

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**EUROGAS INC**

**(United States)**

**and**

**BELMONT RESOURCES INC.**

**(Canada)**

*Claimants*

–v–

**THE SLOVAK REPUBLIC**

*Respondent*

(ICSID Case No. Arb/14/14)

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**RESPONDENT'S APPLICATION FOR PROVISIONAL  
MEASURES AND OPPOSITION TO CLAIMANTS'  
APPLICATION FOR PROVISIONAL MEASURES**

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10 September 2014

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## I. INTRODUCTION

1. The Slovak Republic hereby submits (i) its Application for Provisional Measures against Claimants seeking an order requiring Claimants to post security for the Slovak Republic's costs in this arbitration (the "**Slovak Republic's Application**"), and (ii) its Opposition to Claimants' Application for Provisional Measures, which are now moot and unjustified in any event (the "**Claimants' Application**").
2. Claimants are EuroGas Inc., registered by the Utah Division of Corporations as Entity No. 6050868-0142 ("**EuroGas II**"), and Belmont Resources, Inc. ("**Belmont**") (together, the "**Claimants**"). The management of EuroGas II has previously been found by a U.S. federal court to have engaged in fraud, to have provided false testimony, and to have habitually reneged on its payment obligations. Both EuroGas II and its management are currently facing an additional complaint for fraud in U.S. federal court in Utah. And, as discussed below, it appears that Claimants have misrepresented their own status in this arbitration.
3. Claimants are impecunious, carry out no business activity, and do not have the means to pay for the costs of these proceedings. The present claim is entirely funded by third parties. Any award in favor of the Slovak Republic will be against Claimants—not against the third-parties that are currently funding these proceedings. It therefore is necessary that the Tribunal grant the requested security for costs. Without that security, the Slovak Republic will suffer irreparable harm when the award on costs against Claimants is inevitably not honored.
4. For its part, Claimants' Application is now moot. On 26 August 2014, the prosecutor ordered the return of seized hard-copy and electronic documents.<sup>1</sup> The prosecutor is affiliated with the Office of the Special Prosecution, which is part of the General Prosecution of the Slovak Republic—an independent entity outside the control of the Slovak legal representatives in this proceeding. The National Unit of Finance Police issued the corresponding decision on 4 September 2014.<sup>2</sup> Shortly thereafter, on 5 September 2014, the prosecutor issued a resolution suspending the criminal

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<sup>1</sup> Resolution dated 4 September 2014, **R-1**.

<sup>2</sup> Resolution dated 4 September 2014, **R-1**.

proceedings of which Claimants' complain pending the resolution of this arbitration.<sup>3</sup> Claimants therefore should withdraw the Claimants' Application forthwith.

5. Claimants' Application is baseless in any event. The Tribunal has no *prima facie* jurisdiction in respect of either EuroGas II or Belmont. EuroGas II is abusing the ICSID process by falsely claiming to have held an interest in Rozmin s.r.o. ("**Rozmin**") since 16 March 1998.<sup>4</sup> In fact, the interest in Rozmin was acquired and held indirectly by an entity named EuroGas Inc., registered by the Utah Division of Corporations as Entity No. 117160 ("**EuroGas I**"). EuroGas I was dissolved on 11 July 2001.<sup>5</sup> The Claimant, EuroGas II, was registered under the same name on 15 November 2005, but is an entity entirely distinct from EuroGas I. EuroGas II has not evidenced any interest whatsoever in the current dispute.
6. Further, EuroGas II also has no real activity in the U.S. and is controlled by nationals of a third-party. The Slovak Republic therefore validly exercised its right to deny EuroGas II the benefit of the Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment dated 22 October 1991 (the "**U.S. BIT**") on 21 December 2012—more than a year-and-a-half *before* this arbitration was commenced.<sup>6</sup> The Tribunal thus has no jurisdiction over EuroGas II.
7. Nor has the Tribunal *prima facie* jurisdiction over Belmont because the instant dispute is excluded *rationae temporis* from the scope of the Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments dated 20 July 2010 (the "**Canada BIT**").<sup>7</sup> Under Article 15(6), the Canada BIT shall only apply to disputes that arose not more than three years prior to its entry into force on 14 March 2012. The present dispute, however, arose in 2005—more than three years prior to 14 March 2012. In addition, it appears that Belmont was not even a shareholder in Rozmin at that time. Each of these facts is fatal to the Tribunal's jurisdiction over Belmont's claims.

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<sup>3</sup> Resolution dated 5 September 2014, **R-2**.

<sup>4</sup> Request for Arbitration, ¶8.

<sup>5</sup> Application for Reinstatement dated 24 August 1994, **R-3**.

<sup>6</sup> Article I.2, U.S. BIT, **R-4**; Letter from the Slovak Republic dated 21 December 2012, **R-5**.

<sup>7</sup> Article 15(6), Canada BIT, **R-6**.

8. In any event, Claimants are not entitled to seek provisional measures that would impact criminal proceedings in the Slovak Republic. This is particularly so in the present circumstances because the criminal proceedings were initiated following a criminal complaint from a private party, by independent entities, in good faith, and with due respect to the rights of all parties involved. Nevertheless, given EuroGas' history of fraud—as found by a US federal court—it is not surprising that additional fraud allegations have been raised in the private complaint.
9. Claimants' Application also fails because it does not seek measures that are necessary or urgent. Resolutions suspending the criminal proceedings and returning the seized documents have been issued. Even if that were not the case, Claimants have failed to discharge their burden to demonstrate irreparable harm to the procedural integrity of these ICSID proceedings. The documents seized were documents held by an independent contractor accountant—not an employee of Rozmin or of Claimants. In the absence of evidence to the contrary, it is not credible to suggest that an independent contractor—over whom Claimants have little control—is in possession of documents critical to this arbitration but which Claimants, who have been preparing this case for three years, somehow do not possess. These documents are unlikely to be necessary to prepare a claim arising from events that occurred in 2004 and 2005 and where investment treaty breaches have been alleged since 16 December 2010.<sup>8</sup> Moreover, the alleged intimidation of any witness has simply not occurred.
10. In sum, the Tribunal has no *prima facie* jurisdiction, and evidence of its financial insolvency and history of fraud requires provisional measures to be awarded *against* Claimants, not in *favor* of them. The Slovak Republic will not address Claimants' other unsupported allegations and inflammatory statements regarding the merits of the case sprinkled throughout their papers. They are inappropriate in this phase of the proceeding; they are baseless; and they are hereby denied in their entirety.

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<sup>8</sup> Letter from EuroGas GmbH to the Government of the Slovak Republic, dated 16 December 2010, **R-7**.

## II. THE FACTS

11. Claimants' Application and the underlying events are intrinsically intertwined with the corporate identity and recent activities of Claimants. Prior to turning to the specific facts that allegedly gave rise to Claimants' Application, the Slovak Republic sets out below the relevant background pertaining to each Claimant.

### A. EUROGAS I

12. The entity that became EuroGas I, named Northampton, Inc., was registered with the Utah Division of Corporations under Entity No. 117160 on 7 October 1985.<sup>9</sup>

13. On 1 January 1994, Northampton, Inc. was involuntarily dissolved.<sup>10</sup> Northampton, Inc. applied for reinstatement on 24 August 1994.<sup>11</sup> The reinstatement was granted. Shortly thereafter, on 29 August 1994, Northampton, Inc. changed its name to EuroGas Inc.<sup>12</sup>

14. On 30 October 1995, a private individual, Mr. Harven Michael McKenzie, filed a petition for relief under Chapter 7 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of Texas.<sup>13</sup> In March 1997, however, a settlement was reached between Eurogas I and the bankruptcy trustee (the "**1995 Settlement**"). The Court approved the 1995 Settlement.<sup>14</sup>

15. On 16 March 1998, EuroGas I became an indirect shareholder in Rozmin when EuroGas (JAKUTIEN) Exploration GmbH (later renamed **EuroGas GmbH**), a wholly-owned subsidiary of EuroGas I incorporated in Austria, purchased a 55% shareholding

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<sup>9</sup> Articles of Incorporation of Northampton, Inc. dated 7 October 1985, **R-8**.

<sup>10</sup> Application for Reinstatement dated 24 August 1994, **R-3**.

<sup>11</sup> Application for Reinstatement dated 24 August 1994, **R-3**.

<sup>12</sup> Articles of Amendment to the Articles of Incorporation of Northampton, Inc. dated 29 August 1994, **R-9**.

<sup>13</sup> Smith v. McKenzie (In re McKenzie), Bk. No. 95-48397-H5-7 (Admin. Cons. under 95-47219-H5-7), Adv. Nos. 97-4114 and 97-4155, Judgment (Bankr. S.D. Texas 7 June 2004), ¶2, **R-10**.

<sup>14</sup> Smith v. McKenzie (In re McKenzie), Bk. No. 95-48397-H5-7 (Admin. Cons. under 95-47219-H5-7), Adv. Nos. 97-4114 and 97-4155, Judgment (Bankr. S.D. Texas 7 June 2004), ¶79, **R-10**.



interest in RimaMurán s.r.o. (“**RimaMurán**”), which held a 43% shareholding in Rozmin.<sup>15</sup>

16. On 27 March 2001, EuroGas I entered into agreement to purchase an additional 57% in Rozmin from Belmont.<sup>16</sup>
17. On 11 July 2001, having failed to renew its registration with the Utah Division of Corporations since 19 October 1998, and having filed its last annual report on 11 February 2000, EuroGas I was dissolved due to its failure to file for renewal.<sup>17</sup> The deadline to apply for reinstatement expired two years later, in 2003, at which point EuroGas I was permanently dissolved.<sup>18</sup>
18. As a result of EuroGas I’s dissolution, EuroGas I lost its corporate status and was not authorised to conduct business (including bringing a claim or filing a suit),<sup>19</sup> other than winding down and liquidating its own assets.<sup>20</sup>

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<sup>15</sup> Contract on the Transfer of a Business Share in the Commercial Company RimaMuran between EuroGas GmbH and Mr. Viliam Komora, dated 16 March 1998, **R-11**; Contract on the Transfer of a Business Share in the Commercial Company RimaMuran between Eurogas GmbH and Mr. Peter Čorej, dated March 16, 1998, **R-12**, Contract on the Transfer of a Business Share in the Commercial Company RimaMuran between EuroGas GmbH and Mr. Pavol Krajec, dated 16 March 1998, **R-13**; and Contract on the Transfer of a Business Share in the Commercial Company RimaMuran between EuroGas GmbH and Mr. Jan Baláž, dated March 16, 1998, **R-14**.

<sup>16</sup> Share Purchase Agreement between Eurogas I and Belmont dated 27 March 2001, available at [www.passfail.com/doc/10-k--a/0001050234-01-500125/7/cik-783209/](http://www.passfail.com/doc/10-k--a/0001050234-01-500125/7/cik-783209/), **R-15**.

<sup>17</sup> See <https://secure.utah.gov/bes/action/details?entity=912082-0142>, showing 11 July 2001 as the company’s expiration date, **R-16**; see also Utah Code Ann. § 16-10a-1421(2)(a) (“If the corporation does not correct each ground for dissolution, or demonstrate to the reasonable satisfaction of the division that each ground does not exist, within 60 days after mailing the notice provided by Subsection (1), the division shall administratively dissolve the corporation.”), **R-17**.

