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)

RESPONDENT'S COUNTER-MEMORIAL

30 June 2015

Members of the Tribunal
Professor Pierre Mayer
Professor Emmanuel Gaillard
Professor Brigitte Stern

Secretary of the Tribunal
Lindsay Elizabeth Gastrell

SQUIRE PATTON BOGGS

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I. INTRODUCTION

A. Preliminary Statement

1. EuroGas began misrepresenting facts to this Tribunal before it even filed its Memorial, holding itself out to be an entity that it now admits it is not.[1] The U.S. judiciary has found that EuroGas and its Director, Wolfgang Rauball, misrepresented facts under oath relevant to this case.[2] And a German court has convicted Mr. Rauball for a crime relating to misrepresentations about corporate bankruptcy.[3]

2. It should come as no surprise that Claimants continue to misrepresent facts in their Memorial.

3. When those misrepresentations are exposed, it becomes clear that Claimants' case is riddled with jurisdictional problems. Claimants have now been forced to admit that the original Claimant in this arbitration, EuroGas Inc. (the company by that name that was incorporated in 1985) ("**EuroGas I**"), was dissolved in 2001, ceased to have a legal existence when it failed to seek reinstatement within two years, and its assets were liquidated in a U.S. bankruptcy in 2007.

4. Claimants, however, concealed all of this from the Tribunal. They originally represented to the Tribunal that EuroGas I was the Claimant in this arbitration and owned the alleged investment. When the Slovak Republic caught Claimants in this misrepresentation, Claimants were forced to literally *change the identity of the Claimant*. The new Claimant is now a different entity that Mr. Rauball incorporated in 2005 (while EuroGas I was in bankruptcy) using the same name, EuroGas Inc. ("**EuroGas II**").

5. Claimants' new theory is that EuroGas I—despite ceasing to exist under Utah law and having been liquidated in a U.S. bankruptcy in 2007—magically transferred the alleged

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1 *Compare* Claimants' Request for Arbitration, ¶¶ 7-8 *with* Claimants' Memorial, ¶ 13.

2 *Smith v. 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), ¶¶ 102-103, **R-0010**.

3 SEC filing available on: http://www.sec.gov/Archives/edgar/data/783209/0000914233-98-000092.txt ("*In 1993, Wolfgang Rauball was convicted by a German court of negligently causing the bankruptcy of a German subsidiary of a Canadian company*."), **R-0143**.

investment to EuroGas II in 2008 and made it retroactive to 2005 (when EuroGas I was in bankruptcy and its assets were frozen). As the Slovak Republic will show below, this is a fiction of gargantuan proportions. EuroGas II never owned the alleged investment, it has no standing to bring its claims, and the Tribunal therefore lacks jurisdiction *ratione materiae* over them.

6. With equal force, the Tribunal lacks jurisdiction over EuroGas II because the Slovak Republic denied the benefits of the U.S.-Slovak BIT to EuroGas[4] on 21 December 2012, becoming the first country to deny benefits under an investment treaty prior to the commencement of arbitration. The denial was valid because EuroGas II is controlled by Mr. Rauball, a national of a third country (Germany), and EuroGas II has no substantial business activities in the U.S. Hence, the Tribunal has no jurisdiction *ratione voluntatis* over EuroGas II's claims.

7. Nor does the Tribunal have jurisdiction over Belmont Resources Inc. ("**Belmont**"). Belmont initially told the Tribunal that it owned 57% of the Slovak mining company, Rozmin s.r.o. ("**Rozmin**"). The Slovak Republic, however, discovered a Share Purchase Agreement dated effective 27 March 2001 (before EuroGas I was dissolved) by which Belmont sold its 57% interest to EuroGas I. The Slovak Republic has also uncovered numerous public statements from Belmont and Rozmin—some under oath—confirming that Belmont no longer owns the 57% interest in Rozmin. Therefore, Belmont does not own the alleged investment, it has no standing to bring its claims, and the Tribunal has no jurisdiction *ratione materiae* over them.

8. Finally, the Canada-Slovak BIT under which Belmont brings its claims only covers disputes that arose after 14 March 2009, and all of Claimants' colorable allegations occurred prior to that date. The reassignment of the Gemerská Poloma excavation area in the Slovak Republic (the "**Excavation Area**") occurred four years earlier—on 3 May 2005. The only relevant State acts that occurred after 14 March 2009 were administrative

[4] The Slovak Republic refers to only "EuroGas" at various times in this Counter-Memorial when it is unclear whether EuroGas I or EuroGas II is the proper entity. Any reference to "EuroGas" should not be construed as an admission by the Slovak Republic that EuroGas I or EuroGas II is or is not the proper entity identified in the particular context.

and court decisions that Rozmin either won or did not appeal (and thus cannot complain about now). Accordingly, the Tribunal has no jurisdiction *ratione temporis* over Belmont's colorable claims.

9. Claimants' merits case fares no better. At the heart of this case is Section 27(12) of Act No. 44/1988 Coll. on the protection and utilization of mineral resources (the "**Mining Act**"), as amended in 2001 (the "**2002 Amendment**"). The 2002 Amendment provided that, if mining companies did not commence "*excavation*" (in Slovak, "*dobývanie*") of the excavation area to which they were assigned within three years after the statute took effect, then the local mining authority was required to cancel the excavation area or to reassign it to a third-party.[5] The 2002 Amendment took effect on 1 January 2002. Therefore, mining companies had to commence excavation by 1 January 2005.

10. The purpose of the 2002 Amendment was to address the widespread problem of entities assigned to excavation areas sitting idly on their rights and engaging in speculative practices (often developing certain sites while idly holding others to prevent competitors from exploiting them). The 2002 Amendment was thus intended to foster effective use of the country's natural resources and to increase the revenue that the State would achieve through the extraction of mineral resources.

11. The Slovak Republic has uncovered public statements from both Belmont and Rozmin stating that they were well aware of the 2002 Amendment shortly after it took effect, that they knew they would lose the Excavation Area if they did not commence excavation by 1 January 2005, and that the local district mining office (the "**DMO**") had explicitly warned them of this fact. Despite that knowledge, it is undisputed that Rozmin never commenced excavation.

12. In fact, Rozmin never even came close to doing so. Contrary to Claimants' portrayals in this arbitration, Rozmin did little meaningful work at the Excavation Area during the entire time that EuroGas I and Belmont had an ownership interest in the project. By the

[5] Section 27(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-0062**.

end of the three-year period, Rozmin was still more than 90% away from finishing opening works—and thus was not even remotely close to starting preparatory works or the actual excavation.

13. In the end, Rozmin's executive director, Ondrej Rozložník, admitted that "*not a single unit of the mineral in question had been extracted from the deposit*."[6] Claimants have also admitted that the reason they did not excavate during the three-year period was because of their own financial problems (which is not surprising, since its owner, EuroGas I, ceased to legally exist and was put into bankruptcy during that time period).

14. After three years of no excavation under the 2002 Amendment (indeed, *seven* years if one counts from when Rozmin was first assigned the Excavation Area), the relevant DMO followed the mandatory provisions of the 2002 Amendment and assigned the Excavation Area to a third-party on 3 May 2005 after an open tender. Rozmin was not singled out. The Slovak Republic ran tenders for the reassignment of approximately 30 other excavation areas in 2005.

15. Importantly, the 2002 Amendment did not set forth the procedure by which the excavation areas should be cancelled or reassigned. The absence of detailed statutory guidance left the DMOs sailing on unchartered waters, applying a new statute without the benefit of legislative guidance, court decisions, or other precedent on the procedure that should be followed.

16. Rozmin challenged the DMO's reassignment of the Excavation Area to the Slovak courts, complaining that the *procedure* by which it was reassigned was incorrect. The Slovak Supreme Court ultimately agreed and directed the DMO to undertake a different procedure, thereby demonstrating that the Slovak Republic was not adverse to Claimants' investment. On remand, the DMO followed the Supreme Court's instructions, applied the ordered procedures, and reached the same substantive conclusion.

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[6] Decision of the Regional Court in Košice, 3 February 2010 (Ref. 7S/25/2009-207), pp. 16-17, **C-0272**; Decision of the District Mining Office on Assignment of the Excavation Area "Gemerská Poloma" to other organization, pp. 228-229 of the PDF, 30 March 2012, **R-0058**; Decision of the Main Mining Office, 1 August 2012 (Ref. 808-1482/2012), p. 12, **C-0273**.

17. Rozmin challenged the DMO's reassignment again, this time raising new procedural arguments which it had not timely raised in the first challenge. Had Rozmin timely raised these new arguments in its first challenge, the second challenge could have been avoided entirely. Rozmin, however, engaged in piecemeal litigation, which added years to the process.

18. The Supreme Court ultimately agreed with several (but not all) of Rozmin's new procedural arguments and remanded the matter back to the DMO. The DMO again followed the Supreme Court's instructions. And yet again, it reached the same substantive result. This is not surprising, since the underlying facts—that Rozmin had not commenced excavation within the three-year period—had not (and could not have) changed.

19. Rozmin ultimately did not appeal that final decision to the Slovak courts.[7]

20. To be clear, therefore, at no time did the Supreme Court ever conclude that Rozmin had commenced excavation within the three-year period or that the DMO should have not engaged in the process of reassigning the Excavation Area. It simply held that the DMO had to follow a different procedure and analysis, and the DMO faithfully followed the Supreme Court's instructions on remand.

21. If Rozmin disagreed with any of the administrative or court decisions, it had two choices: (*i*) appeal, or (*ii*) do not appeal and forego any legal action against that decision. This is particularly true under international law, where low-level administrative or judicial decisions cannot constitute an international delict if an effective remedy is available and not exhausted. A State must be judged by its "final product," and it will only be held liable if the overall process of its decision-making violates international law.

22. Here, Claimants' claims based on the administrative and judicial appeals are effectively denial-of-justice claims "dressed up" to look like alleged breaches of other standards in the U.S.-Slovak BIT and the Canada–Slovak BIT. By looking beneath the labels that

[7] There was a third Supreme Court decision, discussed below, but it did not relate to the reassignment of the Excavation Area.

Claimants have put on their claims, it is apparent that, in reality, they simply challenge the decisions of administrative bodies that were subject to appeal. Of the three DMO decisions reassigning the Excavation Area, Rozmin won two of them and did not appeal the third.

23. In sum, a State is judged by the final product. An investor cannot complain that a State's operations violate international law unless and until it has given it scope to operate. As discussed below, when Rozmin gave the Slovak administrative and judicial system scope to operate, it ruled in favor of Rozmin. In each case, the record is clear that the DMO took appropriate steps to rectify the procedural deficiencies. When it became clear to Rozmin that its procedural complaints would not change the substantive outcome resulting from its admitted failure to commence excavation within the three-year period, Rozmin abandoned further appeals.

24. In the end, therefore, this case is simple and straightforward:

- The 2002 Amendment—which Claimants admitted they were aware of and had been explicitly warned about by the Slovak authorities—stated that if there was no excavation within a three-year period, then the 2002 Amendment *required* cancellation of the Excavation Area or its assignment to another entity.

- It is undisputed that Rozmin conducted no excavation before, during, or after that three-year period, and Claimants admit that Rozmin failed to do so because they were unable to inject it with the necessary capital.

- Therefore, the Slovak authorities followed the mandatory 2002 Amendment and reassigned the Excavation Area to an entity who would commercially exploit it.

- Nothing that occurred *after* the lapse of the three-year period could have harmed Claimants, because nothing after that time could have changed the fact that there had been no excavation during a three-year period, which triggered a mandatory loss of Rozmin's assigned Excavation Area due to its own inactivity.

- Even if events *after* the three-year period could have somehow harmed Claimants (they could not), the only facts of which Claimants complain are the challenges before Slovak administrative bodies and courts. When the DMO received instructions from the Supreme Court, the DMO faithfully followed the Supreme Court's direction and issued new decisions rectifying all of the procedural errors identified by the Supreme Court. The Supreme Court *never* ruled that the conditions for reassignment to a third-party were not satisfied. And the DMO's final, detailed decision—which followed all guidance provided by the courts—was never challenged by Rozmin in the Slovak courts.

B. Evidence and Organization

25. This Counter-Memorial is submitted in accordance with the procedural timetable established by the Tribunal in Article 15 of Procedural Order No. 1 dated 1 April 2015.

26. This Counter-Memorial is accompanied by the witness statements of:

(a) Mr. Peter Čorej, former executive director and shareholder of RimaMuráň s.r.o. and Economy Agency RV, s.r.o.;

(b) Mr. Peter Kúkelčík, head of the Main Mining Office;

(c) Mr. Ernst Haidecker, executive director of EUROTALC s.r.o. and former executive director of Rozmin s.r.o.; and

(d) Mr. Stephan Dorfner, former managing director of Dorfner Group.

27. This submission is also accompanied by the expert reports of:

(a) Ms. Annette W. Jarvis, a partner in the international law firm of Dorsey & Whitney LLP in Salt Lake City, Utah and expert in Utah corporate law and U.S. bankruptcy law;

(b) Mr. John Anderson, a partner at the international law firm of Stikeman Elliott LLP in Vancouver, Canada and expert in British Columbia corporate law; and

(c) Mr. Gregory Sparks, managing director for metals at John T. Boyd Company in Denver and mining expert.

28. This Counter-Memorial annexes a number of exhibits (*e.g.*, R-[x]) and legal authorities (*e.g.*, RL-[x]), numbered consecutively following those submitted with the Slovak Republic's previous submissions.

29. This Counter-Memorial is divided into the following Sections:

(a) Section I is the Introduction;

(b) Section II explains that the Tribunal has no jurisdiction over EuroGas II;

(c) Section III explains that the Tribunal has no jurisdiction over Belmont;

(d) Section IV sets out the real reason that Rozmin lost the Excavation Area;

(e) Section V explains the 2002 Amendment;

(f) Section VI describes the Slovak administrative and judicial proceedings;

(g) Section VII explains that the Slovak Republic did not breach international law; and

(h) Section VIII is the Conclusion.

II. THE TRIBUNAL HAS NO JURISDICTION OVER EUROGAS II

30. EuroGas II's claim is fraught with two overarching jurisdictional defects: (*i*) EuroGas II never made an investment in the Slovak Republic, does not own the alleged investment made by EuroGas I, and has no standing to bring its claim, and (*ii*) the Slovak Republic validly denied the benefits of the U.S.-Slovak BIT to EuroGas II.

A. EuroGas II does not own the alleged "investment" and has no standing

31. The primary jurisdictional problem with regard to EuroGas II relates to its misrepresentation to the Tribunal about its identity. In the Request for Arbitration, EuroGas II misrepresented itself to be EuroGas I, an entity incorporated in 1985:

> **I. PARTIES**
>
> **A. CLAIMANTS**
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> 7. **EuroGas** was legally constituted under the laws of the United States on October 7, 1985, first under the name Northampton, Inc.[4] It was renamed EuroGas Inc. in 1994.[5] EuroGas' registered office is located at 3098 South Highland Drive, Suite 323, Salt Lake City, Utah, 84106-6001, USA.[6] Until March 2011, EuroGas was listed and its Common Shares traded

32. Upon receiving this Request for Arbitration, the Slovak Republic researched Utah corporate records and discovered *two* different corporate entities named "EuroGas Inc."—one incorporated in 1985 and another incorporated in 2005. The Slovak Republic discovered that the 1985 company (EuroGas I)—the entity that owned the alleged "investment"—no longer exists and all of its assets were liquidated in a U.S. bankruptcy.

33. When the Slovak Republic uncovered this misrepresentation, Claimants were forced to change their story in their Memorial to say that the real Claimant was, in fact, EuroGas II (the 2005 company):

> **A. CLAIMANTS**
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> 12. Claimants are EuroGas Inc. (**1**) and Belmont Resources Inc. (**2**), two companies considered "junior mining companies," a well-established and recognized category of investors in the mining industry (**3**).
>
> **1. EuroGas Inc.**
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> 13. EuroGas is an oil and gas company. It was incorporated on November 15, 2005 under the laws of the United States. Its registered office is located at 3098 South Highland Drive, Suite 323, Salt Lake City, Utah, 84106-6001.[3]

34. As shown below, the Tribunal's jurisdiction *rests upon* Claimants' misrepresentation, because EuroGas I was the only U.S. entity that ever owned the alleged investment. Had the Slovak Republic not caught Claimants' in this misrepresentation, this entire arbitration would have proceeded on a fraud. The Slovak Republic will revisit this issue later when seeking an award against Claimants for the full costs of this arbitration.

1. Factual background

35. The story of EuroGas II begins with a *different* bankruptcy proceeding in Texas in the 1990s, which dealt with the bankruptcy estates of McKenzie Energy Com. U.S., LaPlata Pipeline Co., Harven Michael McKenzie, Timothy Stewart McKenzie, and Steven Darryl McKenzie (the "**McKenzie Bankruptcy**"), with whom EuroGas I and Mr. Rauball had been affiliated.

36. In the McKenzie Bankruptcy, the bankruptcy trustee, Steve Smith (the "**McKenzie Trustee**"), was charged with the responsibility to maintain and protect assets for the benefit of creditors. To that end, he filed a number of lawsuits against EuroGas I and its principals, including Mr. Rauball. Those lawsuits resulted in a judgment dated 7 June 2004, in which the U.S. Bankruptcy Court found that EuroGas I and Mr. Rauball:

- "*knowingly and willfully misled*" the U.S. Securities and Exchange Commission (the "**SEC**"), "*defrauded*" creditors, and "*conspired*" to hide assets from creditors and the bankruptcy estate;[8]

- gave "*false*" testimony to the court and "*concealed and misrepresented the facts*";[9] and

- acted with "*willful, careless and reckless*" indifference to the rights of creditors and the bankruptcy estate.[10]

37. The U.S. Bankruptcy Court entered a $113 million judgment against Mr. Rauball, his brother, and EuroGas I itself. Their conduct was so egregious that U.S. Bankruptcy Court ordered them to pay $500,000 in punitive damages.

38. The U.S. Bankruptcy Court's decision is exhibit R-0010.[11] We invite the Tribunal to read that document with care. The findings are grave. They should cause this Tribunal to approach everything Claimants say in this proceeding with caution.

39. On 11 July 2001, EuroGas I was dissolved under Utah law for a failure to file a renewal and pay the associated fee.[12] It is undisputed that EuroGas I did not apply for reinstatement within the permitted two-year period after dissolution.[13] Therefore, EuroGas I ceased to exist.[14]

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8 *Smith v. 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), ¶¶ 102-103, **R-0010**.

9 *Smith v. 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), ¶¶ 102-103, **R-0010**.

10 Smith v. 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), p. 51, **R-0010**.

11 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-0010**.

12 Claimants' Reply to Application for Provisional Measures, ¶ 136 ("*As a matter of Utah State law, the company incorporated in 1985 was administratively dissolved in 2001 . . .*").

13 Claimants' Reply to Application for Provisional Measures, ¶ 136 ("*This oversight went unnoticed until well after the two-year deadline within which an application for reinstatement could be filed*.").

14 Expert Report of Annette W. Jarvis (the "**Jarvis Expert Report**"), ¶¶ 41 *et seq*.

40. On 18 May 2004, the creditors of EuroGas I—represented by the McKenzie Trustee—filed an involuntary petition for bankruptcy against EuroGas I under Chapter 7 of the U.S. Bankruptcy Code, largely based on amounts owed from judgments obtained in the McKenzie Bankruptcy.[15] Although EuroGas I had already ceased to exist under Utah law, it was still subject to bankruptcy proceedings in U.S. federal courts for the liquidation of its assets.

41. On 20 October 2004, the U.S. Bankruptcy Court entered an "Order for Relief," thus requiring the liquidation of EuroGas I by a Chapter 7 trustee.[16] The U.S. Bankruptcy Court appointed Joel T. Marker as the trustee (the "**EuroGas Trustee**").[17] On 28 January 2005, the U.S. Bankruptcy Court issued an Order appointing Wolfgang Rauball, his brother Reinhard Rauball, and EuroGas I's CFO Hank Blankenstein to act for the "Debtor" in the case (the "**Debtor**"), and ordered them to file statements and schedules of EuroGas I's assets and to turn over all property and records of the estate to the EuroGas Trustee.[18]

42. On 4 February 2005, EuroGas I's counsel filed a motion to withdraw as attorney of record, stating that the Debtor would not return phone calls or provide information to counsel.[19] The Debtor did not retain substitute counsel or appear in the bankruptcy from this date forward.[20]

43. In violation of the U.S. Bankruptcy Court's Order, the Debtor did not file any statements or schedules of assets, and the property and records of the estate were never turned over

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15 A Public U.S. Bankruptcy Filing from the EuroGas Bankruptcy Case, Case No. 04-28075, Docket No. 1 – EuroGas Bankruptcy Petition, 18 May 2004, **R-0085**. The hearing on the final judgment was held on 20 April 2004 (before the involuntary petition for EuroGas I's bankruptcy was filed). The court then entered the final judgment two months later on 18 June 2004 (before the Order for Relief was entered on 20 October 2004).

16 Jarvis Expert Report, ¶ 16; Bankruptcy Court for the District of Utah Order for Relief, 20 October 2004, **R-0021**.

17 Jarvis Expert Report, ¶ 16.

18 Jarvis Expert Report, ¶ 16; Order Designating Individuals Pursuant to Bankruptcy Rule 9001(5), 27 January 2005, **R-0068**.

19 Jarvis Expert Report, ¶ 17; A Public U.S. Bankruptcy Filing From the EuroGas Bankruptcy Case, Case No. 04-28075, Docket No. 58 – Motion to Withdraw as Counsel, 4 February 2005, **R-0094**.

20 Jarvis Expert Report, ¶ 18.

to the EuroGas Trustee.[21] The EuroGas I bankruptcy case was closed on 19 March 2007.[22] Neither EuroGas I's interest in EuroGas GmbH or Rozmin was included or referenced in the EuroGas Trustee's final report.[23] In its 2007 financial statement, EuroGas reported to the investing public that all of its "*remaining*" assets were liquidated.[24]

2. Claimants' "*deemed merger*" theory

44. The question, then, is how EuroGas I—a dissolved and defunct corporation whose assets were liquidated years ago—could have transferred the alleged "investment" to EuroGas II, on which this Tribunal's jurisdiction now rests. Claimants' explanation is as follows:

> "By way of background, on July 31, 2008 EuroGas took on the surviving corporate existence, business, and affairs of a company that had been incorporated on October 7, 1985 under the name Northhampton Inc. and that had been renamed EuroGas Inc. in 1994 (the "1985 Company").
>
> ***
>
> When the Chapter 7 proceedings were closed, the interest in Rozmin had therefore not been administered and hence remained with the 1985 Company. On July 23, 2008, EuroGas' corporate documents were amended to mirror those of the 1985 Company, and in order to wind up and liquidate its business and affairs, in accordance with Utah State law, the 1985 Company entered into a ***joint resolution*** with EuroGas and performed a type-F reorganization, whereby EuroGas assumed all of the assets, liabilities and issued stock certificates of the 1985 Company.
>
> As a matter of Utah State law, EuroGas is thus a mere continuation of the 1985 Company."[25]

45. This is farce. The Joint Resolution to which this quote refers is a document dated 31 July 2008, in which EuroGas I is "*deemed to have merged*"[26] with EuroGas II and that was

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21 Jarvis Expert Report, ¶ 18.

22 Jarvis Expert Report, ¶ 27; Screen Grab of the EuroGas I Bankruptcy Case Docket, 8 September 2014, **R-0024**; Second Screen Grab of the EuroGas Bankruptcy Case Docket, 8 September 2014, **R-0025**.

23 Jarvis Expert Report, ¶ 27.

24 EuroGas, Inc., Form 10-K (Amended) for Fiscal Year Ended 31 December 2007, pp. 28-29, **R-0063**.

25 Claimants' Memorial, ¶¶ 14, 20-21 (emphasis added).

26 "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, p. 4, **C-0057**.

purportedly "*[m]ade retroactively effective to November 15, 2005*."[27] As discussed below, this is a sham document that is a nullity under both (*i*) the legal regime of the sovereign State of Utah, and (*ii*) the legal regime of U.S. federal bankruptcy.

46. To appreciate the sheer number of reasons why this Joint Resolution is a sham, it is important to distinguish between these two legal regimes. The first is the legal regime of the sovereign State of Utah, which is the jurisdiction in which EuroGas I was incorporated and the law which governs its existence.[28] It determines the status of corporations incorporated in Utah, when such corporations cease to exist, and when the directors and officers lose their capacity to act. The second is the legal regime of U.S. federal bankruptcy, which is applicable in all 50 States in the U.S. (including Utah).[29] U.S. bankruptcy law determines the process through which assets of the bankrupt entity are marshalled, administered, and liquidated.

47. Each of these legal regimes is *alone* sufficient to defeat the Tribunal's jurisdiction. The Slovak Republic hereby submits the expert report of Annette Jarvis, a partner in the international law firm of Dorsey & Whitney LLP in Salt Lake City, Utah, who is an expert both in Utah corporate law and U.S. bankruptcy law. Ms. Jarvis' expert report explains that the alleged "*deemed merger*" between EuroGas I and EuroGas II in 2008 and related asset transfers, purportedly made retroactive to 2005, are a nullity under both Utah law and U.S. bankruptcy law.[30]

3. Claimants' "*deemed merger*" theory fails under Utah law

48. As Ms. Jarvis explains in her expert report, the Joint Resolution is a nullity under Utah law for the following independent reasons.[31]

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27 "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, p. 1, 5, **C-0057**.

28 Jarvis Expert Report, ¶ 40.

29 Jarvis Expert Report, ¶ 39.

30 Jarvis Expert Report, ¶¶ 5-6.

31 Jarvis Expert Report, ¶¶ 41 *et seq.*

a. Under Utah law, a dissolved, defunct corporation cannot merge or reorganize

49. EuroGas I ceased to exist under Utah law and was not capable of entering into the Joint Resolution. It is undisputed that, on 11 July 2001, EuroGas I was legally dissolved as a corporation.[32] After that date, it is only allowed to "*wind up and liquidate its business and affairs*" under Utah law.[33] Utah authorities have held that "*[m]erger is not consistent with liquidation or winding up and is not authorized by statute. . . .*"[34]

50. Under Utah law, a dissolved corporation is permitted to file for reinstatement within two years.[35] As recognized by the Utah Division of Securities, "*a dissolved corporation cannot be reinstated after the two year period for reinstatement has expired*."[36] After the two-year period for reinstatement has expired, the corporate entity ceases to exist. It is undisputed that EuroGas I never sought reinstatement within the two-year period.[37]

51. As a dissolved entity for which reinstatement was not sought within two years, EuroGas I "*cannot assert a cause of action*,"[38] has no "*standing*" to challenge its involuntary dissolution by the Utah Division of Corporation,[39] is "*no longer a legal entity*,"[40] has "*no*

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32 Claimants' Reply to Application for Provisional Measures, ¶ 136 ("*As a matter of Utah State law, the company incorporated in 1985 was administratively dissolved in 2001 . . .*").

33 Utah Code § 16-10a-1405(1), **R-0019** ("*A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs*.").

34 *In re Flavor Brands, Inc.*, Docket Nos. SD-06-0057 to SD-06-0060, Div. of Securities, Utah Dep't of Comm., Final Order, 4 October 2006, ¶ 24(a), **RL-0089**.

35 Utah Code § 16-10a-1422(1), **RL-0090** ("*A corporation dissolved under . . . may apply to the division for reinstatement within two years after the effective date of dissolution . . .*").

36 *In re Flavor Brands, Inc.*, Docket Nos. SD-06-0057 to SD-06-0060, Div. of Securities, Utah Dep't of Comm., Final Order, 4 October 2006, ¶ 24(d), **RL-0089**.

37 Claimants' Reply to Application for Provisional Measures, ¶ 136 ("*This oversight went unnoticed until well after the two-year deadline within which an application for reinstatement could be filed*.").

38 *Holman v. Callister, Duncan & Nebeker*, 905 P.2d 895, 899 (Utah App. 1995), **RL-0091** ("*The State of Utah had dissolved the corporation and all possible extension periods had expired prior to the time this action was filed. Lacking a legal existence, the corporation could not assert a cause of action*.").

39 *Bio-Thrust, Inc.*, 80 P.3d at 166, **RL-0092** ("*According to the internal records kept by the Division, Bio-Thrust was dissolved on January 1, 1991. Thus, Bio-Thrust's legal capacity to challenge its dissolution expired on January 1, 1992. Given that the present action was not filed until April 17, 2002, we hold that the trial court was correct in dismissing Bio-Thrust's petition based on a lack of standing*."). This case was decided on the prior version of the statute, which allowed only one year to move for reinstatement after dissolution, but its holding remains valid law.

legal capacity,"[41] and cannot "*assign a contract*."[42] Indeed, a corporation which has failed to seek reinstatement within two years after dissolution cannot even carry on activities to wind up and liquidate its business. The court in *Hilcrest Invest. v. Sandy City* explained that a contract assignment that took place two years after a corporation's dissolution was invalid and was not part of the winding-up process:

> "***The winding up of a corporation is not indefinite***. The purpose of the liquidation and winding up period is to collect its assets, dispose of properties that will not be distributed in kind to its shareholders, discharge its liabilities, and to distribute its remaining property among its shareholders. ***If Bell Mountain was still winding up its affairs after its administrative dissolution, then for Bell Mountain to continue to act as a legal entity it should have applied for reinstatement within two years pursuant to Utah Code Ann. § 16-10a-1422. Since Bell Mountain failed to do so, it was no longer a legal entity in 2005 when the assignment was executed, therefore, the Court will not give the assignment any legal effect from a dissolved entity with no legal capacity.***
>
> ***The Court concludes that the 2005 assignment did not constitute a timely liquidating or winding up activity because the assignment was made eleven years after Bell Mountain was administratively dissolved***. To allow an entity to liquidate and windup its affairs for such a long period of time would encourage a lack of diligence in the dissolution of a corporation and open the door for a plethora of problems with legally registered entities using the same name."[43]

52. The Utah Division of Securities reached a similar conclusion in *In re Flavor Brands.* There, a company claimed to be the successor of a previously-dissolved corporation through operation of a merger. Finding that purported merger invalid, the Utah Division of Securities explained that an administratively dissolved Utah corporation "*has no officers or directors to act on behalf of either the entity or the shareholders*:"[44]

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40 *Hilcrest Invest. v. Sandy City*, 2009 WL 7347353, (Utah Dist. Ct., Jan. 27, 2009), *aff'd* 238 P.3d 1067 (Utah App. 2010), ¶ 19, **RL-0027**.

41 *Hilcrest Invest. v. Sandy City*, 2009 WL 7347353, (Utah Dist. Ct., Jan. 27, 2009), *aff'd* 238 P.3d 1067 (Utah App. 2010), ¶ 19, **RL-0027**.

42 *Hilcrest Invest. v. Sandy City*, 2009 WL 7347353, (Utah Dist. Ct., Jan. 27, 2009), *aff'd* 238 P.3d 1067 (Utah App. 2010), ¶ 19, **RL-0027**.

43 *Hilcrest Invest. v. Sandy City*, 2009 WL 7347353, (Utah Dist. Ct., Jan. 27, 2009), *aff'd* 238 P.3d 1067 (Utah App. 2010), ¶ 19 (emphasis added), **RL-0027**.

44 *In re Flavor Brands, Inc.*, Docket Nos. SD-06-0057 to SD-06-0060, Div. of Securities, Utah Dep't of Comm., Final Order, 4 October 2006, ¶ 24(b), **RL-0089**.

