ARBITRATION UNDER
THE RULES OF THE INTERNATIONAL CENTRE
FOR SETTLEMENT OF INVESTMENT DISPUTES

EUROGAS INC.

and

BELMONT RESOURCES INC.

(CLAIMANTS)

v.

SLOVAK REPUBLIC

(RESPONDENT)

ICSID Case No. ARB/14/14

Claimants' Rejoinder on Respondent's Application for Provisional Measures

Dr. Hamid Gharavi
Dr. Mercédeh Azeredo da Silveira
Mr. Emmanuel Foy
Derains & Gharavi
25 rue Balzac
75008 Paris
France

Counsel for Claimants

December 22, 2014

TABLE OF CONTENTS

INTRODUCTION

1. Claimants hereby submit their Rejoinder ("Claimants' Rejoinder") to Respondent's Reply Application for Provisional Measures. As per the Parties' agreement, recorded in ICSID's letter dated September 30, 2014, the scope of this submission will be limited to Respondent's Application for Provisional Measures. Insofar as it is necessary and required by due process, this submission will also address Respondent's new arguments in relation to the jurisdictional objections raised for the first time by Respondent in its Opposition to Claimants' Request for Provisional Measures as the claimant must necessarily have the last word on jurisdiction. For the avoidance of doubt, any issue raised by Respondent which is not specifically and explicitly addressed in the present submission is hereby denied in full, and Claimants reserve their right to address any such issue at a more appropriate stage of the proceedings.

2. Claimants would like to flag at the outset that Respondent has chosen to persist with the strategy of diverting the Tribunal's attention not only from Respondent's taking of Claimants' investment – the illegality of which was confirmed by Respondent's own Supreme Court on three separate occasions – once the Gemerská Poloma deposit had been re-risked, but also from the subject-matter of Claimants' Application for Provisional Measures, namely the retaliatory measures of the most irregular kind taken by the host State against Claimants, specifically the seizure of their records, in blatant disregard of the most basic principles of procedural fairness and due process.[1] Claimants therefore again

---

[1] As if these irregularities were insufficient, it has now been revealed that Respondent's Counsel, the law firm Squire Patton Boggs LLP, was already providing "*ad hoc* advice" to the Slovak Republic not only when these retaliatory measures were taken, but even as early as in the fall of 2013, and nonetheless stepped out of the shadows only on August 25, 2014, more than a month after it had been formally retained by Respondent. In other words, Respondent's Counsel has been advising the Slovak Republic since well before Claimants' Notice of Dispute dated December 23, 2013, and continued to do so throughout the six-month cooling off period – which the Slovak Republic refused to waive, leading Claimants to believe that an amicable settlement was in sight. While Squire Patton Boggs LLC was providing Respondent "*ad hoc* advice" in the shadows, it hired within its international arbitration department the former lead senior associate of Claimants' team of counsel, who had been working at Derains & Gharavi on the present case since late 2012. This senior associate played an instrumental role in reviewing material facts and attending strategic meetings, both internal and external, and had in its possession privileged information. Respondent's Counsel now assures Claimants that since he joined Squire Patton Boggs LLP, this senior associate has never worked on the present case and has never discussed it with any member of Respondent's legal team. Irrespective of these assurances, the fact remains that Respondent placed Claimants before a *fait accompli* by belatedly appearing on the record, only two weeks

respectfully urge the Tribunal not to lose sight of the only real subject-matter of the present exchange of submissions on provisional measures.

3. With respect to Respondent's Reply Application for Provisional Measures, Claimants make the following preliminary remarks.

4. First, Claimants note that Respondent persists in making misleading, contradictory, and bad faith allegations. These allegations do not stand and, moreover and in any event, manifestly fall short of the threshold to be met for Respondent's *prima facie* objection to jurisdiction to be entertained.

5. Second and more specifically, Respondent's argument that the Tribunal does not have jurisdiction *ratione temporis* over Belmont Resources Inc. ("Belmont") is of the most frivolous kind.

6. By way of reminder, a first Notice of Dispute was sent to the Slovak Republic on October 31, 2011.[2] In order to delay the initiation of arbitration proceedings, the Slovak Republic replied, on May 2, 2012, that the dispute was not yet ripe because local proceedings were still ongoing, and that it would be premature to engage in pre-arbitration settlement negotiations.[3] Yet, the Slovak Republic – at the request of which the filing of the Request for Arbitration was delayed in good faith by Claimants – shamelessly claims, in both its submissions of September 10, 2014 and November 21, 2014 on provisional measures, that the dispute arose more than three years before the entry into force of the 2010 Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments (the "2010 Canada-Slovak Republic BIT"), *i.e.* before March 14, 2009, and that this Tribunal therefore lacks jurisdiction *ratione temporis* over Belmont. Worse even, and more

---

before Respondent was due to file its first submission on provisional measures, after having been advising Respondent for over eleven months, during which the senior associate in question was in fact already a new member of Counsel for Respondent's legal team. By acting this way, Respondent deprived Claimants of the opportunity to properly make inquiries, require safeguards, including express undertakings by Respondent, and to raise, if needed, a challenge on grounds of conflict. Claimants have been seeking legal advice in relation to this situation and reserve their rights in this respect.

2 **Exhibit C-39**, Letter from EuroGas Inc. to the Government of the Slovak Republic, dated October 31, 2011.

3 **Exhibit C-40**, Letter from the Slovak Republic, dated May 2, 2012.

embarrassingly for Respondent, the latter stated, as late as in January 2014, that it was unaware of the existence of a dispute with Belmont.[4]

7. For Respondent to raise, today, a jurisdictional objection on the ground that the arbitration should have been brought before March 2009, when in fact Respondent represented, as late as in May 2012, that the dispute was not yet ripe and that the filing of the arbitration should therefore be delayed – moreover raising such a jurisdictional objection in the context of provisional measures sought by Claimants further to the unlawful seizure by Respondent of all of Claimants' records and property in the Slovak Republic, as a pure measure of retaliation in reaction to the legitimate exercise by Claimants of their right to initiate arbitration proceedings – is of the most extraordinary motions that could be made by a State in investor-State arbitration.

8. Surely the Slovak Republic cannot have it both ways. It cannot, today, argue that the dispute arose before March 14, 2009 when, on May 2, 2012, it claimed that the dispute was not yet ripe and requested that the initiation of the arbitration proceedings be delayed, and specifically stated on January 28, 2014 that it was unaware of the existence of a dispute with Belmont.

9. Third, Respondent's denial of benefits argument was made with similar bad faith. It was indeed allegedly exercised by way of a letter dated December 21, 2012, that is, by way of a letter sent both after the taking of Claimants' mining rights and investment and after EuroGas Inc. ("EuroGas") had given its consent to arbitration by way of a notice of arbitration dated October 31, 2011. Respondent's preposterous novel case seems to be that a host State can attract a foreign investor, have the latter de-risk a deposit, take its investment, receive the investor's consent to arbitrate the dispute, and then nonetheless successfully deny it the benefits of the bilateral investment treaty under which the investment was made.

---

[4] In the words of the Deputy Prime Minister and Minister of Finance of the Slovak Republic, Counsel for Claimants' "*letter of 23 December* [2013] [was] *the first information that the Slovak Republic* [had] *received regarding a dispute from Belmont Resources Inc.*" See **Exhibit C-59**, Letter from Mr. Peter Kažimr, Deputy Prime Minister and Minister of Finance of the Slovak Republic to Dr. Hamid Gharavi, Counsel for Claimants, dated January 28, 2014.

10. Fourth, in both of its submissions on provisional measures, Respondent has put great care in trying to depict EuroGas and Belmont as unmeritorious claimants, prone to engage in fraudulent conduct. Yet, these allegations, which are directed only at EuroGas, are entirely irrelevant for the purpose of the present proceedings and, in any event, baseless.

11. The only element supporting Respondent's allegations that was even remotely contemporaneous with the present proceedings was the complaint lodged by Tombstone Exploration Corporation ("Tombstone") against EuroGas on August 21, 2014. Yet, this complaint only reflected one side of the disagreement between Tombstone Exploration Corporation and EuroGas. As stated in Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures of October 16, 2014 ("Claimants' Reply"), EuroGas had its own grievances against Tombstone. Furthermore, while Respondent has repeated at will that in August 2013, EuroGas was unable to make a payment in the amount of USD 36,540, Tombstone's own complaint stated that EuroGas had later released, in May 2014, a USD 100,000 payment to the company.[5]

12. Moreover and in any event, Claimants' prediction that Tombstone's allegations of fraud against EuroGas would remain mere allegations was proven right. On November 26, 2014, Tombstone announced that its law suit against EuroGas had been "*dismissed due to the parties agreeing to terms for EuroGas, Inc. to continue with its financing commitment which began in May 2014 and will continue with the second phase which is to be received by the Company in January, 2015*."[6] This has enabled EuroGas to resume its "*financing in the amount of $5 million USD for extensive drilling in* [Tombstone's] *wholly owned USA porphyry copper-gold project in Arizona*."[7] This demonstrates that the temporary fallout between Tombstone and EuroGas was not related to some fraudulent activities or to

---

5 **Exhibit R-37**, Tombstone Complaint, dated August 21, 2014, ¶ 42.

6 **Exhibit C-65**, Tombstone Exploration Corporation press release, dated November 26, 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).

7 **Exhibit C-65**, Tombstone Exploration Corporation press release, dated November 26, 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).

EuroGas' lack of funds. On the contrary, the above shows that EuroGas still has liquidities at its disposal and that it carries out real business activities in the United States.

13. As for Respondent's allegation that Claimants "*misrepresented*" the identity of EuroGas and its interest in Rozmin sro ("Rozmin"), Claimants have explained in their Reply of October 16, 2014, and shall demonstrate below, that in 2008 EuroGas "stepped into the shoes" of the company incorporated in 1985 (the "1985 Company"), after which the former was, for all intents and purpose and as a matter of Utah law, a mere continuation of the 1985 Company, with the same shareholder base, the same liabilities and the same assets.[8] The purpose of the operation whereby EuroGas succeeded to the 1985 Company was precisely to allow the latter to wind up its affairs and allow EuroGas to succeed to it as soon as practically and legally possible. As demonstrated throughout Claimants' submissions, the operation was valid and successful, and EuroGas has never had any reason to believe otherwise. This operation constituted a corporate act, much like a corporate change of structure.

14. Moreover, as much as this may frustrate Respondent's ambitions, this corporate operation was memorialized in documents contemporaneous with the disputed facts, at a time when the present arbitration proceedings were not even contemplated. While Respondent is free to challenge the same – assuming, for the sake of argument, that Respondent even has standing to do so and that this Tribunal has jurisdiction to hear such a challenge – the issue is one of law and pertains to the validity of the legal operation carried out by EuroGas in 2008 under US law. To this date, however, the validity of this operation – which Claimants submit is undisputable – has never been called into question by interested third parties. In any event, Respondent has failed to demonstrate any procedural misconduct, fraud or misrepresentation on the part of EuroGas or Belmont in the present proceedings. As soon as Respondent raised the matter in its Answer to Claimant's Application for Provisional Measures, Claimants produced the relevant contemporaneous documentation so as to address Respondent's concerns.

---

[8] Claimants' Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, dated October 16, 2014, ¶¶ 128-139.

15. Therefore, the only piece of "evidence" that remains to support Claimants' alleged "*history of fraud*" is a Texas Court Judgment obtained a decade ago, by a party that is a stranger to the present proceedings, in relation to facts which, as described by Respondent, date back to 1995.[9] The Tribunal in the instant proceedings has no direct knowledge of the facts and circumstances underlying this Texas Court Judgment, nor should it have any interest in acquiring such knowledge. The facts and circumstances of the Texas Court Judgment are plainly irrelevant to the subject-matter of the present dispute. Accordingly, any allegation or insinuation made by Respondent on the basis of this Judgment should be disregarded outright by the Tribunal. The issues at stake in the present proceedings are the wrongful acts perpetrated by Respondent against Claimants, not the facts underlying a ten-year-old Texas Court Judgment.

16. Lastly, it is extraordinary that Respondent would maintain its request for security for costs. Even assuming that, as Respondent alleges, Claimants were financially incapable of satisfying an adverse costs award, it is not unusual to see impecunious investors bring a claim before ICSID. In fact, the investor's financial difficulties are often the result of the respondent State's illegal acts. This is precisely the case in this matter, and it would be extraordinary if Respondent – that is, the wrongdoer that expropriated Claimants' rights and investment, caused them material damage and, for failure to engage in good faith negotiations, imposed on Claimants the need to proceed with, and bear the costs generated by, the present proceedings – were to now be able to further aggravate Claimants' situation by seeking and being granted security for costs.

17. As demonstrated below, it is simply not part of the ICSID arbitration system to require the claimant to post security for the respondent's costs as a pre-condition for the admissibility of their claim. This would constitute an additional and substantial financial burden on the claimant, and, in the present case, Respondent has not demonstrated any exceptional circumstances that would justify departing from the text of the ICSID Convention.

---

[9] Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, dated September 10, 2014, ¶ 19.

18. Respondent has not demonstrated, nor in fact even alleged, that Claimants voluntarily caused their purported insolvability or that they have taken active steps to frustrate the purpose of a potential future costs award. In other words, the provisional measure requested by Respondent is not intended to prevent Claimants from taking further action that would be detrimental to the Slovak Republic's interests. Rather, Respondent is requiring Claimants, without any basis whatsoever, to demonstrate that they will be able to satisfy a theoretically potential, yet very unlikely, adverse costs award, before they are able to proceed with their claim. Such a request finds no support in the language, object or purpose of the ICSID Convention and should accordingly be denied.

19. These preliminary remarks being made, the present Rejoinder is divided into three parts: the first addresses Respondent's objections to the Tribunal's *prima facie* jurisdiction (**I**); the second puts forth Claimants' response to Respondent's application for security for costs (**II**); and the third contains Claimants' prayers for relief (**III**).

I. THE TRIBUNAL HAS JURISDICTION OVER THE CLAIMS OF EUROGAS INC. AND BELMONT RESOURCES INC.

20. For lack of a plausible defence on the merits of this case, Respondent reiterates, in its Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, its position that the Tribunal does not have *prima facie* jurisdiction to rule over Claimants' application for provisional measures.

21. In their Reply of October 16, 2014, Claimants have already shown that the Tribunal has jurisdiction over their claims. Indeed, Claimants have shown that EuroGas is a mere continuation of the 1985 Company, which held an interest in Rozmin as of March 16, 1998.[10] Claimants have also demonstrated that the Tribunal has jurisdiction over Belmont under the 2010 Canada-Slovak Republic BIT, both *ratione temporis* and *ratione personae*.[11]

---

[10] See paragraphs 135 *et seq.* of Claimant's Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, dated October 16, 2014.

[11] See paragraphs 135 *et seq.* of Claimant's Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, dated October 16, 2014.

22. Claimants will hereafter first set out the threshold for a *prima facie* objection to jurisdiction to be entertained, before demonstrating that this threshold is not met in the present case (**A**), and that this Tribunal has jurisdiction over both EuroGas (**B**) and Belmont (**C**).

