

**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 REPLY APPLICATION FOR  
PROVISIONAL MEASURES AND REJOINDER  
OPPOSITION TO CLAIMANTS' APPLICATION FOR  
PROVISIONAL MEASURES**

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21 November 2014

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## I. INTRODUCTION

1. In its Opposition on Provisional Measures, the Slovak Republic showed that Claimants misrepresented the identity of the U.S. claimant in this arbitration. In their Reply on Provisional Measures, Claimants now effectively admit that they did so. This is a serious matter with profound and conclusive implications for this proceeding.
2. Both in their Request for Arbitration and in their Application for Provisional Measures, Claimants represented to the Tribunal that EuroGas II<sup>1</sup>—the U.S. Claimant in this arbitration—had an interest in Rozmin (its alleged investment) since 16 March 1998.<sup>2</sup> As Claimants now admit, however, the interest in Rozmin was acquired and held indirectly by a different entity—EuroGas I—which was dissolved on 11 July 2001.<sup>3</sup>
3. Confronted with these facts, Claimants now claim that their standing is predicated on a transaction not previously disclosed to the Slovak Republic or, remarkably, to this Tribunal. Indeed, Claimants now argue that their claim of standing is predicated entirely on a transaction not previously disclosed to the investing public, the U.S. Securities and Exchange Commission, or the U.S. Bankruptcy Court with jurisdiction over all assets of EuroGas I.
4. This is a profound admission with serious consequences.
5. The *real* Claimant, EuroGas II, was registered under Utah law on 15 November 2005, but is an entity entirely distinct from EuroGas I. Claimants offer no explanation for why they misrepresented to the Tribunal that this entity—EuroGas II—held the interest in Rozmin since 1998. In truth, there is no explanation available that does not fully reveal the sham nature and complete illegality of the transaction relied upon. Instead, Claimants simply gloss over their misrepresentation and now argue (for the first time) that EuroGas II somehow secretly acquired the Rozmin interest allegedly held by EuroGas I on 31 July 2008.<sup>4</sup>

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<sup>1</sup> Defined terms in the Slovak Republic’s prior submission on provisional measures are also used in this submission.

<sup>2</sup> Request for Arbitration, ¶8.

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

<sup>4</sup> Resolution dated 5 September 2014, **R-2**.

6. Incredibly, Claimants advance this argument despite the fact that all of EuroGas I's assets were liquidated in bankruptcy in U.S. federal court in 2007 and that EuroGas I later acknowledged that fact without reservation in filings with the U.S. Securities and Exchange Commission. Not surprisingly, Claimants offer no explanation for how EuroGas I could transfer what it did not have.
7. Not only was the supposed transfer made years later after EuroGas I was dissolved and defunct, but the transfer was purportedly retroactive to a time when, under U.S. federal bankruptcy law, both EuroGas I and EuroGas II and their principals were actually barred from exercising any control over property of the bankruptcy estate. Any such action taken by EuroGas I or EuroGas II or their principals during the pending bankruptcy (or as here, purportedly retroactive to that same period) would have been a violation of 11 U.S.C. § 362(a)(3) as an “*act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate,*” which, by law, would render such act void.
8. The Tribunal thus does not even have *prima facie* jurisdiction to consider Claimants' Application with respect to EuroGas II's alleged investment.
9. Likewise, Claimants failed to show the Tribunal's *prima facie* jurisdiction concerning Belmont's alleged investment. 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—certainly more than three years prior to 14 March 2012. The instant dispute thus falls *rationae temporis* outside the ambit of the Canada BIT. In addition, Claimants have provided no evidence to refute that Belmont was not a shareholder in Rozmin at that time.
10. With regard to the Slovak Republic's request for an order requiring Claimants to post security for the Slovak Republic's costs in this arbitration, Claimants have not provided any evidence to refute the fact that Claimants are impecunious, carry out no business activity, and do not have the means to pay for the costs of these proceedings. For this reason, their claim is entirely funded by third parties.
11. This situation is exacerbated by the fact that 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. The Slovak Republic demonstrated

these facts in its Opposition on Provisional Measures, and Claimants did not dispute them in its Reply. Equally, Claimants have left undisputed that both EuroGas II and its management are currently facing an additional complaint for fraud in U.S. federal court in Utah. According to that lawsuit, EuroGas II cannot even pay debts as low as US\$36,540.

12. Precisely because any award in favor of the Slovak Republic will be against Claimants—not against the third-parties that are currently funding these proceedings—it 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.
13. In sum, Claimants have wholly failed to answer the Slovak Republic’s case that the Tribunal has no *prima facie* jurisdiction and that evidence of its financial insolvency and history of fraud requires provisional measures to be awarded *against* Claimants, not in *favor* of them.
14. The Slovak Republic’s submissions are organized as follows:
  - (a) Section I is this introduction;
  - (b) Section II shows that the Tribunal has no *prima facie* jurisdiction in respect of either EuroGas II or Belmont and that, therefore, the Tribunal does not have jurisdiction to order any of the requested measures;
  - (c) Section III explains that, if the Tribunal has *prima facie* jurisdiction to grant provisional measures, the only measure it should grant is security for its costs as a result of Claimants’ impecuniosity and history of fraud and misrepresentations;
  - (d) Section IV sets forth the Slovak Republic’s rejoinder to Claimants’ request for provisional measures, to which, even if the Tribunal had *prima facie* jurisdiction, Claimants have no right, and which are neither necessary nor urgent; and
  - (e) Section V is the Slovak Republic’s conclusion and prayer for relief.



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

15. Claimants do not deny that, if the Tribunal has no *prima facie* jurisdiction in respect of either EuroGas II or Belmont, the Tribunal should decline to order the provisional measures requested in Claimants' Application.<sup>5</sup> Instead, Claimants argue that the Tribunal has *prima facie* jurisdiction in respect of both Claimants.<sup>6</sup> For the reasons set out below, the Tribunal has no such jurisdiction.

### A. THE TRIBUNAL HAS NO *PRIMA FACIE* JURISDICTION OVER EUROGAS II BECAUSE EUROGAS II HOLDS NO RIGHT TO THE ALLEGED INVESTMENT

16. EuroGas II has no claim because it holds no right in the investment on which its alleged claim is founded. Claimants do not deny that EuroGas II is a company registered for the first time on 15 November 2005 under the same name as EuroGas I.<sup>7</sup> It follows that EuroGas II is not, as was falsely alleged, EuroGas I, a company "*legally constituted under laws of the United States on October 7, 1985, first under the name Northampton, Inc.*"<sup>8</sup> Despite tacitly acknowledging that fact, Claimants nonetheless argue that EuroGas II is "*very much the same entity as the company incorporated in 1985.*"<sup>9</sup>

17. This response is nothing short of a legal magic act. Stripped of its façade, EuroGas II fails to offer even a colorable basis for its astounding assertion that EuroGas I—a company which ceased to exist as a result of its dissolution under Utah law and was "defunct" as a matter of federal law when its bankruptcy was concluded—could somehow transfer years later the assets upon which EuroGas II's standing now rests. In truth, the effort is quite obviously riddled with the same badges of fraud which permeated the earlier conduct of both EuroGas I and EuroGas II and should not be legitimized in any respect.

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<sup>5</sup> *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Order, 23 January 2007, ¶24, **RA-3**.

<sup>6</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶¶139, 177.

<sup>7</sup> Articles of Incorporation for EuroGas Inc. showing EuroGas II's registration on 15 November 2005, **R-28**.

<sup>8</sup> Request for Arbitration, ¶7.

<sup>9</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶135.

18. Indeed, the admissions made by EuroGas II now confirm that this Tribunal has before it the decisive facts showing that EuroGas II has no plausible claim to the interest in Rozmin—the foundation of its claim in these proceedings. The corporate machinations that EuroGas II has presented to the Tribunal fall well short of establishing standing and do nothing to explain away the legal effect under Utah state law and U.S. bankruptcy law of EuroGas I’s dissolution and subsequent Chapter 7 bankruptcy.
19. Claimants’ Reply admits the following dispositive facts:
- (a) EuroGas I was administratively dissolved in 2001 for failure to renew its registration;<sup>10</sup>
  - (b) EuroGas I did not apply for reinstatement within two years of its dissolution;<sup>11</sup>
  - (c) administrative dissolution under Utah law mandates that a dissolved corporation “*may not carry on any business except that appropriate to wind up and liquidate its business and affairs*”;<sup>12</sup> and
  - (d) involuntary bankruptcy proceedings were instituted against EuroGas I in 2004, concluded in March, 2007, and, according to EuroGas I/II’s own words, “*EuroGas Inc.’s remaining assets were sold at public auction in March 2006 in Salt Lake City, Utah.*”<sup>13</sup>
20. Claimants’ admissions therefore confirm the legal conclusion already established by the Slovak Republic: as a result of EuroGas I’s dissolution, EuroGas I was devoid of the corporate capacity to conduct business (including bringing a claim or filing a suit),

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<sup>10</sup> Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶136.

<sup>11</sup> Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶136.

<sup>12</sup> Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶136, footnote 161.

<sup>13</sup> EuroGas, Inc., Form 10-K (Amended) for Fiscal Year Ended 31 December 2007, page 28, **R-63**; Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶137; Bankruptcy Court for the District of Utah, Order, 30 March 2006, **R-23**; Screen Grab of the EuroGas I Bankruptcy Case Docket, **R-24**.

other than winding down and liquidating its own assets.<sup>14</sup> Simply stated, Claimants have done nothing to counter the indisputable rule that “*once a corporation is dissolved, and not reinstated within the two year window, it has no authority to act except for those actions necessary to wind up its affairs.*”<sup>15</sup> Claimant has offered no response to this obvious point because they have none.

21. Despite their acknowledgement that a dissolved corporation may only wind up and liquidate its business and affairs under Utah law and that EuroGas I was in fact administratively dissolved in 2001, Claimants implausibly contend that the “*company’s corporate existence continued and its business and affairs remained with it.*”<sup>16</sup> Unsurprisingly, Claimants cite no Utah law in support of this statement. And, in fact, no such law exists.
22. Claimants also posit that “*EuroGas was, as a matter of Utah State law, a mere continuation of the company incorporated in 1985*”<sup>17</sup> and that EuroGas II “*stepped into the shoes*” of EuroGas I.<sup>18</sup> This rhetorical fiat is likewise devoid of legal basis. The attempt to evade the legal consequences of EuroGas I’s failure to comply with Utah corporate registration laws is thus laid bare. Claimants purport to rely upon the “*Joint Unanimous Consent Resolution Of The Directors*” dated July 31, 2008 (the “**Joint Resolution**”) and Amended Articles of Incorporation dated July 23, 2008 (the “**Amended Articles**”).<sup>19</sup> But Claimants’ offer no hint of how a corporation, the legal capacity of which ceased in July, 2001, could magically resurrect itself.

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<sup>14</sup> Respondent’s Application for Provisional Measures and Opposition to Claimants’ Application for Provisional Measures, ¶18.