<sup>18</sup> See <https://secure.utah.gov/bes/action/details?entity=912082-0142> showing 11 July 2001 as the company’s expiration date, **R-16**; see also Utah Code Ann. § 16-10a-1422(1) (“A corporation dissolved under Section 16-10a-1403 or 16-10a-1421 may apply to the division for reinstatement within two years after the effective date of dissolution...”), **R-18**.

<sup>19</sup> See, e.g., *Holman v. Callister, Duncan & Nebeker*, 905 P.2d 895, 899 (Utah Ct. App. 1995) (“The State of Utah had dissolved the corporation and all possible extension periods had expired prior to the time this action was filed. Lacking a legal existence, the corporation could not assert a cause of action.”), **RA-1**; *Bio-Thrust, Inc. v. Div. of Corps.*, 2003 UT App 360, ¶¶ 8-9, 80 P.3d 164, 166 (“Thus, Bio-Thrust’s legal capacity to challenge its dissolution expired on January 1, 1992. Given that the present action was not filed until April 17, 2002, we hold that the trial court was correct in dismissing Bio-Thrust’s petition based on a lack of standing.”), **RA-2**.

19. On 7 June 2004, the Bankruptcy Court for the U.S. District Court for the Southern District of Texas issued a judgment against EuroGas I, Mr. Wolfgang Rauball, Mr. Reinhardt Rauball, and Mr. McKenzie for breaching the 1995 Settlement, for fraud, and for civil conspiracy. In particular, the U.S. Bankruptcy Court found EuroGas I liable for:
- breach of the 1995 Settlement, thereby prohibiting the bankruptcy trustee from gaining control of the EuroGas I common stock at a time when its selling price was at its market high;<sup>21</sup>
  - fraud in the inducement, by inducing the bankruptcy trustee into the 1995 settlement agreement with no intention of performing its obligations thereunder;<sup>22</sup> and
  - civil conspiracy and aiding and abetting civil conspiracy, to conceal estate property and hinder the bankruptcy trustee's efforts to identify and recover the property.<sup>23</sup>
20. In reaching its decision, the U.S. Bankruptcy Court made the following relevant findings in respect of the EuroGas I and its management:

*The testimony given by Wolfgang Rauball, individually and as a central person of EuroGas, and by Landa on behalf of EuroGas was not only not credible, but false.*

*[...] EuroGas, Wolfgang Rauball and Reinhard Rauball concealed and misrepresented the facts and breached their duty resulting from the First Settlement Agreement, as well as their duty arising as a result of sworn testimony and affidavits.*

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<sup>20</sup> Utah Code Ann. § 16-10a-1405(1) (“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.”), **R-19**.

<sup>21</sup> Smith v. McKenzie (In re McKenzie), Bk. No. 95-48397-H5-7 (Admin. Cons. under 95-47219-H5-7), Adv. Nos. 97-4114 and 97-4155, Judgment (Bankr. S.D. Texas 7 June 2004), ¶17, **R-10**.

<sup>22</sup> Smith v. McKenzie (In re McKenzie), Bk. No. 95-48397-H5-7 (Admin. Cons. under 95-47219-H5-7), Adv. Nos. 97-4114 and 97-4155, Judgment (Bankr. S.D. Texas 7 June 2004), ¶18, **R-10**.

<sup>23</sup> Smith v. McKenzie (In re McKenzie), Bk. No. 95-48397-H5-7 (Admin. Cons. under 95-47219-H5-7), Adv. Nos. 97-4114 and 97-4155, Judgment (Bankr. S.D. Texas 7 June 2004), ¶¶25-26, **R-10**.

*[...] [Wolfgang Rauball] both affirmatively and by omission misrepresented facts relating to the ownership of those [related companies].*

*[...] Each of the defendants has defrauded McKenzie's creditors, the bankruptcy estate, Trustee, Court and the investing public and conspired, to do so.<sup>24</sup>*

21. EuroGas I and three individuals involved in the scheme (Mr. Wolfgang Rauball, Mr. Reinhard Rauball, and Mr. McKenzie) were held jointly and severally liable and the court awarded the bankruptcy trustee US\$113 million on the basis of the value of EuroGas I shares when the 1995 Settlement was approved by the Court and dividends paid thereon.<sup>25</sup> Mr. Wolfgang Rauball is currently described as “*Chairman & CEO of EuroGas Inc. and EuroGas AG*” by information posted on the website of EuroGas Stock Corporation (AG) (“**EuroGas AG**”).<sup>26</sup>
22. The U.S. bankruptcy trustee placed EuroGas I into an involuntary Chapter 7 bankruptcy in the U.S. Bankruptcy Court for the District of Utah and, after significant litigation, on 20 October 2004, the Court entered an order for relief, thereby officially commencing the EuroGas I bankruptcy in Utah.<sup>27</sup>
23. In May 2005, the Gemerská Poloma excavation area was assigned to another organization, and thus Rozmin’s rights in relation to this area lapsed.<sup>28</sup>
24. In 2006, EuroGas I’s assets were auctioned to various parties for a total of US\$715,000.<sup>29</sup> On 19 March 2007, the bankruptcy case involving EuroGas I was closed.<sup>30</sup>

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<sup>24</sup> Smith v. McKenzie (In re McKenzie), Bk. No. 95-48397-H5-7 (Admin. Cons. under 95-47219-H5-7), Adv. Nos. 97-4114 and 97-4155, Judgment (Bankr. S.D. Texas 7 June 2004), ¶¶90-91, 102-103, (emphasis added) **R-10**.

<sup>25</sup> Smith v. McKenzie (In re McKenzie), Bk. No. 95-48397-H5-7 (Admin. Cons. under 95-47219-H5-7), Adv. Nos. 97-4114 and 97-4155, Judgment (Bankr. S.D. Texas 7 June 2004), page 53, **R-10**.

<sup>26</sup> News Release dated 5 July 2014, **R-20**; see <http://www.eurogas-ag.com/152-1-Tombstone-Exploration-Corporation-Announces-Update-to-Shareholders.html>

<sup>27</sup> Bankruptcy Court for the District of Utah, Order for Relief, **R-21**.

<sup>28</sup> Letter from the District Mining Office to Rozmin dated 3 May 2005, **R-22**.

<sup>29</sup> Bankruptcy Court for the District of Utah, Order dated 30 March 2006, **R-23**.

<sup>30</sup> Screen Grab of the EuroGas I Bankruptcy Case Docket, **R-24**.

25. It appears from a review of the docket in the EuroGas I bankruptcy case that the EuroGas I's alleged interest in Rozmin and Gemerská Poloma excavation area was never identified as an asset of EuroGas I.<sup>31</sup>

## **B. EUROGAS II**

26. On 15 November 2005, while the EuroGas I bankruptcy was still pending, EuroGas II was registered with the Utah Division of Corporations under Entity No. 6050868-0142.<sup>32</sup> Although EuroGas II bears the same name as EuroGas I, EuroGas II was a new company entirely distinct from EuroGas I.
27. There is no evidence that EuroGas II actively carries out any business in the U.S.<sup>33</sup> Its website is currently inactive.<sup>34</sup>
28. Importantly, there is no evidence that EuroGas II lawfully acquired any interest in Rozmin from EuroGas I or otherwise.
29. On 16 December 2010, legal counsel to EuroGas GmbH, the Austrian company through which EuroGas II purports to hold shares in Rozmin, notified the Slovak Republic that it intended to bring a claim under the investment treaty between Austria and the Slovak Republic.<sup>35</sup>
30. On 30 March 2011, the U.S. Securities Exchange Commission terminated EuroGas II's ability to trade its shares because it had failed to include audited financial statements as required by Commission rules for the periods ended 31 December 2007, 2008, and 2009. Similarly, the financial statements filed for the interim periods from 31 March 2007 through 30 September 2010, inclusive, were not reviewed by an independent

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<sup>31</sup> Second Screen Grab of the EuroGas I Bankruptcy Case Docket, **R-25**; Notice of Filing of Trustee's Final Report and Account Before Distribution and Notice of Hearing on Applications for Compensation and Reimbursement of Expenses dated 12 October 2006, **R-26**; Trustee's Final Report and Application for Compensation and Motion for Order Approving Payment of Administrative Costs and Expenses dated 2 October 2006, **R-27**.

<sup>32</sup> Articles of Incorporation of EuroGas Inc. dated 15 November 2005, **R-28**.

<sup>33</sup> Dun & Bradstreet, Inc. Report dated 4 September 2014, page 1, **R-29**.

<sup>34</sup> See <http://www.eurogasinc.com/>, **R-30**.

<sup>35</sup> Letter from EuroGas GmbH to the Slovak Republic dated 16 December 2010, **R-7**.

auditing firm, as required by Commission rules.<sup>36</sup>

31. On 31 October 2011, legal counsel to an entity describing itself as “*EuroGas, Inc.*,” registered in Utah and represented by Mr. Wolfgang Rauball, notified the Slovak Republic that the entity claimed to have a claim under the U.S. BIT.<sup>37</sup>
32. On 6 November 2012, EuroGas AG announced that “*EuroGas Group (EuroGas) has secured financing to pursue its previously announced legal action against the Slovak Republic.*”<sup>38</sup>
33. On 7 May 2012, Tombstone Exploration Corporation (“**Tombstone**”), a Canadian federal corporation, announced that the entire legal costs of future proceedings against the Slovak Republic would be funded by “*a large Luxembourg based European Investment Fund.*” It also announced the receipt of an entitlement of 20% in any potential award from “*EuroGas’ pending*” arbitration against the Slovak Republic.<sup>39</sup>
34. On 3 December 2013, Regent Ventures Ltd., a Canada-based junior resource company, announced that it had been granted a 5% interest in any award or settlement received by EuroGas II from the instant proceedings, net of financing charges and legal fees incurred by EuroGas II, as additional consideration for 450 shares in McCallan Oil & Gas (U.K.) Ltd., allegedly a subsidiary of EuroGas II.<sup>40</sup>
35. EuroGas II therefore manifestly does not have the financial resources to fund its participation to the instant proceedings and, for that reason, has sought and obtained recourse to numerous sources of third-party funding. As shown above, it also appears that EuroGas II is selling rights to a potential award to fund itself, which further evidences the poor state of its financial affairs.

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<sup>36</sup> Order making findings and revoking registration of securities pursuant to section 12(j) of the Securities Exchange Act of 1934 as to EuroGas Inc., 30 March 2011, **R-31**.

<sup>37</sup> Letter from EuroGas Inc. to the Slovak Republic dated 31 October 2011, **R-32**.

<sup>38</sup> News Release dated 6 November 2012, **R-33**.

<sup>39</sup> News Release dated 14 January 2014, **R-34**.

<sup>40</sup> New Release dated 3 December 2013, **R-35**.