A. RESPONDENT HAS FAILED TO MEET THE APPLICABLE THRESHOLD

23. Neither in its Answer of September 10, 2014 to Claimant's Application for Provisional Measures nor in its Reply of November 21, 2014 has Respondent been able to point to a single case in which a tribunal denied a party's application for provisional measures on grounds of absence of *prima facie* jurisdiction. In fact, no such ICSID case exists. Even in instances in which the tribunal ultimately denied jurisdiction, it dismissed, when ruling on the claimant's application for provisional measures, the respondent's argument that the tribunal did not have *prima facie* jurisdiction.[12]

24. In its Reply, Respondent merely refers to an Order rendered in the *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. In this case, the ICJ clearly explained the following:

> *Whereas in dealing with a request for provisional measures the Court need not finally satisfy itself that it has jurisdiction on the merits of the case but will not indicate such measures unless there is, prima facie, a basis on which the jurisdiction of the Court might be established* […]*; whereas that is so whether the request for the indication of provisional measures is made by the applicant or*

---

[12] See, for instance, *Quiborax v. Bolivia* (**Exhibit CL-8**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, dated February 26, 2010, ¶¶ 109-112; available at http://www.italaw.com/sites/default/files/case-documents/ita0698.pdf), in which the tribunal dismissed the respondent's argument that the tribunal should deny the claimants' application for provisional measures on the ground that it did not have *prima facie* jurisdiction, but thereafter denied jurisdiction to rule on one of the claimants' claims, in its Decision on Jurisdiction (**Exhibit CL-101**, *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 Jurisdiction, dated September 27, 2012, ¶ 309; available at http://www.italaw.com/sites/default/files/case-documents/italaw1098.pdf).

by the respondent in the proceedings on the merits.[13]

25. In other words, the jurisdiction of the tribunal over the applicant's claims need not be established for an application for provisional measures to be granted. Suffice it that there be a possible basis establishing the tribunal's jurisdiction ("*a basis on which the jurisdiction of the Court might be established*").

26. In *Millicom v. Senegal*, the tribunal explained more specifically that to establish *prima facie* jurisdiction over the dispute, "*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 analyse them in depth.*"[14]

27. Thus, the tribunal's analysis must remain confined to a mere verification that on the basis of the claimant' allegations, the tribunal appears to have jurisdiction. An application for provisional measures may be denied on the ground that the tribunal lacks *prima facie* jurisdiction only if it is unequivocal that no possible ground exists on which the tribunal's jurisdiction could be based. If an issue raised by respondent is "*clearly a contested matter about which written and oral evidence will be required*,"[15] its analysis must be deferred to a later stage in the proceedings, as it would be "*premature to embark on such an expedition at the stage of a request for interim measures, where the Tribunal only needs to decide whether there is prima facie jurisdiction*."[16]

28. ICSID registered Claimants' Request for Arbitration on July 10, 2014 in accordance with Article 36(3) of the ICSID Convention, as the dispute was not manifestly outside the jurisdiction of the Centre. Respondent did not, at any time thereafter, raise a preliminary

---

13 **Exhibit RA-3**, *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Order, dated January 23, 2007, ¶ 24; emphasis added.

14 **Exhibit CL-24**, *Millicom International Operations BV and Sentel GSM SA v. The Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on the Application for Provisional Measures Submitted by the Claimants on August 24, 2009, dated December 9, 2009, ¶ 42 (available at http://www.italaw.com/sites/default/files/case-documents/italaw1244.pdf).

15 **Exhibit CL-21**, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia*, UNCITRAL, Order on Interim Measures, dated September 2, 2008, ¶ 53 (available at http://www.italaw.com/sites/default/files/case-documents/ita0621.pdf; hereafter "*Paushok v. Mongolia*").

16 **Exhibit CL-21**, *Paushok v. Mongolia*, ¶ 53.

objection to the Tribunal's jurisdiction under Article 41(5) of the ICSID Arbitration Rules. And in fact, if Respondent did not raise such a preliminary objection, it is precisely because it would not have been able to meet the high standard of Article 41(5).

29. It is only once Claimants had filed their application on provisional measures that Respondent argued that these measures should be denied on the ground that the Tribunal does not have *prima facie* jurisdiction over Claimants' claims.

30. Even in its submissions on provisional measures, however, Respondent failed to establish that the Tribunal lacked *prima facie* jurisdiction, and therefore refrained from inviting the Tribunal to deny jurisdiction over Claimants' claims, rather merely seeking an order denying Claimants' application for provisional measures. The truth is that the Tribunal's jurisdiction cannot be called into question under the circumstances at hand, at least not on a *prima facie* basis.

31. The explanations and evidence offered by Claimants in their Reply of October 16, 2014 and below indeed show that the Tribunal has jurisdiction. At the very least and in any event, the arguments raised by Respondent in its Reply are misleading and require an analysis that goes well beyond what is requested from the Tribunal to deny *prima facie* jurisdiction for purposes of Claimants' application for provisional measures. Furthermore and, again in any event, Respondent's arguments, based on its best-case scenario, relate to only one – EuroGas – and not both of the claimants. Belmont holds a 57% shareholding interest in Rozmin and the Tribunal clearly has jurisdiction over Belmont's claims be it on this basis alone.[17]

---

[17] The March 27, 2001 Share Purchase Agreement (the "SPA") was never performed/finalized (see paragraphs 92 *et seq.* below). In fact, assuming for the sake of argument that Respondent has standing to dispute the Tribunal's jurisdiction over EuroGas based on arguments of US law and that the Tribunal has the authority to, and entertains, Respondent's position that after the dissolution of the 1985 Company and its bankruptcy, this Company was defunct, then the Tribunal would have to acknowledge that, *a fortiori*, the 1985 Company could not then have performed the SPA and acquired Belmont's interest in Rozmin. In other words, Respondent's allegation against EuroGas further weakens its objection against Belmont. Heads or tails, the arbitration would therefore proceed to the merits phase, even if, for the sake of argument, one were to consider the extraordinary hypothesis that the Tribunal could ultimately adhere to Respondent's best-case scenario.

B. THE TRIBUNAL HAS JURISDICTION – *A FORTIORI PRIMA FACIE* JURISDICTION – OVER EUROGAS INC.

1. EuroGas Inc. Has Standing under the US-Slovak Republic BIT

32. In its Reply of November 21, 2014, Respondent reiterates its argument that EuroGas holds no right in the investment on which its claim is founded. More specifically, Respondent argues that after its dissolution and the closing of bankruptcy proceedings, the 1985 Company could not have transferred to EuroGas the assets upon which its standing now rests.

33. This contention is simply wrong and shows a fundamental misunderstanding of the dissolution of a corporation under Utah State law and of the Chapter 7 bankruptcy process under Title 11 of the United States Code.

34. As explained below, a dissolved and bankrupt company does not cease to exist once its bankruptcy case is closed (**a**); it may validly transfer the assets with which it emerges from bankruptcy proceedings (**b**); in particular, it may take any action necessary for purposes of winding up its affairs (**c**).

(a) <u>The 1985 Company did not cease to exist as a result of its dissolution or of the closing of the bankruptcy proceedings</u>

35. In its Reply of November 21, 2014, Respondent states that the 1985 Company "*ceased to exist as a result of its dissolution under Utah law and was 'defunct' as a matter of federal law when its bankruptcy was concluded.*"[18] This is plainly wrong under US State and federal law.

36. A dissolved and/or bankrupt entity does not cease to exist, and its business and affairs remain with it for purposes of being wound up. As acknowledged by Respondent itself[19] and

---

[18] Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 17.

[19] Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 20, citing *Union Pac. R.R. Co. v. Harsac, Inc.*, 2014 U.S. Dist. LEXIS 91301, 13 n. 6, dated July 2, 2014 (**Exhibit RA-14**).

pursuant to Utah State law,[20] once a corporation is dissolved, it has the authority to take those actions that are necessary to wind up its affairs. In this respect, as set forth in Claimants' Reply of October 16, 2014, and as further explained below (see paragraph 61), it was precisely to wind up its affairs that the 1985 Company validly entered into a joint resolution with EuroGas (the "Joint Resolution") and performed a type-F reorganization, whereby EuroGas assumed all of the assets, liabilities and issued stock certificates of the 1985 Company.[21]

37. No provision of the United States Bankruptcy Code (the "Bankruptcy Code")[22] provides for the dissolution of a corporation through a Chapter 7 proceeding, be it during bankruptcy proceedings or when the case is closed. Thus, Chapter 7 proceedings cannot, and do not, dissolve a corporation. The nature and existence of a bankrupt corporate entity is governed by applicable State law, here Utah law. If an entity's principals wish to dissolve their company, they must do so in compliance with applicable State procedures.[23]

38. Indeed, rather than dissolve a company, § 727 of the Bankruptcy Code merely provides that a corporation cannot receive a discharge of its debts through Chapter 7. The purpose of § 727(a) is to "*avoid trafficking in corporate shells and in bankrupt partnerships.*"[24] While Respondent contends that this purpose supports its conclusion that Chapter 7 proceedings terminated the corporate existence of the 1985 Company, this position is incorrect. What prevents the trafficking of bankrupt entities is the fact that they do not receive a discharge of their debts, not whether or not they are terminated as entities. Any successor owner acquires

---

20 **Exhibit R-19**, Utah Code Ann. § 16-10a-1405(1): "*A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs*."

21 **Exhibit C-57**, 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, dated July 31, 2008.

22 United States Code, Title 11 – Bankruptcy, 2006 Edition, Supplement 5, ¶¶ 101-1352 (available at http://www.gpo.gov/fdsys/pkg/USCODE-2011-title11/pdf/USCODE-2011-title11.pdf).

23 **Exhibit CL-102**, *N.L.R.B. v. Better Bldg. Supply Corp.*, 837 F.2d 377 (9th Cir. 1988), dated January 13, 1988, p.379 (hereafter "*Better Bldg. Supply Corp*"), stating that if the principals "*sought to dissolve their corporations, they should have used state procedures.*"

24 *Ibid.*, p.379. See also **Exhibit CL-103**, Senate Report No. 95-989, dated July 14, 1978, in H.R.Rep. No. 595, 95th Cong., 1st Sess. 384 (1977) reprinted in 1978 US Code Cong. And Admin. News, pp. 5787, 6340, and S. Rep. No. 989, 95th Cong.2nd Sess. 98 (1978) reprinted in 1978 US Code Cong. and Admin. News, p. 5884: "*This* [the fact that corporations cannot be granted a discharge of their debts] *is a change from present law, under which corporations and partnerships may be discharged in liquidation cases*. […] *This change in policy will avoid trafficking in corporate shells and in bankrupt partnerships*."

the entity with all of the debt that was not paid during the bankruptcy proceedings.[25] Indeed, the drafters of the Bankruptcy Code "*chose not to make corporate debt dischargeable so that corporations continuing to operate could not avoid previously incurred debt*."[26] This ongoing, non-discharged debts of the entity is what discourages post-bankruptcy trafficking.

39. In fact, numerous US courts have recognized that corporations cannot be dissolved through a bankruptcy process and that they continue to exist after the bankruptcy proceedings are closed. These courts include the Ninth Circuit Court of Appeals,[27] the Eight Circuit Court of Appeals,[28] and the Third Circuit Court of Appeals,[29] among others.[30] Furthermore, one of the leading treatises on bankruptcy law also supports the principle that the existence of a company continues after the end of Chapter 7 proceedings:

> *After liquidation, any dissolution of the corporation or partnership that the parties desire must be effectuated under state law, since the*

---

25 **Exhibit CL-102**, *Better Bldg. Supply Corp*, p.379: "*In adopting section 727(a)(1), Congress intended that corporate debt would survive Chapter 7 proceedings and be charged against the corporation when it resumed operations*."

26 **Exhibit CL-102**, *Better Bldg. Supply Corp*, p.379; emphasis added.

27 **Exhibit CL-102**, *Better Bldg. Supply Corp*, p.379: "*Contrary to this assertion, Chapter 7 proceedings cannot dissolve a corporation. If the* [principals] *sought to dissolve their corporations, they should have used state procedures*."

28 **Exhibit CL-104**, *Kramer v. Cash Link Sys.*, 652 F.3d (8th Cir. 2011), dated August 26, 2011, p. 840, "[A] *corporation is not entitled to a discharge of its debts in a Chapter 7 proceeding,* see *11 U.S.C. § 727(a)(1), and the final bankruptcy decree did not purport to grant* [the debtor] *a discharge.* [The plaintiff] *is thus free to pursue his claims against* [the debtor] *after the expiration of the automatic stay*."

29 **Exhibit CL-105**, *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, (3d Cir. 2004), dated September 20, 2004, p. 126, stating, in the context of a Chapter 11 liquidation, that "[d]*issolution* […] *is not an objective that can be attained in bankruptcy*."

30 **Exhibit CL-106**, *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 103 F. Supp. 2d (N.D. Cal. 2000), dated June 20, 2000, pp. 1183-1184 (hereafter "*Contreras*"): "*In addition, any dissolution of a corporation must be effectuated under state law, since the Bankruptcy Code does not provide for the dissolution of corporations*. […] *Even if* [the debtor] *has been dissolved, California law provides that a corporation continues to exist even after dissolution for the purposes of,* inter alia, '*prosecuting and defending actions by or against it and enabling it to collect and discharge obligations*.' *Cal.Corp.Code § 2010(a). Furthermore, Cal.Corp.Code § 2011(a)(1) provides for the enforcement of causes of action against dissolved corporations. Therefore,* [the debtor's] *status as 'out of business and inactive' does not insulate it from the present action*." **Exhibit CL-107**, *F.P. Woll & Co. v. Fifth & Mitchell St. Corp.*, No. CIV.A. 96-CV-5973, 2001 WL 34355652 (E.D. Pa. 2001), dated December 13, 2001, at *3 (hereafter "*F.P. Woll & Co*"): "*The relevant case law also supports the conclusion that 'defunct' corporations are not dissolved and therefore retain the capacity to sue and be sued.*"

[Bankruptcy] *Code does not provide for dissolution of corporations or partnerships.*[31]

40. The fact that corporate debtors continue to exist after Chapter 7 proceedings is thus widely recognized.

41. The three cases cited by Respondent to support its argument that a company becomes defunct after a Chapter 7 proceeding are inapposite. Two of them[32] are unpublished decisions and, therefore, have no precedential value.[33] Moreover and in any event, even if these unpublished cases were to be considered, they are easily distinguishable from the present case.

42. In *Permacel Kansas City*, the court primarily addressed whether a debtor can assign an executory contract that was rejected by the bankruptcy Trustee, *i.e.* terminated (either by order or by operation of law under § 365). While the court briefly stated that a company is "defunct" after a Chapter 7 proceeding, it did not explain its reasoning. Instead, the court merely cited one case, *US Dismantlement Corp.*, to support its assertion.[34] The holding of *US Dismantlement*, however, was subsequently rejected by another court of the same federal district (see paragraph 43 *infra*). Accordingly, *Permacel Kansas City* does not support Respondent's position.

43. *US Dismantlement Corp.*, which is also unpublished, is similarly unpersuasive. One year after this case was decided, the Eastern District of Pennsylvania rejected its conclusion in *F.P. Woll & Co.*, where the Court stated:

---

31 **Exhibit CL-108**, Alan N. Resnick and Henry J. Sommer, *Collier on Bankruptcy, Sixteenth Edition*, Lexis Nexis, 2014, ¶ 727.01[3]; emphasis added.

32 **Exhibit RA-17**, *U.S. Dismantlement Corp. v. Brown Associates, Inc.*, No. CIV. A. 97-1309, 2000 WL 433971, at *2 (E.D. Pa. Apr. 13, 2000); **Exhibit RA-15**, *Permacel Kansas City, Inc. v. Kohler Co.*, No. 08-00804-CV-W-FJG, 2010 WL 2516924 (W.D. Mo. June 14, 2010) , at *1 (hereafter "*Permacel Kan. City, Inc. v. Kohler Co*").

33 **Exhibit CL-109**, United States Court of Appeals for the Eighth Circuit, Rule of Appellate Procedure 32.1A on Citation of Unpublished Opinions: "*Unpublished opinions are decisions which a court designates for unpublished status. They are not precedent*." **Exhibit CL-110**, *Smith v. Sch. Dist. of Philadelphia*, 158 F. Supp. 2d 599, 607 n.5 (E.D. Pa. 2001), dated August 10, 2001, p. 607, noting that "*unpublished opinions have no precedential value*."