<sup>15</sup> *Union Pac. R.R. Co. v. Harsac, Inc.*, 2014 U.S. Dist. LEXIS 91301, 13 n. 6 (2 July 2014) (“Under the Revised Utah Act, however, once a corporation is dissolved, and not reinstated within the two year window, it has no authority to act except for those actions necessary to wind up its affairs”), (citing Utah Code. Ann. § 16-10a-1421(3)(a)), **RA-14**.

<sup>16</sup> Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶136.

<sup>17</sup> Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶21.

<sup>18</sup> Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶137.

<sup>19</sup> Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶ 138; Amended Articles of Incorporation of EuroGas Inc., 23 July 2008, **C-56**; and Joint Director’s Resolution for the Performance of a Type-F

23. Indeed, a review of the Joint Resolution evidences that the directors of EuroGas II were aware of EuroGas I's dissolution and were plainly engaged in an effort to accomplish an unlawful act: the continued existence and power of a deceased corporate entity. Moreover, the explicit attempt to give retroactive effect to the resolution would be a clear violation of U.S. Bankruptcy law, according to which, an "*act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate. . . .*" constitutes a violation of the automatic stay instituted by virtue of the bankruptcy filing.<sup>20</sup> It is therefore void as a matter of federal bankruptcy law.
24. The effort was without legal effect for multiple reasons. As explained below, however, the steps employed to attempt this corporate shell game alone speak volumes.
25. *First*, Claimants state that through the Joint Resolution "*EuroGas assumed all of the 1985 company's assets, liabilities and issued stock certificates.*"<sup>21</sup> What Claimants wholly fail to address, however, is how a corporation that legally dissolved in 2001, and that was later liquidated through a United States Chapter 7 bankruptcy in 2007, could have any assets to transfer. In the wake of a Chapter 7 bankruptcy—which provides for liquidation of a company's property for the benefit of creditors—the company becomes "*defunct.*"<sup>22</sup> Indeed, the Chapter 7 mechanism for corporations was intended by the U.S. Congress to prevent the "*trafficking in corporate shells*" and results in a situation where the defunct entity "*ceases to operate or own any assets.*"<sup>23</sup>
26. A recent U.S. appeal from a bankruptcy court decision rejected a similar effort to ignore the consequences of a Chapter 7 bankruptcy. In *Permacel Kan. City v. Kohler Co.*, a breach of contract claim was brought against the defendant asserting that it had

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Reorganization under Section 368(a)(1)(F) of the Internal Revenue Code of 1986, 31 July 2008, **C-57**.

<sup>20</sup> 11 U.S.C. sec. 362 (a)(3), **R-64**.

<sup>21</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶138.

<sup>22</sup> *Permacel Kan. City, Inc. v. Kohler Co.*, 2010 U.S. Dist. LEXIS 58435, (W.D. Mo. 14 June 2010), **RA-15**; see also *Liberty Trust Co. Employees Profit Sharing Trust v. Holt (In re Liberty Trust Co.)*, 130 B.R. 467, 471 (W.D. Tex. 1991) (same), **RA-16**.

<sup>23</sup> *United States Dismantlement Corp. v. Jeffrey M. Brown Assocs.*, 2000 U.S. Dist. LEXIS 5347, 5, 8 (E.D. Pa. 12 April 2000) (citations omitted), page 4, **RA-17**.

breached a minimum procurement agreement and an exclusivity agreement.<sup>24</sup> The plaintiff was not the original party to the contract, but claimed rights by reason of a purported assignment from AcoustiSeal, a party that had gone through a Chapter 7 bankruptcy.<sup>25</sup> The defendant asserted that the purported assignment from AcoustiSeal was ineffective because the Agreement at issue was never made part of the bankruptcy estate and “*thus never could have been assigned out of the estate to plaintiff or plaintiff’s alleged predecessor company.*”<sup>26</sup>

27. Describing the legal effect of the Chapter 7 bankruptcy, the U.S. Federal Court agreed:

*A chapter 7 debtor does not emerge from bankruptcy; instead, its assets are liquidated and at the end of the bankruptcy proceedings, the company is “defunct.” U.S. Dismantlement Corp., Inc. v. Brown Assoc., Inc., 2000 U.S. Dist. LEXIS 5347, 2000 WL 433971, at \*2 (E.D. Pa. April 13, 2000) (finding that a “defunct” corporation could not maintain a counterclaim in that lawsuit). Thus, the Agreement could not have “passed through” the bankruptcy unaffected. See 11 U.S.C. §365(d)(1). As noted by defendant, AcoustiSeal had no authority over the Agreement and nothing to assign once the chapter 7 trustee was appointed in this matter. See *In re JZ L.L.C.*, 371 B.R. 412, 418 (9<sup>th</sup> Cir. BAP 2007). Accordingly, the Court finds that, as a matter of law, NMAC (allegedly now Permacel) could not have assigned the Agreement by AcoustiSeal.<sup>27</sup>*

28. The Court supported its conclusion by reliance on yet another U.S. Federal Court case, *U.S. Dismantlement Corp., Inc. v. Brown Assoc.*<sup>28</sup> In that case, the U.S. District Court was also called upon to consider the legal effect of a Chapter 7 bankruptcy on a corporation’s legal capacity following the conclusion of the bankruptcy proceedings. Rejecting the very arguments asserted by Claimants here, the Court explained:

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<sup>24</sup> *Permacel Kan. City, Inc. v. Kohler Co.*, 2010 U.S. Dist. LEXIS 58435, 1 (W.D. Mo. 14 June 2010), page 1, **RA-15**.

<sup>25</sup> *Permacel Kan. City, Inc. v. Kohler Co.*, 2010 U.S. Dist. LEXIS 58435, 2 (W.D. Mo. 14 June 2010), page 3, **RA-15**.

<sup>26</sup> *Permacel Kan. City, Inc. v. Kohler Co.*, 2010 U.S. Dist. LEXIS 58435, 7 (W.D. Mo. 14 June 2010), page 4, **RA-15**.

<sup>27</sup> *Permacel Kan. City, Inc. v. Kohler Co.*, 2010 U.S. Dist. LEXIS 58435, (W.D. Mo. 14 June 2010), page 5, **RA-15**.

<sup>28</sup> *U.S. Dismantlement Corp., Inc. v. Brown Assoc.*, 2000 U.S. Dist. LEXIS 5347 (E.D. Pa. 12 April 2000), **RA-17**.

*The reason for the different treatment of corporations in Chapter 7 proceedings is to avoid “trafficking in corporate shells, a form of bankruptcy fraud.”* S. Rep. No. 95-989 (1978), reprinted in 1978 U.S.C.C.A.N. 5787; see H.R. Rep. No. 95-595 (1978), reprinted in 1978 U.S.C.C.A.N. 5963 (“The change in policy will avoid trafficking in corporate shells and in bankrupt partnerships.”)

\* \* \*

*Instead of the corporation’s debts being discharged, the corporation’s assets are liquidated, and, at the close of the bankruptcy proceedings, the corporation becomes “defunct.”*

\* \* \*

JMB’s argument that a defunct corporation may not pursue a pre-petition cause of action is directly supported by *Black’s Law Dictionary, which defines “defunct” as “dead; extinct” and defines “extinct” as “no longer in existence.* Black’s Law Dictionary 434, 604 (7<sup>th</sup> ed. 1999).

\* \* \*

A corporation that has been laid to rest does not pursue a cause of action. In *Tri-R Builders*, the court took note of the Congressional intent behind § 727—to prevent “trafficking in corporate shells”—and stated that *by becoming a defunct corporation, “the corporation ceases to operate or own any assets.”* *Id.*, 86 B.R. at 140-141 (quoting H.R. Rep. No. 95-595).<sup>29</sup>

29. These authorities preclude the effort so brazenly undertaken here. A post-bankruptcy corporation cannot possibly transfer corporate assets after the bankruptcy.
30. The Joint Resolution itself evidences the corporate shell trafficking being played in 2008 and the contradictory nature of the arguments now advanced by Claimants. At first, the Joint Resolution recognizes (correctly) that “*under Utah law, a dissolved corporation cannot formally merge with another domestic corporation under Utah’s corporate merger statute.*”<sup>30</sup> But then it states that “*EuroGas’s dissolved Predecessor*

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<sup>29</sup> *U.S. Dismantlement Corp., Inc. v. Brown Assoc.*, 2000 U.S. Dist. LEXIS 5347, 5-6, 8 (E.D. Pa. 13 April 2000), **RA-17**.

<sup>30</sup> Joint Director’s Resolution for the Performance of a Type-F Reorganization under Section 368(a)(1)(F) of the Internal Revenue Code of 1986, 31 July 2008, page 2, **C-57**.

*Corporation is hereby deemed to have merged or reorganized with and into Eurogas, Inc., a Utah corporation in good standing, the survivor, all as contemplated in Utah Code Ann. § 16-10a-1101 et seq., titled **Merger and Share Exchange**.*<sup>31</sup>

31. The sham character of the purported merger of the dissolved and defunct EuroGas I continues with the false representation that:

“[T]he [new] Corporation is in fact a continuation of the Predecessor Corporation and that all of the assets, liabilities, rights, privileges, and obligations of the Predecessor Corporation are in fact the assets, liabilities, rights, privileges, and obligations of the EuroGas, Inc., corporation incorporated on November 15, 2005.”<sup>32</sup>

32. Of course, EuroGas II conveniently ignores the fact that the U.S. Securities and Exchange Commission (the “SEC”) and investing public had been told by EuroGas, Inc. itself in the SEC annual report for the year ending 31 December 2007, that “***EuroGas Inc.’s remaining assets were sold at public auction in March 2006 in Salt Lake City, Utah. The involuntary bankruptcy of EuroGas, Inc. was closed and terminated by Court Order of the Utah Bankruptcy Court earlier this year.***”<sup>33</sup>

33. Such documents filed were with the SEC by an entity calling itself “*EuroGas, Inc.*” Because this entity never told the SEC whether it is EuroGas I or II—thereby using the fact that the two entities shared the same name to mislead the SEC—the Slovak Republic will hereinafter refer to this entity as “**EuroGas I/II.**”

34. Thus, following the Utah bankruptcy, EuroGas I/II had already admitted that which is clearly established by applicable law: EuroGas I had no assets after March 2006 and therefore, had nothing to transfer under the sham merger documents.

35. In any event, the Utah Code does not permit the transaction contemplated through the Joint Resolution. Section 16-10a-1101(1) simply provides that a “*domestic corporation*

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<sup>31</sup> Joint Director’s Resolution for the Performance of a Type-F Reorganization under Section 368(a)(1)(F) of the Internal Revenue Code of 1986, 31 July 2008, (italics and bold in original) page 4, **C-57**.

<sup>32</sup> Joint Director’s Resolution for the Performance of a Type-F Reorganization under Section 368(a)(1)(F) of the Internal Revenue Code of 1986, 31 July 2008, page 3, **C-57**.

<sup>33</sup> EuroGas, Inc., Form 10-K (Amended) for Fiscal Year Ended 31 December 2007, pages 28-29, **R-63**.

