

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

EUROGAS INC. AND BELMONT RESOURCES INC.

(Claimants)

v.

SLOVAK REPUBLIC

(Respondent)

ICSID Case No. ARB/14/14

DISSENTING OPINION OF PROFESSOR EMMANUEL GAILLARD

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1. It is with regret that I feel compelled to dissent in part from the Award. Despite the great respect and esteem I have for my colleagues, the members of the Arbitral Tribunal (the “Tribunal”), I disagree with their conclusion that Belmont Resources Inc.’s (“Belmont”) claims fall outside the ambit of the Tribunal’s jurisdiction.¹ I concur, nevertheless, with the other findings that are presented in the Award and that are not discussed herein.

2. As I will explain below, I disagree with the majority of the Tribunal (the “Majority”) with respect to the operation of the *ratione temporis* provision found at Article XV(6) of the 2010 Canada-Slovakia BIT (the “BIT” or the “Treaty”) (I). Accordingly, I find the Majority’s assessment of what constitutes the dispute before the Tribunal to be wrong (II): I cannot agree that the dispute between Belmont and the Slovak Republic (the “Respondent”), which has been brought before the Tribunal and concerns certain critical facts that took place after the critical date of March 14, 2009, can be said to have arisen before that date. In my view, the dispute arose after the critical date of March 14, 2009 and, as a result, falls squarely within the Tribunal’s jurisdiction *ratione temporis*.

I. INTERPRETATION OF ARTICLE XV(6) OF THE 2010 CANADA-SLOVAKIA BIT, THE CONCEPT OF “DISPUTE” AND THE PROCESS OF DEFINING THE DISPUTE BEFORE THE ARBITRAL TRIBUNAL

3. The *ratione temporis* scope of the Tribunal’s jurisdiction over Belmont’s claims is found in Article XV(6) of the BIT, which provides, *inter alia*, that

“... this Agreement shall apply to any dispute which has arisen not more than three years prior to its entry into force.”²

4. It is undisputed between the parties that the Treaty’s date of entry into force is March 14, 2012 and that, therefore, the critical date for defining the Tribunal’s jurisdiction *ratione temporis* is March 14, 2009.

¹ Award, paragraph 461.

² Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments, July 20, 2010 (**Exhibits C-2 and R-6**), Article XV(6) (emphasis added).

5. As a preliminary matter, it is important to emphasize that the limitation *ratione temporis* provided by the Treaty concerns only the date on which the dispute arose and not the date on which facts or situations leading up to the dispute occurred.³ Indeed, Article XV(6) of the Treaty calls only for the determination of the date on which the dispute itself arose; it does not call for an assessment of the date on which facts or situations relating to the dispute occurred, *i.e.*, the date of the alleged “real causes” of the dispute as referred to by the Majority. The cornerstone of the Tribunal’s assessment of its jurisdiction is therefore the concept of “dispute”.
6. A “dispute” is traditionally defined as “*a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons*”, following the seminal decision rendered by the Permanent Court of International Justice (“PCIJ”) in the *Mavrommatis* case.⁴ It follows that a dispute arises at the moment a disagreement is formed between the parties over points of law or fact. In turn, a disagreement is formed once the claims or positions of one of the parties over those points of law or fact are contested or ultimately ignored by the other. A dispute, therefore, presupposes the existence of the factual and legal framework on which the disagreement is based and cannot arise until the entirety of such constituent elements has come into existence.
7. The Tribunal therefore has two tasks when ruling on its jurisdiction *ratione temporis*: (1) determining the subject and scope of the disagreement submitted to it by the parties, and (2) determining when this disagreement arose.

³ Compare, for example, with France’s 1931 declaration accepting the Permanent Court of International Justice’s (“PCIJ”) compulsory jurisdiction, which contained a limitation *ratione temporis* to the Court’s jurisdiction not only with respect to the date of the dispute, but also with respect to the date of “*situations and facts with regard to which the dispute arose.*” (*Phosphates in Morocco (Italy v. France)*, PCIJ Reports, Ser. A/B No. 74, 1938, p. 22: “... *jurisdiction of the Court [...] in any disputes which may arise after the ratification of the present declaration with regard to situations or facts subsequent to such ratification...*”). It was this particularity of France’s declaration that prompted the PCIJ, when deciding on its own jurisdiction, to search for the situations and facts that would be “the real causes” of the dispute and their date, instead of satisfying itself with determining the date on which the dispute arose (*see Phosphates in Morocco*, pp. 22-24).

⁴ *Mavrommatis Palestine Concessions*, P.C.I.J., Series A, No. 2, Objection to the Jurisdiction of the Court, 30 August 1924, p. 11.