34 **Exhibit RA-15**, *Permacel Kan. City, Inc. v. Kohler Co*, at IV.

> *The relevant case law also supports the conclusion that 'defunct' corporations* <u>*are not dissolved*</u> *and therefore retain the capacity to sue and be sued.* […] *The debt survives bankruptcy, and* <u>*the corporation survives too*</u>*, because the debt cannot survive without a debtor.*[35]

44. The only published decision cited by Respondent is *Liberty Trust*.[36] However, in this case too, the Court's findings were later disavowed within its own district. Indeed, ten years after *Liberty Trust* was decided, the same court, namely the United States Bankruptcy Court for the Western District of Texas, decided *CVA General Contractors*. In the latter case, the Court "*disagree*[d] *with the district court's holding in* Liberty Trust *that the liquidation of a corporation under chapter 7 accomplishes the dissolution of that corporation*."[37]

45. Further, the Court in *CVA General Contractors* pointed out that even if a Chapter 7 did effect a dissolution of the corporate debtor, as *Liberty Trust* suggested, the applicable State law provides that a dissolved corporation continues to exist "*for a period of three years from the date of dissolution, among other reasons, to prosecute or defend 'in its corporate name any action or proceeding by or against the dissolved corporation' and to permit 'the survival of any existing claim by or against the dissolved corporation.*'"[38] Indeed, the fact that, under the applicable State law, "*upon dissolution, a corporation does continue to exist for a limited time and for limited purposes,* [constituted] <u>*an important detail overlooked by*</u> <u>Liberty Trust</u>."[39] Accordingly, *CVA General Contractors* recognized that the holding in *Liberty Trust* was based upon an incorrect interpretation of the applicable law.

46. In conclusion, the cases cited by Respondent have no precedential value, are irrelevant, and have been criticized by subsequent decisions.

---

35 **Exhibit CL-107**, *F.P. Woll & Co.*, dated February 26, 1999, p. 824 (emphasis added), citing **Exhibit CL-102**, *Better Bldg. Supply Corp*, p. 379; and **Exhibit CL-106**, *Contreras*, p. 1183. See also **Exhibit CL-111**, *In re CVA Gen. Contractors, Inc.*, 267 B.R. 773, (Bankr. W.D. Tex. 2001), dated June 7, 2001, p. 782 (hereafter "*In re CVA Gen. Contractors, Inc*").

36 **Exhibit RA-16**, *Liberty Trust Co. Employees Profit Sharing Trust v. Holt (In re Liberty Trust Co.*), 130 B.R. 467 (W.D. Tex. 1991).

37 **Exhibit CL-111**, *In re CVA Gen. Contractors, Inc.*, FN 10.

38 *Ibid.*

39 *Ibid;* emphasis added.

47. In any event and as demonstrated above, not only does the closing of a company's Chapter 7 proceeding not cause the company's dissolution, but the fate of the company remains at all times a matter of State law. In the present case, all Parties agree that under Utah State law, a "*dissolved corporation continues its corporate existence*" and may take any action "*appropriate to wind up and liquidate its business and affairs*."[40] Thus, after the closing of its Chapter 7 proceeding, the 1985 Company, whose existence and legal capacity were governed by Utah State law, continued its corporate existence to wind up and liquidate its affairs..

(b) <u>The 1985 Company emerged of the bankruptcy proceedings with its interest in EuroGas GmbH</u>

48. In its Reply of November 21, 2014, Respondent argues that the 1985 Company "*had no assets after March 2006 and therefore, had nothing to transfer under the sham merger documents.*"[41] This too is simply wrong.

49. Once a bankruptcy case is closed, any debt not satisfied or paid during the bankruptcy case remains with the debtor, which can also emerge from the proceedings with assets, namely those that were not administered by the trustee. It is often the case that a trustee will not administer assets if they are burdensome (that is, if they are very difficult or expensive to administer) or lack value for unsecured creditors (that is, if the assets are overleveraged with liens). These assets remain with the debtor once the case is closed, albeit subject to the unsatisfied debts and the liens. The 1985 Company's interest in Rozmin is a typical example of such an overly burdensome asset. It was a litigious property with no short-term value and it would have required a considerable amount of time and money to administer.

50. At the time of the Chapter 7 proceedings, it was of public knowledge that Rozmin's mining rights had been revoked. The information was disclosed in the 1985 Company's public

---

[40] **Exhibit R-19**, Utah Code Ann. § 16-10a-1405(1): "*A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs.*"

[41] Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 34.

filings with the SEC for 2004 and 2005.[42] These SEC public filings were reviewed by the Chapter 7 trustee (the "Trustee")[43] together with PriceWaterhouseCoopers LLP,[44] the accountant retained by the Trustee to "*assist* [it] *in his administration of the estate*"[45] and whose services specifically included, amongst other things, "[s]*earch*[ing] *SEC filings for additional information*."[46] At least one of these public filings was even filed in the Chapter 7 proceedings.[47]

51. In its SEC public filings, the 1985 Company specifically disclosed, and the Trustee could read, that (i) the 1985 Company had "*acquired a direct 43% interest in Rozmin s.r.o. through a series of transactions from 1998 through April 2002*;" (ii) "*Rozmin s.r.o. holds a talc deposit in Eastern Slovakia*;" (iii) in January 2005 "*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*;" and (iv) it "*will be forced to impair the cost of the assets, $3,843,560, because of the cancellation of the concession.*"[48]

52. Accordingly, the Trustee knew of the estate's interest in Rozmin, as disclosed in the SEC filings. Nevertheless, based on the above information, the Trustee had no reason to

---

42 **Exhibit R-73**, EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2004; **Exhibit R-75**, EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005.

43 The services the Trustee performed indeed included, *inter alia*, "*review*[ing] *SEC filings*." See **Exhibit R-27**, 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.

44 **Exhibit R-27**, 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.

45 **Exhibit C-66**, Trustee's Motion to Approve Employment of Accountants, dated May 1, 2006, ¶¶ 1-2, EuroGas Inc. Bankruptcy, Docket Entry No. 106; **Exhibit C-67**, Order Granting Trustee's Motion to Approve Employment of Accountants, dated May 11, 2006, EuroGas Inc. Bankruptcy, Docket Entry No. 125.

46 **Exhibit C-68**, 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.

47 See **Exhibit C-69**, 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, EuroGas Inc. Bankruptcy, Docket Entry No. 89; and **Exhibit C-70**, Trustee's Response to Motion to Reconsider or Grant New Trial Filed by W. Steve Smith., EuroGas Inc. Bankruptcy, Docket Entry No. 96.

48 **Exhibit R-73**, EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2004, pp. 46-47; **Exhibit R-75**, EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, pp. 45-46. See also **Exhibit C-69**, 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.

administer the asset. In fact, he had every reason not to. The 1985 Company's interest in Rozmin was an asset with a negative accounting value, and contrary to the four subsidiaries which the Trustee was able to sell,[49] no third party had expressed any interest in acquiring it. Furthermore, challenging the revocation of Rozmin's mining rights in order to create value for the estate would have required a great amount of time and money. By the time the bankruptcy proceedings were closed, the Slovak Supreme Court decision of February 27, 2008 – which revoked the decision of the Regional Court in Košice confirming the reassignment of the Gemerská Poloma talc deposit to Economy Agency and remanding the case to the District Mining Office for further proceedings[50] – had not yet been handed down, and Rozmin's appeals had thus far been repeatedly rejected.

53. Having investigated the 1985 Company's financial affairs and located all the assets that he believed had value, the Trustee therefore decided not to actively administer the 1985 Company's interest in Eurogas GmbH and declared, in his final report to the Bankruptcy Court, that he had "*faithfully and properly fulfilled the duties of the trustee*."[51] The Chapter 7 proceedings were then closed, and the interest in Eurogas GmbH remained with the 1985 Company.

54. In sum, upon termination of the Chapter 7 proceedings, the 1985 Company emerged with its interest in EuroGas GmbH, which it then had the power to transfer, and with all of its debts that were not satisfied during the bankruptcy proceeding.

(c) <u>As memorialized in the Joint Resolution, EuroGas is a mere continuation of the 1985 Company</u>

55. In their Reply of October 16, 2014, Claimants explained that, in accordance with Utah State law, EuroGas was created to serve as the corporate host that would take on the surviving corporate existence, business and affairs of the 1985 Company.

---

49 **Exhibit C-71**, Order Confirming Four-Lot Auction of Debtor's Interests in Certain Affiliates, dated March 30, 2006, EuroGas Inc. Bankruptcy, Docket No. 97.

50 **Exhibit C-33**, Decision of the Supreme Court of the Slovak Republic, dated February 27, 2008 (Ref. 6Sžo/61/2007-121).

51 **Exhibit R-27**, Trustee's Final Report and Application for Compensation and Motion for Order Approving Payment of Administrative Costs and Expenses, p. 1, EuroGas Bankruptcy, Docket No. 140.

56. In its Rejoinder of November 21, 2014, Respondent argues that EuroGas could not have merged with the 1985 Company post-bankruptcy, opining that it would be "*nothing short of a legal magic act*" for a merger to have occurred.[52] Respondent also contends, more specifically, that "*the Utah Code does not permit the transaction contemplated through the Joint Resolution*," considering that while this Code authorizes a domestic corporation to merge into another entity, the 1985 Company was not a "domestic corporation" or "another entity."[53]

57. These statements are patently incorrect. At least two court orders, issued *In the Matter of Synetix Group, Inc.* and *In the Matter of Bio-Thrust, Inc.*, recognize the validity and effectiveness in Utah of the kind of merger performed by the 1985 Company and EuroGas.[54] Both of these court orders indeed hold that the dissolved predecessor has "*merged or* [has been] *reorganized with and into*" an entity in good standing, created specifically to continue on the business of the dissolved corporation.[55]

58. Furthermore and in any event, Respondent argues form rather than substance and, worse even, the arguments of form are raised under the domestic law of one of the claimants. Even if Respondent had standing to raise such arguments and if the Tribunal had jurisdiction to entertain the same, these arguments would hold no weight under international law.

59. As has been widely recognized by tribunals in respect of investment protection claims, and as common sense dictates, substance must prevail over form. In *Banro v. Democratic Republic of Congo*, the tribunal clearly stated that "*ICSID tribunals do not accept the view that their competence is limited by formalities, and rather they rule on their competence*

---

52 Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 17.

53 Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 35.

54 **Exhibit CL-112**, *In the Matter of Bio-Thrust, Inc.*, Order of the Utah Third District Court, dated July 1, 2004; **Exhibit CL-113**, *In the Matter of Synetix Group, Inc.*, Order of the Utah Third District Court, dated March 21, 2008.

55 **Exhibit CL-112**, *In the Matter of Bio-Thrust, Inc.*, Order of the Utah Third District Court, dated July 1, 2004, ¶ 1; **Exhibit CL-113**, *In the Matter of Synetix Group, Inc.*, Order of the Utah Third District Court, dated March 21, 2008, ¶ 1.

based on a review of the circumstances surrounding the case."[56] Similarly, the tribunal in *ADC v. Hungary* was "*in favour of Claimants' '*substance*' approach in considering* [the] *issue* [of investment]."[57] In *S.D. Myers v. Canada*, a NAFTA tribunal held that *"*[t]*he export ban imposed by Canada was not cast in the form of express conditions attached to a regulatory approval but, in applying Article 1106 the Tribunal must look at substance, not only form*."[58] In *Bureau Veritas v. Paraguay*, the tribunal held that "[t]*hese arguments are far from persuasive, and Paraguay seems to take refuge in arguments of form rather than substance*."[59] In *Alpha ProjektHolding v. Ukraine*, the tribunal held that it would not be appropriate to be "*elevating form over substance.*"[60]

60. Based on the foregoing, any conclusion other than that EuroGas is, as a matter of Utah State law, a mere continuation of the 1985 Company, hence the investor under the US-Slovak Republic BIT, would not be in line with the purpose of this BIT and the foundations and purposes underlying investor-State arbitration.

61. As memorialized in the Joint Resolution, EuroGas assumed all of the 1985 Company's assets, liabilities and issued stock certificates.[61] EuroGas has the same management,[62] the

---

56 **Exhibit CL-114**, *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/98/7, Award, dated September 1, 2000, 17 ICSID Rev. 382 (2002), ¶ 11.

57 **Exhibit CL-115**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, dated October 2, 2006, ¶ 325 (available at http://www.italaw.com/sites/default/files/case-documents/ita0006.pdf).

58 **Exhibit CL-116**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, dated November 13, 2000, ¶ 273 (available at http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf).

59 **Exhibit CL-117**, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, dated May 29, 2009, ¶ 101 (available at http://www.italaw.com/sites/default/files/case-documents/ita0103.pdf).

60 **Exhibit CL-118**, *Alpha ProjektHolding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, dated November 8, 2010, ¶ 281 (available at http://www.italaw.com/sites/default/files/case-documents/ita0026.pdf).

61 **Exhibit C-57**, 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, dated July 31, 2008.

62 The Joint resolution indicated that "*the management, namely, the directors and officers of both* [the 1985 Company] *and* [EuroGas]*, are the same individuals and therefore, to the extent that* [the latter] *assumes and recognizes the business, assets and shareholder base of* [the 1985 Company]*, there is and will be complete continuity of management*" (**Exhibit C-57**, 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, dated July 31, 2008, p. 2). the Joint Resolution also provided that "*both corporations currently have the same principal place of business*" (*ibid.*, p. 2), and that EuroGas "*is in fact a continuation of* [the 1985 Company] *and that all of the assets* […] *of* [the 1985 Company] *are in fact the assets* […] *of* [EuroGas]" (*ibid.*, p. 3).

same corporate structure, the same shareholder base,[63] the same assets and the same liabilities as the 1985 Company,[64] and, as soon as the bankruptcy proceedings were closed, EuroGas was, as a matter of Utah State law, a mere continuation of the 1985 Company. A finding that the Tribunal does not have jurisdiction over EuroGas therefore would elevate form over substance.

62. Considering the foregoing, EuroGas is, for purposes of the present proceedings, the same entity as the 1985 Company and qualifies, for the reasons set out in the Request for Arbitration, as an investor under the US-Slovak Republic BIT.[65]

2. Respondent Has Failed to Discharge its Burden of Proof to Deny EuroGas Inc. the Benefits of the US-Slovak Republic BIT

63. As noted in Claimants' Reply of October 16, 2014, the Slovak Republic purported to deny EuroGas the benefits of the US-Slovak BIT by letter dated December 21, 2012,[66] that is, close to fourteen month after EuroGas sent a first Notice of Dispute on October 31, 2011 and accepted Respondent's offer to arbitrate under the US-Slovak Republic BIT.

---

63 The Joint Resolution provided the following: (1) "[the 1985 Company] *hereby complete the* […] *reorganization with* [EuroGas], *namely, carrying out that which is necessary to make* [EuroGas] *assume and inherit the shareholders' list and other assets and liabilities of* [the 1985 Company];" and (2) "[EuroGas], *incorporated in 2005, shall have the same shareholders as* [the 1985 Company], *and in the exact same denominations, and it is in fact capitalized exactly as* [the 1985 Company] *was, and that until such time as the shareholders of* [the 1985 Company] *would want to surrender their own stock certificate(s) in* [the 1985 Company] *and are thus issued new certificate(s) of* [EuroGas], *that* [EuroGas] *will honor as its own, those stock certificates issued by* [the 1985 Company] *as shown on the stock transfer records of* [the 1985 Company]*; in this regard,* [EuroGas] *shall fully and completely recognize and honor* [the] *shareholders* [of the 1985 Company] *as its own and that therefore, the new, successor* [EuroGas], *is and shall NOT be issuing any new securities of its own*" (*ibid.*, p. 3). The Joint Resolution thus memorialized that all of the shareholders of the 1985 Company were to become shareholders of EuroGas and that they ultimately came to hold EuroGas' shares in the exact same denominations as held in the 1985 Company, given that the former company is capitalized exactly as the latter was.

