project was viable and profitable.[40] However, DEG ultimately decided not to invest.

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[33] Counter-Memorial ¶267, *quoting* Decision on the Assignment of the Gemerská Poloma Mining Area, 25 July 1996 (C-20).

[34] Reply ¶265.

[35] Trade License issued by the Rožňava District Authority of the Department of Trade Licenses and Customer Protection on 10 July 1997 (C-125).

[36] Letter from the Ministry of Health of the SR – Inspectorate of Spas and Springs to Rozmin, 31 October 1997 (C-126).

[37] Decision of the Ministry of Environment of the Slovak Republic, 28 November 1997 (Ref. 3609/1327/97-3.3) (C-130).

[38] Memorial ¶85; Invoice No. 1-005 from Gebrüder Dorfner, dated 10 June 1998 (C-132).

[39] Counter-Memorial ¶223; Stephan Dorfner WS ¶10; Haidecker WS ¶13.

[40] Memorial ¶93; Counter-Memorial ¶228; Analysis and Evaluation of the Feasibility Study Talk Gemerská Poloma, Slovakia, dated January 1998, pp. 5, 7 (C-137).

24. In early 1998, Rozmin submitted to the DMO its proposed "Plan for the Opening, Preparation, and Excavation of the Deposit" to be performed during 1998-2002.[41] This plan was a prerequisite to beginning mining operations at the Mining Area.

25. On 16 March 1998, EuroGas I became an indirect shareholder in Rozmin when its wholly owned subsidiary EuroGas GmbH purchased 55% of the shares of RimaMuráň, which held a 43% shareholding interest in Rozmin.[42] As part of the share transfer agreements, EuroGas GmbH agreed to finance RimaMuráň's share of Rozmin's financing and operating costs.

26. On 29 May 1998, the DMO issued an authorization for Rozmin to perform mining activities (the "**Authorization of Mining Activities**"), which allowed Rozmin to undertake mining activities at the Mining Area through 31 December 2002, subject to the terms of the DMO's original assignment of the Mining Area.[43]

27. Rozmin then mandated the State-owned company Rudný projekt a.s. ("**Rudný**") to design the construction works necessary for the opening of the deposit, and Rudný completed the project design in October 1998.[44]

28. Between mid-1998 and the end of 1999, Rozmin secured numerous official approvals, permits and leases that would allow it to begin construction works.[45]

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[41] Memorial ¶118; Counter-Memorial ¶232; Plan for the Opening, Preparation, Development, and Exploitation submitted by Rozmin s.r.o. on 15 January 1998 (C-0168).

[42] Memorial ¶15; Contract on the Transfer of a Business Share in the Commercial Company RimaMuráň s.r.o. between EuroGas GmbH and Mr. Villiam Komora, dated 16 March 1998 (C-6); Contract on the Transfer of a Business Share in the Commercial Company RimaMuráň s.r.o. between EuroGas GmbH and Mr. Peter Čorej, dated 16 March 1998 (C-7); Contract on the Transfer of a Business Share in the Commercial Company RimaMuráň s.r.o. between EuroGas GmbH and Mr. Pavol Krajec, dated 16 March 1998 (C-8); Contract on the Transfer of a Business Share in the Commercial Company RimaMuráň s.r.o. between EuroGas GmbH and Mr. Ján Baláž, dated 16 March 1998 (C-9). The total price of the shares was SKK 1,000,000. Counter-Memorial ¶236.

[43] Memorial ¶121; Counter-Memorial ¶233; Authorization of Mining Activities under the "Plan for the Opening, Development and Mining of an Exclusive Soapstone Deposit in the Gemerská Poloma Mining Area (Registration Number 74/e) for the 1998 – 2002 Period," 29 May 1998 (C-25).

[44] Memorial ¶122; Counter-Memorial ¶238; Rudný Invoice dated 6 November 1998 (C-170).

[45] Memorial ¶¶118-131; Counter-Memorial ¶241.

29. In the area of exploration, by April 1999, Rozmin had drilled seven boreholes.[46] On the basis of the data from these wells, Rozmin commissioned a 3D model of the Extraction Area from Technical Bureau DI Skacel & Kloibhofer OEG (the "**Kloibhofer Report**").[47] Rozmin also engaged ARP/ECV Ges.m.b.H. to produce three reports to verify the quality of the talc and identify the most efficient method of processing the raw material extracted from the deposit.[48]

30. In light of the facts stated above, the Parties disagree regarding the status of the project in 2000. According to the Claimants, by 2000, "any uncertainties regarding the commercial and financial viability of the reserves in the Extraction area had been wiped out: the deposit had been de-risked."[49] Further, Rozmin had secured all necessary permits and also had carried out substantial topographic and mapping works and geological cuts.[50]

31. On the other hand, the Respondent points out that Rozmin had failed to perform any surface construction or opening works. According to the Respondent, Rozmin had also failed to de-risk the project "because, due to the folding and faulting of the deposit, the reserves of talc could be reliably established only through underground drilling within the deposit."[51] Therefore, "the project remained almost entirely in the exploration stage."[52]

(4) Change in Rozmin's Ownership and Initial Works

32. In early 2000, Dorfner and ÖSTU, two of the original shareholders in Rozmin, decided to exit the project. On 24 February 2000, Belmont bought Dorfner's 32.5% ownership of

[46] Memorial ¶¶96-101; Counter-Memorial ¶229; RimaMuráň s.r.o. Invoice No. 436/021097-C, 2 October 1997 (C-138); RimaMuráň s.r.o. Invoice No. 14/300198-B, 30 January 1998 (C-139); RimaMuráň s.r.o. Invoice No. 63/300398-C, 30 March 1998 (C-140); RimaMuráň s.r.o. Invoice No. 73/200498-C, 20 April 1998 (C-141); RimaMuráň s.r.o. Invoice No. 115-100698-C, 10 June 1998 (C-142); Exploration Drilling Contract between Rozmin s.r.o. and RimaMuráň s.r.o., 9 November 1998 (C-143); RimaMuráň s.r.o. Invoice No. 78/010699-C, 1 June 1999 (C-144).

[47] Memorial ¶¶103-108; Kloibhofer Report, dated 4 April 2000 (C-154).

[48] ARP Survey Report, dated 17 December 1999 (C-160); ARP Interim Report, dated 5 May 2000 (C-161); ARP Final Report, dated 29 May 2000 (C-162).

[49] Memorial ¶117.

[50] Memorial ¶131.

[51] Counter-Memorial ¶240.

[52] Counter-Memorial ¶240.

Rozmin for DEM 1,625,000 and ÖSTU's 24.5% ownership for DEM 1,225,000.[53] After the purchase, Rozmin was owned 57% by Belmont and 43% by RimaMuráň.

33. On 17 June 2000, Rozmin initiated a tender for completion of the construction works based on the project design prepared by Rudný. A number of companies submitted bids, including RimaMuráň, which was awarded the work. On 22 September 2000, Rozmin and RimaMuráň entered into a contract entitled "Agreement on Commission of Works on: 'The Opening of the Talc Deposit Gemerská Poloma'."[54]

34. The DMO was notified of the commencement of works on 25 September 2000. By the end of 2000, RimaMuráň had completed the construction of 90% of the planned surface construction.[55] However, various disputes over payment arose between RimaMuráň and Rozmin, eventually leading to a suspension of works.[56] On 15 October 2001, Rozmin notified the DMO of the suspension of mining activities.[57]

(5) 2002 Amendment to the Mining Act

35. The Slovak Parliament passed an amendment to the Mining Act that took effect on 1 January 2002 (the "**2002 Amendment**").[58] For the Respondent, this development is critical because Section 27(12) of the 2002 Amendment placed a new rule on entities to which an excavation area is assigned: if such an entity does not begin excavation of the deposit within three years after the assignment, or if excavation is interrupted for more than three years, the DMO will cancel the excavation area or reassign it to a different entity.[59]

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[53] Counter-Memorial ¶246; Agreement on the Assignment of Company Shares in the Rozmin s.r.o. Corp. between Gebrüder Dorfner GmbH & Co. Kaolin- und Kristallquarzsand- Werke KG and Belmont Resources Inc., 24 February 2000 (C-17); Agreement on the Transfer of Business Shares in the Company Rozmin s.r.o. between Östu Industriemineral Consult GmbH and Belmont Resources Inc., 24 February 2000, (C-16).

[54] Memorial ¶¶132-134; Counter-Memorial ¶247; Contract on giving the contract for works on "Opening of Talc Deposit Gemerská Poloma" entered into between RimaMuráň s.r.o. and Rozmin s.r.o., 22 September 2000 (C-218).

[55] Counter-Memorial ¶253.

[56] Memorial ¶¶132-133; Counter-Memorial ¶¶254-258; Letter from RimaMuráň s.r.o. to Rozmin s.r.o., 28 September 2001 (C-220).

[57] Letter from Rozmin s.r.o. to the District Mining Office, 15 October 2001 (Ref. No. 2274) (C-221).

[58] Act No. 558/2001 Coll. (R-62).

[59] Counter-Memorial ¶¶287-294.

36. The Claimants disagree with this interpretation (and translation) of the 2002 Amendment.

37. According to the Respondent, following general rules of non-retroactivity in Slovak law, the three-year rule would apply to inactivity taking place after the effective date of the 2002 Amendment (1 January 2002).[60]

(6) Rozmin's Activities 2002-2004

38. Following RimaMuráň's exit from the project in 2001, EuroGas GmbH offered to purchase RimaMuráň's 43% equity interest in Rozmin in exchange for payment of RimaMuráň's debt.[61] This transaction was concluded on 26 March 2002. In exchange for the equity in Rozmin, EuroGas GmbH transferred its 55% ownership interest in RimaMuráň back to RimaMuráň's four founding shareholders and agreed to pay off RimaMuráň's debt from the project.[62]

39. On 5 September 2002, Rozmin applied to the DMO for an extension of the Authorization of Mining Activities, a process which required various statements of approval and a new Plan for the Opening, Preparation, Development, and Exploitation. The DMO closed the procedure for extension, allowing the Authorization of Mining Activities to lapse, on the basis that Rozmin had failed to submit the necessary documents.[63] However, after Rozmin appealed to the Main Mining Office (the "**MMO**"), the DMO reopened the procedure.[64] Eventually, after further written exchanges and an oral hearing, the DMO, on 31 May 2004, extended Rozmin's Authorization of Mining Activities until 13 November 2006.[65]

[60] Counter-Memorial ¶291.

[61] Counter-Memorial ¶265.

[62] Contract on Transfer of a Business Share between EuroGas GmbH and Mr. Viliam Komora, 26 March 2002 (C-10); Contract on the Transfer of a Business Share between EuroGas GmbH and Mr. Peter Čorej (C-11); Contract on the Transfer of a Business Share between EuroGas GmbH and Mr. Pavol Krajec, 26 March 2002 (C-12); Contract on the Transfer of a Business Share between EuroGas GmbH and Mr. Ján Baláž, 26 March 2002 (C-13).

[63] Memorial ¶147; Decision of the District Mining Office No. 46/2003, 16 January 2003, p.3 (C-225).

[64] Decision of the MMO, 15 May 2003 (Ref. 230 367/2003) (C-226).

[65] Authorisation of Mining Activity in the Mining Area "Gemerská Poloma," 31 May 2004 (Ref. 1023/511/2004) (C-27).

40. In June 2004, Rozmin initiated a tender for a contractor to resume the opening works. The Slovak company Siderit s.r.o. Nižná Slaná ("**Siderit**") was selected, and on 5 November 2004, Rozmin and Siderit entered into a Contract for Work.[66] On 8 November 2004, Rozmin notified the DMO that it would resume mining activities within ten days.[67]

41. On 8 December 2004, the Director of the DMO, Mr. Antonín Baffi, carried out an inspection at the Gemerská Poloma talc deposit, determining that "no facts were discovered indicating breach of legal regulations in force."[68]

(7) Reassignment of the Mining Area

42. On 30 December 2004, the Slovak Business Journal, under the heading "Decisions and notices of state bodies," announced that the DMO was initiating a new tender procedure for the assignment of the Mining Area.[69]

43. The DMO notified Rozmin of this procedure by letter of 3 January 2005.[70] The letter stated that the DMO was undertaking this action pursuant to Section 27(12) of the 2002 Amendment because mining activity at the Mining Area lapsed between 1 October 2001 and 18 November 2004, more than three years.

44. The DMO held the tender procedure on 21 April 2005 and received bids from seven companies.[71] The tender was awarded to the Slovak company Economy Agency RV s.r.o. ("**Economy Agency**"). Economy Agency was founded and owned by Ms. Zdenka Čorejová, Rozmin's former accountant and spouse of Mr. Peter Čorej, CEO and

[66] Memorial ¶¶161-162; Contract for the development of the Gemerská Poloma talc deposit entered into between Siderit and Rozmin s.r.o. on 5 November 2004 (C-259).

[67] Memorial ¶165; Letter from Rozmin s.r.o. to the District Mining Office, 8 November 2004 (C-267).

[68] Minutes of the 8 December 2004 inspection by the District Mining Office (C-28).

[69] Memorial ¶170; Reply ¶411; Initiation of the Selection Procedure for the Determination and Assignment of the Extraction Area, Business Journal No. 253/2004, 30 December 2004, p. 99 (C-29).

[70] Memorial ¶171; Counter-Memorial ¶304; Letter from the District Mining Office to Rozmin s.r.o., 3 January 2005 (Ref. 2405/451.14/2004-I) (C-30).

[71] Memorial ¶174; Counter-Memorial ¶307; Report on the Course and Results of the Selection Procedure for the Designation of the MA GP to Another Organisation Performed on 21 April 2005 (C-31).

shareholder of RimaMuráň.[72] On 3 May 2005, the DMO wrote to Rozmin and Economy Agency confirming the assignment of the Mining Area to Economy Agency.

45. On 3 November 2005, Mr. Vojtech Agyagos, in his capacity as an executive of Rozmin and as the President and CEO of Belmont, wrote to the Slovak Minister of Economy to complain that the reassignment of the Mining Area was "unlawful, non-standard and made on purpose"; he referred to potential proceedings under "international treaties on mutual support and protection of investments (because the shareholders of Rozmin a.s.ro. are foreign companies)".[73]

46. In December 2005, VSK Mining s.r.o. ("**VSK Mining**") became the sole shareholder of Economy Agency and then, in February 2006, absorbed the company.[74]

(8) Proceedings in the Slovak Republic

47. After being informed of the reassignment of the Mining area, Rozmin initiated local proceedings to challenge the DMO's action, ultimately resulting in three Supreme Court judgments.

48. On 27 September 2005, Rozmin brought the first challenge before the Regional Court in Košice (the "**Regional Court**"). Rozmin sought a revision of the DMO's decision of 22 April 2005 on the basis that (a) a full administrative proceeding was required before the Mining Area could be reassigned; and (b) Rozmin should have been a Party to the proceedings in which the Mining Area was reassigned to another entity.[75] In its decision of 7 February 2007, the Regional Court rejected the complaint, finding that Rozmin did not have standing to bring an action.[76]

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[72] Memorial ¶175; Reply ¶415.

[73] Letter from Mr. Agyagos and Belmont to the Minister of Economy, 3 November 2005 (R-162).

[74] Memorial ¶176; Counter-Memorial ¶311; Extract from the company Business Register in respect of Economy Agency RV, s.r.o., 5 June 2008 (C-269).

[75] Memorial ¶184; Counter-Memorial ¶317; Claim of Rozmin s.r.o. to the Regional Court in Košice, 27 September 2005 (R-195).

[76] Decision of the Regional Court in Košice, Case No. 5S/73/2005, 7 February 2007 (R-197).

49. Rozmin then appealed the Regional Court decision, arguing that the DMO's decision to initiate a new tender did not follow the proper procedure and was both legally and factually incorrect.[77] On 27 February 2008, the Supreme Court of the Slovak Republic issued its decision, in favour of Rozmin. The Supreme Court found that the DMO had failed to give Rozmin proper notice of the revocation of its mining rights and had "committed a whole series of severe procedural misconducts."[78] The Supreme Court concluded that the assignment of the Mining Area to Economy Agency should be cancelled and ordered the DMO to carry out additional proceedings.

50. On 2 July 2008, the DMO awarded the Mining Area to VSK Mining.[79] According to the Respondent, the process by which this was done fully complied with the Supreme Court's decision; formal proceedings were held, including Rozmin as a party.[80] The Claimants disagree, arguing that the assignment was effected through a "corporate sleight of hand," without any new tender proceedings.[81]

51. On 12 August 2008, the DMO issued a formal decision revoking Rozmin's General Mining Authorization.[82]

52. The MMO subsequently confirmed both of these 2008 decisions.[83]

53. Rozmin then brought an unsuccessful challenge of these decisions in the Regional Court.[84] On appeal, however, the Supreme Court found in favour of Rozmin. In its decision of 18 May 2011, the Supreme Court held, *inter alia*, that the 2002 Amendment did not have retroactive effect and, therefore, the three-year period could not commence until 1 January

[77] Memorial ¶186; Decision of the Supreme Court of the Slovak Republic, 27 February 2008 (Ref. 6Sz0/61/2007-121) (C-33).

[78] Decision of the Supreme Court of the Slovak Republic, 27 February 2008 (Ref. 6Sz0/61/2007-121) (C-33).

[79] Decision of the District Mining Office on the Assignment of the Gemerská Poloma Mining Area to VSK Mining s.r.o., 2 July 2 2008 (Ref. 329-1506/2008) (C-34).

[80] Counter-Memorial ¶321.

[81] Memorial ¶192. The Claimants highlight that VSK Mining was merely a shell company that had absorbed Economy Agency.

[82] Decision on the Revocation of the Authorization for Mining, 12 August 2008 (Ref. 104-1620/2008) (C-35).

[83] Decision of the Main Mining Office, 12 January 2009 (Ref. 26-34/2009) (C-270).

[84] Decision of the Regional Court in Košice, 3 February 2010 (Ref. 7S/25/2009-207) (C-272).

2002.[85] The Supreme Court also found that the decision to revoke Rozmin's mining rights and to award them to another company was "premature, unclear and insufficiently reasoned."[86] It declared the DMO's 2 July 2008 assignment to VSK Mining unlawful and remanded the case to the DMO for further proceedings.[87]

54. Following issuance of the Supreme Court's decision, on 31 October 2011, EuroGas sent a "Notification of Claim Against the Slovak Republic" to the Respondent, referring to an investment dispute under the US-Slovakia BIT.[88]

55. According to the Claimants, the Respondent failed to comply with the Supreme Court's decision when, on 30 March 2012, the DMO reassigned exclusive rights over the Mining Area to VSK Mining.[89]

56. The Respondent argues that this decision was based on a thorough investigation and analysis that comported with the Supreme Court's decision. Ultimately, according to the Respondent, the DMO determined that between 1 January 2002 and 1 January 2005, Rozmin did not excavate at the Mining Area and failed to perform any of activities that were necessary to lead to excavation, resulting in the application of Section 27(12) of the 2002 Amendment.[90] The DMO also concluded that Rozmin's activities were speculative, aimed not at excavating the site but at finding a company to buy Rozmin out of the project.[91]

[85] Judgment of the Supreme Court of the Slovak Republic, Case No.2Sžo/132/, 18 May 2011 (C-36/R-61).

[86] Judgment of the Supreme Court of the Slovak Republic, Case No.2Sžo/132/, 18 May 2011, p. 25 (C-36/R-61).

[87] Judgment of the Supreme Court of the Slovak Republic, Case No.2Sžo/132/, 18 May 2011 (C-36/R-61).

[88] Reply ¶189, *citing* Letter from EuroGas Inc. to the Government of the Slovak Republic, dated 31 October 2011 (C-39).

[89] Memorial ¶205; Decision of the District Mining Office, 30 March 2012 (Ref. 157-920/2012) (C-37/R-58).

[90] Counter-Memorial ¶¶329-332; Decision of the District Mining Office, 30 March 2012 (Ref. 157-920/2012) (C-37/R-58).

[91] Counter-Memorial ¶330; Decision of the District Mining Office, 30 March 2012, p. 210 (Ref. 157-920/2012) (C-37/R-58).

57. The MMO subsequently confirmed the DMO's 30 March 2012 decision, and Rozmin did not challenge it in the courts.[92]

58. On 2 May 2012, Mr. Peter Kažimír, the Deputy Prime Minister and Minister of Finance of the Slovak Republic, responded to EuroGas' Notice of 31 October 2011, stating that it would be premature to engage in settlement negotiations because local proceedings were pending.[93]

59. On 21 December 2012, Mr. Kažimír again wrote to EuroGas in reference to the 31 October 2011 Notice.[94] The letter stated that the Respondent was exercising its right under Article VI of the US-Slovakia BIT to "deny EuroGas, Inc. the benefits of the Treaty, including the right to arbitration."[95]

60. Separately, Rozmin had challenged the DMO's revocation of the General Mining Authorization in the Regional Court. The challenge was unsuccessful, but on appeal, the Supreme Court rescinded the Regional Court's decision and remanded the case for further proceedings. Ultimately, on 26 September 2013, the Regional Court confirmed the DMO's decision to revoke Rozmin's General Mining Authorization.[96]

61. On 23 December 2013, EuroGas and Belmont together sent the Respondent a "Final Notice of Dispute under US-Slovak Republic and Canada-Slovak Republic BITs."[97] According to the Claimants, the Respondent replied by citing the six-month period of negotiation and

[92] Decision of the Main Mining Office, 1 August 2012 (Ref. 808- 1482/2012) (C-273).

[93] Letter from the Slovak Republic, dated 2 May 2012 (C-40) ("the administrative procedure before the Slovak mining offices is still pending, therefore any discussions regarding the alleged claims of EuroGas Inc. seems to me to be premature prior relevant decisions of local authorities are rendered.").

[94] Letter from the Slovak Republic to EuroGas Inc., 21 December 2012 (C-41/R-5).

[95] Letter from the Slovak Republic to EuroGas Inc., 21 December 2012 (C-41/R-5).

[96] Decision of the Regional Court in Košice, 19 January 2012 (Ref. 6S/28/2009-175) (C-175).

[97] Letter from EuroGas Inc. and Belmont Resources Inc. to the Government of the Slovak Republic, 23 December 2013, ¶35 (C-42) ("Failing a favorable response from the Republic of Slovakia by January 31, 2014, accepting to engage in good faith in settlement negotiations with EuroGas and Belmont towards an agreement on compensation, an ICSID arbitration will be commenced by EuroGas and Belmont.").

consultation under Article X(2) of the Canada-Slovakia Republic BIT.[98] The Parties had further exchanges and met on 16 April 2014, but no amicable settlement was reached.[99]

(9) EuroGas and the U.S. Bankruptcy Proceedings

62. In the meantime, in 2001, EuroGas I had been administratively dissolved under Utah law.

63. In 2004, the creditors of EuroGas I filed an involuntary petition for bankruptcy against the company under Chapter 7 of the U.S. Bankruptcy Code (the "**Bankruptcy Code**") in the U.S. Bankruptcy Court of the District of Utah (the "**Bankruptcy Court**").[100] On 20 October 2004, the Bankruptcy Court ordered the liquidation of EuroGas I (the "**Bankruptcy Proceedings**") by a Chapter 7 bankruptcy trustee, Mr. Joel T. Marker ("**Trustee Marker**"). Mr. Wolfgang Rauball, Mr. Reinhard Rauball (Wolfgang's brother), and Mr. Hank Blankenstein (EuroGas I's CFO) were appointed to act for EuroGas I as the debtor.[101] EuroGas I did not file any statements or schedules of assets during the Bankruptcy Proceedings.[102] On 19 March 2007, the case was closed with Trustee Marker's final report, which does not include any reference to EuroGas GmbH or Rozmin.

64. On 18 September 2015, a U.S. bankruptcy trustee received a letter from a creditor of EuroGas I, Texas EuroGas Corp., stating that EuroGas I owned an interest in "Rozmin and EuroGas GmbH talc mines in Slovakia" that was omitted from its bankruptcy disclosures.[103] The U.S. Trustee filed a motion to reopen the bankruptcy of EuroGas I, which was granted by the Bankruptcy Court on 21 December 2015.[104]

65. In its decision, the Bankruptcy Court stated that it was reopening the bankruptcy "for the specific purpose of determining the bankruptcy estate's interest in the asset identified in

[98] Reply ¶193.

[99] Reply ¶193.

[100] Counter-Memorial ¶40; A Public U.S. Bankruptcy Filing from the EuroGas Bankruptcy Case, Case No. 04-28075, Docket No. 1 – EuroGas Bankruptcy Petition, 18 May 2004 (R-85).

[101] Order Designating Individuals Pursuant to Bankruptcy Rule 9001(5), 27 January 2005 (R-68).

[102] Counter-Memorial ¶43; see Reply ¶34.

[103] U.S. Trustee's Motion to Reopen Under 11 U.S.C. ¶350, for an Order to Appoint Chapter 7 Trustee Under Fed. R. Bankr. P. 5010, 18 September 2015 (R-248).

[104] Order Granting Motion to Reopen Under 11 U.S.C. §350, 21 December 2015 (R-242).

the Motion to Reopen," which was "Rozmin and EuroGas GmbH talc mines in Slovakia."[105] The U.S. Trustee then appointed Ms. Elizabeth Rose Loveridge ("**Trustee Loveridge**") to serve as the Chapter 7 trustee in the newly opened Bankruptcy Proceedings.

66. On 18 August 2016, Trustee Loveridge filed a motion with the Bankruptcy Court seeking approval of an agreement with EuroGas II whereby: (a) EuroGas II would pay the bankruptcy estate approximately USD 425,000.00; (b) the creditor Texas EuroGas Corp. would withdraw its claim against the estate; and (c) Trustee Loveridge would "abandon *nunc pro tunc*" whatever interest the estate has in Rozmin and EuroGas GmbH.[106] The Bankruptcy Court approved the Agreement on 28 October 2016.[107]

C. Parties' Requests for Relief

(1) Claimants' Requests for Relief

67. The Claimants assert that the Tribunal has jurisdiction over this dispute with respect to both EuroGas and Belmont, and they allege that the Respondent has breached several of its obligations under the US-Slovakia BIT and the Canada-Slovakia BIT.

68. In the Memorial, the Claimants request that the Tribunal:

> - *Declare that Respondent has breached its obligations toward Claimants under the US-Slovak Republic BIT, the Canada-Slovak Republic BIT, and international law.*
>
> - *Order Respondent to pay Claimants damages in an amount to be quantified at a later stage of the proceedings, in accordance with the Tribunal's instructions.*[108]

69. In the Reply, the Claimants further request that the Tribunal:

> - *Declare that it has jurisdiction over Claimants under the BITs and the ICSID Convention.*

[105] Order Granting Motion to Reopen Under 11 U.S.C. §350, 21 December 2015 (R-242).

[106] Motion to Approve Agreement, 18 August 2016 (filed by Respondent on 25 August 2016).

[107] Bankruptcy Court Memorandum Decision, 28 October 2016 (Exhibit A to EuroGas II's letter to the Tribunal dated 9 November 2016).

[108] Memorial ¶446.

- *Declare that Respondent has breached its obligations toward Claimants under the U.S.-Slovak Republic BIT, the Canada-Slovak Republic BIT, and international law, including the obligation not to expropriate Claimants' investment safe for a public purpose, in accordance with due process of law, in a non-discriminatory manner, and upon payment of compensation; the obligation to afford Claimants fair and equitable treatment; the obligation to refrain from taking unreasonable and arbitrary measures; the obligation to afford Claimants full protection and security; and the obligation to comply with its specific undertakings.*

- *Order Respondent to pay Claimants damages, costs, and compounded interest, in an amount to be quantified at a later stage of the proceedings, in accordance with the Tribunal's instructions.*[109]

70. Subsequently, by letter of 25 December 2015, the Claimants stated that they were raising a new claim for breach of international law based on an allegation that the Respondent had illegally interfered with EuroGas' title over its claims in this arbitration by causing the reopening of the Bankruptcy Proceedings.

(2) Respondent's Requests for Relief

71. The Respondent submits that the Tribunal lacks jurisdiction over both EuroGas and Belmont and that the case should be dismissed on this basis. On the merits, the Respondent denies each of the Claimants' allegations of breach of the US-Slovakia BIT and the Canada-Slovakia BIT.

72. In the Counter-Memorial and in the Rejoinder, the Respondent requests the following relief:

> *(a) a declaration dismissing Claimants' claims;*
>
> *(b) an order that Claimants pay the costs of these arbitral proceedings, including the cost of the Arbitral Tribunal and the*

[109] Reply ¶632.

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.[110]

II. PROCEDURAL HISTORY

A. Request for Arbitration

73. On 27 June 2014, ICSID received from the Claimants a request for arbitration dated 25 June 2014, including exhibits C-1 through C-42, against the Respondent (the "**Request for Arbitration**"), pursuant to Article 36 of the ICSID Convention.

74. The Request was supplemented by the Claimants' letters of 8 and 9 July 2014 in response to questions posed by ICSID.

75. On 10 July 2014, in accordance with Article 36 of the ICSID Convention, the Secretary-General of ICSID registered the Request for Arbitration and so notified the Parties. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible pursuant to Articles 37 to 40 of the ICSID Convention.

B. Constitution of the Tribunal

76. By an exchange of letters dated 22 and 24 July 2014, the Parties agreed that the Tribunal would be composed of three members, with each Party appointing one arbitrator by 29 August 2014, and the two Party-appointed arbitrators jointly appointing the President of the Tribunal after consultations with the Parties by 30 September 2014, failing which the appointment(s) would be made by the ICSID Secretary-General.

77. In accordance with the Parties' agreed method of appointment, on 29 August 2014, each Party appointed an arbitrator. The Claimants appointed Professor Emmanuel Gaillard, a national of France, and the Respondent appointed Professor Brigitte Stern, also a national of France. Both arbitrators subsequently accepted their appointments.

[110] Counter-Memorial ¶407; Rejoinder ¶550.

78. On 30 September 2014, the Parties informed ICSID that they had agreed to an amended schedule for the appointment of the presiding arbitrator.

79. On 20 October 2014, ICSID informed the Parties that the Party-appointed arbitrators proposed to appoint Professor Pierre Mayer, a national of France, to serve as President of the Tribunal.

80. In response to this proposal, on 24 October 2014, the Respondent made a disclosure concerning its counsel's relationship with Professor Mayer in a separate case, and on this basis, the Claimants objected to his proposed appointment. In light of this objection, on 4 November 2014, Professor Mayer declined to serve as President of the Tribunal.

81. At this stage, as the Parties' agreed deadline for the Party-appointed arbitrators to appoint the President had elapsed, the Parties agreed to an alternative appointment procedure by letters of 7 November 2014. Under this procedure, the ICSID Secretary-General would provide the Parties with a list of candidates from which the Parties would strike one candidate and rank those remaining. The Secretary-General would then appoint the candidate with the best ranking. On 1 December 2014, ICSID provided the Parties with a list of candidates.

82. The appointment procedure was postponed by agreement of the Parties on 2 and 24 December 2014 and 1 and 8 January 2015, and the list of candidates was amended on 19 and 23 December 2014. Before the procedure was completed, on 13 January 2015, the Parties informed ICSID that they had agreed to appoint Professor Pierre Mayer as the presiding arbitrator.

83. Professor Mayer accepted his appointment on 20 January 2015. On the same date, in accordance with ICSID Arbitration Rule 6(1), the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Lindsay Gastrell, ICSID Legal Counsel, was designated to serve as the Secretary of the Tribunal.

