INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

EuroGas Inc. and Belmont Resources Inc.

v.

Slovak Republic

(ICSID Case No. ARB/14/14)

PROCEDURAL ORDER NO. 3
DECISION ON THE PARTIES' REQUESTS FOR PROVISIONAL MEASURES

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

Secretary of the Tribunal
Ms. Lindsay Gastrell

23 June 2015

Contents

I. INTRODUCTION AND PARTIES

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

2. The Claimants are EuroGas Inc. ("EuroGas"), a company incorporated under the laws of the United States, and Belmont Resources Inc. ("Belmont"), a company incorporated under the laws of Canada (together, the "Claimants"). The Claimants are represented in this proceeding by Dr. Hamid Gharavi, Dr. Mercedéh Azeredo da Silveira and Mr. Emmanuel Foy of the law firm Derains & Gharavi in Paris.

3. The Respondent is the Slovak Republic (also referred to as the "Respondent"). The Respondent is represented in this proceeding by Mr. Stephen P. Anway of the law firm Squire Patton Boggs (US) LLP in New York, Mr. George M. von Mehren and Mr. Alexis Martinez of Squire Patton Boggs (UK) LLP in London, Mr. Rostislav Pekař and Ms. Maria Lokajova of Squire Patton Boggs in Prague and JUDr. Ing. Andrea Holíková of the Ministry of Finance of the Slovak Republic.

4. This Order sets out the Tribunal's analysis of and decision on the Claimants' application for provisional measures, submitted on 8 July 2014, and the Respondent's application for provisional measures, submitted on 10 September 2014.

[1] Exhibit C-1.
[2] Exhibit C-2.

II. PROCEDURAL BACKGROUND

5. On 27 June 2014, the Claimants filed a request for arbitration dated 25 June 2014, together with 42 exhibits (the "Request for Arbitration").

6. On 8 July 2014, the Claimants submitted a letter to the Secretary-General of ICSID containing an Application for Provisional Measures (the "Claimants' Application"). In their letter, the Claimants requested, pursuant to Rule 39(5) of the ICSID Arbitration Rules, that the Secretary-General establish time limits for the parties to present their observations on the Claimants' Application, which could then be considered by the Tribunal promptly upon its constitution.

7. In accordance with Article 36 of the ICSID Convention, on 10 July 2014, the Secretary-General of ICSID registered the Request for Arbitration and so notified the parties. At the same time, the Secretary-General provided the parties with a schedule for their written submissions on the Claimants' Application, noting that it would apply unless the parties agreed on an alternative schedule.

8. Further, in the Notice of Registration, the Secretary-General invited the parties to proceed to constitute an arbitral tribunal as soon as possible pursuant to Articles 37 to 40 of the ICSID Convention.

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

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

11. In accordance with the briefing schedule established by the Secretary-General, on 11 August 2014, the Claimants submitted a Full Briefing on Provisional Measures, together with four exhibits and 27 legal authorities (the "Claimants' Full Briefing").

12. On 25 August 2014, Mr. Stephen P. Anway of Squire Patton Boggs informed ICSID that his firm had been retained to represent the Respondent in this proceeding, and provided the corresponding power of attorney.

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

14. On 10 September 2014, the Respondent submitted its Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, together with 62 exhibits and 13 legal authorities (the "Respondent's Application and Answer").

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

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

17. In accordance with this agreed schedule, the parties filed the following submissions:

    a. Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures dated 16 October 2014, including 11 exhibits and 73 legal authorities;

    b. Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures dated 21 November 2014, including 17 exhibits and 10 legal authorities; and

    c. Claimants' Rejoinder on Respondent's Application for Provisional Measures dated 22 December 2014, including 9 exhibits and 23 legal authorities.

18. Regarding the constitution of the Tribunal, on 20 October 2014, ICSID informed the parties that the party-appointed arbitrators proposed to appoint Professor Pierre Mayer, a national of France, to serve as President of the Tribunal.

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

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

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

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

23. On 23 January 2015, the Respondent sought leave to enter an additional legal authority into the record, and the Tribunal granted this request by letter of 27 January 2015, authorizing the Respondent to include the authority as RA-25.[3] The Tribunal also offered the Claimants an opportunity to comment on this new authority. In response, the Claimants informed the Tribunal that they may choose to address the authority at an oral hearing on provisional measures, should the Tribunal decide to hold such a hearing.

24. By letter of 27 January 2015, the Tribunal informed the parties that it was available to hold a first session and hearing on provisional measures in Paris on either 17 or 26 March 2015. The Respondent replied on 28 January 2015, stating that key members of its counsel team were unavailable on the proposed dates due to a hearing in another matter.

25. On 2 February 2015, the Claimants submitted a letter stating that it would be unacceptable for the Respondent's unavailability to delay an order on the Claimants' Application and requesting that the Tribunal:

> Issue forthwith an Order on Claimants' Request for Provisional Measures or, if it deems oral arguments on their Request to be absolutely necessary despite the Parties' multiple and thorough written exchanges, that the Tribunal issue a provisional order prohibiting Respondent and its Counsel from reading and gathering information from records and property seized in the context of the criminal proceedings launched in June 2014 in the Slovak Republic.

26. The Tribunal responded on the same day, proposing to hold the first session and hearing on provisional measures on 22 April 2015, and inviting the Respondent to comment on the Claimants' letter. In response, by letter of 4 February 2015, the Claimants requested

[3] By separate letter of 23 January 2015, the Respondent requested that the "Claimants specify the identity of their third-party funder for the purposes of determining whether there is any conflict of interests".

that the Tribunal propose a date to hold the first session within the timeframe set forth in ICSID Arbitration Rule 13(1).[4]

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

28. On 9 February 2015, the Tribunal informed the parties that, in light of the Respondent's undertaking, it considered that the Claimants' request of 2 February 2015 had been rendered moot. At the same time, the Tribunal proposed that the first session and hearing on provisional measures be held by teleconference or videoconference on the afternoon of 17 March 2015.