*may merge into another entity*” under certain conditions. Here, EuroGas I, having dissolved in 2001, was clearly not a “*domestic corporation*” or “*another entity*”<sup>34</sup> that would have the capability of engaging in such a transaction.

36. Moreover, EuroGas II failed to follow the statutory requirements under Utah Code Section 16-10a-1102. That statutory provision requires a plan of share exchange and shareholder approval.<sup>35</sup> Section 1105 of the same Chapter requires that articles of merger must be publicly filed with the Utah Division of Corporations.<sup>36</sup> None of these requirements were met. The undisclosed sham merger transaction was a patent legal nullity.
37. The Joint Resolution’s reliance on Section 368(a)(1)(F) of the U.S. Internal Revenue Code is also tangential to the underlying issue of EuroGas I’s corporate existence. As the Joint Resolution acknowledges, that section only addresses how the transaction would be “*characterized*” for “*federal and state income tax purposes.*”<sup>37</sup> In other words, Section 368 does not speak to the underlying issue of whether EuroGas I was a viable corporate entity—which it clearly was not—based both on the 2001 administrative dissolution by the Utah Division of Corporations and the subsequent bankruptcy proceedings.
38. Similarly, the Joint Resolution’s reliance on Rule 145 of the General Rules and Regulations of the Securities and Exchange Commission addresses only whether the transaction could be exempt from that rule’s securities registration requirements. That rule does not speak at all to whether EuroGas I had any valid corporate existence. And, of course, EuroGas was subsequently deregistered by the SEC as well.<sup>38</sup>

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<sup>34</sup> *Utah Code Ann.* § 16-10a-102(19), (“Entity” is defined to include the following, none of which include a dissolved corporation: “(a) a domestic and foreign corporation; (b) a nonprofit corporation; (c) a limited liability company; (d) a profit or nonprofit unincorporated association; (e) a business trust; (f) an estate; (g) a partnership; (h) a trust; (i) two or more persons having a joint or common economic interest; (j) a state; (k) the United States; and (l) a foreign government.”), **R-65**.

<sup>35</sup> *Utah Code Ann.* § 16-10a-1102, **R-66**.

<sup>36</sup> *Utah Code Ann.* § 16-10a-1105, **R-67**.

<sup>37</sup> Joint Director’s Resolution for the Performance of a Type-F Reorganization under Section 368(a)(1)(F) of the Internal Revenue Code of 1986, 31 July 2008, page 4, **C-57**.

<sup>38</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**.



39. EuroGas I's bankruptcy was initiated by an involuntary petition under Chapter 7 of the U.S. Bankruptcy Code. The party initiating the Bankruptcy in the U.S. District Court for the District of Utah was a trustee appointed by the U.S. Bankruptcy Court for the Southern District of Texas. The Texas Bankruptcy trustee put EuroGas I into bankruptcy because it had recovered a US\$ 113 million judgment on 7 June 2004 against EuroGas I, Mr. Wolfgang Rauball, Mr. Reinhardt Rauball, and Mr. McKenzie for fraud and civil conspiracy following findings that EuroGas I's principals had given "false" testimony.<sup>39</sup> The Texas bankruptcy court had made express findings of efforts by these parties to conceal estate property and hinder the bankruptcy trustee's efforts to identify and recover property.<sup>40</sup>
40. The transactions admitted by Claimant in its Reply show a continuation of the very conduct which had led to the original judgment: an obvious effort to continue "trafficking in corporate shells."
41. EuroGas II's claim asserted is accordingly built upon a foundation of fraud and illegality and ought not to be legitimized or sanctioned in any respect by this Tribunal. On the undisputed record before this Tribunal, EuroGas I was dissolved under Utah law in 2001 and was rendered defunct under U.S. law in 2007 by reason of its Chapter 7 bankruptcy. Any subsequent activity by EuroGas I was and is a legal nullity. In any event, Claimants admitted that EuroGas I had no assets following its bankruptcy. It follows that no asset could have been transferred to EuroGas II, and its claim in this proceeding is a sham.

**B. THE TRIBUNAL LACKS *PRIMA FACIE* JURISDICTION BECAUSE EUROGAS II HAS NO SUBSTANTIAL BUSINESS ACTIVITIES IN THE U.S.**

42. Moreover, 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

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<sup>39</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>40</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**.

“that company has no substantial business activities” in the U.S. and is controlled by nationals of a third country.<sup>41</sup>

43. Claimants argue that the Slovak Republic could not exercise this right on 21 December 2012—approximately a year-and-a-half before this arbitration was even commenced—because EuroGas I had made the initial investment more than a decade prior and because EuroGas II had sent a “*notification of claim*” letter to the Slovak Republic on 31 October 2011 purporting to consent to arbitration under the U.S. BIT.<sup>42</sup>
44. Claimants’ letter of 31 October 2011, however, is irrelevant because the Slovak Republic validly denied the benefit of the U.S. BIT for two independent reasons. *First*, the Slovak Republic did not exercise its right to deny benefit retroactively because the U.S.-Slovak BIT—in contrast to the Energy Charter Treaty—allows the Slovak Republic to deny both substantive and procedural rights under the Treaty. This was recently confirmed, for instance, by the tribunal in *Pac Rim v. El Salvador*, which had to interpret a similarly worded denial of benefit provision of CAFTA:

[I]t is significant that the “benefits” denied under CAFTA Article 10.12.2 include all the benefits conferred upon the investor under Chapter 10 of CAFTA, including both Section A on “Investment” and Section B on “Investor-State Dispute Settlement.”<sup>43</sup>

45. In its letter denying benefits, the Slovak Republic denied, among other things, *the procedural benefit of the arbitration clause itself*:

Accordingly, pursuant to Article 1(2) of the Treaty, the Slovak Republic hereby exercises as of today, 21 December 2012, its right to deny EuroGas, Inc. the benefits of the Treaty, *including the right to arbitration under Article VI of the Treaty*.<sup>44</sup>

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<sup>41</sup> Article I.2, U.S. BIT, **R-4**; Dun & Bradstreet, Inc. Report dated 4 September 2014, page 1, **R-29**.

<sup>42</sup> Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶140; Letter from EuroGas Inc. to the Slovak Republic dated 31 October 2011, **R-32**.

<sup>43</sup> *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction, 1 June 2012, ¶¶4.4, 4.56, (emphasis added), **RA-18**.

<sup>44</sup> Letter from the Slovak Republic to EuroGas Inc. dated 21 December 2012, (emphasis added), **R-5**.

46. Claimant's letter of 31 October 2011 did not exercise the right to arbitration under the US-Slovak BIT. Nor did Claimants exercise that right at any other time prior to the Slovak Republic's denial of benefits. Thus, even if, *arguendo*, the denial of benefits is only considered to apply prospectively (rather than retroactively), the Slovak Republic validly denied the benefits of arbitration prospectively by denying the application of the arbitration right, which had not been exercised at the time the Slovak Republic denied the benefits.
47. *Second*, in any event, ICSID case law makes clear that the denial of benefits under the US-Slovak BIT can be exercised retroactively even after the investor files for arbitration. In the *Pac Rim*, the tribunal—interpreting a similarly-worded denial of benefits clause in another treaty to which the U.S. was a party—recounted that the U.S. agreed that a party under the treaty is not required to invoke the denial of benefits clause before an arbitration commences; it may do so as late as a jurisdiction defense in the arbitration. The tribunal recounted:

The USA observes (in common with Costa Rica) that a CAFTA Party is not required to invoke denial of benefits under CAFTA Article 10.12.2 before an arbitration commences; and that it may do so as part of a jurisdictional defence after a claim has been submitted to arbitration (paragraph 5). The USA likewise observes that this CAFTA provision contains no time-limit for its invocation; and that a contrary interpretation would place an untenable burden on a CAFTA Party ....<sup>45</sup>

48. The tribunal in *Pac Rim* went on to hold that, even where the denial of benefits is invoked after the arbitration is commenced, it can still operate to deny the claim. Thus, even if the Slovak Republic had waited until after this arbitration had been filed to deny benefits (and, in fact, the Slovak Republic denied benefits before it was filed), it would *still* have been timely. The same applies to the denial of substantive benefits under the BIT.
49. The Slovak Republic has evidenced that EuroGas II met the requirements for denial of benefit under Article I.2 in its initial submission on provisional measures at paragraphs

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<sup>45</sup> *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction, 1 June 2012, ¶4.56, **RA-18**.

62 to 64. Indeed, numerous facts indicate that EuroGas I and EuroGas II do not have (and did not have) substantial activities in the United States.

50. EuroGas I was dissolved under Utah law in 2001<sup>46</sup> and placed in bankruptcy in the U.S. Bankruptcy Court for the District of Utah by the filing of an involuntary petition, granted on 20 October 2004.<sup>47</sup> Following the commencement of the bankruptcy, EuroGas I was ordered by a U.S. District Bankruptcy judge to file asset schedules required by U.S. law.<sup>48</sup> EuroGas I, however, refused to comply.<sup>49</sup>
51. Indeed, the public record of the docket in the bankruptcy proceedings shows no evidence that asset schedules were ever filed. The Trustee in the bankruptcy case advised the Court that the “*Debtor’s [EuroGas I’s] office in the United States no longer exists.*”<sup>50</sup> EuroGas I’s assets were administered by the Trustee in the bankruptcy proceedings and were the subject of an auction sale ordered by the Court on 13 February 2006 and conducted on 28 March 2006.<sup>51</sup> None of the EuroGas I assets sold at auction were U.S.-based.<sup>52</sup> It is thus impossible to argue that EuroGas I has any substantial activities in the U.S.
52. EuroGas I and EuroGas II’s lack of activities is vividly illustrated by the document that an entity calling itself “EuroGas, Inc.” filed with the SEC.<sup>53</sup> In the document, purporting to be EuroGas I/II’s SEC annual filing for the year ended 31 December

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<sup>46</sup> Respondent’s Application for Provisional Measures and Opposition to Claimants’ Application for Provisional Measures, ¶¶17-18.

<sup>47</sup> Respondent’s Application for Provisional Measures and Opposition to Claimants’ Application for Provisional Measures, ¶22.

<sup>48</sup> Order Designating Individuals Pursuant to Bankruptcy Rule 9001(5), 27 January 2005, ¶2, **R-68**.

<sup>49</sup> Trustee’s Motion for an Order Approving the Sale of the Debtor’s Interest in Certain Affiliates Pursuant to Section 363 of the Bankruptcy Code, 3 January 2006, pages 2-3, **R-69**.

<sup>50</sup> Trustee’s Motion for an Order Approving the Sale of the Debtor’s Interest in Certain Affiliates Pursuant to Section 363 of the Bankruptcy Code, 3 January 2006, page 2 **R-69**.

<sup>51</sup> Order Confirming Four-Lot Auction of Debtor’s Interests in Certain Affiliates, 30 March 2006, ¶¶1-2, **R-70**.