C. Parties' Requests for Provisional Measures

84. On 8 July 2014, the Claimants submitted a letter to the Secretary-General of ICSID containing an Application for Provisional Measures, which related to criminal proceedings launched by the Slovak Republic in June 2014.

85. As the Tribunal had not yet been constituted, the Claimants requested, pursuant to Rule 39(5) of the ICSID Arbitration Rules, that the Secretary-General establish time limits for the Parties to present their observations on the Claimants' Application for Provisional Measures, which could then be considered by the Tribunal promptly upon its constitution.

86. On 10 July 2014, together with the Notice of Registration, the Secretary-General provided the Parties with a schedule for their written submissions on the Claimants' Application for Provisional Measures, noting that it would apply unless the Parties agreed on an alternative schedule.

87. On 16 July 2014, the Claimants sent a letter to the President of the European Commission, copied to the Respondent and ICSID, setting forth allegations concerning the actions of the Slovak Republic in response to the Request for Arbitration and informing the European Commission that the Claimants had filed an application for provisional measures with ICSID.

88. In accordance with the briefing schedule established by the Secretary-General, on 11 August 2014, the Claimants submitted a Full Briefing on Provisional Measures.

89. On 10 September 2014, the Respondent submitted its Opposition to Claimants' Application for Provisional Measures, together with an Application for Provisional Measures in which it sought an order requiring the Claimants to post security for the Respondent's costs.

90. By letter of 11 September 2014, ICSID acknowledged receipt of the Respondent's Application for Provisional Measures, and informed the Parties that they were welcome to agree on a schedule for the Parties to present their observations on this Application, or alternatively, either Party could request the Secretary-General of ICSID to establish such a schedule pursuant to ICSID Arbitration Rule 39(5).

91. On 16 September 2014, the Parties informed ICSID that they had agreed upon a briefing schedule for the exchange of written submissions on both Parties' applications for provisional measures, and ICSID acknowledged the Parties' agreement by letter of the same date. The Parties informed ICSID on 30 September 2014 that they had agreed to an amended briefing schedule.

92. In accordance with this agreed schedule, the Parties filed the following submissions:

a. Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures dated 16 October 2014;

b. Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures dated 21 November 2014; and

c. Claimants' Rejoinder on Respondent's Application for Provisional Measures dated 22 December 2014.

93. On 23 January 2015, the Respondent sought to enter an additional legal authority into the record (RL-25), and the Tribunal granted this request by letter of 27 January 2015. The Tribunal also offered the Claimants an opportunity to comment on this new authority. In response, the Claimants informed the Tribunal that they may choose to address the authority at an oral hearing on provisional measures, should the Tribunal decide to hold such a hearing.

94. By letter of 27 January 2015, the Tribunal proposed dates for a first session and hearing on provisional measures in Paris. The Respondent replied on 28 January 2015, stating that key members of its counsel team were unavailable on the proposed dates due to a hearing in another matter.

95. By letter of 2 February 2015, the Claimants argued that it would be unacceptable for the Respondent's unavailability to delay an order on the Claimants' Application for Provisional Measures and requested that the Tribunal either proceed to issue an Order on that Application forthwith or, alternatively, issue a provisional order prohibiting

Respondent and its counsel from reading and gathering information from records and property seized in the context of the relevant criminal proceedings.

96. In response to an invitation from the Tribunal, on 5 February 2015, the Respondent provided its comments on the Claimants' letter of 2 February 2015. The Respondent noted in particular that the relevant criminal proceedings had been suspended and that neither counsel for the Respondent nor the Slovak Ministry of Finance had read or gathered any information from the materials seized in the investigation. The Respondent also undertook that they would not read or gather such information pending the Tribunal's decision on the Claimants' Application for Provisional Measures.

97. On 9 February 2015, the Tribunal informed the Parties that, in light of the Respondent's undertaking, it considered that the Claimants' request of 2 February 2015 had been rendered moot.

98. On 20 February 2015, the Respondent informed the Tribunal that, in light of a settlement in another matter, its counsel would be available to attend an in-person hearing on 17 March 2015.

99. The Tribunal then confirmed that the first session and the hearing on provisional measures would be held at the ICC in Paris, France on 17 March 2015. Prior to the hearing, on 6 March 2015, the Parties submitted a jointly proposed schedule for the first session and hearing, which the Tribunal adopted.

100. By letter of 15 March 2015, the Respondent sought to introduce three new exhibits into the record (R-81 to R-83), to which the Claimants objected. In a decision communicated to the Parties on 16 March 2015, the Tribunal determined that the new exhibits would not be entered into the record prior to the hearing, but that following the hearing, the exhibits would be admitted and the Claimants given an opportunity to comment. In accordance with this decision, the Respondent resubmitted the documents on 23 March 2015 and the Claimants provided their observations on 3 April 2015. The Respondent then submitted additional comments on this issue on 16 April 2015.

101. The first session and hearing on provisional measures was held on 17 March 2015 at the ICC in Paris. During the hearing, in accordance with the Parties' agreed schedule, each Party was given the opportunity to present oral arguments on provisional measures as well as rebuttal oral arguments. The audio recording of the first session and hearing was dispatched to the Tribunal and the Parties on 30 March 2015.

102. On 25 June 2015, the Tribunal issued its Decision on the Parties' Requests for Provisional Measures (Procedural Order No. 3). In its Decision, the Tribunal (a) denied both Parties' applications for provisional measures; (b) noted certain undertakings made by the Respondent during the hearing on provisional measures; and (c) reminded the Parties of their duty not to take any action that may aggravate the dispute or affect the integrity of the arbitration.

D. Initial Procedural Matters

103. On 16 February 2015, in preparation for the first session, the Secretary of the Tribunal transmitted to the Parties a draft agenda for the session and a draft procedural order, which had been approved by the Tribunal. The Parties were invited to confer on procedural matters and to inform the Tribunal of any agreements they reached or, in the absence of agreement, of their respective positions.

104. On 1 March 2015, the President proposed the appointment of Ms. Marie Nioche to serve as Assistant to the Tribunal and set out the proposed terms of her appointment. The Parties subsequently agreed to the appointment of Ms. Nioche as assistant, and she provided a signed declaration of confidentiality and independence dated 13 March 2015.

105. On 6 March 2015, the Parties submitted a joint draft procedural order, and each Party submitted a separate letter setting out its position on the limited number of disputed matters. Among those matters were:

a. *Bifurcation*: In the Respondent's view, bifurcation of the Respondent's jurisdictional objections from the merits would be necessary to resolve the dispute in a time and cost efficient manner. The Claimants submitted that the contemplated jurisdictional

objections would not warrant a bifurcation, and that the dispute could be promptly resolved in one phase.

b. *Public Access to Hearings and Documents*: The Respondent requested that the proceeding comply with the transparency provisions of Annex B of the Canada-Slovakia BIT, which provide for public access to hearings and case documents. The Claimants objected to this request on the basis that the Annex was not applicable to either Claimant.

c. *Applicability of Confidentiality Rules to Third-Party Funders*: By letter of 23 January 2015, the Respondent had requested that "Claimants specify the identity of their third-party funder for the purposes of determining whether there is any conflict of interests." The Respondent also sought to include a provision in the procedural order stating that any third-party funder would not be granted access to confidential information, and the Claimant considered this provision unjustified.

106. On 15 March 2015, the Respondent sought leave to introduce into the record three new exhibits. After receiving comments from the Claimants, the Tribunal informed the Parties that the new documents would be admitted to the record only after the hearing on provisional measures.

107. As mentioned above, the first session was held together with the hearing on provisional measures on 17 March 2015 at the ICC in Paris. The Tribunal and the Parties discussed procedural matters, including those noted above.

108. During the hearing, the Tribunal informed the Parties of its decision that the Claimants should disclose the identity of the third-party funder, and that the third-party funder would have the normal obligations of confidentiality.

109. The Tribunal also instructed the Claimants to produce the Share Purchase Agreement between EuroGas, Belmont and Rozmin, dated 27 March 2001 (the "**SPA**"); another agreement between EuroGas, Belmont, Rozmin, and RimaMuráň, dated 9 April 2001; as well as all other agreements related to the SPA.

110. By letter of 23 March 2015, as instructed, the Claimants disclosed the name of the funder and filed the SPA and other documents.

111. Also on 23 March 2015, the Respondent filed the three new documents mentioned in its 15 March 2015 letter as R-81 to R-83 and provided comments on their relevance.

112. On 24 March 2015, the Tribunal informed the Parties of its decision not to bifurcate the proceedings between the Respondent's objections to jurisdiction and the merits of the dispute, but rather to hear jurisdiction and merits in a single phase, followed if necessary by a separate phase on quantum. The Tribunal also confirmed the corresponding agreed schedule for the Parties' written submissions.

113. On 1 April 2015, the Tribunal issued Procedural Order No. 1 concerning the other procedural matters addressed during the first session. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural language would be English, and that the place of proceeding would be Paris, France.

114. On 16 April 2015, the Tribunal issued Procedural Order No. 2 addressing the issue of public access to hearings and documents. The Tribunal ordered *inter alia*, that in accordance with Annex B of the Canada-Slovakia BIT:

> *2. Hearings held shall be open to the public. To the extent necessary to ensure the protection of confidential information, the Tribunal may hold portions of hearings in camera.*
>
> *3. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the parties.*
>
> *4. All documents submitted to, or issued by, the Tribunal shall be publicly available, unless the parties otherwise agree, subject to the redaction of confidential information.*
>
> *5. … any Tribunal award shall be publicly available, subject to the redaction of confidential information.*

115. On 14 May 2015, the Tribunal invited the Parties to confer regarding the procedures for making documents open to the public and identifying confidential information. In response, on 11 June 2015, the Parties provided the Tribunal with a jointly proposed draft Confidentiality Order. On 18 June 2015, the Tribunal informed the Parties that it had no objection to their proposal and issued the Confidentiality Order signed by the President. The Parties then signed the Confidentiality Order and provided a copy to the Tribunal.

E. Written Phase

116. In accordance with the procedural calendar, the Claimants submitted their Memorial dated 31 March 2015, together with:

- the witness statements of Dr. Ondrej Rozloznik, Mr. Vojtech Agyagos and Mr. Wolfgang Rauball;
- the expert report of Mr. Alex Hill of Wardell Armstrong International;
- exhibits C-75 to C-307; and
- legal authorities CL-125 to CL-195.

117. On 30 June 2015, also in accordance with the procedural calendar, the Respondent filed its Counter-Memorial, together with:

- the witness statements of Messrs. Peter Corej, Peter Kukelcik, Ernst Haidecker and Stephan Dorfner;
- the expert report of Ms. Annette W. Jarvis of Dorsey & Whitney LLP;
- the expert report of Mr. John Anderson of Stikeman Elliott LLP;
- the expert report of Mr. Gregory Sparks of John T. Boyd Company;
- exhibits R-84 to R-209; and
- legal authorities RL-26 to RL-132.

118. On 29 July 2015, the Claimants wrote to the Respondent requesting that the Respondent's expert Ms. Annette W. Jarvis step down on the basis that she lacked independence. The

Claimants stated that if Ms. Jarvis did not step down, they would formally apply to the Tribunal to seek her disqualification.

119. On 31 July 2015, in accordance with Article 16.3 of Procedural Order No. 1, each Party informed the Tribunal that it had served on the other Party a request for the production of documents, and they asked that the Tribunal establish a schedule for the document production phase of the proceeding. The Tribunal then invited the Parties to agree on the dates of the various steps of the procedure for production of documents. On 7 August 2015, the Parties provided the Tribunal with an agreed timetable, which was adopted by the Tribunal. In accordance with that timetable, on 17 August 2015, each Party submitted a Redfern schedule containing its requests for the production of documents, the other Party's objections to production, and the requesting Party's responses to those objections.

120. On 10 August 2015, the Respondent submitted its response to the Claimants' objection to Ms. Annette W. Jarvis, together with a Statement from Ms. Jarvis, rejecting the Claimants' request for her to step down.

121. On 19 August 2015, the Claimants submitted a letter requesting "as primary relief and while reserving their rights, that the Tribunal read the opinion of Ms. Jarvis not as an independent expert report, but as a Party submission." In response, on 24 August 2015, the Respondent asked the Tribunal to "deny Claimants' request for an evidentiary ruling regarding Ms. Jarvis' expert report at this stage of the proceedings."

122. Having considered the Parties' submissions on this issue, the Tribunal informed the Parties of its view that, as the Claimants were not seeking the disqualification of Ms. Jarvis, no procedural ruling relating to her expert report was needed. In response to the Tribunal's decision, on 27 August 2015, the Claimants wrote to clarify their request. The Respondent responded to Claimants' letter on the same day. On 28 August 2015, the Tribunal informed the Parties that Ms. Jarvis' report remained an expert report and that "[t]he Tribunal will assess its probative value, taking in consideration all relevant circumstances, which may include those which the Parties have debated in their recent letters."

123. In the meantime, on 26 August 2015, the Tribunal issued Procedural Order No. 4, including Annexes A and B, containing its decisions on the Parties' document requests.

124. On 7 September 2015, the Claimants requested an extension of time, from 15 to 29 September 2015, to file their Reply Memorial. The Respondent informed the Tribunal by letter of 8 September 2015 that it opposed such an extension. Having considered the Parties' comments on the matter, on 16 September 2015, the Tribunal granted the request and also extended the deadline for the submission of the Rejoinder to 29 December 2015.

125. The Claimants then filed their Reply dated 29 September 2015, together with:

- the expert report of Messrs. David E. Leta and Brad W. Merrill of Snell & Wilmer;
- the expert report of Mr. John Ellison of KPMG with appendices;
- the supplemental expert report of Mr. Alex Hill of Wardell Armstrong International;
- exhibits C-308 to C-358; and
- legal authorities CL-196 to CL-256.

126. On 28 October 2015, the President of the Tribunal provided the Parties with a supplementary disclosure statement regarding his appointment in another ICSID case.

127. On 29 December 2015, the Respondent filed its Rejoinder, together with:

- the rebuttal witness statement of Messrs. Peter Čorej, Peter Kúkelčík and Stephan Dorfner;
- the rebuttal expert report of Ms. Annette W. Jarvis and Mr. Samuel P. Gardiner from Dorsey &Whitney LLP;
- the rebuttal expert report of Mr. John Anderson from Stikeman Elliott LLP;
- the rebuttal expert report of Messrs. Gregory Sparks from John T. Boyd Company;
- the expert report of Mr. Abdul Sirshar Qureshi from PricewaterhouseCoopers;
- exhibits R-212 to R-290; and
- legal authorities RL-133 to RL-194.

128. On 6 November 2015, in preparation for the hearing scheduled to take place from 18 to 22 January 2016, the Tribunal invited the Parties to consult regarding the logistical arrangements for the open hearing, including procedures for the protection of confidential information, and to revert to the Tribunal in this regard. On 16 November 2015, the Parties informed the Tribunal of their agreement that a video recording of the hearing would be made available on the ICSID website only after the conclusion of the hearing and the identification of any confidential information.

129. On 6 April 2016, the President of the Tribunal informed the Parties that Ms. Nioche had left his firm and proposed Ms. Céline Lachmann to replace Ms. Nioche as Assistant to the Tribunal. Both Parties subsequently consented to the appointment of Ms. Lachmann, and she provided a signed declaration of confidentiality and independence dated 12 April 2016.

F. Developments in the Bankruptcy Proceedings

130. On 2 October 2015, the Respondent wrote to the Tribunal in reference to a statement in the Claimants' Reply that there was an attempt to reopen the bankruptcy of EuroGas. The Respondent attached to its letter the Motion to Reopen, which concerned an interest in "Rozmin and EuroGas GmbH talc mines in Slovakia."

131. On 5 October 2015, the Tribunal confirmed that it had taken note of the information in the Respondent's letter and that it expected to be informed by the Parties of any related developments.

132. By letter of 9 November 2015, the Respondent notified the Tribunal that it had learned that EuroGas had engaged counsel in Utah to oppose reopening the bankruptcy and that an oral hearing on the matter was scheduled for 10 December 2015. The Respondent stated that, in light of these facts, it would likely retain counsel to participate in the reopening proceeding.

133. The following day, on 10 November 2015, the Claimants pointed out what they considered to be a number of inaccuracies in the Respondent's letter. The Claimants confirmed that the hearing on the reopening of the Bankruptcy Proceedings would take place on 10 December 2015.

134. By letter of 22 December 2015, the Respondent notified the Tribunal that on 21 December 2015, the Bankruptcy Court had issued its written decision granting the U.S. Trustee's Motion to Reopen the bankruptcy. A copy of the decision was attached as Exhibit A.

135. On 25 December 2015, the Claimants wrote to the Tribunal to:

> *(i) provide the Tribunal with a more comprehensive and relevant account of the latest developments* [US Proceeding]*; (ii) raise a claim for breach of international law arising out of the Slovak Republic's illegal interference with EuroGas' title over the claims which it has put forward in this arbitration; and (iii) to reserve their right to request a stay of proceedings upon completion of the assessment that they are undertaking.*

136. The following day, the Respondent submitted a brief response to the Claimants' letter, arguing *inter alia* that the Claimants' allegations and new claim were baseless.

G. Postponement of the Hearing

137. On 29 December 2015, the Claimants wrote to the Tribunal, requesting a postponement of the hearing scheduled for 18 to 22 January 2016 or, alternatively, a stay of the proceeding until the issuance of the Trustee Loveridge's final decision. The Claimants argued that the appointment of Trustee Loveridge "undeniably has a material impact on the arbitration proceedings, irrespective of his/her ultimate decision." The Claimants also asked the Tribunal to set out a timetable for Respondent to make a written submission on quantum "so as to mitigate the consequences of any delays."

138. The Respondent submitted its response to the Claimants' letter on 30 December 2015, urging the Tribunal to maintain the scheduled hearing dates and objecting in particular to the Claimants' suggestion that, if the hearing were postponed, the Respondent should be ordered to submit a written pleading on quantum in the meantime. The Respondent argued that this would vacate the Tribunal's decision to bifurcate quantum.

139. On 2 January 2016, the Secretary informed the Parties of the Tribunal's decision to maintain the scheduled hearing dates. The Parties were reminded of the dates for witness notification and the prehearing conference.

140. On 5 January 2016, the Claimants' counsel provided the Tribunal with a letter they had received that day from their clients (Mr. Vojtech Agyagos, President of Belmont and Mr. Wolfgang Rauball, CEO of EuroGas). The letter stated that as a result of the reopened Bankruptcy Proceedings:

> *we feel that a conflict of interest has arisen between our two companies, and we are therefore no longer confident in your ability to jointly represent both of our companies' interests independently. To put it as clearly as possible, given the circumstances, we can no longer allow you to jointly represent our interests in this arbitration.*

141. Counsel for the Claimants explained that under the circumstances, they were not in a position to proceed with the hearing as scheduled.

142. On 7 January 2016, the Respondent identified which of the Claimants' witnesses it intended to cross-examine at the hearing.

143. Also on 7 January 2016, the Respondent objected to the postponement of the hearing, arguing that "an unspecified conflict-of-interest, which existed since the beginning of the arbitration, cannot possibly be a basis for Claimants to not proceed with the Hearing." The Respondent also made the following request, pursuant to Rule 42 of the ICSID Arbitration Rules:

> *Claimants are now a "defaulting party" within the meaning of Rule 42(1) of the Arbitration Rules, and the Slovak Republic respectfully urges the Tribunal to proceed with the case notwithstanding Claimants' default. Claimants have offered no valid reason for refusing to attend the long-scheduled Hearing, and the Slovak Republic therefore requests that the Tribunal inform the Claimants that they are still expected to appear at the Hearing. If Claimants do not withdraw their announced intention to default by noon CET on Friday, 8 January 2016, pursuant to Rule 42(1) of the ICSID Arbitration Rules, the Slovak Republic requests that the "the Tribunal … deal with the questions submitted to it and to render an award" on the memorials and evidence that have been submitted.*

144. The Respondent also stated that it was renewing its application for security for costs.

145. The Claimants responded the following day, challenging the Respondent's allegations and arguing that it would be a fundamental breach of the Claimants' due process rights if they were to be held in default as a result of their inability to participate in the hearing on account of a conflict of interest. The Claimants again urged the Tribunal to stay the proceeding or postpone the hearing until the Trustee Loveridge determined the ownership of the interest in Rozmin. Finally, the Claimants objected to the Respondent's assertion that it was renewing its request for security for costs.

146. On the same day, the Respondent submitted observations on the Claimants' letter.

147. On 11 January 2016, the Tribunal issued Procedural Order No. 5, in which the Tribunal (a) cancelled the scheduled hearing; (b) determined that it was not obliged to proceed to render an award pursuant to Article 45 of the ICSID Convention and Rule 42 of the Arbitration Rules; (c) ordered the Claimants "to decide **now** how they wish to be represented until the end of these proceeding, i.e. by one counsel or two"; (d) decided that the Claimants' request to reschedule the hearing did not constitute a valid reason to reconsider the decision on Respondent's request for security for costs; and (e) reserved for later determination the issue of the allocation of the costs of the cancelled hearing.

148. By email of the same day, the Claimants' counsel informed the Tribunal that:

> *it is certain that Claimants will not be represented in this arbitration by way of joint representation, and will require separate counsel to represent them independently since the decision of the Tribunal is to proceed without first a ruling of the U.S. Bankruptcy Court.*

149. Also on the same day, the Tribunal held a conference call with the Parties in order to reschedule the hearing. Following the call, on 14 January 2016, the Tribunal issued Procedural Order No. 6, holding that: (a) the rescheduled hearing will be held from 12-16 September 2016; (b) each Claimant shall make sure that its counsel is available for the rescheduled hearing; and (c) no additional written submissions shall be permitted unless there are further developments in the Bankruptcy Proceedings.

H. Communication with Trustee Loveridge

150. On 12 January 2016, a representative of Trustee Loveridge wrote to inform the Tribunal that, while Trustee Loveridge was not currently seeking to participate in the arbitration, she might seek to do so in the future. Trustee Loveridge also asked for guidance on how she would obtain access to non-public case documents.

151. The Tribunal invited the Parties' comments on Trustee Loveridge's letter. The Claimants submitted their comments on 27 January 2016, and the Respondent submitted its comments on 29 January 2016.

152. By letter of 9 February 2016, the President of the Tribunal responded to Trustee Loveridge's representative, requesting that the Trustee identify precisely which documents she would like to consult and the relevance of the documents to her mission.

153. By email of 30 March 2016, Trustee Loveridge requested copies of the expert reports filed in this arbitration. In response to an invitation from the Tribunal, the Claimants commented on this request on 11 April 2016, and the Respondent commented on 12 April 2016. Neither Party objected to Trustee Loveridge being given access to the documents, but each Party specified information that it believed should be communicated to Trustee Loveridge together with the documents.

154. On 6 May 2016, the Tribunal notified the Parties that Trustee Loveridge would be provided with the expert reports and would be informed that (a) the Claimants have not had an opportunity to rebut the expert reports filed by Respondent with its Rejoinder, and (b) the procedural timetable does not foresee any rebuttal by Claimants to such reports.

I. Procedural Issues Leading up to the Hearing on Jurisdiction and Merits

155. On 17 June 2016, the Tribunal informed the Parties that the reservation for the hearing rooms at the ICC from 12 to 16 September would be confirmed. The Tribunal also invited the Claimants to clarify who would represent them at the rescheduled hearing.

156. By letter of 21 June 2016, the Respondent confirmed that it was proceeding on the understanding that the hearing would go forward in September.

157. By letter of 4 July 2016, Dr. Hamid Gharavi informed the Tribunal that his firm no longer represented EuroGas in this arbitration and provided the contact details for Mr. Wolfgang Rauball. In response, on 8 July 2016, the Respondent requested that the Tribunal order EuroGas to immediately state its intentions regarding its attendance at the September hearing.

158. On 11 July 2016, Mr. Rauball informed the Tribunal that going forward, EuroGas would be represented in the arbitration by Ms. Mona Lyman Burton of Holland & Hart LLP. Mr. Rauball also confirmed that EuroGas would attend the hearing in September. EuroGas subsequently provided a power of attorney in favour of Ms. Burton of Holland & Hart LLP.

159. By email of 25 July 2016, the Respondent confirmed its letter of 7 January 2016, identifying which of the Claimants' witnesses and experts it intended to cross-examine.

160. On 26 July 2016, the Tribunal provided the Parties with a draft agenda for the pre-hearing teleconference. The Tribunal requested that the Parties confer and attempt to reach agreement on the agenda items in advance of the pre-hearing teleconference.

161. On 29 July 2016, Belmont identified which of the Respondent's witnesses and experts it intended to cross-examine. On the same day, EuroGas, through its new counsel, informed the Tribunal that it intended to cross-examine the same witnesses identified by Belmont.

162. On 1 August 2016, the Tribunal notified the Parties that a pre-hearing teleconference would be held on 5 September 2016.

163. On 23 August 2016, the Respondent responded to the Tribunal regarding the draft agenda for the pre-hearing teleconference. The Respondent informed the Tribunal of the Parties' agreement on certain procedural matters and identified four issues on which the Parties could not agree. The Respondent stated its position on those four issues.

164. Also on 23 August 2016, the Respondent informed the Tribunal that Trustee Loveridge had filed a motion with the Bankruptcy Court seeking approval of an agreement with EuroGas II. The Respondent offered to provide the Tribunal with a copy of the motion and

the proposed agreement. Upon the invitation of the Tribunal, the Respondent provided a copy of this document on 25 August 2016.

165. By email of 26 August 2016, EuroGas submitted corrected versions of the Claimants' legal authorities CL-225, CL-227 and CL-233.

166. On 28 August 2016, Belmont informed the Tribunal of its position on the four contested procedural matters identified in the Respondent's letter of 23 August 2016. The following day, EuroGas did the same.

167. On 1 September 2016, EuroGas wrote to the Tribunal regarding recent developments in the Bankruptcy Proceedings. EuroGas alleged that the Respondent was interfering with EuroGas' rights in that proceeding in an effort to obstruct the Tribunal's jurisdiction. Together with its letter, EuroGas filed exhibits C-359 and C-360 and legal authorities CL-257 to CL-264. On 3 September 2016, Belmont informed the Tribunal that it agreed with EuroGas' submission.

168. By joint letter of 3 September 2016, EuroGas and Belmont requested that the Tribunal order Mr. Peter Kažimír, acting Minister of Finance for the Slovak Republic, to appear as a witness at the hearing. The Claimants argued that Mr. Kažimír's testimony was material and that he was under the Respondent's control.

169. By letter of 5 September 2016, the Respondent responded to the Claimants' respective letters of 1 and 3 September 2016 concerning the Bankruptcy Proceedings and their joint letter of 3 September 2016. The Respondent (a) rejected the Claimants' attempt to raise new claims relating to the Bankruptcy Proceedings, and (b) opposed the Claimants' request for Mr. Kažimír to appear as a witness.

170. On 5 September 2016, EuroGas wrote to the Tribunal on behalf of the Claimants to request:

> *a provisional measure pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, ordering the Slovak Republic (i) to cease any and all interferences in the U.S. bankruptcy proceedings, in a continuing attempt to obstruct or delay the resolution of issues that it raised in this arbitration proceedings as a defense; or at the very least (ii) … to withdraw its request to*

> *continue/postpone the U.S. Bankruptcy Court hearing set for September 8 to formally approve the conclusions of the Trustee's independent investigation into the Rozmin interest, and the Agreement with EuroGas…*

171. Together with this letter, EuroGas filed the Slovak Republic's Motion to Continue the 8 September 2016 hearing before the Bankruptcy Court as exhibit C-363.

172. Later on 5 September 2016, the Tribunal held a prehearing teleconference. The Tribunal and the Parties discussed the organization of the hearing and other outstanding procedural matters, as well as the Claimants' request for a provisional measure. Following the teleconference, the Respondent submitted a letter to memorialise its opposition to the Claimants' request for a provisional measure.

173. The Tribunal then issued Procedural Order No. 7, dated 5 September 2016. The Tribunal first addressed the organization of the hearing, including: the hearing schedule, allocation of time, opening and closing statements, witness and expert examination, hearing materials, and post-hearing submissions. In addition, the Tribunal denied the Claimants' request for an order requiring Mr. Peter Kažimír to appear for examination at the Hearing. In this regard, the Tribunal noted that it had "taken into account the short notice of this request and determined that such an order would not be practicable at this stage, just one week before the Hearing." Finally, the Tribunal denied the Claimants' 3 September 2016 request for a provisional measure, based on its determination that the Claimants had not articulated a right meriting protection under Article 47 of the ICSID Convention. The Tribunal further stated that it was not inclined to interfere with the administration of the Bankruptcy Proceedings, particularly in a way that would effectively pre-empt the Bankruptcy Court's decision on the Slovak Republic's motion for a postponement of the 8 September 2016 hearing.

174. By letter of 6 September 2016, EuroGas requested leave to introduce into the record six documents relating to alleged corporate transactions involving the interest in Rozmin. Upon the invitation of the Tribunal, the following day, the Respondent submitted observations on EuroGas' request, opposing it. On 8 September 2016, the Parties were informed of the Tribunal's decision to admit the new documents. The Tribunal invited the

Respondent to comment on the new documents orally at the hearing and, if it wished, in writing before or during the hearing.

175. Later on 8 September 2016, Belmont requested leave to introduce two additional documents into the record, namely an affidavit sworn by Mr. Wulf Dietrich Keller, former CEO of Mondo Minerals, and an email addressed to Mr. Keller concerning the reassignment of the Mining Area.

176. On 9 September 2016, the Respondent informed the Tribunal of further developments in the Bankruptcy Proceedings. In particular, the Respondent stated that a hearing had been held the previous day to address Trustee Loveridge's proposed deal with EuroGas, but that the Bankruptcy Court had decided not to approve or reject the deal at that time. With its letter, the Respondent filed exhibits R-291 and R-292.

177. Also on 9 September 2016, Belmont requested leave to file two publicly available documents concerning Belmont's business. Belmont noted that the Respondent had objected to the introduction of these documents, which the Respondent confirmed by email the same day.

178. Later on 9 September 2016, the Tribunal issued directions to the Parties concerning a number of outstanding procedural matters. The Tribunal (a) acknowledged the introduction of R-291 and R-292, (b) granted Belmont's 8 September 2016 request to introduce new documents, (c) denied Belmont's 9 September 2016 request to introduce new documents, and (d) provided further guidance relating to the organisation of the hearing.

179. By letter of the same day, the Respondent asked that the Tribunal reconsider its decision to grant Belmont's 8 September 2016 request because the Respondent had not had a sufficient opportunity to state its objection to the request. In response, the Tribunal explained that it had not understood that the Respondent wished to object. Therefore, in light of the objection, the Tribunal suspended its decision on the matter and informed the Parties that it would make its final decision on the first day of the hearing. Ultimately, after hearing both Parties at the hearing, the Tribunal decided not to admit the documents.

180. On 11 September 2016, EuroGas submitted exhibits C-366 to C-370 pursuant to the Tribunal's instructions of 6 September 2016.

J. Hearing on Jurisdiction and Merits

181. A hearing on jurisdiction and merits took place at the ICC in Paris from 12 to 16 September 2016 (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal
Professor Pierre Mayer
Professor Emmanuel Gaillard
Professor Brigitte Stern

Assistant of the Tribunal
Ms. Céline Lachmann

Secretary of the Tribunal
Ms. Lindsay Gastrell

EuroGas
Counsel:
Ms. Mona Burton, Holland & Hart LLP
Ms. Maureen Witt, Holland & Hart LLP

Party:
Mr. Wolfgang Rauball, EuroGas, Inc.