29. On the same day, the Claimants submitted a letter commenting on the Respondent's letter of 5 February 2015 and confirming their availability for a teleconference or videoconference on the dates proposed by the Tribunal. By letter of 12 February 2014, the Respondent commented on the Claimants' letter and also confirmed its availability on 17 March 2015.

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

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

32. By letter of 15 March 2015, the Respondent sought to introduce three new exhibits into the record (R-81 to 83), to which the Claimants objected. In a decision communicated

[4] ICSID Arbitration Rule 13(1) provides"[t]he Tribunal shall hold its first session within 60 days after its constitution or such other period as the parties may agree".

to the parties on 16 March 2015, the Tribunal determined that the new exhibits would not be entered into the record prior to the hearing, but that following the hearing, the exhibits would be admitted and the Claimants given an opportunity to comment. In accordance with this decision, the Respondent resubmitted the documents on 23 March 2015 and the Claimants provided their observations on 3 April 2015. The Respondent then submitted additional comments on this issue on 16 April 2015.

33. The first session and hearing on provisional measures was held on 17 March 2015 at the ICC in Paris. During the hearing, in accordance with the parties' agreed schedule, each Party was given the opportunity to present oral arguments on provisional measures as well as rebuttal oral arguments. As neither party had submitted witness statements with its written submissions, no witness testimony was given at the hearing. The audio recording of the first session and hearing was dispatched to the Tribunal and the parties on 30 March 2015.

34. Following the first session and hearing, on 24 March 2015, the Tribunal's decision to hear the Respondent's objections to jurisdiction and the merits of the dispute in a single phase of the proceeding was communicated to the parties. The Tribunal also confirmed the corresponding agreed schedule for the parties' written submissions.

35. On 1 April 2014, the Tribunal issued Procedural Order No. 1 concerning the procedural matters addressed during the first session. The issue of whether future hearings will be open to the public was reserved for later decision, and on 16 April 2015, the Tribunal issued Procedural Order No. 2, ordering *inter alia*: "Hearings held shall be open to the public. To the extent necessary to ensure the protection of confidential information, the Tribunal may hold portions of hearings in camera".

36. On 1 April 2015, the Claimants submitted their Memorial, together with the witness statements of Dr. Ondrej Rozloznik, Mr. Vojtech Agyagos, and Mr. Wolfgang Rauball, and an expert report prepared by Mr. Alex Hill from Wardell Armstrong International.

III. BACKGROUND OF THE DISPUTE

37. To the extent required for the Tribunal to address the parties' Applications for provisional measures, and for this limited purpose only, the Tribunal briefly summarizes the factual background to the dispute as pleaded in the Request for Arbitration with regard to the dispute, the claims and the relief sought. This summary does not constitute any finding by the Tribunal on any facts disputed by the parties.

A. THE DISPUTE

38. The present dispute arises out of the Claimants' alleged ownership of Rozmin sro ("Rozmin"), a Slovak company that, until 2005, held the exclusive rights for mining activities at one of the world's largest talc deposits, located in the Slovak Republic.[5]

39. According to the Request for Arbitration, Rozmin was constituted in 1997, and shortly thereafter, it was issued a general mining authorization for an indefinite duration by the District Mining Office in Spišská Nová Ves (the "DMO"). Subsequently, on 11 June 1997, Rozmin entered into an agreement with a State-owned entity named Geological Survey, by which Rozmin allegedly obtained exclusive rights to mine the Gemerská Poloma talc deposit.[6]

40. The Claimants state that EuroGas first became an indirect shareholder of Rozmin in 1998, when EuroGas GmbH, a wholly-owned subsidiary of EuroGas incorporated in Austria, purchased an interest in one of Rozmin's three initial shareholders.[7] Then, in 2002, as a result of subsequent stock purchase agreements, EuroGas GmbH became the direct owner of a 33% interest in Rozmin.[8]

41. According to the Claimants, in May 1998, the DMO approved Rozmin's plan for the opening, preparation, development, and exploitation of the deposit.[9] Over the following years, Rozmin commissioned and financed works at the deposit with a view to

[5] Request for Arbitration, para. 1.
[6] Request for Arbitration, para. 19; Agreement for the Transfer of the Gemerska Poloma Mining Area, Exhibit C-24.
[7] Request for Arbitration, para. 8.
[8] Request for Arbitration, para. 8.
[9] Request for Arbitration, para. 21; Exhibit C-25.

preparing it for its commercial development by 13 November 2006, a deadline agreed with the Respondent.[10]

42. While this process was ongoing, on 24 February 2000, Belmont allegedly acquired a 57% share in Rozmin.[11]

43. The Claimants allege that problems began on December 30, 2004, when the Respondent announced, by way of a publication in a business journal (and without prior notification to Rozmin), that it was initiating a new tender procedure for the assignment of the mining rights to the Gemerská Poloma deposit.[12] On January 3, 2005, Rozmin received a letter from the Director of the DMO stating that Rozmin's mining rights had been revoked and were to be awarded to a new company.[13] The DMO subsequently assigned the Gemerská Poloma deposit to Economy Agency RV sro, a Slovak company that had little expertise in the mining sector.[14]

44. The Claimants contend that the tender process and the revocation of Rozmin's mining rights were unjustified and unlawful, motivated by the rise in the price of talc from 2000 to 2005.[15] The Claimants reject the Respondent's purported justification for these actions, and point out that just weeks before the revocation, on 8 December 2004, the Director of the DMO had carried out an inspection of the deposit and concluded that Rozmin's activities were in compliance with all legal regulations in force.[16]

45. According to the Claimants, Rozmin challenged the revocation of its rights in the Slovak courts, and in a 28 February 2008 decision, the Supreme Court of Slovakia found that Rozmin's due process rights had been violated by the tender process.[17] However, the DMO allegedly ignored this decision, and revoked Rozmin's general mining authorization in April 2008.[18] Two further decisions of the Supreme Court found that the Respondent's revocation of Rozmin's rights in 2005 and in 2008 was