64 The Joint Resolution indicated that EuroGas' intent was to assume and inherit the liabilities of the 1985 Company. Specifically, the Joint Resolution made clear that EuroGas is "*in fact a continuation of* [the 1985 Company] *and that all of the assets, liabilities, rights, privileges, and obligations of* [the 1985 Company] *are in fact the assets, liabilities, rights, privileges, and obligations of* [EuroGas]" (*ibid.*, p. 3). Moreover, the two companies authorized the transfer of all liabilities from one to the other. Accordingly, the Joint Resolution memorized the fact that the company incorporated in 2005 assumed all of the liabilities of the company incorporated in 1985, which is evidenced by the actions of the former.

65 Claimants' Request for Arbitration, dated June 25, 2014, Section III.

66 **Exhibit C-41**, Letter from the Slovak Republic, dated December 21, 2012.

64. In its Rejoinder of November 21, 2014, Respondent strangely argues, however, that "*Claimant's letter of 31 October 2011 did not exercise the right to arbitration under the US-Slovak BIT. Nor did Claimants exercise that right at any other time prior to the Slovak Republic's denial of benefits.*"[67] These statements are simply inaccurate.

65. In its notice letter of October 31, 2011, EuroGas explicitly stated that "[t]*he dispute relates to actions of the Slovak Republic and its authorities which constitute violation of obligations of the Slovak Republic under the Treaty between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of lnvestments entered into on October 22, 1991 as amended by the Additional Protocol dated September 22, 2003 (the 'Treaty').*"[68] Furthermore, the letter clearly states that "*EuroGas hereby notifies the Slovak Republic about the existence of an investment dispute under Article 6(1)(c) of the Treaty. Pursuant to Article 6(3)(a) of the Treaty, EuroGas 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.*"[69] In other words, EuroGas expressly accepted Respondent's consent to arbitration well before Respondent denied it the benefits of the US-Slovak Republic BIT.

66. As to the conditions that must be met for the Slovak Republic to be able to validly exercise the right to deny EuroGas the benefits of the US-Slovak Republic BIT under Article I(2) of this Treaty, Respondent itself acknowledges that there are two and that these two conditions are cumulative: Respondent must prove that EuroGas has no substantial activities in the US and it must also prove that this company is controlled by nationals of a third country.

---

67 Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 46.

68 **Exhibit C-39**, Letter from EuroGas Inc. to the Government of the Slovak Republic, dated October 31, 2011, p. 1.

69 **Exhibit C-39**, Letter from EuroGas Inc. to the Government of the Slovak Republic, dated October 31, 2011, p. 3.

67. There is in fact a policy reason underlying denial of benefits clauses and the cumulative nature of the two conditions contained therein, which is to prevent treaty shopping.[70] It is indeed a "*long-standing U.S. policy to include a denial of benefits provision in investments to safeguard against the potential problem of* '*free-rider*' *investors, i.e. third party entities that may only as a matter of formality be entitled to the benefits of a particular agreement*."[71] To qualify, however, as a "*free-rider*" or a so-called treaty-shopper, it is not sufficient for a claimant to have little business activities in the US. By way of example, and for the sake of argument, a mere holding company can very well qualify as an investor with substantial business activities, entitled to validly bring a claim under the BIT.

68. As stated by the tribunal in *Generation Ukraine Inc. v. Ukraine*, "*the burden of proof to establish the factual basis of the 'third country control', together with the other conditions, falls upon the State as the party invoking the 'right to deny' conferred by Article 1(2)*."[72] Further, in *Ulysseas, Inc. v. Ecuador*, the tribunal confirmed that "*in order to satisfy the control test under Article I(2) of the BIT the natural person who is the ultimate controller of Ulysseas and its nationality must be identified*."[73] In the present case, however, Respondent has never even made an attempt to show that EuroGas is controlled by nationals of a third country: not in its letter of December 21, 2012, not in the course of amicable settlement negotiations, not in its Answer of September 10, 2014, and not in its Rejoinder of November 21, 2014.

69. For this reason alone, Respondent's attempt to deny EuroGas the benefits of the US-Slovak Republic BIT must fail and Respondent's argument that the Tribunal has no jurisdiction

---

70 **Exhibit C-72**, Organization for Economic Cooperation & Development, International Investment Law: Understanding Concepts and Tracking Innovations, 2008, Ch. 1, p. 20, "[b]*ecause of its potential opening for treaty shopping,* [a definition of ''investor'' which includes only a place of incorporation requirement] *may be accompanied by a 'denial of benefits' clause which allows the state party concerned to deny treaty protection to a company, under certain circumstances, which is controlled by nationals of a non-party*" (available at http://www.oecd.org/daf/inv/internationalinvestmentagreements/40471468.pdf).

71 **Exhibit RA-18**, *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction, dated June 1, 2012, ¶ 4.55.

72 **Exhibit RA-5**, *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, dated September 16, 2003, ¶ 15.7 (hereafter "*Generation Ukraine Inc. v. Ukraine*").

73 **Exhibit CL-119**, *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Interim Award, dated September 28, 2010, ¶ 170 (available at http://www.italaw.com/sites/default/files/case-documents/ita1045.pdf).

over EuroGas must be rejected. *A fortiori* must Respondent's argument that the Tribunal's jurisdiction must be denied on a *prima facie* basis be rejected.[74]

70. Respondent's allegations that EuroGas does not carry out substantial business activities in the US need therefore not be addressed here. In any event, there can be no doubt that the incorporation of EuroGas in the US had nothing to do with treaty shopping.

71. Ever since its incorporation, EuroGas has indeed had various substantial business activities in the US. Most recently, EuroGas has resumed its "*financing in the amount of $5 million USD for extensive drilling in* [Tombstone] *wholly owned USA porphyry copper-gold project in Arizona*."[75] It had, however, been participating since 2007 in the financing of the US exploration activities of Tombstone,[76] a corporation in which it holds a 10% shareholding interest.[77]

C. THE TRIBUNAL HAS JURISDICTION – *A FORTIORI PRIMA FACIE* JURISDICTION – OVER BELMONT RESOURCES INC.

1. The Dispute Falls within the Scope of Application *Ratione Temporis* of the Canada-Slovakia BIT

72. In its Rejoinder of November 21, 2014, Respondent reiterates its position that the instant dispute is excluded from the scope of the 2010 Canada-Slovak Republic BIT. Respondent wrongly reasserts that "*the instant dispute arose when the Gemerská Poloma excavation area was assigned to a third-party, and Rozmin's rights to that excavation area lapsed on 3*

---

74 As noted in Claimants' Reply of October 16, 2014, the issue of whether Respondent has successfully invoked its right to deny the investor the benefit of the applicable BIT typically falls, like other similar issues such as the observance of a cooling-off period, within the "*matters to be considered as part of the jurisdictional and merits phase of these proceedings*" (**Exhibit CL-21**, *Paushok v. Mongolia*, ¶ 52), and cannot prevent the Tribunal from finding that it has *prima facie* jurisdiction over EuroGas for purposes of Claimant's application for provisional measures.

75 **Exhibit C-65**, Tombstone Exploration Corporation press release, dated November 26, 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).

76 **Exhibit C-73**, Tombstone Exploration Corporation SEC Form 20-F for Fiscal Year Ended December 31, 2003, filed on May 16, 2014, p. 16 (available at http://www.sec.gov/Archives/edgar/data/1072772/000107878214000940/f20f123113_20f.htm).

77 **Exhibit C-73**, Tombstone Exploration Corporation SEC Form 20-F for Fiscal Year Ended December 31, 2003, filed on May 16, 2014, p. 31 (available at http://www.sec.gov/Archives/edgar/data/1072772/000107878214000940/f20f123113_20f.htm).

May 2005,"[78] and therefrom concludes that the dispute with Belmont "*is excluded* rationae temporis *from the scope of the Canada BIT*."[79]

73. Respondent repeats time and again that the dispute between the parties arose in 2005 without, however, explaining its position or addressing Claimants' argument that the dispute argued by Rozmin before local courts simply is not the same as the international law dispute brought by Belmont against the State in the present arbitration proceedings.

74. Respondent also fails, yet again, to draw a distinction between the moment when the dispute has arisen (which, under Article XV(6) of the 2010 Canada-Slovak Republic BIT, must not have occurred earlier than three years before the entry into force of the Treaty[80]), and the moment when the facts that led up to the dispute took place (which may have occurred earlier).[81]

75. Finally, Respondent disregards the requirement, under Article 25 of the ICSID Convention, that the dispute must be of a legal nature,[82] that is, that "[t]*he dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation*."[83] Respondent seems to ignore that "*the decisive factor in determining the legal nature of the dispute* [is] *the assertion of legal rights and the articulation of the claims in terms of law*.[84]

---

78 Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 61.

79 Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 61.

80 **Exhibit C-2**, Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments, dated July 20, 2010, Article XV(6) *in fine*.

81 See, in this respect, ¶¶ 160 *et seq.* of Claimant's Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, dated October 16, 2014.

82 **Exhibit CL-38**, C. Schreuer, What is a Legal Dispute ?, in International Law Between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner (Isabelle Buffard, James Crawford, Alain Pellet & Stephan Wittich eds., 2008), pp. 965 *et seq*.

83 **Exhibit CL-50**, Report of the Executive Directors on the ICSID Convention, ¶ 26.

84 **Exhibit CL-38**, C. Schreuer, What is a Legal Dispute?, in International Law Between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner (Isabelle Buffard, James Crawford, Alain Pellet & Stephan Wittich eds., 2008), p. 970. See **Exhibit CL-51**, *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Decision on Jurisdiction, dated December 8, 1998, ¶ 47 (available at http://www.italaw.com/sites/default/files/case-documents/ita0450_0.pdf); **Exhibit CL-52**, *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction, dated June 17, 2005, ¶¶

76. As explained in Claimants' Reply of October 16, 2014, the fact that local proceedings may have been initiated prior to the critical date does not necessarily imply that a dispute had already arisen before that date for purposes of determining the scope of application *ratione temporis* of a bilateral investment treaty. In this respect, Respondent's reliance on the *Jan de Nul* Decision on Jurisdiction is to no avail.

77. As noted by Respondent itself, in *Jan de Nul*, the tribunal pointed out that "[t]*he purpose of Article 12 of the 2002 BIT* [(which requires that the dispute have arisen after this BIT's entry into force)] *is to exclude disputes which have crystallized before the entry into force of the BIT and that could be deemed 'treaty disputes' under the treaty standards.*"[85] Respondent

---

20-23 (available at http://www.italaw.com/sites/default/files/case-documents/ita0354.pdf); **Exhibit CL-53**, *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Jurisdiction, dated May 11, 2005, ¶ 55 (available at http://www.italaw.com/sites/default/files/case-documents/ita0108.pdf); **Exhibit CL-54**, *AES Corporation. v. The Argentina Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, dated April 26, 2005, ¶¶ 40-47 (available at http://www.italaw.com/sites/default/files/case-documents/ita0011.pdf); **Exhibit CL-55**, *Sempra Energy International. v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Jurisdiction, dated May 11, 2005, ¶¶ 67 and 68 (available at http://www.italaw.com/sites/default/files/case-documents/ita0768.pdf); **Exhibit CL-56**, *Bayindir Insaat Turzim Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*, Decision on Jurisdiction, ICSID Case No. ARB/03/29, dated November 14, 2005, ¶¶ 125 and 126 (available at http://www.italaw.com/sites/default/files/case-documents/ita0074.pdf; hereafter "*Bayindir v. Pakistan*"); **Exhibit CL-57**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, dated April 27, 2006, ¶¶ 47-62 (available at http://www.italaw.com/sites/default/files/case-documents/ita0268_0.pdf); **Exhibit CL-58**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, dated June 16, 2006, ¶ 74 (available at http://www.italaw.com/sites/default/files/case-documents/ita0439.pdf; hereafter "*Jan de Nul v. Egypt*, Decision on Jurisdiction"); **Exhibit CL-59**, *National Grid PCL v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, dated June 20, 2006, ¶¶ 142, 143, and 160 (available at http://www.italaw.com/sites/default/files/case-documents/ita0553.pdf); **Exhibit CL-60**, *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, dated July 27, 2006, ¶¶ 71-91 (available at http://www.italaw.com/sites/default/files/case-documents/ita0616.pdf); **Exhibit CL-10**, *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, dated March 21, 2007, ¶¶ 93-97 (available at http://www.italaw.com/sites/default/files/case-documents/ita0733.pdf). In **Exhibit CL-61**, *Helnan International Hotels A/S v The Arab Republic of Egypt*, ICSID Case No. ARB/05/19 (hereafter "*Helnan v. Egypt*"), Decision on Jurisdiction, dated October 17, 2006, ¶ 52 (available at http://www.italaw.com/sites/default/files/case-documents/ita0398_0.pdf), the tribunal explained that "*in case of a dispute, the difference of views forms the subject of an active exchange between the parties under circumstances which indicate that the parties wish to resolve the difference, be it before a third party or otherwise. Consequently, different views of parties in respect of certain facts and situations become a 'divergence' when they are mutually aware of their disagreement. It crystallises as a 'dispute' as soon as one of the parties decides to have it solved, whether or not by a third party.*" (emphasis added)

85 **Exhibit CL-58**, *Jan de Nul v. Egypt*, Decision on Jurisdiction, ¶ 116, quoted in Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 67.

however argues that in the present case, "[t]*he dispute before this Tribunal is the exact same one that arose in 2005.*"[86] This is simply not the case.

78. First, the disputes are not the same *ratione personae*. The entity that initiated domestic proceedings in the Slovak Republic, namely Rozmin, is distinct from the entities that are the claimants in the present arbitration proceedings, namely EuroGas and Belmont. The dispute that was handled by Slovak local courts thus differs even more clearly from the dispute to be settled in the present proceedings, than the dispute heard by the Administrative Court of Ismaïlia did from the dispute heard by the arbitral tribunal in *Jan de Nul*, where the parties were the same. Belmont was simply not a party to the local proceedings, and prior to the March 14, 2009 cut-off date (three years before the 2010 Canada-Slovak Republic BIT's entry into force), there was no legal dispute between this company and the Slovak Republic.

79. For a legal dispute to have arisen between Belmont and the Slovak Republic, the former needed to raise the existence of a breach by the latter, which the latter needed to oppose.

80. Respondent however itself acknowledged, in a letter dated May 2, 2012 – that is, in a letter sent after the entry into force of the 2010 Canada-Slovak Republic BIT – that the dispute would not be ripe as long as domestic proceedings would be ongoing.[87] These proceedings were concluded only on August 1, 2012, when the Main Mining Office (the "MMO") confirmed the decision of the District Mining Office (the "DMO") to award mining rights to VSK Mining. Thereafter, as late as January 28, 2014 – that is, almost two years after the entry into force of the 2010 Canada-Slovak Republic BIT – Respondent claimed to have been unaware of the existence of a dispute between itself and Belmont.[88]

---

86 Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 67.

87 **Exhibit C-40**, Letter from the Slovak Republic, dated May 2, 2012. In fact, as pointed out in Claimants' Reply of October 16, 2014, ¶ 173, prior to its submission of September 10, 2014, the State never opposed Belmont's claim that it is entitled to compensation under the 2010 Canada-Slovak Republic BIT as a result of the taking of its investment and ensuing deprivation of the benefits thereof. Neither before Belmont's Notice of Dispute of December 23, 2014, nor once thereafter during settlement negotiations, did Respondent oppose Belmont's right to compensation under the 2010 Canada-Slovak Republic BIT.