<sup>52</sup> Order Confirming Four-Lot Auction of Debtor’s Interests in Certain Affiliates, 30 March 2006, ¶2, **R-70**.

<sup>53</sup> By this time, EuroGas II had been incorporated as a separate legal entity under Utah law (Application for Provisional Measures and Opposition to Claimants’ Application for Provisional Measures, ¶¶30-31), but there is no public record of a disclosure to the SEC or investing public that a separate legal entity had been created.

2007, EuroGas I/II states that “*EuroGas, Inc.’s remaining assets were sold at public auction in March 2006 in Salt Lake City, Utah.*”<sup>54</sup> In this same filing, EuroGas I/II purported to transfer its principal offices from Vancouver, Canada to a seemingly prestigious New York address: “*EuroGas, Inc. is announcing that its offices have moved to New York...*” at “14 Wall Street 22<sup>nd</sup> Floor, New York , NY 10005.”<sup>55</sup> This address, however, corresponds to a “*virtual office,*” commonly known as a mail drop and phone forwarding facility.<sup>56</sup> Of course, given EuroGas I’s status as a dissolved Utah corporation and a “*defunct*” corporation under U.S. bankruptcy law,<sup>57</sup> EuroGas I/II’s inability to pay for an actual office is not surprising.

53. Indeed, in a similar previous SEC annual report, EuroGas I/II acknowledged the abandonment of its office facilities in Vienna and Vancouver, stating: “*The Company abandoned its office facilities from various leasers in Vienna, Austria and Vancouver for lack of working capital and because of the Chapter 7 bankruptcy situation.*”<sup>58</sup> Notwithstanding EuroGas I’s status as a legal nullity in the eyes of Utah state law and U.S. bankruptcy law, EuroGas I/II continued to sell and trade its so-called “penny stock” until the SEC ultimately caught up with it and de-registered it for non-compliance with U.S. securities laws on 30 March 2011.<sup>59</sup>
54. That, however, is not all. EuroGas I/II had failed to even file audited financial statements for the periods ended 31 December 2007, 2008, and 2009—as well required by U.S. law.<sup>60</sup> Even more, EuroGas I/II had openly admitted that it lacked the ability to pay its auditors as far back as for the period ended 31 December 2003, coinciding with

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<sup>54</sup> EuroGas, Inc., Form 10-K (Amended) for Fiscal Year Ended 31 December 2007, page 28, **R-63**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2006, page 18, **R-71** (“*The assets were sold at the auction and the Bankruptcy Trustee received appr. \$ 800.000 for the assets which he distributed after costs to certain creditors of the company in November 2006.*”).

<sup>55</sup> EuroGas, Inc., Form 10-K (Amended) for Fiscal Year Ended 31 December 2007, page 29, **R-63**.

<sup>56</sup> Screen grab from <http://www.regus.com/locations/virtual-office/new-york-new-york-city-wall-street>, **R- 72**.

<sup>57</sup> See ¶¶19-20, 24, *above*.

<sup>58</sup> EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2006, page 14, **R-71**; EuroGas, Inc., Form 10-K (Amended) for Fiscal Year Ended 31 December 2007, page 11, **R-63**.

<sup>59</sup> Respondent’s Application for Provisional Measures and Opposition to Claimants’ Application for Provisional Measures, ¶30.

<sup>60</sup> Respondent’s Application for Provisional Measures and Opposition to Claimants’ Application for Provisional Measures, ¶30.

EuroGas I's administrative dissolution.<sup>61</sup> In short, EuroGas I and EuroGas II were, at best, shell entities that carried out no business activity in the U.S.

55. But even if the corporate defalcations orchestrated by Claimants, together with EuroGas I's defunct status, were not, standing alone, sufficient to demonstrate a complete absence of material activities in the U.S. (and it is), both EuroGas I and EuroGas II fail all of the traditional tests of "*substantial business activities.*" Public filings and other public records establish the following:

- There is no evidence of material operations in the U.S. between 2005 and 2012 of either EuroGas I or EuroGas II. It was established during the EuroGas I bankruptcy that it no longer had U.S. offices.<sup>62</sup> In fact, EuroGas I/II stated that it would be managed from outside the U.S., reporting that "[w]e will continue to manage the Company from our North American Headquarters [in West Vancouver, Canada] and our Central European Headquarters,"<sup>63</sup> and adding that "EuroGas" activity would focus on "Central Europe and Canada".<sup>64</sup> In effect, therefore, EuroGas I/II *admitted* that there was no operational or management activities in the U.S.
- Unsurprisingly, EuroGas I/II had no operational revenues either in the U.S. or elsewhere.<sup>65</sup>

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<sup>61</sup> EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2003, page 16, **R-73**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2004, page 35, **R-74**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, page F-1, **R-75**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2006, page 41, **R-71**; EuroGas, Inc., Form 10-K (Amended) for Fiscal Year Ended 31 December 2007, page F-1, **R-63**.

<sup>62</sup> Trustee's Motion for an Order Approving the Sale of the Debtor's Interest in Certain Affiliates Pursuant to Section 363 of the Bankruptcy Code, 3 January 2006, page 2, **R-69**.

<sup>63</sup> EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, page 17, **R-75**.

<sup>64</sup> EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2004, page 17, **R-74**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, page 17, **R-75**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2006, page 21, **R-71**; EuroGas, Inc., Form 10-K (Amended) for Fiscal Year Ended 31 December 2007, page 18, **R-63**.

<sup>65</sup> EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2009, page 15, **R-76**. This statement evidences "\$ 0 –*net sales for all the years between 2005 and 2009*". Its final SEC statement before being de-registered in 2011 likewise shows no operational revenue through 31 September 2010. EuroGas, Inc., Form 10-Q for Quarterly Period Ended 30 September 2010, page 12, **R-77**. In previous years, the company also experienced either zero or nominal net sales. EuroGas, Inc., Form 10-K (Amended) for Fiscal Year Ended 31 December 2007, page

- EuroGas I/II had no operating U.S. subsidiaries.<sup>66</sup>
56. It is therefore not surprising that the Dun & Bradstreet, Inc. report shows that EuroGas II has been inactive since at least 2 December 2010<sup>67</sup> and that EuroGas II is inactive at the address at which it is registered and listed in the Request for Arbitration, as of 18 June 2012.<sup>68</sup> Claimants’ response to this report is based on the thinnest of reeds—it argues that the Tribunal should disregard its content because it *contains a standard disclaimer*.<sup>69</sup> That Claimants must resort to such an argument is itself telling.
57. The disclaimer is hardly sufficient to disregard the conclusions in the Dun & Bradstreet, Inc. Indeed, such disclaimers are a standard part of nearly every external consultant’s report. If disclaimers had the effect of requiring all content in the report to be disregarded, then the content of all such reports would be completely valueless—which is obviously absurd.
58. Claimants also point to the ongoing law suit brought by Tombstone Corporation against EuroGas II as evidence that it maintains substantial business activities.<sup>70</sup> But this claim—which is brought *against* EuroGas II, not *by* it—evidences precisely the opposite. The claim is that EuroGas II and its management made fraudulent representations to Tombstone Corporation, failed to carry out the business activity that EuroGas II represented it would carry out, and thereby caused considerable loss to Tombstone Corporation. None of this constitutes business activity.

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17, **R-63** (showing “0” net sales for 2004); EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2003, page 15, **R-73** (showing “0” net sales for 2003, and only nominal sales for 2002 and 2001). The net sales reported in 2000 and 1999 related to the Big Horn project in Canada, which was later divested, *Id.* at 7.

<sup>66</sup> EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, page 3, **R-75** (identifying subsidiaries as EuroGas GmbH Austria, EuroGas Polska Sp. zo.o., and Energy Global A.G., and the subsidiaries of each of these subsidiaries, including GlobeGas B.V., Pol-Tex Methane, Sp. zo.o., McKenzie Methane Jastrzebie Sp. zo.o.). Subsequent to the bankruptcy, EuroGas no longer had any subsidiaries; and EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2007, page 1, **R-63**.

<sup>67</sup> Dun & Bradstreet, Inc. Report dated 4 September 2014, page 1, **R-29**.

<sup>68</sup> Request for Arbitration, ¶7; and Dun & Bradstreet, Inc. Report dated 4 September 2014, page 3, **R-29**.

<sup>69</sup> Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶146.

<sup>70</sup> Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶147.

59. That Claimants are pointing to lawsuits brought *against* them to show substantial business activities speaks pointedly to just how non-existent EuroGas II's real business activities are.
60. Most fundamentally, Claimants have not provided *any* evidence of business activity in the U.S. This is striking because, while proving a negative is extremely difficult, it would be very easy for Claimants to provide evidence of business activity if any existed—by, for example, disclosing a recent annual report. Claimants, however, have produced nothing. Based on all of the foregoing, however, there is plainly no such activity. Accordingly, for this additional reason, the Tribunal has no jurisdiction over EuroGas II.

**C. THE TRIBUNAL HAS NO *PRIMA FACIE* JURISDICTION IN RESPECT OF BELMONT**

61. The Slovak Republic also demonstrated in its previous submission that the Tribunal has no *prima facie* jurisdiction in respect of Belmont. As Article XV of the Canada BIT makes clear that “*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>71</sup> As the instant dispute 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, it is excluded *rationae temporis* from the scope of the Canada BIT.
62. While Claimants agree that disputes that arose prior to 14 March 2009 are not covered by the Canada BIT,<sup>72</sup> Claimants wrongly deny that the dispute arose after that date because, according to Claimants, a dispute only arises once the claimant expressly invokes the ICSID regime. This is patently wrong.
63. Under international law, a dispute arises when “*the claim of one party was positively opposed by the other.*”<sup>73</sup> Indeed, the tribunal in *Lucchetti*, relying on decisions of the

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<sup>71</sup> Article XV(6), Canada BIT, **R-6**; see also Email enclosing letter from Canada to Hungary and accompanying comments dated 21 December 2004 and accompanying comments, page 7, **R-54**.

<sup>72</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶160.

<sup>73</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶165, footnote 184.



ICJ, confirmed that a dispute arises when the parties assert conflicting legal or factual claims:

In short, a dispute can be held to exist when the parties assert clearly conflicting legal or factual claims bearing on their respective rights or obligations or that “the claim of one party is positively opposed by the other.”<sup>74</sup>

64. There is no requirement that rights under the ICSID regime be asserted. Indeed, it is sufficient to have conflicting factual claims bearing on the relevant rights and obligations.
65. In the instant case, conflicting claims were first allegedly asserted on 13 January 2005, when Rozmin claims to have challenged the DMO’s notification of 3 January 2005 that Rozmin’s excavation rights had lapsed.<sup>75</sup> Further contestation allegedly occurred on 16 February 2005, when Rozmin executives allegedly met with the Minister of Economy of the Slovak Republic to again contest the fact that Rozmin’s mining rights had lapsed.<sup>76</sup> On 27 September 2005, Rozmin even states that it initiated proceedings before the Slovak judiciary.<sup>77</sup> It is thus certain that, on Claimants’ own case, clearly conflicting legal or factual claims bearing on their respective rights or obligations (including under the ICSID regime) arose years prior to 14 March 2009.
66. There is no requirement that the parties make express reference to investment treaty rights for a dispute to arise. Claimants’ reference to Professor Schreuer is irrelevant because it does not deal with the time a dispute arises.<sup>78</sup> *Toto Costruzioni* is also of no assistance to the Claimants because, in that case, the investor made reference to

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<sup>74</sup> *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, ¶48; **RA-21**; see also *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility, 29 July 2008, ¶116, (French version only) **RA-22**.