[10] Request for Arbitration, para. 25.
[11] Request for Arbitration, para. 10; Exhibits C-16 and C-17.
[12] Request for Arbitration, para. 31.
[13] Request for Arbitration, para. 33; Exhibit C-30.
[14] Request for Arbitration, para. 44.
[15] Request for Arbitration, para. 32.
[16] Request for Arbitration, para. 30; Exhibit C-28.
[17] Request for Arbitration, paras. 46-47; Exhibit C-33.
[18] Request for Arbitration, paras. 48-50; Exhibit C-35.

unlawful.[19] Nevertheless, the Respondent allegedly refused to reinstate Rozmin's rights.[20]

B. THE CLAIMS AND RELIEF SOUGHT

46. The Claimants submit that the Slovak Republic has breached *inter alia* the following obligations under the US-Slovak BIT and the Canada-Slovak BIT:

a. to provide fair and equitable treatment;[21]

b. to provide full protection and security;[22]

c. to provide national treatment;[23]

d. to provide most-favored-nation treatment;[24]

e. to provide treatment that is no less than that required by international law;[25]

f. not to expropriate, except in cases in which such measures are taken in the public interest, observing due process of law, are not discriminatory, and are accompanied by adequate compensation effected without delay;[26] and

g. to observe specific commitments entered into with regard to investments.[27]

47. The Claimants seek an award granting it a declaration that the Slovak Republic has violated the US-Slovak BIT and the Canada-Slovak BIT, monetary compensation, costs, interest and such other relief as the Tribunal deems appropriate.[28]

C. RECENT EVENTS

48. According to the Respondent, on 26 May 2014, the National Unit of Finance Police of the Slovak Republic received a criminal complaint dated 5 May 2014, alleging that a

[19] Request for Arbitration, paras. 55-57; Exhibits C-36 and C-37.
[20] Request for Arbitration, para. 57.
[21] Article II(2)(a) of the US-Slovak BIT; Article III(1)(a) of the Canada-Slovak BIT.
[22] Article II(2)(a) of the US-Slovak BIT; Article III(1)(a) of the Canada-Slovak BIT.
[23] Article 11(1) of the US-Slovak BIT; Article III(4) of the Canada-Slovak BIT.
[24] Article 11(1) of the US-Slovak BIT; Article III(2) and (3) of the Canada-Slovak BIT.
[25] Relying on Article II(2)(a) of the US-Slovak BIT and Article III(1)(a) of the Canada-Slovak BIT.
[26] Article III of the US-Slovak BIT; Article VI(1) of the Canada-Slovak BIT.
[27] Article II(2)(c) of the US-Slovak BIT.
[28] Request for Arbitration, para. 73.

crime of fraud was underway in respect of a potential arbitration against the Slovak Republic.[29]

49. On 23 June 2014, Mr. Vasil Špirko, a prosecutor affiliated with the Office of the Special Prosecution, issued an "Order for Preservation and Handing over of Computer Data" against Rozmin and Ms. Jana Czmoriková, the external accountant of Rozmin.

50. On 25 June 2014, Mr. Roman Púchovský, Judge on Preliminary Proceedings of the Special Criminal Court in Banská Bystrica, Slovak Republic, issued an "Order for a House Search"[30] against Ms. Czmoriková.

51. On 2 July 2014, a search was carried out at the home of Ms. Czmoriková.

52. Ms. Czmoriková was requested to hand over all materials and documents referred to in the "Order for a House Search" of 25 June 2014 and to make available all electronic data, in accordance with the "Order for Preservation and Handing over of Computer Data" dated 23 June 2014.

53. A list of materials and documents seized is included in the Minutes on Performance of House Search dated 2 July 2014.[31]

54. According to the Claimants, Ms. Czmoriková was summoned to appear to testify before the Police Corps in Roznava on 2 July 2014.[32]

55. As noted above, on 8 July 2014, the Claimants submitted their Application for Provisional Measures to the Secretary-General of ICSID.

56. On 26 August 2014, the prosecutor affiliated with the Office of the Special Prosecution ordered the return of seized hard-copies and electronic documents to Ms. Czmoriková,[33] and the National Unit of Finance Police issued the corresponding decision on 4 September 2014.[34]

[29] Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, 10 September 2014, para. 49.
[30] Exhibit C-49, Order for a House Search, 25 June 2014.
[31] Exhibit C-51, Minutes on Performance of House Search, 2 July 2014.
[32] Exhibit C-52, Witness Summons, 2 July, 2014.
[33] Exhibit R-1, Resolution, 4 September 2014.
[34] Exhibit R-1, Resolution, 4 September 2014.

57. On 5 September 2014, the prosecutor issued a resolution suspending the criminal proceedings pending the resolution of the instant ICSID arbitration.[35]

58. On 1 October 2014, originals of the seized property and documents were returned to the Claimants. However, the Respondent acknowledges that copies of the seized documents have been retained.[36]

IV. THE CLAIMANTS' APPLICATION FOR PROVISIONAL MEASURES

A. THE PARTIES' SUBMISSIONS

1) Claimants

59. According to the Claimants, the "Order for Preservation and Handing over of Computer Data" of 23 June 2014 and the "Order for a House Search" of 25 June 2014 "were taken by the Slovak Republic in reaction to the Claimants' legitimate exercise of their right to initiate ICSID arbitration proceedings against the Slovak Republic"[37].

60. The Claimants contend that these orders were intended and had the effect to:

- place the Respondent in a privileged position with full access to all of the Claimants' files including legally privileged materials;
- intimidate the Claimants and their potential witnesses;
- aggravate the dispute between the Parties; and
- jeopardize the integrity of the arbitration process, including the principle of equality of arms and the right to the protection of legally privileged materials and information.

61. Based on the foregoing, the Claimants submit that it is necessary and urgent that the Tribunal order provisional measures in order to protect their rights.