> "After dissolution of the company in 1991 and after the two-year period for reinstatement of the corporate charter has expired, any outstanding shares of Flavor Brands I stock [the dissolved corporation] became invalid.
>
> ***
>
> ***A dissolved corporation has no officers or directors to act on behalf of either the entity or the shareholders in approving a merger or the sale of stock[.]***
>
> A dissolved corporation has no shares to offer, sell or swap. The shares of a dissolved corporation are invalid.
>
> ***Because a dissolved corporation cannot be reinstated after the two year period for reinstatement has expired, Flavor Brands II [the purported successor by merger] has no legal basis for claiming to be the successor to Flavor Brands I***."[45]

53. Here, the Joint Resolution *itself* recognizes that EuroGas I, as a dissolved corporation, could not effectuate a merger. It states that EuroGas II was incorporated "*for the purpose of merging . . . with [EuroGas I] in some fashion,*" but then recognizes that "*under Utah law, **a dissolved domestic corporation cannot formally merge with another domestic corporation under Utah's corporate merger statute***."[46]

54. This recognition in the Joint Resolution is consistent with Utah law and was the precise holding in *In re Flavor Brands, Inc.*, where the Utah Division of Securities found: "*A dissolved corporation continues its corporate existence after dissolution only to wind up and liquidate its business affairs. **Merger is not consistent with liquidation or winding up and is not authorized by statute**. **A dissolved company can merge only if it is reinstated before expiration of the two-year deadline***.[47]

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45 *In re Flavor Brands, Inc.*, Docket Nos. SD-06-0057 to SD-06-0060, Div. of Securities, Utah Dep't of Comm., Final Order, 4 October 2006, ¶¶ 14, 24(b)-(d) (emphasis added), **RL-0089**.

46 "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, pp. 1, 4 (emphasis added), **C-0057**.

47 *In re Flavor Brands, Inc.*, Docket Nos. SD-06-0057 to SD-06-0060, Div. of Securities, Utah Dep't of Comm., Final Order, 4 October 2006, ¶¶ 14, 24(a) (emphasis added), **RL-0089**.

55. The Joint Resolution, purportedly signed seven years after dissolution, is therefore a nullity under Utah law,[48] and EuroGas II could have not have "*assumed*" the alleged investment from EuroGas I by virtue of it.

b. The purported "*deemed merger*" was not registered with the Utah Division of Corporations and is ineffective

56. But even if EuroGas I had the legal capacity to effectuate the purported merger (it did not), the Joint Resolution would still be ineffective because merger documents were never filed with the Utah Division of Corporations.[49] Section 16-10a-1105(2) of the Utah Code states that "*[a] merger or share exchange takes effect upon the effective date of the articles of merger or share exchange, **which may not be prior to the date of filing***."[50] EuroGas II, however, never filed articles of merger—and admitted not doing so in the Joint Resolution:

> "WHEREAS, under Utah law, a dissolved domestic corporation cannot formally merge with another domestic corporation under Utah's corporate merger statute, ***the Division . . . being unwilling and lawfully incapable of accepting and stamping Articles of Merger involving a dissolved corporation or in which a dissolved corporation is a party***."[51]

57. Thus, the purported "*deemed merger*" never became effective.[52] Even if it had, however, it could not have applied retroactively.[53] Under Utah law, a merger takes effect, at the earliest, on the date when the document memorializing the merger is filed with the Utah Division of Corporations.[54] As noted above, Section 16-10a-1105(2) of the Utah Code

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48 Jarvis Expert Report, ¶¶ 47 *et seq*.; *In re Flavor Brands, Inc.*, Docket Nos. SD-06-0057 to SD-06-0060, Div. of Securities, Utah Dep't of Comm., Final Order, 4 October 2006, ¶¶ 14, 24(d), **RL-0089** ("*Because a dissolved corporation cannot be reinstated after the two year period for reinstatement has expired, Flavor Brands II [the purported successor by merger] has no legal basis for claiming to be the successor to Flavor Brands I.*").

49 Jarvis Expert Report, ¶¶ 45-46.

50 Utah Code, § 16-10a-1105(2) (emphasis added), **RL-0093**.

51 "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, p. 2 (emphasis added), **C-0057**.

52 Jarvis Expert Report, ¶ 46.

53 Jarvis Expert Report, ¶ 57.

54 Jarvis Expert Report, ¶ 57.

states that a merger takes effect *"upon the effective date of the articles of merger or share exchange, **which may not be prior to the date of filing***."[55]

58. Thus, the purported "*deemed merger*" was never effective and, in any event, could not have been effective retroactively. For this additional reason, EuroGas II could not have "*assumed*" the alleged investment from EuroGas I under the Joint Resolution—much less assumed it retroactively to November 2005.

c. Claimants "type-F reorganization" argument fails because Section 368(a)(1)(F) of the IRC is a tax statute that cannot revive a corporation

59. Unable to counter these mandatory principles of Utah law, Claimants argue that their purported "*deemed merger*" is a so-called "*type-F reorganization*" under Section 368(a)(1)(F) of the U.S. Internal Revenue Code ("**IRC**").[56] This argument misunderstands Section 368(a)(1)(f) and its relationship with state corporation law.

60. Section 368(a)(1)(F) addresses only whether a corporate transaction qualifies for tax-free treatment for U.S. federal income tax purposes.[57] It cannot revive a corporation under state law or authorize reorganization of a corporate entity under state law.[58] As Ms. Jarvis explains in her expert report, Section 368(a)(1)(F) "*could not cure the state legal incapacity and statutory limitations placed on Eurogas I, as a dissolved entity no longer*

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55 Utah Code, § 16-10a-1105(2) (emphasis added), **RL-0093**.

56 Claimants' Memorial, ¶ 21 ("*the 1985 Company entered into a joint resolution with EuroGas and performed a type-F reorganization*"); "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, pp. 2, 4, **C-0057**.

57 Jarvis Expert Report, ¶ 51.

58 The U.S. Code of Federal Regulations, 26 C.F.R. § 1.368-1(b), **RL-0094**, explains the purpose of Section 368 IRC as follows: "*Purpose and scope of exception of reorganization exchanges. Under the general rule, upon the exchange of property, gain or loss must be accounted for if the new property differs in a material particular, either in kind or in extent, from the old property.* ***The purpose of the reorganizations provisions of the Code is to except from the general rule [of accounting] certain specifically described exchanges incident to such readjustments of corporate structures made in one of the particular ways specified in the Code****, as are required by business exigencies and which effect only a readjustment of continuing interest in property under modified corporate forms*." (emphasis added).

subject to reinstatement, under Utah law,"[59] and that provision "*does not authorize a corporation that has been dissolved under state law to act in violation of state law. It only controls whether or not a corporate transaction is a tax-free reorganization for U.S. federal income tax purposes*."[60]

61. Thus, the "type-F reorganization" referenced in the Joint Resolution could not reinstate or revive EuroGas I, which remained administratively dissolved and legally incapable of effectuating a merger with EuroGas II.[61] Consequently, a federal tax reorganization under Section 368(a)(1)(F) has no bearing on the legal incapacity and statutory limitations placed on EuroGas I under Utah law, which invalidated the purported merger.[62]

4. Claimants' "*deemed merger*" theory fails under U.S. bankruptcy law

62. But even if one were to ignore all the problems with Claimants' "*deemed merger*" theory under Utah law, their theory would be equally problematic under U.S. bankruptcy law. According to the Claimants, EuroGas I "*survived [its] Chapter 7 bankruptcy proceedings, from which it emerged with . . . [its] interest in [the Excavation Area]*."[63] This argument proceeds on two legal impossibilities: (*i*) that a corporate debtor can emerge from a Chapter 7 bankruptcy and continue to carry out business, and (*ii*) that it can do so with assets not scheduled in the bankruptcy proceeding. In fact, U.S. bankruptcy law is crystal clear that the debtor cannot do either.[64]

63. The U.S. Bankruptcy Code provides for two types of bankruptcy proceedings. The first is a reorganization proceeding in which the debtor's business is reorganized, with the debtor normally remaining in control of its assets (which become part of its bankruptcy estate) and continuing or selling its ongoing business under a court-approved

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59 Jarvis Expert Report, ¶ 85(iii).

60 Jarvis Expert Report, ¶ 56.

61 Jarvis Expert Report, ¶ 56.

62 Jarvis Expert Report, ¶ 56.

63 Claimants' Memorial, ¶ 18.

64 Jarvis Expert Report, ¶¶ 58 *et seq.*

reorganization plan designed to pay its creditors in accordance with the statutory requirements of the U.S. Bankruptcy Code (which can often involve periodic payments to creditors over time). This type of proceeding is governed by Chapter 11 of the U.S. Bankruptcy Code and is commonly referred to as "Chapter 11 reorganization." The second type of bankruptcy is a liquidation proceeding in which the debtor's assets are marshalled by the bankruptcy trustee and sold (liquidated) to repay the debtor's debt. This type of proceeding is governed by Chapter 7 of the U.S. Bankruptcy Code and is commonly referred to as a "Chapter 7 bankruptcy."[65]

64. EuroGas I's bankruptcy was a Chapter 7 bankruptcy—and thus a liquidation proceeding. As discussed below, because the proceeding was a Chapter 7 liquidation of a corporation, no reorganization or continuation of EuroGas I was possible. Nor was the U.S. Bankruptcy Court allowed to discharge EuroGas I's debt. The U.S. Bankruptcy Code only allowed for EuroGas I's liquidation.[66]

a. EuroGas I did not survive its Chapter 7 liquidation and could not have merged with EuroGas II

65. Prior to the 1978 amendment to the U.S. Bankruptcy Code, a corporate debtor in a Chapter 7 liquidation was entitled to have its debt "*discharged*" at the conclusion of the bankruptcy case.[67] Through that discharge, the corporate debtor's debts were written-off or extinguished.[68] That, however, led to abuse by unscrupulous individuals who continued to traffic in the bankrupt debtor's corporate shell.

66. In 1978, the U.S. Congress amended Section 727(a)(1) of the U.S. Bankruptcy Code to eliminate a court's ability to "*discharge*" a corporate debtor's debt in a Chapter 7

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65 Jarvis Expert Report, ¶ 58.

66 *See* 11 USC § 727(a)(1) ("*The court shall grant the debtor a discharge, unless . . . the debtor is not an individual*."), **RL-0095**; Jarvis Expert Report, ¶ 58.

67 Jarvis Expert Report, ¶ 65.

68 Jarvis Expert Report, ¶ 65.

liquidation.[69] The U.S. Senate's Report on the bill that introduced the change explained its purpose was to "*avoid trafficking in corporate shells and bankrupt partnerships*:"

> "This section is the heart of the fresh start provisions of the bankruptcy law. Subsection (a) requires the court to grant a debtor a discharge unless one of nine conditions is met. The first condition is that the debtor is not an individual. ***This is a change from present law, under which corporations and partnerships may be discharged in liquidation cases, though they rarely are. The change in policy will avoid trafficking in corporate shells and in bankrupt partnerships.***"[70]

67. U.S. courts have found that the amended Section 727(a)(1), by prohibiting a discharge of a corporate entity, renders a Chapter 7 corporate debtor "*defunct*" after the Chapter 7 bankruptcy. As the court in *Thornton v. Mankovitch* explained:

> "Under federal bankruptcy law, [the corporate debtor] ***became a 'defunct corporation' without existence to operate outside the scope of the bankruptcy estate*** upon the filing of the Chapter 7 bankruptcy. Title 11, United States Code, Section 727(a) provides that a corporation is not entitled to a discharge under Chapter 7 bankruptcy. ***The intent of the statutory provision has been interpreted to preclude the continued existence of such corporations***.
>
> ***The consequence of denying discharge to a corporation in a Chapter 7 proceeding is to render such entities 'defunct,' which is akin to a dissolved corporation.*** As a defunct corporation, [the corporate debtor] ceased to exist: it lost the right to own or operate assets and lost the right to pursue pre-petition causes of action, such as its claim against [a contract party]."[71]

68. Other courts are in accord.[72] As the court in *Liberty Trust Co. v. Holt* observed:

> "This Court believes the Bankruptcy Court was correct in concluding that the Debtor in this instance ***could have no further existence*** . . . Congress' purpose in denying discharge to corporations and partnerships was to 'avoid the trafficking in corporate shells and in bankruptcy partnerships.' *The consequence of denying discharge to corporations and partnerships in a Chapter 7 proceeding* ***is to render such entities 'defunct.' The Court assumes that 'defunct' depicts a***

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69 Jarvis Expert Report, ¶ 65.

70 S. Rep. No. 989, 95th Cong.2d Sess. 98 (1978) (emphasis added), **RL-0096**.

71 *Thornton v. Mankovitch*, 626 S.E. 2d 189, 191 (Georgia App. 2006) (emphasis added), **RL-0083**.

72 *See Matter of Federal Insulation Development Corp.*, 14 B.R. 362, 364 (Bankr.S.D. Ohio 1981) ("*This Court first notes that under Chapter Seven, the debts of a corporation are not discharged. Instead, the corporation becomes defunct and the issue of dischargeability irrelevant*."), **RL-0097**; *In re Tri-R Builders, Inc.*, 86 B.R. 138 (Bankr.N.D. Indiana 1986) ("*The filing of a chapter 7 creates a defunct corporation*."), **RL-0098**.

> ***status akin to that of a dissolved corporation or partnership, and so interprets the term in this case***."[73]

69. Unable to refute these authorities, Claimants engage in a game of semantics by arguing that the U.S. Bankruptcy Code does not provide for "*dissolution*" of a corporation through a Chapter 7 proceeding.[74] That statement is technically true; "*dissolution*" of a corporation is governed by the law of the state of incorporation of the subject corporation (here, Utah). Rather, the effect of Chapter 7 liquidation is to render bankrupt entity "*defunct*."[75] The practical effect, however, is the same. As the court in *Liberty Trust* explained, "*'defunct' depicts a status akin to that of a dissolved corporation or partnership*."[76]

70. Consistent with these principles, EuroGas I's Chapter 7 liquidation proceeding was concluded on 19 March 2007 without EuroGas I securing a "*discharge*."[77] Instead, as a matter of U.S. bankruptcy law, EuroGas I exited its Chapter 7 liquidation as a "*defunct*" corporation.[78] As such, EuroGas I could not have merged with EuroGas II or transferred assets, and any such purported merger or transfer is a legal nullity.[79]

71. Finally, Claimants cite in a footnote to a line of cases for the proposition that "*numerous US courts have in fact explicitly recognized that corporations cannot be dissolved through a bankruptcy process and that they continue to exist after the bankruptcy proceedings are closed*."[80] Those cases are inapposite. As Ms. Jarvis explains, they concern whether a *damage judgment* against a debtor can be pursued by another creditor after the bankruptcy of the debtor.[81] That is not the issue here, which is whether *a*

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73 *Liberty Trust Co. v. Holt*, 130 B.R. 467, 472 (W.D. Tex. 1991) (emphasis added), **RL-0099**.

74 Claimants' Memorial, ¶ 18, fn. 11. The case law cited by for this proposition is also accurate as those cases all deal with the *dissolution* of a corporation, which without a doubt is an issue of state law.

75 Jarvis Expert Report, ¶ 65 *et seq*.

76 *Liberty Trust Co. v. Holt*, 130 B.R. 467, 472 (W.D. Tex. 1991), **RL-0099**.

77 Jarvis Expert Report, ¶ 72.

78 Jarvis Expert Report, ¶ 84.

79 Jarvis Expert Report, ¶¶ 72, 84.

80 Claimants' Memorial, ¶ 18, fn. 11.

81 Jarvis Expert Report, ¶ 71.

corporation can survive and continue to carry out business activities after a Chapter 7 bankruptcy. As the cases cited by the Slovak Republic above demonstrate, it cannot.

b. The purported retroactive "*deemed merger*" attempts to reach back to a time when the automatic stay in the bankruptcy applied

72. A second problem with Claimants' "*deemed merger*" theory under U.S. bankruptcy law is that the Joint Resolution purported to be retroactive to 2005—when EuroGas I was in bankruptcy and its assets were subject to the automatic stay that prohibited anyone other than the EuroGas Trustee from disposing or affecting EuroGas I's assets.[82]

73. Under U.S. bankruptcy law, the filing of the Chapter 7 involuntary bankruptcy petition against EuroGas I on 18 May 2004 had two immediate effects. ***First***, a "*bankruptcy estate*" was automatically created by operation of 11 U.S.C. § 541.[83] That bankruptcy estate automatically became the legal owner of all of EuroGas I's assets and property rights.[84] All such assets and property rights immediately became "*property of the estate*"—a term broadly defined to include "*all legal or equitable interests of the debtor in property as of the commencement of the case*."[85]

74. ***Second***, an automatic stay was imposed under 11 USC § 362, which prohibited anyone other than the trustee from disposing or affecting EuroGas I's assets.[86] As explained under 11 USC § 362(a)(3), the automatic stay prevents "*any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate*."[87]

75. The Joint Resolution, however, attempted to make the deemed merger and asset transfer retroactively effective to 15 November 2005. On that date, the automatic stay was effective, and no action could have been taken to affect the property of the estate during

82 Jarvis Expert Report, ¶¶ 62-63.

83 Jarvis Expert Report, ¶ 59.

84 Jarvis Expert Report, ¶ 59.

85 11 USC § 541(a), **RL-0048**; Jarvis Expert Report, ¶ 59.

86 Jarvis Expert Report, ¶ 62.

87 11 USC § 362(a)(3), **RL-0064**.

that period of time.[88] Any effort to reach back was 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*" and, therefore, prohibited by Section 362(a)(3) of the U.S. Bankruptcy Code. Consequently, the purported deemed merger is "*void and without effect*."[89]

c. EuroGas I's indirect interest in Rozmin remains with the bankruptcy estate and was not abandoned by the EuroGas Trustee

76. A third problem with Claimants' "*deemed merger*" theory under U.S. bankruptcy law is that, in addition to the inability of the *debtor* to emerge from bankruptcy, the *asset* in question could not have emerged from the bankruptcy either.[90] Claimants argue that EuroGas I's interest in Rozmin survived the bankruptcy because "*the trustee was well aware of the 1985 Company's interest in EuroGas GmbH and/or Rozmin*"[91] and that the "*trustee decided not to administer*" it.[92] Although this argument does not respond to any of the other problems under Utah law or U.S. bankruptcy law described above, it, too, is incorrect.

77. Under the U.S. Bankruptcy Code, property of the bankruptcy estate may only be abandoned in one of two ways: (*i*) by affirmative action taken by the Chapter 7 trustee following the entry of an order from the bankruptcy court authorizing that abandonment, which order can only be entered after notice is provided to all interested parties and a hearing is held on the matter;[93] or (*ii*) by operation of law for "*any property scheduled under section 521(a)(1)*."[94] Outside of these two possibilities, property of the bankruptcy

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88 Jarvis Expert Report, ¶ 64.

89 *Franklin Savings Assoc. v. Office of Thrift Supervision*, 31 F.3d 1020, 1022 (10th Cir. 1994) ("*[a]ny action taken in violation of the stay is void and without effect*"), **RL-0058**; *In re C.W. Mining Co.*, 749 F.3d 895, 899 (10th Cir. 2014) ("*[a]ny transfer made in violation of the automatic stay is void and the parties are returned to the status quo as it existed before the violation occurred*"), **RL-0100**; *Ellis v. Consolidated Diesel Electric Corp.*, 894 F.2d 371, 372 (10th Cir. 1990) ("*[i]t is well established that any action taken in violation of the stay is void and without effect*"), **RL-0060**.

90 Jarvis Expert Report, ¶¶ 73 *et seq.*

91 Claimants' Memorial, ¶ 19.

92 Claimants' Memorial, ¶ 18.

93 11 USC §§ 554(a)-(b), **RL-0069**; Federal Rules of Bankruptcy Procedure 6007, **RL-0055**; Jarvis Expert Report, ¶ 75.

94 11 USC § 554(c), **RL-0069**; Federal Rules of Bankruptcy Procedure 6007, **RL-0055**; Jarvis Expert Report, ¶ 75.

estate cannot be abandoned and remains property of the estate.[95] The U.S. Bankruptcy Code is unequivocal on this, stating "*property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate*."[96]

78. As to the first method—abandonment by the trustee's affirmative action upon court order—courts have found that "*abandonment under section 554(a) and (b) requires notice, a hearing and an order of the court authorizing abandonment . . . [a]bandonment requires affirmative action by the trustee or some other evidence of the intent to abandon the asset.*'"[97] Thus, not only is there a requirement that the bankruptcy court enter an order authorizing the abandonment,[98] but the trustee must also take affirmative, outward steps manifesting his decision to abandon the property after the court approves the abandonment.[99] None of that took place here.

79. As to the second method, courts have consistently held that, for property to be abandoned by operation of law, it must be disclosed in the schedule of assets.[100] Property not disclosed to the trustee cannot be abandoned.[101] As U.S. courts have observed:

> "Despite appellants' persistent claims, we agree with the district court that the alleged discussion with the Trustee, even if true, has no bearing on the outcome of this appeal. ***The law is abundantly clear that the burden is on the debtors to list the asset and/or amend their schedules, and that in order for property to be abandoned by operation of law pursuant to 11 U.S.C. § 554(c), the debtor must formally schedule the property*** . . . ."[102]

80. Importantly, U.S. courts have also made clear that it is not enough that the trustee learns of the property through other means:

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95 Jarvis Expert Report, ¶ 75.

96 11 USC § 554(d), **RL-0069**; Federal Rules of Bankruptcy Procedure 6007, **RL-0055**.

97 *Billingham v. Wynn & Wynn, P.C.*, 159 B.R. 374, 377 (Bankr. D. MA. 1993), **RL-0071**.

98 *See In re Cook*, 520 Fed. Appx. 697, 702-703 (10th Cir. 2013) (unpublished), **RL-0072** (court held that a trustee's notice to abandon the remaining of the property of the estate, without prior notice to creditors or a hearing, did not constitute abandonment of the remaining assets in the estate because it did not comply with the requirements of 11 USC § 554(a) and Bankr.R.Civ.P. 6007).

99 Jarvis Expert Report, ¶ 76.

100 Jarvis Expert Report, ¶ 78.

101 Jarvis Expert Report, ¶ 78.

102 *In re Jeffrey*, 760 F.3d 183, 186 (1st Cir. 1995) (emphasis added), **RL-0047**.

> "[I]n order for property to be abandoned by operation of law pursuant to section 554(c), the debtor must formally schedule the property before the close of the case. ***It is not enough that the trustee learns of the property through other means; the property must be scheduled pursuant to section 521(1)***."[103]

81. As explained above, EuroGas I and its principals filed no schedules in direct violation of the U.S. Bankruptcy Court's order.[104] As such, the interest in Rozmin and all other "*asset[s] not properly scheduled remain the property of the bankruptcy estate*," and "*[a]s a result, the debtor loses all rights to enforce any unscheduled legal claim in [its] own name.*"[105] Therefore, the Rozmin interest could not have been abandoned,[106] and Claimants' argument about the EuroGas Trustee's knowledge of the Rozmin interest is irrelevant.

82. Claimants' argument is also wrong. Not only is there no evidence that the EuroGas Trustee knew of EuroGas I's interest in Rozmin, but there is evidence to suggest that EuroGas I affirmatively concealed it. EuroGas I's CFO, Hank Blankenstein, testified under oath in the EuroGas I bankruptcy (before EuroGas I began refusing to participate in the proceedings after its counsel withdrew) that EuroGas I held no interest in the Slovak talc deposit:

> "Q. Okay. And that is the property that is referred to as the Gemerska, G-E-M-E-R-S-K-A, Talc Deposit; is that right?
>
> A. Yes.
>
> Q. Correct?

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103 *Vreugdenhill v. Navistar Int'l Trans. Corp.,* 950 F.2d 524, 526 (8th Cir. 1991) (emphasis added), **RL-0074**. *See also Billingham v. Wynn & Wynn, P.C.,* 159 B.R. 374, 377 (Bankr. D. MA. 1993) (same), **RL-0071**.

104 Jarvis Expert Report, ¶ 79.

105 *Milligan v. Reed*, 410 Fed. Appx. 131, 133 (10th Cir. 2011) (unpublished), **RL-0073**. *See also In re Jeffrey*, 760 F.3d 183, 186 (1st Cir. 1995) ("*Furthermore, by operation of 11 U.S.C. § 554(c) and (d), any asset not properly scheduled remains property of the bankrupt estate and the debtor loses all right to enforce it in his own name*."), **RL-0047**; *Riazuddin, et al. v. Schindler Elevator Corp*., 363 B.R. 177, 187 (10th Cir. 2007) ("*The fact that they did not include the claim in their schedules prevented it from being abandoned to them when the case was closed. It remained in the estate. Thus, their failure to list the claim prohibited them from enforcing it in their own name after the bankruptcy case was closed*."), **RL-0101**; *Gache v. Hill Realty Assoc., LLC*, 2014 WL 5048336, *5 (S.D.N.Y. Sept. 22, 2014) ("*Because only the bankruptcy trustee can bring a cause of action on behalf of a bankruptcy estate, a debtor does not have standing to bring a claim that was property of the bankruptcy estate and was not abandoned or administered by the bankruptcy trustee*."), **RL-0082**.

106 Jarvis Expert Report, ¶ 79.

A. Correct.

Q. Now, isn't it true that Eurogas does not even own this talc project?

A. That's correct."[107]

83. Consistent with this testimony, the McKenzie Trustee—representing the creditors in the EuroGas I bankruptcy—told the U.S. Bankruptcy Court that his understanding was that "*the assets have been dissipated, that there is really nothing left*."[108]

84. In the face of this evidence, Claimants argue that the EuroGas Trustee was aware of the Rozmin interest on the basis of time entries showing minimal review of unspecified "*SEC filings*."[109] These documents, however, say nothing about which SEC filings were reviewed, what parts of those unspecified filings were considered, or what was the EuroGas Trustee's understanding of EuroGas I's assets.

85. But even if one were to assume the trustee was looking at the 10-Ks filed by EuroGas I for the years 2004 and 2005—which were filed on 7 June 2005 and 16 May 2006—those filings only suggest that EuroGas I no longer had any interest in the Slovak talc mine and that there was no asset to pursue. In particular, those filings stated that the Rozmin interest had been revoked by the Slovak government, which was listed in the "Activities

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107 A public U.S. bankruptcy filing that contains as an exhibit the testimony of Eurogas, Inc.'s Chief Financial Officer, Hank Blankenstein, before the U.S. Bankruptcy Court, 3 August 2004, p. 2, lines 12-23, **R-0081**.

108 A public U.S. bankruptcy filing that contains as an exhibit the testimony of Eurogas, Inc.'s Chief Financial Officer, Hank Blankenstein, before the U.S. Bankruptcy Court, 3 August 2004, p. 70 (17-25 of the transcript and p. 94 of the PDF), **R-0081**.

109 Trustee's Motion to Approve Employment of Accountants, 1 May 2006, ¶¶ 1-2, EuroGas Inc. Bankruptcy, Docket Entry No. 106, **C-0066**; Order Granting Trustee's Motion to Approve Employment of Accountants, dated May 11, 2006, EuroGas Inc. Bankruptcy, Docket Entry No. 125, **C-0067**; First and Final Application of Trustee's Accountant for Allowance of Compensation as an Administrative Expense, pp. 2 (¶ 5.a-b), and 10, EuroGas Inc. Bankruptcy, Docket No. 138, **C-0068**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2004, pp. 46-47, **R-0074**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, pp. 45-46, **R-0075**; Memorandum of Law in Support of Motion Pursuant to Federal Rule of Bankruptcy Procedure 9023 and Federal Rule of Civil Procedure 59 for New Trial on or to Alter or Amend the Court's "Order Authorizing Sale of the Debtor's Interest in Certain Affiliates," Ex. 2, pp. 12-13, EuroGas Inc. Bankruptcy, Docket Entry No. 89, **C-0069**; Trustee's Final Report and Application for Compensation and Motion for Order Approving Payment of Administrative Costs and Expenses, Time Sheet Report period 01/01/00-02/23/07 (attachment), p. 4, EuroGas Inc. Bankruptcy, Docket No. 140, **R-0027**.

in Slovakia" section of the 10-Ks,[110] and was a risk acknowledged in the "Risks" section of the 10-Ks.[111] The SEC filings further stated that the entire investment of $3,843,560 had to be written off, which was reflected on the 2004 balance sheet.[112]

86. Similarly, in the "Outlook" sections of the 2004 and 2005 10-Ks, there is no citation to the Rozmin interest as a possibility for improvement in the performance of EuroGas I in the future. Instead, the 10-Ks state: "*[t]he Company will be forced to impair the costs of the assets, $3,843,560, because of the cancellation of the concession*."[113] As Ms. Jarvis explains in her expert report, "*these SEC filings support[] the proposition that Eurogas I no longer had any interest in the Slovakian Talc Mine, and that there was no asset to pursue*."[114]

87. Notably, it was not until the 2007 10-K—the first 10-K filed with the SEC *after* the closing of EuroGas I bankruptcy[115]—that EuroGas I disclosed in its SEC filings that it was contesting the reassignment of the Excavation Area. That was almost two years after the EuroGas I bankruptcy had closed. As Ms. Jarvis concludes, "*[t]hus, no disclosure was made in the SEC filings that Eurogas I could still have an interest in the Slovakian*

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110 EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2004, p. 5, **R-0074** ("*In January 2005 the Company's subsidiary Rozmin s.r.o. was notified that the concession regarding the Talc deposit had been cancelled by the Slovakian Government for unspecified and dubious reasons.* ***At this point therefore no further concession is held by Rozmin***.") (emphasis added); EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, p. 5, **R-0075** ("*In January 2005 the Company's subsidiary Rozmin s.r.o. was notified that the concession regarding the Talc deposit had been cancelled by the Slovakian Government for unspecified and dubious reasons.* ***At this point therefore no further concession is held by Rozmin***.") (emphasis added)).

111 EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2004, **R-0074**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, **R-0075**.

112 EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2004, p. 5, **R-0074** ("*The Company will be forced to impair the cost of the assets, $3,843,560, because of the cancellation of the concession*."); EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, p. 47, **R-0075** ("*The Company will be forced to impair the cost of the assets, $3,843,560, because of the cancellation of the concession*.").

113 EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2004, p. 5, **R-0074**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, p. 47, **R-0075**.

114 Jarvis Expert Report, ¶ 78, fn. 169.

115 This was filed by Wolfgang Rauball and Hank Blankenstein on 6 February 2009.

Talc Mine that might have value until after the Chapter 7 Bankruptcy Case was concluded."[116]

88. Claimants also point to a 10-Q of EuroGas I for the period ending 30 September 2005, which was submitted to the U.S. Bankruptcy Court. To be clear, Claimants did not submit this document to the U.S. Bankruptcy Court. Rather, the McKenzie Trustee—representing the creditors in the EuroGas I bankruptcy—attached it to a motion that had nothing to do with the Rozmin interest.[117] The McKenzie Trustee's motion only refers to the document for the proposition that the SEC filings did not adequately inform the Debtor's shareholders about the bankruptcy case and were "*inaccurate*."[118]

89. It speaks volumes that Claimants' only "evidence" of the EuroGas Trustee's knowledge is a document not even filed by the EuroGas I Trustee (but, instead, filed by the McKenzie Trustee) stating that the SEC filings were "*inaccurate*."[119]

90. Finally, just as it was unavailing under Utah law, Claimants' argument that the "*deemed merger*" was a "type-F reorganization" also fails under U.S. bankruptcy law. U.S. courts have held that entities adjudicated and liquidated in bankruptcy cannot engage in type-F reorganizations:

> "Where an insolvent corporation had been adjudicated in bankruptcy and its assets sold to satisfy creditors, . . . neither the corporation nor its stockholders had anything of value to transfer to a new corporation, and that ***such transaction, even though contemplated in advance as a means of reorganization, failed to qualify as such under the terms of the statute.***"[120]

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116 Jarvis Expert Report, ¶ 78, fn. 169.

117 Jarvis Expert Report, ¶ 78, fn. 169.

118 *See* Memorandum of Law in Support of Motion Pursuant to Federal Rule of Bankruptcy Procedure 9023 and Federal Rule of Civil Procedure 59 for New Trial on or to Alter or Amend the Court's "Order Authorizing Sale of the Debtor's Interest in Certain Affiliates," Ex. 2, pp. 12-13, EuroGas Inc. Bankruptcy, Docket Entry No. 89, **C-0069**; Jarvis Expert Report, ¶ 78, fn. 169.

119 Indeed, the EuroGas Trustee and the McKenzie Trustee would have been highly incentivized to sell any assets they could find. The EuroGas Trustee in the Chapter 7 Bankruptcy Case was incentivized because he would get a fee out of the EuroGas I estate. The McKenzie Trustee was incentivized because, as the largest creditor by far in the EuroGas I estate, the MacKenzie bankruptcy estates would get most of the distribution from the EuroGas estate and he would then get a fee based on the money distributed to and then out of the MacKenzie bankruptcy estates.