<sup>75</sup> Letter from the District Mining Office to Rozmin sro dated 3 January 2005 (Ref. 2450/451.14/2004-I), **C-30**; Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶42.

<sup>76</sup> Request for Arbitration, ¶43.

<sup>77</sup> Request for Arbitration, ¶45.

<sup>78</sup> Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶166.

investment treaty arbitration as soon as it made contradicting claims.<sup>79</sup> Therefore the dispute in *Toto Construzioni* arose simultaneously with the investor's reference to investment treaty arbitration.

67. Nor is *Jan de Nul* helpful to Claimants. Even under the particularly strict requirements set out in that decision, the instant dispute arose in 2005. The *Jan de Nul* tribunal noted that the purpose of a provision excluding disputes that had not arisen prior to the entry into force of a treaty is to “*exclude disputes which have crystallized before the entry into force of the BIT and that could be deemed ‘treaty disputes’ under the treaty standards.*”<sup>80</sup> This is precisely what happened in the instant case. The dispute before this Tribunal is the exact same one that arose in 2005.
68. Put simply, Claimants contest that their interest in the Gemerská Poloma excavation area lapsed. That dispute crystallized in 2005, before the entry of the Canada BIT. That the disputes continued is not relevant. There is no question that the factual and legal disputes before this Tribunal had arisen in 2005.
69. In any event, the facts in *Jan de Nul* are vastly different from the facts before the Tribunal. In *Jan de Nul*, the host-State alleged that the dispute arose when the investor made purely contractual claims. It is thus unsurprising that the *Jan de Nul* tribunal ruled that the dispute had not crystallized then because these purely contractual claims could not have amounted to treaty breaches. The situation is entirely different here because the factual and legal disputes are the same in this arbitration: the Tribunal is (*inter alia*) being asked to decide whether Rozmin's rights validly lapsed. Accordingly, even under the requirements set in *Jan de Nul*, Belmont's claim is excluded *rationae temporis* under the Canada BIT.
70. Finally, Claimants can take no solace in their letter of 2 May 2012.<sup>81</sup> Quite the opposite, the letter acknowledges expressly the existence of a dispute, noting that “*this dispute could not be amicably settled at this stage.*”<sup>82</sup> Having acknowledged the

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<sup>79</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶167.

<sup>80</sup> *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, dated 16 June 2006, ¶ 116, **CL-58**.

<sup>81</sup> Letter from the Slovak Republic, dated 2 May 2012, **C-40**.

<sup>82</sup> Letter from the Slovak Republic, dated 2 May 2012, **C-40**.

existence of a dispute, the letter merely goes on to state that discussions regarding the claims of “EuroGas Inc.” (and thus, impliedly, settlement of those claims) are premature prior to the relevant decisions of the local courts. In fact, sending such a letter was necessary *precisely because the dispute had already arisen, but was still pending before Slovak courts*. Belmont therefore does not have jurisdiction *rationae temporis* under the Canada-Slovakia BIT because the dispute arose prior to 14 March 2009.

71. Equally problematic for jurisdictional purposes, Claimants have not provided evidence that Belmont is a shareholder in Rozmin. On the contrary, Claimants confirm that Belmont sold its 57% shareholding to EuroGas I in 2001.<sup>83</sup> Claimants’ assertion that this agreement is ineffective because its conditions were not met has, oddly, remained nothing more than that—an assertion.<sup>84</sup> It is mere *ipse dixit* and thus is wholly unsubstantiated and does not constitute any evidence whatsoever.
72. Unless and until such evidence is forthcoming, Belmont should be assumed to have transferred its shareholding to EuroGas I—an entity that is not a party to the present arbitration. Claimants thus failed to make a *prima facie* showing of this Tribunal’s jurisdiction *ratione materiae* over Belmont as well.

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<sup>83</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>84</sup> Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶¶180-181.

### III. THE SLOVAK REPUBLIC IS ENTITLED TO SECURITY FOR ITS COSTS

73. The Slovak Republic maintains its request for security 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. Contrary to the Claimants' assertions, this request is both necessary and urgent.

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

74. 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

75. Claimants admit that "*it is undeniable that Claimants are encountering financial difficulties*"<sup>85</sup> and Claimants do not deny that they would not be able to pay an award of costs. Indeed:

- Claimants rely on a third-party fund to finance the instant arbitration because they cannot pay the costs of the instant proceedings. It necessarily follows that Claimants would not be able to pay an award of costs, and it is doubtful (to say the least) that the third-party would pay these costs. It is precisely for this reason that the *RSM* tribunal granted the host-State's request for a security.<sup>86</sup>
- Since 2003, EuroGas I/II has not had the financial means to meet both its short and long term needs, reporting that "[w]e do not have sufficient cash to meet our short-term or long-term needs and we will require additional cash, either from financing transactions or operating activities, to meet our immediate and long-

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<sup>85</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶229.

<sup>86</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-4**.

*term obligations.*”<sup>87</sup> In addition, EuroGas I/II reported an “*accumulated deficit*” of approximately US\$157,000,000 in 2003, \$178,000,000 in 2004, \$183,000,000 in 2005; \$189,000,000 in 2006; \$183,000,000 in 2007; \$159,000,000 in 2008 and and \$160,000,000 in 2009.<sup>88</sup>

- EuroGas II was recently unable to honor a check for US\$36,540 and must finance itself by selling future interests in the award that it hopes to obtain in these proceedings.<sup>89</sup> This inability to honor this check is perhaps not surprising given the company’s history of running enormous deficits, as set out in the previous paragraph.
- Belmont has barely any business activity and has reported significant and mounting losses for the last two fiscal years.<sup>90</sup> Belmont demonstrated its lack of intent to pay the costs of the arbitration by entering into an agreement with EuroGas II under which it exchanged these costs for a 3.5% stake in the award that Claimants hope to obtain.
- EuroGas GmbH and EuroGas AG, two entities affiliated with the Claimants, are also in bankruptcy.<sup>91</sup>

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<sup>87</sup> EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2003, page 18, **R-73**; *see also* EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2004, pages 19-20, **R-74**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, page 18, **R-75**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2006, page 10, **R-71**; EuroGas, Inc., Form 10-K (Amended) for Fiscal Year Ended 31 December 2007, page 20; **R-63**; EuroGas, Inc., Form 10-K (Amended) for Fiscal Year Ended 31 December 2008, page 13; **R-78**; EuroGas, Inc., Form 10-K (Amended) for Fiscal Year Ended 31 December 2009, page 17; **R-76**.

<sup>88</sup> EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2003, page 17, **R-73**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2004, page 8, **R-74**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, page 18, **R-75**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2006, page 9, **R-71**; EuroGas, Inc., Form 10-K (Amended) for Fiscal Year Ended 31 December 2007, page 19; **R-63**; EuroGas, Inc., Form 10-K (Amended) for Fiscal Year Ended 31 December 2008, page 5; **R-78**; EuroGas, Inc., Form 10-K (Amended) for Fiscal Year Ended 31 December 2009, page 8; **R-76**.

<sup>89</sup> Respondent’s Application for Provisional Measures and Opposition to Claimants’ Application for Provisional Measures, ¶39.

<sup>90</sup> Respondent’s Application for Provisional Measures and Opposition to Claimants’ Application for Provisional Measures, ¶¶ 45-46.

<sup>91</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**; and Excerpts from the commercial registry of EuroGas AG, **R-56**.

- Finally, there is evidence that EuroGas I, EuroGas II, and Mr. Wolfgang Rauball (EuroGas II’s “*Chairman & CEO*”) all previously engaged in fraudulent activities. This concern is compounded by Claimants’ persistent false assertions concerning the identity of EuroGas II.

76. It is therefore apparent (and not denied by Claimants) that any award on costs would remain unpaid. For these reasons, it is necessary to grant the Slovak Republic security for its costs.

**ii. The Slovak Republic has a “*plausible*” case**

77. Unable to counter the Slovak Republic’s presentation of evidence regarding Claimants’ financial situation, Claimants take the scorched-earth position that the Slovak Republic should not be granted security for costs because it does not even have a “*plausible*” defense.<sup>92</sup> That Claimants have taken such an extreme position—in the face of the damning facts presented above—is itself revealing of the desperate position in which they find themselves.

78. *First*, no prejudgment of the merits is required for the Tribunal to make the required finding that the Slovak Republic has a plausible defense.<sup>93</sup> The Tribunal need only conclude that “*a future claim for cost reimbursement is not evidently excluded.*”<sup>94</sup>

79. *Second*, the Slovak Republic has a plausible defense:

- As demonstrated above, the Tribunal has no jurisdiction, and the instant arbitration should therefore not go beyond the jurisdictional stage.
- The Slovak Republic rightfully assigned the Gemerská Poloma excavation area to a third organization, due to Rozmin’s failure to start excavation activities within

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<sup>92</sup> Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶¶188-202; and *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-4**.

<sup>93</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-4**.

<sup>94</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-4**.

the statutory three year period, which caused Rozmin's rights to lapse.<sup>95</sup> While Claimants are correct that certain lower-level decisions of the Slovak authorities were annulled, they were annulled only for ancillary errors. Crucially, the Slovak courts did not criticize the right of the Slovak authorities to assign the excavation area to a third-party after the lapse of a three-year period. On the contrary, the court decisions referred the case back to the administrative authorities for further proceedings to correct the ancillary errors.<sup>96</sup> As they were bound to do under Slovak law, these administrative authorities corrected the errors pointed out by the Slovak appellate authorities, and re-issued corrected decisions that took into account the previous decisions of the Slovak courts. The final corrected decision was issued on 30 March 2012.<sup>97</sup> Rozmin did not challenge this decision in court.

- Claimants deny relying on incorrect translations of Slovak decisions and legislation that, once translated correctly, show that Claimants' claim is unsustainable.<sup>98</sup> Claimants' response that this translation was rejected by the Slovak Supreme Court is simply incorrect.<sup>99</sup> No such express finding was made by the court. The Supreme Court merely noted that "*restrictive explanation of term 'start of excavation' of the exclusive deposit, which was adopted by administrative bodies in December 2004, is not correct without an appropriate*

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<sup>95</sup> "2002 Amendment (Section 27 para. 12 of the Act No. 44/1988 Coll., on Protection and Exploitation of Mineral Resources (Mining Act), as amended by the Act No. 558/2001 Coll., that amends and supplements the Act No. 44/1988 Coll., on Protection and Exploitation of Mineral Resources (Mining Act), as amended by the Act of Slovak National Council No. 498/1991 Coll)", **R-62**.