Observer:
Mr. Michael Coombs, Mabey & Coombs, L.C.

Belmont
Counsel:
Dr. Hamid Gharavi, Derains & Gharavi International
Mr. Emmanuel Foy, Derains & Gharavi International
Ms. Ellen-Louise Moens, Derains & Gharavi International
Ms. Yuhua Deng, Derains & Gharavi International (Intern)
Ms. Laeticia Morard, Derains & Gharavi International (Intern)

Party:
Mr. Vojtech Agyagos, Belmont Resources Inc.

Observer:
Mr. Guy Lepage

Respondent
Counsel:
Mr. Stephen Anway, Squire Patton Boggs

Mr. David Alexander, Squire Patton Boggs
Mr. Rostislav Pekař, Squire Patton Boggs
Mr. Raúl Mañón, Squire Patton Boggs
Ms. Ms. Mária Poláková, Squire Patton Boggs
Ms. Eva Cibulková, Squire Patton Boggs
Mr. Oliver Hodgson, Squire Patton Boggs

Parties:
Ms. Andrea Holíková, Ministry of Finance of the Slovak Republic
Mr. Radovan Hronský, Ministry of Finance of the Slovak Republic
Mr. Tomáš Jucha, Ministry of Finance of the Slovak Republic
Mr. Julián Kupka, Ministry of Finance of the Slovak Republic

Interpreters
Mr. Will Behran
Mr. Pavol Sveda
Ms. Katarina Tomova

Court Reporter
Mr. Trevor McGowan

182. The following persons testified on behalf of the Claimants:

Mr. Vojtech Agyagos, Witness
Mr. Wolfgang Rauball, Witness
Dr. Ondrej Rozloznik, Witness
Mr. David E. Leta, Expert
Mr. Brad W. Merrill, Expert
Mr. Alex Hill, Expert

183. The following persons testified on behalf of the Respondent:

Mr. Stephan Dorfner, Witness
Mr. Peter Kúkelcík, Witness
Mr. Peter Corej, Witness
Mr. Ernst Haidecker, Witness
Ms. Annette W. Jarvis, Expert
Mr. Samuel P. Gardiner, Expert
Mr. John Anderson, Expert
Mr. Gregory Sparks, Expert

184. At the close of the Hearing, the Tribunal and the Parties discussed various procedural matters, including the submission of two categories of new documents: (a) documents evidencing the date of VSK Mining's first "dobývanie" (the exact meaning of this term is

debated, notably whether it includes or amounts to excavation) and (b) documents regarding the Claimants' agreement on the allocation of the proceeds of the arbitration.

185. In accordance with the Parties' agreement, a video recording of the Hearing was made and subsequently posted on the ICSID website.

K. Post-Hearing Phase

186. Following the Hearing, the Tribunal issued Procedural Order No. 8, dated 23 September 2016, in which it restated its directions on the procedural matters discussed at the close of the Hearing.

187. In accordance with Procedural Order No. 8, on 7 October 2016, the Respondent filed documents related to VSK Mining's activities as exhibits R-295 to R-297.

188. On the same date, and also in accordance with Procedural Order No. 8, Belmont filed documents relating to the agreement between EuroGas and Belmont as exhibits C-370 to C-374.

189. By letter of 20 October 2017, Belmont requested (a) leave to comment on the documents produced by the Respondent on 7 October 2016 and (b) an extension of time for the Parties to file their submissions on costs. By letter of the same date, EuroGas joined Belmont's request.

190. By letter of 21 October 2016, the Respondent informed the Tribunal that it had no objection to the Claimants' requested extension of time for the Parties to file their submissions on costs, provided that the Claimants would not object to an extension of time for the filing of the transcript corrections. Both Claimants confirmed that they had no objection to the Respondent's proposal.

191. On 26 October 2016, the Tribunal confirmed the Parties' agreement on the procedural schedule. In addition, the Tribunal granted the Claimants' request to comment on the documents submitted by the Respondent on 7 October 2016.

192. By letter of 1 November 2016, the Respondent provided the Tribunal with an update on the Bankruptcy Proceedings. In particular, the Respondent noted that the Bankruptcy Court had approved Trustee Loveridge's proposed deal with EuroGas in an order dated 29 October 2016, which the Respondent attached as exhibit B. The Respondent also attached the transcript of the hearing before the Bankruptcy Court as exhibit A and two legal authorities as exhibits C and D. The Respondent argued that this order had not resolved the issue of ownership of the ICSID claim.

193. Also on 1 November 2016, Belmont submitted its comments on the documents disclosed by the Respondent on 7 October 2016. As part of its comments, Belmont requested that negative inferences be drawn against the Respondent. Belmont attached an additional document concerning VSK Mining's activities as exhibit C-375. By letter of the same date, EuroGas joined Belmont's arguments.

194. On 3 November 2016, the Respondent requested leave to respond to Belmont's 1 November 2016 letter, which the Tribunal granted on 7 November 2016.

195. On 8 November 2016, the Parties submitted their Joint Notice of Errata and Interpretation Errors, identifying corrections to the Hearing transcript. The Tribunal subsequently informed the Parties that it confirmed all of the agreed amendments to the transcript, and that it would not issue any decision with respect to four disputed amendments. The Tribunal noted that if it later determined that one or more of the disputed issues were relevant and material to the dispute, it would issue a decision at that time.

196. On 8 November 2016, EuroGas filed a letter commenting on the Bankruptcy Proceedings, together with exhibits A to R. EuroGas argued that the Bankruptcy Court's order of 28 October 2016, which the Respondent discussed in its letter of 1 November 2016, supported EuroGas' position in the arbitration.

197. On 11 November 2016, the Respondent submitted its response to Belmont's letter of 1 November 2016, together with exhibits R-298 to R-306. The Respondent argued that Belmont had raised new allegations that were untimely, improper and incorrect.

198. In accordance with the revised post-Hearing procedural schedule, EuroGas, Belmont, and the Respondent each filed a Statement of Costs on 14 November 2016.

199. On 18 August 2017, the Tribunal declared the proceeding closed in accordance with ICSID Arbitration Rule 38(1).

III. SUMMARY OF THE PARTIES' POSITIONS ON THE TRIBUNAL'S JURISDICTION

200. The Respondent submits that the Tribunal lacks jurisdiction over EuroGas' claims because: (a) the company EuroGas, Inc. that is a Claimant in this arbitration does not own the alleged investment in the Slovak Republic and therefore has no standing to bring its claims;[111] and (b) the Respondent has validly denied the benefits of the US-Slovakia BIT to EuroGas, a company without substantial business activities in the United States that is controlled by a German national.[112]

201. The Respondent further submits that the Tribunal lacks jurisdiction over Belmont for two fundamental reasons:

> *(i) Belmont sold its ownership in the alleged investment to EuroGas I in 2001 and thus does not own the alleged investment, and (ii) the Canada-Slovak BIT only covers disputes arising after 14 March 2009, and all of Claimants' colorable allegations occurred prior to that date.*[113]

202. The Tribunal summarises below in greater detail each Party's position on the Respondent's objections, focusing on the Parties' arguments as set forth in their written submissions.[114] During the Hearing, the Parties elaborated upon these arguments, and the examination of

[111] Counter-Memorial §II.A; Rejoinder §II.A.

[112] Counter-Memorial §II.B; Rejoinder §II.B.

[113] Counter-Memorial ¶128.

[114] For this reason, this Section refers to "the Claimants" rather than to "EuroGas" and "Belmont" separately. As noted above in Section II.I and J, at the Hearing, EuroGas and Belmont were represented by different counsel and made separate oral submissions.

witnesses revealed further relevant information. The Tribunal will address these additional points as necessary in its analysis contained in Sections V and VI below.

A. EuroGas' Standing

(1) Respondent's Position

203. The Respondent's first jurisdictional objection with respect to EuroGas is that this Claimant does not in fact own the alleged investment in the Slovak Republic and, as a result, has no standing to bring its claims before this Tribunal.

204. In this regard, the Respondent alleges that the Claimants have misrepresented EuroGas' identity in this proceeding. In particular, the Respondent points to the description in the Request for Arbitration of EuroGas as a U.S. company incorporated in Utah in 1985.[115] The Respondent discovered that this statement was false when its research of Utah's corporate records revealed that the company named EuroGas, Inc. that was incorporated in 1985 (to which the Respondent refers as "EuroGas I") no longer exists, and the only entity named "EuroGas, Inc." in operation is a company incorporated in 2005 (to which the Respondent refers as "EuroGas II").[116]

205. According to the Respondent, after this information was uncovered, the Claimants "were forced to change their story" and admit that the real Claimant was, in fact, EuroGas II.[117] The Respondent asserts that the Claimants have since presented "one false explanation after another," which the Respondent has disproven each time.[118] The Claimants argued in the Memorial that EuroGas II acquired the interest in Rozmin through a 2008 Type-F reorganization of EuroGas I.[119] Then, after the Respondent proved that position untenable, the Claimants "changed their story" in the Reply and argued that the two EuroGas companies merged through a "*de facto* merger." The Claimants also asserted for the first time in the Reply that EuroGas II acquired the interest in Rozmin from McCallan Oil &

[115] Counter-Memorial ¶31, *reproducing* Request for Arbitration ¶7.

[116] Counter-Memorial ¶¶31-32; *see* Rejoinder ¶46.

[117] Counter-Memorial ¶¶33-34, *reproducing* Memorial ¶¶12-13.

[118] Rejoinder ¶5.

[119] Rejoinder ¶4, *citing* Memorial ¶21.

Gas ("**McCallan**"), a U.K. company.[120] According to the Respondent, each of these various theories is false and results in multiple jurisdictional problems for EuroGas.

206. In any event, the Respondent contends that these theories are rendered moot by a threshold issue: EuroGas I did not emerge from bankruptcy with the alleged investment. Therefore, neither EuroGas II nor McCallan ever could have acquired the investment from EuroGas I.[121]

207. Addressing this threshold issue, the Respondent submits that under U.S. Bankruptcy law, EuroGas I could not have survived the Chapter 7 Bankruptcy with its interest in Rozmin.[122] In this regard, the Respondent draws a distinction between Chapter 7 and Chapter 11 of the Bankruptcy Code. In Chapter 11 proceedings, the debtor's business is reorganized, usually with the debtor retaining control of its assets, whereas in Chapter 7 proceedings, the debtor's assets are marshalled by the bankruptcy trustee and liquidated to repay creditors. The only exception is when an asset is "abandoned" by the trustee, in which case it remains with the debtor.

208. According to the Respondent, Section 554 of the Bankruptcy Code governs abandonment of property, as recognized by the Claimants' experts.[123] Under this provision, there are only two ways for property to be abandoned in a Chapter 7 Bankruptcy: (a) when the court enters an order authorizing the abandonment and the trustee takes affirmative action to abandon the property, pursuant to Sections 554(a)-(b); or (b) by operation of law for property scheduled under Section 521, pursuant to Section 554(c). Otherwise, the property remains part of the bankruptcy estate.[124]

209. The Respondent rejects the Claimants' position that abandonment of EuroGas I's interest in Rozmin occurred by operation of law under Section 554(c). That section expressly

[120] Rejoinder ¶4, *citing* Reply ¶64.

[121] Rejoinder ¶¶55-57.

[122] Counter-Memorial §II.A.4.

[123] Rejoinder ¶60, *citing* 11 U.S.C. §554(a) (RL-69); Snell & Wilmer ER ¶¶72-73.

[124] Counter-Memorial ¶77, *citing* 11 USC §554(c) (RL-69); Federal Rules of Bankruptcy Procedure 6007 (RL-55); Jarvis ER ¶75.

requires that the asset be scheduled under Section 521(a)(1).[125] Yet it is undisputed that EuroGas I's interest in Rozmin was never scheduled in the Chapter 7 proceeding.[126] Therefore, the Respondent concludes that Section 554(c) could not apply.[127]

210. According to the Respondent, U.S. courts have consistently held that, for property to be abandoned by operation of law, it must be disclosed in the schedule of assets. The Respondent cites, for example, recent rulings of the U.S. Court of Appeals for the Tenth Circuit and the Bankruptcy Appellate Panel for the Tenth Circuit, which have precedential value in Utah. Those cases concerned a bankruptcy debtor who failed to disclose the relevant asset in her bankruptcy filings, and the courts held that as a result, the asset was not abandoned but instead remained property of the estate.[128]

211. According to the Respondent, it follows that EuroGas I's interest in Rozmin remains with the bankruptcy estate.[129] The Respondent does not accept the Claimants' argument that the investment was abandoned by operation of law because Trustee Marker knew of the interest in Rozmin but elected not to administer it.[130] According to the Respondent, the actual or imputed knowledge of a Chapter 7 trustee is irrelevant in light of the requirement that property must have been formally scheduled to be abandoned.[131] As held by the U.S. Court of Appeals for the Eighth Circuit:

> *[I]n order for property to be abandoned by operation of law pursuant to section 554(c), the debtor must formally schedule the property before the close of the case. It is not enough that the trustee*

[125] 11 USC §554(c) (RL-69) ("Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor…").

[126] Rejoinder ¶62.

[127] Rejoinder ¶62.

[128] Rejoinder ¶¶64-68, *citing Brumfiel v. U.S. Bank*, Case No. 14-1421, 2015 U.S. App. LEXIS 12812, (10 Cir., 2015) (RL-137); *Brumfiel v. Lewis*, BAP Case No. CO-15-014, 2015 Bankr. LEXIS 3477 (BAP 10th Cir., 2015) (RL-136).

[129] Counter-Memorial ¶¶76-91.

[130] Memorial, ¶¶18-19; Snell & Wilmer ER ¶73.

[131] Counter-Memorial ¶81; Rejoinder ¶77; Jarvis ER ¶73.

> *learns of the property through other means; the property must be scheduled pursuant to section 521(1).*[132]

212. The Respondent states that this "has been the unanimous holding of virtually every court that has ruled on the issue," and that such an approach comports with the policy goals of predictability and finality.[133]

213. Further, the Respondent considers the Claimants' argument to be wrong as a matter of fact because "[n]ot only is there no evidence that the EuroGas Trustee knew of EuroGas I's interest in Rozmin, but there is evidence to suggest that EuroGas I affirmatively concealed it."[134] In this regard, the Respondent points to testimony before the Bankruptcy Court of EuroGas' CFO, Mr. Hank Blankenstein, confirming that EuroGas held no interest in the Gemerská Poloma deposit.[135]

214. The Respondent rejects the Claimants' reliance on time entries of the Trustee's accountant indicating that he reviewed filings with the U.S. Securities and Exchange Commission ("**SEC**"). These entries do not specify which SEC filings were reviewed or in any way reflect the Trustee Marker's knowledge of EuroGas' assets.[136] In any event, EuroGas' 2004 and 2005 Annual Reports (10-Ks) suggest that EuroGas I no longer had any interest in the Gemerská Poloma deposit.[137] It was not until its 2007 10-K, filed after the bankruptcy had closed, that EuroGas disclosed that it was contesting the reassignment of the Mining Area.

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[132] Counter-Memorial ¶¶79-80, *quoting Vreugdenhill v. Navistar Int'l Trans. Corp.*, 950 F.2d 524, 526 (8th Cir. 1991) (RL-0074) and *Jeffrey v. Desmond (In re Jeffrey)*, 760 F.3d 183, 186 (1st Cir. 1995) (RL-47) ("The law is abundantly clear that the burden is on the debtors to list the asset and/or amend their schedules, and that in order for property to be abandoned by operation of law pursuant to 11 U.S.C. § 554(c), the debtor must formally schedule the property.").

[133] Rejoinder ¶77, *citing Jeffrey v. Desmond (In re Jeffrey)*, 760 F.3d 183, 186 (1st Cir. 1995) (RL-47); *Vreugdenhill v. Navistar Internat'l Trans. Corp.*, 950 F.2d 524, 526 (8th Cir. 1991) (RL-74).

[134] Counter-Memorial ¶82; Rejoinder ¶79.

[135] Counter-Memorial ¶82, *quoting* Public U.S. bankruptcy filing that contains as an exhibit the testimony of EuroGas, Inc.'s Chief Financial Officer, Hank Blankenstein, before the U.S. Bankruptcy Court, 3 August 2004, p. 2, lines 12-23 (R-81) ("Question: Now, isn't it true that EuroGas does not even own this talc project? Answer: That's correct.").

[136] Counter-Memorial ¶84.

[137] Counter-Memorial ¶¶84-85, *citing* EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2004, p. 5 (R-74); EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, p. 5 (R-75). The Claimants also rely on a Quarterly Report (10-Q) of EuroGas that was submitted to the Bankruptcy Court. The Respondent highlights that this document was not filed by EuroGas but rather by the creditors' representative, to support the proposition that the SEC

215. The Respondent concludes that because EuroGas I did not emerge from the bankruptcy with its interest in Rozmin, EuroGas II could never have come to possess the alleged investment, and the Tribunal therefore has no jurisdiction over EuroGas II.[138]

216. In any event, the Respondent submits that, even if EuroGas I had somehow retained the interest in Rozmin, the Tribunal would still not have jurisdiction over EuroGas II, given that none of the Claimants' theories as to how EuroGas II obtained the interest in Rozmin is tenable.[139]

217. Specifically, the Respondent denies that EuroGas II could have "stepped into the shoes" of EuroGas I, as asserted by the Claimants. The Claimants rely on a Joint Unanimous Consent Resolution entered into by the directors of the two EuroGas companies on 31 July 2008 (the "**Joint Resolution**"), which provides that the companies are "deemed to have merged" through a Type-F reorganization that is retroactively effective to 15 November 2005.[140] According to the Respondent, this is a "sham document" that is invalid under both Utah law and U.S. Bankruptcy law.[141]

218. The Respondent contends that, in response to its Counter-Memorial, the Claimants were forced to admit in the Reply that Section 368(a)(1)(f) of the U.S. Internal Revenue Code, which governs Type-F reorganizations, is a tax statute that cannot effectuate corporate mergers.[142]

219. According to the Respondent, the Claimants then offered a new theory based on "the common law doctrine of *de facto* merger," which is invalid for two main reasons.[143]

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filings did not adequately inform shareholders about the bankruptcy case. For the Respondent, it "speaks volumes" that the Claimants' own evidence states that EuroGas' SEC filings were inaccurate. Counter-Memorial ¶89.

[138] Rejoinder ¶84.

[139] Rejoinder §II.A.2.

[140] Joint Unanimous Consent Resolution of the Directors of EuroGas, Inc., a Utah Corporation Dissolved in 2001 and EuroGas, Inc., a Utah Corporation Formed In 2005 Approving Proposed Class "F" Reorganization, dated 31 July 2008 ("Joint Resolution") (C-57); Memorial ¶21.

[141] Counter-Memorial ¶45.

[142] Rejoinder ¶104, *citing* Reply ¶¶89-90.

[143] Rejoinder ¶105, *quoting* Reply ¶85.

220. First, the Respondent argues that the *de facto* merger doctrine does not work to merge two entities engaged in an asset acquisition; rather, it is applicable only in successor liability cases as a remedy to protect the creditors of an entity that sells substantially all of its assets to another entity but retains its liabilities.[144] Therefore, it could not apply to effect a merger of EuroGas I and II.

221. Second, the Respondent contends that EuroGas I did not have the capacity to merge with EuroGas II because under Utah law, dissolved corporations cannot merge.[145] In this regard, it is undisputed that EuroGas I was dissolved in 2001 and did not seek reinstatement within two years after its dissolution.

222. Pursuant to the Utah Code, a dissolved corporation "may not carry on any business except that appropriate to wind up and liquidate its business and affairs," and Utah legal authorities have held that mergers do not fall into that category.[146]

223. Moreover, according to the Respondent, a dissolved corporation that has failed to seek reinstatement within the two-year period "has no legal capacity" and may not carry out *any* activities, even to wind up the business.[147] The Respondent relies on an order issued by the Utah Division of Securities in *In re Flavor Brands, Inc.*, which states:

> *A dissolved corporation has no officers or directors to act on behalf of either the entity or the shareholders in approving a merger or the sale of stock … A dissolved corporation has no shares to offer, sell or swap. The shares of a dissolved corporation are invalid.*[148]

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[144] Rejoinder ¶¶107-114; Dorsey ER ¶¶66 *et seq.*

[145] Counter-Memorial ¶¶65-71; Rejoinder ¶¶116-132.

[146] Counter-Memorial ¶¶49-55, *citing In re Flavor Brands, Inc.,* Docket Nos. SD-06-0057 to SD-06-0060, Div. of Securities, Utah Dep't of Comm., Final Order, 4 October 2006 (RL-89); *Hilcrest Invest. v. Sandy City*, 2009 WL 7347353, (Utah Dist. Ct., 2009), aff'd 238 P.3d 1067 (Utah App. 2010), (RL-27); *Holman v. Callister, Duncan & Nebeker*, 905 P.2d 895, 899 (Utah App. 1995) (RL-91).

[147] Counter-Memorial ¶51, *quoting Holman v. Callister, Duncan & Nebeker*, 905 P.2d 895, 899 (Utah App. 1995) (RL-91); *Hilcrest Invest. v. Sandy City*, 2009 WL 7347353, (Utah Dist. Ct., 2009), *aff'd* 238 P.3d 1067 (Utah App. 2010), ¶19 (RL-27) (holding that a dissolved corporation which did not apply for reinstatement within two years after dissolution was no longer a legal entity and could not validly assign a contract).

[148] Counter-Memorial ¶52, *quoting In re Flavor Brands, Inc.,* Docket Nos. SD-06-0057 to SD-06-0060, Div. of Securities, Utah Dep't of Comm., Final Order, 4 October 2006, ¶24(b)-(d) (RL-89).

224. In the Respondent's view, it necessarily follows that EuroGas II could not have merged with EuroGas I or assumed the alleged investment.[149]

225. The Respondent further argues that, even if EuroGas I had the legal capacity to merge under Utah law, its purported merger would still be ineffective because it was not registered with the Utah Division of Corporations as required by law.[150] Section 16-10a-1105(2) of the Utah Code states that a "merger or share exchange takes effect upon the effective date of the articles of merger or share exchange, which may not be prior to the date of filing."[151] The Claimants do not deny the fact that articles of merger were never filed.[152] The consequence, according to the Respondent, is that the purported merger did not take effect.

226. Turning to U.S. Bankruptcy law, the Respondent argues that EuroGas I also lacked the capacity to merge pursuant to Section 727(a)(1) of the Bankruptcy Code, which prohibits a court from discharging a corporate debtor's debt in a Chapter 7 proceeding. U.S. courts have found that as a consequence of this provision, the debtor company is "defunct" at the conclusion of a Chapter 7 Bankruptcy and cannot carry out business activities.[153] Therefore, EuroGas I was rendered "defunct" after the Chapter 7 liquidation proceeding concluded on 19 March 2007 and could not have transferred assets to or merged with EuroGas II after that date.[154]

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[149] Counter-Memorial ¶55.

[150] Counter-Memorial ¶¶49-55.

[151] Utah Code, §16-10a-1105(2) (RL-93).

[152] Counter-Memorial ¶56, *quoting* Joint Resolution, 31 July 2008, p. 2 (C-57) ("the Division [is] unwilling and lawfully incapable of accepting and stamping Articles of Merger involving a dissolved corporation or in which a dissolved corporation is a party").

[153] Counter-Memorial ¶¶67-68, *quoting Thornton v. Mankovitch*, 626 S.E. 2d 189, 191 (Georgia App. 2006) (RL-83) ("The consequence of denying discharge to a corporation in a Chapter 7 proceeding is to render such entities 'defunct,' which is akin to a dissolved corporation.") and *Liberty Trust Co. v. Holt*, 130 B.R. 467, 472 (W.D. Tex. 1991) (RL-99) ("The consequence of denying discharge to corporations and partnerships in a Chapter 7 proceeding is to render such entities 'defunct.' The Court assumes that 'defunct' depicts a status akin to that of a dissolved corporation or partnership.").

[154] Although the Respondent accepts the Claimants' position that the Bankruptcy Code does not provide for "dissolution" of a corporation (as that is a matter of state law), it argues that becoming "defunct" has the same the practical effect: the company cannot carry out business activities. Counter-Memorial ¶71.

227. Finally, the Respondent challenges the purported retroactive effect of the Joint Resolution.[155] First, Utah corporate law expressly prohibits mergers from being effective retroactively.[156] Second, when the bankruptcy petition against EuroGas I was filed on 18 May 2004, an automatic stay came into effect under Section 362 of the Bankruptcy Code preventing "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."[157] Thus, because the Joint Resolution purports to make the merger and asset transfer effective as of 15 November 2005, when this stay was already in effect, it must be "void and without effect."[158]

228. Turning to the Claimants' allegations concerning McCallan's acquisition of EuroGas GmbH, the Respondent contends that this proposition only raises additional jurisdictional problems for EuroGas.[159] According to Respondent, this theory, if believed, would mean that on 13 July 2007, EuroGas I sold its shares in EuroGas GmbH but retained its ICSID claim relating to the reassignment of the Mining Area, such that the ICSID claim became alienated from the shareholding in EuroGas GmbH.[160] Therefore, the Tribunal would need to trace each of these assets at each point in time and analyse the consequences for jurisdiction.[161] The Respondent points specifically to four different periods of time:

[155] Counter-Memorial ¶¶72-75.

[156] Counter-Memorial ¶58. The Respondent also submits that "the 'type-F reorganization' referenced in the Joint Resolution could not reinstate or revive EuroGas I [because] a federal tax reorganization under Section 368(a)(1)(F) has no bearing on the legal incapacity and statutory limitations placed on EuroGas I under Utah law." In addition, "U.S. courts have held that entities adjudicated and liquidated in bankruptcy cannot engage in type-F reorganizations." Counter-Memorial ¶¶59-61, 90, *citing Templeton's Jewelers, Inc. v. U.S.*, 126 F.2d 251, 252 (6th Cir. 1942) (RL-102). The Claimants consider this argument "misplaced since they accept that Section 368(a)(1)(F) did not…constitute the legal basis pursuant to which the merger would be operated and become effective." Reply ¶¶89-91.

[157] Counter-Memorial ¶74, *quoting* 11 USC §362(a)(3) (RL-64) and *citing* Jarvis ER ¶62.

[158] Counter-Memorial ¶75, *quoting*, *inter alia*, *Franklin Savings Assoc. v. Office of Thrift Supervision*, 31 F.3d 1020, 1022 (10th Cir. 1994) (RL-58) ("[a]ny action taken in violation of the stay is void and without effect.").

[159] Rejoinder ¶¶85-105.

[160] Rejoinder ¶¶54, 85-86.

[161] Rejoinder ¶87.

a. *Before 13 July 2007*: assuming that EuroGas I emerged from the bankruptcy with the alleged investment (which it did not), it would have possessed both the interest in EuroGas GmbH and the ICSID claim.[162]

b. *From 13 July 2007 until some unspecified time*: the Tribunal's jurisdiction *ratione temporis* over any alleged breaches of the US-Slovakia BIT ceases on 13 July 2007, when EuroGas I transferred its shareholding in EuroGas GmbH to McCallan, a UK entity not protected by that treaty.[163]

c. *Unspecified time between 13 July 2007 and 4 June 2012*: The Claimants allege that EuroGas II then acquired all the shares of McCallan but do not even mention the date of this alleged transaction.[164] Whatever that date is, the Tribunal has no jurisdiction *ratione temporis* over EuroGas II's claims relating to any event before this acquisition because it had no "investment" prior to this acquisition.[165] This follows from the fundamental principle of public international law that an investment tribunal has jurisdiction only with respect to alleged breaches occurring after the claimant came within the scope of the applicable investment treaty.[166]

   In addition, EuroGas II's alleged acquisition of McCallan (including the interest in Rozmin) during this period is not a protected "investment" under the reasoning set forth in *Phoenix Action v. Czech Republic*.[167] Specifically, EuroGas II "acquired a troubled

[162] Rejoinder ¶88.

[163] Rejoinder ¶¶89-91.

[164] Rejoinder ¶92.

[165] Rejoinder ¶93.

[166] Rejoinder ¶¶93-95, *citing Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic*, UNCITRAL, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶¶105-107 (RL-174); *Gami Inv., Inc. v. The Government of the United Mexican States*, UNCITRAL-NAFTA, Final Award, 15 November 2004, ¶93 (CL-79); *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶71 (RL-107).

[167] Rejoinder ¶¶96-97, *citing Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶142-144 (RL-107).

asset embroiled in national court litigation seeking to remedy the very act that is the subject of this investment treaty claim."[168]

d. *From 4 June 2012*: The Claimants allege that on 4 June 2012, EuroGas II caused McCallan to transfer its interest in EuroGas GmbH to a Swiss subsidiary, EuroGas AG, but they offer no information or evidence about this transaction, making it impossible to assess its impact on the Tribunal's jurisdiction.[169]

229. For all of these reasons, the Respondent concludes that the Claimant EuroGas does not own the alleged investment and has no standing to bring its claims before this Tribunal.[170]

(2) Claimants' Position

230. As a preliminary matter, the Claimants deny that they made any misrepresentation in this arbitration, including with respect to the identity of the Claimant EuroGas.[171] As further explained below, the Claimants' position is that EuroGas "took on the surviving corporate existence, business, and affairs" of the entity named EuroGas, Inc. that was incorporated in 1985 (to which the Claimants refer as the "1985 Company").[172]

231. In response to the Respondent's jurisdictional objection based on EuroGas' alleged lack of standing, the Claimants submit that: (a) the Tribunal should "refrain from even entertaining" the objection because it would be to the detriment of every interested party and benefit only the Respondent, who would not even have standing under U.S. law to raise the arguments it advances in this arbitration;[173] and (b) the objection is groundless, as EuroGas is the rightful owner of the investment.[174]

232. The Claimants' first main argument is summarized as follows:

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[168] Rejoinder ¶97.
[169] Rejoinder ¶¶98-100.
[170] Rejoinder ¶133.
[171] Reply ¶15.
[172] Memorial ¶14.
[173] Reply §I.A.1.
[174] Reply §I.A.4.

> *[I]f the challenge of EuroGas' ownership interest in Rozmin were to be accepted by the Tribunal, despite the fact that Respondent does not have standing under U.S. law to raise this challenge and that it would in fact be prevented in a U.S. court from doing so, the Slovak Republic would literally be the only one to benefit from this decision.*[175]

233. According to the Claimants, the results of the Respondent's position would be:

a. EuroGas' interest in Rozmin would remain with the bankruptcy estate and never be administered. It "would make strictly no business sense to reopen the bankruptcy proceedings" because: (i) the estate would not have the financial means to bring this claim against the Respondent; (ii) a trustee would not take on the burden and expense of bringing a claim, especially because his fees would not be paid until the conclusion of the arbitration; and (iii) selling the interest in Rozmin at auction would not generate a worthwhile return. The asset would have little value to any entity other than the 1985 Company or "a company that had genuinely stepped into the shoes of the 1985 Company before there was even any prospect of arbitration," because no other entity would be considered a genuine investor with the right to bring a claim.[176]

b. The shareholders of the 1985 Company would own shares in a defunct company with no assets, rather than shares in EuroGas, a company in good standing.[177]

c. The creditors of the 1985 Company would remain creditors of a defunct company with no assets and have no means of recovering from EuroGas.[178]

d. The Respondent would never be held accountable for its breaches of international law.[179]

[175] Reply ¶25.
[176] Reply ¶24.1.
[177] Reply ¶24.2.
[178] Reply ¶24.3.
[179] Reply ¶24.4.