[35] Exhibit R-2. Resolution, 5 September 2014.
[36] Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, 10 September 2014, para. 59.
[37] Full Briefing on Claimants'Application for Provisional Measures, 11 August 2014, para. 4

62. In their Application dated 8 July 2014, the Claimants requested that the Tribunal take the following measures:

- Order the Slovak Republic to maintain the *status quo* as of the date of the filing of the Request of Arbitration and put the Parties in the position they should have been in as of the said date;
- Order the Slovak Republic to return to Rozmin and Ms. Czmoriková all originals of documents and all property seized on 2 July 2014;
- Order the Slovak Republic to refrain from using, in the arbitration proceedings, any material or documents seized on 2 July 2014; and
- Order the Slovak Republic to refrain from taking any further measure of intimidation against Rozmin, EuroGas, Belmont or any director, employee or personnel of any of these companies, and to refrain from engaging in any conduct that may aggravate the dispute and/or alter the *status quo* that existed prior to the initiation of the criminal investigation or any local proceedings related to the subject-matter of this arbitration, including any further steps which might undermine the Claimants' ability to substantiate their claims, threaten the procedural integrity of the arbitral process, or aggravate or exacerbate the dispute between the parties.

63. In their Full Briefing on Claimants' Application for Provisional Measures, dated 11 August 2014, the Claimants amended the above list of provisional measures.

64. They further amended it in their Reply on their Application for Provisional measures, dated 16 October 2014, requesting that the Tribunal take the following measures:[38]

a. Order the Slovak Republic to withdraw permanently the criminal proceedings launched on June 23, 2014;

[38] Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, 16 October 2014, para. 238.

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

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

d. Order the Slovak Republic to undertake, in writing, that the documents and property returned on October 1, 2014 constitute the full set of documents and materials that were seized, and that no copies thereof are kept;

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

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

2) Respondent

65. The Respondent points out that the originals of the seized documents have been returned, the criminal proceedings have been suspended until the resolution of the instant ICSID arbitration and that it has committed not to read and not to use the copies of the documents during the arbitration proceedings. According to the Respondent, the Claimants' Application is therefore moot.

66. The Respondent further submits that, in any event, the Tribunal cannot order the requested provisional measures since it has no *prima facie* jurisdiction in respect of either EuroGas II or Belmont.

- The Respondent alleges that the Tribunal has no *prima facie* jurisdiction over EuroGas II since it is a different legal entity from EuroGas I. According to the Respondent, EuroGas II is "a company registered for the first time on 15 November 2005, under the same name as EuroGas I".[39] As a consequence, EuroGas II cannot claim "to have been affected by measures that occurred before it came into existence".[40] Moreover, the Respondent maintains that it has validly exercised its right to deny the advantage of the US-Slovak BIT to EuroGas II on the basis that EuroGas II has no substantial business activities in the United States and is controlled by nationals of a third country.[41]

- The Respondent also contends that the Tribunal has no *prima facie* jurisdiction over Belmont since the dispute arose in 2005, more than three years before the entry into force of the 2010 Canada-Slovak Republic BIT. In addition, the Respondent submits that the Claimants have not provided evidence to show that Belmont is a shareholder in Rozmin. The Respondent notes that, as the Claimants confirm, Belmont sold its 57% shareholding to EuroGas I in 2001. According to the Respondent, there is no evidence that the 2001 agreement is, as the Claimants allege, ineffective because its conditions were not met.

[39] Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, 10 September 2014, para. 62.
[40] Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, 10 September 2014, para. 62.
[41] Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, 10 September 2014, paras. 62-64; Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, 21 November 2014, paras. 16-60.

67. Moreover, according to the Respondent, the Claimants are not entitled to seek provisional measures that would impact the criminal proceedings in the Slovak Republic.

68. Finally, the Respondent submits that the Claimants' Application is, in any event, baseless since the Claimants have failed to demonstrate that the provisional measures they seek are necessary and urgent.

B. ANALYSIS

69. The Tribunal notes that the Respondent challenges the Tribunal's jurisdiction in respect of EuroGas II and Belmont. However, as acknowledged by the Respondent, for the time being, the Tribunal needs only to be *prima facie* satisfied that it has jurisdiction over the dispute.

70. As set out by the tribunal in the Decision on the Application for Provisional Measures in Millicom v. Senegal:

> [T]he arbitral Tribunal cannot and must not examine in depth the claims and arguments submitted on the merits of the case; it must confine itself to an initial analysis, i.e. "at first sight". For this, it is necessary and sufficient that the facts alleged by the applicant establish this jurisdiction without it being necessary or possible at this stage to verify them and analyze them in depth.[42]

71. In the instant case, the facts alleged by the Claimants establish "at first sight" the jurisdiction of the Tribunal. It is not necessary, at this stage, to verify them in depth. The objections raised by the Respondent against the Tribunal's jurisdiction will be fully addressed at a later stage of the proceedings. For the time being, the Tribunal is of the view that the lack of jurisdiction alleged by the Respondent is not blatant.

72. With regard to EuroGas, the Claimants contend that EuroGas II "stepped into the shoes" of EuroGas I. Indeed, according to the Claimants, the corporate documents of EuroGas II were amended to mirror those of EuroGas I, which allowed the two companies to perform a "type-F reorganization" whereby EuroGas II assumed all of the

[42] Exhibit CL-24, *Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal,* Decision on the Application for Provisional Measures, 24 August 2009, para. 42.