36. On 31 July 2014, the District Court of Bratislava I issued a resolution to the effect that, as envisaged under Slovak law, EuroGas GmbH is no longer a shareholder in Rozmin due to its bankruptcy.<sup>41</sup>
37. On 21 August 2014, Tombstone filed a complaint before the U.S. District Court for the District of Utah against, among other entities, EuroGas II, EuroGas AG, and Mr. Wolfgang Rauball (EuroGas II's "*Chairman & CEO*").<sup>42</sup> The complaint makes a number of allegations that support the conclusion that EuroGas II is not incapable of satisfying a costs award and has engaged in fraud and other unlawful behavior. In particular, the complaint states that:
- A check issued by EuroGas II for a mere US\$36,540 was returned due to insufficient funds;
  - Eurogas II, Eurogas AG, and Mr. Wolfgang Rauball engaged in unlawful activities and made wrongful representations to Tombstone, causing it significant harm.
38. In summary, there is evidence—and, indeed, a finding from a US federal court—that EuroGas II and its senior management engage in fraudulent activities. Moreover, it is apparent that EuroGas II does not have the means to finance its operations, including the inability to issue checks for amounts as low as US\$36,540.

### C. BELMONT

39. Belmont was registered in Canada in 1978.<sup>43</sup> Its principal activity is the acquisition and exploration of mineral properties in Canada.<sup>44</sup>
40. On 26 February 2000, Belmont acquired a 57% shareholding in Rozmin for 2,850,000 German marks (approx. EUR 1,457,000).<sup>45</sup>

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<sup>41</sup> Slovak resolution dated 31 July 2014 on removal of the Austrian EuroGas GmbH as one of three shareholders of Rozmin, **R-36**.

<sup>42</sup> Tombstone Complaint dated 21 August 2014, **R-37**.

<sup>43</sup> Request for Arbitration, ¶ 9.

<sup>44</sup> Dun & Bradstreet, Inc. Report dated 28 August 2014, page 5, **R-38**.

41. On 27 March 2001, Belmont sold its Rozmin shareholding to EuroGas I in exchange for, among other things, 12,000,000 shares in EuroGas I.<sup>46</sup> Belmont also received a guarantee providing that if the proceeds of the 12,000,000 shares were less than US\$3 million, EuroGas I was required to issue additional shares in an amount sufficient to allow Belmont to realize the US\$3 million.<sup>47</sup> Until that condition was met, Belmont purportedly continued to hold its former 57% shareholding in Rozmin in escrow pending completion by EuroGas of the terms of the guarantee. This purported collateral security interest was not considered by Belmont management as a controlling or significant interest in the shares or operations of Rozmin, and no active role was to be taken by Belmont in running Rozmin.<sup>48</sup>
42. In 2002, EuroGas I issued an additional 3,830,000 shares to Belmont under the stock price guarantee.<sup>49</sup>
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.<sup>50</sup>
44. In 2008, Belmont claimed that it still owns the 57% shareholding in Rozmin. One year later, however, Belmont indicated that the Rozmin investment has been written off: “As the Company does not expect control or influence over Rozmin, it is not considered a subsidiary. The investments and interest has been fully written off.”<sup>51</sup>

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<sup>45</sup> Agreement on the transfer of Business Shares in Rozmin between ÖSTU Industriemineral Consult GmbH and Belmont Resources Inc., dated 26 February 2000, **R-39**; Agreement on the transfer of Business Shares in Rozmin between Gebrüder Dorfner GmbH & Co. Kaolin-und Kristallquarzsand-Werke KG and Belmont Resources Inc., dated 26 February 2000, **R-40**.

<sup>46</sup> Share Purchase Agreement between Eurogas I and Belmont dated 27 March 2001, available at [www.passfail.com/doc/10-k--a/0001050234-01-500125/7/cik-783209/](http://www.passfail.com/doc/10-k--a/0001050234-01-500125/7/cik-783209/), **R-15**.

<sup>47</sup> Belmont Resources Inc. Consolidated Financial Statements for Years Ended 31 January 2001 and 2000, page 28, **R-41**.

<sup>48</sup> Belmont Resources Inc. Consolidated Financial Statements for Years Ended 31 January 2005 and 2004, page 14, **R-42**.

<sup>49</sup> Belmont Resources Inc. Consolidated Financial Statements for Years Ended 31 January 2004 and 2003, page 14, **R-43**; Belmont Resources Inc. Consolidated Financial Statements for Years Ended 31 January 2005 and 2004, page 14, **R-42**.

<sup>50</sup> Belmont Resources Inc. Consolidated Financial Statements for Years Ended 31 January 2006 and 2005, page 13, **R-44**.

<sup>51</sup> Belmont Resources Inc. Financial Statements for Years Ended 31 January 2009 and 2008, page 27, **R-45**.

45. Since at least early 2014, Belmont has had severe operational difficulties. The audited 2014 Financial Statements make this clear:

As at January 31, 2014, the Company had not identified economically recoverable resources or advanced its properties to commercial production and is not able to finance day to day activities through operations.<sup>52</sup>

46. The result of operating activities (or complete lack thereof) was a net loss of US\$337,789 for the Fiscal Year ended 31 January 2014, and US\$629,999 for the Fiscal Year ended 31 January 2013. In that period, cash decreased from US\$349,060 to US\$58,952. Moreover, for Fiscal Year ending January 31, 2014, there were no net sales or total revenues reported.<sup>53</sup>
47. It appears that Belmont has no actual involvement in the current proceedings. The 2014 Financial Statements state that, as per an agreement reached with EuroGas II, Belmont is not liable for any of the costs of the arbitration, and would be entitled to receive from EuroGas II 3.5% of any award or settlement, subject to the deduction of costs:

On March 5, 2014, the Company entered into an agreement with EuroGas Inc. (“EuroGas”) in respect of EuroGas’ international arbitration against the Slovak Republic in connection with the soapstone talc mineral deposit located near Gemerska Poloma, Slovak Republic. The Company has agreed to provide a power of attorney to a law firm located in Paris, France which is acting on behalf of both the Company and EuroGas in filing an action for damages against the Slovak Federal Republic in the amount of up to 1.65 billion US dollars before an International Arbitration Court.

*The Company will not be responsible for any expenses, legal fees, or disbursements with respect to the lawsuit, and the Company would be entitled to receive from EuroGas 3.5% of any award or settlement from the lawsuit subject only to legal fees and financing charges incurred by EuroGas in the arbitration.*<sup>54</sup>

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<sup>52</sup> Belmont Audited Financial Statements for Financial Year ending 31 January 2014, page 7 **R-46**.

<sup>53</sup> Belmont Financial Statements for Financial Year ending 31 January 2013, **R-47**, Belmont Audited Financial Statements for Financial Year ending 31 January 2014, **R-46**.

<sup>54</sup> Belmont Audited Financial Statements for Financial Year ending 31 January 2014, (emphasis added), **R-46**.



48. Belmont therefore is a largely inactive entity. Its relevance to these proceedings is limited to holding a claim against the Slovak Republic, in the hope of receiving 3.5% of any sums awarded.

#### **D. RECENT EVENTS**

49. On 26 May 2014, the National Unit of Finance Police, Branch for the Central Slovakia (Stred), National Criminal Agency, National Police Headquarters, at the Ministry of Interior of the Slovak Republic, received a criminal complaint dated 5 May 2014 from a private individual, Mr. Peter Čorej.<sup>55</sup> This unit is a special operations unit of the Slovak police that is affiliated with the Ministry of Interior. The criminal complaint alleged that a serious crime of fraud was underway in respect of a potential arbitration against the Slovak Republic.
50. Considering that the criminal complaint gave rise to a suspicion that an especially serious crime of fraud was underway, Mr. Vasil Špirko, prosecutor affiliated with the Office of the Special Prosecution, sought an order for preservation and handing over of computer data against Ms. Czmoriková and Rozmin on 23 June 2014.<sup>56</sup> Ms. Czmoriková is an accountant who performed work in the past as an independent contractor to Rozmin.
51. The public prosecution of the Slovak Republic is an independent government authority, which protects lawful rights and interests of individuals, legal entities, and the State. It has its own budget within the State budget of the Slovak Republic. It therefore is an entirely independent entity, including from both the Slovak Ministry of Interior and the Slovak Ministry of Finance. The public prosecution is obligated within framework of its province to take measures to prevent, identify, and eliminate violations of law and to restore violated rights and apportion responsibility.
52. On 25 June 2014, having reviewed the prosecutor's order, Judge Roman Púchovský, judge for preliminary proceedings in Banská Bystrica, granted an order for a house

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<sup>55</sup> Order for the preservation and handing over of computer data against Ms. Jana Czmoriková and Rozmin, 23 June 2014, page 2, **R-48**.

<sup>56</sup> Order for preservation and handing over of computer data against Ms. Jana Czmoriková and Rozmin, 23 June 2014, **R-48**.

search in the terms sought, but only against Ms. Jana Czmoriková.<sup>57</sup> No order was granted against Rozmin. The Slovak Republic's judiciary, while administratively attached to the Ministry of Justice, is entirely independent, and this decision was thus reached freely.

53. On the same day, EuroGas II and Belmont filed a Request for Arbitration against the Slovak Republic in accordance with the ICSID Convention and Rules, the U.S. BIT, and the Canada BIT. At paragraph 7 of the Request for Arbitration, Claimants allege that EuroGas II “*was legally constituted under the laws of the United States on October 7, 1985, first under the name Northampton, Inc. It was renamed EuroGas Inc. in 1994.*” That allegation is impossible to reconcile with the dissolution of EuroGas I and the subsequent registration of EuroGas II.
54. On 2 July 2014, the house search ordered by Judge Púchovský was performed. The documents seized are listed in the Minutes on Performance of House Search dated 2 July 2014.<sup>58</sup>
55. On 8 July 2014, Claimants wrote to the ICSID Secretariat to request that the Tribunal, once constituted, grant the following measures:

Order the Slovak Republic to maintain the status quo as of the date of the filing of the Request of Arbitration, namely as of June 25, 2014, and put the Parties in the position they should have been in as of the said date.

Order the Slovak Republic to return to Rozmin and Ms. Czmoriková all originals of documents and all property seized pursuant to the Order for Preservation and Handing over of Computer Data dated June 23, 2014 and the Order for a House Search dated June 25, 2014, including records, documents, hardware and software collected in the course of the search carried out on July 2, 2014.

Order the Slovak Republic to refrain from using, in the arbitration proceedings, any material or documents seized pursuant to the Order for Preservation and Handing over of Computer Data dated June 23, 2014 and the Order for a House Search dated June 25, 2014, including records, documents, hardware and software collected in the course of the search carried out on July 2.

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<sup>57</sup> Order for a House Search against Ms. Jana Czmoriková, 25 June 2014, page 2, **R-49**.

<sup>58</sup> Minutes on Performance of House Search, 2 July 2014, pages 2-6, **R-50**.