234. For these reasons, the Claimants assert that "EuroGas is the only party capable of successfully holding the Slovak Republic liable for its breaches."[180] The Tribunal should therefore reject the Respondent's objection, as it would benefit only the Respondent.[181] In the Claimants' view, the unreasonableness of the Respondent's position is highlighted by "the fact that Respondent does not have standing under U.S. law to raise this challenge and that it would in fact be prevented in a U.S. court from doing so."[182]

235. The Claimants further argue that, in any event, the Respondent's objection fails on the merits. According to the Claimants, the 1985 Company (a) emerged from bankruptcy with the interest in Rozmin;[183] (b) was not prevented from acting to wind up its affairs;[184] and (c) validly merged with EuroGas to become the rightful owner of the investment.[185]

236. On the first point, the Claimants submit that the Respondent is wrong to argue that the 1985 Company could not have emerged from the bankruptcy with its interest in Rozmin. According to the Claimants:

> *Respondent relies on the strictest interpretation of the applicable provisions of the U.S. Bankruptcy Code, one which U.S. courts themselves do not follow, and which moreover blatantly disregards the very peculiar circumstances of this case, not to mention the very strong policy reasons that would prohibit finding that the 1985 Company did not emerge from the Chapter 7 reorganization process…, in disregard of the good faith interpretation required under international law and the principle of form over substance.*[186]

[180] Reply ¶26.1. In the Reply, submitted before the reopening of the Bankruptcy Proceedings, the Claimants argued that any creditor who considered petitioning the U.S. court to reopen the EuroGas bankruptcy would recognize its own best interest in instead acknowledging that EuroGas' interest in Rozmin was validly abandoned in the Bankruptcy Proceedings and that the two EuroGas companies validly merged. The creditor could then seek a settlement with or assert a claim against EuroGas, which may prevail in this case with a substantial award.

[181] Reply ¶28.

[182] Reply ¶35, *citing* Snell & Wilmer ER, ¶¶23, 95-99.

[183] Reply §I.A.2.

[184] Reply §I.A.3.

[185] Reply §I.A.4.

[186] Reply ¶30.

237. The Claimants and their legal experts acknowledge that some U.S. courts have ruled that property cannot be abandoned by a bankruptcy trustee unless it is formally scheduled in the Bankruptcy Proceedings.[187] However, they argue that other courts have found that when a trustee is aware of the asset and chooses not to administer it, the asset is deemed to have been abandoned.[188] One court set forth the test as follows:

> *The party claiming the abandonment must demonstrate the trustee had knowledge of the asset as property to the estate such that the court could impute an intent to abandon the asset upon the closing of the case. […] The claiming party must also show an absence of active administration of the asset at the time of the abandonment.*[189]

238. Applying this test in the present case, the Claimants assert that Trustee Marker knew of EuroGas' interest in Rozmin and chose not to administer it; as a consequence, that interest is deemed to have been abandoned.[190] In this regard, the Claimants point out that *no* schedules were filed in the Bankruptcy Proceedings, so the administration of the entire estate was based on knowledge obtained by Trustee Marker from external sources.[191]

239. According to the Claimants and their legal experts, the following facts show that Trustee Marker was aware, or should have been aware, of the Rozmin interest:

a. The interest was reported in EuroGas' public SEC filings, two of which were attached to a pleading filed in the bankruptcy case.[192] Indeed, these filings provide more information about Rozmin than the schedule of assets would have provided.

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[187] Reply ¶31; Snell & Wilmer ER ¶73.

[188] Reply ¶32; Snell & Wilmer ER ¶73.

[189] Reply ¶33, *quoting Starrett v. Starret*, 541 A.2d 1119, 1123 (N.J. App. Div. 1988) (internal citations omitted) (CL-214).

[190] Reply ¶34.

[191] Reply ¶34.

[192] Reply ¶36.1. The Claimants point to EuroGas' 10-Q for the third quarter of 2005, which states that the company "acquired a direct 43% interest in Rozmin s.r.o., [which] holds a talc deposit in Eastern Slovakia," and that "Rozmin s.r.o. was notified that the concession regarding the Tale deposit had been cancelled by the Slovakian Government for unspecified and dubious reasons," and that it "will be forced to impair the cost of the assets, $3,843,560, because of the cancellation of the concession." Trustee's Response to Motion to Reconsider or Grant New Trial Filed by W. Steve Smith dated 22 March 2006, EuroGas I Bankruptcy, Docket No. 96, Ex. 2, pp. 12-13 (C-70).

b. Trustee Marker's time records show that he reviewed tax documents relating to EuroGas, which stated the company's interest in EuroGas GmbH, RimaMuráň, and Rozmin.[193]

c. Trustee Marker's accountant, according to its time records and application for fees, reviewed "[b]usiness records of the prior accountants … to identify possible assets of the company which were unknown to the Trustee," accounting data and tax returns, and also searched SEC filings for additional information.[194]

d. EuroGas' 2006 tax return, which was reviewed, signed and filed by Trustee Marker, identified the company's interest in Rozmin.[195]

e. Online news articles from September 2005, which Trustee Marker could have easily found, report that Rozmin had challenged the Government's decision to revoke Rozmin's mining rights.[196]

240. In response to the Respondent's submissions regarding EuroGas' SEC filings, the Claimants contend that the filings from 1998 to 2006 clearly identified EuroGas' interest in Rozmin and the status of Rozmin's mining rights, including the revocation of those rights by the Government.[197] To the Claimants, it is irrelevant that the SEC filings for these years did not report the legal challenges to the Government's action because:

a. the only reason such information was not included is that, until the Slovak Supreme Court's 27 February 2008 decision, "EuroGas had very little hope that the Slovak Republic would acknowledge the illegality of its own decision to revoke Rozmin's mining rights";[198]

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[193] Reply ¶36.2; Final Report and Application for Compensation and Motion for Order Approving Payment of Administrative Costs and Expenses, EuroGas I Bankruptcy, Docket No. 140, p. 8 (C-328).

[194] Reply ¶36.3; Final Report and Application for Compensation and Motion for Order Approving Payment of Administrative Costs and Expenses, EuroGas I Bankruptcy, Docket No. 140, p. 35 (C-328).

[195] Reply ¶36.4; EuroGas, Inc. 2006 Tax Return, p. 67 (C-329).

[196] Reply ¶42; Snell & Wilmer ER ¶86.

[197] Reply ¶¶39-41.

[198] Reply ¶40.

b. Trustee Marker had a duty on the basis of the SEC filings "to investigate what, if anything, he could have done, or what actions had already been undertaken to recover Rozmin's interest in the Deposit"; and

c. when considering a "contingent, equitable legal claim," such as Rozmin's claim against the Respondent, U.S. courts have held that the level of disclosure required to establish abandonment is "much lower."[199]

241. The Claimants argue that Trustee Marker himself concluded that he had sufficient information from external sources to administer the estate, and elected to close the case.[200] Otherwise, he could have asked the Bankruptcy Court to hold EuroGas and its representatives in contempt for failing to file the schedules of assets as ordered, or to dismiss the case under Section 707(a)(1) of the Bankruptcy Code for "unreasonable delay by the debtor that is prejudicial to creditors."[201] Instead, he apparently believed that he had the information required to fully administer the estate, declaring in his final report that he had "faithfully and properly fulfilled the duties of the trustee."[202]

242. To the Claimants, it is clear that Trustee Marker did not actively administer the claim against the Respondent as an asset in the Bankruptcy Proceedings. The Claimants point out that, even though no schedules were filed, Trustee Marker located and sold EuroGas' interest in four of its subsidiaries.[203] He did not, however, take such action with EuroGas GmbH, likely because he considered the interest in Rozmin to be overly burdensome or too expensive and risky to liquidate.[204] According to the Claimants, as a result of Trustee

[199] Reply ¶42 *citing In Re Kane*, 628 F.3d 631 (3d Cir. 2010) 641, 643 (CL-217) (holding that a trustee had abandoned a debtor's property in a potential lawsuit against her ex-husband, even though that property was unscheduled).

[200] Reply ¶44.

[201] Reply ¶44.

[202] Reply ¶47, *quoting* Final Report and Application for Compensation and Motion for Order Approving Payment of Administrative Costs and Expenses, EuroGas I Bankruptcy, Docket No. 140, p. 35 (C-328).

[203] Reply ¶47, *citing* Order Confirming Four-Lot Auction of Debtors Interests in Certain Affiliates, dated March 30, 2006, EuroGas I Bankruptcy, Docket Entry No. 97, pp. 2 *et seq.* (C-71).

[204] Reply ¶46; Snell & Wilmer ER, ¶93. In the Claimants' view, such a determination by Trustee Marker would have been reasonable, given that he did not have the time or financial resources to challenge the revocation of Rozmin's mining rights in national or international fora, and at the time (before the Slovak Supreme Court decision of 2008), the chance of success of such a challenge would have seemed weak.

Marker's decision not to actively administer EuroGas' interest in Rozmin, it was abandoned back to EuroGas.

243. The Claimants' second main argument is that, despite the administrative dissolution of the 1985 Company, it was able to undertake any act necessary to wind up its affairs, including the merger with EuroGas.

244. In this regard, the Claimants contest the opinion of the Respondent's expert that under Utah corporate law, a dissolved corporation has no legal existence.[205] They argue that the Utah court cases on which Ms. Jarvis relies were decided under the Utah Business Corporation Act, which was repealed on 1 July 1992 and replaced by the Utah Revised Business Corporation Act.[206] This point is important to the Claimants because under the previous law, a dissolved corporation could only pursue a claim that arose prior to its dissolution, and only if the action was initiated within two years after dissolution. On the other hand, the current law allows a corporation to undertake any act necessary to wind up its affairs, and it does not contain a two-year limitation on legal actions.[207]

245. The Claimants also contest the Respondent's arguments relating to U.S. Bankruptcy law. They submit that the Bankruptcy Proceedings could not prevent EuroGas from acting to wind up its affairs for the following reasons:

a. Bankruptcies cannot cause the dissolution of a company because they are governed by U.S. federal law, whereas the creation and dissolution of corporate entities is governed by state law.[208]

b. Not only is there nothing in the Bankruptcy Code to suggest that bankruptcies can result in dissolution, but the preparatory works of that law contemplate the survival of the

[205] Reply ¶¶51-57, *citing* Jarvis ER ¶44.

[206] Reply ¶53; Snell & Wilmer ER ¶142.

[207] Reply ¶¶55-56, *citing* Utah Revised Business Corporation Act §1405(2)(b) (CL-197). The Claimants also argue that the two cases supporting the Respondent's position that a dissolved corporation cannot act to wind up it affairs "have no precedential value whatsoever, and are moreover wrong in law, having disregarded the very plain language of the Current Act." Reply ¶57.

[208] Reply ¶59.

debtor, stating: "[i]n adopting section 727(a)(1), Congress intended that corporate debt would survive Chapter 7 proceedings and be charged against the corporation when it resumed operations."[209]

c. The majority of case law, including a decision by the U.S. Supreme Court, has confirmed that Chapter 7 proceedings do not dissolve a corporation. The cases cited by the Respondent are "outlier decisions" that have been subject to criticism.[210]

d. Ms. Jarvis' position is nonsensical and inconsistent with her recognition that property can be abandoned back to the debtor after the conclusion of the Chapter 7 proceeding.[211]

246. Therefore, according to the Claimants, nothing prevented the 1985 Company from taking action to wind up its affairs, including selling assets or undergoing a merger. EuroGas did both:

> *On July 13, 2007, the 1985 Company sold its interest in EuroGas GmbH to a third party company, namely McCallan Oil & Gas (UK) … EuroGas thereafter acquired the entirety of McCallan's issued shares, and ultimately, on June 4, 2012, caused McCallan to transfer its interest in EuroGas GmbH, and thus Rozmin, to its new Swiss subsidiary, EuroGas AG.*
>
> *Further, in order to complete the winding up process, and at the same time maintain the interest of its shareholders, the 1985 Company validly merged with EuroGas on July 31, 2008.*[212]

247. Relying on the Joint Resolution entered into by the directors of the two EuroGas companies on 31 July 2008, the Claimants assert that the companies underwent "a type-F

[209] Reply ¶60, *quoting N.L.R.B. v. Better Bldg. Supply Corp.*, 837 F.2d 377 (9th Cir. 1988), 13 January 1988 (CL-102).

[210] Reply ¶61; Snell & Wilmer ER §IV(B).

[211] Reply ¶62, citing *Catamount Const. v. Timmis Enterprises*, 2008 WY 122 at 1158 (CL-205) ("If the corporation were '*defunct*' or *de facto* dissolved and incapable of maintaining or defending an action, as the *Liberty Trust* case concluded, it would be unnecessary to deny it a discharge of corporate debt.").

[212] Reply ¶¶64-65.

reorganization whereby EuroGas assumed all of the assets, liabilities and issued stock certificates of the 1985 Company."[213]

248. The Claimants submit that the two EuroGas companies merged pursuant to the common law doctrine of "*de facto* merger."[214] They contend that the Respondent's arguments challenging the validity of this merger are "convoluted and/or formal" and must fail for a number of reasons. [215]

249. First, according to the Claimants, nothing in the Utah Revised Business Corporation Act prevents a dissolved corporation from merging with another corporation; rather, the law expressly allows a corporation to take any "act necessary to wind up and liquidate its business and affairs" and specifies that "dissolution of a corporation does not … prevent transfer of its shares or securities."[216]

250. Further, the Claimants argue that the requirement of registering a merger with the Utah Division of Corporations is mandatory only in the case of statutory mergers (as opposed to common law mergers).[217] According to the Claimants, the validity of such non-statutory and *de facto* mergers is recognized in the official commentary to Utah's corporate statute, which states that a "transaction may have the same economic effect as a statutory merger even though it is cast in the form of a non-statutory transaction."[218] The Claimants cite Utah court decisions holding that a dissolved corporation had undergone a *de facto* merger with a corporation in good standing, just as they argue occurred in the EuroGas merger.[219]

[213] Memorial ¶21; Joint Resolution, 31 July 2008 (C-57).

[214] Reply §I.A.4.

[215] Reply ¶66.

[216] Reply ¶70; Snell & Wilmer ER ¶103; Utah Revised Business Corporation Act §1405(2)(b) (CL-197).

[217] Reply ¶71.

[218] Reply ¶72, *citing* Official commentary to section 1101 of the Utah Revised Business Corporation Act (CL-240).

[219] Reply ¶73, *citing In the Matter of Synetix Group Inc,* Case No. 080500140 (3rd Dist. Utah, 2008) (RL-35) and *In the Matter of Bio-Thrust Case* No. 040908769 (3rd Dist. Utah, 2004) (RL-34).

251. According to the Claimants' legal experts, there are four factors that must be satisfied for a *de facto* merger to be valid under common law, and they are all met in this case. In particular:

a. *continuity of management, personnel, physical location, assets and general business operation*: As specified in the Joint Resolution, the two EuroGas companies share the same directors and officers, principle place of business and assets.[220]

b. *continuity of shareholders*: The Joint Resolution states that EuroGas "shall have the same shareholders as the Predecessor Corporation, and in the same denominations" and that EuroGas "shall fully and completely recognize and honor the Predecessor Corporation's shareholders as its own."[221] This is confirmed by the 2011 share ledger of EuroGas.[222]

c. *cessation of ordinary business by the predecessor*: The 1985 Company had already been dissolved and with the merger it completed its winding up and "ceased to exist entirely."[223]

d. *assumption of successor liability*: The Joint Resolution states that "all assets, liabilities, rights privileges, and obligations of Predecessor Corporation are in fact the assets, liabilities, rights privileges, and obligations of [EuroGas]."[224]

252. On the basis of the above, the Claimants' legal experts opine that Utah courts would affirm this merger, especially given that "all parties with an interest in the 1985 Company, EuroGas, or the merger between the two, have benefitted from said merger."[225]

253. The Claimants reject the Respondent's argument that, since the Joint Resolution purports to be retroactively effective to 15 November 2015, when an automatic stay was imposed

[220] Reply ¶77, *citing* Joint Resolution, 31 July 2008 (C-57).
[221] Reply ¶78; Joint Resolution, 31 July 2008 (C-57).
[222] Reply ¶81; Snell & Wilmer ER ¶¶117-119.
[223] Reply ¶82.
[224] Reply ¶83; Joint Resolution, 31 July 2008 (C-57).
[225] Snell & Wilmer ER ¶122.

on EuroGas' assets through the Chapter 7 proceeding, the merger is not valid. The Claimants point out that the Joint Resolution was entered into in July 2008, more than one year after the stay had been lifted on 19 March 2007, and therefore could not have interfered with the automatic stay.[226] In any event, even if the Joint Resolution could not have had retroactive effect, the merger would still have been validly completed on 31 July 2008.

254. For these reasons, the Claimants ask the Tribunal to deny the Respondent's first jurisdictional objection relating to EuroGas.

B. Denial of Benefits to EuroGas

(1) Respondent's Position

255. The Respondent's second jurisdictional objection relating to EuroGas is based on the "denial of benefits clause" found in Article I.2 of the US-Slovakia BIT:

> *Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party.*

256. The Respondent asserts that it validly denied the benefits of the US-Slovakia BIT to EuroGas pursuant to this provision.[227]

257. In the Respondent's view, this denial of benefits clause covers all "advantages of this Treaty" and therefore applies to the right to the procedural benefits of the BIT, including the right to initiate international arbitration.[228] The Respondent points out that the Claimants do not dispute this.[229] As a result, the Tribunal lacks jurisdiction *ratione voluntatis* over EuroGas's claims.

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[226] Reply ¶87.

[227] Counter-Memorial §II.B; Rejoinder §II.B.

[228] Counter-Memorial ¶119.

[229] Rejoinder ¶135.

258. According to the Respondent, the two requirements for a denial of benefits set forth in Article I.2 are met in this case: (a) EuroGas is controlled by a national of a third country, and (b) it has no substantial business activities in the territory of the United States.[230]

259. Regarding the first requirement, the Respondent notes that the Claimants have not disputed that EuroGas is controlled by Mr. Wolfgang Rauball, a national of Germany.[231] In addition, the Respondent points to the following facts, which in its view demonstrate Mr. Rauball's control of the company:

a. Mr. Rauball has consistently held the key executive positions in EuroGas II (including CEO, President and Director). In particular, he held these positions when the Respondent denied the benefits of the US-Slovakia BIT in 2012.[232]

b. Mr. Rauball has been EuroGas's largest shareholder, holding 27% of its stock in 2009 and 30% in 2010.[233]

c. EuroGas' 2009 SEC annual report states that the company is "dependent on the services of Wolfgang Rauball, Chairman and Chief Executive Officer of the company" and that Mr. Rauball had personally guaranteed investments by creditors.[234]

260. With respect to the second requirement in Article I.2 of the US-Slovakia BIT, that the relevant company "has no substantial business activities in the territory of the other Party," the Respondent asserts that:

> *EuroGas II has provided no documentary evidence showing anything remotely close to "substantial business activity" in the U.S., and all the evidence points to the opposite conclusion:*

[230] Counter-Memorial ¶93.

[231] Counter-Memorial ¶94; Rejoinder ¶135.

[232] Counter-Memorial ¶94, *citing* Registered Principals - Utah Business Search for EuroGas II, 4 June 2015 (R-144); Annual Report-Change Request for EuroGas, Inc., 10 September 2014 (R-145); Annual Report for EuroGas II from the Utah Division of Corporations, 5 November 2012 (R-146).

[233] Counter-Memorial ¶95, *citing* EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2009, p. 24 (R-76); SEC Filing of EuroGas Inc., 21 July 2010 (R-147).

[234] Counter-Memorial ¶95, *citing* EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2009, p. 9 (R-76).

EuroGas II lacks any physical presence in the U.S., and it has no operational or management activities in that jurisdiction.[235]

261. To support this position, the Respondent alleges the following facts:[236]

a. Under Utah corporate law, EuroGas I was dissolved in 2001.[237]

b. EuroGas I entered a Chapter 7 liquidation proceeding in 2004 during which all of its assets (none of which were based in the United States) were auctioned off. The company became legally "defunct" after the bankruptcy.[238]

c. The address for EuroGas' principle office identified in its 2007 Annual Report is only a "mail drop."[239]

d. From the time EuroGas II was created in 2005 to the present, there is no evidence that either EuroGas entity conducted material operations in the United States. Indeed, EuroGas has acknowledged that it is managed from its "North American Headquarters" in Canada and its "Central European Headquarters," and that "Austria and Switzerland have more recently been its principal places of business."[240]

e. EuroGas has had no operational revenues.[241]

f. Since the conclusion of the bankruptcy, EuroGas has had no direct U.S. subsidiaries.[242]

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[235] Counter-Memorial ¶113.

[236] Counter-Memorial ¶¶97-101; Rejoinder ¶151.

[237] Counter-Memorial ¶97.

[238] Counter-Memorial ¶97.

[239] Counter-Memorial ¶98, *citing* Screen grab from http://www.regus.com/locations/virtual-office/new-york-new-york-city-wall-street (R-72).

[240] Counter-Memorial ¶95, *citing* EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2004, p. 17 (R-74); EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, p. 17 (R-75); EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2006, p. 21 (R-71); EuroGas, Inc., Form 10-K (Amended) for Fiscal Year Ended 31 December 2007, p. 18 (R-63). EuroGas II's Answer and Counterclaim in the TEC lawsuit, 4 May 2015, ¶23 (R-148).

[241] Counter-Memorial ¶100, *citing* EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2009, p. 15 (R-76).

[242] Counter-Memorial ¶100, *citing* EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, p. 3 (R-75).

g. EuroGas has not filed the audited financial statements required by U.S. law for fiscal years 2007 to 2009 and was deregistered by the SEC in 2011.[243]

h. According to the Dun & Bradstreet, Inc. Report, EuroGas has been inactive since at least 2 December 2010.[244]

262. The Respondent argues that none of the three activities cited by the Claimants could amount to "substantial business activities" in the United States:[245]

a. *Lawsuit between Tombstone Exploration Corporation ("**TEC**") and EuroGas*: this lawsuit concerns a breach of contract claim brought by TEC *against* EuroGas, first in 2014 and then refiled on 25 March 2015. TEC claims that EuroGas entered into an agreement to provide financing for TEC's exploration activities in the United States in exchange for stock in TEC, but then failed to perform its obligation. According to the Respondent, this only further demonstrates EuroGas' lack of substantial business activities in the United States.[246]

b. *EuroGas' shareholding in TEC*: TEC is a Canadian company with no operating revenues and significant losses.[247] In any event, EuroGas' substantial business activities cannot be established by the activities of another company. As held by the tribunal in *Pac Rim v. El Salvador*, it is the claimant itself which must be shown to have substantial business activities in the relevant territory.[248]

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[243] Counter-Memorial ¶101.

[244] Counter-Memorial ¶102, *citing* Dun & Bradstreet, Inc. Report dated 4 September 2014, p. 1 (R-29).

[245] The Claimants assert that EuroGas conducts substantial business activities in at least three ways: (a) a lawsuit between Tombstone Exploration Corporation and EuroGas, (b) EuroGas' joint business activities with TEC and (c) the business activities of EuroGas Silver and Gold Inc. Nevada.

[246] Counter-Memorial ¶¶104-106, *citing* TEC's Complaint, 21 August 2014, ¶¶ 24-27 (R-149); TEC's Amended Complaint, 21 August 2014, ¶¶30-33 (R-150). *See* Rejoinder ¶152.

[247] Counter-Memorial ¶107, *citing* Tombstone Exploration Corporation Form 20-F for Fiscal Year Ended 31 December 2013, p. 19 (R-153).

[248] Counter-Memorial ¶108; Rejoinder ¶153, *citing Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction, 1 June 2012, ¶4.66 (RL-18). In addition, regarding the reference by Mr. Rauball in his Witness Statement to EuroGas' ownership of "86 porphyry copper mining rights in the Tombstone Mining District of Arizona," the Respondent asserts that there is no evidence supporting this statement and therefore no way of verifying it. Counter-Memorial ¶109; Rejoinder ¶155.

c. *The business activities of EuroGas Silver and Gold Inc., a Nevada corporation ("**ESG**")*: Similarly, the Claimants cannot rely on the activities of ESG to defeat the Respondent's denial-of-benefits.[249] This is especially true because ESG is not owned directly by the Claimant EuroGas, but is rather a "low-level subsidiary" owned through EuroGas AG, a Swiss subsidiary.[250] In any event, the Claimants have offered no evidence of any operational activity of ESG, other than Mr. Rauball's statements.[251]

263. Nor is the Respondent convinced by the Claimants' arguments that EuroGas is a "junior mining company." In the Respondent's view, EuroGas does not carry out any of the activities that the Claimants attribute to junior mining companies (e.g., raising capital, exploring deposits, securing mining rights) in the United States.[252]

264. For these reasons, the Respondent submits the Claimants have failed to show that EuroGas has any substantial business activities in the United States, despite the fact that the Claimants bear the burden of proof on this issue, as recognized by the Tribunal in Procedural Order No. 4.[253]

265. The Respondent states that it does not understand the Claimants' argument that the Respondent did not attempt to "discharge its burden of proof" on the issue of substantial business activities until the Counter-Memorial. Aside from the question of who bears the burden of proof, Article 41 of the ICSID Convention clearly states that an objection to jurisdiction or admissibility may be raised in the counter-memorial.[254]

266. Therefore, according to the Respondent, the two requirements of Article I.2 of the US-Slovakia BIT are clearly met. On this basis, the Respondent denied EuroGas the benefits

[249] Counter-Memorial ¶110; Rejoinder ¶154.

[250] Counter-Memorial ¶111, *citing* Nevada Secretary of State Records for EuroGas Silver & Gold, Inc. (R-154).

[251] Counter-Memorial ¶112.

[252] Rejoinder ¶¶158-161.

[253] Rejoinder ¶156. In its document request No. 24, the Respondent requested "documents showing any business activities of EuroGas I or EuroGas II in the U.S. since 1998." The Tribunal denied that request in Procedural Order No. 4, stating that "Claimants have the burden of proof."

[254] Rejoinder ¶¶137-138.

of the BIT on 21 December 2012. The Respondent submits that this denial of benefits was valid and timely.[255]

267. In this regard, the Respondent disputes the proposition that such a denial of benefits can have only prospective effect. Relying on *Ulysseas v. Ecuador*, *Pac Rim v. El Salvador* and *Guaracachi v. Bolivia*, the Respondent asserts that tribunals in recent cases have interpreted denial of benefits clauses to have retroactive effect, and have also confirmed that States may deny an investor the right to arbitrate up until the filing of the counter-memorial.[256] Therefore, according to the Respondent, it could have denied benefits to EuroGas as late as its Counter-Memorial in this case.

268. The Respondent further asserts that, in any event, even if Article I.2 of the US-Slovakia BIT could not be applied retroactively, the Respondent still validly denied EuroGas the right to arbitration, by doing so *prospectively*.[257] It denied EuroGas this right by letter of 21 December 2012, more than one year before the Claimants filed their Request for Arbitration.[258] That letter states:

> *[P]ursuant to Article 1(2) of the Treaty, the Slovak Republic hereby exercises as of today, 21 December 2012, its right to deny EuroGas, lnc. the benefits of the Treaty, including the right to arbitration under Article VI of the Treaty.*[259]

269. Indeed, according to the Respondent, it is "the first country to deny benefits under an investment treaty prior to the commencement of arbitration."[260]

270. The Respondent does not accept the Claimants' assertion that, by the "Notification of a Claim against the Slovak Republic" of 31 October 2011, EuroGas accepted the Slovak

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[255] Counter-Memorial §II.B.3.

[256] Counter-Memorial ¶¶115-117, *Ulysseas, Inc. v. Ecuador*, UNCITRAL, Interim Award, 28 September 2010, ¶173 (RL-103); *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction, 1 June 2012, ¶¶4.8.5 (RL-18); *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014 (RL-20).

[257] Counter-Memorial ¶119.

[258] Counter-Memorial ¶121, *citing* Letter from the Slovak Republic to EuroGas Inc., 21 December 2012 (C-41/R-5).

[259] Letter from the Slovak Republic to EuroGas Inc., 21 December 2012 (C-41/R-5).

[260] Counter-Memorial ¶6.

Republic's offer to arbitrate before this denial of benefits. First, there is a distinction between when EuroGas agreed to arbitration (the 31 October 2011 letter) and when it exercised the right to arbitrate (the Request for Arbitration). To the Respondent, the critical question is whether the Slovak Republic denied the right to arbitrate before that right was actually exercised, which it did.[261] Second, EuroGas did not in any event validly agree to arbitration by its 31 October 2011 letter because that letter did not specify a choice of arbitration forum, as required under Article IV of the US-Slovakia BIT.[262]

271. Finally, the Respondent contends that the Claimants have adopted an overly-restrictive interpretation of the denial of benefits clause, which should be rejected. The Respondent addresses three specific aspects of the Claimants' interpretation:

a. The Claimants are wrong to suggest that the denial of benefits clause applies only to "shell" or "sham" companies. There is nothing in the language of Article I.2 that would limit its application to particular *types* of companies. In fact, by its express terms, the clause could apply to a company that is active in one country but not in the territory of the relevant treaty party.[263] In any event, "EuroGas II indeed is no more than a sham company with no demonstrable business activities."[264]

b. The Claimants attempt to read the word "substantial" out of the text of the clause. This approach runs counter to Article 31(1) of the Vienna Convention on the Law of Treaties (the "**VCLT**").[265] The ordinary meaning of "substantial" is "real and material."[266]

[261] Counter-Memorial ¶123.

[262] Counter-Memorial ¶124.

[263] Rejoinder ¶140.

[264] Rejoinder ¶141.

[265] Article 31(1) of the VCLT provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[266] Rejoinder ¶¶143-145, *citing* the definition of "substantial" in online Black's Law Dictionary (R-267); definition of "substantial" in online Oxford Dictionary (R-268); *Limited Liability Company Amto v. Ukraine*, Arbitration No. 080/2005, Final Award, 26 March 2008, ¶69 (RL-126) ("Accordingly, 'substantial' in this context means 'of substance, and not merely of form'. It does not mean 'large', and the materiality not the magnitude of the business activity is the decisive question."); Article 1113 - Denial of Benefits in Meg N. Kinnear, Andrea K. Bjorklund, et al.: *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, (Kluwer 2006), pp. 1113-1-13 (RL-176).

Therefore, Article I.2 "requires an assessment of the nature of the business of the company at stake and review the quality of its activities."[267]

c. The Claimants make a novel argument that it is sufficient for a company to carry out substantial business activities at any point in time. However, as held by the tribunal in *Ulysseas v. Ecuador*, the relevant time for the fulfilment of the requirements for a valid denial of benefits is the time of the notice of arbitration.[268] Applying that test, the Respondent has shown that EuroGas has not had any substantial business activities in the United States since its incorporation in 2005. Therefore, the requirements for a valid denial of benefits were satisfied at all relevant times.[269]

(2) Claimants' Position

272. The Claimants submit that the Respondent's objection based on Article I.2 of the US-Slovakia BIT is inadmissible and, in any event, meritless because the Respondent has failed to meet its burden of proving that EuroGas "has no substantial business activities" in the territory of the United States.[270]

273. The Claimants' first main argument is that "this jurisdictional objection should be declared inadmissible and/or deemed to have been waived by the Slovak Republic," as the Respondent did not attempt to demonstrate that the conditions under Article I.2 of the US-Slovakia BIT were satisfied until its Counter-Memorial, despite repeated invitations from the Claimants to do so in earlier submissions.[271]

274. The Claimants assert that, "in accordance with general principles of international arbitration and pursuant to ICSID Arbitration Rule 41, jurisdictional objections are to be

[267] Rejoinder ¶140.