EuroGas I's assets, liabilities and issued stock certificates. The Claimants submit that thereafter, EuroGas II was, as a matter of Utah State law, "a mere continuation" of EuroGas I: "it had the same corporate structure, the same shareholder base, the same assets and the same liabilities" as EuroGas I. Hence, according to the Claimants, EuroGas II is, for purposes of the present proceedings, "the same entity" as EuroGas I.[43]

73. The Claimants further contend that the Respondent's assertion that EuroGas does not maintain any substantial business activities in the United States is contradicted by the Respondent's own reliance on the dispute between EuroGas and Tombstone Exploration Corporation. According to the Claimants, the subject-matter of this dispute stems from a number of mining claims in the United States, in which EuroGas wishes to acquire an interest. The Claimants therefore submit that "this alone demonstrates that EuroGas' activities in the United States are neither fictional nor motivated by any treaty-shopping purposes".[44]

74. With regard to Belmont, the Claimants submit that the dispute did not arise in 2005, as the Respondent contends, since "the dispute argued by Rozmin before local courts (…) is not the same as the international law dispute brought by Belmont against the State in the present arbitration proceedings"[45]. According to the Claimants, the international law dispute brought by Belmont against the Slovak Republic did not arise before 1 August 2012, which is "well after the critical date".[46] In addition, the Claimants deny that Belmont effectively transferred its shares in Rozmin to EuroGas in 2001. They contend that the 2001 agreement was not effective since its conditions were not met.[47]

75. The Tribunal takes due notice of the Respondent's disagreement on all points; however, it is not in a position, at this stage, to address these issues. Without prejudice to a different assessment at a later stage, the Tribunal is *prima facie* satisfied that it has jurisdiction over the dispute.

[43] Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, 16 October 2014, paras. 137-139.
[44] Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures,16 October 2014, para. 147.
[45] Claimants' Rejoinder on Respondent's Application for Provisional Measures, 22 December 2014, para. 73.
[46] Claimants' Rejoinder on Respondent's Application for Provisional Measures, 22 December 2014, para. 90.
[47] Claimants' Rejoinder on Respondent's Application for Provisional Measures, 22 December 2014, paras. 92-98.

76. Under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, provisional measures may be granted to protect certain rights of the applicant, if such measures are necessary and urgent. As noted in Procedural Order No. 14 in *Churchill Mining*[48]: "the applicant must establish the requirements with sufficient likelihood, without however having to actually prove the facts underlying them".

77. At the outset, the Tribunal recalls that the right and duty to conduct criminal prosecutions is a prerogative of any sovereign State and that only exceptional circumstances may therefore justify that an arbitral tribunal order provisional measures which interfere with criminal proceedings.

78. The Tribunal shall assess whether each of the requested provisional measures is necessary and urgent to protect the Claimants' rights.

79. The Tribunal points out that such assessment is necessarily made on the basis of the record as it presently stands and is without prejudice to a different assessment at a later stage.

1) The Claimants' request that the Tribunal order the Respondent to permanently withdraw the criminal proceedings

80. The Claimants submit that the return of the property and documents seized and the suspension of the criminal proceedings constitute "a mere strategic move" to allow the Respondent to argue that the Claimants' Application is now moot.[49] According to the Claimants, since the criminal proceedings have only been suspended and not permanently withdrawn, it is necessary and urgent that the requested provisional measure be ordered so that the integrity of the arbitration process be preserved. The Claimants acknowledge, referring to *Abaclat v. Argentina*[50], that, in principle, an arbitral tribunal cannot prohibit a party from conducting criminal court proceedings

[48] Exhibit RA-25, *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 14, 22 December 2014, para. 64.
[49] Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, 16 October 2014, para. 4.
[50] Exhibit CL-26, *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (formerly *Giovanna a Beccara and Others v. The Argentine Republic*), Procedural Order No. 13, 27 September 2012.

before competent state authorities.[51] However, the Claimants maintain that exceptional circumstances may lead an arbitral tribunal to depart from this general rule, notably if the criminal proceedings interfere with the arbitration process[52], and they submit that this requirement is satisfied in the instant case.

81. The Respondent does not contest that exceptional circumstances may justify that an arbitral tribunal interfere with criminal proceedings,[53] but it denies that this requirement is fulfilled in the present circumstances. According to the Respondent, such exceptional circumstances are not met. It further contends that, since the criminal proceedings have been suspended and the originals of documents have been returned, the requested provisional measure is, in any event, moot.

82. The Tribunal stresses that "a particularly high threshold" must be reached before an ICSID tribunal can order provisional measures which interfere with criminal proceedings, as the right and the responsibility to conduct such proceedings is a prerogative of any sovereign State.[54] As acknowledged by both parties, an arbitral tribunal will not recommend such measures unless exceptional circumstances threaten the integrity of the arbitration proceedings and the principle of due process.

83. As the tribunal held in Procedural Order No. 14 in *Churchill Mining*[55]: "An allegation that the status quo has been altered or that the dispute has been aggravated needs to be buttressed by concrete instances of intimidation or harassment".

84. Yet, in the instant case:

- The criminal court proceedings have been suspended;
- The originals of the seized documents have been returned;

[51] Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, 16 October 2014, para. 44.
[52] Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, 16 October 2014, para. 45.
[53] Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, 10 September 2014, para. 84.
[54] Exhibit RA-9, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID case No ARB/08/12, Decision regarding Claimant's Application for Provisional Measures, 31 July 2009, para. 137; Exhibit RA-25, *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 14, 22 December 2014, para. 72.
[55] Exhibit RA-25, *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 14, 22 December 2014, para. 72.

- The Respondent undertook not to read the copies of the seized documents and not to use them in the arbitration proceedings;
- As it will be explained (*infra*, para. 105-109), there is no evidence showing that the Claimants or potential witnesses have been the targets of abusive behavior, or that they have been intimidated or harassed during the criminal proceedings and investigations.

85. In this context, the Tribunal is of the view that the requested provisional measure is neither necessary nor urgent and that the Claimants have not met the burden of establishing that exceptional circumstances justify an interference with the sovereign right of the Slovak Republic to conduct criminal prosecutions.