Order the Slovak Republic to refrain from taking any further measure of intimidation against Rozmin, EuroGas, Belmont or any director, employee or personnel of any of these companies and to refrain from engaging in any conduct that may aggravate the dispute between the parties and/or alter the status quo that existed prior to the initiation of the criminal investigation launched on June 23, 2014 or any local proceedings related, directly or indirectly, to the subject-matter of this arbitration, including any further steps which might undermine Claimants' ability to substantiate their claims, threaten the procedural integrity of the arbitral process, or aggravate or exacerbate the dispute between the parties.<sup>59</sup>

56. On 10 July 2014, the ICSID Secretariat wrote to the Parties to inform them that the Request for Arbitration as supplemented, had been registered, and set a procedural calendar applicable to the request for provisional measures.<sup>60</sup>
57. On 16 July 2014, Claimants wrote to the President of the European Commission to complain of “*retaliatory measures*” taken by the Slovak Republic allegedly in response to the Request for Arbitration.<sup>61</sup>
58. On 11 August 2014, in accordance with the procedural calendar set by ICSID, Claimants submitted their Application, in which they seek the following provisional measures.

a. Order the Slovak Republic to maintain the *status quo* as of the date of the filing of the Request of Arbitration, namely as of June 25, 2014, and put the Parties in the position they should have remained in as of the said date.

b. Order the Slovak Republic to return to Rozmin and Ms. Czmoriková all originals of documents and all property seized pursuant to the Order for Preservation and Handing over of Computer Data dated June 23, 2014 and the Order for a House Search dated June 25, 2014, including records, documents, hardware and software collected in the course of the search carried out on July 2, 2014, without making and/or preserving any copy thereof.

c. Order the Slovak Republic to undertake, in writing, that the documents and property returned constitute the full set of documents and materials that were seized, and that no copies thereof were made and/or kept.

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<sup>59</sup> Claimants' letter dated 8 July 2014, **R-51**.

<sup>60</sup> ICSID Secretariat's letter dated 10 July 2014, **R-52**.

<sup>61</sup> Claimants' letter dated 16 July 2014, **R-53**.

d. Order the Slovak Republic to refrain from using, in the arbitration proceedings, any material or documents seized pursuant to the Order for Preservation and Handing over of Computer Data dated June 23, 2014 and the Order for a House Search dated June 25, 2014, including records, documents, hardware and software collected in the course of the search carried out on July 2.

e. Order the Slovak Republic to take all appropriate measures to end or, alternatively, suspend until the end of this arbitration the criminal proceedings.

f. Order the Slovak Republic to refrain from initiating any other criminal proceedings directly related to the present arbitration, or engaging in any other course of action which may jeopardize the procedural integrity of this arbitration.

g. Order the Slovak Republic to refrain from taking any further measure of intimidation against Rozmin, EuroGas, Belmont or any director, employee or personnel of any of these companies and to refrain from engaging in any conduct that may aggravate the dispute between the Parties and/or alter the *status quo* that existed prior to the initiation of the criminal investigation launched on June 23, 2014 or any local proceedings related, directly or indirectly, to the subject-matter of this arbitration, including any further steps which might undermine Claimants' ability to substantiate their claims, threaten the procedural integrity of the arbitral process, or aggravate or exacerbate the dispute between the Parties.

59. On 26 August 2014, the prosecutor affiliated with the Office of the Special Prosecution, part of the General Prosecution of the Slovak Republic, ordered the return of all seized hard-copy and electronic documents to Ms. Czmoriková.<sup>62</sup> The National Unit of Finance Police, Branch for the Central Slovakia (Stred), National Criminal Agency, National Police Headquarters, at the Ministry of Interior of the Slovak Republic issued the corresponding decision on 4 September 2014.<sup>63</sup> Copies have been retained.
60. On 5 September 2014, the prosecutor issued a resolution suspending the criminal proceedings until the instant ICSID proceedings (and any other pending administrative or court proceedings) are resolved.<sup>64</sup>

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<sup>62</sup> Resolution dated 4 September 2014, **R-1**.

<sup>63</sup> Resolution dated 4 September 2014, **R-1**.

<sup>64</sup> Resolution dated 5 September 2014, **R-2**.

### III. THE TRIBUNAL HAS NO *PRIMA FACIE* JURISDICTION TO GRANT CLAIMANTS' APPLICATION

61. The Tribunal has no *prima facie* jurisdiction in respect of either EuroGas II or Belmont and should accordingly decline to order the provisional measures requested in Claimants' Application. As noted by the International Court of Justice:

[I]n dealing with a request for provisional measures the Court need not finally satisfy itself that it has jurisdiction on the merits of the case but will not indicate such measures unless there is, *prima facie*, a basis on which the jurisdiction of the Court might be established.<sup>65</sup>

#### A. THERE IS NO *PRIMA FACIE* JURISDICTION IN RESPECT OF EUROGAS II

62. EuroGas II has no claim because it holds no right in the investment on which its alleged claim is founded. Contrary to its assertions, EuroGas II is not EuroGas I, a company “legally constituted under laws of the United States on October 7, 1985, first under the name *Northampton, Inc.*”<sup>66</sup> In fact, EuroGas II is a company registered for the first time on 15 November 2005 under the same name as EuroGas I.<sup>67</sup> The statements made on behalf of EuroGas II as to its identity in these proceedings are untrue. EuroGas II has not shown that it lawfully holds the purported investment in Rozmin that is the object of the instant proceedings, and EuroGas II therefore has no standing in this arbitration. Nor could EuroGas II claim to have been affected by measures that occurred before it came into existence.

63. Moreover, EuroGas II has no activity in the U.S., as evidenced by the Dun & Bradstreet, Inc. report. This report shows that EuroGas II has been inactive since at least 2 December 2010.<sup>68</sup> The report also indicates that EuroGas II is inactive at the address at which it is registered, and listed in the Request for Arbitration:<sup>69</sup> “[a]s of 17

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<sup>65</sup> *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Order, 23 January 2007, ¶24, **RA-3**.

<sup>66</sup> Request for Arbitration, ¶7.

<sup>67</sup> Articles of Incorporation for EuroGas Inc. showing EuroGas II's registration on 15 November 2005, **R-28**.

<sup>68</sup> Dun & Bradstreet, Inc. Report dated 4 September 2014, page 1, **R-29**.

<sup>69</sup> Request for Arbitration, ¶7.

June 2012 [s]ource(s) indicate [EuroGas II's address] may no longer be used by this business.”<sup>70</sup> Moreover, EuroGas II's website is inactive.<sup>71</sup>

64. Therefore, the Slovak Republic was and remains entitled to exercise its right under Article I.2 of the U.S. BIT to deny the advantages of the treaty to EuroGas II because “that company has no substantial business activities” in the U.S. and is controlled by nationals of a third country.<sup>72</sup> The Slovak Republic exercised this right on 21 December 2012—approximately a year-and-a-half before this arbitration was even commenced. For this additional reason, EuroGas II has no standing in this arbitration.

**B. THERE IS NO PRIMA FACIE JURISDICTION IN RESPECT OF BELMONT**

65. Equally fatal to the Tribunal's jurisdiction is that the Canada BIT expressly excludes the instant dispute from its ambit. As Article XV makes clear, “this Agreement shall apply to any dispute which has arisen not more than three years prior to its entry into force.” The Canada BIT entered into force on 14 March 2012. Accordingly, only disputes that have arisen since 14 March 2009 are covered.<sup>73</sup> The fact that “[d]isputes that are more than three years old when the new [treaty] enters into force will have no recourse under a [treaty]” was confirmed by Canada when it provided its comments to a similarly worded provision in a draft treaty between Canada and Hungary.<sup>74</sup>
66. The instant dispute, however, arose when the Gemerská Poloma excavation area was assigned to a third-party, and Rozmin's rights to that excavation area lapsed on 3 May 2005. Therefore, it is excluded *rationae temporis* from the scope of the Canada BIT.
67. Furthermore, Belmont was not a shareholder in Rozmin in 2005 because it had sold its 57% shareholding to EuroGas I in 2001.<sup>75</sup> It is unclear why Belmont claimed in 2008 that it was still a shareholder in Rozmin in 2008. Claimants thus failed to make a *prima*

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<sup>70</sup> Dun & Bradstreet, Inc. Report dated 4 September 2014, page 3, **R-29**.

<sup>71</sup> See <http://www.eurogasinc.com/>, **R-30**.

<sup>72</sup> U.S. BIT, Article I.2, **R-4**.

<sup>73</sup> Article XV(6), Canada BIT, **R-6**.

<sup>74</sup> Email enclosing letter from Canada to Hungary dated 21 December 2004 and accompanying comments, page 7, **R-54**.

<sup>75</sup> Share Purchase Agreement between Eurogas I and Belmont dated 27 March 2001, available at [www.passfail.com/doc/10-k--a/0001050234-01-500125/7/cik-783209/](http://www.passfail.com/doc/10-k--a/0001050234-01-500125/7/cik-783209/), **R-15**.

*facie* showing of this Tribunal's jurisdiction *ratione materiae*.

#### **IV. THE SLOVAK REPUBLIC REQUESTS SECURITY FOR ITS COSTS**

68. The Slovak Republic requests, in any event, a provisional measure to the effect that security should be granted in the form of an irrevocable bank guarantee of at least EUR1,000,000 issued by a reputable international bank in the U.S., Canada, or the European Union for the costs of the Slovak Republic until the end of the jurisdictional phase, with the amount to be updated if necessary in the Tribunal's Decision on Jurisdiction to secure the Slovak Republic's costs until the end of the arbitration. For the reasons set out below, this request is both necessary and urgent.

##### **A. SECURITY FOR THE SLOVAK REPUBLIC'S COSTS IS NECESSARY**

69. As explained below, an order that Claimants provide a security is necessary because Claimants are not capable of satisfying a costs award and have a history of engaging in fraud and renegeing on payment obligations.

##### **i. Claimants are not capable of satisfying a costs award**

70. The following facts demonstrate that Claimants are not capable of satisfying a costs award:

- Claimants do not have the means to pay for their costs in the instant proceedings and have had to rely on a third-party fund to finance the instant arbitration. The fact that Claimants cannot pay their own costs demonstrates that they cannot pay the costs of the Slovak Republic.<sup>76</sup> Very recently, the *RSM* tribunal concluded that recourse to third-party funding is a key consideration that justifies granting security for costs:

*Moreover, the admitted third party funding further supports the Tribunal's concern that Claimant will not comply with a costs award rendered against it, since, in the absence of security or guarantees being offered, it is doubtful whether the third party will assume responsibility for honoring such an award. Against this background, the Tribunal regards it as unjustified to burden Respondent with the risk emanating from the uncertainty as to*

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<sup>76</sup> See above ¶3.

whether or not the unknown third party will be willing to comply with a potential costs award in Respondent's favor.<sup>77</sup>

- EuroGas II's financial distress is further demonstrated by the fact that it was recently unable to honor a check for US\$36,540 and that it must finance itself by selling future interests in the award that it hopes to obtain in these proceedings.<sup>78</sup>
- Likewise, Belmont is impecunious because it has barely any business activity and because it has reported significant and mounting losses for the last two fiscal years.<sup>79</sup> In any event, Belmont is allegedly not liable to pay the costs of the arbitration under the agreement it entered into with EuroGas II, having exchanged these costs for a 3.5% stake in the award Claimants hope to obtain.
- Moreover, EuroGas GmbH and EuroGas AG, two entities affiliated with the Claimants, are also in bankruptcy.<sup>80</sup>
- Finally, it is a matter of serious concern that there is substantial evidence that EuroGas I, EuroGas II, and Mr. Wolfgang Rauball (EuroGas II's "*Chairman & CEO*") have all previously engaged in fraudulent activities. This concern is compounded by Claimants' false assertions concerning the identity of EuroGas II.

71. For all of these reasons, it is reasonable to conclude that Claimants are unlikely to pay an award on costs in these proceedings.