88 In the words of the Deputy Prime Minister and Minister of Finance of the Slovak Republic, Counsel for Claimants' "*letter of 23 December* [2013] [was] *the first information that the Slovak Republic* [had] *received regarding a dispute from Belmont Resources Inc*" (**Exhibit C-59**, Letter from Mr. Peter Kažimr, Deputy Prime

81. Thus, at a time when the 2010 Canada-Slovak Republic BIT had already entered into force, the Slovak Republic's position was that the dispute was not yet ripe and that it would, in fact, not become ripe until the conclusion of local proceedings.

82. Respondent can therefore not argue today, in good faith, that Belmont should have initiated arbitration proceedings when Rozmin's mining rights were revoked in 2005, under the 1990 Canada-Slovak Republic BIT, and that the dispute does not fall within the scope of application *ratione temporis* of the 2010 Canada-Slovak Republic BIT. Respondent's position is inconsistent and Respondent is estopped from raising, in the proceedings, any timing issue with respect to the initiation of the proceedings. It cannot state, in 2012, that the dispute related to the revocation of Rozmin's mining rights is not ripe for arbitration as long as local proceedings are ongoing, and then, in 2014, once the domestic proceedings have reached a close, argue that Belmont should already have initiated proceedings concurrently with Rozmin's domestic proceedings.

83. By Respondent's own admission (in its letter of January 28, 2014) and representations (which led Claimant to postpone, in good faith, the filing of the Request for Arbitration), even well after the entry into force of the 2010 Canada-Slovak Republic BIT, neither the condition that Belmont have asserted the existence of a breach by the State nor the condition that the State have opposed this assertion was met.

84. Second, *ratione materiae*, the disputes in local and arbitration proceedings are not the same. In local administrative and judicial proceedings, Rozmin sought the protection of its rights under Slovak domestic law. More specifically, it sought the rescission of various DMO decisions revoking Rozmin's general mining authorization and authorization to carry out mining activities at the Gemerksá Poloma deposit. In fact, to preserve its mining rights, Rozmin had no alternative but to appeal first the decision of the DMO, then that of the MMO, and ultimately the decision of the Regional Court in Košice. It did so in an attempt to reinstate its mining rights in accordance with Slovak law, which would not have been

---

Minister and Minister of Finance of the Slovak Republic to Dr. Hamid Gharavi, Counsel for Claimants, dated January 28, 2014).

possible and would not have been awarded in arbitration proceedings under either one of the BITs on which Claimants hereby rely.

85. *Ratione materiae*, the situation in the present case is thus precisely the same as in the *Jan de Nul* case, in which the tribunal explained that "*while the dispute which gave rise to the proceedings before the Egyptian courts and authorities related to questions of contract interpretation and of Egyptian law, the dispute before this ICSID Tribunal deals with alleged violations of the two BITs, specifically of the provisions on fair and equitable treatment, on continuous protection and security, and on the obligation to promote investments.*"[89]

86. Respondent has itself acknowledged that a dispute arises when there are "*conflicting factual claims bearing on the relevant rights and obligations*."[90] The relevant rights and obligations in the local proceedings (Rozmin's rights and the State's obligations under Slovak law) were, however, not the same as the rights of foreign investors under bilateral investment treaties and international law and obligations of the host State, whose breach gave rise to the present arbitration. The dispute argued before local courts did not pertain to either one of the foreign investors' rights or the host State's obligations under international law: no claim was made or opposed in this respect.

87. Moreover, Respondent is simply wrong to argue that "*the factual and legal disputes are the same in this arbitration: the Tribunal is (*inter alia*) being asked to decide whether Rozmin's rights validly lapsed.*"[91] Even if the Supreme Court had found that Rozmin's mining rights had been revoked in accordance with Slovak domestic laws (which it did not, be it in its first, second, or third decision), this revocation, once confirmed by local authorities and thus definitively depriving Claimants of the benefits of their investment, could still amount to a breach of international law. Indeed, as set out in the ILC Articles on State Responsibility[92]

---

89 **Exhibit CL-58**, *Jan de Nul v. Egypt*, Decision on Jurisdiction, ¶ 117; emphasis added.

90 Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 64.

91 Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 69.

92 **Exhibit CL-120**, James Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge University Press 2003, Article 3, p. 86, "*The characterization of an act of a State as internationally*

and confirmed in the case-law,[93] an expropriation may indeed be deemed unlawful and an internationally wrongful act even if it was undertaken by the State in accordance with its domestic laws.

88. Finally and in any event, the following should be noted. As will be further explained in the Statement of Claim, irrespective of the revocation, *per se*, of Rozmin's mining rights, the Slovak Republic's disregard of the decisions of its own Supreme Court, when the DMO reassigned Rozmin's mining rights to VSK Mining, in itself constituted an expropriation of Claimants' rights, in breach of the US-Slovak Republic and 2010 Canada-Slovak Republic BIT under international law. This expropriation, carried out in blatant disregard of Claimants' right to due process of law and not justified by any public purpose, in itself constituted a breach of the 2010 Canada-Slovak Republic. The present dispute therefore surely cannot be reduced to (or in the words of Respondent "*put simply*" as) "*Claimants contest*[ing] *that their interest in the Gemerská Poloma excavation area lapsed*."[94]

89. Thus, just as in the *Jan de Nul* case – in which there was "*nothing unsound in the Claimants' assertion that the damage they suffered because of the alleged fraud was compounded by the subsequent conduct of the organs of the Egyptian State until the Court of Ismaïlia adopted the judgment which – according to the Claimants – definitively eliminated all prospects that the Claimants could obtain redress from the Egyptian State*"[95] – in the present case, Claimants' loss was compounded by the DMO's reassignment of Rozmin's mining rights to VSK Mining, in March 2012, confirmed by decision of the MMO on August 1, 2012, which

---

wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law. […] *An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law – even if, under that law, the State was actually bound to act in that way.* […] *That conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is equally well settled.*"

93 **Exhibit CL-121**, *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, P.C.I.J., Series A/B No. 44, Advisory Opinion, dated February 4, 1932, p. 24: "[A] *State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force*."

94 Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 68.

95 **Exhibit CL-58**, *Jan de Nul v. Egypt*, Decision on Jurisdiction, ¶ 118.

definitively eliminated all prospects that Claimants could obtain redress from the Slovak State.

90. Thus, in the present case, just as in the *Jan de Nul* case, the domestic dispute, which antedated the international dispute, led to, or at least aggravated, the latter. Damages sustained by Belmont as a result of the revocation of Rozmin's mining rights were compounded by the subsequent conduct of mining authorities, which disregarded the multiple rulings of the Supreme Court in favour of Rozmin, issued on February 27, 2008 and May 18, 2011, and which definitively deprived Rozmin, as of August 1, 2012 – that is, well after the critical date – of all prospects that it could obtain redress from the Slovak State. Indeed, it was only on August 1, 2012 that the MMO confirmed the DMO's decision of March 30, 2012 to re-assign exclusive mining rights over the Gemerská Poloma deposit to VSK Mining despite the Supreme Court's decision of May 18, 2011.[96]

91. In conclusion, the dispute between Belmont and the Slovak Republic did not occur more than three years before the entry into force of the Slovakia-Canada BIT. It had not even occurred by the time the Treaty entered into force. The dispute between Belmont and the Slovak Republic therefore falls well within the scope *ratione temporis* of the 2010 Canada-Slovak Republic BIT and the tribunal accordingly has *prima facie* jurisdiction in respect of Belmont.

2. Belmont Resources Inc. Is Rozmin sro's Majority Shareholder

92. In its Rejoinder, Respondent states that "*Claimant's assertion that* [the agreement whereby Belmont sold its 57% shareholding to EuroGas in 2001] *is ineffective because its conditions were not met has, oddly, remained nothing more than that – an assertion*."[97] It is this statement, however, that is odd, considering Respondent's own findings that as late as in 2006, the conditions precedent of the March 2001 SPA – which had to be performed for

---

96 **Exhibit C-37**, Decision of the District Mining Office, dated March 30, 2012 (Ref. 157-920/2012).

97 Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 71.

Belmont's 57% interest in Rozmin to be transferred to EuroGas – had not yet been performed.[98]

93. Article 6.1 of the SPA provided that "*the ownership of the Shares shall not pass to the Purchaser* […] *unless and until the Vendor has received 125% of its initial investment equal to CND $3,000,000 through the sale of the Purchase Price Shares.*"[99] Article 4.1(c) of the SPA also stipulated that "*in the event the Vendor is unable from the sale of the Purchase Price Shares to recover 125% of its initial investment in the Deposit equal to CND$3,000,000 (based on the initial investment of CND$2,400,000) within one year of the date of execution of this Agreement by all parties* […] *then the Purchaser shall within 10 business days of the written request by the Vendor issue such additional common shares to compensate for any shortfall from the CDN$3,000,000* […]."[100]

94. As Respondent itself acknowledged in its Answer of September 10, 2014, the condition, in particular, that Belmont sell the Purchase Price Shares for at least CND$ 3,000,000, was never satisfied. Hence, the SPA's conditions for the transfer of Belmont's interest in Rozmin to EuroGas, were never met. In the words of Respondent:

> *On 27 March 2001, Belmont sold its Rozmin shareholding to EuroGas I in exchange for, among other things, 12,000,000 shares in EuroGas I. Belmont also received a guarantee providing that if the proceeds of the 12,000,000 shares were less than US$3 million, EuroGas I was required to issue additional shares in an amount sufficient to allow Belmont to realize the US$3 million. Until that condition was met, Belmont purportedly continued to hold its former 57% shareholding in Rozmin in escrow pending completion by EuroGas of the terms of the guarantee.* […]
>
> *In 2002, EuroGas I issued an additional 3,830,000 shares to Belmont under the stock price guarantee.*

---

98 Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, dated September 10, 2014, ¶¶ 41-43.

99 **Exhibit R-15**, Share Purchase Agreement between Eurogas and Belmont, dated March 27, 2001, Article 6(1).

100 **Exhibit R-15**, Share Purchase Agreement between Eurogas and Belmont, dated March 27, 2001, Article 4(1)(c).

> *As of 31 January 2006, Belmont had disposed of all of the 15,830,000 EuroGas I shares for approximately US$1,505,400.*[101]

95. It is therefore most surprising that Respondent would now call into question the accuracy of its own position.

96. It is even more surprising that Respondent would argue, on the one hand, that after its dissolution, the 1985 Company could not have merged with EuroGas, while implying, on the other hand, that EuroGas could have issued new shares and acquired new assets after its dissolution. Respondent surely cannot have it both ways.

97. Under Utah law and as noted above, a dissolved company may enter into agreements after its dissolution only in connection to the winding up and liquidation of its business and affairs. That does not include acquiring new assets or issuing new shares. Hence, after its dissolution in July 2001, EuroGas could no longer acquire Belmont's 57% interest in Rozmin.

98. For the avoidance of doubt, Claimants produce herewith an up-to-date extract from the Business Register of the Slovak Republic, which evidences that ever since February 24, 2000 (that is, ever since Belmont acquired a 57% interest in Rozmin),[102] Belmont has been a direct shareholder of Rozmin, and that it remains so to this day.[103]

---

101 Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, dated September 10, 2014, ¶¶ 41-43.

102 **Exhibit C-16**, Agreement on the Transfer of Business Shares in the Company Rozmin sro between Östu Industriemineral Consult GmbH and Belmont Resources Inc., dated February 24, 2000; **Exhibit C-17**, 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., dated February 24, 2000.

103 **Exhibit C-74**, Extract from the Business Register of the Slovak Republic, dated December 21, 2014.

II. THE SLOVAK REPUBLIC'S REQUEST FOR SECURITY FOR COSTS SHOULD BE DENIED

99. In its Reply of November 21, 2014, Respondent maintains its request that Claimants be ordered to provide security for Respondent's costs. Respondent has, however, failed to address a number of critical points which Claimants raised in their Reply of October 16, 2016, and which go to the core of Respondent's request.

100. As demonstrated at length by Claimants in their Reply, the Tribunal's power, under the ICSID Convention and Arbitration Rules, to recommend that an investor provide security for the host State's costs in the arbitration proceedings, is – at best – very controversial.[104]

101. To date, virtually all ICSID tribunals have declined to grant such a request,[105] many of them on the ground that the provisional measure requested fell outside the language, object, and

---

[104] Claimant's Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, dated October 16, 2014, ¶¶ 203-222.

[105] **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, dated August 13, 2014, ¶ 53 (hereafter "*RSM v. Saint Lucia*"), "*No ICSID ruling, however, has been submitted to the Tribunal in which such exceptional circumstances were found to be established*." See also **Exhibit CL-63**, *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. 10, dated June 18, 2012 (available at http://www.italaw.com/sites/default/files/case-documents/italaw1301_0.pdf); **Exhibit CL-64**, *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, dated May 19, 2010 (available at http://www.italaw.com/sites/default/files/case-documents/ita0031.pdf; hereafter "*Anderson v. Costa Rica*"); **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, dated May 3, 2012 (available at http://www.italaw.com/sites/default/files/case-documents/italaw1534.pdf; hereafter "*Burimi v. Albania*"); **Exhibit CL-6**, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, dated October 28, 1999 (available at http://www.italaw.com/sites/default/files/case-documents/ita0477.pdf; hereafter "*Maffezini v. Spain*, Procedural Order No. 2"); **Exhibit CL-66**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, dated June 18, 2010, ¶ 17 (available at http://www.italaw.com/sites/default/files/case-documents/ita0396.pdf; hereafter "*Hamester v. Ghana*"); **Exhibit CL-32** *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, dated June 23, 2008 (available at http://www.italaw.com/sites/default/files/case-documents/ita0465.pdf; hereafter "*Libananco v. Turkey*"); **Exhibit CL-67**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 (hereafter "*Plama v. Bulgaria*"), Award, dated August 27, 2008 (available at http://www.italaw.com/sites/default/files/case-documents/ita0671.pdf); **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, Decision on Respondent's Application for Security for Costs, dated October 14, 2010 (available at http://www.italaw.com/sites/default/files/case-documents/ita0725.pdf; hereafter "*RSM v. Grenada*"); **Exhibit CL-69**, *Rafat Ali Rizvi v. Republic of Indonesia*, ICSID Case No. ARB/11/13, Award on Jurisdiction, dated July 16, 2013 (available at http://www.italaw.com/sites/default/files/case-documents/italaw3170.pdf); **Exhibit CL-70**, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, dated July 14, 2010 (available at http://www.italaw.com/sites/default/files/case-

purpose of the ICSID Convention.[106] Indeed, "*it is simply 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*."[107]

102. Those few tribunals that have been willing to consider granting such a request have required the respondent to meet a threshold so high that until the tribunal's decision in *RSM Production Corporation v. Saint Lucia* (the "*RSM v. Saint Lucia* Decision"),[108] the request had never been granted. Yet, not only do the circumstances surrounding the *RSM v. Saint Lucia* Decision severely undermine the reliance, if any, which Respondent may place on this Decision,[109] but the underlying facts thereof were also particularly exceptional.

103. Therefore, contrary to Respondent's assertion, it is the tribunal's decision in *RSM v. Saint Lucia* that is "*unprecedented*,"[110] not Claimants' position, namely that a recommendation to provide security for Respondent's costs goes against the language, object, and purpose of the ICSID Convention.

104. In fact, if the present case is in any way unprecedented, it is by virtue of its strength of Claimants' position on the merits (**A**). While Respondent has endeavored to shed negative light on Claimants by digging up some decade-old dirt related to only one of the claimants and which is, in any event, entirely irrelevant for the reasons set out above, any evidence of fraud or improper conduct in the present proceedings remains to be demonstrated. The facts of the present case are actually particularly demonstrative of why it would go against the language, object, and purpose of the ICSID framework to grant Respondent security for its costs (**B**). And in any event, Respondent has failed to demonstrate the existence of

---

documents/ita0314.pdf); and **Exhibit CL-5**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, dated September 25, 2001 (available at http://www.italaw.com/sites/default/files/case-documents/ita0630.pdf; hereafter "*Pey Casado v. Chile*").