120 *Templeton's Jewelers, Inc. v. U.S.,* 126 F.2d 251, 252 (6th Cir. 1942) (emphasis added), **RL-0102**.

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91. As the foregoing shows, the sheer number of problems with Claimants' "*deemed merger*" theory under both Utah and U.S. bankruptcy law makes it difficult to catalog them all. For all the reasons stated above, EuroGas II never acquired EuroGas I's indirect interest in Rozmin. As a result, EuroGas II does not own the alleged investment; it has no standing to bring its claim; and the Tribunal has no jurisdiction over EuroGas II's claims.[121]

B. The Slovak Republic validly denied the benefits of the U.S.-Slovak BIT

92. The second overarching jurisdictional problem with EuroGas II's claim is that the Slovak Republic validly denied it the benefits of the U.S.-Slovak BIT—including the right to arbitration under Article VI of the U.S.-Slovak BIT. The denial-of-benefits clause is found in Article I.2 of the U.S.-Slovak BIT, which provides:

> "Each Party reserves the right to deny to any company the advantages of this Treaty ***if nationals of any third country control such company*** and, in the case of a company of the other Party, ***that company has no substantial business activities in the territory of the other Party***."[122]

93. Therefore, the Slovak Republic's denial of benefits requires that EuroGas II (*i*) be controlled by a national of a third country, and (*ii*) have no substantial business activities in the territory of the U.S. Both requirements are satisfied here.

1. EuroGas II is controlled by Mr. Rauball, a German national

94. EuroGas II is controlled by Mr. Rauball, a national of Germany—a third country within the meaning of Article I(2) of the U.S.-Slovak BIT.[123] While not openly admitting it,

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121 Even if the "*deemed merger*" were not a nullity, EuroGas II would have become the owner of an indirect interest in Rozmin no sooner than 31 July 2008. Taking that statement as true, this Tribunal's jurisdiction *ratione temporis* is limited to those claims that pertain to measures adopted by the Slovak Republic *after* 31 July 2008. It is undisputed that EuroGas I lost its rights to the Excavation Area in May 2005 when the site was reassigned to another entity. Thus, EuroGas II's claims pertaining to those measures clearly fall outside of the Tribunal's jurisdiction *ratione temporis*. Because all of EuroGas II's claims are premised on the cancellation of Rozmin's rights to the Excavation Area, the Tribunal has no jurisdiction *ratione temporis* over any of EuroGas II's claims.

122 Article I (2), U.S.-Slovak BIT (emphasis added), **R-0004**.

123 Wolfgang Rauball Witness Statement, ¶ 1.

Claimants are careful not to dispute that Mr. Rauball controls EuroGas II.[124] That is not surprising. Mr. Rauball had served as President and CEO of EuroGas since 6 July 2001.[125] In EuroGas II's most recent annual filing with the Utah authorities, Mr. Rauball is identified as President and Director of the company.[126] And Mr. Rauball held these key positions in EuroGas II in 2012 when the Slovak Republic denied the benefits of the U.S.-Slovak BIT.

95. Not only has Mr. Rauball consistently held the key executive positions in EuroGas II, he has also been EuroGas II's largest shareholder. Mr. Rauball held 27% of EuroGas II's stock in 2009[127] and 30% of stock in 2010.[128] Further, in its last SEC annual report filing before its registration was revoked, EuroGas indicated that it is "*dependent on the services of Wolfgang Rauball, Chairman and Chief Executive Officer of the company*."[129] According to the same filing, Mr. Rauball had "*personally guaranteed substantial investments by various creditors and was responsible for "solving the company's bankruptcy proceedings over the last couple of years*."[130]

96. It therefore cannot be seriously disputed—and Claimants, in fact, do not dispute—that Mr. Rauball controls EuroGas II.

2. EuroGas II has no substantial business activities in the U.S.

97. EuroGas II—which purports to be a mere continuation of EuroGas I—has no substantial business activities in the U.S. As described above, EuroGas I was dissolved under Utah

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124 Claimants only state that "*Respondent has never even made an attempt to show that EuroGas is controlled by nationals of a third country . . . .*" Claimants' Rejoinder on Provisional Measures, ¶ 68.

125 *Id.* at page 20.

126 Registered Principals - Utah Business Search for EuroGas II, 4 June 2015; **R-0144**; Annual Report-Change Request for EuroGas, Inc., 10 September 2014, **R-0145**; Annual Report for EuroGas II from the Utah Division of Corporations, 5 November 2012, **R-0146.**

127 EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2009, p. 24, **R-0076**.

128 SEC Filing of EuroGas II, 21 July 2010, **R-0147**.

129 EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2009, p. 9, **R-0076**.

130 *Id.*

law in 2001[131] and placed in bankruptcy for liquidation in 2004.[132] The trustee in the bankruptcy case advised the U.S. Bankruptcy Court that the "*Debtor's [EuroGas I's] office in the United States no longer exists*."[133] EuroGas I's assets were administered by the EuroGas 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.[134] None of the EuroGas I assets sold at auction were U.S.-based.[135] In its SEC annual filing for the year ended 31 December 2007, EuroGas stated that "*EuroGas, Inc.'s remaining assets were sold at public auction in March 2006 in Salt Lake City, Utah*."[136] Following the bankruptcy, EuroGas I became legally defunct (and had been legally dissolved under Utah law years before that).

98. In the same SEC filing, EuroGas 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 22nd Floor, New York , NY 10005*."[137] The Slovak Republic has investigated the address, however, and discovered that it is only a virtual office—merely a "mail drop."[138] Given EuroGas I's status as a dissolved Utah corporation and a defunct corporation under U.S. bankruptcy law,[139] EuroGas II's inability to pay for an actual office is not surprising.

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131 Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, ¶¶17-18.

132 Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, ¶22.

133 Trustee's Motion for an Order Approving the Sale of the Debtor's Interest in Certain Affiliates Pursuant to Section 363 of the U.S. Bankruptcy Code, 3 January 2006, p. 2. **R-0069**.

134 Order Confirming Four-Lot Auction of Debtor's Interests in Certain Affiliates, 30 March 2006, ¶¶1-2, **R-0070**.

135 Order Confirming Four-Lot Auction of Debtor's Interests in Certain Affiliates, 30 March 2006, ¶2, **R-0070**.

136 EuroGas, Inc., Form 10-K (Amended) for Fiscal Year Ended 31 December 2007, p. 28, **R-0063**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2006, p. 18, **R-0071** ("*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*.").

137 EuroGas, Inc., Form 10-K (Amended) for Fiscal Year Ended 31 December 2007, p. 29, **R-0063**.

138 Screen grab from http://www.regus.com/locations/virtual-office/new-york-new-york-city-wall-street, **R-0072**.

139 *See* ¶¶19-20, 24, *above*.

99. From 2005 (when EuroGas II was created) to the present, there is no evidence that either EuroGas entity conducted material operations in the U.S. In fact, EuroGas 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*"[140] and adding that EuroGas activity would focus on "*Central Europe and Canada.*"[141] Most recently, Eurogas acknowledged that "*Austria and Switzerland have more recently been its principal places of business.*"[142]

100. EuroGas has had no operational revenues either in the U.S. or elsewhere.[143] Subsequent to the bankruptcy, EuroGas had no direct operating U.S. subsidiaries.[144] In its own investigation of public records, the Slovak Republic has not identified any direct U.S. subsidiary of EuroGas, and nowhere in Mr. Rauball's statement does he identify one.

101. EuroGas even failed to file audited financial statements for the periods ended 31 December 2007, 2008, and 2009—as required by U.S. law.[145] EuroGas openly admitted that it lacked the ability to pay its auditors as far back as for the period ended 31

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140 EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, p. 17, **R-0075**.

141 EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2004, p. 17, **R-0074**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, p. 17, **R-0075**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2006, p. 21, **R-0071**; EuroGas, Inc., Form 10-K (Amended) for Fiscal Year Ended 31 December 2007, p. 18, **R-0063**.

142 EuroGas II's Answer and Counterclaim in the TEC lawsuit, 4 May 2015, ¶ 23, **R-0148**.

143 EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2009, p. 15, **R-0076**. 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 30 September 2010. EuroGas, Inc., Form 10-Q for Quarterly Period Ended 30 September 2010, p. 12, **R-0077**. 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, p. 17, **R-0063** (showing "0" net sales for 2004); EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2003, p. 15, **R-0073** (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.

144 EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, p. 3, **R-0075** (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; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2007, p. 1, **R-0063**.

145 Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, ¶ 30.

December 2003, which coincided with EuroGas I's administrative dissolution.[146] The SEC de-registered EuroGas for non-compliance with U.S. securities laws on 30 March 2011.[147]

102. Moreover, the Dun & Bradstreet, Inc. report shows that EuroGas has been inactive since at least 2 December 2010[148] and that EuroGas is inactive at the address at which it is registered and listed in the Request for Arbitration, as of 18 June 2012.[149] In short, EuroGas I and EuroGas II were, at best, shell entities that carried out no business activity in the U.S.

103. In the face of this evidence, EuroGas II argues that it has engaged in three types of substantial business activities in the U.S.: (*i*) a lawsuit brought by Tombstone Exploration Corporation ("**TEC**") against EuroGas, (*ii*) EuroGas II's financial commitments towards TEC and the purported joint business activities of EuroGas II and TEC, and (*iii*) business activities of a company known as "EuroGas Silver and Gold" ("**ESG**"). None of these alleged activities, however, suffice as "*substantial business activities*" in the U.S.

104. ***First***, the lawsuit involving TEC was brought *against* EuroGas II on 21 August 2014, alleging that EuroGas II breached a Stock Exchange Agreement requiring EuroGas II to finance TEC's U.S. exploration efforts in the amount of $5,000,000 in exchange for 348,000,000 shares of TEC stock.[150] Interestingly, the First Amendment to that

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146 EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2003, p. 16, **R-0073**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2004, p. 35, **R-0074**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, p. F-1, **R-0075**; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2006, p. 41, **R-0071**; EuroGas, Inc., Form 10-K (Amended) for Fiscal Year Ended 31 December 2007, p. F-1, **R-0063**.

147 Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, ¶ 30.

148 Dun & Bradstreet, Inc. Report dated 4 September 2014, p. 1, **R-0029**.

149 Request for Arbitration, ¶ 7; Dun & Bradstreet, Inc. Report, 4 September 2014, p. 3, **R-0029**.

150 TEC's Complaint, 21 August 2014, (the "**Original Complaint**"), ¶¶ 24-27, **R-0149**; TEC's Amended Complaint, 21 August 2014, (the "**Amended Complaint**"), ¶¶ 30-33, **R-0150**.

agreement called for EuroGas II to also pay TEC 20% of any award granted to EuroGas II in this arbitration.[151]

105. On 19 November 2014, TEC and EuroGas II entered into a so-called "Extension Agreement" under which EuroGas II would renew its financing obligations, which resulted in the dismissal of the original lawsuit.[152] It was this renewed commitment from EuroGas that Claimants cited as "*substantial business activities*" in its provisional measures briefing in this arbitration, stating that EuroGas II had recently resumed its "*financing in the amount of $5 million USD for extensive drilling in [Tombstone] wholly owned USA porphyry copper-gold project in Arizona.*"[153]

106. On 25 March 2015, however, TEC re-filed the lawsuit against EuroGas II because EuroGas II failed to provide the promised financing. This renewed lawsuit against EuroGas II thus shows EuroGas II's *lack* of substantial business activities in the U.S. Indeed, TEC's renewed claim is for an alleged breach of the very commitments that Claimants had brandished as a proof of EuroGas II's "*substantial business activities*" during the provisional measures stage of this arbitration.[154]

107. ***Second***, EuroGas II claims that it acquired a "*substantial shareholding stake*" in TEC.[155] EuroGas II's shareholding in TEC, however, is far from substantial business activity in the U.S. TEC itself is not even a U.S. company. It is a Canadian corporation.[156] Although an entity with the same name was once incorporated in Nevada, the registration of the Nevada entity has been revoked since 2011."[157] TEC is a company with no

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151 Original Complaint, ¶¶ 34-37, **R-0149**; Amended Complaint, ¶¶ 42-44, **R-0150**; Tombstone Exploration Corporation press release, 26 November 2014 (available at http://www.tombstonemining.com/index.php/2014-09-16-21-11-47/2014/38-tombstone-exploration-corporation- announces-progress-on-EuroGas-inc-s-commitment-of-5-million-for-exploration-and-drilling-program), **C-0065**, quoted in Claimants' Rejoinder on Provisional Measures, ¶ 71.

152 Amended Complaint, ¶¶ 64-70, **R-0150**.

153 Claimants' Rejoinder on Provisional Measures, ¶ 71.

154 Claimants' Rejoinder on Provisional Measures, ¶ 71.

155 Wolfgang Rauball Witness Statement, ¶ 9.

156 *Id.* at 1; Corporations Canada Status Page for TEC, **R-0151**.

157 Print-out from Nevada Secretary of State status page for Tombstone Exploration Corporation, **R-0152**.

operating revenues, substantial operating losses, and a negative balance sheet.[158] It is therefore difficult to understand how EuroGas II could derive any substantial business activity from TEC's operations.

108. In any event, it is not enough for EuroGas II to argue that it has substantial business activities through other, related companies. As the tribunal in *Pac Rim v. El Salvador* explained, the claimant must show that the *claimant itself* has substantial business activities in the relevant jurisdiction:

> "However, in the Tribunal's view, ***this first condition under CAFTA Article 10.12.2 relates not to the collective activities of a group of companies, but to activities attributable to the "enterprise" itself, here the Claimant.*** If that enterprise's own activities do not reach the level stipulated by CAFTA Article 10.12.2, it cannot aggregate to itself the separate activities of other natural or legal persons to increase the level of its own activities: those would not be the enterprises activities for the purpose of applying CAFTA Article 10.12.2."[159]

109. Apart from the claimed shareholding interest in TEC, Claimants allege that EuroGas owns "*86 porphyry copper mining rights in the Tombstone Mining District of Arizona*" and that those rights were acquired by EuroGas in 2008 from Rio Plata Corp. of Montana, USA—a private U.S. mining company.[160] Claimants, however, have offered no evidence for this statement. The Slovak Republic is therefore unable to verify its accuracy or whether any of those rights are being exercised.

110. ***Third***, EuroGas II argues that it engages in substantial business activities in the U.S. because "*EuroGas incorporated EuroGas Silver & Gold Inc. Nevada in 2011.*"[161] Again, however, Claimants cannot rely on the activities of other companies to defeat the Slovak Republic's denial-of-benefits, and they offer no evidence for the alleged activity beyond mere statements of Mr. Rauball.

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158 Tombstone Exploration Corporation Form 20-F for Fiscal Year Ended 31 December 2013, p. 19, **R-0153**.

159 *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction, 1 June 2012, ¶ 4.66 (emphasis added), **RL-0018**.

160 Wolfgang Rauball Witness Statement, ¶ 9.

161 Wolfgang Rauball Witness Statement, ¶ 10.

111. In any event, EuroGas II owns no direct shareholding in ESG.[162] Rather, the Swiss entity EuroGas AG—not EuroGas II—owns an interest in ESG. In 2012, EuroGas AG stated: "*The EuroGas Stock Corporation board of directors decided to raise its stake in gold and silver companies in the USA. For this reason, EuroGas AG is acquiring all stocks of EuroGas Silver & Gold Inc., Nevada/USA.*" [163] EuroGas AG's website further evidences that ESG is a subsidiary of EuroGas AG.[164] As explained above, Eurogas II cannot legitimately borrow the business activities of its low-level subsidiary and brandish them as its own.

112. In any event, even ESG has no real business activities. Claimants' assertions relating to the business plans of ESG do not show anything other than nebulous plans for exploiting the historic Banner Silver Mine. There is no information about the availability of funds to engage in the plans set forth and no evidence of any operational activity.

113. In sum, EuroGas II has provided no documentary evidence showing anything remotely close to "*substantial business activity*" in the U.S., and all the evidence points to the opposite conclusion: EuroGas II lacks any physical presence in the U.S., and it has no operational or management activities in that jurisdiction.

3. The Slovak Republic validly denied EuroGas II benefits, regardless of whether the denial applies only prospectively

114. Having shown that Mr. Rauball—a national of Germany—controls EuroGas II and that EuroGas II has no substantial business activity in the U.S., the Slovak Republic validly denied the rights under the U.S.-Slovak BIT to EuroGas II on 21 December 2012. Claimants argue, however, that the Slovak Republic's denial-of-benefits only applies prospectively and thus did not apply at the time of the alleged breaches of the U.S.-Slovak BIT.

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162 The review of the Nevada Secretary of State records for ESG, including ESG's Articles of Incorporation, does not evidence any direct involvement of EuroGas II in ESG. *See* Nevada Secretary of State Records for EuroGas Silver & Gold, Inc., **R-0154**.

163 EuroGas AG Press Release, 27 February 2012, **R-0155**.

164 *See* EuroGas AG Corporate Organizational Chart at http://EuroGas-ag.com/26-1-Status.html, **R-0156**.

115. Recent tribunals have disagreed and applied States' denials-of-benefits retroactively. For example, the tribunal in *Ulysseas v. Ecuador* interpreted an identical denial-of-benefits clause to apply retroactively:

> "A further question is whether the denial of advantages should apply only prospectively, as argued by Claimant, or may also have retrospective effects, as contended by Respondent. ***The Tribunal sees no valid reasons to exclude retrospective effects***. In reply to Claimant's argument that this would cause uncertainties as to the legal relations under the BIT, it may be noted that since the possibility for the host State to exercise the right in question is known to the investor from the time when it made its the investment, it may be concluded that the protection afforded by the BIT is subject during the life of the investment to the possibility of a denial of the BIT's advantages by the host State."[165]

116. Likewise, the tribunal in *Pac Rim v. El Salvador* confirmed that the benefit of the right to arbitrate may be denied retrospectively and that the time-limit for the respondent State to validly deny the right to arbitrate is the filing of its counter-memorial:

> "[T]his is an arbitration subject to the ICSID Convention and the ICSID Arbitration Rules, as chosen by the Claimant under CAFTA Article 10.16(3)(a). Under ICSID Arbitration Rule 41, any objection by a respondent that the dispute is not within the jurisdiction of the Centre, or, for other reasons, is not within the competence of the tribunal 'shall be made as early as possible' and '***no later than the expiration of the time limit fixed for the filing of the counter-memorial'. In the Tribunals view, that is the time-limit in this case here incorporated by reference into CAFTA Article 10.12.2. Any earlier time-limit could not be justified on the wording of CAFTA Article 10.12.2; and further, it would create considerable practical difficulties for CAFTA Parties inconsistent with this provision's object and purpose***, as observed by Costa Rica and the USA from their different perspectives as host and home States (as also by the Amicus Curiae more generally)."[166]

117. Most recently, the tribunal in *Guaracachi v. Bolivia*[167] addressed a similarly-worded denial-of-benefits clause of the U.S.-Bolivia BIT and held:

> "Whenever a BIT includes a denial of benefits clause, ***the consent by the host State to arbitration itself is conditional and thus may be denied by it***, provided that certain objective requirements concerning the investor are fulfilled. All

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165 *Ulysseas, Inc. v. Ecuador*, Interim Award, 28 September 2010, ¶ 173 (emphasis added), **RL-0103**.

166 *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction, 1 June 2012, ¶¶ 4.8.5 (emphasis added), **RL-0018**.

167 *See Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, **RL-0020**.

> investors are aware of the possibility of such a denial, such that no legitimate expectations are frustrated by that denial of benefits.
>
> No one can accept more than what is being offered. In this case, what was offered by both Bolivia and the US, in the BIT concluded between them, was a package of benefits to investors of both countries, ***including the benefit of being able to submit disputes to arbitration, coupled with an express prior reservation of the right to deny those benefits*** if and when the Respondent so decides (subjective requirement) and if the investor's company is or becomes a "shell company" controlled by a company incorporated in a third country (objective requirement). ***The reservation of the right of denial of benefits contained in Article XII operates on the Contracting Parties' offer of consent to arbitration as much as every other benefit conferred by the BIT. Hence, any US investor who invests in Bolivia already knows in advance of the possibility of a denial of benefits by Bolivia—as long as the Article XII requirements are met—and, if it decides to accept the offer of arbitration made by Bolivia in the BIT, it accepts it at face value***."[168]

118. Thus, the Slovak Republic retained the right to deny the benefits of this BIT arbitration until filing this Counter-Memorial. The Slovak Republic's exercise of this right on 21 December 2012 was thus timely.[169]

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168 *See Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, ¶¶ 372-373 (emphasis added), **RL-0020**.

169 Assuming that EuroGas II did somehow "*assume*" an indirect ownership interest in Rozmin, its claims would still be inadmissible because they are derivative in nature and are too remote to be afforded protection under the U.S.-Slovak BIT. Derivative claims are shareholders' claims for the loss in value of their shareholding incurred as a result of an injury suffered by the domestic company. *See, e.g., Douglas: International law of investment claims*, Cambridge University Press, 2009, ¶ 787, **RL-0104**. Derivative claims are based on the premise that, while a shareholder is not directly affected by the host State's measures taken against the domestic company, the loss in value of the shareholders' stake incurred as a result of the measures in question can be adequately measured.

Investment law generally allows derivative claims, but not without limitation. The difficulty related to derivative claims is particularly acute where a derivative investor seeks protection for its indirect shareholding. Indeed, investment tribunals have held that there must be some limit beyond which claims of indirect shareholders would be too remote to be admissible. The tribunal in *Enron v. Argentina* stated in this respect: "*[T]here is indeed a need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company. As this is in essence a question of admissibility of claims, the answer lies in establishing the extent of the consent to arbitration of the host State*."

EuroGas II's claims are a textbook example of derivative claims. EuroGas II seeks recovery to the alleged decrease of the value of its shareholding in Rozmin purportedly incurred as the result of the loss of Rozmin's Excavation Area. However, EuroGas II purports to hold its interest in through several corporate entities, including EuroGas AG and EuroGas GmbH. EuroGas GmbH has however been in bankruptcy proceedings in Austria while EuroGas AG appears to have only recently taken steps to get out of bankruptcy in Switzerland. In bankruptcy proceedings, the economic benefits deriving from the purported ownership interest in Rozmin form part of the bankruptcy assets. As such, these assets should be distributed first to the creditors of the intermediary entity. The economic benefit attaching to the purported

119. But even if the denial-of-benefits could not apply retroactively, the Slovak Republic still *prospectively* denied EuroGas II the right to arbitration. The denial-of-benefits clause under the U.S.-Slovak BIT covers all "*advantages of this Treaty*."[170] It thus applies to the right to the procedural benefits of the U.S.-Slovak BIT, including the right to initiate international arbitration. This was confirmed by the tribunal *Ulysseas v. Ecuador*, which analyzed an identical denial-of-benefits provision:

> "The first question concerns whether there is a time-limit for the exercise by the State of the right to deny the BIT's advantages. In the Tribunal's view, ***since such advantages include BIT arbitration,*** a valid exercise of the right would have the effect of depriving the Tribunal of jurisdiction under the BIT."[171]

120. The tribunal in *Pac Rim v. El Salvador* interpreted a similarly-worded denial-of-benefits provision in the same manner:

> "[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***.'"[172]

121. Thus, unlike some investment treaties than are worded differently (such as the Energy Charter Treaty), the U.S.-Slovak BIT allows the Slovak Republic to deny the right to arbitration itself. The Slovak Republic expressly denied that right to EuroGas II in its letter dated 21 December 2012[173]—one-and-a-half years *before* Claimants exercised their right to arbitration by filing their Request for Arbitration on 25 June 2014.

122. Undeterred, Claimants argue that they accepted the Slovak Republic's offer to arbitrate on 31 October 2011—and thus before the Slovak Republic denied it benefits—when EuroGas sent to the Slovak Republic its letter entitled "*Notification of a Claim against*

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ownership interest in Rozmin would thus be diluted amongst a number of unknown of creditors before even reaching EuroGas II. EuroGas II's derivative claim is simply too remote from the affected company.

170 Article I (2), U.S.-Slovak BIT, **R-0004**.

171 *Ulysseas, Inc. v. Ecuador*, Interim Award, 28 September 2010, ¶ 172 (emphasis added), **RL-0103**.

172 *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), **RL-0018**.

173 Letter from the Slovak Republic to EuroGas Inc., 21 December 2012, **R-0005** where the Slovak Republic states: "*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, lnc. the benefits of the Treaty,* ***including the right to arbitration under Article VI of the Treaty.***" (emphasis added).

the Slovak Republic" (the "**Notification Letter**"). In the Notification Letter, EuroGas II stated that it "*consents to submit this investment dispute with the Slovak Republic to international arbitration and reserves the right to initiate international arbitral proceedings in accordance with any of the procedural ways open by the Treaty*."[174]

123. EuroGas II's argument fails for two reasons. ***First***, the question is not when the investor *agreed* to the State's unilateral offer to arbitrate before benefits were denied; rather, the question is whether the investor *exercised* that right before benefits were denied. Here, EuroGas did not exercise the right to arbitration in its Notification Letter. It only exercised its right to arbitration on 25 June 2014, when Claimants filed their Request for Arbitration.

124. ***Second***, EuroGas did not validly agree to arbitration in its Notification Letter in any event. Article VI of the U.S.-Slovak BIT provides:

> "At any time after six months from the date on which the dispute arose, ***the national or company concerned may choose to consent in writing to*** the submission of the dispute for settlement by conciliation or binding arbitration to the ***International Centre for the Settlement of Investment Disputes ("Centre") or to the Additional Facility of the Centre of pursuant to the Arbitration Rules of the United Nationals Commission on International Trade Law ("UNICTRAL")*** or pursuant to the arbitration rules of any arbitral institution mutually agreed between the parties to the dispute. ***Once the national or company concerned has so consented, either party to the dispute may institute such proceeding provided*** . . . ."[175]

125. Article VI of the U.S.-Slovak BIT thus states that the investor's consent must include a specific choice of arbitration forum. It entrusts that choice solely to the *investor* rather than to the host State and, after that choice is made, allows "*either party*" to initiate arbitration proceedings.[176] Thus, the Slovak Republic can exercise its right to act upon the investor's consent and initiate arbitration only if the consent specifies the arbitration forum or rules. The investor's consent cannot be valid without that specification. EuroGas II's Notification Letter, however, contained no such specification.

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174 Letter from EuroGas Inc. to the Slovak Republic, 31 October 2011, **R-0032**.

175 Article VI (3), U.S.-Slovak BIT (emphasis added), **R-0004**.

176 Article VI (3) of the U.S.-Slovak BIT provides: "*Once the national or company concerned has so consented, either party to the dispute may institute such proceeding provided.*" **R-0004**.

126. Accordingly, *regardless* of whether the U.S.-Slovak BIT permits a retroactive denial of benefits, and *regardless* of whether the relevant event is EuroGas II's consent to arbitration or the exercise of the arbitration right, the Slovak Republic still validly denied the right to arbitration to EuroGas II. The Tribunal thus has no jurisdiction *ratione voluntatis* over EuroGas II's claims.

* * *

127. In conclusion, there are a host of reasons why this Tribunal has no jurisdiction over EuroGas II. Most importantly, it misrepresented its identity to this Tribunal in its Request for Arbitration precisely because the Tribunal's jurisdiction *rests upon* that misrepresentation. EuroGas II has never owned the alleged investment; it does not have standing to bring this claim; and the Tribunal has no jurisdiction over it. In any event, the Slovak Republic has validly denied EuroGas II the benefits of the U.S.-Slovak BIT.

III. THE TRIBUNAL HAS NO JURISDICTION OVER BELMONT

128. Belmont's claims are also fraught with two overarching jurisdictional defects: (*i*) Belmont sold its ownership in the alleged investment to EuroGas I in 2001 and thus does not own the alleged investment, and (*ii*) the Canada-Slovak BIT only covers disputes arising *after* 14 March 2009, and all of Claimants' colorable allegations occurred prior to that date. Each is discussed below in turn.

A. Belmont sold its ownership in the alleged investment to EuroGas I in 2001

129. Belmont's first jurisdictional defect is that it sold its alleged "investment"—a 57% interest in Rozmin—to EuroGas I in 2001. It did so in a Sale and Purchase Agreement dated effective 27 March 2001 (the "**SPA**"), which Claimants did not disclose to this Tribunal but which the Slovak Republic discovered through its own research[177] (now a familiar theme).[178]

130. Contrary to Claimants' suggestion at the provisional measures hearing, this SPA was signed and took effect *before* EuroGas I was dissolved on 11 July 2001, *before* the two-year period for seeking reinstatement expired under Utah law, and *before* EuroGas I was put into involuntary bankruptcy in 2004. Therefore, as of the date of the SPA, EuroGas I still had legal capacity to enter into the SPA to purchase the 57% interest.

131. Claimants have responded by arguing that, despite the SPA, Belmont has retained ownership of the 57% in Rozmin because certain conditions precedent under the SPA were not satisfied. The Slovak Republic hereby submits an expert report from Mr. John Anderson, a partner at the international law firm of Stikeman Elliott LLP in Vancouver, Canada, who is an expert in British Columbia corporate law (the law that governs the SPA). In his expert report, Mr. Anderson provides the following expert opinion:

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177 Share Purchase Agreement between EuroGas Inc. and Belmont Resources Inc., 17 April 2001, **R-0015**.

178 Given the number of jurisdictional problems the Slovak Republic has discovered through its own research rather than from Claimants' disclosures, the Slovak Republic is compelled to reserves its right to raise additional jurisdictional objections as more facts become available through, for example, the document production phase that will take place after the filing of this Counter-Memorial.

> "Based on the documents I have examined, a court applying British Columbia law, if asked to interpret the Share Purchase Agreement, would arrive at the conclusion that, at the time of Closing (as the term is defined in the Share Purchase Agreement):
>
> (a) Belmont transferred to EuroGas ownership over Belmont's 57% interest in Rozmin s.r.o. ("Rozmin"); and
>
> (b) Belmont retained a security interest in the 57% interest, to secure EuroGas' compliance with its covenants under sections 4.1(c) and 4.1(d) of the Share Purchase Agreement."[179]

132. Consistent with Mr. Anderson's expert opinion, Belmont has repeatedly admitted that it transferred the 57% interest and retained the Rozmin shares only as collateral. For example, in its year-end 2002 financial statements, Belmont told the world:

> "***The Company [Belmont] sold its 57% interest in Rozmin s.r.o. effective 27 March 2001***. . . . The Company [Belmont] has recorded the EuroGas transaction as a sale and disposition of a subsidiary and holds the shares as a ***collateral measure only***. EuroGas acquired effective control of Rozmin on March 27, 2001."[180]

133. Similarly, in its Annual Information Form dated 30 September 2002, Belmont stated:

> "***The Issuer [Belmont] sold its 57% interest in Rozmin s.r.o. ("Rozmin") effective March 27, 2001. The accounts and operations of Rozmin (a registered Slovakian company) have been consolidated in the accounts up to the date of disposition***. The Issuer still holds the Rozmin shares pending realization of an agreed $ amount upon sale of restricted common shares issued by EuroGas, Inc."[181]

134. In addition, Belmont's counsel wrote to EuroGas I alleging a breach of the SPA on 16 September 2004, threatening that, unless corrective action was taken, Belmont would seek to "***repossess***" the 57% interest.[182] And on 24 September 2004, Belmont and

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179 John Anderson Expert Report, ¶ 5.

180 Belmont Resources Inc.'s Audited Consolidated Financial Statements Years Ended 31 January 2002 and 2001, note 2, p. 8 (emphasis added), **R-0114**.

181 Belmont Annual Information Form, 30 September 2002 (emphasis added), **R-0116**.

182 Letter from Belmont's counsel, Fang and Associates Barristers & Solicitors, to EuroGas, Inc., 16 September 2004, **R-0117**.

EuroGas I executed a letter agreement by which Belmont agreed not to "***foreclose***" on the collateral interest.[183]

135. If that were not enough, in 2009, the Slovak criminal authorities interviewed the President and Director of Belmont, Mr. Vojtech Agyagos, in connection with a criminal complaint that EuroGas II had itself filed. Testifying under penalty of perjury, Mr. Agyagos stated: "***Based on the fact that Belmont Vancouver sold its shares probably in 2002 to EuroGas, [Belmont] did not suffer any direct damage***" from the alleged acts by the Slovak Republic in this arbitration.[184]

136. Mr. Agyagos thus admitted in 2009 that Belmont held no protected investment and thus had no claim for damages.[185] Either Mr. Agyagos was misleading the Slovak Police in 2009 or it is misleading this Tribunal now. Both alternatives are equally troubling.