86. The requested provisional measure is therefore denied.

2) The Claimants' request that the Tribunal order the Respondent to maintain the status quo

87. The Claimants submit that "provisional measures may be ordered to preserve either substantive rights or procedural rights, including the general right to the preservation of the *status quo* and to the non-aggravation of the dispute".[56] The Claimants point out that the Respondent "provided no assurance that it would refrain from taking measures during the arbitration proceedings that could further jeopardize the integrity of these proceedings or aggravate the dispute between the parties, in particular, further measures of intimidation of Claimants' potential witnesses".[57] The Claimants therefore request that the Tribunal "order the Slovak Republic to maintain the *status quo* as of the date of the filing of the Request of Arbitration and put the parties in the position they should have been in as of the said date". Referring to *Biwater*,[58] the Claimants contend that no actual harm needs to be shown to justify the issuance of an order that a party refrain

[56] Full Briefing on Claimants' Application for Provisional Measures, 11 August 2014, para. 36. The Claimants refer to Exhibit CL-8, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010; Exhibit CL-13, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures ; Exhibit CL-14, *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1.
[57] Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, 16 October 2014, paras. 35-36.
[58] Exhibit CL-31, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September, 2006.

from taking any step that might harm or prejudice the integrity of the proceedings or aggravate the dispute.[59]

88. The Respondent submits that the Claimants' request must be rejected because they have failed to provide sufficient evidence of an actual threat of aggravation of the dispute.[60] Furthermore, the Respondent contends that this request has, in any event, become moot since the criminal proceedings have been suspended, the originals of the seized documents have been returned and the Respondent has undertaken not to read the copies of the seized documents and not to use them during the arbitration proceedings.

89. The Tribunal points out that, as held in *Caratube*,[61] as well as in Procedural Order No. 9 in *Churchill Mining*[62] and in Procedural Order No. 2 in *SGS v. Pakistan*,[63] a recommendation for the preservation of *status quo* should only be granted if the claimant provides sufficient evidence of an actual threat of aggravation of the dispute. Moreover, the Tribunal recalls that, as held in *Lao Holdings*: "[A] criminal proceeding does not *per se* (…) aggravate the dispute".[64] Something more has to be at stake in order to allow an arbitral tribunal to conclude that there is a threat of aggravation of the dispute.

90. The Tribunal is of the view that, as noted in *Biwater*[65] and as underlined by the Claimants, the assessment of a threat of aggravation of the dispute "involves probabilities, not certainties". However, in the instant case, the criminal proceedings have been suspended, originals of the seized documents have been returned, the Respondent has undertaken not to read the copies of the seized documents and not to use them during the arbitration proceedings and no witness intimidation has occurred.

[59] Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, 16 October 2014, para. 81.
[60] Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, 21 November 2014, para. 116.
[61] Exhibit RA-9, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID case No ARB/08/12, Decision regarding Claimant's Application for Provisional Measures, 31 July 2009, para. 139.
[62] Exhibit RA-13, *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 9, 8 July 2014, para. 91-95.
[63] Exhibit RA-8, *Société Générale de Surveillance v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2, 16 October 2002, p. 305.
[64] Exhibit CL-15, *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measure Order, 30 May 2014, para. 30.
[65] Exhibit CL-31, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, September 29, 2006, para. 145.

In view of these circumstances, the Tribunal considers that while an aggravation of the dispute is always possible, there is no element in the record evidencing an actual threat.

91. The requested provisional measure is therefore denied.

3) The Claimants' requests that the Tribunal order the Respondent to return all copies made of the seized documents and to refrain from using in the arbitration proceedings any material or documents seized or any information gathered during the criminal proceedings

92. The Claimants submit that it is necessary and urgent, in order to preserve the integrity of the arbitration proceedings, that the Tribunal order the Respondent to return all copies of the seized documents and to refrain from using in this arbitration any information gathered in the course of the criminal proceedings. According to the Claimants, the retention of copies of the seized documents by the Respondent is "in blatant violation of Claimants' right to the protection of privileged and confidential information and of the most basic procedural rules and principles, including the principles of equality of arms, fairness and due process".[66]

93. The Respondent maintains that the Tribunal should reject the requested provisional measures since:

- The original of the seized documents and materials were returned;
- The Claimants have failed to evidence how the retention of copies would prejudice their procedural rights;
- The return of copies would turn the suspension of the criminal proceedings into an effective termination, exposing the prosecution and court to a risk that the evidence might disappear;
- The Respondent has already declared in writing that the Slovak Ministry of Finance has not read the documents;

[66] Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, 16 October 2014, para. 8.

- The Respondent has committed to the Tribunal not to read them "unless the Claimants make the seizure for the criminal investigation part of this proceeding, by alleging it is a violation of the BIT".[67]

94. The Tribunal is mindful of the Claimants' argument that the Respondent might obtain an unfair advantage in the instant ICSID arbitration by using, in the course of these proceedings, the copies of the documents seized or the information gathered during the search carried out at Ms. Czmoriková's home.

95. However, the Tribunal stresses that the copies of the seized documents are part of the criminal proceedings, in relation to which the Tribunal has not made any order.

96. Furthermore, the Tribunal takes due notice of the facts that:

- The originals of the seized documents have been returned;
- The Respondent has represented to the Tribunal, both in writing[68] and during the Hearing on Provisional Measures,[69] that the Slovak Ministry of Finance has not read the seized documents;
- The Respondent has undertaken that it will not read or produce the copies of the seized documents in the arbitration proceedings.[70]

97. The Tribunal notes that the Respondent's undertaking will not apply in case "the Claimants make the seizure for the criminal investigation part of this proceeding, by alleging it is a violation of the BIT".[71] The Tribunal understands this restriction to mean that, in such circumstances, the Respondent might need to read or produce the seized documents in order to organize its defense. However, even in such situation, the Respondent committed to the Tribunal to seek its leave to produce any of the copies of the seized documents.[72] The Tribunal underlines that this would allow the Claimants to express any objection they may have with respect to the evidence at issue. The Tribunal further notes that if it decided to admit the production of a copy of a seized document, it would assess its evidentiary value taking into account, among other factors, its source.

[67] First Session and Hearing on Provisional Measures, 17 March 2015, Transcript, p. 115.
[68] Respondent's Letter to the Arbitral Tribunal, 5 February 2015.
[69] First Session and Hearing on Provisional Measures, 17 March 2015, Transcript, p. 115.
[70] *Ibidem*; The Slovak Republic's Presentation of the Parties' Applications for Provisional Measures, 17 March 2015, p. 71.
[71] *Ibidem.*
[72] *Ibidem.*

98. Based on the foregoing, the Tribunal finds that it is neither necessary nor urgent to order the Respondent to return all copies of the seized documents or to refrain from using them in arbitration proceedings.