8. In the context of determining the subject and scope of the dispute, the *Mavrommatis* definition calls for an assessment that encompasses *all* relevant facts and elements constituting the parties' disagreement, as conveyed in their submissions.⁵ It is therefore not sufficient to carry out an analysis that is limited to searching for the “*real causes*” of the dispute, particularly when this results in overlooking key and distinctive features of the dispute.
9. For this reason, I find the Majority's approach to the definition of the dispute before the Tribunal to be too reductive and inconsistent with the well-established *Mavrommatis* definition. When stating that “[w]hat matters is the real cause of the dispute,”⁶ basing its conclusion on the award rendered in *Lucchetti v. Peru*⁷ and the PCIJ decision in *Phosphates in Morocco*,⁸ the Majority disregards key features of the dispute, focusing on early events instead of considering the dispute as a whole, as submitted by the parties.
10. In its search for the “*real causes*” of the dispute, the Majority ends up reducing the dispute to its most abstract element, described as “*the reassignment of Rozmin's rights*”, and overlooks aspects of the dispute that concern the concrete

⁵ Shabtai Rosenne, *Rosenne's Law and Practice of the International Court: 1920-2015* (Malcolm Shaw, ed., 5th ed., Brill Nijhoff 2016), vol II Jurisdiction, p. 532. The case law of the International Court of Justice is consistent in this regard and provides authoritative guidance on how the process of defining the dispute should be conducted: for a case-by-case application of this process, see *Interhandel Case*, Judgment of March 21st, 1959: I.C.J. Reports 1959, p. 6, pp. 20-22; and *Case concerning Right of Passage over Indian Territory (Merits)*, Judgment of 12 April 1960: I.C.J. Reports 1960, p. 6, pp. 33-34. For cases in which the ICJ defined the dispute but was not faced with the question of the critical date, see: *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457, paras. 24-31; and *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432, paras. 29-35.

⁶ Award, para. 453.

⁷ Award, paras. 440-451, referring to *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, para. 50.

⁸ Award, para. 453, referring to *Phosphates in Morocco (Italy v. France)*, PCIJ Reports, Ser. A/B No. 74, 1938. As discussed above, in footnote 3, in *Phosphates in Morocco*, the PCIJ only proceeded to determine the “*real causes*” of the dispute and to distinguish them from “*subsequent factors which either presume the existence or are merely the confirmation or development or earlier situations or facts*” because the limitation *ratione temporis* to its jurisdiction emanating from France's declaration concerned both the date of the dispute and the date on which situations relating to the dispute occurred. That limitation *ratione temporis* is different from the provision in the BIT in the case at hand. I therefore believe the application of *Phosphates in Morocco* reasoning to be misplaced in the present case.

circumstances in which the legal acts that allegedly brought about this reassignment occurred.⁹ In particular, I consider that the Majority neglected the specific circumstances and effects of the Slovak authorities' acts carried out after the critical date of March 14, 2009, despite the fact that they constitute a significant aspect of the parties' disagreement in the present proceedings. What is more, by reducing the dispute to "*the reassignment of Rozmin's rights*", the Majority reached the conclusion that this is the same dispute as the one submitted to the Slovak courts in 2005, despite the distinctiveness of the factual and legal circumstances leading up to each of the two disputes, which I will discuss further in Section II below.

11. In other words, by limiting the dispute to its alleged "*real causes*" instead of analyzing all the relevant factual and legal circumstances leading to the disagreement brought before the Tribunal, the Majority departed from the *Mavrommatis* definition of "dispute" it purports to apply.
12. I further strongly disagree with the Majority's interpretation of the intention of the State Parties to the BIT as set out in Article XV(6) of the Treaty. According to the Majority:

"[t]he 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."¹⁰

13. First of all, as discussed above, nothing in the Treaty conveys an intention of the State Parties to define jurisdiction by reference to "facts" as opposed to a "dispute". Certain other treaties have chosen to exclude from their scope of temporal jurisdiction "facts" having occurred before a certain date (generally the date of entry into force of the relevant treaty); that the Treaty does not contain

⁹ Award, para. 448. The Majority also describes this common element as "*the taking of Belmont's investment*" (Award, para. 457) and as Belmont's losing of its rights on the Mining Area (Award, para. 455).

¹⁰ Award, para. 459.

such language simply means that such an intention did not exist and cannot be inferred.