## ii. The Slovak Republic has a "*plausible*" case

72. The Tribunal may order the security for costs if the Respondent demonstrates that it has a "*plausible*" defense, "*i.e. a future claim for cost reimbursement is not evidently excluded.*"<sup>81</sup> No prejudgment of the merits is required for the Tribunal to make this

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<sup>77</sup> *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on the Respondent's Request for Security for Costs, 13 August 2014, ¶83, (emphasis added), **RA-2**.

<sup>78</sup> See above ¶¶38 & 39.

<sup>79</sup> See above ¶¶46-47.

<sup>80</sup> Slovak resolution dated 31 July 2014 on removal of the Austrian EuroGas GmbH as one three shareholders of Rozmin, **R-36**; Excerpts from the commercial registry of Eurogas GmbH, **R-55**; Excerpts from the commercial registry of Eurogas AG, **R-56**.

<sup>81</sup> *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on the Respondent's Request for Security for Costs, 13 August 2014, ¶74, **RA-2**.



finding.<sup>82</sup>

73. As demonstrated above, the Tribunal has no jurisdiction. At the very least, therefore, it is plausible that the instant arbitration will not go beyond the jurisdictional stage.
74. Moreover, it is also, at a minimum, plausible that the Slovak Republic will, in any event, prevail on the merits because Claimants make several gross errors in their arguments, including:
- Rozmin’s rights lapsed and Gemerská Poloma excavation area was assigned to a third organization because Rozmin did not start excavation activities within the statutory three years period.<sup>83</sup> That is not surprising, given that EuroGas I was involved in bankruptcy proceedings during that time. Even applying the statute that imposed the three-year rule only prospectively (rather than retroactively), three years still would have expired (between 1 January 2002, when the 2002 Amendment entered into force, and, at a minimum, 7 January 2005, when Rozmin was first notified that its rights to Gemerská Poloma excavation area had lapsed and would be assigned to another entity) with no excavation. The Slovak authorities therefore were perfectly within the bounds of Slovak law.
  - Contrary to Claimants’ suggestion otherwise, *the Slovak courts have never held to the contrary*. The Slovak Courts did not criticize the right of the Slovak authorities to assign the excavation area to a third-party. When the Slovak Court decisions are correctly translated, it is apparent that the Slovak Courts annulled

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<sup>82</sup> *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on the Respondent’s Request for Security for Costs, 13 August 2014, ¶74, **RA-2**.

<sup>83</sup> Claimants rely on incorrect translations of Slovak decisions and legislation that, once translated correctly, show that Claimants’ claim is unsustainable. Crucially, Claimants wrongly translated two different Slovak legal terms (“*dobývanie*” and “*banské činnosti*”) as “*mining activities*” despite the fact that the word “*dobývanie*” should be translated as “*excavation*” and the word “*banské činnosti*” should be translated as “*mining activities*” in a general sense. Once the documents are correctly translated, it is apparent that the Slovak Republic was entitled to revoke Rozmin’s rights because Rozmin had failed to *excavate* minerals within a three-year period. This termination is thus consistent with the separate observation that Rozmin had carried out *mining activities*—but other than *excavations*. Corrected Translation of the 8 December 2004 Minutes, **R-57**; Decision of the District Mining Office on Assignment of Excavation Area “Gemerská Poloma” to other organization dated 30 March 2012, **R-58**; Resolution of the Supreme Court of the Slovak Republic, Case No. 5Sžp/10/2012 dated 31 January 2013, **R-59**; Resolution of the Supreme Court of the Slovak Republic, Case No. 6Sžo/61/2007 dated 27 February 2008, **R-60**; Judgment of the Supreme Court of the Slovak Republic, Case No. 2Sžo/132/2010 dated 18 May 2011, **R-61**.

decisions due to *procedural* errors. These errors were noted by the Slovak authorities, which re-issued corrected decisions. The Slovak Republic, rather than denying Rozmin due process, in fact granted due process to a fault.<sup>84</sup>

- In fact, every time that Rozmin exhausted its right to appeal, *its challenge succeeded*.<sup>85</sup> And when it did not exhaust its right to appeal, it voluntarily relinquished any claim it may have before an international tribunal. Having been thoroughly granted due process, Claimants cannot now claim that their investment treaty rights were breached. As stated by the tribunal in *Generation Ukraine*, in a situation where the investor had failed to even attempt to obtain domestic redress:

This Tribunal does not exercise the function of an administrative review body to ensure that municipal agencies perform their tasks diligently, conscientiously or efficiently. [...] In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of *exhaustion* of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a *reasonable*—not necessarily exhaustive—effort by the investor to obtain correction.<sup>86</sup>

75. Claimants accordingly have no claim on the merits, and a future claim for cost reimbursement is not evidently excluded.

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<sup>84</sup> Resolution of the Supreme Court of the Slovak Republic, Case No. 5Sžp/10/2012 dated 31 January 2013, **R-59**; Resolution of the Supreme Court of the Slovak Republic, Case No. 6Sžo/61/2007 dated 27 February 2008, **R-60**; Judgment of the Supreme Court of the Slovak Republic, Case No. 2Sžo/132/2010 dated 18 May 2011, **R-61**.

<sup>85</sup> Resolution of the Supreme Court of the Slovak Republic, Case No. 5Sžp/10/2012 dated 31 January 2013, **R-59**; Resolution of the Supreme Court of the Slovak Republic, Case No. 6Sžo/61/2007 dated 27 February 2008, **R-60**; Judgment of the Supreme Court of the Slovak Republic, Case No. 2Sžo/132/2010 dated 18 May 2011, **R-61**.

<sup>86</sup> *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶¶20.30-20.33, **RA-5**. This view was expressly confirmed by the Tribunal in *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013, ¶¶627-628 (Spanish version only), **RA-6**. A similar decision was reached by the Tribunal in *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN 3481, Award, 3 February 2006, ¶194, **RA-7**.

**B. SECURITY FOR THE SLOVAK REPUBLIC’S COSTS IS URGENT**

76. The Slovak Republic’s Application is urgent because if the request is not granted, irreparable harm will be caused to the Slovak Republic: it will never recover the costs to which it is entitled.
77. It follows that the Tribunal should recommend that Claimants provide a security for the Slovak Republic’s costs until the conclusion of the jurisdictional phase in an amount of EUR1,000,000, with the amount to be updated if necessary in the Tribunal’s Decision on Jurisdiction to secure the Slovak Republic’s costs until the end of the arbitration.

**V. CLAIMANTS HAVE NO GROUND TO SEEK PROVISIONAL MEASURES**

78. In any event, Claimants’ Application should be rejected because the Tribunal does not have the power to issue provisional measures that interfere with the normal domestic criminal processes, and Claimants have failed to discharge their burden to prove that they meet the legal standard for provisional measures.

**A. CLAIMANTS CANNOT CLAIM PROVISIONAL MEASURES THAT IMPACT CRIMINAL PROCEEDINGS**

79. The Tribunal does not have the power to issue the provisional measures requested by Claimants because these measures would interfere with the Slovak Republic’s sovereign right and responsibility to conduct criminal proceedings.
80. The principle was set out in *SGS v. Pakistan*. In that case, the claimant sought recommendations that the State “*immediately withdraw from and cause to be discontinued all proceedings in the courts of Pakistan relating in any way to this arbitration*” (including criminal proceedings), refrain from commencing or participating in such proceeding in the future, and “*take no action of any kind that might aggravate or further extend the dispute submitted to the Tribunal.*”<sup>87</sup> The claimant also sought a recommendation that a concurrent Islamabad-based arbitration be stayed pending the ICSID tribunal’s decision on jurisdiction.

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<sup>87</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ARB/01/13, Procedural Order No. 2, 16 October 2002, page 305, **RA-8**.

81. These first two recommendations were rejected by the *SGS v. Pakistan* tribunal because the tribunal concluded that it did not have the power to enjoin a State in respect of domestic proceedings. As the *SGS v. Pakistan* tribunal stated:

We cannot enjoin a State from conducting the normal processes of criminal, administrative and civil justice within its own territory. We cannot, therefore, purport to restrain the ordinary exercise of these processes.<sup>88</sup>

82. Similarly, the tribunal in *Abaclat* recently confirmed that it cannot prevent a party from conducting criminal court proceedings before the competent state authorities:

Whilst the Arbitral Tribunal can in principle not prohibit a Party from conducting criminal court proceedings before competent state authorities, neither Party may for this purpose use the Confidential Information.<sup>89</sup>

83. This principle applies with equal force here. The Tribunal does not have the power to restrain the ordinary exercise of the Slovak Republic's powers in relation to the criminal proceedings.

84. To be sure, some authorities have held that an ICSID tribunal has authority to issue a provisional measure impacting criminal proceedings. These decisions, however, all emphasize that these measures require special consideration and can only be granted if a particularly high threshold is overcome. The tribunal in *Caratube*, prior to declining the request for provisional measures, summarized this view as follows:

[C]riminal investigations and measures taken by a state in that context require special considerations.

They are a most obvious and undisputed part of the sovereign right of a state to implement and enforce its national law on its territory.

[...] this Tribunal feels that a particularly high threshold must be overcome before an ICSID tribunal can indeed recommend

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<sup>88</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ARB/01/13, Procedural Order No. 2, 16 October 2002, page 301, **RA-8**.

<sup>89</sup> *Abaclat and others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 13, ¶39, **CL-26**.

provisional measures regarding criminal investigations conducted by a state.<sup>90</sup>

85. Similarly, the tribunal in *Lao Holdings* noted that the “*general rule*” was that a State should not be prevented from enforcing its criminal law. It is only where the integrity of the arbitral process is threatened that, according to the *Lao Holdings* tribunal, a provisional measure might be issued:

[T]he general rule that a State ought not to be prevented from enforcing its criminal law in the usual way applied. However, at the time the present Motion to Amend the PMO was made, events related to the conduct of the Respondent had developed to the point where, exceptionally, the initiation of a criminal investigation would so seriously disturb the status quo ante as to threaten the integrity of the arbitral process.<sup>91</sup>

86. The tribunal in *Quiborax* likewise observed:

Neither the ICSID Convention nor the BIT contain any rules enjoining a State from exercising criminal jurisdiction, nor do they exempt suspected criminals from prosecution by virtue of their being investors.<sup>92</sup>

87. In the instant case, there is no basis to interfere with the criminal proceedings initiated by the Slovak authorities because the proceedings were initiated following a complaint by a private party, by an independent entity, in good faith, and with due respect of the rights of all parties involved.

88. In particular, the criminal proceedings were instigated following a criminal complaint dated 5 May 2014 by a private individual, Mr. Peter Čorej, to the National Criminal Agency. The criminal complaint was assigned to an independent prosecutor affiliated with the Office of the Special Prosecution, part of the General Prosecution of the Slovak Republic, who, having conducted an independent enquiry, requested an order from a judge on preliminary proceedings of the Special Criminal Court in Banská Bystrica. The order was granted.

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<sup>90</sup> *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant’s Application for Provisional Measures, 31 July 2009, ¶¶134-135, 137, **RA-9**.

<sup>91</sup> *Lao Holdings N.V. v. Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measure Order, 30 May 2014, ¶14, **CL-15**.

<sup>92</sup> *Quiborax, SA., Non Metallic Minerals SA. & Allan Fosk Kaplun v. Plurinational State of Bolivia*, Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶129, **CL-8**.