137. Lest there be any lingering doubt, Alexander Danicek, an executive of Rozmin from 2008 to 2014, told the Austrian criminal bodies on 17 August 2013 that EuroGas had a 90% share in Rozmin (*i.e.*, the 33% that EuroGas II claims in this arbitration plus the 57% that Belmont sold to EuroGas I in 2001):

> "Question:
>
> What shareholding did the company "EuroGas s.r.o." have in the company "Rozmin", a limited liability company, Rožňava, Slovak Republic?
>
> Answer:
>
> It was a 90-percent share."[186]

138. Further confirming that Belmont does not own the 57% and would not receive damages associated with that interest in this arbitration even if successful, Claimants have publicly

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183 Letter Agreement between Belmont and EuroGas, 24 September 2004, **C-0297**.

184 Witness Statement of Mr. Vojtech Agyagos provided with respect to criminal proceedings No. PPZ-155/BPK-S-2008, 16 March 2009, (with extended translation) (emphasis added), **R-0115**.

185 This is also consistent with the fact that Belmont was not even included in the Notification Letter that EuroGas II sent to the Slovak Republic in October 2011. Letter from EuroGas Inc. and Belmont Resources Inc. to the Government of the Slovak Republic, 23 December 2013, **C-0042**. Belmont only notified its claim on 23 December 2013.

186 Examination of Alexander Danicek by Austrian criminal authorities, 17 August 2013, **R-0157**.

acknowledged that Belmont will only receive 3.5% interest in any award that EuroGas obtains in this proceeding and will not be responsible for any of the costs of arbitration.[187] These facts are irreconcilable with Belmont's representation to this Tribunal that it is still the 57% owner of the alleged investment at issue.

139. To be sure, Belmont made various statements that conflict with the above statements and sworn testimony. But it is the Claimants who bear the burden to prove the facts necessary for the establishment of the Tribunal's jurisdiction.[188] Relying on *Saipem v. Bangladesh*, the tribunal in *Emmis v. Hungary* recently confirmed this principle:

> "The Tribunal must decide this question finally at the jurisdictional stage on the balance of probabilities. ***The Claimants bear the burden of proof***. If the Claimants' burden of proving ownership of the claim is not met, the Respondent has no burden to establish the validity of its jurisdictional defenses. As the tribunal held in Saipem v Bangladesh: 'In accordance with accepted international practice (and generally also with national practice), a party bears the burden of proving the facts it asserts. For instance, an ICSID tribunal held that ***the Claimant had to satisfy the burden of proof required at the jurisdictional phase*** . . . .'"[189]

140. Having stated repeatedly and under the penalty of perjury that it does *not* own the alleged investment, Belmont cannot now say that the Tribunal's jurisdiction rests on the fact that it *does* own the investment. The fact that Belmont both claimed and denied ownership whenever it suited their interests should hardly be the basis for giving them the benefit of the doubt.

141. Finally, the fact that Belmont remains registered as a shareholder of Rozmin is legally irrelevant.[190] The SPA was signed in 2001, when registration of the transfer of shares under the SPA in the Slovak Commercial Register was governed by the Act No.

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187 Belmont's News Release, 20 November 2013, **R-0158**.

188 *See Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, 1996 I.C.J. 803, Judgment of Preliminary Objection, Separate Opinion of Judge Higgins, 12 December 1996, ¶ 32, **RL-0105**.

189 *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶ 171 (emphasis added), **RL-0106**; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 68, **RL-0107**.

190 Claimants' Memorial, ¶ 27 and Extract from the Business Register of the Slovak Republic, 21 December 2014, **C-0074**.

513/1991 Coll., Commercial Code, as amended. Under that Act, the registration of the change in ownership of shares in a limited liability company was not dispositive of ownership.[191]

142. Thus, Belmont does not own the alleged investment, it has no standing to bring its claims, and the Tribunal has no jurisdiction ratione *materiae* over them.

B. The Canada-Slovak BIT only covers disputes arising after 14 March 2009

143. But even if the Tribunal concluded that Belmont still owned the 57% interest (despite Belmont's repeated admissions that it sold it), the Tribunal still would not have jurisdiction over Belmont's claim because it pre-dates the three-year "reach-back" period under the Canada-Slovak BIT. Article 15(6) of the Canada-Slovak BIT provides that it will only "*apply to any dispute that has arisen not more than three years prior to its entry into force*."[192] The Canada-Slovak BIT entered into force on 14 March 2012. Thus, any dispute that arose prior to 14 March 2009 falls outside the Tribunal's jurisdiction *ratione temporis* over Belmont.

144. The earliest date that the Canada-Slovak BIT can apply—14 March 2009—is *two days* before Mr. Agyagos told the Slovak criminal authorities (in the sworn testimony quoted above) that the Slovak Republic had caused EuroGas "*direct damage*," which was "*very high*."[193] In other words, Mr. Agyagos admitted that whatever alleged damage had been caused by the Slovak Republic *had already been incurred before the Canada-Slovak BIT*

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191 Commentary to Act No. 513/1991 Coll., Commercial Code, as amended – wording effective until 30 September 2012, **R-0159**. On 1 October 2012 the amendment No. 246/2012 Coll. to the Commercial Code became effective and the rules on the effects of the registration of transfer of a majority ownership interest in the Slovak Commercial Register changed. Since 1 October 2012, the transfer of the majority interest in a Slovak limited liability company only becomes effective with the registration. Commentary to Act No. 513/1991 Coll., Commercial Code, as amended – wording effective as of 1 October 2012, **R-0160**. That change however is irrelevant for Belmont's ownership of ownership interest in Rozmin because it only affected transfers that took place after 1 October 2012.

192 Article 15(6), Canada-Slovak BIT, **R-0006**; Article 15(6) of the Canada-Slovak BIT is an inter-temporal provision addressing the successive application of the old Canada-Slovak BIT dated 15 November 1990 and in force on 1 July 1992, which was replaced by the Canada-Slovak BIT as of 14 March 2012.

193 Witness Statement of Mr. Vojtech Agyagos provided with respect to criminal proceedings No. PPZ-155/BPK-S-2008, 16 March 2009, (with extended translation), **R-0115**.

became applicable. Mr. Agyagos' testimony is unsurprising, since Rozmin had to leave the Excavation Area four years before March 2009.

145. In an effort to blur the chronology of facts, Claimants argue that the acts of the Slovak authorities before and after the reassignment of the Excavation Area constitute a single, continuing "*creeping expropriation*."[194] That characterization is manifestly baseless. In reality, Claimants advance two distinct types of claims.

146. ***First***, Claimants advance a claim for wrongful reassignment of Rozmin's Excavation Area in 2005 (the **"Reassignment Claim**"). This claim is not for *creeping* expropriation; it is for *outright* expropriation.

147. ***Second***, Claimants complain of the Slovak Republic's subsequent failure to remedy the reassignment of the Excavation Area in administrative and judicial proceedings. This claim, however labelled, is in essence a denial-of-justice claim (the "**Denial-of-Justice Claim**").

148. As discussed below, the Reassignment Claim arose upon the assignment of the Excavation Area on 3 May 2005 and thus falls outside the Tribunal's jurisdiction *ratione temporis* under the Canada-Slovak BIT.

1. The Reassignment Claim arose in 2005

149. The Reassignment Claim is indisputably an outright expropriation claim. It is a claim based on the alleged unlawful taking of the Excavation Area assigned to Rozmin. Indeed, Claimants themselves characterize their claims as an expropriation when they open their Memorial stating that "*the taking by the Slovak Republic of Claimants' rights and investment is a textbook case of expropriation*."[195] Claimants' other claims are merely duplicative of and residual to their expropriation claim.

150. Accepting *pro tem* that the reassignment of the Excavation Area constituted an unlawful expropriation, that expropriation was completed on 3 May 2005—the day when the DMO

194 Claimants' Rejoinder on Provisional Measures, ¶¶ 87-88.

195 Claimants' Memorial, ¶ 6.

reassigned the Excavation Area to Economy Agency RV, s.r.o. ("**Economy Agency**") and when Rozmin's rights to the Excavation Area lapsed. This claim is thus based on an action with a clear-cut date when all the relevant rights were taken away.

151. Creeping expropriation, by contrast, is—to use Claimants' own words—"*a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property*."[196] Nothing of that kind occurred in this case.

152. Rather, on Claimants' own case, the expropriation of the Rozmin's Excavation Area was completed at a single specific moment. Indeed, Claimants recognize as much when they state that "*the taking was performed **abruptly**, without warning or prior notice, let alone an invitation to cure any default or an opportunity for Rozmin or Claimants to set out their position as required by the most basic rules of due process*."[197]

153. As explained in the *Mavrommatis* case, international law defines a dispute as a "*[a] disagreement on a point of law or fact, a conflict of legal views or of interests between two persons*."[198] Here, the dispute concerning the Reassignment Claim arose upon the alleged taking in 2005.

154. *African Holding Company v. Congo* illustrates the point. There, the tribunal assessed a claim on Congo's non-payment under a contract. Congo objected to the Tribunal's jurisdiction on the basis that the claimant only acquired the requisite nationality to bring a BIT claim in 2000 and did not have the nationality when the dispute arose. Congo claimed that the dispute arose in 1990s when the claimant began to complain about its non-payment. The claimant countered that the dispute only arose in 2004-2005 when Congo for the first time refused to pay the entirety of the debt and decided to pay only a

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196 Claimants' Memorial, ¶ 226 referring to *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶ 20.22, **CL-0136**.

197 Claimants' Memorial, ¶ 6.

198 *Mavrommatis Palestine Concessions*, P.C.I.J., Series A, No. 2, Objection to the Jurisdiction of the Court, 30 August 1924, p. 11, **RL-0108**.

small portion thereof.[199] The tribunal accepted Congo's objection and found that the dispute on non-payment under a contract arose as of the date of the breach:

> "La question à laquelle le Tribunal doit répondre ***est celle de savoir si le différend concerne le règlement de factures restées impayées depuis le tout début ou si le différend n'est né qu'à un moment postérieur à la date critique lorsque la RDC aurait refusé de payer***.
>
> […]Le Tribunal conclut à cet égard que la nature du différend concerne le fait que des travaux ont été exécutés sous contrat et que leur coût n'a pas été réglé pendant une longue période de plus de quinze ans. Que la RDC ait officiellement refusé de payer ou ait gardé le silence, est sans importance pour la nature du différend. Le fait est que la RDC a manqué à ses obligations aux termes du contrat, ce qui se rattache donc à une situation d'inexécution envisagée à l'article 7.1.1 des Principes d'UNIDROIT. Aux termes de ce même article, l'inexécution comprend l'exécution défectueuse ou tardive. En outre, le fait que la RDC offrait de renégocier les créances et de ne payer qu'une fraction de leur valeur ne peut pas être assimilé à un refus officiel. Même si la RDC avait accepté de payer, et n'a en fait pas payé, la nature du différend serait toujours restée la même: avant comme après la date critique: le montant des travaux exécutés n'a pas été réglé."[200]

155. This objective test is particularly appropriate where, as here, a dispute relates to an outright expropriation. Such a dispute may reasonably arise only as of the moment of the expropriation. Under the objective test, the Reassignment Claim arose on the day of the reassignment, *i.e.*, 3 May 2005.

156. This approach was confirmed by the Permanent Court of International Justice ("**PCIJ**") in *Phosphates of Morocco,* a diplomatic protection case brought by Italy against France for the alleged wrongful expropriation of licenses to prospect phosphates in Morocco granted to the Italian citizen Mr. Tassara. France's consent to jurisdiction, effective towards Italy as of 7 September 1931, was specifically limited to "*any disputes which*

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199 *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République démocratique du Congo*, ICSID Case No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité, ¶ 121, **RL-0022**.

200 *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République démocratique du Congo*, ICSID Case No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité, ¶ 101 (emphases added), **RL-0022**.

may arise after the ratification of the present declaration with regards to situations or facts subsequent to such ratification […]".[201]

157. The decrees monopolizing the phosphates ("*dahirs*") were adopted in 1920, following which Mr. Tassara applied to the local mining authority, the Department of Mines, to have his rights restituted. This application was rejected in 1925. Mr. Tassara then took several other unsuccessful steps to remedy this removal. France thus objected to Italy's claim on the ground that the dispute concerned facts that preceded the cut-off date of its ratification of the declaration of acceptance of PCIJ's jurisdiction. Italy countered that France was liable for a continuing breach, which was only completed subsequently to the cut-off date of 1931.[202] The PCIJ upheld France's objection. It stated that a dispute may only arise out of its "*real causes*," as opposed to situations or factors which merely follow-up or confirm these real causes:

> "[I]t is necessary always to bear in mind the will of the State which only accepted the compulsory jurisdiction within specified limits, and consequently only intended to submit to that jurisdiction disputes having, actually arisen from situations or facts subsequent to its acceptance. ***But it would be impossible to admit the existence of such a relationship between a dispute and subsequent factors which either presume the existence or are merely the confirmation or development of earlier situations or facts constitute the real causes of the dispute***."[203]

158. The PCIJ concluded that it was the decrees on the monopolization—adopted long before the ratification of France's declaration—that were the real source of the dispute on expropriation. At the same time, the PCIJ rejected Italy's attempt to bring the dispute within the purview of its jurisdiction by virtue of a plea of a denial of justice:

> "***The Court cannot regard the denial of justice alleged by the Italian Government as a factor giving rise to the present dispute. In its Application, the Italian Government has represented the decision of the Department of Mines as an unlawful international act***, because that decision was inspired by the will to get rid of the foreign holding and because it therefore constituted a violation of

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201 *Phosphates in Morocco (Italy v. France)*, PCIJ Reports, Ser. A/B No. 74, 1938, p. 16, **CL-0033**.

202 Most notably in 1933, when the French Ministry of Foreign Affairs stated in a note that the decision of the Department of Mines was final and unappealable. *Phosphates in Morocco (Italy v. France)*, PCIJ Reports, Ser. A/B No. 74, 1938, p. 16, **CL-0033**.

203 *Phosphates in Morocco (Italy v. France)*, PCIJ Reports, Ser. A/B No. 74, 1938, p. 16 (emphasis added), **CL-0033**.

> the vested rights placed under the protection of the international conventions. ***That being so, it is in this decision that we should look for the violation of international law-a definitive act which would, by itself, directly involve international responsibility***. This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States. ***In these circumstances the alleged denial of justice, resulting either from a lacuna in the judicial organization or from the refusal of administrative or extraordinary methods of redress designed to supplement its deficiencies, merely results in allowing the unlawful act to subsist. It exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it***."[204]

159. These principles should guide the Tribunal here. The "*real cause*" of the dispute between the Slovak Republic and Belmont is the reassignment of the Excavation Area. The subsequent alleged failure of the Slovak authorities to redress the reassignment of the Excavation Area cannot create a new dispute entirely disconnected from the underlying reassignment.

160. Similarly, the tribunal in *Lucchetti v. Peru* concluded it had no jurisdiction *ratione temporis* to hear a dispute with the same subject matter as a pre-treaty dispute. In that case, claimants alleged the existence of two disputes. The original dispute related to the annulment of the licenses held by the local company and arose before the relevant Chile-Peru BIT came into force (the "**1998 Dispute**"). The removal of these licenses was then annulled based on remedies asserted by the local company. A few years later, however, Peru issued new decrees revoking these licenses altogether. Claimants thus asserted that a new dispute arose when Peru issued the revocation decrees and this new dispute was already covered by the Chile-Peru BIT (the "**2001 Dispute**"). The tribunal thus analyzed whether the original dispute pre-dating the relevant BIT was the same as the dispute before the tribunal:

> "The Tribunal must therefore now consider whether, in light of other here relevant factors, the present dispute is or is not a new dispute. In addressing that issue, the Tribunal must examine the facts that gave rise to the 2001 dispute and those that culminated in the 1998 dispute, seeking to determine in each instance whether and to what extent the subject matter or facts that were the real cause of the disputes differ from or are identical to the other. ***According to a recent ICSID***

[204] *Phosphates in Morocco (Italy v. France)*, PCIJ Reports, Ser. A/B No. 74, 1938, pp. 13, 28 (emphasis added), **CL-0033**.

> ***case, the critical element in determining the existence of one or two separate disputes is whether or not they concern the same subject matter. The Tribunal considers that, whether the focus is on the "real causes" of the dispute or on its "subject matter", it will in each instance have to determine whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute***."[205]

161. The tribunal in *Lucchetti* held that the subject-matter of the 2001 Dispute was the same as the 1998 Dispute and noted *inter alia* that the reasons for the adoption of the new decrees were directly related to the considerations that gave rise to the 1998 Dispute:[206]

> "The reasons for the adoption of Decree 259 were thus directly related to the considerations that gave rise to the 1997/98 dispute: the municipality's stated commitment to protect the environmental integrity of the Pantanos de Villa and its repeated efforts to compel Claimants to comply with the rules and regulations applicable to the construction of their factory in the vicinity of that environmental reserve. ***The subject matter of the earlier dispute thus did not differ from the municipality's action in 2001 which prompted Claimants to institute the present proceedings. In that sense, too, the disputes have the same origin or source***: the municipality's desire to ensure that its environmental policies are complied with and Claimants' efforts to block their application to the construction and production of the pasta factory. ***The Tribunal consequently considers that the present dispute had crystallized by 1998. The adoption of Decrees 258 and 259 and their challenge by Claimants merely continued the earlier dispute***."[207]

162. Because the dispute before the Tribunal had the same subject matter as the dispute pre-dating the applicable investment treaty, the Tribunal ultimately declined jurisdiction *ratione temporis* to hear Lucchetti's claims.[208]

163. As in *Lucchetti*, the Slovak administrative and judicial decisions at issue here "*merely continued the earlier dispute*."[209]

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[205] *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 (emphasis added), **RL-0021**.

[206] *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, ¶ 53, **RL-0021.**

[207] *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, ¶ 53 (emphasis added), **RL-0021.**

[208] *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, ¶¶ 59-62, **RL-0021**.

164. Unable to rebut these authorities, Claimants argue that a dispute exists only once the parties have *articulated* their disagreement. In *Lucchetti*, however, the tribunal quoted decisions of the ICJ and held 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."[210]

165. Along the same lines, the tribunal in *Teinver v. Argentina* stated as follows:

> "To instigate a dispute, therefore, refers to the time at which the disagreement was formed, which can only occur once there has been at least some exchange of views by the parties. It does not refer to the commission of the act that caused the parties to disagree, for the very simple reason a breach or violation does not become a 'dispute' until the injured party identifies the breach or violation and objects to it."[211]

166. Even under this "more demanding" standard requiring that the parties first articulate their claims, the dispute on the Reassignment Claim still arose in 2005 and in any event before the cut-off date of 14 March 2009. This dispute in fact arose as soon as Rozmin asserted conflicting claims immediately after the reassignment in 2005. Rozmin initiated proceedings before the Slovak judiciary in September 2005 and clearly expressed its disagreement with the reassignment of the Excavation Area.

167. It is wholly irrelevant that the dispute regarding the reassignment before Slovak authorities was not articulated in the terms of an investment treaty in 2005 and that no specific violations of international law were made at that time. This is confirmed by the wording of Article X(2) of the Canada-Slovak BIT. That provision states that "*if the dispute has not been settled amicably within a period of six months from the date on*

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209 *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, ¶ 53, **RL-0021**.

210 *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, ¶ 48; **RL-0021**; *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), **RL-0022**.

211 *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, **RL-0109**.

which the dispute was initiated, it may be submitted by the investor to arbitration." Thus, the Canada-Slovak BIT expressly distinguishes between the moment when a dispute is *initiated, i.e.*, notified to the host state and articulated in terms of the investment treaty, and the moment when the dispute *arises*. The moment when a dispute arises thus necessarily pre-dates the moment when it is initiated.

168. Claimants' assertion was attempted by the claimants in *Lucchetti* and rejected by that tribunal:

> "It is true, of course, that Claimants are entitled to have this Tribunal adjudge rights and obligations set forth in the BIT. But this is so only if and when the claim seeks the adjudication of a dispute which, pursuant to Article 2 of the BIT, is not a dispute that arose prior to that treaty's entry into force. The allegation of a BIT claim, however meritorious it might be on the merits, does not and cannot have the effect of nullifying or depriving of any meaning the ratione temporis reservation spelled out in Article 2 of the BIT.7 Further, a pre-BIT dispute can relate to the same subject matter as a post-BIT dispute and, by that very fact, run afoul of Article 2. That, as has been seen above, is the case here."[212]

169. Therefore, the moment when a dispute *arises* must be determined objectively and cannot depend solely on the formalistic manner of articulation of claims.

170. But even accepting, *pro tem*, that a dispute only arises when opposing views are formulated in terms of international investment law, the dispute before this Tribunal had been so formulated as early as in 2005 and then again in 2008, thus conclusively disposing of Claimants' assertion that the present dispute arose after 14 March 2009.

171. On 13 January 2005, Rozmin's attorney wrote a letter to the DMO complaining about the opening of the tender to reassign the Excavation Area. Rozmin stated that a withdrawal of its right to explore the Excavation Area would amount *inter alia* to a violation of the bilateral investment treaty with Canada:

> "It is also significant that the existing investments of about SKK 120,000,000 were financed by foreign investors – the companies Belmont Resources Inc. with its seat in Canada and EuroGas GmbH. with its seat in the Federal Republic of Austria, whose investments are protected by bilateral investment treaties

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[212] *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, ¶ 59; **RL-0021**.

> concluded with the Federal Republic of Austria and with Canada. […] It is undisputable that the unlawful withdrawal of the excavation area, which will evidently occur without any compensation, is in conflict with the stated international treaties that have precedence over the Slovak laws, *i.e.*, also over Act No. 44/1988 Coll."[213]

172. On 3 November 2005, Mr. Agyagos, executive director of Rozmin and the President and CEO of Belmont, wrote to the then Minister of Economy of the Slovak Republic Mr. Malchárek. In the letter, Belmont's President and CEO complains to the Minister about the reassignment of the Excavation Area and expressly threatens with investment arbitration against the Slovak Republic:

> "[W]e are convinced that neither the Slovak courts nor the relevant international institutions to which we intend to subsequently refer, will make any allowances for the interests of the former Minister, ***and they will proceed strictly under law and international treaties on mutual support and protection of investments (because the shareholders of Rozmin a.s.ro. are foreign companies)***, which can cause to the Slovak Republic considerable damage in the form of an obligation to compensate damage including the lost profit that will range approximately at hundreds of millions of crowns, as well as damage of reputation and cause of an international scandal of similar extent as it was, for example, in the recent so-called ČSOB case."[214]

173. It is thus beyond doubt that Belmont believed in 2005 that an investment dispute arose with regard to the reassignment and articulated this dispute before the Slovak authorities.

174. On 22 September 2008—*i.e.*, almost six months before the cut-off date—EuroGas GmbH, Rozmin's shareholder and the first entity of the Claimants' group to have had an ambition to initiate investment arbitration against the Slovak Republic, also wrote to the Slovak Ministry of Economy with a complaint on the allegedly unlawful treatment of Rozmin's right to explore the Excavation Area. In this letter, EuroGas GmbH also threatened an international investment claim:

> "[T]he Ministry's mining offices have infringed upon the legal rights of Rozmin s .r.o . and its foreign shareholders and have opened the Slovak Republic to ***potentially class-action lawsuits with foreign investors which potentially will claim damages because of their investment in Rozmin s .r.o. and the loss of the mining concession as well as potential loss of profit from one of the largest talc***

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213 Rozmin's complaint against DMO's acts, 13 January 2005, **R-0161**.

214 Letter from Mr. Agyagos and Belmont to the Minister of Economy, 3 November 2005 (emphasis added), **R-0162**.

> mines in the world. […] We therefore would like to believe that the Slovak Republic as a full Member of the European Union ***is finally also protecting the rights of foreign investors***."[215]

175. There can be no clearer evidence that the dispute had already arisen in 2005. By 14 March 2009, both Belmont and EuroGas GmbH had stated that the reassignment of the Excavation Area amounted to a violation of bilateral investment treaties and clearly formulated their intention to bring an investment treaty claim.

176. Thus, under any of the standards adopted by international courts and tribunals, this dispute arose prior to 14 March 2009, when the Canada-Slovak BIT became effective.

2. The Denial-of-Justice Claim

177. Once the dispute over the reassignment of the Excavation Area was submitted to the Slovak Republic's administrative and judicial authorities, the treatment by these authorities may only give rise to a claim for denial of justice. The principles embodied in the standard of denial of justice specifically address the interplay between States' responsibility under international law and their decision-making in multi-level administrative or judicial proceedings. Denial of justice thus can be seen as *lex specialis* governing State liability in such matters, despite the existence of other, more general standards of protection.

178. The table below shows the denial-of-justice claims that could conceivably fall within the Tribunal's jurisdiction *ratione temporis* under the Canada-Slovak BIT:

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[215] Letter from EuroGas GmbH to the Minister of Economy of the Slovak Republic, 22 September 2008, **R-0163**.

DATE	EVENT
1 Jan 2002 to 1 Jan 2005	Three-year period in which there was no excavation
3 May 2005	DMO reassigns Excavation Area to Economy Agency
7 Feb. 2007	Regional Court affirms
27 Feb. 2008	Supreme Court reverses on procedural grounds
2 July 2008	DMO follows Supreme Court decision and reassigns the Excavation Area to VSK Mining s.r.o.
12 Jan. 2009	MMO affirms
14 March 2009	Canada-Slovak BIT Takes Effect
3 Feb. 2010	Regional Court affirms
18 May 2011	Supreme Court reverses on procedural grounds
30 March 2012	DMO follows Supreme Court decision reassigns the Excavation Area to VSK Mining s.r.o.
1 Aug. 2012	MMO affirms (which Rozmin does not appeal)

179. Thus, the Tribunal could only conceivably have jurisdiction *ratione temporis* under the Canada-Slovak BIT over the four events from 3 February 2010 to 1 August 2012. As shown above, the only DMO decision that occurred during that time period was the DMO decision of 30 March 2012, which Rozmin voluntarily did not appeal to the Slovak courts. The Slovak Republic explains the legal consequences of this below in Section VII.

180. Claimants' reliance on *Jan de Nul v. Egypt*[216] is unavailing. In *Jan de Nul*, the tribunal ruled that the dispute had not crystalized prior to the final judgment of the court of Ismaïlia.[217] This was understandable under the facts of *Jan de Nul* because, unlike here,

[216] Claimants' Rejoinder on Provisional Measures, ¶ 85.

[217] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, ¶ 128, **RL-0110**.

there had been no State act prior to the involvement of the courts. Thus, the interference of the State through its courts had been a "*decisive factor*":

> "It is clear, however, that the reasons, which may have motivated the alleged wrongdoings of the SCA at the time of the conclusion and/or performance of the Contract, do not coincide with those underlying the acts of the organs of the Egyptian State in the post-contract phase of the dispute. Since the Claimants also base their claim upon the decision of the Ismaïlia Court, the present dispute must be deemed a new dispute.
>
> ***The intervention of a new actor, the Ismaïlia Court, appears here as a decisive factor to determine whether the dispute is a new dispute***. As the Claimants' case is directly based on the alleged wrongdoing of the Ismaïlia Court, the Tribunal considers that the original dispute has (re)crystallized into a new dispute when the Ismaïlia Court rendered its decision."[218]

181. The situation here is different. The Slovak Republic intervened in the exercise of its sovereign powers from the very beginning, on 3 May 2005, when it reassigned the Excavation Area to Economy Agency. Unlike in *Jan de Nul*, the Slovak Republic's administrative bodies and courts are not alleged to have *worsened* Claimants' status after the reassignment of the Excavation Area; Claimants only claim that the administrative bodies and courts failed to provide redress by restoring Rozmin's rights.

182. Finally, Claimants argue that the Slovak Republic somehow created an independent basis for the Tribunal's jurisdiction *ratione temporis* in its letter dated 2 May 2012.[219] In that letter, the Slovak Republic stated:

> "[T]he administrative procedure before the Slovak mining offices is still pending, ***therefore any discussions regarding the alleged claims of EuroGas Inc, seems to me to be premature prior relevant decisions of local authorities are rendered***. Therefore, as long as the above mentioned proceedings are ongoing, the Ministry of Finance of the Slovak Republic is of the view that this dispute could not be amicably settled at this stage."[220]

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218 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, ¶ 128 (emphasis added), **RL-0110**.

219 Letter from the Slovak Republic, 2 May 2012, **C-0040**.

220 Letter from the Slovak Republic, 2 May 2012 (emphasis added), **C-0040**.

183. The Slovak Republic's letter related solely to the claims of EuroGas II, not Belmont—which did not raise claims until over a year-and-a-half later.[221] More fundamentally, the Slovak Republic's statements were limited to the possibility of settlement discussions. These discussions were premature prior to the closing of administrative and judicial proceedings because the Slovak Republic was not empowered to influence the outcome of these proceedings in any manner. As discussed below, Claimants' Denial-of-Justice Claim is substantively defective until all remedies are exhausted. Thus, the Slovak Republic's letter concerned the requirement of finality for a Denial-of-Justice Claim rather than jurisdiction *ratione temporis*.

* * *

184. In sum, the Tribunal has no jurisdiction *ratione materiae* over any of Belmont's claims because Belmont sold its 57% interest in the alleged investment to EuroGas I in 2001. Even if Belmont did not sell its 57% interest, however, the Tribunal would have no jurisdiction *ratione temporis* over Belmont's claims arising before 14 March 2009.

[221] Letter from EuroGas Inc. and Belmont Resources Inc. to the Government of the Slovak Republic, 23 December 2013, **C-0042**.

IV. THE REAL REASON THAT ROZMIN LOST THE EXCAVATION AREA

185. Even if the Tribunal had jurisdiction (it does not), Claimants' case still fails because it was Claimants and their investment, not the Slovak Republic, who caused the loss of the Excavation Area. The fundamental liability issue is whether Rozmin commenced excavation before 1 January 2005—which all Parties agree was the end of the statutory three-year period under the 2002 Amendment. It is undisputed that Rozmin did not do so. And the Slovak Republic had nothing to do with Rozmin's failure to commence excavation during that time period.

186. That can—and should—be the beginning and end of the matter.

A. Claimants' fictional story

187. To obfuscate this otherwise straightforward analysis, Claimants endeavor to sway the equities in their favor by attempting to give the impression that they invested in a wildcard mine and de-risked it by confirming talc reserves and thus converted it into a bonanza. Once the hard work was done and substantial reserves were confirmed—so Claimants' story goes—the Slovak Republic reassigned the Excavation Area to a well-connected local businessman, suggesting that corruption was involved.

188. That story is a fiction. In fact, the Excavation Area was transferred to Rozmin in 1997 after the initial exploration[222] (but not de-risking) work was complete, and Rozmin never did anything meaningful with the Excavation Area thereafter. *That* is why Rozmin lost the Excavation Area: because for seven years it did no excavation at the site.

189. And it never came close.

[222] On 5 June 1997 the District Mining Office approved the transfer of the excavation area Gemerská Poloma, **C-0123**, and on 11 June 1997 the transfer agreement was concluded between Rozmin s.r.o. and Geologická služba SR, **C-0023**. On 24 June 1997 the District Mining Office ratified its approval, **C-0024**.

B. Types of activities at an excavation area

190. There are two general types of activities that must be performed at an excavation area:

(a) surface construction activities; and

(b) mining activities.

191. An example of the first activity—surface construction activities ("**Surface Construction**")—is the construction of a mining water treatment plant, which is often necessary when water flowing out of the mine needs to be drained into a nearby stream and, to avoid any contamination, a water treatment plant is necessary.