[268] Rejoinder ¶148, *citing Ulysseas, Inc. v. Ecuador*, UNCITRAL, Interim Award, 28 September 2010, ¶174 (RL-103) ("[T]he date on which the conditions for a valid and effective denial of advantages are to be met in the instant case is the date of the Notice of Arbitration, … this being the date on which Claimant has claimed the BIT's advantages that Respondent intends to deny.").

[269] Rejoinder ¶150.

[270] Reply §I.B.

[271] Reply ¶96. The Claimants state that they advanced these invitations in a notice of dispute dated 23 December 2013, Request for Arbitration dated 25 June 2014, Answer to Respondent's Application for Provisional Measures dated 16 October 2014, and Rejoinder to Respondent's Application for Provisional Measures dated 21 November 2014.

raised in *limine litis* in order to be admissible," and therefore the Respondent should have attempted to discharge its burden of proof at the earliest opportunity.[272]

275. Moreover, in the present case, the Respondent's delay puts the Claimants at a procedural disadvantage that could result in an irreparable infringement of their due process rights.[273] This, according to the Claimants, is because they have been "forced to preemptively address matters for which Respondent bears the burden of proof" in their Reply and will not have the opportunity to address in writing the Respondent's response. A decision to admit the Respondent's objection "would essentially be rewarding Respondent for its recurrent failure to meet its procedural obligations."[274]

276. The Claimants' alternative position is that, even if the Respondent's objection is deemed admissible, it must fail on the merits. In the Claimants' view, the burden of proving that EuroGas "has no substantial business activities" in the territory of the United States lies with the Respondent, and the Respondent has entirely failed to discharge this burden. The Claimants offer three main arguments to support this view.

277. First, the Claimants submit that EuroGas does not fall into the very narrow category of claimants that the parties to the US-Slovakia BIT intended to be covered by Article I.2. In accordance with the VCLT, that provision must be interpreted in light of its "object and purpose."[275] According to the Claimants, the object and purpose of denial of benefits clauses in United States BITs is reflected in the *amicus curiae* submission of the United States in *Pac Rim v. El Salvador*.[276] In that submission, the United States indicated that such provisions are meant "to safeguard against the potential problem of 'free rider' investors, i.e., third-party entities that may only as a matter of formality be entitled to the benefits of a particular agreement," and that they allow a treaty party "to deny benefits to

[272] Reply ¶98.

[273] Reply ¶99.

[274] Reply ¶99.

[275] Reply ¶103, *citing* Vienna Convention of the Law of Treaties, Article 31(1).

[276] *Pac Rim Cayman LLC v. Republic of El Salvador,* ICSID Case No. ARB/09/12, Submission of the United States of America, 20 May 2011, ¶3 (CL-241).

an enterprise if it is merely a 'sham company' having no 'substantial business activities' in the … country in which it is established."[277]

278. To the Claimants, it follows that the object and purpose of Article I.2 is to prevent "treaty shopping." The intended application is limited to companies that are formally incorporated in a particular State in order to take advantage of the relevant treaty. It would be "nonsensical" to suggest that EuroGas, which has been operating in the United States for 20 years (first as the 1985 Company and then as the Claimant EuroGas), was incorporated in order to secure the advantages of the US-Slovakia BIT.[278]

279. In this regard, the Claimants assert that EuroGas is unlike the claimant in *Pac Rim v. El Salvador*. In particular, until 2011, EuroGas was registered with the SEC and had publicly traded stock, and today it still has hundreds of shareholders.[279] Notably, after 2011, EuroGas "continued to own its U.S. assets, namely EuroGas Silver & Gold and Tombstone, both of which conducted mining exploration activities in the U.S."[280]

280. The Claimants' second argument is that the Respondent has failed to show how its "disjointed allegations" regarding EuroGas demonstrate an absence of business activities, as required by Article I.2 of the US-Slovakia BIT.[281] According to the Claimants, these allegations are irrelevant in assessing EuroGas' main business and reflect a misunderstanding of junior mining companies. In particular, the Claimants assert that:

    a. The absence of operational revenues is to be expected "because the accumulation of substantial losses is inherent to the very nature of the activity of junior mining companies."[282]

[277] Reply ¶104, *quoting Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Submission of the United States of America, 20 May 2011, ¶3 (CL-241).

[278] Reply ¶¶105-106.

[279] Reply ¶107, *citing* Complete Stock Holders List of EuroGas, Inc. – Common (as of 14 November 2011).

[280] Reply ¶109.

[281] Reply ¶110.

[282] Reply ¶¶111-114.

b. EuroGas had very few assets other than shareholding in projects outside of the United States to be auctioned in the Bankruptcy Proceedings because "junior mining companies typically do not own many assets, and their most valuable one is their investment in the exploration of newly discovered deposits, in the hope of a high rate of return."[283]

c. It is irrelevant whether EuroGas' management was based outside of the United States "given that its activity as a junior mining company, which consisted mainly in raising capital to fund exploration projects, remained in the U.S."[284]

d. EuroGas would not need to have a physical office to carry out its business, and it has always maintained an address in the United States (at times a P.O. Box) where it could be reached.[285]

281. The Claimants' third argument is temporal: the Respondent has failed to identify at which point in time a company must lack substantial business activities in order to fall within Article I.2 of the US-Slovakia BIT.[286] According to the Claimants, if a company has the requisite "substantial business activities" at any time during the life of the investment, that "in itself would demonstrate a high level of commitment to the country's economy."[287] To deny such an investor the benefits of the US-Slovakia BIT on the basis of a formal requirement would run counter to the BIT's object and purpose, which, as reflected in its preamble, is to stimulate investment by offering investors foreseeable protections.[288]

282. The Claimants' position is summarized as follows:

[283] Reply ¶114.

[284] Reply ¶114.

[285] Reply ¶114.

[286] Reply ¶¶115-123. The Claimants point out that previous tribunals considering denial of benefits clauses have not been called upon to address this specific question. This is because, when compared to the element of foreign control, the level of a company's business activities is much less volatile, and significant time and money would be required to "fake" substantial activities. Reply ¶116.

[287] Reply ¶118.

[288] Reply ¶121, *citing* the US-Slovakia BIT, Preamble (C-1).

> *once the existence of substantial business activities has been ascertained at one point during the life of the investment, or at the very least at the time of the initial investment … any purported attempt to invoke the denial of benefits clause would go against the object and purpose of the Treaty and should fail. Any other conclusion would defeat the object and purpose of the Treaty, especially in circumstances where it may very well be the host State's very own breaches that could have caused the investor to cease having any substantial activities in the U.S.*[289]

283. According to the Claimants, the Respondent has not shown, or even attempted to show, that EuroGas lacked substantial business activities in the territory of the United States in 1998, at the time of the initial investment.[290] In light of EuroGas' operations at that time, the Claimants consider the existence of EuroGas' substantial business activities to be undisputable.

C. *Ratione Temporis* Application of the Canada-Slovakia BIT

(1) Respondent's Position

284. The Respondent's objection to the Tribunal's jurisdiction *ratione temporis* over Belmont finds its basis in Article 15(6) of the Canada-Slovakia BIT, which limits the treaty's application "to any dispute that has arisen not more than three years prior to its entry into force." The Respondent submits that because the Canada-Slovakia BIT entered into force on 14 March 2012, it covers only disputes arising after 14 March 2009, and the Tribunal therefore lacks jurisdiction *ratione temporis* over Belmont in relation to any dispute arising before that date.[291]

285. In applying Article 15(6) to Belmont's claims in this arbitration, the Respondent asserts that the Claimants advance two distinct types of claims: (a) one for the Respondent's wrongful reassignment of Rozmin's mining rights in 2005 (referred to by the Respondent as the "Reassignment Claim"); and (b) another for the Respondent's failure to remedy the

[289] Reply ¶122.

[290] Reply ¶123.

[291] Counter-Memorial §II.B; Rejoinder §III.B.

wrongful reassignment through its administrative and judicial processes (referred to by the Respondent as the "Denial-of-Justice Claim").[292]

286. The Respondent's primary argument is that the "real cause" of this dispute is the reassignment of the Mining Area in 2005; the decisions of Slovak administrative and judicial authorities at issue in this case cannot be considered a separate dispute.[293]

287. In this regard, the Respondent relies on *Lucchetti v. Peru*, in which the tribunal found that it lacked jurisdiction *ratione temporis* to hear a dispute with the same subject matter as a dispute that arose before the relevant treaty came into force.[294] The tribunal considered the critical inquiry to be "whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute."[295] Applying this test to the present case, the Respondent argues that the Slovak administrative and judicial proceedings "merely continued the earlier dispute."[296]

288. The Respondent finds further support for this approach in *Phosphates in Morocco*, in which the PCIJ drew a distinction between the "real causes of the dispute" and "subsequent factors which either presume the existence or are merely the confirmation or development of earlier situations or facts."[297] The court found that the real cause of the dispute before it was the alleged expropriation, not the subsequent administrative and judicial processes

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[292] Counter-Memorial ¶¶146-147; Rejoinder ¶¶244-245. According to the Respondent, the Claimants have not disputed this distinction between types of claims, and they have admitted that they are not asserting a claim for a single "creeping expropriation." Rejoinder ¶246; *see* Counter-Memorial ¶145.

[293] Rejoinder §III.B.2. The Respondent applies the objective definition of "dispute" offered in the *Mavrommatis* case (a "disagreement on a point of law or fact, a conflict of legal views or of interests between two persons"), and concludes that the dispute leading to the Reassignment Claim arose on 3 May 2005. Counter-Memorial ¶153, *citing Mavrommatis Palestine Concessions*, P.C.I.J., Series A, No. 2, Objection to the Jurisdiction of the Court, 30 August 1924, p. 11 (RL-108).

[294] Counter-Memorial ¶¶160-163; Rejoinder ¶248, *citing Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, ¶53 (RL-21).

[295] *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, ¶53 (RL-21).

[296] Counter-Memorial ¶¶160-163, *quoting Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, ¶48 (RL-21).

[297] *Phosphates in Morocco (Italy v. France)*, Judgment of 14 June 1938, PCIJ Reports, Series A/B No. 74, p. 16 (CL-33).

undertaken to remedy the taking.[298] It also found that an alleged denial of justice could not be considered a factor giving rise to the underlying dispute.[299] The Respondent argues that the same reasoning applies in the present case: the real cause of the dispute is the reassignment of Rozmin's mining rights.[300]

289. In this regard, the Respondent rejects the Claimants' argument that the judicial treatment of an earlier claim can give rise to a new investment dispute. Claimants rely solely on *Jan de Nul v. Egypt*, in which the tribunal ruled that the dispute had not crystalized prior to the final judgment of the domestic court. However, the Respondent argues that it has shown that case to be fundamentally different and that the Claimants have not disagreed with its analysis.[301]

290. The Respondent also challenges the Claimants' assertion that a dispute arises only when the complaint is articulated.[302] For the Respondent, "the moment when a dispute arises must be determined objectively and cannot depend solely on the formalistic manner of articulation of claims."[303] This has been confirmed by numerous international tribunals, including the tribunals in *Lao Holdings v. Laos* and *African Holding v. Congo.*[304] An

[298] Similarly, the Respondent cites *African Holding Company v. Congo*, a contractual case, in which the tribunal found that the dispute arose when the respondent first failed to pay amounts due under the relevant contract, not at a later date when the respondent expressly refused to pay. Counter-Memorial ¶154-155 citing *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République démocratique du Congo*, ICSID Case No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité, ¶121 (RL-22).

[299] *Phosphates in Morocco (Italy v. France)*, PCIJ Reports, Ser. A/B No. 74, 1938, pp. 13, 28 (CL-33).

[300] Counter-Memorial ¶159.

[301] Rejoinder ¶¶251-255, *citing Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, ¶¶127-128. The Respondent asserts that, unlike in the present case, in *Jan de Nul*, the State was not involved in the underlying dispute; it only became involved through its courts. Therefore, the judicial action was considered to be a "decisive factor" in defining the dispute. That cannot be the case here, where the State has been involved since the reassignment of the Mining Area. *Id.*

[302] Rejoinder §III.B.3

[303] Counter-Memorial ¶169.

[304] Rejoinder ¶256, *citing Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014, ¶ 124 (CL-49) ("the question is whether the facts, objectively analysed, establish the existence of a dispute and if so at what time did it arise"); *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République démocratique du Congo*, ICSID Case No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité, ¶¶120-121 (RL-22).

objective analysis shows that this dispute arose upon the reassignment of the Mining Area.[305]

291. However, the Respondent does acknowledge that the ICJ and investment tribunals have in some cases applied a "more demanding" standard in identifying the time at which a dispute arises, requiring that the parties have articulated their disagreement.[306] According to the Respondent, even under this standard, the dispute in the present case arose in 2005, when Rozmin initiated proceedings in the Slovak courts and clearly expressed its disagreement with the reassignment of the Mining Area.[307] For the Respondent, it is irrelevant that Rozmin is not a claimant in this arbitration, especially since Belmont and Rozmin both acted through Mr. Agyagos.[308]

292. Further, the Respondent argues that the present dispute was articulated in terms of international investment law beginning in 2005, as follows:

a. In a letter to the DMO of 13 January 2005, Rozmin complained of the withdrawal of its rights and, after referring to the Canada-Slovakia BIT, stated: "It is undisputable that the unlawful withdrawal of the excavation area … is in conflict with the stated international treaties that have precedence over the Slovak laws."[309]

b. In a letter to the Slovak Minister of Economy of 3 November 2005, Mr. Agyagos (as Belmont's President and CEO) challenged the reassignment and threatened arbitration under bilateral investment treaties.[310]

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[305] Rejoinder §III.B.3.

[306] Counter-Memorial ¶¶164-165. For example, the tribunal in *Teinver v. Argentina* stated that: "To instigate a dispute … does not refer to the commission of the act that caused the parties to disagree, for the very simple reason a breach or violation does not become a 'dispute' until the injured party identifies the breach or violation and objects to it." *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012 (RL-109).

[307] Counter-Memorial ¶166; Rejoinder ¶261.

[308] Rejoinder ¶265.

[309] Counter-Memorial ¶171, Rozmin's complaint against DMO's acts, 13 January 2005 (R-161).

[310] Counter-Memorial ¶172, *citing* Letter from Mr. Agyagos and Belmont to the Minister of Economy of the Slovak Republic, 3 November 2005 (R-162).

c. In a letter of 22 September 2008, EuroGas GmbH also threatened to bring an international investment claim.[311]

293. Furthermore, the Respondent asserts that Belmont's own words contradict the Claimants' position that the dispute arose after 1 August 2012, when the local Slovak proceedings were concluded. In Claimants' notice of dispute of 23 December 2013, the Claimants refer to EuroGas' notice of dispute of 2011 and state that "Belmont's claims are the very same as those of EuroGas."[312]

294. In light of these facts, the Respondent concludes that there is no doubt that the dispute leading to the Reassignment Claim arose before 14 March 2009 when the Canada-Slovakia BIT first began to apply.

295. In the Respondent's view, the Claimants try to avoid this clear result by improperly conflating the words "arise" and "initiate" under the Canada-Slovakia BIT.[313] However, the Canada-Slovakia BIT intentionally distinguishes between the time when a dispute is initiated (by being notified to the State under the terms of the treaty), and the time when it arises, which logically must precede its initiation.[314]

296. Turning specifically to what Respondent calls the Claimants' "Denial-of-Justice Claim," the Respondent states:

> *Once the dispute over the reassignment of the Excavation Area was submitted to the Slovak Republic's administrative and judicial authorities, the treatment by these authorities may only give rise to a claim for denial of justice.*[315]

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[311] Counter-Memorial ¶174, *citing* Letter from EuroGas GmbH to the Minister of Economy of the Slovak Republic, 22 September 2008 (R-163).

[312] Rejoinder ¶268, *citing* Letter from EuroGas Inc. and Belmont Resources Inc. to the Government of the Slovak Republic, 23 December 2013, ¶35 (C-42).

[313] Rejoinder §III.B.5.

[314] Counter-Memorial ¶167, *citing* Canada-Slovakia BIT, Article X(2) (C-2) ("if the dispute has not been settled amicably within a period of six months from the date on which the dispute was initiated, it may be submitted by the investor to arbitration.").

[315] Counter-Memorial ¶177. *See* Rejoinder ¶245.

297. According to the Respondent, the tribunal lacks jurisdiction over any administrative/judicial actions prior to 14 March 2009. Thus, the Respondent identifies just four events occurring after that date: (a) the Regional Court decision of 3 February 2010, (b) the Supreme Court decision of 18 May 2011, (c) the DMO's reassignment on 30 March 2012, and (d) the MMO's confirmation of that assignment on 1 August 2012.[316] However, for the Respondent, the fact remains that "the reassignment of Rozmin's Excavation Area in 2005 is the one and only source of this dispute."[317]

298. Finally, the Respondent addresses the Claimants' argument that the Respondent is estopped from raising its objection *ratione temporis* against Belmont because it "represented, as late as in May 2012, that the dispute was not yet ripe and that the filing of the arbitration should therefore be delayed."[318] In Respondent's view, none of the three requirements for estoppel under international law is met in this case:[319]

a. First, there is no clear statement of fact. In the 2 May 2012 letter upon which the Claimants rely, the Respondent never stated that the "dispute was not ripe," as the Claimants allege. Even if this statement had been made, it would be merely a legal characterisation, not a statement of fact.[320]

b. Second, the Respondent's statements in the 2 May 2012 letter were not unconditional. Indeed, the letter contains an express reservation of rights.[321]

[316] Counter-Memorial ¶178.

[317] Rejoinder ¶247.

[318] Rejoinder §III.B.6; Letter from the Slovak Republic, 2 May 2012, (C-40). The Respondent also rejects any suggestion that this letter could form an independent basis for jurisdiction *ratione temporis* over Belmont's claims, as suggested by the Claimants, given that this letter related only to EuroGas' claims. Counter-Memorial ¶¶182-183.

[319] Rejoinder ¶276. The Respondent adopts the requirements set forth by the tribunal in *Pan Am v. Argentina* (*quoting* the ICJ in *Temple of Preah Vihear*): "(i) a clear statement of fact by one party which (ii) is voluntary, unconditional and authorised; and (iii) reliance in good faith by another party on that statement to that party's detriment or to the advantage of the first party." *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, ¶¶151, 160 (CL-60).

[320] Rejoinder ¶¶278-280.

[321] Rejoinder ¶281.

c. Third, there was no good faith reliance on the Respondent's statement.[322] In fact, Belmont could not have relied on any statement in the 2 May 2012 letter, because that letter related only to EuroGas' claims brought under the US-Slovakia BIT.

299. Furthermore, the Respondent argues that Belmont could have initiated its investment treaty claims under the previous BIT between Canada and the Slovak Republic, which was effective from 30 January 2001 until 14 March 2012, the period when most of the alleged events relating to Belmont's claims occurred.[323] Nothing prevented Belmont from initiating international arbitration immediately after the reassignment of the Mining Area, whether in parallel or *in lieu* of Rozmin's domestic proceedings.[324] In particular, Article X(5) of the Canada-Slovakia BIT did not restrict Belmont's choice because Rozmin was not seeking monetary damages. Indeed, for the Respondent, Article X(5) only confirms that a treaty claim can arise before the conclusion of local proceedings.[325]

300. According to the Respondent, Belmont had more than seven years to seek recourse to arbitration under the previous Canada-Slovakia BIT, and by waiting, it assumed the risk that its claim would be time-barred.[326] This principle was recently upheld by the tribunal in *Ping An v. Belgium*, which held that disputes already notified to the host State, but not yet submitted to arbitration when a successive investment treaty came into force, fell outside of the tribunal's jurisdiction *ratione temporis*. For the Respondent, the same is true here.[327]

(2) Claimants' Position

301. In response to the Respondent's objection to the Tribunal's jurisdiction *ratione temporis*, the Claimants submit that: (a) the Respondent should be estopped from raising this

[322] Rejoinder ¶282.

[323] Rejoinder §III.B.7.

[324] According to the Respondent, those domestic proceedings and the "investment claim are totally independent." Rejoinder ¶289.

[325] Rejoinder ¶239.

[326] Rejoinder ¶269.

[327] Rejoinder ¶¶297-299, *citing Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium*, ICSID Case No. ARB/12/29, Award, 30 April 2015, ¶¶231-232 (RL-187).

argument because in May 2012, it represented that the dispute was not yet ripe;[328] and (b) although certain events giving rise to this dispute occurred before the critical date of 14 March 2009, the dispute arose only thereafter.[329]

302. In connection with the estoppel argument, the Claimants point primarily to a letter of 2 May 2012 from Mr. Peter Kažimír, the Deputy Prime Minister and Minister of Finance of the Slovak Republic, sent in response to EuroGas' notice of dispute dated 31 October 2011.[330] According to the Claimants, Mr. Kažimír stated that the dispute was not yet ripe because local proceedings were pending, and it would therefore be premature to engage in settlement negotiations.[331]

303. In light of this statement by the Respondent, the Claimants' position is that:

> *Respondent cannot, state, in 2012, that the dispute related to the revocation of Rozmin's mining rights is not ripe for arbitration as long as local proceedings are ongoing, and then, in 2014, once the domestic proceedings have reached a close, argue that Belmont should already have initiated proceedings concurrently with Rozmin's domestic proceedings. Respondent's position is inconsistent and Respondent is therefore estopped from raising, in the proceedings, any timing issue with respect to the initiation of the proceedings.*[332]

304. Indeed, according to the Claimants, the Respondent continued to intentionally delay the initiation of proceedings, even after the Claimants sent the Respondent a "Final Notice of Dispute" on 23 December 2013.[333]

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[328] Reply §II.B.1.

[329] Reply §II.B.2.

[330] Reply ¶189, *citing* Letter from EuroGas Inc. to the Government of the Slovak Republic, 31 October 2011 (C-39) and Letter from the Slovak Republic, 2 May 2012 (C-40).

[331] Reply ¶189, *citing* Letter from the Slovak Republic, dated 2 May 2012 (C-40) ("the administrative procedure before the Slovak mining offices is still pending, therefore any discussions regarding the alleged claims of EuroGas Inc. seems to me to be premature.").

[332] Reply ¶192.

[333] Reply ¶193, *citing* Letter from EuroGas Inc. and Belmont Resources Inc. to the Government of the Slovak Republic, 23 December 2013, ¶35 (C-42). In response to this letter, the Respondent cited the six-month period of negotiation and consultation under Article X(2) of the Canada-Slovakia BIT.

305. In any event, in the Claimants' view, even if the Tribunal were to determine that the Respondent is not estopped from raising this jurisdictional objection, the objection should still be dismissed.[334]

306. The Claimants accept that under Article 15(6) of the Canada-Slovakia BIT, the dispute itself must have arisen after 14 March 2009.[335] However, unlike the Respondent, their position is that the dispute arose only after that critical date. The Claimants raise five main arguments to contest the Respondent's position.

307. First, the Claimants argue that the Respondent mistakenly focuses on the events leading up to the dispute, when the only relevant factor in determining whether the Tribunal has jurisdiction *ratione temporis* is the time when the dispute itself arises.[336] In this regard, the Claimants point to *Maffezini v. Spain*, in which the tribunal held that it had jurisdiction *ratione temporis* because, even though the events giving rise to the dispute predated the entry into force of the relevant treaty, the dispute itself did not arise until after that date.[337]

308. The Claimants also cite Professors Dolzer and Schreuer's statement that:

> *The time of the dispute is not identical with the time of the events leading to the dispute. By definition, the allegedly illegal acts must have occurred some time before the dispute. Therefore, the exclusion of disputes occurring before the treaty's entry into force should not be read as excluding jurisdiction over events occurring before that date*.[338]

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[334] Reply §II.B.2.

[335] Reply ¶197.

[336] Reply ¶¶197-199.

[337] Reply ¶198, *citing Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, ¶96 (CL-39) ("there tends to be a natural sequence of events that leads to a dispute. … The conflict of legal views and interests will only be present in the latter stage, even though the underlying facts predate them. It has also been rightly commented that the existence of the dispute presupposes a minimum of communications between the parties, one Party taking up the matter with the other, with the latter opposing the Claimant's position directly or indirectly.").

[338] Reply ¶197, *quoting* Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2008), p. 44 (CL-36).

309. According to the Claimants, this important distinction is reflected in the text of Article 15(6) of the Canada-Slovakia BIT, which provides that the treaty "shall apply to any *dispute* which has arisen not more than three years prior to its entry into force."[339] In contrast, the Claimants point out that the PCIJ's jurisdiction in *Phosphates of Morocco* depended on the time at which the "situations or facts" leading up to the dispute occurred.[340] Similarly, in *African Holding v. Congo,* the tribunal explained that it was the date of the events leading up to the dispute, rather than the dispute itself, which was determinative of its jurisdiction.[341] Therefore, the Respondent's reliance on these cases is entirely misplaced.

310. In the Claimants' view, the DMO's reassignment of the Mining Area to Economy Agency on 3 May 2005 is merely an event leading up to the dispute and is thus "perfectly irrelevant" to determining whether the Tribunal has jurisdiction *ratione temporis.*[342] Similarly, the fact that on 16 March 2009 Mr. Agyagos referred to "direct damage" caused by the Slovak Republic is immaterial, given that damage may be – and often is – incurred before a dispute arises.

311. Second, contrary to the Respondent's position, the Claimants submit that the parties' formulation of opposing views and articulation of claims in terms of international investment law are critical in determining when the dispute arose.[343] The Claimants point to the requirement in Article 25 of the ICSID Convention that the "dispute must concern the existence or scope of a legal right or obligation." They assert that tribunals have repeatedly held that "the decisive factor in determining the legal nature of the dispute was

[339] Reply ¶197, *quoting* the Canada-Slovakia BIT, Article 15(6) (C-2) (emphasis added by the Claimants).

[340] Reply ¶200, *citing Phosphates in Morocco (Italy v. France),* Judgment of 14 June 1938, PCIJ Reports, Series A/B No. 74, p. 22 (CL-33). The Court's jurisdiction was based on the French Government's acceptance of jurisdiction under Article 36(2) of the PCIJ's Statute.

[341] Reply ¶201, *citing African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République démocratique du Congo,* ICSID Case No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité, 29 July 2008, ¶¶120-121 (RL-22).

[342] Reply ¶202.

[343] Reply ¶204.

the assertion of legal rights and the articulation of the claims in terms of law."[344] The Claimants cite *Toto Costruzioni v. Lebanon*, in which the tribunal held that the dispute in question crystallized only when one party invited the other to have recourse to arbitration under the applicable investment treaty.[345]

312. Furthermore, according to the Claimants, a dispute cannot be deemed to have arisen until "the claim of one Party was positively opposed by the other."[346] As stated by the tribunal in *RDC v. Guatemala*, a dispute is "a conflict of views on points of law or fact which requires sufficient communication between the parties for each to know the other's views and oppose them."[347]

313. On this basis, the Claimants reject the Respondent's position that the present dispute could have arisen when Rozmin stated on 13 January 2005 that a withdrawal of its mining rights would constitute a breach of international law,[348] or on 3 November 2005 when Mr. Agyagos wrote to the Slovak Minister of Economy mentioning "the relevant international institutions to which we intend to subsequently refer."[349] The Claimants consider these to be merely "one-sided observations, which were not accompanied by any claim."[350] Similarly, the dispute could not be deemed to have arisen on the basis of EuroGas GmbH's

[344] Reply ¶207, *quoting* Christoph Schreuer, "What is a Legal Dispute?", in James Crawford, Alain Pellet & Stephan Wittich (eds.), *International Law Between Universalism and Fragmentation* (2008), p. 966 (CL-38).

[345] Reply ¶208, *citing Toto Costruzioni Generali S.p.A. v. Lebanese Republic*, ICSID Case No. ARB/07/12, Award, 7 June 2012, ¶63 (C-62).

[346] Reply ¶211, *quoting South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment of 21 December 1962, ICJ Reports 1962, pp. 319 *et seq.* (CL-42). The Claimants also quote the ICJ's statement that "it is not sufficient for one Party to assert that there is a dispute." *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, ICJ Reports 1974, p. 271, ¶55 (CL-45).

[347] Reply ¶211, *quoting Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010 (CL-133), ¶129. The Claimants also rely on *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Jurisdiction, 17 October 2006 (CL-61), ¶52.

[348] Rozmin's complaint against DMO's acts, 13 January 2005 (R-161) (referring to "foreign investors – the companies Belmont Resources Inc. with its seat in Canada and EuroGas GmbH. with its seat in the Federal Republic of Austria, whose investments are protected by bilateral investment treaties concluded with the Federal Republic of Austria and with Canada" and stating that "[i]t is undisputable that the unlawful withdrawal of the excavation area, which will evidently occur without any compensation, is in conflict with the stated international treaties.").

[349] Letter from Mr. Agyagos and Belmont to the Minister of Economy, 3 November 2005 (R-162).

[350] Reply ¶212.

22 September 2008 letter to the Minister of Economy,[351] as EuroGas GmbH is not even a Party to this arbitration and did not formulate any claim in that letter.[352]

314. Third, the Claimants reject the Respondent's assertion that the dispute arose as soon as Rozmin asserted its claims in domestic proceedings. The Claimants cite *Jan de Nul v. Egypt*, where the tribunal found that it had jurisdiction over the relevant treaty dispute even though a dispute concerning the same facts had been submitted to local courts before the treaty had entered force.[353]

315. The Claimants argue that the dispute before the Slovak courts is not the same as the one before the Tribunal. They differ *ratione personae* as Belmont was not a party to the local proceedings, and they differ *ratione materiae* as the local proceedings concern Rozmin's rights under Slovak domestic law. Thus, the Respondent's reliance on *Lucchetti v. Peru* is misplaced, as the factual scenario in that case differs radically from the facts before the Tribunal.[354]

316. According to the Claimants, "[a]s long as there was a chance of reinstatement of Rozmin's rights through local court proceedings, the dispute was not ripe for purposes of arbitration."[355] Indeed, the Claimants argue that the Respondent itself acknowledged as much in its letter of 2 May 2012.[356] Regarding this letter, the Claimants reject the Respondent's assertion that it related only to EuroGas (and not to Belmont), given that the two Claimants' claims are identical. Furthermore, as late as 28 January 2015, two years

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[351] Letter from EuroGas GmbH to the Minister of Economy of the Slovak Republic, 22 September 2008 (R-163).

[352] Reply ¶212

[353] Reply ¶215, *citing Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, ¶¶116-121 (CL-58). The applicable treaty in that case provided that it would not apply to disputes that had arisen before its entry into force.

[354] Reply ¶¶232-234, *citing Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005 ¶53 (RL-21). The Claimants point out in particular that in *Lucchetti v. Peru*, the claimant in the local proceeding and in the arbitration was the same, and that there was no BIT in force at the time when the dispute was submitted to local authorities.

[355] Reply ¶230.