89. The private person, the National Criminal Agency, the Office on Special Prosecution, and the judge on preliminary proceedings of the Special Criminal Court in Banská Bystrica are all independent entities from the Slovak Republic’s legal team and counsel. These entities do not have any connection to the Ministry of Finance, which is the entity administering the instant proceedings on behalf of the Slovak Republic.
90. This is not the first time that EuroGas I, EuroGas II, and their management have faced allegations of fraudulent activities. As explained above, EuroGas I and Mr. Wolfgang Rauball, the “*Chairman & CEO*”<sup>93</sup> of EuroGas II, were jointly and severally held to have committed fraud on 7 June 2004 by the U.S. Bankruptcy Court for the Southern District of Texas.<sup>94</sup> Further allegations of fraud are currently pending against both EuroGas II and Mr. Wolfgang Rauball before the U.S. District Court of Utah.<sup>95</sup> The fact that Claimants in this arbitration have falsely claimed that EuroGas II is EuroGas I is also serious matter.<sup>96</sup> In spite of this, the prosecution has ordered the suspension of the criminal proceedings for which Claimants seek provisional measures and that all seized documents be returned.<sup>97</sup>

Given these extraordinary facts, one can hardly assume—as Claimants ask the Tribunal do—that the above criminal proceedings were brought by the Slovak prosecutor in bad faith. In fact, Claimants would have to satisfy a particularly high evidentiary threshold, and they have failed to do so.

91. The Tribunal therefore should reject Claimants’ Application because it purports to restrict the Slovak Republic’s right to carry out criminal proceedings. Alternatively, Claimants’ Application should be rejected because the particularly high evidentiary threshold to which it is bound has not been met.

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<sup>93</sup> News Release dated 5 July 2014; see <http://www.eurogas-ag.com/152-1-Tombstone-Exploration-Corporation-Announces-Update-to-Shareholders.html>, **R-21**.

<sup>94</sup> *Smith v. McKenzie (In re McKenzie)*, Bk. No. 95-48397-H5-7 (Admin. Cons. under 95-47219-H5-7), Adv. Nos. 97-4114 and 97-4155, Judgment (Bankr. S.D. Texas 7 June 2004), **R-10**.

<sup>95</sup> Complaint dated 21 August 2014, **R-38**.

<sup>96</sup> See above ¶63.

<sup>97</sup> See above ¶4.

**B. IN ANY EVENT, THE PROVISIONAL MEASURES SOUGHT ARE NEITHER NECESSARY NOR URGENT**

92. The Parties agree that provisional measures can only be granted under Article 47 of the ICSID Convention and ICSID Arbitration Rule 39 if the measure requested is both necessary and urgent.<sup>98</sup> Claimants' Application satisfies neither of these requirements.

**i. The requirements for provisional measures**

93. It is well settled that the imposition of provisional measures is an “*extraordinary*” measure that should not be granted lightly.<sup>99</sup> For that reason, the burden of proving that provisional measures are required is placed squarely on Claimants. As stated by the tribunal in *Maffezini*:

The imposition of provisional measures is an extraordinary measure which should not be granted lightly by the Arbitral Tribunal. There is no doubt that the applicant, in this case the Respondent, has the burden to demonstrate why the Tribunal should grant its application.<sup>100</sup>

94. Indeed, the tribunal in *Tanzania* denied the request for provisional measures precisely because the requesting party had not met its burden of proof.<sup>101</sup>

95. As to the standard that must be met to order provisional measures, the Parties agree that provisional measures may be granted only if they are both necessary and urgent.<sup>102</sup> As succinctly put by the *Occidental* tribunal:

[I]n order for an international tribunal to grant provisional measures, there must exist both a right to be preserved and circumstances of necessity and urgency to avoid irreparable harm.<sup>103</sup>

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<sup>98</sup> Full Briefing on Claimants' Application for Provisional Measures Dated July 8, 2014, ¶34.

<sup>99</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999, ¶10, **CL-6**.

<sup>100</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999, ¶10, **CL-6**.

<sup>101</sup> *Tanzania Electric Supply Company Limited (TANESCO) v. Independent Power Tanzania Limited (IPTL)*, ICSID ARB/98/8, Decision on Provisional Measures, 20 December 1999, ¶31, **RA-10**.

<sup>102</sup> Full Briefing on Claimants' Application for Provisional Measures dated 8 July 2014, ¶34.

<sup>103</sup> *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶61, **CL-2**.

96. As to the level of necessity, Claimants argue that the measures they seek should be granted because, in their absence, “*the ensuing prejudice would be irreparable.*”<sup>104</sup> While Claimants’ factual assertions are wrong, that is the correct standard: the measure must be necessary to avoid irreparable harm.<sup>105</sup>

97. Moreover, the mere possibility of future harm is insufficient. As noted by the *Occidental* tribunal:

Provisional measures are not meant to protect against any potential or hypothetical harm susceptible to result from uncertain actions. Rather they are meant to protect the requesting party from imminent harm.<sup>106</sup>

98. With regard to the level of urgency required, as stated by the International Court of Justice, a measure is urgent if “*action prejudicial to the rights of either party is likely to be taken before such final decision is given.*”<sup>107</sup>

99. The Slovak Republic states in the following sections why the provisional measures sought by Claimants are neither necessary nor urgent.

**ii. The provisional measures sought are not necessary**

100. Claimants do not set out clearly how their legal and factual arguments apply to the seven provisional measures they seek. Nonetheless, for the Tribunal’s convenience, the Slovak Republic will address each requested measure in turn.

**(1) Order to maintain the status quo as of 25 June 2014**<sup>108</sup>

101. Claimants’ request of a general recommendation to “*maintain the status quo*” is too vague and imprecise to permit the Tribunal to issue an order. Claimants have simply failed to articulate the rights that they seek to protect or the harm from which they seek

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<sup>104</sup> Full Briefing on Claimants’ Application for Provisional Measures dated 8 July 2014, ¶¶45-46.

<sup>105</sup> *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Request for the Indication of Interim Measures of Protection, Order dated 11 September 1976, Separate Opinion of President Jiménez de Aréchaga, 1976 I.C.J. Rep. 3 at page 11, **RA-11**.

<sup>106</sup> *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶89, **CL-2**.

<sup>107</sup> *Case Concerning Passage Through the Great Belt (Finland v. Denmark)*, Request for the Indication of Provisional Measures, Order dated 29 July 1991, 1991 I.C.J. Rep. 12 at page 17, ¶23 **RA-12**.

<sup>108</sup> Full Briefing on Claimants’ Application for Provisional Measures dated 8 July 2014, ¶68.



protection. Having failed to evidence imminent harm, the request for provisional measures must be denied.<sup>109</sup>

102. It is also undeniable that the Slovak Republic is entitled to exercise its rights “*in good faith and with due respect for Claimants’ rights.*”<sup>110</sup> Claimants may therefore only seek a recommendation that would restrict certain specific rights or request certain specific conduct. In the absence of such a precise request, a general *status quo* recommendation cannot be granted, and Claimants’ request for this provisional measure should be rejected. In the words of the tribunal in *SGS v. Pakistan*:

We have already addressed the issues relating to legal proceedings in the courts of Pakistan, and in particular the issue of the contempt proceedings. Apart from the considerations that flow from the state of those proceedings, we note that neither party has taken any measure to aggravate the dispute. We observe the current cooperation between the parties and see no evidence that would justify the making of an order.<sup>111</sup>

103. The tribunal in *Caratube* rejected a similar request for an order that the State refrain from aggravating or exacerbate the dispute:

First of all, applying Rule 39(1), the Tribunal does not find that the right to be preserved is threatened. Claimant has not shown that its procedural right to continue with this ICSID arbitration is precluded by the criminal investigation, if one takes into account the conclusions reached above regarding the other Requests.<sup>112</sup>

104. Finally, the tribunal in *Churchill Mining* reached a similar conclusion:

The Tribunal can dispense with entering into a discussion of the Parties’ arguments. Since in the present circumstances, the rights for which Claimants seek provisional measures are not

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<sup>109</sup> *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶89, **CL-2**.

<sup>110</sup> *Lao Holdings N.V. v. Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measure Order, 30 May 2014, ¶25, **CL-15**.

<sup>111</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ARB/01/13, Procedural Order No. 2, 16 October 2002, ¶51, **RA-8**.

<sup>112</sup> *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant’s Application for Provisional Measures, 31 July 2009, ¶ 139, **RA-9**.

affected, the necessity requirement is consequently not fulfilled.<sup>113</sup>

**(2) Order to return to Rozmin and Ms. Czmoriková all originals of documents and all property seized without making and/or preserving any copy thereof**

105. Claimants' request for the return of documents is now moot. A resolution ordering the return of all documents has been issued.
106. The request should have been denied in any event, however, because Claimants have failed to discharge their burden of proof that the measures are necessary to prevent irreparable harm. Indeed, while Claimants seek the measure on the ground that they have been deprived of documentary evidence, which allegedly threatens the integrity of the ICSID proceedings, Claimants have failed to produce any evidence that this is the case.<sup>114</sup>
107. Claimants rely only on the Minutes on Performance of House Search dated 2 July 2014 prepared by the Slovak police.<sup>115</sup> While these Minutes evidence that documents in the possession of Ms. Czmoriková were seized, they do not show that Claimants do not have access to originals or copies of those documents. Crucially, they do not evidence that Claimants do not have all the documents required to set out their case.
108. Indeed, it is highly unlikely that unique documents necessary for the submission of the claim would be in the hands of Ms. Czmoriková. Ms. Czmoriková is an independent contractor who has been employed in the past by Rozmin as a contractor accountant. Rozmin is unlikely to have provided originals of documents of which it did not keep copies to such independent contractor, over whom Rozmin has little control. Moreover, the principal actions complained of occurred in 2004 and 2005, and EuroGas GmbH—the entity through which EuroGas II claims to hold shareholding in Rozmin—notified the Slovak Republic that it claimed to have an investment treaty claim on 16 December 2010.<sup>116</sup> Claimants have therefore been in the preparatory stages of the instant claim

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<sup>113</sup> *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 9, 8 July 2014, ¶103, **RA-13**.

<sup>114</sup> Full Briefing on the Claimants' Application for Provisional Measures dated 8 July 2014, ¶¶39-44.

<sup>115</sup> Minutes on Performance of House Search dated July 2, 2014, **R-51**.

<sup>116</sup> Letter from EuroGas GmbH to the Government of the Slovak Republic, dated 16 December 2010, **R-7**.

for *over three years*. In those circumstances, it is unlikely that unique documents necessary to support a claim would have been left in the hands of an independent contractor. Furthermore, under Slovak law, companies such as Rozmin have an obligation to keep or professionally archive documents for five to ten years, depending on the type of document. In the absence of any contrary evidence, in the form of a witness statement or otherwise, Claimants have failed to discharge their burden of proof.