14. Moreover, if “*follow-up action[s]*” – in effect, new actions relating to past facts – produce new legal effects and transform the subject and scope of the initial disagreement of the parties (independently or combined with previous legal acts), I do not see how this intervening action cannot give rise to a new dispute in light of the *Mavrommatis* definition. A new disagreement between the parties in relation to which they seek adjudication by the Tribunal is, by definition, a new dispute.
15. This is not to say that any new fact or act that follows a dispute that has already arisen will necessarily result in a new dispute between the parties. One still needs to assess the relevance of these new elements in light of all of the circumstances in order to determine the seriousness of the parties’ new positions.
16. This consideration leads me to my second point of disagreement with the Majority, which pertains to the legal effects of the events taking place after March 14, 2009, and their relevance to the dispute between the parties.

II. THE DISPUTE BEFORE THE ARBITRAL TRIBUNAL AND THE POST-MARCH 14, 2009 FACTS

17. As discussed above, when deciding on its jurisdiction *ratione temporis* based on Article XV(6) of the BIT, the Tribunal has two tasks: to determine the subject and scope of the dispute (**A**), and to determine when this dispute arose (**B**).

A. The Dispute before the Arbitral Tribunal

18. By way of summary, based on the parties’ submissions throughout the arbitral proceedings, it appears that the dispute before the Tribunal concerns the conduct of the Slovak authorities vis-à-vis Rozmin’s mining rights over the Gemerská Poloma reserve, which, as alleged by Belmont and contested by the Respondent, amounted to an illegal expropriation and constituted a number of other breaches of the Slovak Republic’s international obligations under the Treaty.

19. The conduct of the Slovak authorities at the heart of the dispute between the parties began in 2005, before the critical date, but extended well beyond the critical date, until 2012. It encompasses the alleged *de facto* revocation of Rozmin’s mining rights in 2005, the conduct of the Slovak authorities following the Slovak Supreme Court decisions of 2008 and 2011, and the final legal act taken by the District Mining Office (“DMO”) which definitively reassigned the mining rights to VSK Mining in 2012. The dispute before the Tribunal is thus distinct from the dispute that was submitted by Rozmin to the Slovak courts in 2005, which only concerned facts that took place before and in 2005.
20. When setting out its position before the Tribunal, Belmont presented a claim on expropriation and other treaty breaches based on the alleged *de facto* revocation of the mining rights in 2005 by the DMO’s decision to hold a new tender.¹¹
21. However, Belmont also took issue with actions carried out by the Slovak authorities following the Slovak Supreme Court decisions, which took place from 2008 until 2012, through and beyond the critical date of March 14, 2009. These actions are presented by Belmont as an illegal expropriation:

“Furthermore, irrespective of the revocation, *per se*, of Rozmin’s mining rights, Slovakia’s subsequent disregard of the decisions of its own Supreme Court (dated February 27, 2008 and May 18, 2011), by way of the DMO’s assignment of these mining rights, first in July 2008 and then again in March 2012, to VSK Mining, in itself also constituted an expropriation of Claimant’s rights under international law.”¹²

22. These actions are also presented as breaches of other international obligations undertaken by the Respondent under the Treaty:

“Slovakia’s disregard of the decisions of its Supreme Court dated February 27, 2008 and May 18, 2011, by way of the assignment of mining rights over the Gemerská

¹¹ Request for Arbitration, para 88: “... *the abrupt revocation of Rozmin’s mining rights, justified post facto by the 2002 Amendment, amounted to a prohibited expropriation under both BITs.*” See also, Request for Arbitration, para. 90.

¹² Request for Arbitration, para. 89. See also, Claimants’ Memorial, paras. 283-284; Claimants’ Reply, para. 546.

Poloma talc deposit to VSK Mining, first in July 2008 and then again in March 2012, also constituted a breach of Claimants' above-mentioned rights, including the right to fair and equitable treatment, to full protection and security, and to protection against discriminatory and arbitrary measures.”¹³

23. These formulations of Belmont's position in the arbitral proceedings show that the dispute comprises claims based on the 2005 *de facto* revocation as well as claims that are substantially based on a spectrum of conduct which extends from 2008 through 2012. Belmont's position is that that spectrum of conduct produces its own legal effects, which are independent from the acts of 2005.
24. The opposing positions presented by the Respondent in its submissions are a mirror image of Belmont's and confirm that the scope of the present dispute goes beyond the DMO's conduct in 2005 and encompasses the conduct of the Slovak authorities between 2008 and 2012. Indeed, the Respondent's submissions are also devoted to a discussion of the alleged legality and justifiability of the DMO's and other Slovak authorities' conduct after the Supreme Court decisions of 2008 and 2012.¹⁴
25. The dispute before the Tribunal therefore concerns the legality, under international law, of the 2005 *de facto* revocation of the mining rights as well as the Slovak authorities' conduct from 2008 and 2012 with respect to Rozmin's mining rights and leading to the definitive reassignment of the mining rights to VSK Mining in 2012. It is not disputed that the latter conduct from 2008 through 2012 was not – and could not have been – raised in the case brought before the Slovak courts in 2005.