<sup>96</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**; and Judgment of the Supreme Court of the Slovak Republic, Case No. 2Sžo/132/2010 dated 18 May 2011, **R-61**.

<sup>97</sup> Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, **R-58**.

<sup>98</sup> 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**; and Judgment of the Supreme Court of the Slovak Republic, Case No. 2Sžo/132/2010 dated 18 May 2011, **R-61**.

<sup>99</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶200.

*reasoning.*<sup>100</sup> Such reasoning was provided in the final corrected decision issued on 30 March 2012.<sup>101</sup> The fact is that 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. Claimants’ suggestion that the terms are interchangeable is simply not true.<sup>102</sup> The distinction between the terms is clear and important in the mining sector. 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.

80. In fact, every time that Rozmin exhausted its right to appeal, *its challenge succeeded*. Claimants argue that this is not relevant because the authorities ignored the Slovak courts decisions and Rozmin went beyond what was expected.<sup>103</sup> This too is incorrect. Rozmin was granted full due process. The lower-level authorities always took into account of the findings of the appellate bodies. Having been thoroughly granted due process, Claimants cannot now claim that their investment treaty rights were breached.
81. Nor did Rozmin exhaust its right to appeal. In this regard, the *Generation Ukraine* tribunal concluded that “*a reasonable-not necessarily exhaustive-effort by the investor to obtain correction*” is required to bring an international claim.<sup>104</sup> This finding was recently confirmed by the *Abengoa* tribunal, which held that it had to “*assess whether, in the circumstances of the case, the Claimants were negligent by not seeking judicial*

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<sup>100</sup> Judgment of the Supreme Court of the Slovak Republic, Case No. 2Sžo/132/2010 dated 18 May 2011, page 26, (emphasis added), **R-61**.

<sup>101</sup> Decision of the District Mining Office on Assignment of Excavation Area “*Gemerská Poloma*” to other organization, **R-58**.

<sup>102</sup> Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶199.

<sup>103</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**; and Judgment of the Supreme Court of the Slovak Republic, Case No. 2Sžo/132/2010 dated 18 May 2011, **R-61**.

<sup>104</sup> *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶20.30, **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**.



*protection against the second cancellation of their licence.*”<sup>105</sup> Applying these principles to this case, Rozmin voluntarily relinquished any claim it may have before an international tribunal when it did not exhaust its right to appeal.

82. The fact that a third-party funder has taken the risk to finance the claim does not, in any way, evidence that the Claimants’ claim has any merit.<sup>106</sup> On the contrary, investment funds operate on the principle that the majority of their investments will fail, but that the minority of successful claims will provide a profit. As summarized by a recent report from the U.S. Chamber of Commerce’s Institute for Legal Reform:

[Third-party funds] view disputes as investments – and they can hedge any “investment” against their entire portfolio of cases. This makes them more willing to put money into cases that are weak on the merits – but have at least a chance of a large award.<sup>107</sup>

83. The Slovak Republic accordingly has much more than a mere “*plausible*” defense. The reality is that neither the US-Slovakia BIT nor the Canada-Slovakia BIT applies because Claimants’ claims run afoul their jurisdictional requirements. And even if any of those BITs did apply, Claimants would still have no claim on the merits. In sum, the Slovak Republic’s future claim for cost reimbursement is not evidently excluded.

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

84. Claimants do not deny that the Slovak Republic’s Application is urgent. It is urgent because, if the request is not granted, the Slovak Republic will never recover the costs to which it would be entitled.<sup>108</sup> Indeed, Claimants do not have the means to pay their own costs, let alone an award on costs.

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<sup>105</sup> *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013, ¶628, **RA-6** (free translation).

<sup>106</sup> Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶231.

<sup>107</sup> Stopping the Sale on Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation, dated October 2012, available at: [http://www.instituteforlegalreform.com/uploads/sites/1/TPLF\\_Solutions.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/TPLF_Solutions.pdf), Executive Summary, **R-79**.

<sup>108</sup> C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary*, 2d ed. 2009, Article 47, page 776, **RA-23**, citing *Azurix Corp v The Argentine Republic*, Decision on Provisional Measures, 6 August 2003, ¶33; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order on Provisional Measures, ¶38, **RA-24**.

85. Claimants' argument that the Slovak Republic will not be bankrupted by the loss of such costs is not relevant. There is no requirement that the host-State be destroyed if the measure is not granted. The measure sought is urgent because, if it is not taken, "*action prejudicial to the rights*"<sup>109</sup> of the Slovak Republic is likely: the Slovak Republic will never recover its costs.

**C. THE SLOVAK REPUBLIC HAS THE RIGHT TO SECURE ITS COSTS IN FULL CONFORMITY WITH THE PURPOSE OF ICSID ARBITRATION**

86. Unable to refute the foregoing principles, Claimants' resort to the perplexing argument that a party does not have the right to seek security for its costs under the ICSID regime because there is no such right to preserve. In fact, Claimants go so far as to argue that granting security for costs would go "*against the very purpose of ICSID arbitration.*"<sup>110</sup>

87. Claimants' argument is manifestly baseless. The Slovak Republic is seeking to protect its right to recover costs in the face of self-admitted insolvency by Claimants and a history of fraud (as so found by U.S. federal courts). It is for this reason that, to make such provisional measures application, the Slovak Republic must evidence that "*a future claim for cost reimbursement is not evidently excluded.*"<sup>111</sup>

88. Indeed, in addition to the *RSM* tribunal, the tribunals in *Atlantic Triton*,<sup>112</sup> *Pey Casado*,<sup>113</sup> and *Bayindir*<sup>114</sup> all held that they had the power to grant security for costs. Professor Schreuer summarizes this ICSID practice as follows:

this practice indicates that, if it is proven that a party is insolvent or will be unable to perform under an award, a

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<sup>109</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>110</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶¶215-221.

<sup>111</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-4**.

<sup>112</sup> C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary*, 2d ed. 2009, pages 782-783, **RA-23**.

<sup>113</sup> *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, 25 September 2001, ¶¶78-89, **CL-5**.

<sup>114</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶46, **CL-56**.

tribunal has the power to establish financial guarantees under Art. 47.<sup>115</sup>

89. As the above requirements are met, Claimants should provide security for the Slovak Republic's costs.
90. The proposition offered by Claimants that granting security for costs would go “*against the very purpose of ICSID arbitration*” would, if accepted, be unprecedented and run counter to the decisions described above, in which the Tribunals had no difficulty accepting the principle that security for costs can be granted in certain circumstances. It is false to assert, as Claimants do, that the drafters of the ICSID Convention and Arbitration Rules did not expressly include provisions granting an ICSID arbitral tribunal the power to order security for costs. Under Article 47 of the ICSID Convention, the Tribunal may recommend “*any provisional measures which should be taken to preserve the respective rights of either party.*”<sup>116</sup> Far from limiting the types of measure that can be ordered, the drafters of the ICSID Convention and Arbitration Rules granted tribunals the power to grant *any* measure for *either* party if the requirements are otherwise satisfied.
91. Indeed, it would defeat the purpose of the ICSID system to permit Claimants to finance their claim by way of third-party funding, and, after it is rightfully rejected and costs are awarded to the Slovak Republic, allow both Claimants and the third-party funder to walk away without paying costs, leaving the Slovak Republic to “foot the bill.” Such an outcome would allow third-party funders to escape the consequences of costs orders.
92. Accordingly, the Tribunal should order 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.

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<sup>115</sup> C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary*, 2d ed. 2009, Article 47, page 784, ¶98, **RA-23**.

<sup>116</sup> Article 47 of the ICSD Convention, **R-80**.

#### **IV. CLAIMANTS HAVE NO GROUND TO SEEK PROVISIONAL MEASURES**

93. As the Tribunal will recall, the Slovak Republic made clear in its earlier submission that Claimants' request for provisional measures must be denied because:

- Claimants' request for provisional measures asks the Tribunal to interfere with normal domestic criminal proceedings, which were prompted by a complaint filed from a private person unrelated to the government;
- The Slovak Republic has in any event already returned all seized documents; and
- The Slovak Republic has in any event suspended all criminal proceedings.

94. As explained below, Claimants have offered little more by way of rebuttal than a string of mischaracterizations and a wild growth of new and unsupported assertions.

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

95. As the Slovak Republic has explained, 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 good faith criminal proceedings. Contrary to the Claimants' allegations,<sup>117</sup> this does not exempt the Slovak Republic from its international obligations. On the contrary, should the Tribunal find that a wrongdoing occurred, the Slovak Republic will be bound by the Tribunal's award.

96. Claimants have not contested the findings of the *Abaclat* tribunal, which recently confirmed that an ICSID tribunal 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>118</sup>

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<sup>117</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶¶42-44.

<sup>118</sup> *Abaclat and others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 13, ¶39, **CL-26**.

97. The principle was set out in *SGS v. Pakistan*, relating specifically to the recommendation sought by the claimant that the State “*refrain from commencing or participating in ‘all proceedings in the courts of Pakistan relating in any way to this arbitration’ in the future*” (including criminal proceedings).<sup>119</sup> The *SGS v. Pakistan* tribunal rightfully refrained from issuing such a recommendation because it did not have the power to enjoin a State in respect of normal domestic proceedings. As the *SGS v. Pakistan* tribunal observed:

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>120</sup>

98. Claimants wrongly argue that this finding does not exclude all provisional measures in respect of domestic proceedings because (i) the *SGS v. Pakistan* tribunal did not recommend that ongoing proceedings be withdrawn because these proceedings had already come to an end, and (ii) the *SGS v. Pakistan* tribunal asked Pakistan to ensure that no action be taken in respect of Pakistan’s pending application for contempt and that, if any other contempt proceedings are initiated by any party, such proceedings not be acted upon.<sup>121</sup>

99. These findings, however, take nothing away from the principle set out above. The point is that the *SGS v. Pakistan* tribunal *did not enjoin Pakistan from conducting criminal proceedings*—it merely took note that proceedings had ended and asked Pakistan as a potential party to criminal proceedings not to act upon specific contempt proceedings and, if relevant, to “*inform the relevant court of the current standing of this proceeding and of the fact that this Tribunal must discharge its duty to determine whether it has jurisdiction . . .*”<sup>122</sup> The principle that an ICSID tribunal does not have the power to interfere with the normal course of legal proceedings remains, as

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<sup>119</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>120</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>121</sup> Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶¶49-50.

<sup>122</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**.

unambiguously stated by the *SGS v. Pakistan* tribunal. And the principle applies with equal force here.