109. Separately, the Tribunal should reject Claimants' request that the Slovak authorities (namely, the police, the prosecutor, and the court) be prevented from making copies of the evidence because it is completely unnecessary. Indeed, Claimants have failed to evidence how this would prejudice their procedural rights. Moreover, copies were made in good faith to ensure that the suspension of the criminal proceedings is effective. Indeed, requesting the return of copies would turn the suspension into an effective termination of the proceedings, rendering them without effect. The prosecution and court would also be exposed to a risk that the evidence disappear and become no longer available after the proceedings. Such measure would also constitute an unnecessary and impermissible intervention into good faith proceedings brought by independent authorities.
110. The authorities on which Claimants essentially rely (*City Oriente*,<sup>117</sup> *Quiborax*,<sup>118</sup> and *Lao Holdings*<sup>119</sup>) are either of no assistance to Claimants or show that Claimants may not seek a provisional measure that the police return the documents. The *City Oriente* and *Lao Holdings* decisions are of no help to Claimants because these decisions did not deal with the question of the return of documents seized in the course of criminal proceedings.
111. Nor can Claimants rely on *Quiborax* because, not only are they factually distinguishable, but the *Quiborax* tribunal effectively declined to order any measure

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<sup>117</sup> *City Oriente Limited v. The Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, **CL-3**.

<sup>118</sup> *Quiborax, SA., Non Metallic Minerals SA. & Allan Fosk Kaplun v. Plurinational State of Bolivia*, Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, **CL-8**.

<sup>119</sup> *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measure Order, 30 May 2014, **CL-15**.

ordering the return of documents at issue, despite criticizing the sequestration of corporate records.<sup>120</sup>

112. The facts in *Quiborax* must be briefly summarized because they highlight how far apart *Quiborax* is from the present case. In *Quiborax*, the *Superintendencia de Empresas* (a government entity supervising companies) launched criminal proceedings founded on a minor inconsistency between meeting minutes against one of the claimants, claimants' Bolivian business partners, claimants' former and current legal counsel, and the two employees of the *Superintendencia de Empresas* who had previously found no wrongdoing. Shortly thereafter, Bolivia sequestered corporate records and interrogated persons related to claimants' business. The proceedings moved most swiftly against claimants' Bolivian business partner, Mr. Moscoso. On appeal, a bail of US\$300,000 was set on Mr. Moscoso's personal liberty, to be deposited within 72 hours. In August 2009, on notice that bail would be set, Mr. Moscoso asked one of the claimants for bail money in compliance with a "*gentlemen's agreements*," and stated that if money was not forthcoming, he would have to look for ways to preserve his freedom, noting that "[o]ne way could be to ask for summary judgment in my condition as director of the company and be punished with a sanction that would allow me not going to prison" and adding that in the absence of bail money, he would have to immediately start negotiations for a summary judgment. Shortly thereafter, the prosecutor requested a summary judgment against Mr. Moscoso sentencing him to two years imprisonment. That judgment was rendered in August 2009, noting that Mr. Moscoso had confessed his participation in the forgery of minutes and sentencing him to two years imprisonment with, however, immediate judicial pardon on the basis of his previous clean record. Following his judicial pardon, Mr. Moscoso waived his right to appeal. On the same day, Mr. Moscoso signed an affidavit given expressly "*within the request for Arbitration*" in which he "*freely and spontaneously*" confessed to his participation in crimes related to falsification of the minutes. While these proceedings were underway, criminal charges of malfeasance in office were brought against the judge who had declined to order the initial bail for failing in her functions and not taking into consideration the importance of the case before her that concerns the protection of the

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<sup>120</sup> *Quiborax, SA., Non Metallic Minerals SA. & Allan Fosc Kaplun v. Plurinational State of Bolivia*, Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶142, **CL-8**.

goods and interests of the State that are subject to an international arbitration. It is in those circumstances that the *Quiborax* granted a suspension of the criminal proceedings.

113. In spite of these extreme facts, however, the *Quiborax* tribunal did *not* grant the majority of the provisional measures requested by claimants. In particular, although the *Quiborax* tribunal noted that claimants had been deprived of their corporate records,<sup>121</sup> it did not recommend that corporate documents sequestered by Bolivia be returned. The tribunal issued limited provisional measure out of deference to the State's sovereignty, noting that "*a mere stay of the criminal proceedings would not affect Respondent's sovereignty nor require conduct in violation of national law.*"<sup>122</sup>
114. *Quiborax* is thus easily distinguishable. In *Quiborax*, the behavior of the State went to the extreme to prevent the ICSID arbitration from proceeding. In the instant case, there is nothing of the sort. Moreover, the *Quiborax* tribunal did not order the return of documents. Thus, rather than *support* Claimants' Application, the *Quiborax* decision *undermines* it.
115. In sum, notwithstanding the fact that the request is now moot, in the absence of evidence that the measure is necessary to prevent irreparable harm, the request for provisional measure should be rejected.

**(3) Order to undertake, in writing, that the documents and property returned constitute the full set of documents and materials that were seized, and that no copies thereof were made and/or kept**

116. This provisional measure request mirrors the second request and should be denied for the same reasons.

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<sup>121</sup> *Quiborax, SA., Non Metallic Minerals SA. & Allan Fosc Kaplun v. Plurinational State of Bolivia*, Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶142, **CL-8**.

<sup>122</sup> *Quiborax, SA., Non Metallic Minerals SA. & Allan Fosc Kaplun v. Plurinational State of Bolivia*, Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶165, **CL-8**.

**(4) Order to refrain from using, in the arbitration proceedings, any material or documents seized**

117. Claimants have likewise failed to discharge their burden of proof that this provisional request is necessary to prevent irreparable harm. The measure would also constitute an impermissible intervention with the Slovak Republic's sovereign rights and responsibilities.
118. Claimants allege that the measure is necessary to “to preserve the integrity of the arbitration proceedings, [...] and to prevent an imbalance (including through use of legally privileged documents)” and therefore to prevent irreparable harm. No evidence of this, however, has been provided. Claimants' request is therefore purely hypothetical.
119. The authorities on which Claimants rely only confirm that the Tribunal should not order the requested measures. The tribunal in *Quiborax* noted that, even if criminal proceedings result in evidence that is later used in the ICSID proceedings, that is not sufficient ground to enjoin such proceedings:

Even if the criminal proceedings result in evidence that is later used by Respondent in this arbitration, that would not undermine the Tribunal's jurisdiction to resolve Claimants' claims, if such jurisdiction is established at the appropriate procedural instance.<sup>123</sup>

120. Similarly, the tribunal in *Lao Holdings* held that criminal proceedings enabling a party to develop evidence that will be used in the ICSID arbitration are not necessarily sufficient basis to enjoin a State to pursue a criminal case. In the words of the tribunal:

[...] Laos has admitted that at least one of the objectives of the threatened criminal proceeding is to enable it to develop evidence that will serve as part of its defense in the present arbitration proceedings. As a consequence, there is no doubt that the criminal investigation intended by the Respondent is directed at precisely the conduct in respect of which it requires evidence to defend its claim in the arbitration and support its Counterclaim.

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<sup>123</sup> *Quiborax, SA., Non Metallic Minerals SA. & Allan Fosc Kaplun v. Plurinational State of Bolivia*, Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶130, **CL-8**.

This would not necessarily be sufficient as a basis for enjoining a State to pursue a criminal case on its territory.<sup>124</sup>

121. Thus, contrary to what Claimants suggest, *Lao Holdings* does not support an argument that the procedural integrity of the arbitral process is threatened by the possibility that criminal proceedings may reveal evidence that could serve as part of the State's defense in the ICSID proceedings. In *Lao Holdings*, the tribunal declined the State's request to permit a criminal investigation not because the State might access evidence, but because:

What is now being sought, a month before the merits hearing, is an intrusive criminal investigation of potential witnesses during the period of final trial preparation.<sup>125</sup>

122. The tribunal in *Lao Holdings* made clear that the criminal proceedings would endanger the procedural integrity of the arbitral proceedings because of timing. The timing of the criminal proceedings would, as the tribunal held, have disrupted the Claimant's final preparation and might have deterred witnesses engaged in the process of testifying before an ICSID tribunal:

As to the criminal investigations, the question is one of timing. In the Tribunal's view, the integrity of the arbitral process would be compromised by permitting the Respondent to run a criminal investigation concurrently with the arbitration directed to the same people and the same facts at the same time.

Firstly, the criminal investigation contemplated by the Motion as amended would be disruptive. It would inevitably divert at least some of the Claimant's resources from final preparation of the hearing next month to dealing with issues arising out of police interviews with people now or in the past associated with the Claimant [...] as well as potential seizure of documents from any location within Laos or elsewhere [...] and any derivative evidence arising therefrom.

Secondly, the Claimant contends that the "chilling effect" of a concurrent criminal investigation will be a powerful deterrent to Laotian witnesses to give evidence contrary to the Respondent's position.[...]<sup>126</sup>

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<sup>124</sup> *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measure Order, 30 May 2014, ¶¶28-29, **CL-15**.

<sup>125</sup> *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measure Order, 30 May 2014, ¶32, **CL-15**.

<sup>126</sup> *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measure Order, 30 May 2014, ¶¶39-41, **CL-15**.

123. The tribunal in *Lao Holdings* therefore refused to grant permission to the State to pursue the criminal investigation concurrently with the arbitration, noting that suspension of the criminal investigation was a sufficient measure and that “*there is no sufficient evidence of urgency to establish that a deferral of the police investigation for another few months will seriously prejudice the Respondent.*”<sup>127</sup>
124. Moreover, the *Lao Holdings* tribunal did not grant any measure preventing the State from accessing evidence. The tribunal in *Lao Holdings* merely noted that suspension of the proceedings was the appropriate solution. As a result, this case is of no support to Claimants—particularly given that a suspension of the criminal proceedings has already been ordered. Claimants’ Application should therefore be denied.

**(5) Order to take all appropriate measures to end or, alternatively, suspend until the end of this arbitration the criminal proceedings**

125. This provisional request is now moot, as a resolution was issued suspending the criminal proceedings until the end of the arbitration.
126. In any event, Claimants have not provided any evidence that the measure is necessary to prevent irreparable harm. In fact, the authorities cited by Claimants all indicate *that the State has a right to conduct criminal proceedings concurrently with an ICSID arbitration.* As succinctly put by the tribunal in *Quiborax*:

[T]he international protection granted to investors does not exempt suspected criminals from prosecution by virtue of their being investors.<sup>128</sup>

127. It is only because the situation was “*exceptional,*” as set out above, that the *Quiborax* tribunal ordered the suspension of the criminal proceedings until the resolution of the ICSID dispute.<sup>129</sup> The case is therefore of no assistance to Claimants.

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<sup>127</sup> *Lao Holdings N.V. v. Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measure Order, 30 May 2014, ¶71, **CL-15**.

<sup>128</sup> *Quiborax, SA., Non Metallic Minerals SA. & Allan Fosc Kaplan v. Plurinational State of Bolivia*, Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶164, **CL-8**.

<sup>129</sup> As summarized below at ¶138, in *Quiborax* the Tribunal concluded that the State had taken exceptional measures to impair the investors ability to present their case, including exercising undue pressure against potential witnesses.



128. Similarly, the tribunal in *Lao Holdings* held that criminal proceedings concurrent with an ICSID arbitration, without more, do not justify a suspension of the criminal proceedings:

[A] criminal proceeding does not *per se* violate the principle of exclusivity of ICSID arbitration, or aggravate the dispute. *Something more* has to be at stake to justify a tribunal enjoining a State to suspend or defer a criminal investigation.<sup>130</sup>

129. In *Lao Holding*, as detailed above, the tribunal concluded that a suspension was in order because the criminal proceedings were taking place immediately before, and potentially during, the hearing. No such circumstances are present here, as a hearing will not take place for a significant period of time.