[356] Reply ¶221, *citing* Letter from the Slovak Republic, dated 2 May 2012 (C-40) ("the administrative procedure before the Slovak mining offices is still pending, therefore any discussions regarding the alleged claims of EuroGas Inc. seems to me to be premature prior relevant decisions of local authorities are rendered.").

after the Canada-Slovakia BIT entered into force, the Respondent asserted that it was unaware of any dispute with Belmont.[357]

317. Also in this context, the Claimants oppose the Respondent's interpretation of the Canada-Slovakia BIT as distinguishing between the moment when a dispute is "initiated" and when it "arises." According to the Claimants, under Article X(2) of that treaty, "the outset of the dispute – the moment when the dispute arises or is 'initiated' – corresponds to the moment one party articulates its claims, which triggers the parties' duty to engage in settlement negotiations."[358]

318. Fourth, the Claimants recall that one of the breaches they are alleging is that the Slovak Republic failed to comply with the decisions of the Slovak Supreme Court, issued on 27 February 2008 and 18 May 2011. They argue that it was not until 1 August 2012, when the MMO confirmed the DMO's reassignment of the Mining Area that any prospect of Belmont's recovery through the local proceedings was closed.[359] That was well after the critical date for the purpose of jurisdiction *ratione temporis*.

319. Finally, according to the Claimants, the Respondent's argument that Belmont should have initiated arbitration sooner, before the exhaustion of local remedies, contradicts its own position on the merits that the Claimants' claims relating to the Supreme Court decisions were not ripe until all local remedies had been exhausted.[360]

[357] Reply ¶225, *citing* Letter from Mr. Peter Kažimr, Deputy Prime Minister and Minister of Finance of the Slovak Republic to Dr. Hamid Gharavi, Counsel for Claimants, 28 January 2014 (C-59) (stating that Dr. Gharavi's letter of 23 December 2013 was "the first information that the Slovak Republic [had] received regarding a dispute from Belmont Resources Inc.").

[358] Reply ¶217. The Claimants state that the BIT distinguishes between the moments when the dispute is initiated or arises, on the one hand, and when the dispute is submitted to arbitration, on the other. *Id.*, *citing* Canada-Slovakia BIT Article 15(6) (C-2).

[359] Reply ¶¶235-236.

[360] Reply ¶237.

D. Belmont's Ownership of the Investment

(1) Respondent's Position

320. The Respondent's jurisdictional objection relating to Belmont's standing is that this Claimant no longer holds any shares in Rozmin and cannot bring a claim on the basis of an alleged investment it does not own. Belmont therefore "has no standing to bring its claims, and the Tribunal has no jurisdiction *ratione materiae* over them."[361]

321. According to the Respondent, Belmont sold its 57% interest in Rozmin to EuroGas I through a Sale and Purchase Agreement dated as of 27 March 2001 (the "**SPA**").[362] The date of the SPA is important to the Respondent, who asserts that the agreement was executed at a time when EuroGas I still had the legal capacity to enter the SPA, before the company was dissolved and before it entered the Bankruptcy Proceedings.[363]

322. To support this jurisdictional objection, the Respondent relies on the analysis of the SPA provided by its expert on British Columbia Law (which governs the SPA), as well as on certain public statements and actions of EuroGas and Belmont after the SPA's execution.[364]

323. The Respondent and its expert oppose the Claimants' argument that Belmont still owns the shares in Rozmin, as certain conditions precedent provided in the SPA were unfulfilled. The analysis of the Respondent's expert focuses in particular on Sections 2.1, 4.1, and 6.1 of the SPA:

a. Section 2.1(a) requires EuroGas to transfer 12,000,000 of its common shares (the "**Purchase Price Shares**") to Belmont. Under Section 6.1 of the SPA, this is a

[361] Counter-Memorial ¶142. *See* Rejoinder §III.A.

[362] Share Purchase Agreement between EuroGas Inc. and Belmont Resources Inc., 17 April 2001 (R-15). The Respondent notes that the Claimants did not disclose this document to the Tribunal, and the Respondent had to uncover it through its own research.

[363] Rejoinder ¶223.

[364] Rejoinder §III.A.

condition precedent to closing of the sale. It is undisputed that this condition was satisfied.[365]

b. Section 2.1(e) requires EuroGas to pay Belmont a USD 100,000.00 non-refundable advance royalty. Under Section 6.1 of the SPA, this too is a condition precedent to closing of the sale. The Claimants acknowledge that at least USD 74,000.00 was paid, and in fact, Belmont's audited financial statements show, effectively, that the entire amount was paid.[366]

c. Section 2.1(b), (c) and (d) are obligations that "need only be undertaken, not actually be performed, before the 57% interest transfers."[367] This interpretation is confirmed by the language of the provision and the nature of the obligations. For example, Section 2.1(d) grants to Belmont a 2% royalty on "the gross sale revenue of any talc sold [during] the mining life of the deposit." The only condition to closing is the *grant* of a 2% royalty; the *payment* of the royalty could not take place until later, after closing.[368]

d. Sections 4.1(b) and (c) provide that EuroGas will issue additional shares to Belmont in certain circumstances following the closing. EuroGas did issue 3,830,000 additional shares to Belmont under Subsection 4.1(b).[369]

e. Section 4.1(d) states that EuroGas I "*agrees* to arrange the necessary financing."[370] EuroGas obviously met this requirement by signing the SPA. If EuroGas could not arrange financing, it was to "pay [Belmont] an advance royalty of USD 10,000.00 per month." Any failure to pay that monthly royalty would not prevent the closing of the sale, although it might be grounds for a breach of contract claim by Belmont.

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[365] Rejoinder ¶175.

[366] Rejoinder ¶¶176-177, *citing* Belmont Resources Inc.'s Audited Consolidated Financial Statements for the Years Ended 31 January 2002 and 2001, notes 2 and 3 (R-114) (referring to "[p]ayment by EuroGas of $100,000 U.S. as advance royalties (subsequently net recovery to Belmont of $96,744)").

[367] Rejoinder ¶181.

[368] Anderson ER ¶12.

[369] Rejoinder ¶185, *citing* Letter from Belmont to EuroGas, dated 10 October 2002 (R-112).

[370] Rejoinder ¶¶208-212, *quoting* SPA, Section 4.1(d) (emphasis added by the Respondent).

f. Section 6.1 states that ownership of the 57% interest in Rozmin will not pass to EuroGas "unless and until [Belmont] has received 125% of its initial investment equal to CDN $3,000,000 through the sale of the Purchase Price Shares." However, "it is clear that the words cannot be given their plain meaning" because that would lead to a commercially absurd result: after receiving payment, Belmont could prevent the transaction by simply selling the shares for less, or not at all.[371] Further, there is a disconnect between Section 6.1 and Subsections 4.1(b) and (c). To reconcile this, Section 6.1 should be read to provide that "the shares to the 57% interest remain with Belmont as collateral, which secures EuroGas I's obligation to issue additional shares under Subsections 4.1(b) and (c)."[372]

324. Based on this analysis, the Respondent concludes that Belmont transferred its 57% stake in Rozmin to EuroGas at the time of closing, retaining only a security interest in those shares to secure EuroGas' compliance with other covenants in the SPA.[373]

325. According to the Respondent, this conclusion is consistent with the fact that the Claimants have repeatedly declared that Belmont sold the 57% interest to EuroGas, including on the following occasions:

a. Belmont's 2002 audited financial statements stated that Belmont "sold its 57% interest in Rozmin s.r.o. effective 27 March 2001 … and holds the shares as a collateral measure only."[374]

b. Belmont's Annual Information Form of 30 September 2002 also stated that it sold interest in Rozmin to EuroGas.[375]

[371] Anderson ER ¶16.

[372] Counter-Memorial ¶131; Rejoinder ¶200; Anderson ER ¶7. In other words, Belmont could foreclose and repossess legal title to the shares in Rozmin if EuroGas failed to issue additional shares under Subsections 4.1(b) and (c).

[373] Counter-Memorial ¶131; Anderson ER ¶5.

[374] Counter-Memorial ¶132, *quoting* Belmont Resources Inc.'s Audited Consolidated Financial Statements Years Ended 31 January 2002 and 2001, note 2, p. 8 (R-114).

[375] Counter-Memorial ¶133, *citing* Belmont Annual Information Form, 30 September 2002 (R-116).

c. In September 2004, Belmont alleged a breach of the SPA and threatened to "repossess" its shares from Rozmin but then agreed not to "foreclose" on the collateral interest.[376]

d. Belmont and EuroGas I entered into a letter agreement on 24 September 2004, in which they recognized "EuroGas, Inc.'s 57% interest in Rozmin s.r.o."[377]

e. Mr. Vojtech Agyagos, President and Director of Belmont, testified before Slovak criminal authorities that Belmont "sold its shares probably in 2002 to EuroGas" and "did not suffer any direct damage" from the Respondent's acts alleged in this arbitration.[378]

f. On 17 August 2013, Mr. Alexander Danicek, an executive of Rozmin from 2008 to 2014, stated before Austrian criminal authorities that EuroGas owned a 90% share in Rozmin.[379]

g. Claimants have stated that Belmont will receive just a 3.5% interest in any award in this case and that it will not cover any of the arbitration costs.[380]

h. EuroGas AG informed the German Stock Market that EuroGas had acquired an additional 57% of the shares of Rozmin.[381]

326. The Respondent acknowledges that Belmont has also made statements conflicting with those above. However, "[t]he fact that Belmont both claimed and denied ownership whenever it suited their interests should hardly be the basis for giving them the benefit of

[376] Counter-Memorial ¶134, *quoting* Letter from Belmont's counsel, Fang and Associates Barristers & Solicitors, to EuroGas, Inc., 16 September 2004 (R-117); Letter Agreement between Belmont and EuroGas, 24 September 2004 (C-297).

[377] Rejoinder ¶222, *citing* Letter Agreement between Belmont and EuroGas, 24 September 2004 (C-297).

[378] Counter-Memorial ¶135, *quoting* Witness Statement of Mr. Vojtech Agyagos provided with respect to criminal proceedings No. PPZ-155/BPK-S-2008, 16 March 2009, (with extended translation) (R-115).

[379] Counter-Memorial ¶137, *citing* Examination of Alexander Danicek by Austrian criminal authorities, 17 August 2013 (R-157).

[380] Counter-Memorial ¶138, *citing* Belmont's News Release, 20 November 2013 (R-158).

[381] Rejoinder ¶202, *citing* EuroGas AG Statement about participation (German original: DGAP-News EuroGas AG:Klarstellung zur Unternehmens-Beteiligung), (with extended translation), 25 February 2012, p. 1 (R-265).

the doubt."[382] The Claimants bear the burden of establishing the factual basis of the Tribunal's jurisdiction, and Belmont cannot rely on its ownership in Rozmin after having repeatedly admitted that it does not own Rozmin.

327. According to the Respondent, its position is also supported by the actions of EuroGas and Belmont. After receiving the EuroGas shares as consideration for the 57% transfer, Belmont sold them to a third Party.[383] Similarly, EuroGas claims to have granted an irrevocable option on the 57% interest in Rozmin to Protec Industries, Inc. and then transferred it to EuroGas GmbH.[384]

328. Respondent further argues that none of the other facts alleged by the Claimants demonstrate that Belmont retained ownership of the Rozmin interest. First, in the Respondent's view, it is "legally irrelevant" that Belmont is registered as a shareholder of Rozmin.[385] Under the Slovak Commercial Code in effect when the SPA was executed, "the registration of the change in ownership of shares in a limited liability company was not dispositive of ownership."[386] Second, the appointment of Mr. Agyagos to the board of EuroGas only undermines the Claimants' position, as it was precisely Belmont's shareholding in EuroGas – acquired through the SPA – that gave Belmont the right to appoint a director.[387] Similarly, "Belmont's injections of working capital into the Gemerská Poloma project are fully consistent with Belmont's new position as shareholder of EuroGas I," particularly because Belmont was to receive a royalty based on revenues from the project.[388]

[382] Counter-Memorial ¶140.

[383] Rejoinder ¶¶204-205, *citing* Belmont Resources Inc.'s Audited Consolidated Financial Statements for the Years ended 31 January 2004 and 2003, note 3 (R-43); Agyagos WS, ¶26.

[384] Rejoinder ¶206, *citing* Letter from Mr. Wolfgang Rauball to Mr. Arne Przybilla, of Protec Industries Ltd., 12 January 2004 (R-118); EuroGas AG Statement about participation (German original: DGAP-News EuroGas AG:Klarstellung zur Unternehmens-Beteiligung), (with extended translation), 25 February 2012 (R-265).

[385] Counter-Memorial ¶141.

[386] Counter-Memorial ¶141.

[387] Rejoinder ¶219.

[388] Rejoinder ¶221.

329. In addition, the Respondent challenges the Claimants' legal argument that even if Belmont held the shares in Rozmin only as collateral, the Tribunal would still have jurisdiction over Belmont. The Respondent contends that:

a. If Belmont held only a collateral security interest, then it would be nothing more than a creditor of EuroGas. As held by the tribunal in *Burimi v. Albania*, the creditor of an investor has no standing to bring claims for losses suffered by the investor. This is true even if the creditor holds the investment as collateral.[389]

b. Belmont's collateral security interest would not qualify as an "investment" under the *Salini* test, as it "involves no transfer of economic value from Belmont to the Slovak Republic, no effective contribution over a period of time, and no contribution to the development of the Slovak Republic's economy."[390]

330. Finally, the Respondent submits that even if EuroGas did not acquire legal title to the 57% interest in Rozmin under the SPA, at a minimum it became the beneficial owner of that interest. Therefore, in accordance with the general principle of law that "the beneficial (and not the nominal) owner of property is the real Party-in-interest before an international court," Belmont would still not have standing to bring its claims before this Tribunal.[391]

(2) Claimants' Position

331. In response to the Respondent's submissions relating to the SPA, the Claimants argue that (a) Belmont remains the owner of a 57% interest in Rozmin because certain conditions for the transfer of its shares under the SPA were never satisfied; and (b) even if Belmont

[389] Rejoinder ¶¶225-226, *citing Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Award, 29 May 2013, ¶36 (RL-177). The Respondent argues that the Claimants' reliance on *Saluka v. Czech Republic* is misplaced because the claimant in that case owned shares in the investment, and it was the ownership of those shares that qualified as an investment. Rejoinder ¶¶227-229, *discussing Saluka Investment BV v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶¶207 *et seq.* (CL-151).

[390] Rejoinder ¶¶231-234, *citing Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, ¶¶ 44-45 (CL-81).

[391] Rejoinder §III.A.5.

retained only a security interest in the 57% stake in Rozmin, this would still qualify as an "investment" under the Canada-Slovakia BIT and the ICSID Convention.[392]

332. The Claimants submit that Belmont never transferred its shares in Rozmin to EuroGas under the SPA because neither the conditions set forth in Article 2 of the SPA nor the condition precedent stipulated in Article 6.1 were fulfilled.[393]

333. First, the Claimants point out that Article 2(1)(a) and (e) of the SPA required EuroGas to transfer the Purchase Price Shares to Belmont, and to pay Belmont a non-refundable advance royalty of USD 100,000.00.[394] In turn, under Article 6.1, Belmont was to deliver to a trust all documentation necessary for the transfer of its shares in Rozmin. According to the Claimants, while EuroGas did transfer the common shares to Belmont, it fell short on the advance royalty payment by approximately USD 26,000.00. Therefore, Belmont never delivered the transfer documentation to the trust, and the shares were not transferred.[395]

334. The Claimants contest the opinion of the Respondent's expert that Belmont waived the shortfall on the advance royalty payment.[396] They assert that none of the correspondence cited by Mr. Anderson supports his assumption, and "there is no ground to assume an implicit waiver of any of the conditions stipulated in the SPA."[397]

335. Second, the Claimants point to Article 2.1(d) of the SPA, which provided that EuroGas would pay Belmont a 2% royalty on the revenue of any talc sold over the life of the Gemerska Poloma deposit. The Claimants argue that since the deposit never went into commercial production, EuroGas was unable to pay the 2% royalty. Further, it did not

[392] Reply §II.A.

[393] Reply ¶¶133 *et seq.*

[394] Reply ¶135, *citing* SPA, Article 2.1(a), (d) and (e) (R-15).

[395] Reply ¶¶139-142.

[396] Reply ¶140, *citing* Anderson ER ¶14.

[397] Reply ¶141. Mr. Anderson cites, *inter alia*, a letter from Belmont to EuroGas of 27 April 2004 (C-296). The Claimants point out that it does not mention a waiver and states that "[e]xcept as provided in this Letter of Understanding ('LOU'), all other terms and conditions of the March 27/01 Share Purchase Agreement and November 8/03 Agreement shall continue to have the same effect and force as though the parties had not entered into this LOU."

perform its obligation to make monthly advance royalty payments as required under Article 4(d).[398]

336. Third, the Claimants refer to Article 6.1 of the SPA, which stipulated that "the ownership of the Shares shall not pass to the Purchaser […] unless and until the Vendor has received 125% of its initial investment equal to CND $3,000,000 through the sale of the Purchase Price Shares." According to the Claimants, this condition precedent was never satisfied. In 2002, EuroGas issued Belmont an additional 3,830,000 restricted shares, but by 31 January 2006, Belmont had recovered only USD 1,505,400.00. The Claimants point out that the Respondent expressly acknowledged this fact in its Application for Provisional Measures.[399]

337. In addition to these contractual arguments, the Claimants submit that, in any event, after EuroGas' dissolution in 2001, it could no longer acquire Belmont's shares in Rozmin. Under Utah law "a dissolved company may enter into agreements after its dissolution only for purposes of winding up and liquidating its business and affairs. That does not include acquiring new assets or issuing new shares."[400]

338. According to the Claimants, in correspondence beginning in October 2003, Belmont and EuroGas acknowledged that Belmont had never transferred the 57% interest in Rozmin to EuroGas.[401] For example, on 18 June 2004, Belmont threatened to "offer for sale [its] 57%

[398] Article 4(d) required EuroGas to arrange the financing necessary to get the deposit into production within one year of the SPA. If this was not achieved, EuroGas was to pay Belmont "an advance royalty of U.S.$ 10,000 per month for each month of delay in achieving commercial production." Share Purchase Agreement between EuroGas Inc. and Belmont Resources Inc., 27 March 2001, Article 4(d) (R-15).

[399] Reply, ¶153, *citing* Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, 10 September 2014, ¶¶41-43 ("As of 31 January 2006, Belmont had disposed of all of the 15,830,000 EuroGas I shares for approximately US$1,505,400").

[400] Reply ¶176. In this regard, the Claimants submit that, if the Tribunal were to accept the Respondent's argument that EuroGas I did not have capacity to enter into a merger with EuroGas II after its dissolution, it "would also have to conclude that the 1985 Company could not have acquired Belmont's 57% interest in Rozmin after its dissolution." Reply ¶177.

[401] Reply ¶¶145-152, citing Letter from Belmont Resources Inc. to EuroGas Inc., 30 October 2003 (C-337); Letter Agreement between Belmont Resources and EuroGas Inc., 8 November 2003 (C-298); Letter of Understanding between Belmont Resources and EuroGas Inc. dated 27 April 2004 (C-296) ("Belmont agrees, once the remaining 50% is paid (Item3/Promissory Note) to transfer without any delay the recorded ownership of the 57% interest in Rozmin from Belmont to EuroGas Inc."); Letter from Belmont Resources Inc. to EuroGas Inc., 18 June 2004 (C-338);

interest in Rozmin s.r.o. to any interested third party."[402] Although the companies tried to recover the deal, EuroGas never performed its obligations.

339. Therefore, the Claimants conclude that Belmont remains the owner of its shares in Rozmin. The Claimants highlight that Belmont is still today a registered shareholder of Rozmin.[403] Further, EuroGas never acted as the beneficial owner of Belmont's interest in Rozmin.[404] Belmont remained active in Rozmin's management even after the SPA was executed and never ceded exclusive control to EuroGas. It also continued to make advances of working capital after the SPA was concluded, none of which was ever reimbursed.[405]

340. The Claimants challenge several aspects of the analysis of Respondent's expert, Mr. Anderson, who concludes that the transfer of shares was effected under the SPA.[406] In particular, they criticize his opinion that the words of Article 6.1 of the SPA "cannot be given their plain meaning" because that would lead to illogical results.[407] To the Claimants, this cannot be correct because:

a. As Mr. Anderson himself states, under the law of British Columbia, courts "initially interpret a contact by giving the words of a contract their ordinary meaning."[408]

b. Mr. Anderson incorrectly assumes that if the Purchase Price Shares were sold for less than CAD 3 million, the precondition in Article 6.1 of the SPA could never be met. He

Letter from EuroGas Inc. to Belmont Resources Inc., 24 September 2004, accepted and counter-signed by Mr. Agyagos on behalf of Belmont Resources Inc. (C-297).

[402] Letter from Belmont Resources Inc. to EuroGas Inc., 18 June 2004 (C-338).

[403] Reply ¶156, *citing* Extract from the Business Register of the Slovak Republic, 21 December 2014 (C-74). The Claimants consider the Respondent's statement that registration of a change in ownership was not legally required at the time of the SPA to be irrelevant; "the absence of re-registration cannot in any way be deemed proof than [*sic*] an actual change of ownership occurred."

[404] Reply ¶¶157-159.

[405] Reply ¶159, *citing* Rozmin s.r.o. Bank Statements from HVB Group from 2003 and 2004 (C-299 to C-303).

[406] Reply ¶¶160-168.

[407] Reply ¶163, *citing* Anderson ER ¶16.

[408] Reply ¶163, *citing* Anderson ER ¶ 10(a) and (b).

fails to consider that Article 4(c) requires EuroGas to "issue such additional common shares to compensate for any shortfall from the CDN$3,000,000."[409]

c. Mr. Anderson opines that Belmont had no obligation under the SPA to use its best efforts to sell the Purchase Price Shares. However, Belmont clearly had such a duty, given that Article 4(c) would apply only if Belmont was "unable" to recover CAD 3 million.[410]

341. The Claimants also challenge the reliance of the Respondent and Mr. Anderson on public statements regarding the sale of shares under the SPA. These statements have no legal effect "because mere declarations by one party alone … cannot bind or create rights and/or obligations for the other party."[411]

342. The Claimants acknowledge that in Belmont's 2001 and 2002 financial statements, the company stated that it held the 57% interest in Rozmin as collateral only.[412] They assert that at this time, Belmont was hopeful that EuroGas would fulfil its obligations. Indeed, in 2002, Belmont explained that it held the Rozmin shares "pending settlement of the amount of guarantee shares to be issued by EuroGas and completion of the U.S. registration statement."[413] Around the same time, Mr. Agyagos was appointed to serve on the board of EuroGas to ensure the company would perform its obligations under the SPA, and the press release announcing the appointment stated that Belmont had "*conditionally* accepted the sale of Belmont's 57% interest in Rozmin s.r.o. to EuroGas, Inc."[414]

[409] Reply ¶166.

[410] Reply ¶167.

[411] Reply ¶161.

[412] Reply ¶170.

[413] Reply ¶170, *citing* Belmont Resources Inc.'s Audited Consolidated Financial Statements Years Ended 31 January 2002 and 2001, note 2, p. 8 (R-114).

[414] Reply ¶171, *quoting* News Release and Material Change Report issued by Belmont and filed on SEDAR in anticipation of the transaction, 16 May 2001 (R-111) (emphasis added by the Claimants).

343. The Claimants point to additional Belmont press releases from 2005[415] and 2008,[416] stating that Belmont still owned a 57% stake in Rozmin. They also cite a statement by the Respondent itself in its Annual Information Form of 2002 that Belmont held "the Rozmin shares pending realization of an agreed $ amount upon sale of restricted common shares issued by EuroGas, Inc."[417]

344. For the Claimants, these statements are consistent with their argument that the transfer of shares to EuroGas never occurred due to the nonfulfillment of the SPA's conditions.

345. The Claimants' alternative argument relating to the alleged sale of Belmont's shares in Rozmin is summarised as follows:

> *Even if the Tribunal were to follow Mr. Anderson's conclusion that "Belmont retained a security interest in the 57% ownership interest," this would not change anything with respect to Belmont's standing in the present arbitration: Belmont would remain an "investor" for purposes both of the Canada-Slovak Republic BIT and of the ICSID Convention.*[418]

346. Specifically, the Claimants assert that such a security/collateral interest in the Rozmin shares would fall within Article I(d)(ii) of the Canada-Slovakia BIT, which defines "investment" to include "shares of stock or other interests in a company or interests in the assets thereof."[419]

IV. OVERVIEW OF THE PARTIES' POSITIONS ON LIABILITY

347. As discussed in Sections V and VI below, the Tribunal has decided that it lacks jurisdiction over both Claimants. Therefore, in this Section, the Parties' positions on liability are summarised briefly for information purposes only. This brief summary provides a general

[415] Reply ¶172, *citing* Belmont Resources Inc. press release, 18 January 2005 (C-343) ("Belmont owns 57% of Rozmin s.r.o. which holds the interest in Gemerska Poloma talc deposit concession.").

[416] Reply ¶172, *citing* Belmont Resources Inc. press release, 25 August 2008 (C-344) ("EuroGas owns 33% interest and has an agreement to acquire a further 57% interest from Belmont Resources Inc.").

[417] Reply ¶173, *quoting* Belmont Annual Information Form, 30 September 2002 (R-116) p. 3, Section 2.2.

[418] Reply ¶180.

[419] Reply ¶181.

overview of the Parties' positions and does not reflect the detailed arguments and sub-arguments raised by the Parties in this proceeding.

A. Expropriation Claim

(1) Claimants' Position

348. Both Claimants argue that the taking and reassignment of Rozmin's mining rights, as confirmed by the DMO's letter of 3 January 2005 informing Rozmin that its rights had *de facto* been revoked and were to be awarded to a new organization, constitutes an unlawful expropriation. The Claimants submit that direct and indirect expropriation is prohibited under both BITs unless the expropriation was carried out for a public purpose, in a non-discriminatory manner, in accordance with due process of law and upon payment of prompt, adequate and effective compensation.

349. According to the Claimants, the taking of Rozmin's rights was a substantively unlawful indirect or creeping expropriation because it was not conducted for a public purpose. Contrary to the Respondent's position, the Claimants argue that the 2002 Amendment could not validly justify the revocation of Rozmin's mining rights because the Amendment entered into force after Rozmin was awarded its rights and had no retroactive effect. Therefore, the Amendment could not be applied to Rozmin. In addition, the Claimants submit that even if the 2002 Amendment did apply, its application could not justify the taking of Rozmin's rights in the circumstances. Notably, the Claimants recall that (a) on 31 May 2004, the DMO granted Rozmin an authorization to carry out activities until 13 November 2006; (b) Rozmin officially announced to the DMO that it would resume mining activities by 18 November 2004; and (c) the DMO never warned Rozmin of the application of the 2002 Amendment.

350. The Claimants further argue that the taking of Rozmin's right was an unlawful expropriation having regard to the procedure followed by the DMO. The Claimants complain that the taking was performed "abruptly," without consideration for the "most basic due process rights," notably due to the lack of any prior notice that the Slovak authorities contemplated revoking Rozmin's rights. The Claimants emphasise that the

Slovak Supreme Court itself found on three occasions that the procedure followed to reassign Rozmin's mining rights was unlawful.

351. The Claimants finally argue that in any event, the taking was not accompanied by the "immediate adequate and effective compensation" due in case of a lawful expropriation, because Rozmin received no compensation at all.

(2) Respondent's Position

352. The Slovak Republic maintains that the reassignment of the Mining Area was a legitimate exercise of the State's regulatory powers. According to the Respondent, the 2002 Amendment was mandatory law aimed at fostering effective use of the Slovak Republic's mineral resources by preventing speculative practices. Rozmin did not excavate from 1 January 2002 to 1 January 2005 and thereby failed to comply with the 2002 Amendment.

353. In the Respondent's view, the Claimants merely complain that the value of their shareholding decreased as a result of the reassignment of the Mining Area; however, the fact that their shareholding may be worth less does not constitute an expropriation.

B. Fair and Equitable Treatment Claims

(1) Claimants' Position

354. The Claimants contend that the Respondent's acts and omissions, taken individually or collectively, constitute substantive and procedural breaches of the fair and equitable treatment standard set forth in Article II(2)(a) of the US-Slovakia BIT and Article III(1)(a) of the Canada-Slovakia BIT.

355. In particular, the Claimants submit that the Respondent failed to act consistently and to meet their legitimate expectations having regard to the following chronology of events:

a. on 31 May 2004, the DMO authorised Rozmin to carry out mining activities until 13 November 2006;

b. on 8 November 2004, Rozmin officially announced to the DMO that it would resume mining activities by 18 November 2004, and the DMO did not react;

c. on 8 December 2004, the Director of the DMO conducted an inspection of the deposit and concluded that Rozmin's activities were in compliance with legal regulations in force; and

d. on 3 January 2005, the Slovak Republic announced that Rozmin's mining rights had been awarded to Economy Agency.

356. The Claimants also consider that the Respondent failed to act transparently and to treat their investment non-arbitrarily and reasonably, notably because:

a. the Claimants were neither notified that the authorities were contemplating revoking their mining rights nor afforded an opportunity to present their case;

b. the Respondent announced that it was initiating a new tender procedure for the assignment of the Mining Area before informing Rozmin of the revocation of its mining rights;

c. the DMO disregarded the decision of the Slovak Supreme Court by "stubbornly" reassigning Rozmin's rights to VSK Mining in July 2008 and again in March 2012, which amounts to a denial of justice and hence a breach of the fair and equitable treatment standard;

d. in July 2008, following the Supreme Court's decision of 27 February 2008 cancelling the DMO's decision to reassign Rozmin's rights, the DMO did not initiate a new tender and simply awarded these rights to VSK Mining; and

e. finally, in June 2014, on the eve of commencement of ICSID proceedings as announced in settlement discussions, the Respondent launched criminal proceedings targeting Rozmin and the Claimants.

(2) Respondent's Position

357. The Respondent characterises the Claimants' fair and equitable treatment claim as a denial of justice claim because it is based on the assumption that the Slovak administrative and

judicial bodies issued incorrect decisions and caused delays in administrative proceedings commenced by Rozmin following the reassignment of its mining rights.

358. The Respondent states that

> *it is a fundamental principle of international law that a low-level administrative or judicial decision can constitute an international delict only if no effective remedy is available or if the aggrieved party's applications for remedy do not lead to redress. In other words, a State should always be judged by its "final product", and will only be held liable if the overall process of its decision-making is erroneous.*[420]

359. The Respondent concludes that denial of justice requires exhaustion of local remedies and that the Claimants' claims therefore cannot succeed, because the Claimants abandoned the domestic proceedings they commenced by not appealing the decision of the DMO confirming the assignment of the Mining Area on 1 August 2012. Respondent adds that Claimants were at all times provided with a fair opportunity to present their case.

360. In any event, the Respondent submits that even if the high standard required for finding a denial of justice does not apply, the Claimants still have failed to prove a violation of the fair and equitable treatment standard. In particular, the Respondent argues that a claimant's legitimate expectations may be based only on specific assurances given by the host State at the time when the investor makes the investment; however, the Claimants have not shown that they received any such assurance from the Slovak Republic with respect to Rozmin's mining rights.

361. Regarding the criminal investigation complained of by the Claimants, the Respondent states that the issue is moot because the Slovak Republic has already returned all seized documents. In this context, the Respondent refers to its Opposition to Claimants' Application for Provisional Measures dated 10 September 2014 and its Rejoinder Opposition to Claimants' Application for Provisional Measures dated 21 November 2014.