192. Examples of the second activity—mining activities—are:

(a) opening works, which makes the deposit accessible from the surface ("**Opening Works**");

(b) preparation works, which is the development both on the surface and in the deposit after the Opening Works such that a specific excavation method can be used ("**Preparation Works**"); and

(c) excavation of the deposit, which is the actual commercial production of the minerals from the deposit ("**Excavation**").[223]

193. These three activities constitute mining works ("**Mining Works**"). It is the last type—Excavation—that the 2002 Amendment required to be commenced within three years.[224] Section 55 of the Decree No. 21/1989 Coll. confirms the sequential order of these

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223 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, **R-0058**, so defined these terms, relying on technical literature. The definition of excavation was added into the Slovak legislation in 2007 as follows: "*[…] excavation is an activity of an organization at the excavation area, by the means of which the mineral is obtained from the deposit through the excavation methods in accordance with a permit from the district mining office and a valid plan for opening, preparation and excavation […]*," **R-0164**. Thus, this definition is not materially different than the one previously adopted by the District Mining Office.

224 Section 27 (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-0062**.

activities, stating: "*Excavation works may be initiated only after the completion of required [O]pening and [P]reparatory works . . . .*"[225]

194. Rozmin started Opening Works in 2001,[226] but had to stop no later than November 2001[227] for lack of financing.[228] At that point in time, it had performed less than 10% of the Opening Works. Rozmin never did any more Opening Works—and therefore never came close to starting Preparation Works or Excavation. Indeed, during the three-year period between 1 January 2002 and 1 January 2005, Rozmin engaged in no Mining Works at all.

195. It is not surprising that Rozmin engaged in no Mining Works while under the ownership of EuroGas I and Belmont. Neither EuroGas I nor Belmont could provide it with the required capital. In his witness statement in this arbitration, Mr. Agyagos admits that "*Belmont had incurred significant losses in 2000*," and therefore "*contemplated in early 2001, selling its 57% interest in Rozmin to EuroGas*."[229] Mr. Agyagos further admits that, because Belmont was suffering losses, "*EuroGas agreed to arrange the necessary financing to place the Gemerska Poloma talc deposit into Commercial Production*" within one year from the date of execution of the SPA on 17 April 2001.[230]

196. This admission is important. It is recognition by Claimants' that (*i*) it was feasible to achieve commercial production within one year, but (*ii*) it was entirely dependent on EuroGas I's ability to raise the necessary capital. Despite EuroGas I's agreement to provide the capital, Mr. Agyagos also admits that EuroGas I failed to provide capital through at least 8 November 2003.[231]

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225 Section 55 of the Decree No. 21/1989 Coll. of the Slovak Mining Office on Safety and Health Protection at Work and Safety of Operation with respect to Mining Activities and Activities Carried out by Mining Means in Underground, **R-0165**.

226 Peter Čorej Witness Statement, ¶ 40.

227 Letter from Rozmin s.r.o. to the District Mining Office, 30 November 2001 (Ref. 2304), **C-0026**.

228 Peter Čorej Witness Statement, ¶¶ 45-46.

229 Vojtech Agyagos Witness Statement, ¶ 15.

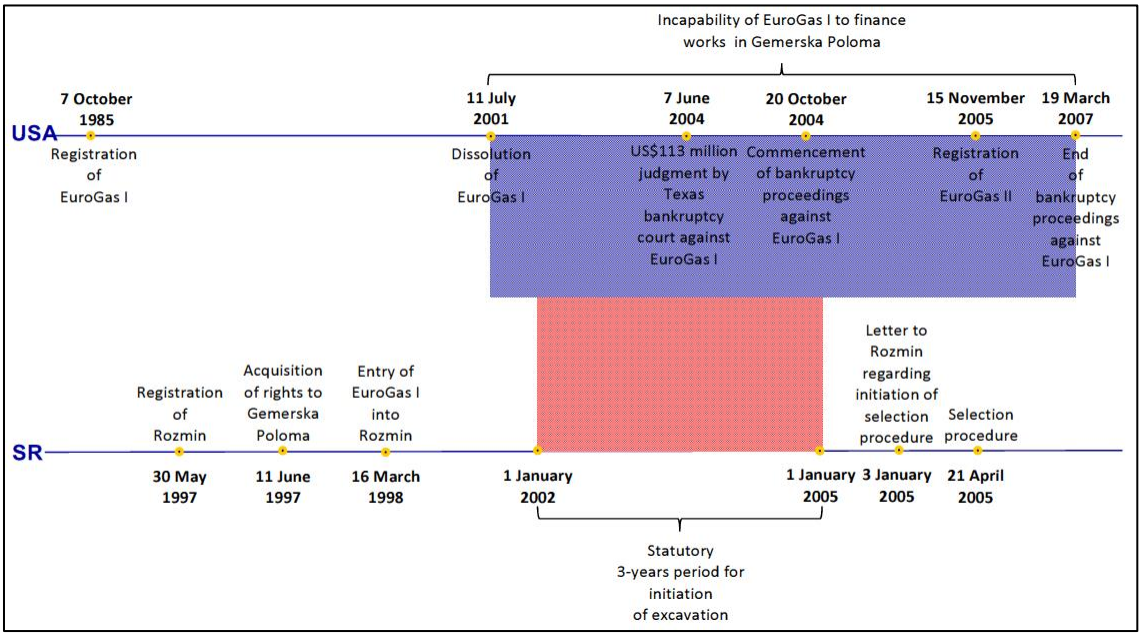
230 Vojtech Agyagos Witness Statement, ¶ 16.

231 Vojtech Agyagos Witness Statement, ¶ 28.

197. In other words, two thirds of the way through the critical three-year period to bring the mine to commercial production, EuroGas I failed to deliver the promised capital on which commercial production depended. Mr. Agyagos additionally admits that EuroGas I made a renewed commitment to provide capital on 27 April 2004, but that EuroGas I defaulted on that commitment as well.[232]

198. Figure 1 below—which the Slovak Republic presented at the provisional measures hearing in Paris on 17 March 2015—compares the overlap between the financial and legal trouble that EuroGas I was experiencing in the U.S. (the top line) with Rozmin's non-activity during the three-year period in the Slovak Republic (the bottom line):

Figure 1



199. It therefore is not surprising that EuroGas I did not inject capital into Rozmin's mining project in the Slovak Republic. EuroGas I left Rozmin starved for capital, and Rozmin never came close to reaching the point where actual Excavation could begin.

200. After three years of no Excavation under the 2002 Amendment (seven years, if one counts from when Rozmin was first assigned the Excavation Area), the DMO followed

232 Vojtech Agyagos Witness Statement, ¶ 29.

the mandate under the 2002 Amendment and assigned the Excavation Area to a third-party through an open tender.[233]

201. To understand how Rozmin got to this point, it is necessary to go back in time to the beginning of the Gemerská Poloma talc deposit.

C. The Gemerská Poloma talc deposit

1. 1988-March 1995: Discovery of the deposit and initial exploratory works

202. The Excavation Area is located in the Košice region in Eastern Slovakia. It extends over two districts: its Western part lies in the Rožňava District in the Municipality of Gemerská Poloma, and its Eastern part lies in the Gelnica District in the Municipality of Henclová. The Excavation Area was discovered in 1988 by the Slovak state-owned entity Geologický prieskum š.p., Spišská Nová Ves ("**GPS**") while performing geological and exploration works in search of tin mineralization.[234]

203. Following these initial findings, on 28 April 1989, the Slovak government agency in charge of the geological exploration, Slovenský geologický úrad Bratislava, instructed GPS to perform geological and exploration works specifically focused on talc. The project was designated "Gemerská Poloma–talc."[235]

204. Work on the project began in May 1990[236] with the aim of securing a comprehensive analysis of the geological and tectonic structure of the deposit, assessing the quantity and quality of the mineral, and preparing a preliminary analysis of how to physically open the deposit to allow for mining of the resource.[237] The works performed within the "Gemerská Poloma–talc" task covered, in particular topographic works, mineralogical

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233 Letter from the District Mining Office to Rozmin s.r.o., 3 May 2005, **R-0022**.

234 Ján Kilík *et al.*, "Final Report and the Supply Calculation, GEMERSKÁ POLOMA – Talc – VP," 31 March 1995, p. 9, **R-0120**.

235 Ján Kilík *et al.*, "Final Report and the Supply Calculation, GEMERSKÁ POLOMA – Talc – VP," 31 March 1995, p. 9, **R-0120**.

236 Ján Kilík *et al.*, "Final Report and the Supply Calculation, GEMERSKÁ POLOMA – Talc – VP," 31 March 1995, p. 10, **R-0120**.

237 Ján Kilík *et al.*, "Final Report and the Supply Calculation, GEMERSKÁ POLOMA – Talc – VP," 31 March 1995, pp. 10-11, **R-0120**.

studies, petrographic studies, geophysical studies, logging, laboratory studies, and technological and drilling works.[238]

205. By 1992, GPS had drilled eight exploration wells further confirming the initial assessment of the quality of the deposit.[239] To perform further geological and exploratory works—and consistent with the mining laws in effect at the time—GPS formally applied to the Slovak Ministry of the Environment (the "**Ministry of Environment**") for the assignment of the exploration area. The Ministry of Environment granted the request on 16 April 1993 and assigned the exploration area to GPS. On 21 May 1993, the Ministry of the Environment issued a certificate designating the deposit as an "exclusive deposit" and certifying the existence of potentially minable reserved minerals.[240]

206. By then, the Slovak government had decided to bring private capital into the project to further develop it. The government was looking for an established mining company with which it could partner in developing the deposit. Among the companies approached by the Slovak government was Gebrüder Dorfner GmbH & Co. Kaolin-und Kristallquarzsand-Werke KG ("**Gebrüder Dorfner**"), a well-known German mining company that had expressed interest in the deposit.[241]

207. After initial discussions, on 18 June 1993, Gebrüder Dorfner and GPS, with the approval of the Ministry of Environment, executed a Letter of Intent pursuant to which they promised to establish a joint venture to finance and conduct additional geological studies at the deposit.[242] A final agreement on the subject, titled "Contract of Association," was later formalized on 28 February 1994, which included as parties Gebrüder Dorfner, GPS,

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238 Ján Kilík *et al*., "Final Report and the Supply Calculation, GEMERSKÁ POLOMA – Talc – VP," 31 March 1995, p. 11, **R-0120**.

239 Ján Kilík *et al*., "Final Report and the Supply Calculation, GEMERSKÁ POLOMA – Talc – VP," 31 March 1995, p. 36, **R-0120**.

240 Certificate of Exclusive Mineral Deposit issued by the Ministry of Environment of the Slovak Republic, 21 May 1993 (Ref. 6.3/638-792/93), **C-0118**.

241 Stephan Dorfner Witness Statement ¶ 6.

242 Information for the Head of the Office of the Ministry of Environment of the Slovak Republic prepared by Mr. Tözsér, 8 November 1996, point 1, **R-0121**.

and two Slovak companies: HELL, spol. s r.o. ("**Hell**"), and MR Trading, a.s. ("**MR Trading**").[243]

208. Under the Contract of Association, the parties undertook, among other things, to assess the qualitative and quantitative parameters of the deposit and to prepare a feasibility study for its future commercial exploitation. It was further agreed that if the geological assessment produced positive results, the parties were to incorporate a Slovak mining company to which the Excavation Area would be assigned and which would be in charge of commercially exploiting the deposit.[244]

209. To work on the feasibility study, Gebrüder Dorfner subcontracted the German firm Thyssen Schachtbau GmbH ("**Thyssen**") and its subsidiary ÖSTU Industriemineral Consult GmbH ("**ÖSTU**"),[245] which specialized on mining construction, shaft sinking and drilling, business field construction, mineral production, and other related service businesses.

210. The involvement of Gebrüder Dorfner, Thyssen, and ÖSTU, however, did not terminate the Slovak government's work at the site. GPS, which had continued with its government-assigned task No. 11 90 1274 32 336 1344 1, concluded those works on 31 March 1995 by preparation of a final report. By then, a total of 15 wells had been drilled, mostly on the Western side of the deposit, including wells V-DD-23 through V-DD-36 and V-DD-40.[246] These works were entirely financed by the Slovak government at a cost of SKK 21,985,000 (EUR 729,768.31).[247] Gebrüder Dorfner, Thyssen, and ÖSTU also

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243 Information for the Head of the Office of the Ministry of Environment of the Slovak Republic prepared by Mr. Tözsér, 8 November 1996, point 2, **R-0121**; Peter Čorej Witness Statement, ¶ 8.

244 Information for the Head of the Office of the Ministry of Environment of the Slovak Republic prepared by Mr. Tözsér, 8 November 1996, point 2, **R-0121**; Peter Čorej Witness Statement, ¶ 9; Stephan Dorfner Witness Statement, ¶ 7.

245 Peter Čorej Witness Statement, ¶ 10; Stephan Dorfner Witness Statement, ¶ 8; Ernst Haidecker Witness Statement, ¶ 6.

246 Ján Kilík, *et al.*, "Final Report and the Supply Calculation, Talc – VP," 31 March 1995, p. 36, **R-0120**; Peter Čorej Witness Statement, ¶ 6.

247 Ján Kilík, *et al.*, "Final Report and the Supply Calculation, Talc – VP," 31 March 1995, pp. 73–74, **R-0120**.

contracted a local company RimaMuráň s.r.o. ("**RimaMuráň**") to drill another exploratory well, V-DD-37 in order to obtain additional data about the deposit.[248]

211. The results of the Government's work at the deposit were set forth in a 31 March 1995 Final Report prepared by Mr. Ján Kilík (the "**Kilík Report**").[249] The Kilík Report estimated the volume of the deposit at approximately 85,384,000 tons of economically-extractable talc (consisting of mineral with 65.70% average talc content) and 146,633,000 tons of non-economically extractable talc (consisting of mineral with 31.09% average talc content).[250]

2. March 1995-May 1997: Rozmin is incorporated and is assigned rights to the Excavation Area

212. Having concluded the initial exploratory phase and estimated the quality and quantity of the deposit, Gebrüder Dorfner and Thyssen focused on preparing the deposit for its exploitation. Three things needed to occur: (*i*) the Slovak mining authorities had to assign the Excavation Area to a Slovak mining company; (*ii*) a feasibility study had to be completed on the project; and (*iii*) assuming the project was to proceed further, a Slovak mining company had to be incorporated and its shareholding structure agreed upon.

213. Regarding the first task—the assignment of the Excavation Area—GPS's successor entity, Slovenská geológia, š.p., requested on 31 October 1995 the assignment of the Excavation Area at the deposit from the DMO in Spišská Nová Ves, which had jurisdiction over Gemerská Poloma.[251] That assignment was required under Article 24(1) the Mining Act.[252] As discussed below, the Mining Act was amended in 2001 and these provisions became effective on 1 January 2002.

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248 Peter Čorej Witness Statement ¶ 17; Stephan Dorfner Witness Statement, ¶ 8; Ernst Haidecker Witness Statement, ¶ 8.

249 Ján Kilík *et al.*, "Final Report and the Supply Calculation, GEMERSKÁ POLOMA – Talc – VP," 31March 1995, **R-0120**.

250 Decision of the Ministry of Environment of the Slovak Republic, 13 November 1995 (Ref. 2204/95-min), **C-0120**.

251 Decision on the Assignment of the Gemerská Poloma Mining Area, 25 July 1996, **C-0020**.

252 Section 24(1) of the Act No. 44/1988 Coll. on the Protection and Utilization of Mineral Resources, as amended, **R-0166**.

214. The DMO granted the assignment request on 25 July 1996, assigning the Excavation Area to the Geologická služba SR, which by then had succeeded Slovenská geológia, š.p. The DMO's decision on assignment required that "*opening works at the deposit Gemerská Poloma shall be initiated not later than on 31 July 1998*."[253]

215. The second task—the feasibility study—was completed in February 1997 by Gebrüder Dorfner, Thyssen, and ÖSTU (the "**Feasibility Study**").[254] Sources included the exploration data from Kilík´s Report, the drillcore data bank from GPS and further data obtained by Thyssen, ÖSTU and Gebrüder Dorfner during their own exploration and modelling work.[255] The Feasibility Study was comprehensive in scope, but conceptual in nature because it contained numerous assumptions which were made with limited project specific information. This study would likely be identified as a Class 5 or 4 (the lowest or second lowest level of certainty) under the international standards of the Association for the Advancement of Cost Engineering (AACE).[256]

216. The third task—incorporating a Slovak mining company—was finalized in 1997 when RimaMuráň (which was already familiar with the project having drilled the last exploratory well), Gebrüder Dorfner, and Thyssen (through its subsidiary ÖSTU), founded the Slovak mining company Rozmin.[257]

217. Rozmin was formally incorporated in May 1997.[258] Gebrüder Dorfner had a 32.5% interest, ÖSTU had a 24.5% interest, and RimaMuráň had a 43% interest. It had SKK 400,000 (EUR 13,277.57) in registered capital.[259] Rozmin's first executive director was

253 Decision on the Assignment of the Gemerská Poloma Mining Area, 25 July 1996, **C-0020**.

254 Feasibility Study Outline, TALC – GEMERSKA POLOMA, E. Haidecker, February 1997, **C-0121.**

255 Ernst Haidecker Witness Statement, ¶ 11.

256 Sparks Expert Report, ¶ 41.

257 Memorandum of Association on the Establishment of the Company Rozmin sro, 7 May 1997, **C-0021**.

258 Memorandum of Association on the Establishment of the Company Rozmin sro, 7 May 1997, **C-0021**.

259 Memorandum of Association on the Establishment of the Company Rozmin sro, 7 May 1997, **C-0021**.

Mr. Ondrej Rozložník[260] and later also Mr. Ernst Haidecker was designated the second executive director.[261]

218. Also in May 1997, Rozmin applied for a general mining permit from the DMO. The permit was issued on 14 May 1997 (the "**General Mining Permit**").[262] The General Mining Permit authorized Rozmin to perform mining activities within the Slovak Republic subject to it previously complying with other statutory and regulatory requirements, including securing rights to a particular excavation area and securing the State's authorization to perform specific mining activities at that excavation area.

219. As required under Slovak law, the General Mining Permit designated Messrs. Ondrej Rozložník, Peter Čorej, and Pavol Krajec (the latter two from RimaMuráň), as Rozmin's responsible representatives.[263] In that capacity, those individuals were directly responsible for the mining activities to be carried out by Rozmin and were also responsible for ensuring Rozmin's compliance with all mining laws and regulations. Mr. Čorej issues a witness statement in this arbitration.

220. Although the original plan was to have the Slovak Government, through Geologická služba SR (GPS's successor), partner with private investors to develop the deposit, a change in Slovak regulations made this plan of partnership impossible by precluding State entities like Geologická služba SR from having a financial participation in for-profit, capital entities.[264] Geologická služba SR thus transferred its rights to the Excavation Area to Rozmin on 11 June 1997.[265]

260 Memorandum of Association on the Establishment of the Company Rozmin sro, 7 May 1997, **C-0021**.

261 Minutes of Rozmin's Shareholder Meeting held on 26 May 1997, p. 2, **C-0131**.

262 Mining Authorization issued by the District Mining Office, 14 May 1997, **C-0022**.

263 Mining Authorization issued by the District Mining Office, 14 May 1997, **C-0022**.

264 Peter Čorej Witness Statement, ¶ 16.

265 Agreement on the Transfer of the Gemerská Poloma Mining Area, 11 June 1997, **C-0023**.

221. As the transferee, Rozmin became bound by the terms of the original assignment of the Excavation Area to Geologická služba SR.[266] Therefore, it was required to initiate "*opening works at the deposit Gemerská Poloma . . . not later than on 31 July 1998*."[267]

3. May 1997-March 1998: Rozmin searches for investors

222. The works that were needed for the next phase of the project required a significant investment of capital to finance the entire infrastructure necessary to open (access) the deposit, perform additional exploration within the deposit, and eventually extract and commercialize the resource.[268] The Slovak Republic's mining expert agrees with contemporaneous estimates that this task would have required approximately the equivalent of EUR 19 million (at the then price level).[269]

223. Over the next two years, from 1997 to 1998, Rozmin and its then-shareholders were actively looking for investors who could provide that needed capital.[270]

224. To aid in these searches, Rozmin and its then-shareholders also performed additional, limited surface exploratory drills. These drilling activities were performed between September 1997 and June 1998 by Rozmin's own shareholder, RimaMuráň, and resulted in the drilling of three new exploratory wells: V-DD-38, V-DD-39, and V-DD-41.[271]

225. Rozmin and its then shareholders also hired Koral s.r.o. and others to estimate and measure the deposit.

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266 Agreement on the Transfer of the Gemerská Poloma Mining Area, 11 June 1997, Art. IV, Section 2, **C-0023**.

267 Decision on the Assignment of the Gemerská Poloma Mining Area, 25 July 1996, **C-0020**.

268 Stephan Dorfner Witness Statement, ¶ 10; Ernst Haidecker Witness Statement, ¶ 13.

269 Sparks Expert Report, ¶ 79.

270 Stephan Dorfner Witness Statement, ¶ 10; Ernst Haidecker Witness Statement, ¶ 13.

271 Rima Muráň sro Invoice No. 436/021097-C, 2 October 1997, **C-0138**; Rima Muráň sro Invoice No. 14/300198-B, 30 January 1998, **C-0139**; Rima Muráň sro Invoice No. 63/300398-C, 30 March 1998, **C-0140**; Rima Muráň sro Invoice No. 73/200498-C, 20 April 1998, **C-0141**; Rima Muráň sro Invoice No. 115-100698-C, 10 June 1998, **C-0142**.

226. As explained by the Slovak Republic's mining expert, Mr. Gregory Sparks, these efforts did not de-risk the deposit.[272] The deposit could be de-risked only by closely-spaced underground drilling within the deposit after its opening, which was necessary to confirm continuity of talc layers for development of high confidence resources and to permit a reasonable understanding of actual mining conditions to permit development of reserves.[273]

227. As a result of Rozmin's efforts, in mid-1997, the German firm DEG–Deutsche Investitions–und Entwicklungsgesselschaft mbH ("**DEG**") expressed an interest in investing in the project in return for an equity stake. It reached a preliminary agreement with Rozmin's shareholders on the subject[274] and commissioned a due diligence report on Mr. Haidecker's Feasibility Study from Hansa GeoMin Consult, GmbH ("**Hansa GeoMin**").

228. In January 1998, Hansa GeoMin concluded that while the project appeared viable, the structure and shape of the deposit, which was the basis for the Feasibility Study, was just an interpretation of the limited information obtained by surface borehole drilling.[275] Hansa GeoMin noted that the deposit appeared to have a highly irregular structure with folding and significant displacement folding and concluded that underground exploration work was required to obtain more information and verify the mining plan proposed in the Feasibility Study.[276] As a result, DEG ultimately decided not to invest in the project.

229. At the time of its discussions with DEG, Rozmin and its then-shareholders also started to perform additional, limited surface exploratory drills. These drilling activities were performed between September 1997 and June 1998 by Rozmin's own shareholder,

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272 Sparks Expert Report, ¶¶ 81*et seq*.

273 Sparks Expert Report, ¶ 78.

274 Peter Čorej Witness Statement, ¶ 24; Share Purchase Agreement between DEG – Deutsche Investitions – und Entwicklungsgesselschaft mbH, Gebrüder Dorfner GmbH & Co. Kaolin-und Kristallquarzsand-Werke KG, ÖSTU Industriemineral Consult GmbH and RimaMuráň s.r.o., 1997, **R-0122**.

275 Sparks Expert Report, ¶¶ 43, 102-103.

276 Sparks Expert Report, ¶¶ 43, 102-103.

RimaMuráň, and resulted in the drilling of three new exploratory wells: V-DD-38, V-DD-39, and V-DD-41.[277]

230. As explained by the Slovak Republic's mining expert, these efforts did not de-risk the deposit. The deposit could be de-risked only by further exploratory drilling within the deposit after its opening. As the Slovak Republic's mining expert puts it, *"[i]t was imperative to get underground to establish underground drilling platforms which would permit appropriate data density to validate Measured and Indicated Resources. Then and only then could economic analysis in the context of real data be generated for purposes of Reserve determination.*"[278]

231. Also during this period of time, Rozmin undertook two additional steps to secure its position at the Excavation Area. ***First***, it obtained from the Ministry of Environment the assignment of an additional exploration area in close proximity to the Excavation Area that had already been assigned to it.[279] Rozmin intended by this to prevent other mining firms from securing rights in close proximity to its already-designated Excavation Area.

232. ***Second***, Rozmin sought to secure the Slovak government's authorization to perform specific mining activities at the excavation area—a prerequisite to beginning mining operations at the Excavation Area. For this purpose, in early 1998, Rozmin submitted to the DMO its proposed "Plan for the Opening, Preparation, and Excavation of the Deposit" to be performed during 1998-2002 (the "**1998-2002 POPE**").[280] The 1998-2002 POPE was prepared by Messrs. Rozložník, Čorej, and Haidecker and was based on the information and data contained in the Kilík Report and the Gebrüder Dorfner Feasibility Study. In the 1998-2002 POPE, Rozmin admitted that "*only research exploration stage*

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277 Rima Muráň sro Invoice No. 436/021097-C, 2 October 1997, **C-0138**; Rima Muráň sro Invoice No. 14/300198-B, 30 January 1998, **C-0139**; Rima Muráň sro Invoice No. 63/300398-C, 30 March 1998, **C-0140**; RimaMuráň s.r.o. Invoice No. 73/200498-C, 20 April 1998, **C-0141**; Rima Muráň sro Invoice No. 115-100698-C, 10 June 1998, **C-0142**.

278 Sparks Expert Report, ¶ 104.

279 Decision of the Ministry of Environment of the Slovak Republic, 28 November 1997 (Ref. 3609/1327/97-3.3), **C-0130**.

280 Plan for the Opening, Preparation, Development, and Exploitation submitted by Rozmin sro on 15 January 1998, **C-0168**.

was finished with surface boreholes" and further geological exploration was planned in the underground during and after its opening.[281]

233. On 29 May 1998, the DMO granted Rozmin's request and issued an authorization for Rozmin to perform mining activities at the Excavation Area through 31 December 2002 (the "**Authorization of Mining Activities**").[282] This Authorization of Mining Activities allowed Rozmin to undertake mining activities at the Excavation Area subject to the terms of the DMO's original assignment of the Excavation Area, which required Rozmin to initiate "*opening works at the deposit Gemerská Poloma . . . not later than on 31 July 1998*."[283]

4. March 1998-December 1999: EuroGas I enters Rozmin—no significant development occurs

234. Given the lack of activity from Rozmin's other shareholders (Gebrüder Dorfner and ÖSTU), RimaMuráň undertook its own efforts to identify potential investors for the project.[284] Mr. Čorej, from RimaMuráň, was introduced to Mr. Wolfgang Rauball, who represented EuroGas GmbH.[285] Both men met in Vienna, and Mr. Rauball indicated that EuroGas GmbH was interested in investing in the project and acquiring an equity stake in Rozmin.[286]

235. After the initial meeting in Vienna, Mr. Čorej met with Rozmin's other shareholders to discuss EuroGas GmbH's interest in the project.[287] However, Rozmin's other

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281 Plan for the Opening, Preparation, and Excavation of the Deposit submitted by Rozmin s.r.o. on 15 January 1998, p. 22, **C-0168**.

282 Authorization of Mining Activities under the "Plan for the Opening, Development and Mining of an Exclusive Soapstone Deposit in the Gemerská Poloma Mining Area (Registration Number 74/e) for the 1998 – 2002 Period," 29 May 1998, **C-0025**.

283 Decision on the Assignment of the Gemerská Poloma Mining Area, 25 July 1996, **C-0020**.

284 Peter Čorej Witness Statement, ¶ 26.

285 Peter Čorej Witness Statement, ¶ 26.

286 Peter Čorej Witness Statement, ¶ 26.

287 Peter Čorej Witness Statement, ¶ 27; Stephan Dorfner Witness Statement, ¶ 11.

shareholders—Gebrüder Dorfner and ÖSTU—did not consider Mr. Rauball and EuroGas GmbH to be an appropriate partner.[288]

236. EuroGas GmbH side-stepped this concern by purchasing shares in RimaMuráň, thus providing EuroGas GmbH an indirect interest in Rozmin.[289] Relying on EuroGas GmbH's promises to provide the needed capital infusion, RimaMuráň's shareholders agreed to sell a 55% equity stake in the company to EuroGas GmbH for a total sum of SKK 1,000,000 (EUR 33,193.92).[290]

237. As part of the transaction, EuroGas GmbH also agreed to compensate RimaMuráň's share of Rozmin's financing and operating costs. Sums advanced by EuroGas GmbH were to be allocated as follows: 55% was to be accounted as EuroGas GmbH's own capital contribution to RimaMuráň, since it was now a 55% shareholder in the entity, and the remaining 45% was to be accounted as a loan to the individual shareholders of RimaMuráň payable from RimaMuráň's future revenues. This commitment was memorialized in a 16 March 1998 Agreement on Financing.[291]

238. The entry of EuroGas GmbH into the project, however, had no material effect on its development. Rozmin failed to comply with the 31 July 1998 deadline to commence Opening Works. Instead, Rozmin merely applied for the building permits necessary to commence construction of the temporary surface structures[292]—a process that was unusually delayed because Rozmin submitted incomplete applications that had to be subsequently amended to include the necessary supporting paperwork.[293] Because of its

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288 Peter Čorej Witness Statement, ¶ 27; Ernst Haidecker Witness Statement, ¶ 15; Stephan Dorfner Witness Statement, ¶ 11.

289 Peter Čorej Witness Statement ¶ 28.

290 Every one of RimaMuráň's four individual shareholders, each of which owned a 25% equity stake in the company, agreed to sell to EuroGas GmbH a 13.5% equity stake in the company. These four agreements are included in Exhibits **C-0006** through **C-0009**; Peter Čorej Witness Statement, ¶ 28.

291 Financing Agreement between EuroGas GmbH and Rima Muráň sro, 16 March 1998, **C-0136**; Peter Čorej Witness Statement, ¶¶ 29-31.

292 This included, applying for and securing a land-use authorizations and approval from several governmental agencies. See Exhibits **C-0171** through **C-0184**.

293 *See e.g.* Statement of the Slovak Water Management Company – Hron River Basin Branch, 30 September 1998, **C-0174**; Decision of the Department of Environment of the District Office of Rožňava, No SP 98/06072/003-OL, 23 October 1998, **C-0171**; Decision of the Department of Lands, Agriculture, and

failure to timely secure all required permits, Rozmin was unable to commence construction works at the project in 1998. This delay occurred despite the fact that the Slovak government, through the state-owned entity Rudný projekt a.s., had completed the design necessary for the construction works by October 1998.[294]

239. During this time, Rozmin continued its exploration works and commissioned RimaMuráň to drill five additional exploratory wells: V-DD-42, V-DD-43, V-DD-43a[295], V-DD-44[296], and V-DD-45.[297]

240. As with Rozmin's previously drilled exploratory wells, these five additional wells did not de-risk the project because, due to the folding and faulting of the deposit, the reserves of talc could be reliably established only through underground drilling within the deposit. Without more closely-spaced underground drilling, Rozmin could not have produced anything but conceptual economics. The project remained almost entirely in the exploration stage. [298]

241. In early 1999, several of Rozmin's requested permits were approved, including: (*i*) the permit for the construction of the water management infrastructure, which was granted on 23 February 1999 by the Department of the Environment for the District Office in Rožňava;[299] (*ii*) the permit for the relocation of the forest road adjacent to the deposit and for the construction of a bridge over the stream Dlhý potok, which was granted on 24 February 1999 by the Department of Transportation and Road Management for the District Office in Rožňava;[300] and (*iii*) the permit to build the remainder of the surface

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Forestry of the District Office of Rožňava (land plots No. 2278/8, 2278/9 and 2278/10), 27 October 1998, **C-0179**.

294 Rudný Invoice, 6 November 1998, **C-0170**.

295 Exploration Drilling Contract between Rozmin sro and Rima Muráň sro, 9 November 1998, **C-0143**.

296 Exploration Drilling Contract between Rozmin sro and Rima Muráň sro, 9 November 1998, **C-0143**.

297 Rima Muráň sro Invoice No. 78/010699-C, 1 June 1999, **C-0144**.

298 Sparks Expert Report, ¶ 105.

299 Decision of the Department of Environment of the District Office of Rožňava, 23 February 1999 (Ref. ŠVS - 98/ 09586-Kú), **C-0187**.