99. The requested provisional measures are therefore denied.

4) The Claimants' request that the Tribunal order the Respondent to undertake that the documents and property returned constitute the full set of documents and materials that were seized and that no copies thereof are kept

100. According to the Claimants, the minutes prepared on 1 October 2014, when the seized documents were being released, indicate that certain pages of some documents were missing.[73] The Claimants therefore submit that it is necessary and urgent for the Tribunal to order the Respondent to undertake that the documents and property returned constitute the full set of documents and materials that were seized.

101. The Respondent contends that this request is neither necessary nor urgent since it is improbable that Ms. Czmoriková was in possession of the only original copies of the documents necessary to Claimants. According to the Respondent: "Rozmin is unlikely to have provided originals of documents of which it did not keep copies to an independent contractor".[74]

102. The Tribunal is mindful of the Claimants' right to substantiate their claim in the instant ICSID arbitration. However, the Tribunal is reluctant to order the Respondent to repeat, in a more solemn way, what it has already clearly stated during the Hearing on Provisional Measures.[75] This would imply that the Tribunal has doubt as to whether the Respondent's statements during the hearing reflected the truth, without any evidence justifying such doubts. Indeed, no element has been brought to the attention of the Tribunal showing that the Claimants have been deprived of relevant evidence.

[73] Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, 16 October 2014, para. 7.
[74] Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, 21 November 2014, para. 136.
[75] First Session and Hearing on Provisional Measures, 17 March 2015, Transcript, p. 114; The Slovak Republic's Presentation of the Parties' Applications for Provisional Measures, 17 March 2015, p. 69.

103. Furthermore, in light of the Respondent's recent behavior and commitments, the Tribunal is of the view that there is no reason to believe that the Respondent did not return the full set of documents and materials that were seized.

104. The requested provisional measure is thus denied.

5) The Claimants' request that the Tribunal order the Respondent to refrain from taking any measure of intimidation against Rozmin, EuroGas, Belmont or any director, employee or personnel of any of these companies

105. The Claimants contend that, during her examination, Ms. Czmoriková was asked questions "exclusively related to the issues in dispute and which will be raised in the arbitration",[76] as well as questions directly related to her knowledge of the arbitration proceedings. They allege that Ms. Czmoriková is now concerned that the Slovak authorities may cause her trouble given her position as an employee of Rozmin. According to the Claimants, "everyone fears that at any time, she may be the object of an unannounced search and/or interrogation, at her own private home, by Slovak officials or police force members, and that herself or her whole family may even be targeted".[77] According to the Claimants, Ms. Czmoriková has "become reluctant to being involved in any way in the arbitration proceedings".[78] They further maintain that "other individuals (including Dr Rozlozkin, who was a director and general manager of Rozmin between 1997 and 2011) have expressed similar concerns and reluctance with respect to having to cooperate with Claimants in relation to the arbitration proceedings".[79] Referring to *Quiborax v. Bolivia*,[80] the Claimants submit that provisional measures are justified to preserve the applicant's right to access evidence through potential witnesses.[81] They therefore contend that it is necessary and urgent that the Tribunal order the Respondent to refrain from taking any further measure of intimidation against the Claimants or potential witnesses.

[76] Full Briefing on Claimants' Application for Provisional Measures, 11 August 2014, paras. 30-31.
[77] *Ibidem.*
[78] *Ibidem.*
[79] Full Briefing on Claimants' Application for Provisional Measures, 11 August 2014, para. 32.
[80] Exhibit CL-8, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010.
[81] Full Briefing on Claimants' Application for Provisional Measures, 11 August 2014, para. 39.

106. According to the Respondent, the request is moot because the prosecutor has suspended the criminal proceedings which the Claimants allege amounted to intimidation of potential witnesses. Moreover, the Respondent contends that, in any event, the Claimants failed to demonstrate that a potential witness was ever intimidated. The Respondent points out, referring to *Occidental v. Ecuador*,[82] that provisional measures are not meant to protect against potential or hypothetical harm. Rather, they are meant to protect against imminent harm.

107. The Tribunal is mindful of the Claimants' right to present their case and to access evidence through potential witnesses. However, the Tribunal notes that the criminal proceedings have been suspended and that there is no indication that either Ms. Czmoriková, any of the Claimants, or any potential witness, had been intimidated or harassed before the suspension of the investigation.

108. Even though Ms. Czmoriková's uneasiness, deriving from the search carried out at her home, is understandable, it does not imply, in itself, that the search was irregular. As noted in Procedural Order No. 14 in *Churchill Mining*, it is "common practice, in criminal law systems to conduct on-site searches and to seize relevant evidence, for the purpose of a criminal investigation".[83] The Tribunal is of the view that there is no concrete element on record showing that Ms. Czmoriková has been the object of undue pressure, intimidation, abuse, mistreatment, harassment or threats.

109. Based on the foregoing, the Tribunal finds that the requested provisional measure is neither necessary nor urgent. It is therefore denied.

V. THE RESPONDENT'S APPLICATION FOR PROVISIONAL MEASURES

A. THE PARTIES' SUBMISSIONS

1) Respondent

[82] Exhibit CL-2, *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007.
[83] Exhibit RA-25, *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 14, 22 December 2014, para. 73.

110. The Respondent asserts that, pursuant to Article 47 of the ICSID Convention and to ICSID Arbitration Rule 39, the Tribunal has the power to order the security for costs which the Respondent requests.

111. The Respondent alleges that the Claimants "have a history of engaging in fraud and reneging on payment obligations"[84] and that they do not have the means to pay for the costs of the arbitration proceedings, which are entirely funded by third parties.[85] The Respondent therefore submits that the Claimants are not capable of satisfying a future costs award.

112. The Respondent also contends that it has a plausible defense and that a future claim for cost reimbursement is "not evidently excluded".[86]

113. According to the Respondent, it is therefore both necessary and urgent that the Claimants be ordered to provide a security for costs in order to prevent the Respondent from suffering an irreparable harm if it cannot recover the costs to which it is entitled.