[420] Counter-Memorial ¶370.

C. Arbitrary and Unreasonable Treatment Claim

(1) Claimants' Position

362. The Claimants consider that the Respondent's acts and omissions identified as being in violation of the fair and equitable treatment standard are also in breach of (a) Article IX(1) of the of the US-Slovakia BIT[421] and (b) Article IX(1) of the Canada-Slovakia BIT,[422] which is to be read *a contrario*. They submit that the DMO's conduct could not be inspired by a rational policy.

(2) Respondent's Position

363. The Respondent's position is that the DMO's reassignment of the Mining Area was substantively correct, and that "any and all errors in the Slovak Republic's administrative and judicial proceedings were remedied and had no impact on Rozmin."[423] Thus, in the Respondent's view, such errors could not meet the high threshold for arbitrariness established by the International Court of Justice in the *E.L.S.I.* case. The Respondent emphasises that the correct application of Slovak law would have led to the same result and that the 2002 Amendment was enacted to address a rational policy (namely fostering effective use of mineral resources and avoiding speculative practices).

D. Full Protection and Security Claim

(1) Claimants' Position

364. The Claimants consider that the Respondent's acts and omissions identified as being in violation of the fair and equitable treatment standard also constitute a violation of the standard of full protection and security, which is provided in Article II(2)(a) of the US-

[421] Article II(2)(b) of the US-Slovakia BIT provides: "neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments."

[422] Article IX(1) of the Canada-Slovakia BIT provides: "Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures necessary: (a) to protect human, animal or plant life or health; (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or (c) for the conservation of living or non-living exhaustible natural resources."

[423] Rejoinder ¶539.

Slovakia BIT and Article III(1)(a) of the Canada-Slovakia BIT, as well as customary international law.

(2) Respondent's Position

365. The Respondent argues that the standard of full protection and security invoked by Claimants is not applicable to their claims as this standard requires events of threats or actual injury to aliens attributable to a third party, which are absent in this case. Further, according to the Respondent, even if the Tribunal were to adopt a more expansive interpretation of the full protection and security standard, the Claimants have failed to establish facts that would rise to a violation of that standard.

E. Failure to Comply with Specific Commitments Claim

(1) Claimants' Position

366. The Claimants contend that both BITs require the Slovak Republic to honour its specific obligations towards foreign investors.

367. As regards the US-Slovakia BIT, the Claimants invoke Article II(2)(c), which provides that "[e]ach Party shall observe any obligation it may have entered into with regard to investments."

368. As regards the Canada-Slovakia BIT, the Claimants recognise that that treaty does not contain a similar provision and submit that Article II(2)(c) of the US-Slovakia BIT may be applied to Canadian investors via Article III(2) of the Canada-Slovakia BIT, which is a most favoured nation clause.

369. The Claimants argue that "the Slovak Republic specifically undertook to allow Rozmin to carry out mining activities at the Gemerskà Poloma deposit until November 13, 2006, by way of decision of the DMO issued on May 31, 2004, which was reconfirmed on December 8, 2004, by Mr. Baffi, the DMO's Director, following an inspection of the Mining Area"[424] and breached that obligation by revoking Rozmin's rights in the weeks which followed.

[424] Memorial ¶378.

(2) Respondent's Position

370. The Respondent argues that it did not undertake any commitment that it would not reassign the Mining Area under the 2002 Amendment. Therefore, the Claimants' specific commitments claim should fail.

V. TRIBUNAL'S DECISIONS ON JURISDICTIONAL OBJECTIONS RELATING TO EUROGAS

371. To begin, the Tribunal notes that EuroGas was erroneously described as being incorporated in 1985 in the Request for Arbitration, leading to confusion as to which company is a claimant in this arbitration. Even though the mistake would have been very serious if it had not been rectified, at this stage, the Tribunal sees no consequences to be drawn from the incorrect description of one of the Claimants in the Request for Arbitration.

372. In the following sections, the Tribunal will refer to one of the Claimants as "**EuroGas II**." The Tribunal will refer to the company called EuroGas Inc. that was incorporated in 1985 and later dissolved as "**EuroGas I**." EuroGas I is not a party to these proceedings.

373. The question for the Tribunal to resolve is whether EuroGas II validly qualifies as an investor under the US-Slovakia BIT through its shareholding in EuroGas GmbH, which was a shareholder in Rozmin at the time of the reassignment of Rozmin's mining rights.

374. In order to establish that it does, EuroGas II must demonstrate:

a. that when the Bankruptcy Proceedings closed on 19 March 2007, EuroGas I owned the shares in EuroGas GmbH and thereby owned the claim relating to the 2005 reassignment of the Mining Area (the "**Talc/Reassignment Claims**"); ***and***

b. that EuroGas I validly transferred the Talc/Reassignment Claims to EuroGas II.

A. Did EuroGas I Emerge from the Bankruptcy Proceedings Owning the Talc/Reassignment Claims?

375. As a preliminary matter, it is important to recall the chronology of the Bankruptcy Proceedings initiated in respect of EuroGas I on the basis of Chapter 7 of the Bankruptcy Code.[425]

376. On 18 May 2004, Mr. Steve Smith, Trustee for the bankruptcy estate of Harven Michael McKenzie, a creditor of EuroGas I ("**Trustee Smith**"), filed an involuntary petition of bankruptcy against EuroGas I in the Bankruptcy Court.[426] Trustee Smith subsequently obtained a judgment against EuroGas I in a separate bankruptcy proceeding in Texas, in the amount of USD 113,371,837.65 and filed this claim against EuroGas I in the Bankruptcy Court in Utah.

377. The Chapter 7 trustee appointed to administer EuroGas I's estate was Trustee Marker. The Tribunal understands that a Chapter 7 trustee is required to "collect and reduce to money the property of the estate for which [he] serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest."[427]

378. On 27 January 2005, the Bankruptcy Court ordered Mr. Wolfgang Rauball, Mr. Reinhard Rauball and Mr. Hank Blankenstein, as designated principals of EuroGas I, to file schedules and statements of assets and to turn over property and records of the estate of EuroGas I to Trustee Marker.

379. No schedules or statements of assets were ever filed. Trustee Marker therefore conducted an investigation and liquidated EuroGas I's interest in several affiliated companies and distributed the proceeds to creditors. The proceedings were closed on 19 March 2007, without the estate's interest in EuroGas GmbH or any potential claims that EuroGas I might have against the Slovak Republic being administered.

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[425] See also §I(B)(9) above.

[426] A Public U.S. Bankruptcy Filing from the EuroGas Bankruptcy Case, Case No. 04-28075, Docket No. 1 – EuroGas Bankruptcy Petition, 18 May 2004 (R-85).

[427] *In re Buerge*, 2014 WL 1309694 (10th Cir. BAP 2014) (CL-257).

380. The question whether the potential claims against the Slovak Republic (the Talc/Reassignment Claims), which should have been scheduled, became property of the estate or were abandoned to EuroGas I by Trustee Marker, is debated. The Tribunal has heard expert evidence from both sides and has been provided with several legal authorities on the issue. However, the Tribunal considers that the question has become moot due to the reopening of the Bankruptcy Proceedings and subsequent developments.

381. Indeed, in September 2015, a creditor described as an affiliate of EuroGas II, Texas EuroGas Corp., sent a letter to the U.S. Trustee, requesting that the Bankruptcy Proceedings be reopened to investigate whether the Talc/Reassignment Claims were property of the EuroGas I estate. On 21 December 2015, following a Motion to Reopen from the U.S. Trustee,[428] the Bankruptcy Court ordered the reopening of the case "for the specific purpose of determining the bankruptcy estate's interest in the asset identified in the Motion to Reopen."[429] The Bankruptcy Court also ordered the appointment of a Chapter 7 trustee, Trustee Loveridge, to investigate the bankruptcy estate's interest in the asset identified in the Motion to Reopen.[430]

382. Having looked into the issue and conducted her own investigation, Trustee Loveridge entered into discussions with EuroGas II and with the Slovak Republic with a view to concluding an agreement with one of them to generate cash for distribution to EuroGas I's creditors. Eventually, Trustee Loveridge entered into an agreement with EuroGas II on 9 August 2016, subject to approval by the Bankruptcy Court (the "**Agreement**").[431] The Bankruptcy Court approved the Agreement on 28 October 2016.[432] The Agreement provides as follows in Recitals and substantive provisions:

> *Based on her independent investigation, the Trustee has concluded that (a) the Former Trustee* [Trustee Marker] *had information available to him concerning the existence of the Talc Claims; (b) the Former Trustee did not expressly abandon the Talc Claims, but may*

[428] U.S. Trustee's Motion to Reopen Under 11 U.S.C. ¶350, 18 September 2015 (R-248).

[429] Order Granting Motion to Reopen Under 11 U.S.C. ¶350, 21 December 2015 (R-242).

[430] Notice of Appointment of Interim Trustee, 22 December 2015 (R-264).

[431] U.S. Trustee's Motion to Reopen, 18 September 2015 including draft agreement (C-360**)**.

[432] Bankruptcy Court Memorandum Decision, 28 October 2016 (Exhibit A to EuroGas II's letter to the Tribunal dated 9 November 2016).

> *or may not have intended that the Talc Claims were abandoned upon closing of the Bankruptcy Case; (c) in any case, the issue whether the Talc Claims may not have been abandoned by the Former Trustee has not been resolved; (d) to the extent the Talc Claims were abandoned by the Former Trustee, they are burdensome to the estate and of inconsequential value to the estate; (e) creditors would stand to benefit from EuroGas pursuing the Talc Claims because EuroGas has assumed the Debtors liabilities; and (f) an abandonment of whatever remaining interest the Bankruptcy Estate may have in the Talc Claims* nunc pro tunc *to the petition date* [the petition date is 18 May 2004, commencement of the Bankruptcy Proceedings – *cf.* Recital C] *under the terms of this Agreement is in the best interests of creditors.*
>
> *In consideration of the terms and conditions contained therein, the Parties now agree as follows:*
>
> […]
>
> *3. Remittance upon Execution. Immediately upon execution, EuroGas will remit to the Trustee $150,000.00.* […]
>
> *4. Notice of Abandonment. Together with the motion to approve the Agreement, the Trustee shall file a notice of abandonment of any remaining interest, if any, that the Bankruptcy Estate may still have in the Talc Claims.* […][433]

383. The abandonment *nunc pro tunc* of any interest that may have remained with EuroGas I's bankruptcy estate means that the Talc/Reassignment Claims must be considered has having remained with EuroGas I since the opening of the Bankruptcy Proceedings on 18 May 2004. As stated by the Bankruptcy Court in its Memorandum Decision approving the Agreement:

> *The Trustee has requested a determination that the abandonment is effective* nunc pro tunc *to the petition date* [18 May 2004]. *Making a judicial finding that the abandonment is effective* nunc pro tunc *to the petition date is available only in "extraordinary circumstances." The legal effect of abandonment is determined as a*

[433] U.S. Trustee's Motion to Reopen, 18 September 2015 including draft agreement (C-360).

> *matter of law. When property is abandoned, it* "reverts to the debtor and stands as if no bankruptcy petition was filed." [434]

384. Therefore, either the Talc/Reassignment Claims had been validly abandoned by Trustee Marker initially and reverted to EuroGas I, or they had not been abandoned, remained property of the estate, and reverted to EuroGas I *nunc pro tunc* following their abandonment by Trustee Loveridge under the terms of the Agreement. In both scenarios, the Talc/Reassignment Claims must be deemed property of EuroGas I as from 18 May 2004.

385. Therefore, notwithstanding the fact that it is uncontested that the Tribunal has jurisdiction to determine the thorny issue whether Trustee Marker validly abandoned the Talc/Reassignment Claims or not, the Tribunal need not embark on this complex legal and factual enquiry.

386. The main question to resolve in respect of the Tribunal's jurisdiction over EuroGas II's claims in these ICSID proceedings therefore lies in the alleged transfer of the Talc/Reassignment Claims from EuroGas I to EuroGas II. The Tribunal notes that the Bankruptcy Court acknowledged the Tribunal's jurisdiction on this point and made no factual or legal determination in that respect in the Memorandum Decision approving the Agreement. The Bankruptcy Court stated that

> *EuroGas I was administratively dissolved in 2001 for failure to file an annual report and pay a nominal fee. EuroGas II was incorporated after the bankruptcy petition was filed, and signed the Merger documents in which it sought to inherit all EuroGas I's assets and liabilities. Whether the Talc Claims passed to EuroGas II in the Merger or remained with EuroGas I will be a matter for the Arbitration Tribunal to decide. This Court takes no position on that question other than to note that whatever interest the bankruptcy*

[434] Bankruptcy Court Memorandum Decision, 28 October 2016 (Exhibit A to EuroGas II's letter to the Tribunal dated 9 November 2016).

> *estate had or has in the Talc Claims is authorized to be abandoned by the Trustee.*[435]

387. At this point, the Tribunal specifies that it need not determine EuroGas II's argument that the Respondent has no standing to challenge the abandonment of the interest in EuroGas GmbH by Trustee Marker.[436] As noted above, the Tribunal does not make any finding in that respect and simply draws consequences from the terms of the Agreement between EuroGas II and Trustee Loveridge, as approved by the Bankruptcy Court.

B. Did EuroGas I Validly Merge with EuroGas II, Making the Latter the Continuation of the Former?

388. According to EuroGas II, the alleged transfer of EuroGas I's assets and liabilities (including the Talc/Reassignment Claims) to EuroGas II was implemented through a "*de facto* merger" between EuroGas I and EuroGas II in 2008, making the latter the continuation and the successor of the former. The merger was allegedly effectuated through the Joint Resolution, the full title of which is "Joint Unanimous Consent Resolution of the Directors of EuroGas Inc, a Utah corporation dissolved in 2001 and EuroGas Inc, a Utah corporation formed in 2005 and in good standing approving proposed class 'F' reorganisation made retroactively effective to November 15, 2005."[437]

389. The effectiveness of this merger as a means of transfer by EuroGas I of its interest in EuroGas GmbH and of the Talc/Reassignment Claims to EuroGas II is contested.

390. First, the Respondent contends that the merger is void (or at least voidable) because EuroGas I, as a dissolved company, could not enter into any contracts other than for the purpose of winding up its activities. According to the Respondent, a merger agreement purporting to enable the business of the dissolved company to continue through a different corporate shell is inconsistent with winding up. In addition, since EuroGas I had been dissolved for longer than two years, there was no possibility of reinstatement and therefore

[435] Bankruptcy Court Memorandum Decision, 28 October 2016 (Exhibit A to EuroGas II's letter to the Tribunal dated 9 November 2016).

[436] Reply ¶25. Snell & Wilmer ER, ¶¶95-99.

[437] Joint Resolution, 31 July 2008 (C-57).

of retroactive validation of any other contracts that EuroGas I might have entered into while it was dissolved.

391. Second, the Respondent submits that the Joint Resolution could not possibly effectuate a merger between EuroGas I and EuroGas II because, under Utah law, the corporate law of both EuroGas I and EuroGas II, mergers may only be effectuated in accordance with certain legal provisions which have not been followed.

392. The Tribunal will address both arguments in turn.

(1) Can a Dissolved Company Validly Merge with Another Company?

393. Regarding whether EuroGas I could validly merge with another entity while it was dissolved, the Tribunal notes that the evidence submitted by the Parties is unclear. It appeared uncontested during most of the proceedings that EuroGas I, as a dissolved company, was authorised to enter into contracts aiming at the winding up of its affairs (although a recent case discussed during the cross examination of Mr. Gardiner appeared to stand for the proposition that all contracts entered into by a dissolved company are void).[438]

394. To add to the confusion, the Joint Resolution suggests that the Utah Division of Corporations considers that a dissolved company cannot merge with another company in good standing. The Joint Resolution recalls:

> *WHEREAS, under Utah law, a dissolved domestic corporation cannot formally merge with another domestic corporation under Utah's corporate merger statute, the [Utah Division of Corporations], among other things, being unwilling and lawfully incapable of accepting and stamping Articles of Merger involving a dissolved corporation or in which a dissolved corporation is a Party.*[439]

395. The fact that the Utah Division of Corporations appears to have refused to accept articles of merger involving EuroGas I due to the fact that it was a dissolved corporation is not

[438] *See* Tr. Day 3, 78:15 *et seq.* (discussion between Mr. Gardiner and Ms. Burton of *Wittingham LLC v. TNE Limited Partnership* (2016 UT App 176, or 2016 Utah App Lexus 19 193, or 820 Utah Advance Report 68).

[439] Joint Resolution, 31 July 2008 (C-57).

conclusive evidence of whether dissolved companies may take part in a merger under Utah law. However, it is a strong signal that they may not. If that were the case, there would be no legal avenue for EuroGas I to transfer the Talc/Reassignment Claims to EuroGas II through a merger.

396. However, the Tribunal will assume that the practice of the Utah Division of Corporations as recalled in the Joint Resolution is inconclusive or should not be given any weight in the context of its analysis because neither side has relied on the Utah Division of Corporations practice in the context of the jurisdiction debate.

397. What the Parties have addressed is the meaning and effects of Section 1405(1) of the Utah Revised Business Corporation Act, which provides:

> *A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs including:*
>
> *(a) collecting its assets;*
>
> *(b) disposing of its properties that will not be distributed in kind to its shareholders;*
>
> *(c) discharging or making provision for discharging its liabilities;*
>
> *(d) distributing its remaining property among its shareholders according to their interests; and*
>
> *(e) doing every other act necessary to wind up and liquidate its business and affairs.*[440]

398. In the opinion of Mr. Brad W. Merrill, EuroGas II's Utah corporate law expert, this provision authorises a dissolved company such as EuroGas I to merge with another entity. Mr. Merrill states in the expert opinion dated 28 September 2015 that:

> *None of the provisions of the* [Utah Revised Business Corporation Act]*, including the merger provisions or dissolution provisions, in any way restrict or limit a dissolved corporation from pursing or consummating a merger in connection with its wind up activities. Indeed, given the very nature of a merger – to combine two*

[440] Utah Code. Ann. §16-10a-1405 (R-19**)**.

> *companies into one surviving legal entity where the surviving entity assumes all assets, rights and liabilities of the extinguished entity – a merger into an active corporation would in fact be one of the most effective and efficient ways to wind up and liquidate a dissolved corporation.*[441]

399. Mr. Merrill concludes that there is no legal obstacle under Utah law to a merger between EuroGas I and EuroGas II.

400. The Respondent's experts, Ms. Jarvis and Mr. Gardiner, hold a different view. They consider that the merger that allegedly took place between EuroGas I and EuroGas II cannot have been entered into validly because it aimed at perpetuating EuroGas I's existence, not liquidate it. In support of this conclusion, these experts emphasise the terms of the Joint Resolution:

> *The Joint Resolution attempts to establish EuroGas II "as a continuation" of EuroGas I, specifically "to continue and carry on the business and affairs" of EuroGas I. Such an effort runs contrary to the* [Utah Revised Business Corporation Act]*'s explicit prohibition of a dissolved corporation from continuing its business. In addition, such an action is not of the same kind as "disposing of [the corporation's] properties."* [442]

401. Having considered both sides' arguments, the Tribunal leans toward the conclusion that EuroGas I, though dissolved, was authorised under Utah law to merge with EuroGas II. The alleged merger would have the effect of transferring all the assets and liabilities of one company to another, leaving nothing behind in the first company's corporate shell. This outcome, which is clearly the desired outcome of the Joint Resolution, is consistent with Section 1405(1) of the Utah Revised Business Corporation Act. Therefore, the Tribunal concludes that EuroGas I could merge with EuroGas II in 2008 even though it was dissolved. The only reason it would have to doubt that this conclusion is correct is the practice of the Utah Division of Corporations, as described in the Joint Resolution (quoted

[441] Snell & Wilmer ER ¶103.

[442] Jarvis/Gardiner ER ¶58.

above at paragraph 392). However, as previously stated, the Tribunal has not taken this into account.

402. However, the Tribunal's conclusion that a dissolved corporation may, under Utah law, take part in a merger in order to liquidate its assets is without prejudice to the crucial issue as to whether a merger between EuroGas I and EuroGas II did occur in the present case.

(2) Did EuroGas I Validly Merge with EuroGas II?

403. The Tribunal now turns to the issue whether the Joint Resolution validly effectuated a merger between these two entities, with the result that the Talc/Reassignment Claims passed to EuroGas II.

404. First, the Tribunal notes that it is uncontested that the alleged merger did not comply with the statutory requirements for mergers under Utah law, in particular the filing of articles of merger with the Utah Division of Corporations (due to, it appears, the Utah Division of Corporations' refusal to accept and stamp articles of merger involving a dissolved corporation). Section 16-10a-1105(2) of the Utah Code states that a "merger or share exchange takes effect upon the effective date of the articles of merger or share exchange, which may not be prior to the date of filing."[443]

405. The first question to resolve, therefore, is whether there was any possibility for the Joint Resolution to effectuate a merger without complying with the Utah law statutory requirements.

406. According to the express terms of the Joint Resolution, the parties to this resolution intended to effectuate the merger on the basis of Section 368(a)(1)(F) of the Internal Revenue Code of 1986 to circumvent the refusal of the Utah Division of Corporations to register a merger involving a dissolved company. They envisaged a so-called "Class F reorganization" to achieve the merger that the Utah Division of Corporations refused:

> *WHEREAS, the "winding up" of a dissolved corporation's affairs would seem NOT to exclude the engaging or participating in a Class "F" reorganization under the Internal Revenue Code, as amended,*

[443] Utah Code, §16-10a-1105(2) (RL-93).

> *particularly when nothing in the law appears to require that a Class F reorganization requires filing and recording of Articles of Merger with the Division;*[444]

407. On the basis of this (hesitant) understanding that the Class F reorganisation described in Section 368(a)(1)(F) of the Internal Revenue Code of 1986 would enable EuroGas I and EuroGas II to achieve the same outcome as a statutory merger, the signatories to the Joint Resolution (*i.e*: the directors of these companies) resolved as follows (*inter alia*):

> *that the Corporation* [EuroGas II] *proceed to carry on the business and affairs for which it was incorporated, namely, to continue and carry on the business and affairs of the Predecessor Corporation* [EuroGas I]; *and, in addition, that the Corporation hereby complete the so-called Class "F" reorganization with its Predecessor, namely, carrying out that which is necessary to make the Corporation assume and inherit the shareholders' list and other assets and liabilities of the Predecessor Corporation, including the recognition of the Predecessor Corporation, including the recognition of the Predecessor Corporation's issued and outstanding shares, shareholder base and issued and outstanding stock certificates;*[445]

408. Consistent with the text of the Joint Resolution, EuroGas II initially argued, relying on the Joint Resolution, that the transfer of EuroGas I's assets and liabilities to EuroGas II was effectuated through the Class F reorganisation process referred to in the Joint Resolution and that this made EuroGas II the continuation of EuroGas I under Utah law:

> *On July 23, 2008, EuroGas' corporate documents were amended to mirror those of the 1985 Company and in order to wind up and liquidate its business and affairs, in accordance with Utah State law, the 1985 Company entered into a joint resolution with EuroGas and performed a type-F reorganization, whereby EuroGas assumed all of the assets, liabilities and issued stock certificates of the 1985 Company.*[446]

[444] Joint Resolution, 31 July 2008 (C-57).

[445] Joint Resolution, 31 July 2008 (C-57).

[446] Memorial ¶21.

409. The Respondent protested, in the Counter-Memorial, that the Joint Resolution is "a sham document that is a nullity under both (i) the legal regime of the sovereign State of Utah, and (ii) the legal regime of U.S. federal bankruptcy."[447] It notably argued that "Section 368(a)(1)(F) addresses only whether a corporate transaction qualifies for tax-free treatment for U.S. federal income tax purposes. It cannot revive a corporation under state law or authorize reorganization of a corporate entity under state law."[448]

410. In its Reply, EuroGas II did not express a disagreement and stated that

> *the reference in the Resolution to Section 368(a)(1)(F) of the U.S. Internal Revenue Code only reflected the parties' intention to treat the merger as a tax-free transaction. It did not however constitute the legal basis pursuant to which the merger would be operated and become effective.*[449]

411. EuroGas II then re-focused its arguments on the (alleged) transfer of EuroGas I's assets and liabilities to EuroGas II to a *de facto* common law merger theory.

412. The Respondent has contested the possibility that such a "*de facto* merger" could ever be deemed to have occurred between EuroGas I and EuroGas II for the purpose of transferring the Talc/Reassignment Claims from the former to the latter. According to the Respondent, the common law *de facto* merger theory is a liability theory developed by the courts to sanction parties which attempt to avoid the applicable requirements of a statutory merger, for example by implementing the merger operation through a series of transactions which minority shareholders cannot oppose.[450] The *de facto* merger theory can also apply where two companies enter into an agreement whereby one of them transfers all its assets to another to the detriment of its creditors.[451]

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[447] Counter-Memorial ¶45.

[448] Counter-Memorial ¶60.

[449] Reply ¶90.

[450] Rejoinder ¶¶107-114; Utah Department of Commerce Division of Corporate & Commercial Code, Utah Corporation and Business Laws (1992) (RL-154).

[451] *City of New York v. Charles Pfizer & Co.*, 688 N.Y.S.2d 23, 24 (NY App. 1st Dep't 1999) (6 April 1999) (RL-175).

413. Mr. Gardiner, the Respondent's Utah corporate law expert, convincingly explained why, in his view, the *de facto* merger common law theory is not an autonomous legal basis for companies to merge validly under Utah law, without complying with the statutory provisions on mergers. Notably, he provides a full quote of an authority relied upon by EuroGas II's corporate law experts: the official commentary of Utah corporation and business laws. The Tribunal finds this authority helpful in understanding the concept of "*de facto* merger" and notes that it was only partially cited by EuroGas II's experts. The commentary states:

> *A transaction may have the same economic effect as a statutory merger even though it is cast in the form of a non statutory transaction. For example, assets of the disappearing corporations may be sold for consideration in the form of shares of the surviving corporation, followed by the distribution of those shares by the disappearing corporations to their shareholders and their subsequent dissolution. Transactions have sometimes been structured in nonstatutory form for tax reasons or in an effort to avoid some of the consequences of a statutory merger, particularly appraisal rights to dissenting shareholders. Faced with these transactions, a few courts have developed or accepted the "de facto merger" concept which, to some uncertain extent, grants to dissenting shareholders the rights they would have had if the transaction had been structured as a statutory merger. … These problems should not occur under the Revised Act since the procedural requirements for authorization and consequences of various types of transactions are largely standardized.*[452]

414. This passage of the official commentary of Utah corporate law, deemed relevant and authoritative by both sides, supports the Respondent's position that the *de facto* merger theory is not an autonomous legal basis for Utah corporations to merge, but a theory developed by the courts to address situations which fall in the gaps of statutory provisions. It addresses situations where the legal rights of third parties to the transactions under review are unjustly affected, and aims to protect them.

[452] Rejoinder ¶¶107-114; Utah Department of Commerce Division of Corporate & Commercial Code, Utah Corporation and Business Laws (1992) pp. 185-186 (RL-154).

415. As explained by Mr. Gardiner, the legal authorities cited by EuroGas II do not support the proposition that Utah law authorises mergers between entities outside the framework of the statutory provisions on mergers, which both sides agree have not been followed.

416. But even assuming that such a *de facto* merger could have taken place in theory, the Tribunal is doubtful that the merger could have taken place through a joint resolution of the directors of the allegedly merging entities without shareholders' consultation and agreement, especially where the companies are listed.

417. Even if this could be admitted, which the Tribunal cannot accept, there is a real question as to whether the Joint Resolution on its own effectuated the contemplated merger.

418. As noted by Mr. Gardiner, the Joint Resolution falls short of an actual transfer of rights and liabilities from EuroGas I to EuroGas II. The Joint Resolution records the signatories' (*i.e.:* the directors') agreement to proceed with the transfer, but it also records their (justified) doubts as to the necessary legal steps to be taken to render the transfer effective and valid. The Joint Resolution indeed records that:

> *RESOLVED FURTHER, that a confirmatory transfer of the assets of the Predecessor Corporation to EuroGas, Inc (incorporated on November 15, 2005) is hereby authorized and that at least one of the officers and directors of the Predecessor Corporation is hereby authorized to execute, on behalf of the Predecessor Corporation, those documents necessary, if any, to confirm transfer of any personal property and liabilities from the Predecessor Corporation to the new successor EuroGas, Inc.*[453]

419. Mr. Gardiner explained at the hearing that the directors' agreement to proceed with an action is insufficient to make that action occur:

> *(Mr Gardiner): …. This joint resolution reflects the intentions of the two boards of directors to do something to, in essence, combine the two corporations and make them into one, without complying with merger statute or without at least providing evidence of actual transfers of assets or contractual assumptions of liabilities. It also contemplates that the new EuroGas entity would simply treat the outstanding shares of the prior EuroGas entity, or EuroGas I, as I*

[453] Joint Resolution, 31 July 2008, (C-57).

> *call it, simply treat those shareholders as its own, which in my experience as a corporate lawyer, I don't know how you do that. One company can't, just by a resolution – and by the way, the directors are the same on both sides, right? – decide that the shareholders of one company are now the shareholders of another company. That just doesn't work, at least in Utah corporate law.*
>
> *Q. How do companies merge in Utah?*
>
> *A. (Mr Gardiner) They enter into an agreement: we usually call it an "agreement and plan of merger." And they agree to file articles of merger with the Division of Corporations, and they file them. The public gets notice of the fact that these corporations have merged. And the merger is effective once those articles of merger have been filed.*
>
> *Q. So the merger cannot take effect before the articles of merger are filed?*
>
> *A. (Mr Gardiner) No.*[454]

420. The Tribunal is convinced by this testimony and finds that EuroGas II and its experts have failed to establish any basis under Utah law (statutory or common law) by which the Joint Resolution could have resulted in a valid merger. Therefore, the Tribunal concludes that the Joint Resolution could not, and did not, effectuate a valid merger between EuroGas I and EuroGas II, with the result that the Talc/Reassignment Claims validly passed from EuroGas I to EuroGas II.

C. Are the Transactions with McCallan Relevant to the Tribunal's Jurisdiction?

421. In the Tribunal's view, the transactions with McCallan, raised for the first time in EuroGas' Reply, have no bearing on that conclusion. Indeed, in the Reply, EuroGas II submitted that EuroGas I sold the EuroGas GmbH shares to McCallan in 2007 (before the alleged merger) and that EuroGas II then acquired that shareholding from McCallan at an unspecified time between 13 July 2007 and 4 June 2012 (after the merger). The process was described as follows in the Reply:

> *On July 13, 2007, the 1985 Company sold its interest in EuroGas GmbH to a third party company, namely McCallan Oil & Gas (UK)*

[454] Hearing Tr. Day 4, 110:5-111:6.

> *(hereafter "McCallan"). EuroGas thereafter acquired the entirety of McCallan's issued shares, and ultimately, on June 4, 2012, caused McCallan to transfer its interest in EuroGas GmbH, and thus Rozmin, to its new Swiss subsidiary, EuroGas AG.*[455]

422. The Tribunal regrets that EuroGas II did not file the documents underlying these transactions in these proceedings. The documents on file do not enable the Tribunal to have a complete picture of those (complex) transactions involving third parties.[456] However, in any event, the Tribunal views the ownership of the EuroGas GmbH shares after the reassignment as having no real bearing on the Tribunal's jurisdiction over EuroGas II. The alleged sale of EuroGas GmbH shares by EuroGas I to McCallan took place in 2007, years after the reassignment of Rozmin's rights. The right to receive compensation under the US-Slovakia BIT, which arose at the time of the reassignment, in 2005,[457] belonged to EuroGas I; it was not transferred together with the EuroGas GmbH shares to McCallan, since it is by no means incorporated in those shares; it remained with EuroGas I. Therefore, the right to compensation under the US-Slovakia BIT could not be subsequently transferred back to EuroGas II with McCallan's shares or EuroGas GmbH shares.