130. In the same manner, the tribunal in *City Oriente* acknowledged the State's right to criminal proceedings:

[T]he Tribunal notes that it has great respect for the Ecuadorian judiciary and that it acknowledges Ecuador's sovereign right to prosecute and punish crimes of all kinds perpetrated in its territory.<sup>131</sup>

131. In *City Oriente*, however, the tribunal concluded that in that case a stay of the proceeding should be recommended because the State's rights were used "to *coactively secure payment of the amount [contested in the ICSID proceedings]*."<sup>132</sup> This conclusion does not apply to the instant case because the criminal proceedings do not seek to enforce a measure that is contested by Claimants in these proceedings. The *City Oriente* case is therefore of no help to Claimants either.

***(6) Order to refrain from initiating any other criminal proceedings directly related to the present arbitration, or engaging in any other course of action which may jeopardize the procedural integrity of this arbitration***

132. This request for provisional measures should be rejected for the same reasons set out in the preceding sub-section.

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<sup>130</sup> *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measure Order, 30 May 2014, ¶30, **CL-15**.

<sup>131</sup> *City Oriente Limited v. The Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, ¶62, **CL-3**.

<sup>132</sup> *City Oriente Limited v. The Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, ¶62, **CL-3**.

133. Indeed, the request is moot because the prosecutor affiliated with the Office of the Special Prosecution, part of the General Prosecution of the Slovak Republic, has issued a resolution suspending the ongoing proceedings that it does not intend to carry criminal proceedings concurrent to the ongoing arbitration. In any event, the request is purely hypothetical. Claimants have failed to evidence how criminal proceedings relating to the present arbitration, in the absence of more, could jeopardize the procedural integrity of the arbitration. The request should therefore be rejected.

***(7) Order to refrain from taking any further measure of intimidation and from engaging in any conduct that may aggravate the dispute***

134. This request is largely redundant. The Slovak Republic set out in its response to the first request why it is unnecessary to issue a measure precluding the Slovak Republic from engaging in conduct that may aggravate the dispute and/or alter the *status quo*, and in its response to the sixth request why a measure preventing it from imitating local proceedings is not necessary. The Slovak Republic therefore only sets out below the reasons why a recommendation that the Slovak Republic refrain from taking measures of intimidation against any party is not necessary.

135. The request is moot because the prosecutor has issued a resolution suspending the criminal proceedings that Claimants allege amounted to intimidation of potential witnesses.

136. In any event, the Tribunal could not make such an order because Claimants has provided no evidence that the criminal proceedings had the effect of intimidating either a witness or any other entity. Thus far, only Ms. Czmoriková, an independent contractor accountant with little connection to the instant dispute and Rozmin, have been the object of the criminal proceedings. Claimants have simply failed to demonstrate any intimidation of either of these persons. The request is therefore purely hypothetical and should be denied.

137. It is on similar grounds that the tribunal in *Churchill Mining* declined to order a provisional measure seeking a preservation of the *status quo*, non-aggravation of the dispute, and preservation of the right to the procedural integrity of ICSID proceedings. In the absence of actual criminal proceedings against potential witnesses, no measure can be ordered:

The Tribunal now turns to the question whether Indonesia's actions have altered the status quo or aggravated the dispute. [...]

The Tribunal agrees with the Claimants that the threat or the initiation of criminal charges is not conducive to lowering the level of antagonism between the Parties. For the following reasons, the Tribunal does not find, however, that Indonesia's (intended) actions have altered the status quo or aggravated the dispute. With regard to the first two groups, the Tribunal notes that *no investigation has been initiated nor have criminal charges been lodged against the Claimants or their current witnesses*. The Tribunal further fails to see how the initiation of a criminal investigation against the Ridlatama companies which are not parties to the present dispute, has altered the status quo or aggravated the dispute in the present proceedings. *While it is undeniable that the criminal charges lodged against the Ridlatama companies are related to the present arbitration, the Tribunal does not believe at this juncture that the Claimants' rights are affected.*

As regards the "extraordinary stress and mental anguish" allegedly suffered by the Claimants and their witnesses, due to Indonesia's conduct, the Tribunal *does not either find the initiation of criminal proceedings against Ridlatama to have altered the status quo or to have otherwise aggravated the dispute*. There is no element on record showing any pressure or intimidation against the Claimants and their witnesses.

As regards Mr. Benjamin, it is true that counsel to Indonesia argued at the hearing on jurisdiction that he may have to respond to the Indonesian authorities about his involvement in the compilation of the documents the authenticity of which Indonesia now questions. However, there are no concrete elements in the record allowing to conclude that Indonesia is indeed contemplating the possibility of initiating a criminal investigation against Mr. Benjamin. In its latest submission, Indonesia stated that Mr. Benjamin was not accused of forgery at the hearing or thereafter by Indonesian authorities. While Mr. Benjamin may have to appear as a witness in the investigation initiated against the Ridlatama companies in light of his personal role in the collection of the documents that are now under investigation, this does not mean, absent further elements, that Mr. Benjamin is subject to undue pressure.

*With respect to the third group, the Tribunal equally fails to see how the threat to initiate criminal investigations or proceedings against the unidentified third group of persons "being currently or previously associated with the Claimants' investment in*

*Indonesia” has changed the status quo and aggravated the dispute.*<sup>133</sup>

138. The cases cited by Claimants underscore the hypothetical nature of Claimants’ request. In *Quiborax*, for instance, potential witnesses were the object of direct intimidation. That case is therefore wholly distinguishable. As summarized by the *Quiborax* tribunal:

The record shows that Respondent has pressed formal charges against several persons involved in Claimants’ operation in Bolivia, including its business partner, former counsel, the authors of Informe 001/2005, and the judge who refused to order the preventive detention of Mr. Moscoso. [...]

[A]t least one of them – David Moscoso – is as a result of the criminal proceedings legally prevented from testifying for Claimants in the ICSID proceedings because he cannot testify against his own confession.

In addition, the way in which the criminal proceedings against David Moscoso developed suggests that Respondent indeed may be exercising undue pressure against potential witnesses. The record shows that David Moscoso had first denied participation in the crimes charged and confessed only after bail of US\$300,000 was set on his personal liberty. Such bail had first been denied by the competent judge, and was only set after that judge was charged with malfeasance in office for having neglected to consider the importance of the case for the State of Bolivia. The Tribunal also finds it troubling that although the Bolivian authorities first insisted on Mr. Moscoso’s preventive detention, once he had confessed he was immediately pardoned, which seems to suggest that the restriction on his personal liberty was meant as an intimidation measure and not because the nature or circumstances of the crime required Mr. Moscoso’s detention.

Even if no undue pressure is exercised on potential witnesses, the very nature of these criminal proceedings is bound to reduce their willingness to cooperate in the ICSID proceeding. Given that the existence of this ICSID arbitration has been characterized within the criminal proceedings as a harm to Bolivia, it is unlikely that the persons charged will feel free to participate as witnesses in this arbitration.<sup>134</sup>

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<sup>133</sup> *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 9, 8 July 2014, ¶¶ 91-95 (emphasis added), RA-13.

<sup>134</sup> *Quiborax, SA., Non Metallic Minerals SA. & Allan Fosk Kaplun v. Plurinational State of Bolivia*, Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶¶ 143-146, CL-8.

139. The facts in *Quiborax* are therefore entirely different from the facts before this Tribunal and illustrate why, in the absence of evidence of similar facts, Claimants' Application cannot be granted. Not only was a resolution issued suspending the criminal proceedings, no charges were ever brought against potential witnesses, and the Slovak Republic has not criticized the ICSID arbitration—much less described it as a “harm.” It is on similar grounds that the *Churchill Mining* tribunal distinguished the case before it from *Quiborax*:

While presenting certain similarities, the Tribunal is of the view that *Quiborax* must be distinguished, since it dealt with actual criminal investigations against a co-claimant and persons involved in the setting up of the investment. As matters presently stand, the Tribunal considers that the impairment of the Claimants' procedural rights is speculative and hypothetical.

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140. In any event, the measure sought by Claimants was not granted in *Quiborax*.

141. The *Lao Holdings* case is also inapplicable because the key factor for the tribunal's decision was the timing of the criminal proceedings, which were initiated immediately before the ICSID hearing and would have resulted in witnesses being investigated at the same time they gave their evidence. As noted by the tribunal “[a]s to the criminal investigation, the question is one of timing.”<sup>136</sup> No such issue arises here, as there will be no hearing for a significant period of time. Moreover, and in any event, the *Lao Holdings* did not grant the measure sought by the claimants.

142. Finally, Claimants find no solace in *City Oriente*. As explained above, there was no issue of alleged intimidation of witnesses in that case. Rather, *City Oriente* concerned the State's attempt to obtain a payment disputed in the ICSID proceedings by means of domestic proceedings<sup>137</sup>—an issue not relevant at all here. As in the other cases invoked by Claimants, and in any event, the tribunal in *City Oriente* did not grant the measure sought by Claimants here.

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<sup>135</sup> *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 9, 8 July 2014, ¶99, **RA-13**.

<sup>136</sup> *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measure Order, 30 May 2014, ¶39, **CL-15**.

<sup>137</sup> *City Oriente Limited v. The Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, ¶62, **CL-3**.

143. Accordingly, Claimants' Application should be rejected because Claimants have failed to meet their burden of proof that the request is necessary to prevent imminent harm.

**iii. Urgency**

144. Nor are the provisional measures requested by Claimants urgent. A resolution suspending the criminal proceedings has been adopted. The proceedings therefore do not affect Claimants' rights. Similarly, a resolution has been issued for the return of the taken documents. There is therefore no urgency. As noted in *Churchill Mining*:

Since the specific circumstances as they stand do not affect the Claimants' right to the exclusivity of the ICSID proceedings, their right to the preservation of the status quo and non-aggravation of the dispute, and their right to the procedural integrity of these proceedings, it follows that the urgency requirement is not fulfilled.<sup>138</sup>

145. Hence, there is no urgency, and the provisional measures sought by Claimants should be denied.

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146. In sum, *none* of the requirements for provisional measures are satisfied in this case. Claimants' Application is baseless and should be denied, and the full cost of this phase of the proceeding should be awarded to the Slovak Republic.

**VI. PRAYER FOR RELIEF**

147. In view of the foregoing, the Slovak Republic hereby respectfully requests that the Tribunal, once constituted:

- grant the Slovak Republic's Application and order Claimants obtain within 30 days an irrevocable bank guarantee from a reputable international bank in the U.S., Canada, or the European Union in the amount of EUR1,000,000, callable on in whole or in part by the Respondent upon presentation of the Tribunal's Final Award or any Decision on Costs, with the amount to be updated if necessary in

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<sup>138</sup> *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 9, 8 July 2014, ¶101, **RA-13**.

the Tribunal's Decision on Jurisdiction to ensure that the Slovak Republic's costs are secured until the end of the arbitration;

- deny Claimants' Application in its entirety; and
- order such relief as the Tribunal may deem just and appropriate.

148. The Slovak Republic reserves the right to object to the jurisdiction of this Tribunal and/or to modify or supplement the claims and arguments in this submission as permitted by the ICSID Convention and Arbitration Rules.

Submitted on behalf of Respondent

10 September 2014

[Signed]

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SQUIRE PATTON BOGGS  
Counsel for the Respondent