300 Decision of the Department of Transport and Road Management of the District Office of Rožňava, 24 February 1999 (Ref. 99/01138-00005), **C-0188**.

infrastructure, which was granted on 23 March 1999 by the Department of the Environment for the District Office in Rožňava.[301]

242. Despite having all of these permits, Rozmin did not commence work at the Excavation Area. Thus, by year-end 1999—and having been involved in Rozmin since March 1998—EuroGas GmbH had not significantly advanced Rozmin's works or the development of the Excavation Area. This almost 2-year period was entirely consumed by Rozmin's inadequate handling of permitting issues and the performance of additional, minor "promotional" surface exploratory works (which, however, could not de-risk the deposit).

243. Thus, during this period of time, Rozmin failed to do any Surface Construction or perform Opening Works to access the resource and enable high-density underground exploratory drilling necessary to de-risk the deposit. Rozmin did not engage in any Preparatory Works or conduct any Excavation.[302]

5. January 2000-October 2001: Belmont enters Rozmin—no significant development occurs

244. Through the entry of EuroGas GmbH into the project, the cooperation between Gebrüder Dorfner and ÖSTU, on one side, and RimaMuráň, on the other, became complicated, and it was almost impossible to find and pursue common strategy with respect to the deposit.[303]

245. Moreover, by early-2000, the coal mining industry in Germany was being affected by a financial crisis. That crisis caused Thyssen and its subsidiary ÖSTU, one of the two German shareholders of Rozmin, to reevaluate their investments abroad and to reassess their commitment in Rozmin.[304] Gebrüder Dorfner did not want to continue the project

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301 Decision of the Department of Environment of the District Office of Rožňava, 23 March 1999 (Ref. SP 99/01195/003-OL), **C-0186**.

302 Rozmin´s Annual Report on Activity for the Year 1999, 28 January 2000, **R-0167**.

303 Stephan Dorfner Witness Statement, ¶ 12.

304 Ernst Haidecker Witness Statement, ¶ 15; Stephan Dorfner Witness Statement, ¶13.

without Thyssen, and they were concerned that it was too risky.[305] Thyssen and Gebrüder Dorfner thus both decided to exit Rozmin—a decision that was facilitated by their concerns about an association with EuroGas GmbH and Mr. Rauball.

246. Given the circumstances and that the investment into the deposit was still considered risky, only two established companies showed an interest in acquiring Gebrüder Dorfner's and ÖSTU's stake in Rozmin. Lusenac was interested, but withdrew after a few visits at the site.[306] The only interested buyer was Mr. Rauball. Mr. Rauball, however, stated that EuroGas could not buy the shares due to its financial difficulties and, therefore, the buyer would instead be Belmont, a relatively unknown junior mining company from Canada.[307] On 24 February 2000, Belmont separately bought Gebrüder Dorfner's and ÖSTU's respective 32.5% and 24.5% ownership interests in Rozmin for DEM 1,625,000 (EUR 830,849.30)[308] and DEM 1,225,000 (EUR 626,332.55).[309] After the purchase, Rozmin was owned 57% by Belmont and 43% by RimaMuráň.

247. On 17 June 2000, Rozmin put out a request for tenders for a contractor interested in performing the Opening Works at the Excavation Area. Six companies submitted bids, including RimaMuráň, which was 55% owned by EuroGas GmbH and which was awarded the work.[310]

248. Before RimaMuráň and Rozmin could finalize the contract, however, Rozmin had to ensure the delivery of electricity to the Excavation Area. Rozmin sought to supply electricity to the site through a nearby high-voltage line that was owned by RimaMuráň, and the parties entered into an agreement to that effect on 26 July 2000.[311] The line

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305 Stephan Dorfner Witness Statement, ¶ 13.

306 Stephan Dorfner Witness Statement, ¶ 14.

307 Stephan Dorfner Witness Statement, ¶¶ 14-15.

308 Agreement on the Assignment of Company Shares in the Rozmin sro Corp. between Gebrüder Dorfner GmbH & Co. Kaolin- und Kristallquarzsand- Werke KG and Belmont Resources Inc., 24 February 2000, **C-0017**.

309 Agreement on the Transfer of Business Shares in the Company Rozmin sro between Östu Industriemineral Consult GmbH and Belmont Resources Inc., 24 February 2000, **C-0016**.

310 Monthly Report for the Activities of Rozmin sro of August and September 2000, p. 2, **C-0217**.

311 Agreement on Temporary Use of the High Voltage Line by Rima Muran, 26 July 2000, **C-0196**.

passed through lands owned by a non-party, LESY SR, which charged a monthly fee for that right of way.[312]

249. With the supply of electricity temporarily secured, Rozmin and RimaMuráň concluded their Construction Contract on 22 September 2000.[313] Under the Construction Contract, RimaMuráň was to build all surface infrastructures and was to perform Opening Works at the Excavation Area.[314] The Opening Works consisted of building a 1300 meter long decline (*i.e.*, declining ramp) into the mountain on the most Western-part of the Excavation Area.[315] The decline was to provide access to the resource and to enable its Excavation.

250. The plans for the Opening Works also contemplated a 320 meter long shaft (chimney) to provide a second point of access to the mine required for safety and other reasons under Slovak mining regulations.[316] The construction of that shaft, however, was planned for a second phase of the project. Under the approved schedule of works, RimaMuráň was to focus solely on constructing the decline (or entry tunnel). The schedule of works for that part of the project was as follows:[317]

- 29 September 2000 to commence the work at the Excavation Area;
- 24 November 2000 to commence drilling;
- 22 June 2001 to complete drilling; and
- 7 September 2001 to liquidate the construction site.

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312 Peter Čorej Witness Statement, ¶ 38.

313 Contract on giving the contract for works on "Opening of Talc Deposit Gemerská Poloma" entered into between Rima Muráň sro and Rozmin sro, 22 September 2000, **C-0218**.

314 Contract on giving the contract for works on "Opening of Talc Deposit Gemerská Poloma" entered into between Rima Muráň sro and Rozmin sro, 22 September 2000, p. 31, **C-0218**.

315 Contract on giving the contract for works on "Opening of Talc Deposit Gemerská Poloma" entered into between Rima Muráň sro and Rozmin sro, 22 September 2000, p. 31, **C-0218**.

316 Peter Čorej Witness Statement, ¶ 35.

317 Contract on giving the contract for works on "Opening of Talc Deposit Gemerská Poloma" entered into between Rima Muráň sro and Rozmin sro, 22 September 2000, p. 8, **C-0218**.

251. Under the Construction Contract, RimaMuráň was to receive SKK 71,500,000 (EUR 2,373,365.20) (SKK 78,650,000 including VAT (EUR 2,610,701.72)) in payment, of which SKK 16,490,145 (EUR 547,372.54) was to pay for equipment, SKK 54,328,643 (EUR 1,803,380.57) was to pay for the drilling works, SKK 623,412 (EUR 20,693.49) was to pay for the construction of a storage for explosives, and SKK 57,800 (EUR 1918.61) was earmarked other unexpected works.[318]

252. Recognizing the significant delay in developing of the deposit and that time was of the essence, the Construction Contract required that RimaMuráň employ three shifts of workers to complete the work.[319]

253. The commencement of works was announced to the DMO on 25 September 2000.[320] By the end of 2000, RimaMuráň had completed the construction of 90% of the Surface Construction[321] except for the mining water treatment plant whose construction was delayed because of weather conditions.

254. Thereafter, however, progress began to slow down and, by mid-December 2000, virtually came to a halt. Disputes arose over amounts due under the Construction Contract to RimaMuráň (even though RimaMuráň was 55% owned by EuroGas GmbH).[322] As a result, RimaMuráň was unable to pay its own employees, who threatened to suspend all works and go on strike. In late December 2000, Rozmin paid some of the amounts that were outstanding and work was reinitiated. From that point forward, however, Rozmin's payments were consistently late.[323]

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318 Contract on giving the contract for works on "Opening of Talc Deposit Gemerská Poloma" entered into between Rima Muráň sro and Rozmin sro, 22 September 2000, p. 69, **C-0218**.

319 Contract on giving the contract for works on "Opening of Talc Deposit Gemerská Poloma" entered into between Rima Muráň sro and Rozmin sro, 22 September 2000, p. 76, **C-0218**.

320 Rozmin´s Annual Report on Activity for the Year 2000, 16 January 2001, **R-0168**.

321 Rozmin´s Annual Report on Activity for the Year 2000, 16 January 2001, **R-0168**.

322 Peter Čorej Witness Statement, ¶ 39.

323 Peter Čorej Witness Statement, ¶ 39.

255. In January 2001, RimaMuráň began building the decline.[324] By then, nearly four years had passed since Rozmin had acquired the Excavation Area.

256. Rozmin's financial troubles, however, continued. RimaMuráň asserted that Rozmin's late payments required the use of a single shift of employees.[325] That, in turn, further delayed the works at the Excavation Area.[326] On 20 April 2001, RimaMuráň and Rozmin executed an Amendment No. 1 to their Construction Contract, which extended the deadlines for the completion of works until mid-2002. Recognizing that Rozmin was solely at fault for the delay, Amendment No. 1 stated that "*[t]he deadlines stipulated in the original agreement were not adhered to because of the client [Rozmin] who does not fulfill its monetary obligations towards the contractor*."[327]

257. Despite Rozmin's failure to fund and proceed with the development of the Excavation Area, Rozmin arranged for a public ceremony to mark the commencement of Opening Works.[328] The ceremony, which was attended by several significant guests,[329] provided a broad public platform for Mr. Rauball to announce to the public the commencement of Opening Works.

258. The dispute between RimaMuráň (still 55%-owned by EuroGas I) and Rozmin continued throughout the summer of 2001. After several warnings and a heated exchange of correspondence, RimaMuráň suspended its activities at the Excavation Area in October 2001.[330]

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324 Peter Čorej Witness Statement, ¶ 40.

325 Peter Čorej Witness Statement, ¶ 41.

326 Peter Čorej Witness Statement, ¶ 41.

327 Amendment No. 1 to the Contract on giving the contract for Works on "Opening of Talc Deposit Gemerská Poloma" entered into between RimaMuráň s.r.o. and Rozmin s.r.o., 20 April 2001, p. 2, **R-0124**; Peter Čorej Witness Statement, ¶ 41.

328 Peter Čorej Witness Statement, ¶ 44.

329 Peter Čorej Witness Statement, ¶ 43.

330 Letter from RimaMuráň s.r.o to Rozmin s.r.o., 23 July 2001, **R-0127**; Letter from Rozmin s.r.o. to RimaMuráň s.r.o, 25 July 2001, **R-0169**; Letter from RimaMuráň s.r.o to Rozmin s.r.o., 30 July 2001, **R-0126**; Letter from RimaMuráň s.r.o. to Rozmin s.r.o., 15 August 2001, **R-0170**; Letter from Rima Muráň sro to Rozmin sro, 28 September 2001, **C-0220;** Letter from Rozmin s.r.o. to RimaMuráň s.r.o., 2 October

259. At the time of RimaMuráň's suspension of activities at the Excavation Area, the status of works was the following:

- Less than 7.2% of the decline (entry tunnel) had been drilled. To be exact, 93.2 meters of a total of 1300 meters had been drilled. In addition, 44.9 meters of an underground storage of explosives were drilled.

- No Excavation of the resource had taken place.

- The 320 meter shaft (chimney) that was to function as the mine's second point of access and that needed to be fully functional prior to commercial operation of the mine had not been designed, much less built.[331]

6. October 2001: All works were suspended

260. On 15 October 2001, Rozmin informed the DMO in writing that the works at the Excavation Area had been suspended effective 1 October 2001.[332] Notably, this suspension of works took place only five months after Mr. Rauball announced to the world that Rozmin had commenced Opening Works at the deposit.

261. On 28 November 2001, RimaMuráň wrote to Rozmin to confirm that it had ceased all activities at the Excavation Area and had withdrawn from the site effective 27 November 2001. RimaMuráň reported that the reason for its withdrawal was Rozmin's failure to pay the amount it owed under the Construction Contract.[333]

262. On 30 November 2001, Rozmin sent a second letter to the DMO confirming the suspension of works at the Excavation Area and advising that the suspension was expected to last through 1 May 2002. This letter also informed the DMO of the flooding of the 93.2 meters of decline built to date and of the 43 meters of underground explosive

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2001, **R-0171**; Letter from Rima Muráň s.r.o to Rozmin s.r.o, 3 October 2001, **R-0172**; Letter from Rozmin s.r.o to Rima Muráň s.r.o, 4 October 2001, **R-0173**.

331 Rozmin´s Annual Report on Activity for the Year 2001, 16 January 2002, **R-0174**.

332 Letter from Rozmin sro to the District Mining Office, 15 October 2001 (Ref. No. 2274), **C-0221**.

333 Letter from RimaMuráň s.r.o. to Rozmin s.r.o., 28 November 2001, **R-0128**.

storage.[334] The flooding occurred because, with the electricity supply disconnected, groundwater was no longer pumped out of the mine.

263. After RimaMuráň withdrew from the Excavation Area, the site was abandoned by Rozmin. The deposit was robbed, and a damage amounting to approx. SKK 3,000,000 (EUR 99,581.76) was caused. Moreover, the decline was watered.[335]

264. RimaMuráň's exit from the Excavation Area coincided with the enactment of the 2002 Amendment. The three-year period for commencement of Excavation began on 1 January 2002, the date when the 2002 Amendment came into effect.

7. October 2001-January 2005: Works remained suspended

265. Upon its exit from the Excavation Area, RimaMuráň carried a significant amount of debt. Seizing on the situation, Mr. Rauball offered to pay off RimaMuráň's debt in exchange for RimaMuráň's equity interest in Rozmin.[336] RimaMuráň was already 55% indirectly owned by Mr. Rauball, through EuroGas GmbH, and RimaMuráň was a 43% shareholder in Rozmin. Nevertheless, having no other way out of their predicament, RimaMuráň's other shareholders accepted Mr. Rauball's offer and agreed to transfer RimaMuráň's entire ownership stake in Rozmin directly to EuroGas GmbH.[337]

266. The transaction was concluded on 26 March 2002 and consisted of an exchange of stock without any additional consideration. RimaMuráň transferred its 43% ownership interest in Rozmin to EuroGas GmbH and in exchange EuroGas GmbH (*i*) transferred its 55% ownership interest in RimaMuráň back to RimaMuráň's four founding shareholders (Messrs. Komora, Čorej, Krajec, and Baláž),[338] and (*ii*) agreed to pay off the debt that

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334 Letter from Rozmin sro to the District Mining Office, 30 November 2001 (Ref. 2304), **C-0026**.

335 Rozmin´s Annual Report on Activity for the Year 2001, 16 January 2002, **R-0174.**

336 Peter Čorej Witness Statement, ¶ 48.

337 Peter Čorej Witness Statement, ¶¶ 48-49.

338 Contract on Transfer of a Business Share between EuroGas GmbH and Mr. Viliam Komora, 26 March 2002, **C-0010**; Contract on the Transfer of a Business Share between EuroGas GmbH and Mr. Peter Čorej, **C-0011**; Contract on the Transfer of a Business Share between EuroGas GmbH and Mr. Pavol Krajec, 26 March 2002, **C-0012**; Contract on the Transfer of a Business Share between EuroGas GmbH and Mr. Ján Baláž, 26 March 2002, **C-0013**.

RimaMuráň had incurred because of Rozmin's failure to pay for the work at the Excavation Area.[339] This transaction effectively returned RimaMuráň to its four original shareholders.[340]

267. The parties also executed other agreements formally severing their relationship, including a Settlement Agreement that settled all loans and other financing commitments between EuroGas GmbH and RimaMuráň.[341] Following the execution of these agreements, the Construction Contract was formally terminated on 13 August 2002 and the unfinished works at the Excavation Area were formally turned over to Rozmin on 23 and 24 October 2002.[342]

268. On 5 September 2002, Rozmin applied to the DMO for an extension of its Authorization of Mining Activities, which was set to lapse on 31 December 2002.[343] Almost a year had passed since the works at the Excavation Area had been suspended.

269. Rozmin's application for the extension was formally and substantively defective. For example, Rozmin had failed to pay the statutory fees for the extension and had failed to comply with other statutory requirements. On 12 November 2002, the DMO wrote to Rozmin and granted it 45 days to cure these and other defects.[344] Rozmin responded on 20 December 2002, curing some of the defects but acknowledged that it was unable to cure others.[345] As a result, on 16 January 2003, the DMO rendered a decision terminating the proceedings.[346]

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339 Peter Čorej Witness Statement, ¶ 50.

340 Agreement on the Transfer of Business Share between Ríma Muráň sro and EuroGas GmbH, **C-0014**.

341 Settlement Agreement between EuroGas GmbH and RimaMuráň s.r.o., 26 March 2002, **R-0130**; Peter Čorej Witness Statement, ¶ 50.

342 Handover Protocol between Rozmin s.r.o. and RimaMuráň s.r.o., 24 October 2002, **R-0131**; Peter Čorej Witness Statement, ¶¶ 52.

343 Decision of the District Mining Office, 12 November 2002 (Ref. 2118/2002), **C-0223**.

344 Decision of the District Mining Office, 12 November 2002 (Ref. 2118/2002), **C-0223**.

345 Letter from Rozmin sro to District Mining Office, 20 December 2002, **C-0224**.

346 Decision of the District Mining Office No. 46/2003, 16 January 2003, **C-0225**.

270. Rozmin appealed that decision to the Main Mining Office ("**MMO**"), which remanded the matter back to the DMO for further proceedings.[347] On remand, the DMO granted Rozmin 90 days to submit missing information and to cure certain defects of its application.[348] Rozmin failed to provide the missing information and did not cure the defects. On 27 November 2003, the DMO again terminated the proceedings.[349]

271. Having lost the whole of 2003 on this needless and fruitless exercise, on 8 January 2004, Rozmin submitted an entirely new application for the Authorization of Mining Activities, which had already elapsed on 31 December 2002. The new application was also defective. The DMO wrote to Rozmin on 6 February 2004, awarding it 90 days to cure the defects and submit the missing supporting documentation.[350] The defects related to a new "*Plan for the Opening, Preparation, and Excavation of the Deposit*" prepared in 2004.

272. This time, Rozmin complied with the DMO's request and secured all of the required documentation, including the renewal of the permit for the construction of the water management facilities, which had lapsed, and of the building permit for the surface infrastructure, which had also lapsed.[351]

273. After this and other information had been supplied by Rozmin, on 31 May 2004, the DMO issued a new Authorization of Mining Activities. The authorization was valid through the term of the Rozmin's lease agreement with Lesy Slovenskej Republiky, š.p. but, in any case, not longer than 13 November 2006.[352] This time period pertained exclusively to Rozmin's Authorization of Mining Activities and did not apply to any other authorization or requirement imposed under Slovak law.

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347 Decision of the MMO, 15 May 2003 (Ref. 230 367/2003), **C-0226**.

348 Decision of the District Mining Office, 12 August 2003 (Ref. 1494/2003), **C-0227**.

349 Decision of the District Mining Office, No, 367/2003, 27 November 2003, **C-0228**.

350 Decision of the District Mining Office, No. 155/2004, 6 February 2004, **C-0229**.

351 Lease contract, 1 July 2002, **C-0232**; Decision of the Department of Lands, Agriculture, and Forestry of the District Office of Rožňava, 21 October 2003, **C-0233**; Lease contract, 30 November 2003, **C-0234**.

352 Authorisation of Mining Activity in the Mining Area "Gemerská Poloma," 31 May 2004 (Ref. 1023/511/2004), **C-0027**.

274. By this time, there had been no activity at the Excavation Area since October 2001—almost 31 months of inactivity. Both the Annual Report on Activity for the Year 2002 and Annual Report on Activity for the Year 2003 prepared by Rozmin state that no mining activities were performed at the deposit in 2002 and 2003.[353]

275. Rozmin put out a tender for the performance of the Opening Works at the Excavation Area. The tender sought bids from companies interested in drilling and building the decline.[354] A company by the name of Siderit, s.r.o. Nižná Slaná ("**Siderit**") won the tender process on 3 August 2004.

276. Siderit, however, was unable to commence work at the Excavation Area because the 93.2 meters of the decline (which RimaMuráň had built through October 2001) were flooded.[355] Additionally, under the Decision of the Department of Environment of the District Office, the mining activities at the deposit could not have been re-initiated until all of the surface infrastructures were completed and put into operation.[356]

277. Thereafter—and cognizant that the 3-year period under the 2002 Amendment was about to expire—Rozmin began a series of frantic efforts to create the appearance of works at the Excavation Area. For example, in mid-September 2004, Rozmin—without yet having concluded a construction agreement with Siderit—placed individual orders to Siderit for the construction of the unfinished surface infrastructures, including the mining wastewater treatment plant,[357] the rainwater sewage system,[358] and the building that would house the mine's employee lounge and administrative offices.[359] Importantly, these surface infrastructures had to be completed *before* Siderit could commence Mining

353 Rozmin´s Annual Report on Activity for the Year 2002, 14 January 2003, **R-0175**; Rozmin´s Annual Report on Activity for the Year 2003, **R-0176**.

354 Bid for Opening the Talc Deposit in Gemerská Poloma – Legal and Organizational Documents, submitted by Siderit on 3 August 2004, p. 24, **C-0258**.

355 Peter Čorej Witness Statement, ¶ 55; Construction Diary of Siderit, s.r.o. Nižná Slaná (Based on information included therein the water was depleted only in January 2005), **R-0141**.

356 Decision of the Department of Environment of the District Office of Rožňava, 9 August 2002 (Ref. ŠVS-2002/02214), **C-0239**.

357 Individual Order for Works from Rozmin sro to Siderit, 14 September 2004, **C-0254**.

358 Individual Order for Works from Rozmin sro to Siderit, 27 September 2004, **C-0255**.

359 Individual Order for Works from Rozmin sro to Siderit, 6 October 2004, **C-0256**.

Works. The overview of Siderit's activities at the deposit was recorded in its Construction Diary.[360]

278. Siderit's construction contract was entered into on 5 November 2004. The contract called for, among other things, the construction of the remaining Surface Constructions and the drilling and construction of the decline.[361] The work had to be completed within 15 months.[362]

279. On 8 November 2004, four days after concluding its agreement with Siderit, Rozmin informed the DMO that it intended to resume works at the Excavation Area by 18 November 2004.[363]

280. Upon receiving such an announcement, on 8 December 2004, Mr. Antonín Baffi from the DMO conducted a routine supervisory inspection of the site to verify whether Rozmin's contemporaneous on-site activities were in accordance with Slovak mining regulations.[364] Mr. Baffi observed that Rozmin was performing surface work and concluded that none of those surface activities were inconsistent with applicable regulations.[365]

281. Thus, contrary to Claimants' representations, Mr. Baffi's inspection had nothing to do with whether Rozmin had commenced Excavation within the three-year period or whether the 2002 Amendment would be applied to Rozmin at the end of that period. That stands to reason. Legally, Mr. Baffi had no authority to ignore the 2002 Amendment, which was mandatory Slovak law. Factually, the only purpose of the inspection was to verify that Rozmin's contemporaneous on-site activities were in accordance with Slovak mining regulations, and it merely concluded that they were.

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360 Construction Diary of Siderit, s.r.o. Nižná Slaná (Based on information included therein the water was depleted only in January 2005), **R-0141**.

361 Contract for the development of the Gemerská Poloma talc deposit entered into between Siderit and Rozmin sro on 5 November 2004, **C-0259**.

362 Contract for the development of the Gemerská Poloma talc deposit entered into between Siderit and Rozmin sro on 5 November 2004, **C-0259**.

363 Letter from Rozmin sro to the District Mining Office, 8 November 2004, **C-0267**.

364 Corrected Translation of the 8 December 2004 Minutes, **R-0057**.

365 Corrected Translation of the 8 December 2004 Minutes, **R-0057**.

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282. In the end, Rozmin never came close to commencing Excavation. The last Opening Works were done in 2001 by RimaMuráň—*i.e.*, *before* the three-year period even started to run—and Rozmin had drilled only 93.2 meters (or about 7% of the 1,300 meters) of the decline. No further Opening Works were ever done.

283. Therefore, Rozmin remained 93% away from finishing Opening Works[366]—and thus not even remotely close to Preparation Works or the statutorily-required Excavation—when the three-year period concluded. None of this is surprising. As Claimants have admitted, Rozmin's owners were dealing with major financial trouble and simply did not provide sufficient money to fund Rozmin.

366 Pursuant to Section 33(1) of the Decree No. 21/1989 Coll. of the Slovak Mining Office on Safety and Health Protection at Work and Safety of Operation with respect to Mining Activities and Activities Carried out by Mining Means in Underground, before excavation is initiated, every mine must have two openings, **R-0177**. With respect to the Gemerská Poloma, the mine should have been opened by the decline and a raise. However, at the time when the Opening Works were initiated by RimaMuráň, there was no plan in place to construct a raise. This would have been the next stage of the construction.

V. THE 2002 AMENDMENT

284. The 2002 Amendment was born of good reason. Prior to its enactment, the Slovak Republic had a systemic problem with entities assigned to excavation areas simply "sitting" on them. There were numerous reasons for this inactivity. Chief among them was that companies would obtain excavation areas not for the *positive* effect of mining but for the *negative* effect of preventing their competitors from doing so. These companies would collect numerous excavation areas throughout the country, develop only some of the sites, and idly "hold" the others—thus preventing their competitors from having access to those sites.[367]

285. As explained in the Rationale Report to this Government proposal, one of the goals of the 2002 Amendment was to foster effective use of Slovakia's mineral resources by preventing persons with assigned excavation areas from sitting on their rights indefinitely and engaging in speculative practices:

> "Frequently, in practice cases occur, when the excavation area is assigned to an organization for more years, ***but the organization does not perform any activities in the excavation area because of various, sometimes even speculative reasons***, and it is not even interested in transferring the excavation area to other organization, which would be able to excavate the exclusive deposit and is interested in the excavation. Based on the amendment of the Mining Act, the District Mining Office is empowered, as a body of the state mining administration exercising main supervision over the use of mineral resources, to cancel the excavation area or to assign it to other organization, ***if the organization did not begin the excavation of the exclusive deposit within three years from the assignment of the excavation area*** or its transfer, or if the organization groundlessly interrupted the excavation for a period of time exceeding three years (short-term interruptions are not counted together), by the means of a selection procedure conducted pursuant to Art. 24, paragraphs 4-10 of the Act."[368]

286. The proposal was introduced to the Slovak Parliament on 25 July 2001.

A. The mandatory nature of the 2002 Amendment

287. The initial bill of the 2002 Amendment made cancellation or reassignment of the excavation area *discretionary*, stating that the DMO "***may*** *cancel […] or [re]assign*" the

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367 Peter Kúkelčík Witness Statement, ¶¶ 7-8.

368 Rationale Report to the 2002 Amendment, Specific Part (emphasis added), **R-0178**.

excavation area.[369] Members of the Slovak Parliament, however, were not satisfied with this proposal because it left cancellation or reassignment to the discretion of the DMO. The Parliament therefore adopted a stricter version that made cancellation or transfer *mandatory*, stating that the mining office "***will** cancel […] or **will** assign*" the excavation area if the three-year period was not respected.[370]

288. The Parliament's written rationale for this change explained that the stricter version was necessary because a failure to meet the deadline to start Excavation is a material breach and the matter thus cannot be left to the mining authority's discretion:

> "A failure to meet the deadline to start excavation must be qualified as a material breach of obligations and ***therefore it is necessary to impose, by law, a duty on the mining office***."[371]

289. The Slovak Parliament passed the amended wording of the proposal on 19 December 2001, and the 2002 Amendment became effective on 1 January 2002. The final wording of the relevant Section 27(12) stated:

> "The District Mining Office ***will*** cancel the excavation area or will assign the excavation area to other organization based on a selection procedure (Section 24, paragraphs 4 to 10), if the organization to which the excavation area was assigned does not begin the excavation of the exclusive deposit within three years from the assignment of the excavation area or its transfer, or if the organization interrupted the excavation for a period of time exceeding three years."[372]

290. The final wording of Section 27(12) thus clearly provided that if an entity to which the excavation area has been assigned does not begin Excavation of the deposit within the

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369 The Government's Proposal for the 2002 Amendment, § 27(12), **R-0179**.

370 Joint Report No. 1498/2001 of committees of the National Council of the Slovak Republic regarding the outcome of discussions on the government bill amending and supplementing Act No. 44/1988 Coll. on Protection and Utilization of Mineral Resources (Mining Act) as amended by the Act of the Slovak National Council No. 498/1991 Coll., Section 8, **R-0180**.

371 Joint Report No. 1498/2001 of committees of the National Council of the Slovak Republic regarding the outcome of discussions on the government bill amending and supplementing Act No. 44/1988 Coll. on Protection and Utilization of Mineral Resources (Mining Act) as amended by the Act of the Slovak National Council No. 498/1991 Coll., Section 8 (emphasis added), **R-0180**.

372 Section 27 (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.)," (emphasis added), **R-0062**.

three years from the assignment, the corresponding DMO is required to cancel the excavation area or reassign it to another entity.

291. The three-year rule imposed by Section 27(12) applied to every holder of an excavation area. It therefore applied to excavation areas acquired both before and after 1 January 2002, the effective date of the 2002 Amendment.[373] Consistent with the general rules of Slovak law on the protection of affected persons from a retroactive application of legislative changes, the three-year rule applied to inactivity taking place *after* 1 January 2002, the effective date of the 2002 Amendment.[374]

292. The 2002 Amendment required the cancellation or reassignment of "*the excavation area*." Acquisition of the excavation area is only one of three different requirements that entities must meet before mining in the Slovak Republic. Mining companies must:

(a) secure a general mining permit, which allows the company to carry out specified mining activities;

(b) acquire an assignment of a particular geographic area—*i.e.*, an excavation area to perform the specific mining activities authorized under the general mining permit either by way of an assignment by the corresponding DMO or by way of a contractual transfer from another person who holds the excavation area; and

(c) secure an authorization for performance of mining activities specifying and authorizing the detailed manner in which the mining activities shall be performed at the designated excavation area.

293. The 2002 Amendment concerned the cancellation or reassignment of the second requirement: the excavation area.

294. The 2002 Amendment was duly published in the Slovak Collection of Laws and became effective on 1 January 2002.

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373 Judgment of the Supreme Court of the Slovak Republic, Case No. 2Sžo/132/2010, 18 May 2011, p. 82, **R-0061**.

374 Judgment of the Supreme Court of the Slovak Republic, Case No. 2Sžo/132/2010, 18 May 2011, p. 82, **R-0061**.

B. Claimants' and Rozmin's knowledge of the 2002 Amendment

295. It is undisputed that Rozmin never commenced Excavation. Therefore, under the mandatory terms of the 2002 Amendment, the DMO had the obligation to cancel the Excavation Area or transfer it to a third party.[375]

296. Claimants, however, suggest they were unaware that the statute would be applied to their investment, stating that they were "*shocked*"[376] and "*kept in the dark*"[377] about its application. In fact, however, Claimants and Rozmin publicly admitted outside of this arbitration that they were well aware of the 2002 Amendment and its relevance to Rozmin.

297. Rozmin's executive director, Ondrej Rozložník (who issued a witness statement in this arbitration), told the press in 2003 that he was aware of the 2002 Amendment and that, unless Rozmin started mining, Rozmin would lose its Excavation Area. He stated in 2003:

> "[U]nder the amended Mining Act the firm will have to commence the mining activity. ***If that is not the case, it will lose the authorization for extraction.***"[378]

298. Claimants also admitted outside of this arbitration that the local DMO office specifically warned them about this possibility. Contrary to his testimony in this arbitration,[379] the President and Director of Belmont—Mr. Agyagos—admitted in his sworn testimony to the Slovak criminal authorities that, in late 2004, Mr. Baffi from the DMO "***explicitly said to me . . . that if we did not start carrying out works, our exploration rights would***

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375 Section 27 (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-0062**.

376 Claimants' Memorial, ¶ 275.

377 Claimants' Memorial, ¶ 276.

378 Hospodárske noviny, *The Talc Saint Barbora Has Been Waiting for Extraction for Years*, 18 November 2003 (emphasis added), **R-0181**.