423. Therefore, the obscure transactions with McCallan have no bearing on the Tribunal's conclusion as to its jurisdiction over EuroGas II, as explained above. Since the Talc/ Reassignment Claims never passed from EuroGas I to EuroGas II through the alleged merger (which the Tribunal considers ineffective), and there is no evidence that EuroGas I sold its Talc/ Reassignment claims to McCallan in a way that those claims could have then

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[455] Reply ¶64.

[456] Notariatsakt (Deed), 13 July 2007 (C-330); Amended Agreement to the Share Option Agreement, 22 April 2008 (C-366); Agreement between EuroGas Inc. and Hans D. Deitmann, 26 May 2008 (C-367); Public Deed regarding the resolutions of the board of directors of ZB Capital Inc., 17 November 2011 (C-368); Public Deed regarding the resolutions of the board of directors of EuroGas AG, 17 November 2011 (C-369); Record Motion, 4 June 2012 (C-370). *See also* Hearing Tr. Day 1, Respondent's Opening, 45:21-53:18.

[457] Hearing Tr. Day 5, 265:25 *et seq.* ("PRESIDENT: … That was the second question. And the third one, to Dr Gharavi: what are the dates of the breaches of international law that you are complaining about? That's not related to the issue of when did the dispute arise; it's not that. And I am not asking you to make a choice, not at all, because there may be several breaches or a continuous breach. But can you clarify that for us? DR GHARAVI: For us it's the date of the revocation, of January 3rd 2005, of our rights. And then there are subsequent breaches, I would say. We do not read the decisions of the District Mining Authority when its decision is quashed and sent back to it, that just rubber-stamps it, we think that's an independent breach afterwards; "independent" meaning within the context of the same global breach.").

been transferred to EuroGas II, the Tribunal is compelled to conclude that it lacks jurisdiction over the claims raised by EuroGas (EuroGas II) in these proceedings.

424. Because the Tribunal lacks jurisdiction over the Claimant EuroGas for the reasons stated above, the Tribunal does not need to address the Respondent's objection based on the "denial of benefits clause" in Article I.2 of the US-Slovakia BIT. The Tribunal turns now to the Respondent's jurisdictional objections relating to Belmont.

VI. TRIBUNAL'S DECISIONS ON JURISDICTIONAL OBJECTIONS RELATING TO BELMONT

425. The Tribunal begins with the Respondent's objection that Belmont's claims fall outside the *ratione temporis* application of the Canada-Slovakia BIT.

426. The Slovak Republic's arguments in respect of the *ratione temporis* application of the Canada-Slovakia BIT and Belmont's responses have been summarised in Section III(C). The Tribunal will therefore refer only briefly to the Parties' positions in the analysis that follows.

427. Article 15(6) of the Canada-Slovakia BIT provides that the treaty will only "apply to any dispute which has arisen not more than three years prior to its entry into force."[458] The Canada-Slovakia BIT entered into force on 14 March 2012. Therefore, the dispute between Belmont and the Slovak Republic must have arisen on or after 14 March 2009 to be captured by the Canada-Slovakia BIT and for this Tribunal to have jurisdiction over Belmont's claims.

428. The Respondent submits that the dispute with Belmont arose prior to 14 March 2009 and therefore falls outside the Tribunal's *ratione temporis* jurisdiction. In response, Belmont argues, first, that the Respondent is "estopped" from asserting this objection. In addition, Belmont submits that the Respondent confuses the events leading up to the dispute with the dispute itself, and that in fact, the dispute arose after the critical date.

[458] Canada-Slovakia BIT, Article XV(6) in fine (C-2).

A. Is the Respondent "Estopped" from Relying on Article 15(6) of the Canada-Slovakia BIT?

429. Belmont places great emphasis on the fact that EuroGas sent the Respondent a notice of dispute on 31 October 2011[459] and that the Respondent reacted on 2 May 2012 by asserting that it was premature to trigger the dispute resolution process provided in the Canada-Slovakia BIT.[460] According to Belmont, the State is now "estopped" from asserting that the dispute is not captured by the *ratione temporis* application of the Canada-Slovakia BIT. Belmont's argument assumes that its dispute with the Slovak Republic is one and the same with the dispute between EuroGas and the Slovak Republic (which relates to a different BIT).

430. The Tribunal considers that the legal consequence that Belmont seeks to draw from the Respondent's posture in its correspondence of 2 May 2012 is excessive and unsupported. First, the Respondent's letter does not imply any admission that the US-Slovakia BIT, and *a fortiori* the Canada-Slovakia BIT (which is not even mentioned) were applicable. The letter contains an express reservation as regards the applicability of the US-Slovakia BIT:

> *Therefore, as long as the above mentioned proceedings are ongoing, the Ministry of Finance of the Slovak Republic is of the view that this dispute could not be amicably settled at this stage. For avoidance of doubt, this letter is subject to the reservation that such conduct is in no way a confession that the claim articulated in your Notification of claim against Slovak Republic meets the jurisdiction or substantive requirements of the Slovak-US Bilateral Investment Treaty The Slovak Republic fully reserves all rights arising under that Treaty and all applicable laws.*[461]

431. Second, by saying that EuroGas' claim was premature, the Respondent did not indicate that it was too early for the factual situation to be considered a *dispute* within the meaning of the Treaty; it clearly meant that it was premature to *start negotiations* under the Treaty while a dispute was still pending before the local courts.

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[459] Letter from EuroGas Inc. to the Government of the Slovak Republic, dated 31 October 2011 (C-39).

[460] Letter from the Slovak Republic, dated 2 May 2012 (C-40).

[461] Letter from the Slovak Republic, dated 2 May 2012 (C-40).

432. Third, even assuming that the Respondent had accepted to extend the applicability of the Treaty in spite of its temporal limitation, it is doubtful that such extension would have any legal effect, because the applicability *ratione temporis* of the Canada-Slovakia BIT depends only on the intentions of the Parties to the Treaty.

433. There is therefore no basis for Belmont to claim that it is entitled to the protections of the Canada-Slovakia BIT on the ground of statements made by the Respondent in response to EuroGas' notice of dispute. The Tribunal rejects Belmont's argument that the Respondent is "estopped" from arguing that Belmont's claims fall outside the *ratione temporis* realm of the Canada-Slovakia BIT.

434. The real question is whether the dispute arose after 14 March 2009, within the meaning of Article 15(6) of the Canada-Slovakia BIT.

B. Is the Treaty Dispute Distinguishable from the Dispute Submitted to Domestic Courts?

435. According to Belmont, the dispute must be distinguished from the events leading to the dispute, a distinction notably made by the authors Dolzer and Schreuer in the following words (cited by Belmont):

> *The time of the dispute is not identical with the time of the events leading to the dispute. By definition, the allegedly illegal acts must have occurred some time before the dispute. Therefore, the exclusion of disputes occurring before the treaty's entry into force should not be read as excluding jurisdiction over events occurring before that date.*[462]

436. The Tribunal naturally agrees that the allegedly illegal acts necessarily precede the dispute in respect of such acts, and that the relevant date is the date when the dispute arose.

437. As regards the occurrence of a dispute, the Tribunal agrees with the Respondent's submission that the relevant consideration is the articulation of opposing views and interests, as opposed to the articulation of a specific legal basis for the claim. The landmark case on this point remains the PCIJ *Mavrommatis* case, where the Court stated that a dispute

[462] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2008), p. 44 (CL-36).

is "[a] disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[463] A conflict of legal views does not require the expression of all possible legal arguments and grounds in support of one's position.

438. In the present case, the Parties diverge as to whether the dispute submitted to the Slovak courts prior to the commencement of this arbitration should be treated as the same dispute as the dispute under the Canada-Slovakia BIT. If it is the same dispute, then the dispute falls outside the *ratione temporis* application of the BIT. If the dispute submitted to this Tribunal is a different dispute, then the question arises as to when that different dispute arose and whether it is captured by the BIT or not.

439. According to the Respondent, there is essentially one dispute about the reassignment of Rozmin's mining rights (and potentially a denial of justice dispute). The dispute arose in 2005, when Rozmin's mining rights were reassigned and this reassignment was contested. The dispute therefore falls outside the *ratione temporis* application of the Canada-Slovakia BIT.

440. The Slovak Republic draws a parallel between the present situation and the situation in the *Lucchetti v. Peru* case, where the arbitral tribunal recalled that "[a]ccording to a recent ICSID case, the critical element in determining the existence of one or two separate disputes is whether or not they concern the same subject matter." [464]

441. Indeed, a provision such as Article 15(6) of the Canada-Slovakia BIT obviously aims at avoiding that disputes which have accumulated for more than a certain number of years (three years in the case of the Canada-Slovakia BIT) give rise at the same time to a multitude of treaty claims brought before arbitral tribunals. A pre-existing "dispute," in that context, is any dispute whose intrinsic elements are invoked by the investor as the basis of the treaty claim.

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[463] *Mavrommatis Palestine Concessions,* Objection to the Jurisdiction of the Court, 30 August 1924, PCIJ, Series A, No. 2, p. 11 (RL-108**)**.

[464] *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru,* ICSID Case No. ARB/03/4, Award, 7 February 2005, ¶50 (RL-21).

442. Based on this analysis, the Respondent considers that the dispute submitted to domestic courts in the Slovak Republic concerns the same "subject-matter" as the dispute submitted to the Tribunal under the Canada-Slovakia BIT, and that since 2005, that dispute involved the same complaints against the State as those now invoked by Belmont before this Tribunal.

443. Belmont attempts to distinguish the present situation from that in the *Lucchetti v. Peru* case, on two accounts.

444. First, Belmont emphasises that in the *Lucchetti v. Peru* case, the Tribunal relied on the fact that no treaty existed at the time when the investment was made, and therefore the investor did not make the investment based on the expectation that it would receive the protections of the treaty which later came into force. However, the Tribunal is not convinced that the distinction made by Belmont has an impact on the proper approach to determine the existence of a dispute for the purpose of the application of Article 15(6) of the Canada-Slovakia BIT: this provision must be applied in accordance with its terms, the meaning of which is not affected by the existence of a prior BIT in force before the entry into force of the BIT invoked by Belmont.

445. Second, Belmont submits that the facts of *Lucchetti v. Peru* are different from the present situation because in that case the claimants were the same in the domestic proceedings and in the BIT proceedings, whereas in the present case the claimants are different: Rozmin was the claimant in the domestic proceedings whereas its shareholder Belmont is the claimant in the present ICSID proceedings.

446. However, it would be artificial to distinguish the dispute between Rozmin and the State authorities concerning Rozmin's own mining rights, from the dispute between Rozmin's shareholders and the State in respect of Rozmin's mining rights.

447. The terms of the letter from Mr. Agyagos, who was both the executive director of Rozmin and the President and CEO of Belmont,[465] to the then Minister of Economy of the Slovak Republic Mr. Malchárek on 3 November 2005, while domestic proceedings were pending, already encapsulated the terms of the dispute as it is submitted to this Tribunal:

> *The company Rozmin s.r.o. has been engaged, since June 1997, in the mining activity, in particular in the activity relating to the opening, preparation and excavation of the talc deposit in the excavation area "Gemerská Poloma" which is located in the district Rožňava.* […]
>
> *It was a big surprise when there appeared, in Commercial Bulletin No. 253/2004 dated 30 December 2004, a notice on the announcement of the selection procedure for the assignment of the excavation area "Gemerská Poloma" to another organization, which was justified to us by the mining office by the fact that we discontinued the mining activity in the site for a period exceeding three years. However, such a reason has no support in the Mining Act and moreover it is not based on the truth because our mining activity was discontinued for a shorter period (2 years and 10 months). The conduct of the mining office is incomprehensible also given the fact that it issued to us, on 31 May 2004 by decision No. 1023/511/2004, an authorization for performance of the mining activity in the excavation area "Gemerská Poloma" with validity until 13 November 2006! The procedure of the mining office, which we consider as made on purpose and unlawful, we immediately challenged by available legal means; however, all filed complaints were evaluated by the relevant bodies in the competence of the Ministry of Economy of the SR as unjustified, to which we do not agree until today.* […]
>
> *On 22 April 2005, the planned selection procedure for the assignment of the excavation area was held, in which bids were submitted also by leading world talc producers, as, for example, Mondo Minerals, as well as leading Slovak companies engaged in the mining activity in various areas. It was a great surprise for the entire European expert economic society that in such a strong*

[465] Mr. Agyagos indeed identifies himself as follows in his First Witness Statement: "Since October 17, 1996, I hold the position of President and Director of Belmont Resources Inc. ("Belmont"), an emerging resource company listed on the Canadian TSX Venture Exchange and the Frankfurt Stock Exchange, specialized in the acquisition, exploration, and development of mineral resources. Since May 22, 2001, I also act as Managing Director of Rozmin s.r.o. ("Rozmin"), a company that was incorporated in the Slovak Republic in 1997 for purposes of carrying out a mining project at the Gemerská Poloma deposit in the Slovak Republic, one of the world's largest talc deposits." Agyagos WS ¶3.

> *competition the excavation area was assigned to an absolutely unknown Rožňava company, Economy Agency RV, s.r.o. with its seat at Marikovszkého 53, Rožňava 048 01, BIN: 36 582 760 with registered capital of SKK 200,000, which until then was only engaged in bookkeeping and obtained the mining permit only a week before holding the selection procedure.* […]
>
> *We believe that the procedure of the District Mining Office in Spišská Nová Ves is unlawful, non-standard and made on purpose; however, unfortunately it is shielded by means of the assistance of the Main Mining Office and until now it also had ensured the highest political shield from the side of the former Minister of Economy. On the other hand, we are convinced that neither the Slovak courts nor* ***the relevant international institutions to which we intend to subsequently refer****, will make any allowances for the interests of the former Minister, and they will proceed strictly under law and* ***international treaties on mutual support and protection of investments (because the shareholders of Rozmin a.s.ro. are foreign companies****), which can cause to the Slovak Republic considerable damage in the form of an obligation to compensate damage including the lost profit that will range approximately at hundreds of millions of crowns, as well as damage of reputation and cause of an international scandal of similar extent as it was, for example, in the recent so-called ČSOB case.*[466]

448. Clearly, the possibility of investment treaty proceedings to challenge the reassignment of Rozmin's rights was already foreseen and was the subject of correspondence by the CEO of Belmont to a Minister in November 2005. A dispute between Belmont and the Slovak Republic already crystallized with Mr. Agyagos' letter, which expressly refers to claims by Rozmin's shareholders against the State under "international treaties on mutual support and protection of investments (because the shareholders of Rozmin a.s.r.o are foreign companies), which can cause to the Slovak Republic considerable damage in the form of an obligation to compensate damage including the lost profit that will range approximately at hundreds of millions of crowns." In addition, Mr. Agyagos signed the letter in his two capacities of Executive of Rozmin and President and CEO of Belmont:[467]

[466] Letter from Mr. Agyagos and Belmont to the Minister of Economy, 3 November 2005 (R-162**)** (emphasis added).

[467] Excerpt from Letter from Mr. Agyagos and Belmont to the Minister of Economy, 3 November 2005 (R-162).

Vancouver, Kanada, dňa 03.11.2005

Vojtech Agyagos
konateľ Rozmin s.r.o.
President a CEO Belmont Resourcec Inc.

449. Belmont considers that this letter is only a one-sided position, and invokes the decision in *Railroad Development Corporation v. Guatemala*, in which an ICSID tribunal held that "a dispute is a conflict of views on points of law or fact which requires sufficient communication between the parties for each to know the other's view and oppose them."[468] However, such was the case after Mr. Agyagos had sent this letter to the Minister, since the position of the Slovak Republic on points of fact and law was already known to him at the time he wrote the letter, and was not changed after the Minister received it. Moreover, it is paradoxical to maintain that a dispute does not exist after one of the parties has threatened the other of bringing a lawsuit before a tribunal.

450. EuroGas' notice of dispute of 31 October 2011 does not highlight anything new, as compared with Mr. Agyagos' letter of November 2005, except for the outcome of the domestic court process regarding the re-assignment of Rozmin's mining rights.

451. To counter the approach taken by the tribunal in *Lucchetti v. Peru*, which this Tribunal approves, Belmont relies heavily on *Jan de Nul v. Egypt*, where a provision similar to Article 15(6) of the Canada-Slovakia BIT was at stake. In that case, a dispute between Jan de Nul and the Suez Canal Authority had been submitted to local courts well before the entry into force of the investment treaty. When the treaty came into force, the dispute was pending before the Administrative Court of Ismaïlia, which eventually rendered an adverse decision in 2003, approximately one year after the BIT's entry into force. Notwithstanding

[468] *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010 (CL-133), ¶129.

the fact that the BIT excluded disputes that had arisen prior to its entry into force, the Tribunal concluded that it had jurisdiction. However, in the *Jan de Nul v. Egypt* Decision on Jurisdiction, the tribunal reasoned as follows:

> *… the claims regarding the judgment and the manner in which the Egyptian courts dealt with the dispute address the actions of the court system as such, and are thus separate and distinct from the conduct which formed the subject matter of the domestic proceedings. Hence, they do not coincide with the conduct examined in the course of the dispute brought under domestic law.* […]
>
> […] *Admittedly, the previous dispute is one of the sources of the present dispute, if not the main one. It is clear, however, that the reasons, which may have motivated the alleged wrongdoings of the SCA* [Suez Canal Authority] *at the time of the conclusion and/or performance of the Contract, do not coincide with those underlying the acts of the organs of the Egyptian State in the post-contract phase of the dispute. Since the Claimants also base their claim upon the decision of the Ismaïlia Court, the present dispute must be deemed a new dispute.*
>
> *The intervention of a new actor, the Ismaïlia Court, appears here as a decisive factor to determine whether the dispute is a new dispute. As the Claimants' case is directly based on the alleged wrongdoing of the Ismaïlia Court, the Tribunal considers that the original dispute has (re)crystallized into a new dispute when the Ismaïlia Court rendered its decision.*[469]

452. Thus the *Jan de Nul v. Egypt* tribunal clearly distinguished between two phases. In the first phase the actor accused of a wrongdoing was the Suez Canal Authority, which as the tribunal observed, was not an organ of the State. In the second phase, the actor accused of a wrongdoing was the Court of Ismaïlia, an organ of the State. By contrast, in the present case all the actors accused of a wrongdoing were organs of the State, which were the same at all stages: the DMO, the MMO and the Regional Court confirming their decisions.

[469] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No ARB/04/13, Decision on Jurisdiction, 16 June 2006, ¶¶119, 127-128 (Exhibit CL-58).

453. The situation in the present case is to some extent similar to that in the PCIJ case *Phosphates in Morrocco,*[470] in which the PCIJ drew a distinction between the "real causes of the dispute" and "subsequent factors which either presume the existence or are merely the confirmation or development of earlier situations or facts." What matters is the real cause of the dispute.

454. In this case, there has been no separate act by a Slovak State organ that could be deemed to have crystallized a new dispute. The chronology of relevant events in this case helps distinguish the present situation from the situation in *Jan de Nul v. Egypt*:

DATE	EVENT
3 May 2005	DMO reassigns Mining Area to Economy Agency
3 November 2005	Letter from Mr. Agyagos, acting in the name of Rozmin *and* Belmont to Minister of the Economy, threatening international arbitration
7 February 2008	Regional Court affirms the reassignment
27 February 2008	Supreme Court reverses on procedural grounds
2 July 2008	DMO reassigns the Mining Area to VSK Mining s.r.o.
12 January 2009	MMO affirms the reassignment
14 March 2009	Canada-Slovakia BIT takes effect
3 February 2010	Regional court affirms the reassignment
18 May 2011	Supreme Court reverses on procedural grounds
30 March 2012	DMO reassigns the Mining Area to VSK Mining s.r.o.
1 August 2012	MMO affirms the reassignment (which Rozmin does not appeal)

[470] *Phosphates in Morocco (Italy v. France)*, PCIJ Reports, Ser. A/B No. 74, 1938, p. 16 (CL-33).

455. This chart illustrates the fact that the situation was exactly the same on 3 May 2005, before the BIT entered into force, and 1 August 2012, after the BIT entered into force: the mining rights that were lost by Rozmin were reassigned to another company. In other words, the mining rights were taken from Rozmin in 2005, allegedly in violation of Belmont's rights under the Canada-Slovakia BIT and international law, and several decisions of the mining authorities (not the judicial authorities) refused to restitute the rights to Rozmin. The decision of the DMO, on 30 March 2012, to reassign exclusive rights over the Mining Area to VSK Mining, and its confirmation by the MMO on 1 August 2012, did not change Belmont's legal and factual situation: since the reassignment of the Mining Area in 2005, it had lost its rights on the Mining Area and was not present on the site.

456. Contrary to Belmont's position, the decisions of 30 March 2012 and 1 August 2012 cannot be considered the source of a new dispute; rather, they were a refusal to resolve the ongoing dispute, which arose from the alleged breach in 2005.

457. All the decisions by Slovak authorities that have been mentioned in this arbitration are elements of the same dispute, the main feature of which is the taking of Belmont's investment. Pursuant to Article 15(6) of the BIT, the relevant time is the time when the dispute *arose*. It arose with Mr. Agyagos' letter of 3 November 2005, more than six years before the entry into force of the BIT.

458. Since no new State conduct has given rise to a new dispute after 14 March 2009 (or even (re)crystallised an old dispute), the Tribunal must conclude that it lacks jurisdiction over Belmont's claims. To conclude otherwise would deprive Article 15(6) of the Canada-Slovakia BIT from any meaning and effect, and would require the Tribunal to engineer a legalistic and artificial reasoning to bypass this provision, and effectively extend the *ratione temporis* application of the Treaty to a long-standing dispute dating from well over three years prior to the entry into force of the treaty.

459. The State Parties to the Canada-Slovakia BIT cannot have intended that Article 15(6) be read and applied in a way that exposes them to claims from investors that could date from more than three years before the entry into force of the treaty, just because a certain dispute was not settled and/or might give rise to a follow-up action. Considering that the State's

refusal to overturn an existing alleged breach gives rise to a new dispute would open the floodgates to a possible complete disregard of the condition *ratione temporis* of the application of a BIT. The consequence would be that an investor could bypass the *ratione temporis* limitations of a treaty by commencing local court proceedings after the entry into force of the treaty, in respect of an old dispute. This cannot be a sensible legal result.

460. The Tribunal does not accept that an investor may invoke the last event in a series of related or similar actions by the State to claim the benefit of the treaty. In the present case, the situation is clear-cut since there has not been a series of (alleged) transgressions by the Respondent, but one (alleged) transgression whose effects have been maintained throughout domestic court proceedings and repeated decisions by the mining authorities.

461. To conclude, the Tribunal finds that Belmont's claims fall outside the ambit of the Tribunal's jurisdiction under the Canada-Slovakia BIT. Because the Tribunal lacks jurisdiction over the Claimant Belmont's claims for the reasons stated above, the Tribunal does not need to address the Respondent's objection based on Belmont's standing.

VII. COSTS

462. EuroGas, Belmont and the Respondent each request an award of costs covering of the legal fees and expenses and the costs incurred in connection with this proceeding, and they have filed submissions quantifying their fees and costs.[471]

A. Summary of the Parties' Costs

(1) EuroGas' Costs

463. EuroGas claims reimbursement of the following costs, incurred through 31 October 2016, in connection with this arbitration:[472]

[471] EuroGas' Statement of Costs, 14 November 2016, ¶8; Belmont's Statement of Costs, 14 November 2016, ¶11; Respondent's Statement of Costs, 14 November 2016, p. 2.

[472] EuroGas' Statement of Costs, 14 November 2016.

Description	Amount
ICSID	USD 192,500.00
Attorney fees and expenses of EuroGas' previous counsel (Derains & Gharavi)	EUR 411,213.12
Attorney fees (Holland & Hart, LLP) Attorney fees (Mabey & Coombs)	USD 474,138.55 USD 15,000.00
Costs (Holland & Hart, LLP) Costs (Mabey & Coombs)	USD 25,084.85 and EUR 6,698.26 USD 2,225.00 and EUR 2,551.70
Translation costs	USD 113,972.14
Snell & Wilmer (fees and expenses)	USD 241,502.35
KPMG	USD 128,041.10
WAI	GBP 33,671.99
Travel and related expenses for the hearing	EUR 8,889.92
Grand total	USD 1,192,463.99 EUR 411,213.12 GBP 33,671.99

464. EuroGas provides the following relevant details in respect of those costs:

a. the attorney fees and costs included in the table above relate to the present arbitration and also to the Utah Bankruptcy Proceedings. The attorney fees related only to the arbitration are USD 296,118.30 for Holland & Hart and USD 10,000.00 for Mabey & Coombs. The costs related to the arbitration are USD 22,040.78 and EUR 6,698.26 for Holland & Hart and USD 2,225.00 and EUR 2,551.70 for Mabey & Coombs.

b. Seventy percent of the fees and costs outlined above relate to responding to jurisdictional objections raised against EuroGas and the remaining 30% relate to responding to the Respondent's defence on the merits.

c. Belmont and EuroGas have agreed that they are liable in proportion of their respective shareholding in Rozmin for (i) the advances paid to ICSID, (ii) the fees and expenses of KPMG and WAI, (iii) the translation costs incurred in connection with the present

arbitration, and (iv) travel and lodging expenses relating to Dr. Rozloznik's attendance at the Hearing.

(2) Belmont's Costs

465. Belmont claims reimbursement of the following costs:

Description	Amount
ICSID	USD 332,500.00
Counsel (fees and expenses)	EUR 1,103,510.38
Translations costs	USD 196,860.96
KPMG (fees and expenses)	USD 221,161.90
WAI (fees and expenses)	GBP 58,160.72
Travel and related expenses for the hearing	EUR 6,336.57 and CHF 1,719.97
Grand total	EUR 1,108,846.95 USD 750,522.86 GBP 59,160.72 CHF 1,719.97

466. Belmont specifies that the grand total of counsel fees and expenses incurred by Belmont in connection with the present arbitration (EUR 1,103,510.38) is broken down as follows: EUR 250,000.00 was incurred on issues of jurisdiction, EUR 718,990.78 was incurred on the merits and EUR 134,519.60 was incurred on quantum.

467. Belmont confirms that (i) the advances on costs paid to ICSID, (ii) the fees and expenses of KPMG and WAI, (iii) the translation costs incurred in connection with the present arbitration, and (iv) travel and lodging expenses relating to Dr. Rozloznik's attendance at the Hearing were allocated between Belmont and EuroGas in proportion of their respective shareholding in Rozmin.

(3) Respondent's Costs

468. The Respondent claims reimbursement of the following costs:

External costs	
Counsel fees	EUR 3,051,946.52
Counsel travel costs	EUR 153,555.45
Experts	EUR 1,025,000.44
Other services (translator, courier, etc.)	EUR 48,458.00
TOTAL: EUR 4,278,960.41	
Internal costs	
Travel costs of Ministry of Finance	EUR 4,181.13
Translation costs of Ministry of Finance	EUR 331.52
TOTAL: EUR 4,512.65	
Other costs	
Payments to ICSID	USD 300,000.00
	USD 200,000.00
TOTAL: USD 500,000.00	
Grand total: EUR 4,283,473.06 + USD 500,000.00	

B. Tribunal's Decision on Costs

469. The costs of this arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant, ICSID's administrative fees and direct expenses, amount to (in USD):[473]

[473] The ICSID Secretariat will provide the parties with a detailed Financial Statement of the case account once all invoices are received and the account is final.

Arbitrators' fees and expenses	
Professor Pierre Mayer	298,022.39
Professor Emmanuel Gaillard	115,799.50
Professor Brigitte Stern	160,848.19
Assistants' fees and expenses	49,875.00
ICSID's administrative fees	96,000.00
Direct expenses (estimated)[474]	129,979.63
Total	**850,524.71**

470. In accordance with ICSID Financial Regulation 14(3)(d) and paragraph 10 of Procedural Order No. 1, these arbitration costs have been paid out of advances made by the Parties in equal parts (50% by the Claimants and 50% by the Respondent). As a result, the Claimants' share of the arbitration costs amounts to USD 425,262.35, and the Respondent's share also amounts to USD 425,262.35. In addition, as mentioned above, the Claimants have agreed that Belmont and EuroGas are liable for the Claimants' share of the arbitration costs in proportion to their respective (alleged) shareholding in Rozmin. Belmont claims to have a 57% interest in Rozmin, and EuroGas claims to have a 33% interest in Rozmin. Therefore, Belmont bears 63.3% of the Claimants' share of the arbitration costs (USD 269,332.82),[475] and EuroGas bears 36.6% (USD 155,929.53).[476]

471. Article 61(2) of the ICSID Convention provides that

> *the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid.*

[474] This amount includes estimated charges relating to the dispatch of this Award (printing, copying and courier).

[475] Because the Claimants together own 90% of Rozmin's shares, the applicable formula to determine Belmont's share of the arbitration costs is USD 425,262.35 x (57/90).

[476] The applicable formula to determine EuroGas' share of the arbitration costs is USD 425,262.35 x (33/90).

472. This provision establishes the Tribunal's discretion in allocating the costs of the arbitration and the Parties' costs, including legal fees and expenses.

473. In reaching its decision on costs in this case, the Tribunal has considered in particular the following circumstances: the Respondent has succeeded in its plea that this Tribunal lacks jurisdiction. However, the jurisdictional issues arising in this matter were complex, and it was not unreasonable for the Claimants to attempt to establish jurisdiction under the BITs, even if the Tribunal eventually found that treaty protection was not available in the specific and complex circumstances of the case.

474. Therefore, in exercising its discretion under Article 61(2) of the ICSID Convention, the Tribunal finds it equitable that the arbitration costs identified in paragraph 469 above are finally apportioned just as they were borne by the Parties during the proceeding, *i.e.*: the Respondent shall bear USD 425,262.35 of the arbitration costs; Belmont shall bear USD 269,332.82; and EuroGas shall bear USD 155,929.53.

475. Each Party shall bear its own costs for the preparation and presentation of its case (legal and expert fees and expenses, travel costs, translation and other costs).

VIII. AWARD

476. For the reasons stated above, the Tribunal decides as follows:

a) The Tribunal lacks jurisdiction over EuroGas.

b) The Tribunal lacks jurisdiction over Belmont.

c) The Tribunal's fees and costs and ICSID charges are apportioned as they were borne by the Parties during the proceeding, which is as follows: USD 425,262.35 by the Respondent; USD 269,332.82 by Belmont; and USD 155,929.53 by EuroGas.

d) Each Party shall bear its own legal fees and other expenses incurred in relation to this arbitration.

e) All other requests for relief are dismissed.

[signed]

Professor Emmanuel Gaillard
Arbitrator
(Subject to the attached Dissenting Opinion)

Date: 26 July, 2017

[signed]

Professor Brigitte Stern
Arbitrator

Date: 6 July, 2017

[signed]

Professor Pierre Mayer
President of the Tribunal

Date: 28 June, 2017