106 Claimant's Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, dated October 16, 2014, ¶¶ 203-222.

107 **Exhibit CL-68**, *RSM v. Grenada*, ¶ 5.19. See also **Exhibit CL-5**, *Pey Casado v. Chile*, ¶ 86: "*rien n'indique que, dans le système de la Convention, la requête soumise par un investisseur ne devrait être considérée comme recevable qu'à la condition pour le demandeur d'établir sa propre solvabilité*."

108 **Exhibit RA-4**, *RSM v. Saint Lucia*.

109 Claimant's Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, dated October 16, 2014, ¶ 186.

110 Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 90.

circumstances of such an exceptional nature that they would warrant granting the controversial provisional measure which it is requesting (**C**).

A. THE SLOVAK REPUBLIC DOES NOT HAVE A PLAUSIBLE DEFENCE

105. As set out in their Reply, the case of Claimants on the merits is bullet proof. This explains why Respondent has wasted so much time and effort looking into the past of Claimants, in an attempt to discredit them before this Tribunal and to depict them as unmeritorious Claimants. The Tribunal should, however, not be misled.

106. In its last submission, the Slovak Republic has reiterated its bold attempt to deny its responsibility under international law and to escape and/or circumvent the findings of its very own Supreme Court, going so far as to assert that EuroGas and Belmont "*have no claim on the merits*."[111] Claimants will demonstrate below that this position is unsustainable.

107. First, it is undeniable and, indeed, Respondent does not even attempt to deny that:

- on May 31, 2004, Rozmin was specifically authorized to resume mining activities until November 13, 2006;[112]

- on December 8, 2004 – that is, no less than 22 days before the revocation of Rozmin's rights – an inspection of the Mining Area was carried out by the Director of the District Mining Office, Mr. Antonín Baffi, during which he recorded that the works were ongoing and that Rozmin's activities were in compliance with the legislation in force;[113]

- as recognized by Respondent's own Supreme Court, Rozmin had, by then, invested at least SKK 120,000,000 in the Mining Area;[114]

---

111 Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 83.

112 **Exhibit C-27**, Authorisation of Mining Activity in the Mining Area "Gemerská Poloma," dated May 31, 2004 (Ref. 1023/511/2004).

113 **Exhibit C-28**, Minutes of the December 8, 2004 inspection by the District Mining Office.

114 **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), p. 26.

- on December 20, 2004, the DMO requested the Ministry of Justice of the Slovak Republic to initiate a new tender procedure for the assignment of the deposit;[115]

- on January 3, 2005, once the decision of revocation of Rozmin's mining rights had, in fact, already been taken, and a new tender publicly announced on December 30, 2004, the Slovak Republic wrote to Rozmin, ironically by way of a letter signed by Mr. Baffi himself (namely, the Director of the DMO who had carried out the above-mentioned site inspection less than a month earlier, acknowledged and recorded Rozmin's full compliance of its obligations, and reiterated Rozmin's right to carry out mining activities until November 13, 2006), to announce *post facto* that Rozmin's rights had *de facto* been revoked and were to be awarded to a new organization;[116]

- on February 27, 2008 and then again on May 18, 2011, the Supreme Court, upon Rozmin's appeal and on the basis of Slovak law, annulled the revocation of Rozmin's mining rights and their assignment to another entity;[117]

- on March 30, 2012, the DMO again disregarded the findings of the Supreme Court and assigned Rozmin's mining rights to another entity;[118]

- Rozmin was never paid any compensation for the taking of its mining rights.

108. On the basis of these circumstances alone and even if, for the sake of argument, the Tribunal found that the taking of Claimant's investment was made for a public purpose and with due consideration for Claimants' due process rights, the taking would still be illegal under international law given that no prompt, effective and adequate compensation was ever paid to Claimants.[119]

---

115 **Exhibit C-37**, Decision of the District Mining Office, dated March 30, 2012 (Ref. 157-920/2012), p. 27.

116 **Exhibit C-30**, Letter from the District Mining Office to Rozmin sro, dated January 3, 2005 (Ref. 2450/451.14/2004-I).

117 **Exhibit C-33**, Decision of the Supreme Court of the Slovak Republic, dated February 27, 2008 (Ref. 6Sžo/61/2007-121); **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010).

118 **Exhibit C-37**, Decision of the District Mining Office, dated March 30, 2012 (Ref. 157-920/2012), p. 27.

119 See Article III(1) of the US-Slovak Republic BIT (**Exhibit C-1**, Treaty between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of

109. Second and in any event, Respondent's brand new argument (never raised during pre-arbitration correspondence or settlement discussions) that the taking of Claimants' investment was made in accordance with Slovak law and, even more extraordinarily (and of course without the slightest shred of legal support), that Claimants are at fault for not exhausting their right to engage in further local proceedings – assuming, for the sake of argument, that there is such a prerequisite to resorting to international arbitration and to a finding of liability under international law – must fail for the reasons set out below.

110. Respondent claims that the only reasons why the Slovak Republic "*annulled*" the decisions of the lower level administrative bodies – first in 2008 and then in 2011 – were ancillary reasons, which were "*corrected*" by the DMO in its Decision of March 30, 2012.[120] However, Respondent conveniently omits to set out these reasons, which, once spelled out, demonstrate how untenable Respondent's position is.

111. Indeed, on February 27, 2008, the Supreme Court of the Slovak Republic annulled the decision to assign the Gemerská Poloma talc deposit to Economy Agency on the ground, *inter alia*, that Rozmin's due process right had been violated. The Supreme Court indeed held that by assigning the Gemerská Poloma deposit to another entity by way of an official

---

Investment, dated October 22, 1991) and Article VI(1) of the 2010 Canada-Slovak Republic BIT (**Exhibit C-2**, Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments, dated July 20, 2010). See also under customary international law: **Exhibit CL-122**, *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Damages and Costs, dated June 30, 1990, (1994) 95 ILR 211 ("*While the record does not now permit a final calculation of damages, the essential principles that will inform the tribunal's determination may be noted for the Parties' guidance. Under principles of customary international law, a claimant whose property has been expropriated by a foreign state is entitled to full – i.e., to prompt, adequate and effective – compensation. This, generally means that such a claimant is to receive the fair market or actual value of the property at the time of the expropriation, plus interest, and that the compensation must be seasonably made and in a form that can be freely repatriated or otherwise satisfactorily deployed*"); **Exhibit CL-123**, *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1 and ARB/09/20, Award, dated May 16, 2012, at FN222 (hereafter "*Marion Unglaube and Reinhard Unglaube v. Costa Rica*"; available at http://www.italaw.com/sites/default/files/case-documents/ita1052.pdf),"*Prompt and adequate compensation is also, of course, a requirement of customary international law.*".

120 Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 79.

letter, *i.e.* without issuing a proper decision in the form of a notice, the DMO deprived Rozmin of the opportunity to raise objections.[121]

112. Contrary to Respondent's assertion, this was not an ancillary error. This was a major breach of Rozmin's due process right. After having de-risked the deposit, Rozmin was simply deprived of its mining rights, without any kind of prior notice or warning, and without even an opportunity to defend its rights. And it took Rozmin more than two years of costly litigation before this breach was acknowledged. But even after the February 27, 2008 Supreme Court decision, Rozmin's mining rights were not reinstated. On July 2, 2008, the DMO awarded, by a corporate sleight of hands, the rights over the deposit to VSK Mining.[122] The latter had, in the meantime, absorbed Economy Agency, the company to which the mining rights had initially been assigned in 2005. Rozmin lodged another appeal, this time against the DMO's decision of July 2, 2008.

113. On May 18, 2011, the Supreme Court of the Slovak Republic yet again rescinded the decision to award the mining rights to another entity.[123] The grounds for this decision were numerous and went far beyond mere "*ancillary errors*." The Supreme Court held, *inter alia*, that:

- The DMO had wrongly interpreted and applied the legal basis for its decision to revoke Rozmin's mining rights, namely Act No. 558/2001 amending Act No. 44/1988 on Protection and Utilization of Mineral Resources (the "2002 Amendment"). The Supreme Court held that the 2002 Amendment could not have applied retroactively.[124] In other words, the three-year period after which mining rights could, provided the requisite conditions were met, be revoked, could only have started to run from the date of the entry into force of the Amendment, *i.e.* January 1, 2002, and the three-year

---

121 **Exhibit C-33**, Decision of the Supreme Court of the Slovak Republic, dated February 27, 2008 (Ref. 6Sžo/61/2007-121), p. 8.

122 **Exhibit C-34**, Decision of the District Mining Office on the Assignment of the Mining Area Gemerská Poloma to VSK Mining, dated July 2, 2008 (Ref. 329-1506/2008).

123 **Exhibit C-36**, Decision of the Supreme Court of the Republic of Slovakia, dated May 18, 2011 (Ref. 2Sz0/132/2010), p. 1.

124 **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), pp. 14, 22, 24-25.

period could only have elapsed, at the earliest, on December 31, 2004. In the case of Rozmin however, on December 20, 2004, i.e. before the three year period had elapsed, the DMO had already requested the Ministry of Justice of the Slovak Republic to publish a Notification of the Initiation of the Tender Procedure for the Assignment of the Mining Area.[125] This Notification was published on December 30, 2004, before Rozmin had even been notified of the revocation of its mining rights. The Supreme Court concluded that on this basis alone, the decision of the administrative bodies could not "*be considered as legitimate in the spirit of the rule 'no right can arise from unjustice'*."[126]

- The decision to revoke Rozmin's mining rights and award them to another company was "*premature, unclear and insufficiently reasoned*."[127] Upon a detailed analysis of the 2002 Amendment and its background, including the explanatory report that accompanied it, the Supreme Court indeed held that the decision to revoke Rozmin's mining rights was "*not in conformity with the legislation*,"[128] given that it was not based on a "*thorough investigation*" [129] ascertaining notably whether the Mining Area had been left unexploited or the exploitation of the Mining Area been artificially delayed for speculative purposes, whether the inference with Rozmin's rights was justified by a public purpose, and whether it was proportionate to said public purpose.[130] In particular, the Supreme Court noted that the administrative bodies had failed to take into account, *inter alia*, the fact that (i) on May 31, 2004, Rozmin had been specifically authorized to resume mining activities until November 13, 2006; (ii) on December 8, 2004, an inspection of the Mining Area had been carried out, during

---

125 **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), pp. 21-22.

126 **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), p. 25.

127 **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), p. 25.

128 **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), p. 26.

129 **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), p. 23.

130 **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), pp. 25-26.

which it had been recorded that the works were ongoing and that Rozmin's activities were in compliance with the legislation in force; and (iii) Rozmin had invested at least SKK 120,000,000 in the Mining Area.[131]

114. Again, these shortcomings of the administrative bodies were not "*ancillary errors*." They were serious deficiencies, each independently fatal to the decision's validity. According to the Supreme Court, the administrative bodies had not only initiated a new tender procedure on the basis of an unlawful interpretation of the 2002 Amendment, but they had unlawfully interfered with Rozmin's rights without relying on any valid public purpose, let alone considered the proportionality of their interference with the said public purpose. Given the nature of the independent and fatal deficiencies identified by the Supreme Court, the fact that "*dobývanie*" – the Slovak word which refers to the type of activity that ought to be carried out within the three-year period set out in the 2002 Amendment – should be translated as "excavation," as stated by Respondent, rather than as "mining activities," as maintained by Claimants, is entirely irrelevant. Respondent cannot expect this Tribunal to overrule the findings of its own Supreme Court and interpret the 2002 Amendment *de novo.*

115. In total, Rozmin was embroiled in costly legal proceedings before local courts for more than 8 years, and obtained three favorable rulings of the Slovak Supreme Court, but its rights were never reinstated.

116. In these circumstances, arguing – as Respondent does (again without any support) – that Rozmin had an obligation to exhaust the right to appeal and moreover that it failed to do so, hinges on bad faith. Rozmin certainly cannot be said to have exercised anything less than a "*reasonable – not necessarily exhaustive effort – to obtain correction*."[132] In fact, Rozmin's effort to obtain specific performance before local courts went above and beyond what could reasonably have been expected of any investor, and in fact can be said to have been exhaustive, given that any further appeal would have been futile.

---

131 **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), pp. 25-27.

132 **Exhibit RA-5**, *Generation Ukraine Inc. v. Ukraine*, ¶ 20.30.

117. Based on the foregoing, the fact that Respondent illegally expropriated Claimants' investment is undeniable.

118. Moreover and in any event, even if, for the sake of argument, the Tribunal found that the revocation of Rozmin's mining rights was made in accordance with Claimant's due process right, and for a public purpose, the taking of Claimants' investment would still be illegal. Indeed, no prompt, effective and adequate compensation, required under international law, was ever paid to Claimants.[133]

B. RESPONDENT'S REQUEST GOES AGAINST THE LANGUAGE, OBJECT AND PURPOSE OF THE ICSID CONVENTION

119. The Slovak Republic has, for the most part, failed to address Claimants' argument in this respect. It has failed to demonstrate that it has a right to be preserved by way of provisional measures (**1**), and it has failed to demonstrate that Respondent's request for security for costs is compatible with the object and purpose of the ICSID Convention (**2**).

1. The Slovak Republic Has No Right to Be Preserved by Way of Provisional Measures

120. Despite Claimants' lengthy demonstration that Respondent's theoretical right to an award on costs is not only unsubstantiated but, in any event, not one of the "*respective rights of either party*" contemplated by Article 47 of the ICSID Convention,[134] Respondent has chosen to

---

133 Article III(1) of the US-Slovak Republic BIT (**Exhibit C-1**, Treaty between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment, dated October 22, 1991) and Article VI(1) of the Canada-Slovak Republic BIT (**Exhibit C-2**, Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments, dated July 20, 2010). See also under customary international law: **Exhibit CL-122**, *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Damages and Costs, dated June 30, 1990, (1994) 95 ILR 211 ("*While the record does not now permit a final calculation of damages, the essential principles that will inform the tribunal's determination may be noted for the Parties' guidance. Under principles of customary international law, a claimant whose property has been expropriated by a foreign state is entitled to full – i.e., to prompt, adequate and effective – compensation. This, generally means that such a claimant is to receive the fair market or actual value of the property at the time of the expropriation, plus interest, and that the compensation must be seasonably made and in a form that can be freely repatriated or otherwise satisfactorily deployed*"); **Exhibit CL-123**, *Marion Unglaube and Reinhard Unglaube v. Costa Rica*, FN 222: "*Prompt and adequate compensation is also, of course, a requirement of customary international law.*"

134 Claimant's Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, dated October 16, 2014, ¶¶ 203-214.

summarily dismiss the authorities cited by Claimants in their Reply, and to refer only to the *RSM v. Saint Lucia* Decision, according to which the Slovak Republic would purportedly only need to evidence that "a future claim for cost reimbursement is not evidently excluded."[135]

121. It is noteworthy that the tribunal in *RSM v. Saint Lucia* – just as Respondent in its Reply – did not make reference to any authority in support of this proposition.[136] And indeed, the proposition flies in the face of the numerous authorities cited by Claimants in paragraphs 203 to 214 of their Reply of October 16, 2014, which are hereby incorporated into the present submission.

122. First, the proposition is at odds with the wording of Article 47 of the ICSID Convention which states that the Tribunal may recommend provisional measures to "*preserve the respective rights of either party*" (emphasis added). The term "*preserve*" in and of itself implies that the right at issue must already exist – at least hypothetically or theoretically – at the time of the request.

123. Yet, as demonstrated above at paragraphs 107 *et seq.*, Respondent has failed to put forward even a plausible defense. This is not surprising, given the very circumstances of this case which led Respondent's own Supreme Court to declare, on three separate occasions, Respondent's actions and omissions illegal. It is therefore only highly hypothetically that one could conceive that Respondent could prevail on the merits.