B. The Time at which the Dispute before the Arbitral Tribunal Arose

26. As stated above, a dispute cannot arise until all of its constituent elements have fully come into existence. In this case, the DMO's 2012 act of reassignment of

¹³ Request for Arbitration, para. 93. *See also*, Claimants' Memorial, paras. 293, 330-331, 363, 371; Claimants' Reply, paras. 598-617.

¹⁴ Respondent's Counter-Memorial, Sections VI and VII; Respondent's Rejoinder, Sections V and VI.

the mining rights is the final and essential constituent element of the dispute, as it is the act that created the legal situation of the mining rights contested before the Tribunal. Without this final act, the dispute before the Tribunal would not exist. As a result, the dispute before the Tribunal necessarily arose after this act.

27. In this light, I feel compelled to examine closely the Majority's conclusion that, after the critical date of March 14, 2009, there was no new act by the Slovak authorities capable of giving rise to a new dispute between the parties because the acts that took place then only maintained the effects of previous, pre-critical date acts.¹⁵ I strongly disagree with both the Majority's conclusion and its justification.
28. Indeed, I find the Majority's conclusion that the post-March 14, 2009 acts merely maintained Belmont's previous factual and legal situation to be incorrect in light of the effects of the Slovak Supreme Court decisions upon the acts of reassignment of Rozmin's mining rights.
29. To summarize, the events leading up to the final act of reassignment of the mining rights may be divided in three phases. The first phase is comprised of the following events:
 - (i) On 30 December 2004, the Slovak Business Journal announced that the DMO was initiating a new tender procedure for the assignment of the mining area.¹⁶
 - (ii) On January 3, 2005, Rozmin was notified by the DMO that it was initiating a new tender procedure for the reassignment of the mining rights;¹⁷
 - (iii) On April 21, 2005, the DMO held a tender procedure which resulted in the assignment of the mining area to Economy Agency, the outcome of which was informed to Rozmin on May 3, 2005;¹⁸

¹⁵ Award, paras. 454-460.

¹⁶ Award, para. 42. Initiation of the Selection Procedure for the Determination and Assignment of the Extraction Area, Business Journal No. 253/2004, dated December 30, 2004, p. 99 (**Exhibit C-29**).

¹⁷ Award, para. 43. Letter from the District Mining Office to Rozmin sro, dated January 3, 2005 (**Exhibit C-30**).

- (iv) On February 27, 2008, the Supreme Court quashed the DMO's decision to assign the mining area to Economy Agency.¹⁹
30. I find it important to insist on the specific wording of the Supreme Court's order in its decision, as translated into English by both the Claimants and the Respondent: it "*quashed*" the act of reassignment.²⁰ This means that the decision rendered the reassignment act void, depriving it of any legal effect. As a result, based on the record of the present arbitral proceedings, as of the Supreme Court's decision there no longer was a valid legal act providing for the reassignment of the mining area.
31. The events constituting the second phase can be described as follows:
- (v) On July 2, 2008, the DMO, through a new legal act, awarded the Mining Area to VSK Mining;²¹
- (vi) On May 18, 2011, the Supreme Court cancelled the DMO's decision.²²
32. Again, the result of this second phase was the cancellation of the second act of reassignment, therefore depriving it of legal effect. Accordingly, as of this point, there was, once again, no valid legal act in the record providing for the reassignment of the mining area.

¹⁸ Award, para. 44. Report on the Course and Results of the Selection Procedure for the Designation of the MA GP to Another Organization Performed on April 21, 2005 (**Exhibit C-31**); Letter from the District Mining Office to Rozmin sro, dated May 3, 2005 (**Exhibit C-32**).

¹⁹ Award, para. 49; Decision of the Supreme Court of the Slovak Republic, dated February 27, 2008 (**Exhibits C-33** and **R-60**).

²⁰ Decision of the Supreme Court of the Slovak Republic, dated February 27, 2008, p. 1 (**Exhibits C-33** and **R-60**).

²¹ Award, para. 50; Decision of the District Mining Office on the Assignment of the Gemerská Poloma Mining Area to VSK Mining sro, dated July 2, 2008 (**Exhibit C-34**).

²² Award, para. 53; Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (**Exhibits C-36** and **R-61**).