100. Importantly, Claimants have not contested that authorities holding that an ICSID tribunal has authority to issue a provisional measure impacting criminal proceedings have all emphasized that these measures require special consideration and can only be granted if a particularly high threshold is overcome. Claimants do not dispute, for example, the principle articulated by the tribunal in *Caratube* that “*a particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a state*”.<sup>123</sup>
101. Nor do Claimants dispute the conclusion reached by the tribunal in *Lao Holdings* that the “*general rule*” was that a State should not be prevented from enforcing its criminal law. Rather, it is only where the integrity of the arbitral process is threatened that a provisional measure might be issued.<sup>124</sup> Indeed, as the tribunal in *Quiborax* noted, the ICSID Convention and relevant BIT do not “*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>125</sup>
102. In the instant case, there is no basis for the Tribunal to interfere with the criminal proceedings initiated by the Slovak authorities. The proceedings were initiated following a complaint by a private party, commenced by an independent government entity, done so in good faith, and carried out with due respect of the rights of all parties involved. Contrary to Claimants unsubstantiated assertion, the proceedings were not retaliatory.
103. More specifically, 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. Since Mr. Peter Čorej is connected to Rozmin and to the mining

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<sup>123</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, ¶137, **RA-9**.

<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, ¶14, **CL-15**.

<sup>125</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**.

area, it is not surprising that he had knowledge of the events that led him to file a complaint.<sup>126</sup> The criminal complaint alleged that Rozmin, EuroGas II, and Belmont were contemplating fraudulent arbitral proceedings, with a view of defrauding the Slovak Republic of € 3.2 billion.<sup>127</sup> 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. There is no evidence of bad faith, and Claimants have offered none—apart from the complaint of Mr. Peter Čorej, who is an individual entirely independent of the Slovak Republic.

104. Claimants wrongly challenge the fact that, although an order for the preservation of evidence was sought against both Rozmin and Ms. Jana Czmoriková, an order against Ms. Jana Czmoriková only was granted.<sup>128</sup> This is easily verified by the evidence provided by the Slovak Republic. 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. Jana Czmoriková and Rozmin on 23 June 2014.<sup>129</sup> On 25 June 2014, Judge Roman Púchovský granted an order for a house search in the terms sought, but only against Ms. Jana Czmoriková.<sup>130</sup> This is apparent from the text of the prosecutor's request and the judge's order, both of which are on the record. As the documents make clear, the house search was ordered for the purpose of obtaining evidence in connection to the allegations of fraud made against Rozmin, EuroGas II, and Belmont. The conduct of Ms. Jana Czmoriková was not the object of these criminal proceedings. Relevant documents were merely thought to be present at her house by the relevant authorities.

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<sup>126</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶62.

<sup>127</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>128</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶¶69-70.

<sup>129</sup> Order for preservation and handing over of computer data against Ms. Jana Czmoriková and Rozmin, 23 June 2014, **R-48**.

<sup>130</sup> Order for a House Search against Ms. Jana Czmoriková, 25 June 2014, page 2, **R-49**.

105. In considering the legitimacy of the criminal investigation, it is also relevant to consider EuroGas I and EuroGas II's history of fraudulent conduct. This is not the first time that EuroGas I, EuroGas II, and their management have faced allegations of fraudulent activities. As explained in the Slovak Republic's earlier pleading, EuroGas I and Mr. Wolfgang Rauball, the "*Chairman & CEO*"<sup>131</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>132</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>133</sup> The fact that Claimants in this arbitration have falsely claimed that EuroGas II is EuroGas I is also a serious matter.<sup>134</sup>
106. Mr. Peter Čorej, the National Criminal Agency, the Office of the Special Prosecution, and the judge on preliminary proceedings of the Special Criminal Court in Banská Bystrica are all entities independent from the Slovak Republic's legal team and counsel. These entities are independent of the Ministry of Finance, which is administering the instant proceedings on behalf of the Slovak Republic. These entities all behaved reasonably given the seriousness of the alleged fraud.
107. Claimants' assertion that the criminal proceedings were initiated to retaliate and to deprive Claimants of the documents and material necessary to substantiate their claim is incorrect and wholly unsubstantiated.<sup>135</sup> Claimants' allegation that "*Respondent resolved not to consult its attorneys, for fear of being advised to refrain from taking retaliatory measures*"<sup>136</sup> is plucked from thin air. Such grave accusations should not be made unless accompanied with credible evidence. None has been provided.

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<sup>131</sup> News Release dated 5 July 2014, see: <http://www.eurogas-ag.com/152-1-Tombstone-Exploration-Corporation-Announces-Update-to-Shareholders.html>, **R-20**.

<sup>132</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>133</sup> Complaint dated 21 August 2014, **R-37**.

<sup>134</sup> Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, ¶¶62-63.

<sup>135</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶59.

<sup>136</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶61.



108. Claimants' reliance on *Quiborax* is also difficult to understand,<sup>137</sup> particularly given Claimants' admission that the case is distinguishable.<sup>138</sup> As summarized in the Slovak Republic's previous submission, the facts of the two cases are completely distinct: in *Quiborax*, the behavior of the State was at the extreme by attempting to prevent the ICSID arbitration from even proceeding.<sup>139</sup> In the instant case, there is nothing of the sort. In any event, the *Quiborax* tribunal recommended the suspension of the criminal proceedings, that the respondent refrain from initiating any other criminal proceedings directly related to the arbitration, or from engaging in any other course of action that could jeopardize the procedural integrity of the arbitration.<sup>140</sup> No such measures are required here, as the criminal proceedings are suspended and the Slovak Republic has demonstrated its good faith.

109. In sum, one can hardly assume—as Claimants ask the Tribunal to do—that the Slovak prosecutor brought criminal proceedings in bad faith. To sustain such a bad faith claim, Claimants would have to satisfy a particularly high evidentiary threshold. They have not come remotely close to doing so. In any event, these allegations are now irrelevant because the documents have been returned and the criminal proceedings suspended.<sup>141</sup>

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

110. Nor are Claimants' requested measures necessary or urgent—both requirements under Article 47 of the ICSID Convention and ICSID Arbitration Rule 39.<sup>142</sup>

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<sup>137</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶71.

<sup>138</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶101.

<sup>139</sup> Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, ¶¶112-114.

<sup>140</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, page 46, **CL-8**.

<sup>141</sup> Claimants' claim that this has not been the case because a total of eight sheets are allegedly missing (or were wrongly accounted for) is ludicrous. Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶¶39-40.

<sup>142</sup> Full Briefing on Claimants' Application for Provisional Measures dated 8 July 2014, ¶34.

**i. The Parties agree upon the requirements for provisional measures**

111. The Parties agree on the standards that apply to Claimants' Application. Claimants do not deny that the imposition of provisional measures is an “*extraordinary*” measure that should not be granted lightly,<sup>143</sup> and that the burden of proving that provisional measures are required is placed squarely on Claimants.<sup>144</sup> The Parties also agree that provisional measures may be granted only if they are both necessary and urgent.<sup>145</sup> And Claimants do not deny that a measure may be granted only if it is necessary to avoid irreparable harm<sup>146</sup> and that the mere possibility of future harm is insufficient.<sup>147</sup>
112. As explained below, application of these standards to the facts of this case inexorably leads to the conclusion that Claimants' Application must be dismissed.

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

113. In its previous submission, the Slovak Republic showed that none of Claimants' requested measures were necessary. Unable to counter that showing, Claimants' advocates looked for a straw man that they *were* able to knock down and seized on arguments that the Slovak Republic never made. To reset the discussion into its proper context, the Slovak Republic addresses each of the requested measures below.

**(1) Order to take all appropriate measures to withdraw permanently the criminal proceedings launched in June 2014**

114. No ICSID tribunal has ever granted this requested relief—to permanently withdraw criminal proceedings. Claimants ask this Tribunal—and on *this* record, which shows a history of fraud by Claimants—to be the first. To succeed on such an unprecedented

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<sup>143</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>144</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**; and *Tanzania Electric Supply Company Limited (TANESCO) v. Independent Power Tanzania Limited (IPTL)*, ICSID ARB/98/8, Decision on Provisional Measures, 20 December 1999, ¶¶9-11, **RA-10**.

<sup>145</sup> Full Briefing on Claimants' Application for Provisional Measures dated 8 July 2014, ¶34; and *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶61, **CL-2**.

<sup>146</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>147</sup> *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶89, **CL-2**.

request, Claimants would have to make a compelling showing indeed. Claimants, however, have not developed the grounds for this request in their submissions *at all*.

115. The request should be denied for the reasons set out at paragraphs 79 to 91 and 125 to 131 of the Slovak Republic's previous submission on provisional measures, and at paragraphs 95 to 109 above. Indeed, not only is the request no longer necessary because the criminal proceedings are now suspended, and no likelihood of irreparable harm has been evidenced, but such an order would constitute an impermissible intervention into good faith criminal proceedings brought by independent authorities. Such an order would also require a heightened evidentiary threshold, which has not been met by Claimants.

**(2) Order to maintain the status quo as of 25 June 2014<sup>148</sup>**

116. The Slovak Republic also showed that Claimants' request to maintain the status quo as of 25 June 2014 should be rejected. In response, Claimants misconstrued the Slovak Republic's position. The Slovak Republic does not deny that, *in the abstract*, a tribunal might make a recommendation that the Parties maintain the *status quo*. Rather, the Slovak Republic's point is that, *in this case*, the request must be rejected *because Claimants failed to evidence imminent harm*.<sup>149</sup> As Claimants themselves admit, a request for the preservation of *status quo* must be rejected if Claimants fail "to provide sufficient evidence of an actual threat of aggravation of the dispute."<sup>150</sup>
117. The Slovak Republic has rightfully exercised its rights "*in good faith and with due respect for Claimants' rights*."<sup>151</sup> As the tribunal in *Lao Holdings* held, criminal proceedings concurrent with an ICSID arbitration do not, without more, aggravate the dispute:

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<sup>148</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶¶74-88.

<sup>149</sup> *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶89, **CL-2**.

<sup>150</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶82.

<sup>151</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶44; See *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**.

[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>152</sup>

118. The findings of the *Plama* tribunal are likewise illustrative. In that case, the claimant sought an order to have the host-State take no action that might aggravate or further extend the dispute,<sup>153</sup> essentially because insolvency proceedings and tax debt execution proceedings were brought against the investor. The *Plama* tribunal rejected the request, noting that although the domestic proceedings might aggravate the dispute between the parties, the subject matter of these proceedings was different from the claims before the tribunal, the bankruptcy proceedings were brought by third parties, and the tribunal was not convinced that the host-State had the power to impose its will on an independent judiciary:

Moreover, at least with respect to the bankruptcy proceedings, it is significant that the parties to those proceedings and the parties to this arbitration are different. The bankruptcy proceedings are brought by private parties who are not involved in the present arbitration. The Tribunal is reluctant to recommend to a State that it order its courts to deny third parties the right to pursue their judicial remedies and is not satisfied that if it did so in this case, Respondent would have the power to impose its will on an independent judiciary.

However, the tax claims of the ASR and the state aid claims of CPC relating to Nova Plama, which are the subject of the proceedings in Bulgaria, are not presently claims before this Tribunal and will not affect Claimant's pursuit of its claims here or of the Tribunal's ability to dispose of them.<sup>154</sup>

119. In any event, the criminal proceedings complained of were suspended, and the documents returned. As shown below, no witness intimidation occurred. Claimants

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<sup>152</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>153</sup> *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order on Provisional Measures, ¶2, **RA-24**.