124. But in any event, even if it were plausible that Respondent could succeed on the merits, Respondent's theoretical right to an award on costs would remain to be established. Claimants demonstrated in their Reply of October 16, 2014 that the historical trend in international investment arbitration is to not shift costs onto the unsuccessful claimant[137] – a fact that Respondent simply fails to address in its submission of November 21, 2014. The case-law put forward by Claimants in this respect is, however, extensive, and is aptly

---

135 Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 78.

136 **Exhibit RA-4**, *RSM v. Saint Lucia*, ¶ 74.

137 Claimant's Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, dated October 16, 2014, ¶ 208.

summarized by David Smith, who concludes that "[i]*n the case of victorious respondents, most awards do not shift costs*"[138] save, potentially, for cases "*of abuse of process, fraud, or other such misconduct by claimants*."[139] No such abuse of process, fraud or misconduct has been demonstrated in the present case.

125. In other words, even Respondent's theoretical right to an award on cost, based on the unlikely hypothesis that it would prevail in this arbitration, is not demonstrated. By claiming that it has a right to an award on costs, Respondent is essentially requesting the Tribunal to impose on Claimants an additional – and substantial – financial burden, on the assumption not only that Respondent will prevail on the merits, but also that Claimants will engage in an abuse of process or procedural misconduct that would warrant an award on costs being rendered against them. It is far too early in these proceedings to make, let alone act upon such assumptions, and the Tribunal should accordingly refrain from any "*determination at this time which may cast a shadow on either party's ability to present its case*."[140]

126. Second, and independently of the above, Respondent has failed to even address Claimants' argument and supporting authorities, that Respondent's alleged right to an award on costs is not one of the "*respective rights of either party*" contemplated by Article 47 of the ICSID Convention.

127. Yet, this was emphasized by Judge Edward W. Nottingham, the arbitrator on the *RSM v. Saint Lucia* tribunal who issued a powerful dissenting opinion and who stated, *inter alia*, that "*the provisional measures envisioned in Article 47 are mainly those formulated to preserve the* status quo pende litis."[141] The position of Judge Edward W. Nottingham is supported by the *travaux préparatoires* of the ICSID Convention[142] as well as other

---

138 **Exhibit CL-95**, David Smith, "Cost-and-Fee Allocation in International Investment Arbitration," 51 VJIL 749 (2011), p. 768.

139 *Ibid.*, p. 779.

140 **Exhibit CL-6**, *Maffezini v. Spain*, Procedural Order No. 2, ¶ 21.

141 **Exhibit RA-4**, *RSM v. Saint Lucia*, Dissenting Opinion of Judge Edward W. Nottingham, dated August 13, 2014, ¶ 7.

142 See **Exhibit CL-124**, G. Kaufmann-Kohler and A. Antonietti, "Interim relief in International Investment Agreements," in *Arbitration under International Investment Agreements: An analysis of the Key Procedural, Jurisdictional and Substantive Issues*, Katia Yannaca-Small (Ed.), Oxford University Press 2010, p. 521 (available at http://www.arbitration-

authorities, including the award in *Anderson v. Costa Rica*, in which the tribunal concluded that "*the request to order the Claimants to be held joint and severally liable for the payment of any costs eventually awarded to the Respondent is not in the nature of a provisional measure to preserve existing rights.*"[143]

128. Based on the foregoing, Respondent's alleged right to an award on costs, far from constituting an existing right, is a mere expectation unlikely to come to fruition which, in any event, would not constitute a right within the scope of Article 47 of the ICSID Convention.

2. Respondent's Request for Security for Costs Goes Against the Object and Purpose of the ICSID Arbitration

129. In their Reply, Claimants have demonstrated at length that Respondent's request goes beyond the object and purpose of the ICSID Convention.[144]

130. By way of reminder, Claimants underlined, and Respondent did not deny, that one of the cornerstones and a key purpose of the ICSID arbitration system is to provide investors with a direct – unfettered – access to a neutral method of dispute resolution.[145] Yet, such a direct and unfettered access would be greatly hindered, and the ICSID arbitration system's underlying purpose defeated, if a respondent State were able to require an investor to provide security for the former's costs before being able to pursue a claim. This is all the more true that "*it is far from unusual in ICSID proceedings to be faced with a Claimant* […] *with few assets*."[146] In many cases, the investor's lack of assets is directly attributable to the illegal acts of the respondent State. If the drafters of the ICSID Convention had intended to grant arbitral tribunals the power to mitigate the risk posed by insolvent investors, they would have included specific provisions to that effect, setting out, in particular, the

---

icca.org/media/1/13571336619700/interim_relief_in_international_investment_agreements_kaufmann-kohler.pdf).

143 **Exhibit CL-64**, *Anderson v. Costa Rica*, ¶ 9.

144 Claimant's Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, dated October 16, 2014, ¶¶ 215-233.

145 Claimant's Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, dated October 16, 2014, ¶¶ 215-218.

146 **Exhibit CL-68**, *RSM v. Grenada*, ¶ 5.19.

conditions and circumstances that would warrant the making of an order on security for costs.[147] Yet, they did not do so and it is reasonable to assume that they had valid reasons for not doing so.

131. Indeed, there is no language in the ICSID Convention or the *travaux préparatoires* suggesting that a provisional measure of the type requested by Respondent was at any time contemplated by the drafters of the Convention. To the contrary, the *travaux préparatoires* suggest that the provisional measures contemplated by the drafters of the Convention under Article 47 were those aimed at preserving the *status quo*.[148] This has led many arbitral tribunals to conclude that "*it is simply 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*,"[149] and that there is "*a serious risk that an order for security for costs would stifle the Claimant's claims*."[150]

132. Respondent has not rebutted the above arguments, but rather sought to avoid them by referring to three arbitral decisions in which the tribunal would allegedly have "*had no difficulty accepting that security for costs can be granted in certain circumstances*."[151] The reality, however, is that the tribunal's position in these three cases was much more nuanced than suggested by Respondent, and in fact supports Claimants' position that a

---

147 **Exhibit CL-5**, *Pey Casado v. Chile*, ¶¶ 84-85: "*La République du Chili a souligné le risque encouru par les Etats parties à la Convention de Washington en raison d'une possible insolvabilité de l'Investisseur demandeur à l'instance* […] *Si le risque évoqué par la Partie défenderesse ne saurait être ignoré, il y a lieu de penser que tant les auteurs de la Convention de Washington que les Etats qui ont ratifié ladite Convention (dont le Chili) ne l'ont pas ignoré non plus. Il leur eût été facile, s'ils entendaient se protéger contre ce risque, de prévoir dans la Convention ou dans le Règlement d'Arbitrage l'insertion d'une disposition appropriée. Il est permis de supposer que, s'ils ne l'ont pas fait, c'est que ledit risque leur a paru minimal ou possible à accepter*."

148 **Exhibit CL-124**, G. Kaufmann-Kohler and A. Antonietti, "Interim relief in International Investment Agreements," in *Arbitration under International Investment Agreements: An analysis of the Key Procedural, Jurisdictional and Substantive Issues*, Katia Yannaca-Small (Ed.), Oxford University Press 2010, p. 521 (available at http://www.arbitration-icca.org/media/1/13571336619700/interim_relief_in_international_investment_agreements_kaufmann-kohler.pdf).

149 **Exhibit CL-68**, *RSM v. Grenada*, ¶ 5.19. See also **Exhibit CL-5**, *Pey Casado v. Chile*, ¶ 86: "*rien n'indique que, dans le système de la Convention, la requête soumise par un investisseur ne devrait être considérée comme recevable qu'à la condition pour le demandeur d'établir sa propre solvabilité*."

150 **Exhibit CL-66**, *Hamester v. Ghana*, ¶ 17.

151 Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 90.

recommendation for security for costs goes against the object and purpose of the ICSID framework.

133. In *Atlantic Triton Company Limited v. People's Revolutionary Republic of Guinea*,[152] the tribunal, while seemingly accepting that an order for security for costs fell within the ambit of Article 47, "*expressed some fundamental reservations about pre-judgment security*."[153] The case was unreported but a commentator summarized the tribunal's position as follows:

> *The Tribunal was further dissuaded from granting the requested pre-judgment security by the fact that both requests were directly linked to, and dependent on resolution of the basic claims in the arbitration.* [...]
>
> *The Atlantic Triton decision thus establishes that pre-judgment security to ensure payment of an eventual award will not be granted in the ordinary course of ICSID arbitrations.*[154]

134. The fact that security for the respondent's costs will not be granted "*in the ordinary course of ICSID arbitrations*" underlines the fact that, absent extraordinary circumstances, the power to order such a measure goes against the object and purpose of the ICSID Convention, and lies outside the powers of the tribunal.

135. In *Pey Casado*, the tribunal, before acknowledging that certain extraordinary circumstances may warrant that a request for security for costs be granted, closely examined the ICSID Convention and stressed the following:

> [T]*he lack of any provision on security for costs, without being determinative on its own, seems to entail a certain presumption that such a measure is*

---

152 *Atlantic Triton Company Limited v. People's Revolutionary Republic of Guinea*, ICSID Case No. ARB/84/1, Decision on Provisional Measures, dated December 18, 1984, unreported, see **Exhibit RA-23**, C. Schreuer, L, Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary*, 2d ed. 2009, Article 47, pp. 782-783.

153 **Exhibit RA-23**, C. Schreuer, L, Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary*, 2d ed. 2009, Article 47, page 783.

154 **Exhibit RA-23**, C. Schreuer, L, Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary*, 2d ed. 2009, Article 47, page 783; emphasis added.

> *not provided for or authorized. In other words, nothing suggests that, in the framework of the Convention, the request submitted by the claimant may only be considered admissible upon the claimant's demonstration of its own solvency. Such a restriction on the protection of investments would certainly be conceivable, but it could and should have been expressly provided for, be it by the Washington Convention or the above cited bilateral Treaty between Chile and Spain.*
>
> *To sum up, in the absence of any indication to the contrary, one is entitled to consider that the Contracting States of the Washington Convention, who surely could and should have foreseen, before ratifying the Convention, the possibility of the claiming investor being insolvent, have evaluated and accepted the risk* [of non payment of a party's allocated costs].[155]

136. Again, the tribunal in this case confirmed that its power to grant the respondent security for its costs – which is not a measure of "*general and ordinary nature*" – goes against the object and purpose of the ICSID Convention, and, absent specific conditions, lies outside the powers of the tribunal.

137. As for *Bayindir v. Pakistan*, the Award on Jurisdiction merely states that the tribunal "*dismisse*[d] *Pakistan's request to recommend, as a matter of principle, that Bayindir should provide security for Pakistan's costs*,"[156] without any further indication as to the tribunal's underlying reasoning. However, the reference to a recommendation, "*as a matter of principle*," that a party provide security for the other's costs, implies that the request was not supported by any exceptional or extraordinary circumstances.

138. Further, in an article on interim relief in International Investment Agreements, co-authored by Prof. Gabrielle Kofmann-Kohler, the President of the tribunal in *Bayindir v. Pakistan*, the Award on Jurisdiction is referenced in support of the proposition that the risk of non-payment by an insolvent investor, of a costs award made against them, was evaluated and

---

155 **Exhibit CL-5**, *Pey Casado v. Chile*, ¶ 86; emphasis added.
156 **Exhibit CL-56**, *Bayindir v. Pakistan*, ¶ 46.

accepted by the Contracting States of the ICSID Convention.[157] It therefore seems that the lack of an express provision granting the tribunal the power to order an investor to provide security for the respondent's costs, and the inference that such power goes against the object and purpose of the ICSID Convention, played a determinative role in the tribunal's decision to reject the request in *Bayindir v. Pakistan*. And indeed, Prof. Gabrielle Kofmann-Kohler concluded her analysis of the available case-law by submitting that "*an order for security for costs in favor of the respondent should only by granted if the claimant's case appears abusive, frivolous or extravagant*."[158]

139. It results from the foregoing that, even according to the case-law cited by Respondent, a measure requiring Claimants to provide security for Respondent's costs before allowing them to bring a claim has no place "*in the ordinary course of ICSID arbitrations*,"[159] and goes against the object and purpose of the ICSID Convention, namely to provide investors with a direct and unfettered access to a neutral forum for the resolution of disputes.

140. If some ICSID tribunals have been willing to consider it within their power to grant the respondent security for its costs, it has always been subject to the requirement that the respondent evidence the existence of extraordinary circumstances justifying a departure from the "*ordinary course of ICSID arbitrations*." Such extraordinary circumstances would include situations in which "*claimant's case appears abusive, frivolous or extravagant*."[160]

---

157 **Exhibit CL-124**, G. Kaufmann-Kohler and A. Antonietti, "Interim relief in International Investment Agreements," in *Arbitration under International Investment Agreements: An analysis of the Key Procedural, Jurisdictional and Substantive Issues*, Katia Yannaca-Small (Ed.), Oxford University Press 2010, p. 528 (available at http://www.arbitration-icca.org/media/1/13571336619700/interim_relief_in_international_investment_agreements_kaufmann-kohler.pdf).

158 **Exhibit CL-124**, G. Kaufmann-Kohler and A. Antonietti, "Interim relief in International Investment Agreements," in *Arbitration under International Investment Agreements: An analysis of the Key Procedural, Jurisdictional and Substantive Issues*, Katia Yannaca-Small (Ed.), Oxford University Press 2010, p. 528 (available at http://www.arbitration-icca.org/media/1/13571336619700/interim_relief_in_international_investment_agreements_kaufmann-kohler.pdf).

159 **Exhibit RA-23**, C. Schreuer, L, Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary*, 2d ed. 2009, Article 47, page 783.

160 **Exhibit CL-124**, G. Kaufmann-Kohler and A. Antonietti, "Interim relief in International Investment Agreements," in *Arbitration under International Investment Agreements: An analysis of the Key Procedural, Jurisdictional and Substantive Issues*, Katia Yannaca-Small (Ed.), Oxford University Press 2010, p. 528 (available at http://www.arbitration-

C. RESPONDENT HAS FAILED TO DEMONSTRATE THE EXISTENCE OF EXTRAORDINARY CIRCUMSTANCES JUSTIFYING THAT ITS REQUEST BE GRANTED

1. The Requested Measure Is Not Necessary

141. As demonstrated above, even according to the case-law cited by Respondent, the security for costs which it requests is not of an "*ordinary nature*" and has no place in the "*ordinary course of ICSID arbitrations*," given the language, object, and purpose of the ICSID Convention. Therefore, if the Tribunal were to consider itself empowered to grant such an extraordinary measure – which Claimants contend it is not – it would have to be in the most exceptional of circumstances, where "*claimant's case appears abusive, frivolous or extravagant*." This was confirmed notably by the tribunals in *Burimi v. Albania*,[161] *Libananco v. Turkey*,[162] and *Commerce Group & San Sebastian Gold Mines v. El Salvador*.[163]

142. In the present case, however, Respondent's request for security for costs is based on the allegations that "*Claimants are not capable of satisfying a costs award and have a history of engaging in fraud and reneging on payment obligations*."[164] This is plainly insufficient to justify the measure which Respondent requests, for the following non-exhaustive reasons.

143. First, Claimants' alleged inability to satisfy a costs award is entirely irrelevant for the purpose of establishing extraordinary circumstances justifying that Respondent be granted security for its costs.

144. As stated above, "*it is far from unusual in ICSID proceedings to be faced with a Claimant* […] *with few assets*."[165] And indeed, Claimants have already demonstrated, and Respondent has not denied, that it was easily foreseeable to the drafters and Contracting States of the

---

icca.org/media/1/13571336619700/interim_relief_in_international_investment_agreements_kaufmann-kohler.pdf).

161 **Exhibit CL-65**, *Burimi. v. Albania*, ¶ 41.