379 Vojtech Agyagos Witness Statement, ¶ 37.

be removed as of midnight of the last day of November and a tender for the new owner of exploration rights would be declared."[380]

299. Beyond these admissions, there is a fundamental rule in the Slovak Republic—as there is in all legal systems—to know the law. Ignorance of the law is no excuse. Slovak law goes even further in the mining context, requiring mining companies to designate a responsible representative who has the obligation to have "*knowledge of generally binding legal regulations*" related to "*protection and use of mineral deposits*."[381] For Rozmin, the responsible representative was Mr. Rozložník—the person quoted in the 2003 article above.[382] Mr. Rozložník thus had a specific legal duty to be aware of the 2002 Amendment (which, as the above-quoted article shows, he clearly was).

300. Rozmin's specific knowledge of the 2002 Amendment is not surprising. The 2002 Amendment was subject to widespread discussion within the mining community in the Slovak Republic.[383] Indeed, the Slovak Mining Society—of which Rozmin had been a member since the 1990s[384]—held conferences and seminars in 2002 and 2003 specifically to help educate mining companies about the 2002 Amendment.[385]

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380 Witness Statement of Mr. Vojtech Agyagos provided with respect to criminal proceedings No. PPZ-155/BPK-S-2008, 16 March 2009 (with extended translation) (emphasis added), **R-0115**.

381 Section 4a (2) of the Act No. 51/1988 Coll. on Mining Activity, Explosives and on State Mining Administration, **R-0182**.

382 Mining Authorisation issued by the District Mining Office, 14 May 1997, **C-0022**.

383 Peter Kúkelčík Witness Statement, ¶¶ 13-14.

384 Letter from Dr.h.c. Ing. Peter Čičmanec, PhD. of the Slovak Mining Chamber to Ing. Katarína Kaszasová from Slovak Ministry of Finance, 3 May 2011, **R-0183**.

385 Letter from Dr.h.c. Ing. Peter Čičmanec, PhD. of the Slovak Mining Chamber to Ing. Katarína Kaszasová from Slovak Ministry of Finance, 3 May 2011, **R-0183**. In May 2002, a professional workshop held in the hotel Hradok close to Jelšava, attended in total by 66 participants, focused on "*amendments to regulations, for example*, to . . . *the Mining Act* . . . ." (*Id*.) On 3-4 October 2002, an international conference was held in Stará Lesná on the topic "Use of Mineral Raw Materials" focused on "*the new mining legislation*." (*Id*.) In 2002, a professional workshop held in May at the premises of ŠGÚDS (State Geological Institute of Dionýz Štúr, Slovak Republic) in Spišská Nová Ves, focused on "*amendments to regulations, for example . . . the Mining Act . . . .*" (*Id*.) On 9-10 October 2003, an international conference was held titled "Slovak Mining Industry and Geology Prior to Entry to the EU" in the hotel Repiska in Demänovská dolina, focused on "*the application of the amendment to the Mining Act*." (*Id*.) Each of the above references to "*amendments to the Mining Act*" necessarily concerned the 2002 Amendment because there had been no other amendment to the Mining Act in those years.

301. In view of these facts, Claimants' representation to this Tribunal that they were "*shocked*"[386] and "*kept in the dark*"[387] about the 2002 Amendment and its application to Rozmin is yet another in a long series of misrepresentations. Claimants and Rozmin were fully aware of it from the very beginning and they openly admitted their knowledge in the press and under oath.

C. Application of the 2002 Amendment

302. At the end of the three-year period, the state of affairs was as follows:

- Rozmin's indirect owner, EuroGas I, had legally ceased to exist, was in involuntary bankruptcy in the U.S., and did not inject any capital into Rozmin;
- Rozmin was not even close to the start of Excavation because at no time in the three-year period had Rozmin engaged in any Opening works to reach the talc deposit—much less actually start Preparation Works or the statutorily-required Excavation;
- Rozmin was aware—as shown by Mr. Rozložník's own admission to the press in 2003—that the Excavation Area had to be cancelled or assigned to a third party unless it began Excavation by the end of 2004;
- Rozmin was—by Mr. Agyagos' own admission—"*explicitly*" warned by Mr. Baffi that the assigned Excavation Area would be reassigned to a third-party if Excavation did not commence before the end of 2004.

303. By late December 2004, there was no question that Rozmin was not going to be able to commence Excavation at the site by the 1 January 2005 deadline. Upon expiration of the three-year period, on 1 January 2005, the DMO was accordingly required by law to "*assign[] the excavation area to [an]other organization*."[388]

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386 Claimants' Memorial, ¶ 275.

387 Claimants' Memorial, ¶ 277.

388 Section 27 (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.,

304. After the deadline passed without Excavation, on 3 January 2005, the DMO wrote to Rozmin to inform it of the new selection procedure.[389] Delivery of this 3 January 2005 letter commenced the administrative proceeding for assignment of the Excavation Area to another person.[390]

305. The DMO moved forward with the selection procedure to choose an entity to which the Excavation Area could be assigned as required under the 2002 Amendment. A committee composed of seven individuals—one representative from the District Office in Rožňava, Department of Environment, one representative each from the municipalities of Gemerská Poloma and Henclova, one representative from the Slovak Mining Chamber, and three representatives from DMOs in Košice and Banská Bystrica—was assembled to review the bids that were submitted by interested persons.[391]

306. The selection procedure was conducted in an open and public manner. All interested persons had the right to participate. Mr. Rozložník confirmed that, while Rozmin was legally precluded from participating in the selection procedure individually, its principals could consider establishing a new company that would participate in the selection procedure. At the meeting to discuss the assignment of the Excavation Area to another entity, Mr. Rusko, the then Minister of Economy, informed Messrs. Przybilla, Luber and Rozložník, all of Rozmin, that Rozmin had lost its rights to the Excavation Area in the

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on Protection and Exploitation of Mineral Resources (Mining Act), as amended by the Act of Slovak National Council No. 498/1991 Coll.)," **R-0062**.

389 Letter from the District Mining Office to Rozmin sro, 3 January 2005 (Ref. 2450/451.14/2004-I), **C-0030**.

390 *See* Section 18(2) of the Act No. No. 71/1967 Coll., Administrative Procedural Code, as amended, **R-0184** ("*The proceedings shall be deemed initiated upon receipt of the party's proposal by the administrative authority competent to take the relevant decision. In case of proceedings held upon the administrative authority's motion, the proceedings shall be deemed initiated on the date when the first action was taken towards the party.*"). That the proceedings were deemed commenced when Rozmin received the DMO's 3 January 2005 notice, was twice confirmed by the Slovak Supreme Court during Rozmin's numerous challenges. *See* Resolution of the Slovak Supreme Court, Case No. 6Sžo/61/2007, 27 February 2008, p. 29-30, **R-0060**; Judgment of the Supreme Court of the Slovak Republic, Case No. 2Sžo/132/2010, 18 May 2011, p. 70, **R-0061**.

391 Letter from the District Mining Office to Mr. Chanas, 20 April 2005, **R-0185**, Letter from the District Mining Office to Mr. Piovarczy, 19 April 2005, **R-0186**, Letter from the District Mining Office to Mr. Nedeljak, 19 April 2005, **R-0187**, Letter from the District Mining Office to Mr. Mihalík, 20 April 2005, **R-0188**, Letter from the District Mining Office to Mrs. Somsáková, 18 April 2005, **R-0189**, Letter from the District Mining Office to Mr. Kapusta, 21 April 2005, **R-0190**, Letter from the District Mining Office to Mrs. Kúdelová, 19 April 2005, **R-0191**.

talc deposit Gemerská Poloma because it did not commence Excavation within a three-year period. He noted that this was a decision of the DMO by which he had to abide and proposed to Rozmin two alternatives: (*i*) to establish a new company and submit a bid in the selection procedure while adding that he could not promise that Rozmin would be selected or (*ii*) to agree with the company to which the Excavation Area will be assigned on the compensation of the expended costs.[392] This highlights the transparent nature of the process and further demonstrates that there was no personal animosity towards Rozmin or its principals.

307. On 21 April 2005, the committee in charge of evaluating the bids submitted in the selection procedure reviewed bids from seven companies interested in the Excavation Area, including (*i*) Economy Agency; (*ii*) Východoslovenské kameňolomy, a.s.; (*iii*) SIDERIT s.r.o. Nižná Slaná; (*iv*) Mondo Minerals Slovakia, s.r.o.; (*v*) Rudohorská investičná spoločnosť, s.r.o.; (*vi*) IMI Fabi (Slovakia), s.r.o.; and (*vii*) NewCo Slovakia s.r.o.[393]

308. After a thorough review of those bids, the committee awarded the winning bid to Economy Agency—the company that had submitted the proposal for exploitation of the Excavation Area that ranked first.[394] Indeed, the documentation of Economy Agency was prepared by Mr. Čorej, who had taken part in the project since 1989 and who had substantial knowledge of the Excavation Area.[395]

309. On 3 May 2005, the DMO wrote to Rozmin and Economy Agency confirming the assignment of the Excavation Area to Economy Agency (the "**2005 Notice**").[396] Shortly

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392 Minutes from meeting with Mr. Rusko on 16 February 2005 prepared by Mr. Rozložník, **R-0192**.

393 Report on the Course and Results of the Selection Procedure for the Designation of the MA GP to Another Organisation Performed on 21 April 2005, **C-0031**.

394 Peter Čorej Witness Statement, ¶ 59.

395 Peter Čorej Witness Statement, ¶ 6.

396 Letter from the District Mining Office to Rozmin s.r.o., 3 May 2005, **R-0022**.

thereafter, Mr. Rauball and Mr. Agyagos approached Mr. Čorej seeking to partner with Economy Agency to develop the site.[397]

310. Following the selection of Economy Agency as the winning bidder, a company named Mondo Minerals Slovakia, s.r.o. challenged the selection procedure. As a response to this challenge, the MMO composed an advisory committee to evaluate the selection procedure as a whole.[398] After a thorough review of the bids, the advisory committee issued its written conclusions on 6 September 2005 and found that only Economy Agency's bid satisfied all statutory requirements.[399] The advisory committee explained:

> "Based on abovementioned, six proposals were submitted for assignment of the Gemerská Poloma excavation area and ***only*** a single proposal, namely ***a proposal of an organization Economy Agency RV, s.r.o.***, Marikovszkého 53, 048 01 Roznava, ***fulfills requirements*** of the mining act and of the implementing decree."[400]

311. After the assignment, Economy Agency secured an investor with sufficient funds to provide capital to the project. It then opened the mine in a completely different manner—by using a 4,200-meter "adit" (a nearly horizontal passage leading into a mine) drilled from the side of the mountain—and started actual Excavation.[401] Several years later, Economy Agency—which became VSK Mining s.r.o. ("**VSK Mining**") upon the investor's entry—was sold to an Austrian mining company, which now runs the mine under the name of "EUROTALC s.r.o."

312. Rozmin was not singled out. In 2005, relevant DMOs in the Slovak Republic applied the 2002 Amendment to approximately 30 assigned excavation areas involving different entities that also had not engaged in any Excavation during the three-year period.[402]

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397 Peter Čorej Witness Statement, ¶ 60.

398 Announcement on Handling of Submission of Mondo Minerals OY by. Main Mining Office, 19 September 2005, **R-0193**.

399 Report of the Advisory Committee of the Chairman of the Main Mining Office, 6 September 2005, **R-0194**.

400 Report of the Advisory Committee of the Chairman of the Main Mining Office, 6 September 2005 (emphasis added), **R-0194**.

401 Ernst Haidecker Witness Statement, ¶ 18.

402 Peter Kúkelčík Witness Statement, ¶ 15.

VI. THE SLOVAK ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

313. Unable to credibly dispute any of the foregoing facts, Claimants concoct a highly misleading story about what occurred *after* the reassignment of the Excavation Area. As discussed below, those events were legitimate acts by the State. In any event, however, Claimants could not have suffered any harm from them because nothing the State did *after* the three-year period can change the fact that Rozmin did not commence Excavation within the three-year period. Regardless of the State acts that later occurred, Rozmin would still have been required to relinquish its Excavation Area under the 2002 Amendment.

A. The two appeals to the Supreme Court regarding the Excavation Area

314. While the 2002 Amendment required the cancellation of the Excavation Area or its reassignment if its holder failed to initiate the Excavation during a three-year period, it did not establish the details of the procedure by which that reassignment was to occur. The absence of detailed statutory guidance left the DMOs sailing on unchartered waters, applying a new statute without the benefit of legislative guidance, court decisions, or other precedent on the procedure that should be followed.

315. Because the 2002 Amendment was mandatory and left the DMO no discretion, the DMO thought it appropriate to issue a simple notice to Rozmin in early January 2005 about the reassignment of the Excavation Area.[403] It conducted an open tender to determine to which company it should reassign the Excavation Area. Based on the results of the tender, the DMO assigned the Excavation Area to Economy Agency[404] and announced the registration of Economy Agency with the mining register to Rozmin on 3 May 2005, again in the form of a simple notice.[405]

316. Rozmin, however, challenged the DMO's reassignment before local administrative bodies and the Slovak courts. As explained below, Rozmin succeeded in convincing the

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403 Letter from the District Mining Office to Rozmin sro, 3 January 2005 (Ref. 2450/451.14/2004-I), **C-0030**.

404 Report on the Course and Results of the Selection Procedure for the Designation of the MA GP to Another Organization Performed on 21 April 2005, **C-0031**.

405 Letter from the District Mining Office to Rozmin s.r.o., 3 May 2005, **R-0022**.

Slovak Supreme Court that the DMO had committed errors in the *procedure* by which the Excavation Area was reassigned and that the matter should be remanded to the DMO to redo the procedure. To be clear, however, no court ever held that Rozmin had commenced Excavations (because it had not), that the statute was discretionary (because it was not), or that the Excavation Area should not have been cancelled or reassigned (since it follows from first two propositions that it had to be).

1. Rozmin's first challenge

317. Rozmin challenged the DMO's decision to the Regional Court in Košice (the "**Regional Court**"), alleging that the *procedure* by which the Excavation Area was reassigned was faulty in two respects.[406] ***First***, Rozmin argued that a full administrative proceeding was required before the Excavation Area could be reassigned, rather than a simple "notice" announcing the registration of the winner of the tender. The DMO had thought differently, since the statute was mandatory. ***Second***, Rozmin argued that it should have been a party to the proceedings by which the Excavation Area was reassigned to another entity. The DMO had thought differently because, by law, the entity whose rights were being assigned could not win those rights back in the tender. Rozmin's entire appeal petition was 4 pages long.[407]

318. The Regional Court disagreed with Rozmin and rejected the claim.[408] Rozmin then appealed to the Supreme Court of the Slovak Republic.[409]

319. Evidencing that the Slovak Republic was not adverse to Claimants' investment, the Supreme Court sustained Rozmin's claims of procedural error. The Supreme Court held that the DMO's decision on the reassignment of the Excavation Area should have been made in formal administrative proceedings (despite the fact that the 2002 Amendment

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406 Claim of Rozmin s.r.o. to the Regional Court in Košice, 27 September 2005, **R-0195**. Since the District Mining Office had not recognized Rozmin as a formal participant in the administrative proceedings, special rules applied and Rozmin was entitled to file judicial challenge with the Regional Court without prior administrative appeal the Main Mining Office.

407 It was modified on 21 August 2006 and the modification included another 6 pages, **R-0196**.

408 Decision of the Regional Court in Košice, Case No. 5S/73/2005, 7 February 2007, **R-0197**.

409 Appeal of Rozmin s.r.o. to the Supreme Court of the Slovak Republic, 30 March 2007, **R-0198**.

does not give the DMO discretion) and that Rozmin should have been a party to such proceedings (despite the fact that it could not keep the Excavation Area).[410]

320. The Supreme Court did not take a position on any other issue because, under the applicable procedural rules, it could only opine on issues that Rozmin had raised in its challenge to the Regional Court.

321. On remand, the DMO fully complied with the Supreme Court's decision. It launched formal administrative proceedings and included Rozmin as a party.[411] Having conducted full administrative proceeding and having heard Rozmin, the DMO again concluded that there had been no Excavation within the three-year period (not surprisingly, since the substantive failure to commence Excavation within the three-year period had not—and could not have—changed). The DMO assigned the Excavation Area to VSK Mining (the successor-in-interest to Economy Agency).[412]

322. Therefore, Claimants' assertion that the DMO "*relentlessly disregarded*"[413] the Supreme Court's decision is simply not true. Far from disregarding the Supreme Court's decision, the DMO faithfully followed it.

2. Rozmin's second challenge

323. Rozmin then appealed against the second DMO decision.[414] Because this DMO decision was in the form of an administrative decision, the appeal was required to be filed with the MMO before an action could be filed with the Slovak courts. The MMO considered

410 Resolution of the Supreme Court of the Slovak Republic, Case No. 6Sžo/61/2007, 27 February 2008, p. 31-33, **R-0060**.

411 Announcement of the District Mining Office on invitation of the new proceeding on assignment of the excavation area Gemerská Poloma, 21 May 2008, **R-0199**.

412 Decision of the District Mining Office on the Assignment of the Gemerská Poloma Mining Area to VSK Mining sro, 2 July 2008 (Ref. 329- 1506/2008), **C-0034**.

413 Claimants' Memorial, ¶ 209.

414 Appeal of Rozmin s.r.o. against the Decision on assignment of the excavation area to VSK Mining s.r.o., 21 July 2008, **R-0200**.

Rozmin's appeal and rejected it.[415] Rozmin then submitted a challenge against the MMO's decision to the Regional Court,[416] which rejected the challenge as well.[417]

324. In neither its appeal to the MMO nor its claim to the Regional Court did Rozmin argue—as Claimants do here—that the DMO had not followed the Supreme Court's decision (not surprisingly, since the DMO had followed it). Rather, Rozmin raised entirely different arguments:

(a) That the three-year period could not have started before the 2002 Amendment took effect, on 1 January 2002, and thus should have concluded on 1 January 2005;

(b) That the three-year period was tolled when Rozmin informed the DMO that it was commencing work;

(c) That during the inspection on 8 December 2004, the DMO did not identify any violations of the applicable law;

(d) That it was technically impossible to start Excavation within the three years; and

(e) That the Excavation Area was reassigned to an entity which did not fulfill the statutory criteria.

325. All of these arguments could have been raised in the first claim to the Regional Court but were not.[418] If Rozmin had raised these arguments in the first claim to the Regional

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415 Decision of the Main Mining Office, 12 January 2009 (Ref. 26- 34/2009), **C-0270**.

416 Appeal to the Regional Court in Košice, 12 March 2009 (Ref. 449-9109), **C-0271**.

417 Decision of the Regional Court in Košice, 3 February 2010 (Ref. 7S/25/2009-207), **C-0272**.

418 These reasons were raised in Rozmin's first claim to the Supreme Court, but it was too late to raise them because Rozmin had failed to do so before the Regional Court. Under Slovak law, the Supreme Court was not allowed to deal with them. Slovak administrative courts may only review legality of administrative decisions based on the grounds asserted by the claimant in the initial claim and not beyond. *See* Commentary to the Act No. 99/1963 Coll., Civil Procedure Code, as amended ("*The court (instead of the participant–claimant) does not look for the specific grounds of the unlawfulness of a decision of an administrative body; these grounds should be included in the claim and determine the extent of the legality review by the court which is bound by the claim under Section 250h. Section 249(2) implies the "iudex ne eat petita partium" principle (i.e., the judge does not go beyond the petitions of parties), which must be applied by the court in every case where it reviews the legality of the administrative decision on the basis of*

Court, the second appeal would not have been necessary—and years of litigation could have been saved. Rozmin, however, engaged in piecemeal litigation and, in so doing, was solely responsible for the need for a second appeal.

326. The Regional Court considered Rozmin's arguments and rejected them.[419] Rozmin then appealed to the Supreme Court.[420]

327. The Supreme Court assessed Rozmin's new arguments and—again demonstrating that the Slovak Republic was not adverse to Claimants' investment—*agreed* with Rozmin on several (but not all) of its new arguments. In particular, the Supreme Court confirmed that the three-year period did not apply retroactively but, instead, started on 1 January 2002 (and thus, as applied to Rozmin, ran through 1 January 2005).[421] It also instructed DMO to perform a more detailed examination of Rozmin's activity with the correct three-year period.[422]

328. The Supreme Court rejected Rozmin's other arguments and did not reach any conclusions about whether Rozmin complied with the statutory requirement to commence Excavation with the three-year period. It remanded the matter to the DMO again for further proceedings.[423]

329. On remand, the DMO again followed the Supreme Court's decision by performing a thorough investigation of Rozmin's activities at the site between 2000, when the DMO approved the initiation of works at the site, and 2005, when the Excavation Area was first reassigned because of Rozmin's failure to commence Excavation. The DMO also inquired into the reasons for Rozmin's failure to excavate at the site and considered Rozmin's financial contributions and commitments to the site. On the basis of this

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a claim"), **R-0201**. Thus, Rozmin should have raised these arguments in its first claim to the Regional Court.

419 Decision of the Regional Court in Košice, 3 February 2010 (Ref. 7S/25/2009-207), **C-0272**.

420 Appeal of Rozmin s.r.o. to the Supreme Court, 25 March 2010, **R-0202**.

421 Judgment of the Supreme Court of the Slovak Republic, Case No.2Sžo/132/, 18 May 2011, p. 82, **R-0061**.

422 Judgment of the Supreme Court of the Slovak Republic, Case No.2Sžo/132/, 18 May 2011, p. 84-86, **R-0061**.

423 Judgment of the Supreme Court of the Slovak Republic, Case No.2Sžo/132/, 18 May 2011, **R-0061**.

investigation, on 30 March 2012, the DMO rendered a reasoned decision with the results of its investigation.[424] It found, among other things, that:

- Between 1 January 2002 and 1 January 2005, Rozmin did not excavate at the site and failed to perform any of the DMO-approved activities that were necessary to lead to Excavation;[425]

- Rozmin had performed little work at the site—for example, out of 1300 meters of decline that needed to be built, Rozmin had only built 93 meters (less than 7%),[426] and the limited work that was performed by Rozmin's subcontractors, RimaMuráň and Siderit, was Surface Construction, limited in nature, and unconnected to Excavation.[427]

- Given Rozmin's failure to advance on works at the site and the site's flooding, Rozmin could not comply with the pre-approved Plan of Opening, Preparation and Excavation by the 1 January 2005 deadline under the 2002 Amendment[428] (in other words, Rozmin was so far behind schedule that it could not commence Excavation before the expiration of the three-year period under the 2002 Amendment);

- Rozmin had not demonstrated that it had sufficient financial resources or the ability to secure the funding necessary to commence Excavation;[429]

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424 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, **R-0058**.

425 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, p. 190, **R-0058**.

426 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, p. 188, **R-0058**.

427 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, **R-0058**.

428 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, **R-0058**.

429 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, p. 189, **R-0058**.

- Rozmin's failure to commence Excavation was its own responsibility and did not result from the geological characteristics of the mine, technical conditions of the project, or interference from the Slovak authorities.[430]

330. Based on these findings, the DMO concluded that Rozmin's activities at the site were speculative and that, instead of concentrating on developing the mine and excavating the resource, Rozmin's apparent goal was to delay work and limit its capital investment in the mine until it found a senior mining company interested in buying Rozmin out of the project.[431]

331. The DMO then applied the public-interest analysis raised by the Supreme Court and reasoned that, under the mining regulations in effect, the public interest was best served by the rational use of mineral deposits.[432] In the case of the talc deposit, the public interest was best served by excavating the deposit and extracting the talc, and any contrary conduct (such as the failure to excavate the site or actively blocking Excavation works) was not in the public interest.[433]

332. Based on these findings, the DMO confirmed its earlier decision assigning the Excavation Area to VSK Mining, the legal successor of Economy Agency and the winner of the selection procedure.[434]

333. On 17 April 2012, Rozmin appealed that DMO decision before the MMO,[435] which denied Rozmin's appeal on 1 August 2012.[436]

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430 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, p. 235, **R-0058**.

431 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, p. 210, **R-0058**.

432 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, p. 236, **R-0058**.

433 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, **R-0058**.

434 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, p. 164-165, **R-0058**.

435 Appeal of Rozmin s.r.o. against the Decision on assignment of the excavation area to VSK Mining s.r.o., 17 April 2012, **R-0203**.

334. Rozmin did not exercise its right to challenge the MMO's decision before the courts.

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335. If Rozmin believed the DMO's final detailed decision was not in accordance with the second Supreme Court decision—as Claimants now argue[437]—then it could have submitted a claim to the Regional Court, which if necessary was appealable to the Supreme Court. And if the reassignment to VSK Mining was contrary to the second Supreme Court Decision, then the Supreme Court would have certainly reversed it. But Rozmin chose not to do so. The fact that Rozmin did not challenge the DMO's detailed decision to the Slovak courts is telling. Having not given the Supreme Court the opportunity to review whether the DMO reached the wrong conclusion, Claimants cannot complain about it now.

336. Consequently, any suggestion that Rozmin did not turn to the courts because it lost faith in the courts is not genuine because Rozmin had always been successful before the Supreme Court. Nor can Claimants plausibly argue that Rozmin was discouraged after eight "long" years of court proceedings because Rozmin itself was entirely responsible for the second appeal—which was only necessary because Rozmin had failed to include all of its arguments in the first challenge.

337. With the benefit of the Supreme Court decisions on this brand new legislation, the DMO rectified all of the procedural defects identified by the Supreme Court and always acted in compliance with its instructions.

B. Rozmin's third appeal to the Supreme Court was irrelevant to the Excavation Area

338. There was also a third appeal to the Supreme Court, but it was irrelevant to the Excavation Area and it ultimately did not result in the overturning of the respective DMO decision. Claimants appear to have raised it only to embellish and dramatize the facts.

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436 Decision of the Main Mining Office, 1 August 2012 (Ref. 808- 1482/2012), **C-0273**.

437 Claimants' Memorial, ¶ 205.

339. The third Supreme Court decision dealt with a *different* authorization: the General Mining Permit. The general mining permit is, in essence, a general business license, whereas the assigned excavation area is the particular geographic area in which company is permitted to mine. Thus, the third Supreme Court decision related to the former, whereas the first two Supreme Court decisions related to the latter.

340. The general mining permit is governed by Act No. 51/1988 Coll. on Mining Activity, Explosives and on the State Mining Administration ("**Law 51**"), which is a different law than the Mining Act that governs excavation areas. Pursuant to Section 4(b) of Law 51 (not the Mining Act which was amended by the 2002 Amendment), the DMO shall initiate proceedings on cancellation of the general mining permit if the entity, *inter alia*: (*i*) ceases to meet the conditions for obtaining the general mining permit for a period of more than 3 months; or (*ii*) ceases to perform Mining Works at *any* site in the Slovak Republic for a period of more than three years.[438]

341. In 2008, the DMO concluded that these conditions applied to Rozmin because (*i*) Rozmin had not appointed a responsible representative for several years and thus that the conditions for obtaining the General Mining Permit were not met for more than three months,[439] and (*ii*) Rozmin did not perform any mining activities at any site in the Slovak Republic for a period longer than three years.[440] The DMO therefore cancelled Rozmin's General Mining Permit.[441]

342. After an appeal to the MMO,[442] Rozmin submitted a claim to the Regional Court. Both the MMO and the Regional Court confirmed the DMO's decision.[443]

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438 Section 4(b) of the Act 51/1988 Coll., on Mining Activities, Explosives and on State Mining Administration, **R-0204**.

439 Decision on the Revocation of the Authorization for Mining, 12 August 2008 (Ref. 104-1620/2008) p. 3, **C-0035**.

440 Decision on the Revocation of the Authorization for Mining, 12 August 2008 (Ref. 104-1620/2008) p. 3, **C-0035**.

441 Decision on the Revocation of the Authorization for Mining, 12 August 2008 (Ref. 104-1620/2008) **C-0035**.

442 Appeal of Rozmin s.r.o. against the Decision of the District Mining Office on cancellation of the General Mining Permit, 1 September 2008, **R-0205**.

343. Rozmin then appealed to the Supreme Court. Contrary to Claimants' suggestion, the Supreme Court did *not* reverse the DMO's decision. It simply instructed the Regional Court to assess in more detail the matter—in particular whether the State's conduct (the DMO's procedural errors and the challenges thereto, described above) had prevented Rozmin from performing mining activity for three years.[444] After further assessment, the Regional Court confirmed that, from 2002 to 2005, Rozmin had conducted no mining activity and the State had played no role in that lack of activity during that three-year period. Therefore, the Regional Court confirmed the DMO's decision on cancellation of the General Mining Permit.[445]

344. Rozmin chose not to appeal. Having not given the Supreme Court the opportunity to review whether the Regional Court reached the wrong conclusion, Claimants cannot complain about it now.

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345. In sum, during the proceedings regarding the Excavation Area, no Slovak court ever concluded that Rozmin had commenced Excavation during the three-year period or that 2002 Amendment did not require cancellation or reassignment. To the contrary, the thorough investigation of the administrative bodies required by the second Supreme Court decision confirmed that Rozmin did not develop the site within the three-year time period required by law.

346. The evidence before this Tribunal demonstrates that Rozmin was starved for capital throughout the period of its tenure under the assigned Excavation Area. The reason for Rozmin's inactivity during the three-year period was because it lacked the capital necessary to complete Opening Works and commence Excavation. In an annual report prepared by Rozmin for DMO for year 2000, Rozmin stated that "*the works at the deposit*

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443 Decision of the Main Mining Office, 12 January 2009 (Ref. 25- 32/2009), **C-0274**; Decision of the Regional Court in Košice, 19 January 2012 (Ref. 6S/28/2009-175), **C-0275**.

444 Resolution of the Supreme Court of the Slovak Republic, Case No. 5Sžp/10/2012, 31 January 2013, p 14-15, **R-0059**.

445 Decision of the Regional Court in Košice, 19 January 2012 (Ref. 6S/28/2009-175), pp. 11 and 13, **C-0276**.

were limited because of lack of financing."[446] Additionally, in media articles dated 28 December 2004,[447] 29 December 2005,[448] and 5 January 2005,[449] Mr. Rozložník is cited as saying that problems with financing were the reason for discontinuing works. And Mr. Agyagos sent a letter to the Minister of Economy dated 3 November 2005 in which he acknowledged that the reason for discontinuance of mining activities was lack of sufficient financial resources (Rozmin claimed that these arose due to unexpected additional costs caused by RimaMuráň as a contractor).[450]

347. In the end, it is undisputed that:

- Rozmin did not commence Excavation during the three-year period from 1 January 2002 to 1 January 2005;
- The DMO did not reassign the Excavation Area until after that three-year period; and
- Rozmin's inactivity was the result of its own financial problems.

446 Rozmin´s Annual Report on Activity for the Year 2000, 16 January 2001, **R-0168**.

447 Hospodárske noviny, *Renewed Works on Talc Mine*, 28 December 2004, **R-0206**.

448 Korzár, *Will the mining of talc be renewed in Gemerská Poloma?*, 29 December 2005, **R-0207**.

449 Hospodárske noviny, *European Market is waiting for the Gemer Talc*, 5 January 2005, **R-0208**.

450 Letter from Mr. Agyagos to Minister of Economy, 3 November 2005, **R-0162**.

VII. THE SLOVAK REPUBLIC DID NOT BREACH INTERNATIONAL LAW

348. It should be readily apparent from the foregoing that Claimants, not the Slovak Republic, were solely responsible for Rozmin's loss of the Excavation Area. Nevertheless, this Section explains that the Slovak Republic did not violate international law by reassigning the Excavation Area and in the subsequent challenges to that decision.

349. Before doing so, however, the Slovak Republic is compelled to address Claimants' inflammatory statements that the Slovak Republic "*has track record of hostile conduct in relation to foreign investors*"[451] and is beset with "*corruption*." Those statements are inappropriate; they are baseless; and they are hereby denied in their entirety. Suffice it to say that the Slovak Republic has an overwhelming record of success in investment treaty arbitrations, having won eight investment arbitrations against only one loss (which is currently subject to setting-aside proceedings), and Claimants have presented no evidence—literally, *none*—that there was any corruption in this case.

350. More to the point, the tribunal in *ECE v. Czech Republic* recently stated that it finds this type of argumentation—that "everyone knows that the State is corrupt; therefore, there was corruption in this case"—to be "*deeply unattractive*." The tribunal observed:

> "The Tribunal does not close its eyes to the fact that the Czech Republic, like other countries, has had, and reportedly still has, problems with corruption. ***But the Tribunal remains vigilant against blanket condemnatory allegations which can have the appearance of an attempt to 'poison the well' in the hopes of making up for a lack of direct proof. Reference to other instances of alleged corruption may prove that corruption exists in the State, but it does little to advance the argument that corruption existed in the specific events giving rise to the claim***."[452]

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451 Claimants' Memorial, ¶ 41.