33. The events constituting the final phase took place entirely after the critical date of March 14, 2009:
- (vii) On March 30, 2012, the DMO issued a new act assigning the mining area to VSK Mining;²³
 - (viii) On August 1st, 2012, the Main Mining Office (the “MMO”) confirmed the DMO’s reassignment decision.²⁴
34. It is only at the end of this final phase, as the MMO’s decision was not challenged, that the reassignment of the mining area became final.
35. In considering these three phases, the only tenable conclusion is that, in the end, there was only one legally valid act, issued in 2012, which had the legal effect of reassigning Rozmin’s mining rights to another company and which Belmont could complain of, both prior measures having been annulled. This is a key consideration, as it demonstrates the difference between, on the one hand, certain measures which merely confirm a legal situation that came about in 2005 – as argued by the Majority – and, on the other, certain annulled acts that were followed by another act that started producing effects as of 2012.
36. The fact of the matter is that the DMO’s act of March 30, 2012 did not confirm a previous situation, but rather was the sole act that created the legal situation complained of by Belmont before the Tribunal. In fact, after the second Supreme Court decision, had the DMO taken a different course of conduct, either reinstating the mining rights to Rozmin or simply doing nothing, the legal situation in question would not have existed. A dispute would, accordingly, not have existed before the Tribunal.
37. In light of these considerations, I find it difficult to agree with the Majority’s conclusion that the acts between 2008 and 2012 did not change Belmont’s legal and factual situation as existing in 2005,²⁵ and that there was “*one (alleged) transgression whose effects have been maintained throughout domestic court*”

²³ Award, para. 55; Decision of the District Mining Office, dated March 30, 2012 (**Exhibits C-37 and R-58**).

²⁴ Award, para. 57. Decision of the Main Mining Office, dated August 1, 2012 (**Exhibit C-273**).

²⁵ Award, para. 455.

*proceedings and repeated decisions by the mining authorities.”*²⁶ Given the critical nature of the DMO’s reassignment act of 2012 to the dispute before the Tribunal, I believe the dispute to be inextricably linked to this act, such that the dispute can only be considered to have arisen after its implementation. As stated above, since the constituent elements of the dispute only fully came into existence in 2012, the dispute could not have arisen before then.

38. In other words, until the final act of 2012, the Respondent could – and did, through its courts – remedy a situation that could potentially have constituted treaty breaches. By changing its course of conduct and deciding to reassign the mining rights to VSK Mining in 2012, notwithstanding the Slovak Supreme Court’s previous decisions, the Slovak authorities’ conduct created a dispute at that point in time concerning the legality, under the Treaty, of the reassignment of mining rights.
39. The exchange of communications between the parties with respect to the dispute confirms that an actual disagreement between them only took form on the eve of the present proceedings. The so-called “Final Notice of Dispute” of December 23, 2013 was the first time that Belmont presented its position on the issues of the dispute to the Respondent, particularly on how the DMO’s alleged stonewalling of Rozmin’s attempts of judicial redress by its repeated disregard for the Supreme Court decisions and the final reassignment of the mining rights in 2012 amounted to violations of Respondent’s international obligations.²⁷
40. The notification was answered by the Respondent on January 28, 2014, whereby the Respondent stated that the “*letter of 23 December [was] the first information that the Slovak Republic received regarding a dispute from Belmont Resources Inc.*”²⁸ It was in that letter that the Respondent opposed Belmont’s positions, alleging that it had “*acted in full compliance with the Agreement at all times and dispute[d] the allegations to the contrary in your [Belmont’s] letter.*” This

²⁶ Award, para. 460.

²⁷ Letter from EuroGas Inc. and Belmont Resources Inc. to the Government of the Slovak Republic, dated December 23, 2013 (**Exhibit C-42**), paras. 29-30.

²⁸ Letter from Mr. Peter Kažimr, Deputy Prime Minister and Minister of Finance of the Slovak Republic to Dr. Hamid Gharavi, dated January 28, 2014 (**Exhibit C-59**).

meeting of opposing views in 2014, *i.e.* after the critical date, therefore marks the birth of the dispute brought before the Tribunal.

41. In conclusion, and strongly dissenting from the Majority, my opinion is that the dispute brought before the Tribunal by Belmont with respect to the Slovak authorities' actions *vis-à-vis* Rozmin's mining rights falls under the Tribunal's jurisdiction and is not barred by the *ratione temporis* scope of Article XV(6) of the BIT. Accordingly, the Tribunal has jurisdiction to consider all facts relevant to that dispute, including facts that took place before March 14, 2009, consistent with Article XV(6) of the BIT.

Paris, July 26, 2017

[signed]

Professor Emmanuel Gaillard