162 **Exhibit CL-32**, *Libananco v. Turkey*, ¶ 78.

163 **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, dated September 20, 2012, ¶ 44 (available at http://www.italaw.com/sites/default/files/case-documents/italaw1087.pdf).

164 Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 74.

165 **Exhibit CL-68**, *RSM v. Grenada*, ¶ 5.19.

ICSID Convention that claims before ICSID would potentially be brought by investors who are insolvent, possibly precisely as a result of the acts and omissions of the respondent State.[166] Yet, no specific provisions were made to address the situation, which indicates that the risk of non-payment of a costs award by an insolvent investor was a risk considered by the drafters when they resolved to grant investors an unfettered access to the ICSID arbitration process.[167]

145. Thus, assuming for the sake of argument that Claimants would indeed be unable to satisfy a costs award, such a state of affairs, being "*far from unusual*"[168] and constituting a risk foreseen and accepted by the drafters of the Convention, would not qualify as an extraordinary circumstance.

146. This is all the more true considering that Respondent has not alleged, let alone demonstrated, that Claimants were taking active steps to avoid satisfying any potential – yet most unlikely – costs award, or that Respondent would be unable to enforce such a costs award against the assets of Claimants and/or their shareholders. Given the extraordinary nature of Respondent's request, the burden of proof is not on Claimants to demonstrate that they are able to satisfy a costs award, but on Respondent to – at the very least – demonstrate that Claimants would be unable to comply with such an award, and that they are moreover actively working towards frustrating its enforcement. This was underlined *inter alia* by the tribunal in *Burimi v. Albania*:

> *Even if there were more persuasive evidence than that offered by the Respondent concerning the Claimants' ability or willingness to pay a possible award on costs, the Tribunal would be reluctant to*

---

166 Claimant's Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, dated October 16, 2014, ¶¶ 215-218.

167 **Exhibit CL-5**, *Pey Casado v. Chile*, ¶¶ 84-85: "*La République du Chili a souligné le risque encouru par les Etats parties à la Convention de Washington en raison d'une possible insolvabilité de l'Investisseur demandeur à l'instance* […] *Si le risque évoqué par la Partie défenderesse ne saurait être ignoré, il y a lieu de penser que tant les auteurs de la Convention de Washington que les Etats qui ont ratifié ladite Convention (dont le Chili) ne l'ont pas ignoré non plus. Il leur eût été facile, s'ils entendaient se protéger contre ce risque, de prévoir dans la Convention ou dans le Règlement d'Arbitrage l'insertion d'une disposition appropriée. Il est permis de supposer que, s'ils ne l'ont pas fait, c'est que ledit risque leur a paru minimal ou possible à accepter*."

168 **Exhibit CL-68**, *RSM v. Grenada*, ¶ 5.19.

> *impose on the Claimants what amounts to an additional financial requirement as a condition for the case to proceed. Notably, there are no provisions in the ICSID Convention or the Arbitration Rules imposing such a condition, except the advance on costs under Administrative and Financial Regulation 14(3)(d). The Claimants met this requirement on January 11, 2012.*[169]

147. Indeed, absent any evidence that Claimants are taking active steps to frustrate the enforcement of a possible – yet most unlikely – adverse costs award, the provisional measure requested by Respondent does not seek to prevent Claimants from taking further action that would be detrimental to the Slovak Republic's interests. It is requiring Claimants, without any textual basis whatsoever, to demonstrate that they will be able to satisfy such a possible – yet unlikely – adverse costs award, before they are able to proceed with their claim. Such a request finds no support in the language, object or purpose of the ICSID Convention and should accordingly be denied.

148. Second, Respondent's reliance on the alleged third-party funding from which Claimants would be benefiting is equally irrelevant. The Slovak Republic insists that it "*is precisely for this reason* [namely, the involvement of the claimant's admitted third-party funding] *that the* RSM *tribunal granted the host-State's request for a security*."[170] This is simply not true.

149. The reality is that the involvement of the admitted third party funding in *RSM v. Saint* Lucia only "*further support*[ed] *the Tribunal's concern that Claimant will not comply with a cost award rendered against it*."[171] The tribunal's initial concern however stemmed from the averred fact that the claimant had already failed to abide by its payment obligations in two previous arbitrations. Such circumstances are indeed exceptional and unprecedented.

---

169 **Exhibit CL-65**, *Burimi. v. Albania*, ¶ 41; emphasis added. See also **Exhibit CL-68**, *RSM v. Grenada*, ¶ 5.20: "*it seems clear to us that more should be required than a simple showing of the likely inability of a Claimant to pay a possible costs award.*"

170 Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 75.

171 **Exhibit RA-4**, *RSM v. Saint Lucia*, ¶ 83.

150. In the present case, however, a similar track record has not been demonstrated or even alleged. Neither one of Claimants has defaulted on its payment obligations in the present proceedings or in other arbitration proceedings. Absent such a concern, the mere involvement of a third party funder cannot even remotely constitute the extraordinary circumstances that would warrant granting Respondent's request for security for costs.

151. From a general point of view, the involvement of a third-party funder does not in and of itself demonstrate that a claimant is insolvent – in fact, third-party funding allows investors to rely on resources other than their own to fund the proceedings, which reduces the risk of there being no assets left to satisfy a costs award – nor does it constitute extraordinary circumstances justifying a departure from the "*ordinary course of ICSID arbitrations*."

152. To the contrary, the involvement of a third-party funder in investment arbitrations has become a common occurrence – not an unusual, let alone an extraordinary one – and does not in any way undermine the merits of the claims put forward by the investor. Claimants have produced several pieces of evidence supporting the view that third-party funding "*tends to filter out unmeritorious cases*,"[172] and in any event, the merits of Claimants' case cannot give rise to serious concern, let alone be considered "*frivolous or extravagant*," when the acts and omissions of Respondent have been found illegal by Respondent's own Supreme Court on three separate occasions. Therefore, if Claimants are indeed benefitting from third-party funding, it would only be enabling them to pursue meritorious claims which they might not have been able to do otherwise. There are no extraordinary circumstances that would warrant granting Respondent security for its costs, and the Slovak Republic is in a position no different than if Claimants were investors with financial difficulties who had to take out a loan to finance the proceedings.

---

[172] Claimant's Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, dated October 16, 2014, ¶¶ 203-231; **Exhibit CL-100** Lord Justice Jackson, "Review of Civil Litigation Costs: Final Report," The Stationery Office, 2010 (available at http://www.ciarb.org/information-and-resources/2010/01/22/Review%20of%20Civil%20Litigation%20Costs%20Final%20Report.pdf), p. 117.

153. Third, Respondent's allegation that Claimants have "*a history of engaging in fraud and reneging on payment obligations*"[173] is entirely irrelevant. As stated above at paragraph 15, the only "evidence" raised to support this allegation is a Texas Court Judgment obtained a decade ago, by a party that is a stranger to the present proceedings, in relation to facts which, as described by Respondent, date back to 1995.[174] The sole purpose of Respondent's allegations is to divert the Tribunal's attention from the indisputable and material breaches of international law committed by Respondent, in an attempt to shed a negative light on Claimants.

154. As stated in Claimants' Reply, the Tribunal in the instant proceedings has no direct knowledge of the facts and circumstances underlying this Texas Court Judgment, nor should it have any interest in acquiring such knowledge. It is in fact rather bold of the Slovak Republic to invite this Tribunal to draw material inferences from a decade-old Texas Court Judgment which is, from all perspective, entirely irrelevant to the subject-matter at hand, when it is itself trying to escape the conclusions reached most recently by its own Supreme Court in relation to the very subject-matter of the instant proceedings.

155. It remains that, as far as this Tribunal is concerned, any reprehensible behavior of Claimants in the instant proceedings remains to be proven. It has been demonstrated above that Respondent's objections on jurisdiction do not withstand scrutiny. And indeed, EuroGas has never made any "*false assertions concerning the identity of EuroGas II.*"[175] Claimants have demonstrated in their Reply and above at paragraph 61 that, by way of a joint resolution dated July 31, 2008,[176] EuroGas "stepped into the shoes" of the 1985 Company, after which

---

173 Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 75.

174 Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, dated September 10, 2014, ¶ 19.

175 Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 75.

176 **Exhibit C-57**, 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, dated July 31, 2008.

it was, for all intents and purpose and as a matter of Utah law, a mere continuation of that Company, with the same shareholder base, the same assets, and the same liabilities.[177]

156. This corporate operation is evidenced by documents contemporary with the disputed facts, when the present arbitration proceedings were not even contemplated. While Respondent is free to challenge the same – assuming for the sake of argument that this Tribunal even has jurisdiction to hear such a challenge – the issue is one of law, namely the validity under US law of the legal operation carried out by EuroGas in 2008, which Claimants submit is unquestionable and which was in fact never questioned by interested third parties until the present proceedings.

157. It does not, however, demonstrate any procedural misconduct, fraud or misrepresentation perpetrated by EuroGas or Belmont in the present proceedings. The whole purpose of the operation was specifically to ensure that EuroGas would succeed to the 1985 Company as soon as practically and legally possible. As demonstrated throughout Claimants' submissions, the operation was valid and successful and EuroGas has never had any reason to believe otherwise. Accordingly, such a corporate formality, much like a corporate change of structure, did not need to be set out in Claimants' pleadings from the outset. And as soon as Respondent raised the matter in its Answer to Claimants' Application for Provisional Measures, Claimants produced the relevant contemporaneous documentation and addressed Respondent's concerns.

158. As for the suggestions made on the basis of the "allegations" raised by Tombstone Exploration Corporation in a complaint against EuroGas, namely that EuroGas and its management have recently engaged in fraudulent activities, Claimants' prediction that Tombstone's allegations of fraud would remain mere allegations was proven right. On November 26, 2014, Tombstone announced that its law suit against EuroGas had been "*dismissed due to the parties agreeing to terms for EuroGas, Inc. to continue with its financing commitment which began in May 2014 and will continue with the second phase*

---

[177] Claimant's Reply on their Application for Provisional Measures and Answer to Respondent's Application for Provisional Measures, dated October 16, 2014, ¶¶ 128-139.

which is to be received by the Company in January, 2015."[178] In turn, EuroGas was able to resume its "*financing in the amount of $5 million USD for extensive drilling in* [Tombstone's] *wholly owned USA porphyry copper-gold project in Arizona*."[179] This demonstrates not only that the temporary fallout between Tombstone and EuroGas was related neither to any alleged fraudulent activities nor to EuroGas' purported lack of funds, but in fact that EuroGas still has liquidities at its disposal and that it carries out real business activities in the U.S.

159. Lastly, and in any event, Respondent's allegations that "*Claimant have* […] *a history of engaging in fraud and reneging on payment obligations*" are in fact only directed at EuroGas. The only justification that Respondent puts forward for ordering Belmont to provide security for Respondent's costs is the fact that Belmont has been encountering financial difficulties for the past two years and that it has entered into an agreement with EuroGas whereby the latter would bear the costs of the arbitration.

160. Yet, as amply demonstrated above at paragraphs 143 *et seq.*, mere financial difficulties on behalf of the investor do not constitute the extraordinary circumstances that would warrant a departure from the "*ordinary course of ICSID arbitrations*." Further, the Slovak Republic has not demonstrated, or even alleged that Claimants are actively attempting to frustrate the enforcement of any potential costs award. And the agreement apportioning the costs of the arbitration between Belmont and EuroGas would not in any way prevent the Slovak Republic from seeking the enforcement of a potential costs award against the assets of Belmont.

161. Based on the foregoing, it is evident that Respondent has failed to discharge its burden of proof to demonstrate the existence of extraordinary circumstances that would justify the exceptional provisional measure which it is requesting. The Tribunal should therefore not

---

[178] **Exhibit C-65**, Tombstone Exploration Corporation press release, dated November 26, 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).

[179] **Exhibit C-65**, Tombstone Exploration Corporation press release, dated November 26, 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).

impose on Claimants a financial burden which was not provided for by the drafters of the ICSID Convention, and which would unduly fetter their ability to bring forward a claim the merits of which are indisputable.

2. The Requested Measure Is Not Urgent

162. Independently of the above, Respondent has failed to prove that the measure it is requesting is urgent.

163. As stated by the International Court of Justice, there is urgency only if "*action prejudicial to the rights of either party is likely to be taken before* [a] *final decision is given*."[180] Yet, Respondent merely claims that "*if the request is not granted the Slovak Republic will never recover the costs to which it is entitled* [because] *Claimants do not have the means to pay* […] *an award on costs.*"[181] This in no way demonstrates that "*action prejudicial to the rights of either party is likely to be taken*" by Claimants if the requested measure is not granted.

164. Indeed, if the basis for Respondent's Request is that Claimants' financial situation would prevent them from satisfying an award on costs, the situation of which Respondent complains already exists today. It would not be the result of any action likely to be taken by Claimants in the future, which the requested provisional measure would in turn seek to prevent. Respondent has not alleged, let alone demonstrated, that Claimants were taking any positive actions to dissipate their assets or to otherwise frustrate the enforcement of a costs award. And even if Respondent had made such an allegation, the mere fact that EuroGas has resumed its "*financing in the amount of $5 million USD for extensive drilling in* [Tombstone's] *wholly owned USA porphyry copper-gold project in Arizona*,"[182] alone

---

180 **Exhibit RA-12**, *Case Concerning Passage Through the Great Belt (Finland v. Denmark)*, Request for the Indication of Provisional Measures, Order, 1991 I.C.J. Rep. 12, p. 17.

181 Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 84.

182 **Exhibit C-65**, Tombstone Exploration Corporation press release, dated November 26, 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)

demonstrates that EuroGas is not trying to dissipate its assets but rather is going about its business as usual.

165. In fact, what Respondent seems to argue is that the action prejudicial to its rights would be the continuance of the present proceedings without the Slovak Republic having been provided sufficient comfort as to Claimants ability to satisfy a costs award, however unlikely such an award may be. This is not acceptable and in fact contrary to the object and purpose of the ICSID Convention, as demonstrated above.

166. It is Claimants' most basic right, regardless of their financial situation, to seek before this Tribunal the redress they deserve, particularly when the illegality of the Slovak Republic's actions and omission has been recognized by Respondent's own Supreme Court on no less than three occasions. Yet, as demonstrated above, "*it is simply 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*."[183]

167. Lastly, while it may be true that there is "*no requirement that the host-State be destroyed if the measure is not granted*," Respondent itself has argued that its request was "*urgent because if the request is not granted, irreparable harm will be caused to the Slovak Republic*." Considering that the Slovak Republic generates an annual GDP in the amount of EUR 91 billion, placing it ahead of Portugal in terms of GDP per capital, it is highly doubtful that costs in the amount of EUR 1 million, as quantified by Respondent in its Request, would cause it – assuming it is unable to recover them – immediate irreparable harm. And indeed, in its Rejoinder, the Slovak Republic no longer claims that it would. For Claimants, on the other hand, EUR 1 million is a very substantial amount which might "*stifle the Claimant's claims*."[184]

---

183 **Exhibit CL-68**, *RSM v. Grenada*, ¶ 5.19. See also **Exhibit CL-5**, *Pey Casado v. Chile*, ¶ 86: "*rien n'indique que, dans le système de la Convention, la requête soumise par un investisseur ne devrait être considérée comme recevable qu'à la condition pour le demandeur d'établir sa propre solvabilité*."

184 **Exhibit CL-66**, *Hamester v. Ghana*, ¶ 17.

III. PRAYERS FOR RELIEF

168. Based on the foregoing, Claimants respectfully request that the Tribunal, once constituted:

- Order the provisional measures requested by Claimants in their Reply, which Claimants reserve the right to supplement and/or amend and in relation to which Claimants' reserve the right to seek, in due course, moral damages;

- Reject Respondent's request for security for costs.

Respectfully submitted,

[Signed]

Hamid G. Gharavi