<sup>154</sup> *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order on Provisional Measures, ¶¶ 43-44, **RA-24**.

therefore cannot claim that their procedural rights are threatened. Should the situation change, Claimants will be free to renew their request for provisional measure.

120. As in *SGS v. Pakistan*, the Slovak Republic has taken no measure to aggravate the dispute and is reasonably cooperating with Claimants. The *SGS v. Pakistan* tribunal thus concluded:

We observe the current cooperation between the parties and see no evidence that would justify the making of an order.<sup>155</sup>

121. The situation was similar in *Caratube*, where the tribunal rejected a similar request for an order that the State refrain from aggravating or exacerbating 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>156</sup>

122. Likewise, 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 affected, the necessity requirement is consequently not fulfilled.<sup>157</sup>

123. Finally, the Slovak Republic stresses that it is entitled to exercise its right to legal proceedings in good faith. Claimants cannot claim immunity from suit merely because they have brought an ICSID claim. As noted in *Quiborax*, the “*international protection granted to investors does not exempt suspected criminals from prosecution by virtue of*

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<sup>155</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**.

<sup>156</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**.

<sup>157</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**.

*their being investors.*”<sup>158</sup> Claimants’ request for this provisional measure should accordingly be rejected.

***(3) Order to refrain from taking any further measure of intimidation of Claimants’ potential witness***

124. In its prior submission, the Slovak Republic showed that Claimants’ third request—for an order preventing intimidation of Claimants’ potential witnesses—was entirely unnecessary. Indeed, the issue is now moot because the prosecutor has issued a resolution suspending the criminal proceedings that Claimants allege amounted to intimidation of potential witnesses.
125. Despite that fact, Claimants continues to the press the request. In so doing, however, Claimants again misconstrue the Slovak Republic’s argument.<sup>159</sup> Claimants seize on the unremarkable proposition that a party has the right to present evidence through witnesses. The Slovak Republic has never argued otherwise. What the Slovak Republic has argued is that *Claimants have provided no evidence that the criminal proceedings had the effect of intimidating either a witness or any other entity.* Although Claimants state that both Ms. Jana Czmoriková and Dr. Ondrej Rozložník have expressed reluctance with respect to being involved in the arbitration.<sup>160</sup> *But not a single hint of evidence has been provided to support these allegations.* Claimants have simply failed to demonstrate any intimidation in any way, shape, or form. The request is therefore purely hypothetical and should be denied.
126. Claimants alleged that the criminal proceedings against Rozmin, Belmont, and EuroGas II constitute sufficient evidence. But evidence of *what?* Certainly not that witnesses felt intimidated. Claimants’ allegations are pure guesswork. In fact, Ms. Jana Czmoriková’s house was searched for less than one day on Wednesday 2 July 2014. No evidence that this had intimidating effect has been provided. Ms. Jana Czmoriková was not the target of the criminal proceedings. Claimants do not allege that any harm

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<sup>158</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, ¶164, **CL-8**.

<sup>159</sup> Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶¶89-90.

<sup>160</sup> Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶96.

was done to Ms. Jana Czmoriková or her property. The criminal proceedings concern Rozmin, Belmont, and EuroGas II. There is no threat of proceedings being initiated against anyone else. And in any event, these proceedings are now suspended, and the Slovak Republic has behaved with utmost good faith in this regard. Claimants have not evidenced any intimidation of any kind against any potential witness.

127. As in *Churchill Mining*, the Tribunal should decline to order the provisional measure sought because “*there is no element on record showing any pressure or intimidation against the Claimants and their witnesses,*”<sup>161</sup> and the actions complained of by Claimants have not “*altered the status quo or aggravated the dispute*”.<sup>162</sup> *Churchill Mining* is particularly relevant because, in that case, the investors alleged that one of their key witnesses, Mr. Benjamin, was subject to undue pressure because he might be questioned in relation to a criminal investigation concerning the possible forgery of documents Mr. Benjamin had collected. The *Churchill Mining* tribunal held that there was no indication that the host-State was contemplating the initiation of criminal proceedings against Mr. Benjamin, and that, absent more, his role in the investigation did not amount to undue pressure:

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

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

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<sup>161</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, ¶93, **RA-13**.

<sup>162</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, ¶89, **RA-13**.

further elements, that Mr. Benjamin is subject to undue pressure.<sup>163</sup>

128. As in *Churchill Mining*, no criminal proceedings have been brought against any of the Claimants' potential witnesses. Moreover, the criminal proceedings concerning Rozmin, Belmont, and EuroGas II are suspended. No provisional measure is thus required.
129. Claimants persist in relying upon *Quiborax*, despite admitting that the case is distinguishable.<sup>164</sup> In *Quiborax*, potential witnesses were the object of direct intimidation. That case is therefore wholly inapplicable to the present dispute. 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

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<sup>163</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, ¶¶91-94 (emphasis added), **RA-13**.

<sup>164</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶101.



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>165</sup>

130. The findings of the *Quiborax* tribunal that the Claimants rely upon are therefore irrelevant. Again, Slovak Republic has not criticized this ICSID arbitration—much less described it as a “harm.” The wording of Mr. Peter Čorej’s claim is not a statement of the Slovak Republic. Nor are the Resolution of 5 September 2014 and the Orders of 23 and 25 June 2014.<sup>166</sup> These documents are the complaint of Mr. Peter Čorej and documents issued by the prosecution on the basis of that complaint.
131. The *Churchill Mining* tribunal distinguished the case before it from *Quiborax* on grounds that apply equally here, as criminal proceedings are suspended and Claimants’ allegations are purely speculative and hypothetical:

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.<sup>167</sup>

132. Claimants also maintain their reliance on *Lao Holdings*, despite the significant differences with the instant case. In particular, as conceded by Claimants,<sup>168</sup> the key

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<sup>165</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, (emphasis added), ¶¶143-146, **CL-8**.

<sup>166</sup> Resolution dated 5 September 2014, **R-2**; Order for the preservation and handing over of computer data against Ms. Jana Czmoriková and Rozmin, 23 June 2014, **R-48**; and Order for a House Search against Ms. Jana Czmoriková, 25 June 2014 **R-49**.

<sup>167</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>168</sup> Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶109.

factor for the tribunal's decision in that case 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.<sup>169</sup> The tribunal concluded that the criminal proceedings would impact their testimony. There is no such issue here. Not only will it be a significant period of time before the written final submission is exchanged and before a hearing takes place, the proceedings complained of are suspended, and Claimants provided no evidence that any witness's desire to testify has been impacted. Claimants' assertion that the proceedings intimidate witnesses should therefore be dismissed.

133. Finally, contrary to the Claimants' assertion,<sup>170</sup> the measure sought by Claimants was not granted in either *Quiborax* or *Lao Holdings* (or, indeed, any other case the Claimants rely upon).

***(4) Undertaking that documents and property returned constitute all that was seized, to return to Claimants the copies that were made, and to undertake not to use in the arbitration proceedings the copied documents or the information collected through documents and material seized***

134. Claimants provide no evidence to support this request, and it should accordingly be denied.
135. Claimants' accuse the Slovak Republic of "playing the clock" and of having reviewed the information collected by the criminal authorities to draft its submissions.<sup>171</sup> That accusation is simply untrue. *Counsel hereby represents that it has not seen any of the documents that were seized, and those documents played no role in the preparation of any submission that the Slovak Republic has ever made in this arbitration.* And that can be verified by simply noting that all of the facts that the Slovak Republic has put forward are supported by publicly-available documents.
136. Moreover, Claimants both do not deny and have yet to provide any evidence that Ms. Jana Czmoriková was in the possession of the only original copies of documents

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<sup>169</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>170</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶110.

<sup>171</sup> Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, ¶112.

necessary to Claimants. This is in fact improbable because Rozmin is unlikely to have provided originals of documents of which it did not keep copies to an independent contractor, over whom Rozmin has little control. In addition, the principal actions complained of occurred in 2004 through 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>172</sup> Claimants have therefore been in the preparatory stages of the instant claim 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 and not kept by the company. Furthermore, under Slovak law, companies such as Rozmin have an obligation to keep or professionally archive documents for 5 to 10 years, depending on the type of document. It is striking that Claimants failed to provide any contrary evidence, particularly given how easily such evidence could be provided if Claimants' allegations were correct.

137. Further, Claimants have not addressed the Slovak Republic's submissions at paragraphs 116 to 124 of its previous pleading, and in particular the consistent findings by ICSID tribunals that evidence uncovered in criminal proceedings may legitimately be used in ICSID proceedings. Indeed, the *Quiborax* tribunal held that, even if criminal proceedings result in evidence that is later used in the ICSID proceedings, that is not a sufficient ground to enjoin such proceedings.<sup>173</sup> 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

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<sup>172</sup> Letter from EuroGas GmbH to the Government of the Slovak Republic, dated 16 December 2010, **R-7**.

<sup>173</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**.

respect of which it requires evidence to defend its claim in the arbitration and support its Counterclaim.

This would not necessarily be sufficient as a basis for enjoining a State to pursue a criminal case on its territory.<sup>174</sup>

138. The request should thus be denied because Claimants have failed to discharge their burden of proof that the measures are necessary to prevent irreparable harm.

***(5) Order to return all copies made of documents seized on 2 July 2014***

139. Claimants do not address this fifth request—for return of even the copies of the original documents that have already been returned—in their submission at all. It should be denied for the reasons set out at paragraphs 105 to 115 of the Slovak Republic’s previous submission on provisional measures dated 10 September 2014.
140. Claimants’ failure to address this request is unsurprising. No ICSID tribunal has ever granted such provisional measure. Not only is it not necessary because the documents have been returned, such measure would constitute an impermissible intervention into good faith criminal proceedings brought by independent authorities.
141. Indeed, the return of copies would indeed turn the *suspension* into an effective *termination* of the criminal proceedings, rendering them without effect. The prosecution and court would also be exposed to a risk that the evidence would disappear and become no longer available after the proceedings. Such a measure would also constitute an unnecessary and impermissible intervention into good faith proceedings brought by independent authorities. Claimants’ allegation that there is no “*hint of any crime having been committed*” is wholly self-serving.<sup>175</sup> At present, it is for the Slovak prosecutor and judicial system to make findings of fact if and when a criminal proceeding is recommenced.

**iii. The provisional measures sought by Claimants are not urgent**

142. Claimants have not denied the Slovak Republic’s submissions that the provisional measures requested by Claimants are not urgent. Indeed, a resolution suspending the

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<sup>174</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>175</sup> Claimants’ Reply on their Application for Provisional Measures and Answer to Respondent’s Application for Provisional Measures, ¶125.

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>176</sup>

143. On this basis alone, the provisional measures sought by Claimants should be denied.

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144. 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.

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<sup>176</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**.

**V. PRAYER FOR RELIEF**

145. 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 to 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 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.

146. 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

21 November 2014

[Signed]

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SQUIRE PATTON BOGGS  
Counsel for the Respondent