114. As a consequence, the Respondent requests the Tribunal to:

> Order Claimants to obtain within 30 days an irrevocable bank guarantee from a reputable international bank in the U.S., Canada, or the European Union in the amount of EUR 1,000,000, callable on in whole or in part by the Respondent upon presentation of the Tribunal's Final Award or any Decision on Costs, with the amount to be updated if necessary in the Tribunal's Decision on Jurisdiction to ensure that the Slovak Republic's costs are secured until the end of the arbitration.[87]

[84] Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, 21 November 2014, para. 74.
[85] Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, 10 September 2014, para. 3.
[86] Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, 10 September 2014, para. 75; Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, 21 November 2014, para. 83.
[87] Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, 10 September 2014, para. 147.

2) Claimants

115. The Claimants deny the Tribunal's authority to order security for costs and contend that, to date, virtually all ICSID tribunals have declined to recommend that an investor provide security for the host State's costs in the arbitration proceedings.[88]

116. The Claimants point out that there is no reason to presume that the Respondent will succeed on the merits and that the Tribunal will shift the parties' costs onto the Claimants, especially as the trend in investment arbitration is not to automatically shift costs to an unsuccessful claimant. According to the Claimants, since the Respondent's right to the reimbursement of its costs is highly hypothetical, it cannot constitute a "right to be preserved" under Article 47 of the ICSID Convention and ICSID Arbitration Rule 39.[89]

117. The Claimants contend that the Respondent's request goes against the very purpose of the ICSID framework, which aims at providing investors with direct access to a neutral forum for the resolution of their dispute with a State. According to the Claimants, "given that the power struggle in investor-State disputes is generally in favor of the State, any additional financial burden imposed on Claimants is very likely to unduly restrict their ability to bring forward meritorious claims".[90]

118. Moreover, the Claimants submit that the requested provisional measure is, in any event, neither necessary nor urgent. The Claimants acknowledge that they are encountering financial difficulties. However, according to them, such difficulties are "in large part attributable to acts and omissions of Respondent".[91] They further assert, citing *Burimi v. Albania*,[92] that mere financial difficulties are not sufficient to justify granting the Respondent security for its costs.[93] Referring *inter alia* to *Commerce Group & San*

[88] Claimants' Rejoinder on Respondent's Application for Provisional Measures, 22 December 2014, para. 101.
[89] Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, 16 October 2014, para. 206.
[90] Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, 16 October 2014, para. 221.
[91] Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, 16 October 2014, para. 229.
[92] Exhibit CL-65, *Burimi S.R.L and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012, para. 41.
[93] Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, 16 October 2014, para. 224.

Sebastian Gold Mines v. El Salvador,[94] they maintain that an arbitral tribunal should only exercise its power to order security for costs "in extreme circumstances" which are not met in the instant case.[95]

B. ANALYSIS

119. The Tribunal stresses that the provisional measures envisioned in Article 47 of the ICSID Convention are mainly those formulated to preserve the *status quo*.[96]

120. The Tribunal further notes that, as held in *RSM v. Grenada*, it is "not part of the ICSID dispute resolution system that an investor's claim should be heard only upon the establishment of a sufficient financial standing of the investor to meet a possible costs award".[97]

121. As regularly held by ICSID arbitral tribunals, security for costs may only be granted in exceptional circumstances,[98] "for example, where abuse or serious misconduct has been evidenced".[99]

122. It is true that in *RSM v. Saint Lucia*, an ICSID tribunal ordered security for costs. However, the underlying facts in that arbitration were rather exceptional since the claimant was not only impecunious and funded by a third party, but also had a proven

[94] Exhibit CL-98, *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs of 20 September 2012.
[95] Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, 16 October 2014, para. 224.
[96] Exhibit RA-4, Dissenting Opinion of Judge Edward W. Nottingham in *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, 13 August 2014.
[97] Exhibit CL-68, *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Government of Grenada*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs, 14 October 2010, para. 5.19; see also Exhibit CL-5, *Víctor Pey Casado Fondation Président Allende c. la République du Chili*, Affaire CIRDI/ARB/98/2, 25 September 2001, para. 86.
[98] Exhibit RA-4, *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on the Respondent's Request for Security for Costs, 13 August 2014, para. 48; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, 6 April 2007, para. 32; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order of the Tribunal on the Claimant's Request for Urgent Provisional Measures, 6 September 2005, para. 38; *Saipem S.p.A. v. People's Republic of Bangladesh,* ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 175; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, para. 59; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Decision on Respondent's Application for Security for Costs, 14 October 2010, para. 5.17; *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs, 20 September 2012, para. 44; *Burimi S.R.L. and Eagle Games SH.A. v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012, para. 34.
[99] Exhibit CL-98, *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs, 20 September 2012, para. 45.

history of not complying with cost orders. As underlined by the arbitral tribunal, these circumstances were considered cumulatively.[100]

123. Yet, no such exceptional circumstances have been evidenced in the instant case. The Claimants have not defaulted on their payment obligations in the present proceedings or in other arbitration proceedings. The Tribunal is of the view that financial difficulties and third party-funding – which has become a common practice – do not necessarily constitute *per se* exceptional circumstances justifying that the Respondent be granted an order of security for costs.

124. The requested provisional measure is therefore denied.

VI. DECISION

125. Based on the above analysis, the Tribunal issues the following decision:

(1) Denies the Claimants' Application, as amended, for provisional measures;

(2) Denies the Respondent's Application for provisional measures;

(3) Takes due note of the Respondent's commitments, set out in paragraphs 96-97 above;

(4) Reminds the parties of their general duty arising from the principle of good faith not to take any action that may aggravate the dispute or affect the integrity of the arbitration.

[100] Exhibit RA-4, *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on the Respondent's Request for Security for Costs, 13 August 2014, para. 86.

[Signed]

Professor Pierre Mayer
President of the Tribunal

[Signed]

Professor Emmanuel Gaillard
Arbitrator

[Signed]

Professor Brigitte Stern
Arbitrator