452 *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.879 (emphasis added), **RL-0111**.

351. Having been presented with no evidence of any corruption—and given Claimants' admission that they do not rely on corruption to substantiate their claims[453]—the Slovak Republic resists further comment on Claimants' baseless allegations.

A. The reassignment of the Excavation Area was a legitimate exercise of the State's regulatory powers

352. It is widely recognized in international law that a measure does not violate international law if it is a result of a legitimate exercise of a good faith regulatory power of the State. The reassignment of the Excavation Area was such a measure. The 2002 Amendment was enacted to pursue the public interest of the Slovak Republic to address the widespread problem of entities assigned to an excavation area sitting idly on those sites and thus reducing the amount of potential revenue that the State could be achieving.

353. Obligations in investment treaties must be interpreted against the background of the doctrine of police powers in general international law enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[454] The tribunal in *Saluka v. Czech Republic* observed:

> "It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare."[455]

354. The tribunal in *Saluka v. Czech Republic* relied on the Harvard Draft Convention and the United States Third Restatement of the Law of Foreign Relations and concluded:

> "In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as

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453 Claimants' Memorial, ¶ 54 (Claimants "*neither need to nor in fact rely on corruption to substantiate their claims*").

454 Vienna Convention on the Law of Treaties, Article 31(3)(c) (the "**Vienna Convention**"), **RL-0112**.

455 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 ¶¶ 254-255, **RL-0113**.

> within the police power of States' forms part of customary international law today."[456]

355. Several other tribunals have applied the police powers doctrine, including the tribunals in *Methanex Corp v. USA*[457], *Chemtura v. Canada*,[458] *Suez v. Argentina*[459] and *Les Laboratoires Servier, S.A.S. v. Poland*.[460] Other tribunals have applied the doctrine in substance (if not in name), such as the *Feldman v. Mexico*, which recognized that States cannot be required to indemnify against the adverse effects of reasonable governmental regulation:

> "[G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this."[461]

356. Still other tribunals have recognized this principle as well, including the tribunals in *Total v. Argentina*,[462] *Glamis Gold v. USA*[463] and *Tza Yap Shum v. Peru*.[464]

357. Investment treaty obligations must be interpreted against the background of the police powers doctrine because they must be interpreted in accordance with Article 31(3)(c) of the Vienna Convention. The tribunal in *ADF v. USA* explained:

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456 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 262, **RL-0113**.

457 *Methanex Corporation v. USA*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, 3 August 2005, 44 ILM 1345 (2005), Part IV, Chapter D, ¶ 7, **RL-0114**.

458 *Chemtura Corporation v. Canada*, NAFTA/UNCITRAL, Award, August 2, 2010, ¶ 266, **RL-0115**.

459 *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶ 139, **RL-0116**.

460 *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, PCA, Final Award, 14 February 2012, ¶¶ 569-84, **RL-0117**.

461 *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶103, **RL-0118**.

462 *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, ¶123, **RL-0119**.

463 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award, 8 June 2009, ¶ 804, **RL-0120**.

464 *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, ¶ 95, **RL-0121**.

> "[A]ny general requirement to accord 'fair and equitable treatment' and 'full protection and security' must be disciplined by being based upon State practice and judicial or arbitral case law or other sources of customary or general international law."[465]

358. The police powers doctrine applies to Claimants' expropriation and non-expropriation claims alike. *Saluka v. Czech Republic* stands for this proposition. The claimant, Saluka, claimed that the Czech Republic's decision to place IPB (a bank in which Saluka had invested) into forced administration was an unlawful expropriation (Article 5 of the BIT), a breach of the fair and equitable standard of treatment, and a breach of the obligation to accord full protection and security (Article 3 of the BIT). In the context of considering Claimant's expropriation claim under Article 5, the tribunal found that the Czech Republic's decision was a "*lawful and permissible regulatory action*"[466] and protected by the police powers doctrine:

> "In summary, the Tribunal finds, based on the totality of the evidence which has been presented to it, that in imposing the forced administration of IPB on 16 June 2000 the Czech Republic adopted a measure which was valid and permissible as within its regulatory powers, notwithstanding that the measure had the effect of eviscerating Saluka's investment in IPB."[467]

359. When the tribunal returned to the forced administration in the context of the claims under Article 3, the tribunal stated that its conclusion in respect of expropriation had to be applied, *mutatis mutandi*, to its assessment of the other obligations:

> "As far as the Claimant's allegation of an unlawful impairment of Saluka's investment by the Czech Government's imposition of forced administration upon IPB is concerned, the reasons which led the Tribunal, in the preceding Chapter of this Award, to find that the 'deprivation' of Saluka's investment caused by the forced administration was lawful and that the Czech Republic did not violate Article 5 of the Treaty also lead the Tribunal to find that the 'impairment' of Saluka's investment by the same measure was lawful as well and that the Czech Republic did not violate Article 3.1 of the Treaty in this respect either. Since in the context of Article 5, the 'deprivation' of Saluka's investment by the imposition of forced administration upon IPB was justified on reasonable

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465 *ADF Group Inc. v. USA*, ICSID Case No. ARB(AF)/00/1 (NAFTA), Award, 9 January 2003, ¶ 184, **RL-0122**.

466 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 ¶ 275, **RL-0113**.

467 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 ¶ 276, **RL-0113**.

> regulatory grounds, the same applies a majore ad minus to the 'impairment' of Saluka's investment in the context of Article 3.1. In other words: to the extent that the concepts of 'deprivation' and 'impairment' overlap, because a 'deprivation' is just one variety of possible 'impairments', the regulatory power exception (or 'police power exception') explained in the previous Chapter of this Award applies to both."[468]

360. Thus, under the recognized principle of the police powers doctrine, the Slovak Republic's legitimate exercise of its regulatory powers cannot violate the U.S.-Slovak BIT or the Canada-Slovak BIT.

361. The reassignment of the Excavation Area was a result of such a bona fide legitimate regulatory power of the Slovak Republic. The 2002 Amendment was mandatory Slovak law.[469] As explained in the Rationale Report to the 2002 Amendment, one of its main goals was to foster effective use of Slovakia's mineral resources by preventing persons with assigned excavation areas from sitting on their rights indefinitely and engaging in speculative practices. [470] It cannot thus be seriously disputed that the 2002 Amendment was adopted based on serious and legitimate concerns of public interest in effective use of the State's mineral wealth.

362. It is undisputed that Rozmin did not excavate from 1 January 2002 to 1 January 2005 and that the State had nothing to do with Rozmin's failure to excavate. It was therefore mandatory for the DMO to cancel Rozmin's rights to the Excavation Area or reassign the Excavation Area to another entity. Although the Slovak courts remedied and clarified several non-substantive errors of the DMO's decisions reassigning the Excavation Area to a third party, it cannot be disputed that the 2002 Amendment justified the reassignment of the Excavation Area.

363. The reassignment of the Excavation Area was thus a rational and justifiable regulation seeking to protect and maximize the effective utilization of the Slovak Republic's natural

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468 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 ¶ 470, **RL-0113**.

469 Section 27(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-0062**.

470 *See* Rationale Report to the 2002 Amendment, Special Part, **R-0178**.

resources. Rozmin was not singled out; the Slovak Republic ran a total of approximately 30 tenders for reassignment of excavation areas in 2005. It was a legitimate exercise of the Slovak Republic's police powers and therefore cannot give rise to an unlawful expropriation or violation of any other standards set by the U.S.-Slovak BIT or the Canada-Slovak BIT.

B. The administrative and judicial processes did not deny Claimants justice

364. The essence of Claimants' claims relating to the Slovak Republic's conduct after the reassignment of the Excavation Area is that the Slovak administrative and judicial bodies issued incorrect decisions and caused delays in administrative proceedings. Claimants' claims are thus for denial of justice—*i.e.*, claims that the State is liable under international law for the actions or omissions of its judicial or administrative bodies.

365. It is well settled, however, that denial of justice claims can only be brought where the aggrieved party has exhausted local remedies. Here, Claimants complain of first instance procedural decisions that either were corrected upon appeal or were not appealed. Thus, the first instance decisions cannot constitute a denial of justice.

366. Claimants likely realized the inherent weakness of their claims and thus chose to style their claims differently. They complain of "*expropriation*," "*arbitrariness*," violations of "*due process*," failure to provide "*fair and equitable treatment*," and failure to provide "*full protection and security*." These labels, however, do not change the fundamental nature of their claims.

367. The principles embodied in the standard of denial of justice specifically address the interplay between States' responsibility under international law and their decision-making in multi-level administrative or judicial proceedings. Denials of justice thus can be seen as *lex specialis* governing State liability in such matters, despite the existence of other, more general standards of protection.

368. No State in the world can guarantee the correctness of each of the thousands of administrative and judicial decisions that its authorities issue each day. Precisely for that

reason, States have codes of administrative and judicial procedure which provide for appeals and other remedies that allow appellate bodies to review first instance decisions.

369. The Slovak Republic is no exception. Indeed, under Slovak law, if a first instance decision is appealed in a timely fashion, it does not enter into legal force unless and until it is confirmed by the appellate body.

370. International law thus developed a set of principles that regulate international liability for the multi-level decision-making in administrative or judicial proceedings. For example, it is a fundamental principle of international law that a low-level administrative or judicial decision can constitute an international delict only if no effective remedy is available or if the aggrieved party's applications for remedy do not lead to redress.[471]

371. In other words, a State should always be judged by its "final product," and it will only be held liable if the overall process of its decision-making is erroneous.[472] It would be unrealistic to interpret investment treaties as requiring that first instance administrative decisions always be procedurally and substantively correct.

372. Those specific principles are embodied in the standard of denial of justice. Claimants' claims should be assessed against this standard. This is exactly the approach taken in *Amco v. Indonesia* and *Jan de Nul v. Egypt*, where the tribunals applied denial-of-justice standards to claims regarding court and administrative proceedings.[473] As the tribunal in *Jan de Nul* observed:

> "[T]he delay in the proceedings, the conduct of the Court and of the Second Panel all materialized with the issuance of the Judgment. The Judgment lies at the core of this set of acts. ***Therefore, the Tribunal is of the opinion that the relevant standards to trigger State responsibility for the first set of acts are the standards of denial of justice, including the requirement of exhaustion of local remedies***

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471 *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3), Award, 26 June 2003, ¶ 154, **CL-0085**.

472 Jan Paulsson, Denial of Justice in International Law, Cambridge University Press, 4th edition, 2007, pp. 108, 112, **RL-0123**.

473 *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/8, Award, 5 June 1990, **RL-0124**; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, **RL-0125**.

> ***as will be discussed below. Holding otherwise would allow to circumvent the standards of denial of justice***."[474]

373. Claimants' claims must thus be analyzed against the standards governing a denial of justice claim. That stands to reason. If international law were otherwise, then claimants could attack the actions of a court of first instance (or an administrative body of first instance) by rushing to an international tribunal—without ever seeking recourse from the domestic appellate body—and simply labeling their claims as ones for breaches of "*fair and equitable treatment*," "*full protection and security*," and "*expropriation*," and thus avoid all of the requirements for a denial of justice claim.

1. Denial of justice requires exhaustion of local remedies

374. The standard of denial of justice can only be violated by a final and binding measure that was not or could not have been remedied upon appeal. This rule may be referred to as the substantive requirement to exhaust local remedies. As the Slovak Republic showed above, this rule has been applied by all international tribunals assessing first-instance decisions rendered in multi-level administrative or court proceedings, whether the conduct was assessed under the standards of denial of justice or any other standard.

375. This requirement must be distinguished from the procedural requirement to exhaust local remedies, which exists under customary international law (and some international fora such as the European Court for Human Rights). The procedural requirement requires that all domestic remedies be exhausted before the matter is brought to a court of international justice. As Jan Paulsson has observed, "*[i]n the case of denial of justice, finality is thus a substantive element of the international delict. States are held to an obligation to provide a fair and efficient system of justice, not to an undertaking that there will never be an instance of judicial misconduct*."[475] Similarly, the tribunal in *AMTO v. Ukraine* held:

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474 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, ¶ 191 (emphasis added), **RL-0125**.

475 Jan Paulsson, Denial of Justice in International Law, Cambridge University Press, 4th edition, 2007, p. 100, **RL-0123**.

> "In the context of the present arbitration, the Tribunal would add that the experience of an investor in domestic courts may involve a series of decisions, and these decisions should be considered in their entirety. Further, the available means within the host State's legal system to address errors or injustices, and whether or not they were exercised, are relevant to the assessment of the propriety of the outcome. ***The investor that fails to exercise his rights within a legal system, or exercises its rights unwisely, cannot pass his own responsibility for the outcome to the administration of justice, and from there to the host State in international law***."[476]

376. The requirement of finality is lacking here. After prevailing twice before the Supreme Court, and after the DMO followed the Supreme Court decisions in both cases, Claimants abandoned the domestic proceedings by not appealing to the courts the decision of the DMO confirming the assignment of the Excavation Area on 1 August 2012.

2. Denial of justice is subject to a very high threshold

377. In any event, a claim on denial of justice is subject to a very demanding threshold requiring a systemic failure of the entire domestic legal system. As the tribunal in *Oostergetel v. The Slovak Republic* stated:

> "***The Tribunal notes that a claim for denial of justice under International law is a demanding one***. To meet the applicable test, it will not be enough to claim that municipal taw has been breached, that the decision of a national court is erroneous, that a judicial procedure was incompetently conducted, or that the *actions* of the judge in question were probably motivated by corruption. ***A denial of justice implies the failure of a national system as a whole to satisfy minimum standards***."[477]

378. Similarly, the tribunal in *Liman Caspian v. Kazakhstan* held:

> "Taking into account the above authorities, the Tribunal concludes that Respondent can only be held liable *for* denial of justice if Claimants are able to prove that the court system fundamentally failed. ***Such failure is mainly to be held established in cases of major procedural errors such as lack of due process. The substantive outcome of a case can be relevant as an indication of***

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476 *Limited Liability Company Amto v. Ukraine*, Arbitration No. 080/2005, Final Award, 26 March 2008, ¶ 76 (emphasis added), **RL-0126**.

477 *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, ¶ 273 (emphasis added), **RL-0127**.

> ***lack of due process and thus can be considered as an element to prove denial of justice***."[478]

379. Investment tribunals have also emphasized that a denial of justice very rarely arises as a result of a substantive misapplication of domestic law. International tribunals do not sit as appellate courts to domestic decision-making authorities and thus should exercise restraint when reviewing highly complex and technical matters of domestic law, regardless of whether those matters are relevant for the assessment of administrative or court decisions. In the words of the tribunal in *Generation Ukraine v. Ukraine*:

> "***This Tribunal does not exercise the function of an administrative review body to ensure that municipal agencies perform their tasks diligently, conscientiously or efficiently***. That function is within the proper domain of domestic courts and tribunals that are cognisant of the *minutiae* of the applicable regulatory regime. . . . [I]n the absence of any per se violation of the BIT discernable from the relevant conduct of the Kyiv City State Administration, ***the only possibility in this case for the series of complaints relating to highly technical matters of Ukrainian planning law to be transformed into a BIT violation would have been for the Claimant to be denied justice before the Ukrainian courts in a bona fide attempt to resolve these technical matters***."[479]

380. Claimants seek to avoid these demanding requirements simply by articulating their claims as claims for the violation of the fair and equitable treatment. Indeed, investment tribunals have held that the very same principles apply to claims of violation of the fair and equitable treatment standard related to alleged dysfunctionalities of domestic decision-making authorities. In *ECE v. Czech Republic*, the tribunal confirmed that allegations of erroneous administrative decision-making must be measured against the test of a *systemic failure* of the domestic system and that standard is concerned with due process:

> "[I]it has to be accepted that ***it is an inherent feature of any legal system that the competent administrative authorities (and courts), in applying domestic law, may commit errors and make mistakes, or simply reach decisions as to the meaning of the law or as to the facts of a case on to which a superior court or administrative authority subsequently takes a different view.*** It has also to be accepted that it is not the role of an international tribunal to sit on appeal against

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478 *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, ¶ 279 (emphasis added), **RL-0128**.

479 *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶ 20.33 (emphasis added), **CL-0015**.

> the legal correctness or substantive reasonableness of individual administrative acts or the judgments of a municipal court reviewing them**. *Its role is rather to assess whether the decision makers and the courts acted fairly and consistently with accepted standard of due process, and that their decision making was not tainted by improper motives. It follows that the possibility that a decision was wrong under domestic law is not in and of itself a breach of the standard of fair and equitable treatment***, although it may in appropriate circumstances constitute a relevant factor to be weighed in the balance alongside the availability of effective remedies. ***In other words, the standard is about the operation of the State's administrative and legal system as a whole***."[480]

381. The demanding standard for a denial of justice also means that denial of justice normally cannot be based on single erroneous decisions of low-level administrative of judicial authorities. As explained by *Jan de Nul*:

> "The Tribunal considers that the respondent State must be put in a position to redress the wrongdoings of its judiciary. In other words, it cannot be held liable unless "the system as a whole has been tested and the initial delict remained uncorrected." An exception to this rule may be made when there is no effective remedy or "no reasonable prospect of success" which was not argued by Claimants.
>
> ***The Tribunal cannot concur with Claimants' expert that an unjust judgment of a lower court may per se constitute unfair and inequitable treatment and, therefore, denial of justice without any prior conditions being met***. Equally, the fact that an appeal is pending is not irrelevant. "[481]

382. Similarly, the *ad hoc* committee in *Helnan v. Egypt* reiterated this principle in the context of fair and equitable treatment:

> "To be sure, the Treaty standard of fair and equitable treatment is concerned with consideration of the overall process of the State's decision-making. ***A single aberrant decision of a low-level official is unlikely to breach the standard*** unless the investor can demonstrate that it was part of a pattern of state conduct applicable to the case or that the investor took steps within the administration to achieve redress and was rebuffed in a way which compounded, rather than cured, the unfair treatment."[482]

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480 *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.764 (emphasis added), **RL-0111**.

481 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (November 6, 2008), ¶¶ 258-259, (footnotes omitted) (emphasis added), **RL-0125**.

482 *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* committee on annulment, 14 June 2010, ¶ 50 (emphasis added), **RL-0129**.

383. Therefore, even if Claimants' claims were not to be assessed as claims for denial of justice, the standard remains largely the same—Claimants must show much more than individual erroneous decisions. They must demonstrate that the Slovak Republic's administrative and legal system fundamentally failed by denying due process to Rozmin and/or issuing manifestly improper decisions.

384. Claimants fail to meet this burden. The conduct of the Slovak Republic does not even remotely meet the high standard required for violation of the U.S.-Slovak BIT or the Canada-Slovak BIT. Claimants suffered from no due process violations and were at all times granted a fair opportunity to present their case. Claimants' Denial-of-Justice Claim is thus reduced to allegations of misapplication of Slovak law by low-level authorities. This claim fails because the errors attaching to the impugned decisions of the DMO and the Regional Court in Košice were minor and, most importantly, even a faultless application of Slovak law would still lead to the same result, *i.e.*, reassignment of the Excavation Area from Rozmin to a third party.

385. Further, as in *Jan de Nul* and *Helnan*, Claimants attack the decisions of the DMO and the Regional Court in Košice issued in the first instance. These decisions were subsequently remedied by superior authorities based on Rozmin's petitions. No viable claim for denial of justice may thus arise from those decisions.

386. Nor can Claimants complain about the ultimate outcome of the administrative and judicial proceedings in the Slovak Republic. The last decision of the MMO dated 1 August 2012, which confirmed the reassignment of the Excavation Area, was not appealed by Rozmin. This decision was not the "final product" and thus cannot constitute a violation of the U.S.-Slovak BIT or the Canada-Slovak BIT.

C. The Slovak Republic did not otherwise breach international law

387. Even if the standard of denial of justice does not apply to Claimants' complaints about the Slovak administrative and court procedures, the Slovak Republic still did not violate the other standards of the U.S.-Slovak BIT and the Canada-Slovak BIT.

388. The Slovak Republic's conduct did not constitute an expropriatory taking because it did not substantially affect Claimants' investment—*i.e.*, the shares in Rozmin, the company through which Claimants purportedly hoped to carry out their business plan. Claimants merely complain that the value of their shareholding decreased as a result of the reassignment of the Excavation Area.

389. The tribunal in *ECE v. Czech Republic* faced a very similar inquiry. Claimants in that case held shareholding interests in Czech project companies. These companies applied for the issuance of planning and building permits to build a shopping center in the north of the Czech Republic. The issuance of the permits took longer than expected, and some of the permits had not been issued when Claimants initiated a BIT arbitration in which they complained that the Czech Republic expropriated the investment. The tribunal rejected the claim in part because Claimants' shareholding rights (asserted as protected investment) were not adversely affected by the impugned measures:

> "In any case, the Tribunal is of the view that the Claimants' claim of a "creeping" expropriation of their investment faces insurmountable difficulties on the facts. The Claimants insisted throughout that their "investment" for the purposes of Article 1(1) of the BIT was their shareholding or other participatory rights in Tschechien 7 and ECE Praha. They were not however able to point to any measure adopted by the Respondent which had adversely affected their rights in that regard. The Claimants retain their participatory rights in Tschechien 7 and ECE Praha; ***their complaint is that those rights are now worth less to them than they had hoped and expected. That does not however in and of itself give rise to a claim of expropriation, even if it could be shown that the deduction in value was solely attributable to the actions of the Respondent***."[483]

390. This analysis applies with equal force here. Claimants' claim is that their shareholding is worth less, not that any of *their* assets have been expropriated.

391. Claimants are also mistaken in claiming that the Slovak Republic violated international law by modifying its legal framework. Under public international law, a State is permitted to modify its legal framework without breaching its international obligations unless it has made a specific commitment to the investor.[484] However, the Slovak

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483 *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.814 (emphasis added), **RL-0111**.

484 Claimants' Memorial, ¶¶ 299–300 (citing authorities).

Republic never gave to Claimants any specific commitment or guaranteed that it would not modify its regulation of the mining sector and enforce it against Claimants.

392. The only purported "specific commitment" identified by Claimants in support of their claim on inconsistency and breach of legitimate expectations is the Authorization of Mining Activities issued by DMO on 31 May 2004.[485] Claimants proclaim that this Authorization of Mining Activities gave them a right to resume and carry out mining activities in Gemerská Poloma until 13 November 2006.[486] This is simply not true. The Authorization of Mining Activities dated 31 May 2004 was a decision specifying the technical conditions to carry out the mining activities. Under Slovak law, the Authorization of Mining Activities is just one in a series of mining permits necessary to carry out mining activities in Slovakia.

393. Each of these permits, however, remains subject to its own specific legal regulation. Thus, the fact that Rozmin was issued the Authorization of Mining Activities cannot guarantee that Rozmin will continue to hold the other permits. The Authorization of Mining Activities thus cannot have been a source of any specific commitment given by the Slovak Republic to Claimants with regard to Rozmin's right to carry out mining activities in the Excavation Area.

394. Claimants' reliance on *Arif v. Moldova* in this regard is misplaced. There, the State enterprise that entered into an agreement with the investor supported the investment while the courts of Moldova found the same agreement to be illegal. In that situation, the tribunal held that two arms of the State acted differently towards the investment.[487] There is no such inconsistency here. As explained above, the issuance of the Authorization of Mining Activities carried no promise that Rozmin would continue to hold the other more general mining permits necessary for its mining activities. Thus, the

485 Claimants' Memorial ¶ 308.

486 Claimants' Memorial ¶ 308.

487 Claimants' Memorial ¶ 298 (citing **CL-0150**, *Arif*, at ¶547).

issuance of the Authorization of Mining Activities was in no way contradicted by DMO's later decision assigning the Excavation Area to a third party.[488]

395. More generally, international investment law only protects legitimate expectations of the investor if they are based on assurances of the host state made "*at the time when the investor makes the investment*."[489] The tribunals in *Azurix v. Argentina*, *Duke v. Ecuador*, *Tecmed v. Mexico*, *Occidental v. Ecuador*, and *LG&E v. Argentina* confirm this principle.[490]

396. The Authorization of Mining Activities was issued on 31 May 2004. EuroGas II (through its purported legal predecessor EuroGas I) allegedly made its investment in 1998 when it acquired an indirect shareholding interest in RimaMuráň.[491] Belmont acquired its investment in Rozmin in 2000.[492] Therefore, under no circumstances could the Authorization of Mining Activities, issued several years, later thus have been a source of Claimants' legitimate expectations protected by international investment law.

397. Claimants' claim for non-transparency is likewise without merit. Claimants allege that the DMO failed to notify Rozmin of the opening of the tender for the assignment of the Excavation Area and to give Rozmin an opportunity to present its case in the assignment proceeding.[493] In Claimants' own words, however, the requirement of transparency requires "*that there be no ambiguity in the legal framework relating to the investor's operations and that any decision affecting the latter be traceable to that legal framework*"[494] The requirement of transparency has been mostly addressed by investment

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488 Nor can Claimants derive any purported legitimate expectations from the General Mining Permit. The General Mining Permit constituted no specific undertaking of the Slovak Republic towards Rozmin as to its continuing right to explore the Excavation Area.

489 *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 340, **RL-0130**.

490 *See* **CL-0152**, *Azurix*, ¶ 318 quoted in Claimants' Memorial, ¶ 304 *("[A]ssurances explicit or implicit, or […] representations, made by the State which the investor* ***took into account in making the investment***." (emphasis added)).

491 Claimants' Memorial, ¶ 15.

492 Claimants' Memorial, ¶ 24.

493 Claimants' Memorial, ¶ 364.

494 Claimants' Memorial, ¶ 312.

tribunals in the context of claims alleging that "*the law has been changed to the detriment of the investor following the making of its investment*."[495] No such scenario occurred in the present case.

398. Equally unavailing is Claimants' allegation that Slovak Republic's conduct violated the principle of proportionality.[496] The principle of proportionality only applies where the decision-making authority has discretionary powers. This was confirmed for example in the leading investment case *Occidental v. Ecuador*."[497] The principle of proportionality finds no application to the decision-making of the DMO on the assignment of the Excavation Area to the Economy Agency because that decision-making was not discretionary.

399. Claimants allege that the Slovak Republic violated the standard of non-impairment by unreasonable or arbitrary measures under Article II(2)(b) of the U.S.-Slovak BIT and, purportedly, also under Article XI(1) of the Canada-Slovak BIT. In *E.L.S.I.*, the International Court of Justice referred to the widely-recognized definition of arbitrariness as follows:

> "Arbitrariness is not so much something opposed to a rule of law, but something opposed to the rule of law. . . . It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety."[498]

400. The ICJ also emphasized that arbitrariness in international law cannot be equated with mere unlawfulness:

> "[B]y itself, and without more, unlawfulness cannot be said to amount to arbitrariness. It would be absurd if measures later quashed by higher authority or a superior court could, for that reason, be said to have been arbitrary in the sense

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495 *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.808, **RL-0111**.

496 Claimants' Memorial, ¶¶ 252 *et seq.*, ¶ 266.

497 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, 5 October 2012, ¶ 425, **RL-0131**.

498 *Elettronica Sicula S.P.A. (ELSI)*, Judgment, 20 July 1989), I.C.J. Reports 1989, p. 15, ¶ 128, **RL-0132**.

> of international law. To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right."[499]

401. In this case, the DMO's reassignment of the Excavation Area was only incorrect in the procedure by which it did so. This is hardly a violation of *the* rule of law; it was simply incorrect as *a* rule of Slovak law (and understandably so, given that it was a brand new statute that did not set forth the procedure to be followed). Most importantly, however, the DMO's reassignment cannot violate the standard of arbitrariness because the correct application of Slovak law ultimately would have led to the same result.

402. By the same token, the Slovak Republic's measures were not unreasonable. Claimants correctly define reasonable measures as requiring a conduct bearing "*a reasonable relationship to some rational policy*."[500] The decisions of the DMO were issued under the 2002 Amendment, which was enacted to address the rational policy of fostering effective use of Slovakia's mineral resources by preventing persons with assigned excavation areas from sitting on their rights indefinitely and engaging in speculative practices.

403. Nor do Claimants find solace in the full protection and security standard. That standard is not applicable to Claimants' claims at all. Both investment case-law and customary international law recognize that the standard of full protection and security prescribes a minimum duty of due diligence applicable in the event of threats or actual injury to aliens attributable to a third party. As the tribunal in *El Paso v. Argentina* explained:

> "The Tribunal considers that the full protection and security standard is no more than the traditional obligation to protect aliens under international customary law and that it is a residual obligation provided for those cases in which the acts challenged may not in themselves be attributed to the Government, but to a third party. […]
>
> The minimum standard of vigilance and care set by international law comprises a duty of prevention and a duty of repression. A well-established aspect of the international standard of treatment is that States must use "due diligence" to prevent wrongful injuries to the person or property of aliens caused by third parties within their territory, and, if they did not succeed, exercise at least "due diligence" to punish such injuries. If a State fails to exercise due diligence to

499 *Elettronica Sicula S.P.A. (ELSI)*, Judgment, 20 July 1989), I.C.J. Reports 1989, p. 15, ¶ 128, **RL-0132**.

500 Claimants' Memorial ¶ 362 quoting **CL-0151**, ¶460.

> prevent or punish such injuries, it is responsible for this omission and is liable for the ensuing damage. […]"[501]

404. Claimants have raised no claim about violation of their rights by a third party. On the contrary, all their claims relate to the administrative and judicial actions of the Slovak Republic's authorities.

405. Finally, Claimants' umbrella clause argument fails as well. The purpose of umbrella clauses is to bring consensual legal obligations entered into with a foreign investor under the protection of an investment treaty by creating an international law obligation for the host state to comply with those obligations. Here, however, the Slovak Republic did not undertake a single obligation specifically towards Claimants' investment. It did not enter into any contract or otherwise create a contractual legal relationship with Claimants or Rozmin.[502]

D. The Slovak Republic did not violate international law through the criminal investigation

406. Claimants also continue to complain about the criminal investigation and seizure of documents concerning this arbitration. These issues were extensively briefed in the context of Claimants' request for provisional measures against the Slovak Republic based on that investigation and seizure. The Tribunal has since rejected Claimants request.[503] For the avoidance of doubt, and to avoid repeating what the Slovak Republic has already said on the matter, the Slovak Republic hereby incorporates by reference, as if fully rewritten herein, its Opposition to Claimants' Application for Provisional Measures dated 10 September 2014 and its Rejoinder Opposition to Claimants' Application for Provisional Measures dated 21 November 2014. As those documents make clear, the

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501 *El Paso Energy International Company v. The Argentine Republic*, Award, 31 October 2011, ¶¶ 522-523, **RL-0056**.

502 Claimants' argument instead seems focused the Authorization of Mining Activities. That Authorization, however, cannot amount to a specific commitment because, as explained above, it is one of a series of administrative decisions required under Slovak law to carry out mining activities in Slovakia. It is not a contractual obligation and is thus not covered by the umbrella clause. *Al-Bahloul v. Tajikistan*, relied on by Claimants, confirms this interpretation. In that case, the commitment to issue exploration licenses protected by the umbrella clause was included in specific agreements. Claimants, by contrast, cannot rely on any specific agreement with the Slovak Republic.

503 Procedural Order No. 3, Decision on the Parties' Requests for Provisional Measures, dated 23 June 2015.

criminal proceedings were prompted by a complaint filed by a private individual 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. The issue is therefore moot.

VIII. CONCLUSION

407. For the foregoing reasons, the Slovak Republic requests the following relief:

(a) a declaration dismissing Claimants' claims;

(b) an order that Claimants pay the costs of these arbitral proceedings, including the cost of the Arbitral Tribunal and the legal and other costs incurred by the Slovak Republic, on a full indemnity basis; and

(c) interest on any costs awarded to the Slovak Republic, in an amount to be determined by the Tribunal.

408. The Slovak Republic reserves the right to modify or supplement the claims and arguments in this submission as permitted by the Tribunal.

Submitted on behalf of Respondent

30 June 2015

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