

IN THE MATTER OF AN ARBITRATION  
UNDER THE RULES OF THE INTERNATIONAL CENTRE  
FOR SETTLEMENT OF INVESTMENT DISPUTES

Arbitral Tribunal

Professor Pierre Mayer (President)  
Professor Emmanuel Gaillard  
Professor Brigitte Stern

**EUROGAS INC.**

**AND**

**BELMONT RESOURCES INC.**

**(CLAIMANTS)**

**v.**

**THE SLOVAK REPUBLIC**

**(RESPONDENT)**

**REPLY**

**Case No. ARB/14/14**

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## INTRODUCTION

1. This Reply, together with supporting factual exhibits numbered C-308 to C-358 and legal exhibits numbered CL-196 to CL-256, an expert report prepared by Messrs. David E. Leta and Brad W. Merrill, attorneys at law specializing in U.S. federal and State bankruptcy law and corporate law (the “SW Expert Report”), an expert report prepared by Mr. John Ellison from KPMG LLP (the “KPMG Expert Report”), and a supplemental expert report prepared by Mr. Alex Hill from Wardell Armstrong International (the “WAI Supplemental Expert Report”), are submitted on behalf of EuroGas Inc. (“EuroGas”) and Belmont Resources Inc. (“Belmont”), collectively referred to as “Claimants,” in accordance with the Tribunal’s instructions of March 24, 2015 and September 16, 2015.
2. For ease of reference, the definitions used in Claimant’s Memorial dated March 31, 2015 are maintained in this Reply.
3. This Reply sets out the facts in dispute and EuroGas’ and Belmont’s claims on the merits arising out of multiple breaches committed by the Slovak Republic ( “Slovakia” or “Respondent”) under the Treaty between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment (the “U.S.-Slovak Republic BIT”), and under the Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments (the “Canada-Slovak Republic BIT”) (collectively the “BITs”), in relation to Claimants’ investments in a talc deposit in the Slovak Republic.
4. Respondent’s Counter-Memorial contains a large number of inaccuracies and unsupported assertions. This Reply addresses these inaccuracies and assertions to the extent that they are relevant. The fact that this Reply may not address every factual and/or legal allegation made by Respondent should not be construed as any admission on the part of Claimants. In other words, all of Respondent’s allegations are denied, unless expressly admitted.
5. Claimants’ Reply is divided into the following six sections:
  - the Tribunal’s jurisdiction over EuroGas (**Section I**);
  - the Tribunal’s jurisdiction over Belmont (**Section II**);

- the facts of the case (**Section III**);
  - Respondent's breaches of its obligations under international law (**Section IV**);
  - the damages sustained by Claimants (**Section V**); and
  - the relief sought (**Section VI**).
6. Before addressing the tribunal's jurisdiction over the dispute with Claimants and the merits of this case, Claimants would like to bring to the Tribunal's attention two most recent developments in relation to this matter.
  7. First, Respondent has managed, directly or indirectly, to induce an alleged Texas creditor of the EuroGas Inc. company that was incorporated in 1985 (the "1985 Company") to file a motion to reopen this Company's bankruptcy case in Utah, which had been closed in 2007, in an effort to find some support to their jurisdictional objections against EuroGas, the minority shareholder in Rozmin.
  8. Respondent is indeed attempting to have U.S. courts declare – as Respondent has argued in its pleadings in this arbitration – that the 1985 Company's interest in Rozmin was not disclosed in the bankruptcy proceedings and has therefore remained in the estate. As explained in detail below, Respondent's case fails. The overwhelming evidence on the record shows that the trustee appointed in the 1985 Company's bankruptcy proceedings was very much aware of the Rozmin asset, but had no interest, let alone the financial resources, to go through the time and to bear the expenses of a challenge – before national courts and then an international tribunal – of the Slovak Republic's decision to revoke Rozmin's mining rights. It is in these circumstances and for these reasons that the trustee decided not to administer such a litigious asset and to abandon it back to the 1985 Company.
  9. Today, strictly no one with an interest in the affairs of the 1985 Company or EuroGas, be it the creditors or the shareholders thereof, would have any genuine interest in the bankruptcy being reopened, so as to have the 1985 Company's interest in Rozmin – hence the claims against Slovakia – being declared to have remained in the estate and moreover incapable of being processed by EuroGas against the Slovak Republic. Any such ruling would in fact be adverse to any creditor that may be ultimately recognized as still having a right over the minority shares held by EuroGas in Rozmin, hence an

interest in the ultimate monetary award in these ICSID proceedings. As explained below, only the Slovak Republic would benefit from such an outcome, which is why Respondent resolved to convince, directly or indirectly, a creditor of the 1985 Company to file a motion for the reopening of the bankruptcy case, which Respondent itself would have no standing to do. The reopening of the bankruptcy case would be of interest to a *bone fide* creditor solely to request that its interest in the litigious asset, hence in EuroGas' minority interest in the ultimate award, be recognized by the U.S. court, a matter that would not effect the jurisdiction of this Tribunal over EuroGas, let alone over Rozmin's majority shareholder of Rozmin, namely Belmont.

10. Second, what was already a textbook case of procedural and substantive expropriation by Slovakia, as confirmed by the very findings of its own Supreme Court, moreover without compensation, has now become the epitome of expropriations. Indeed, documents responsive to some of Claimants' document production requests, but which Respondent failed to disclose despite an order from the Tribunal, were uncovered and show that as early as in November 2004 – namely a month before the December 2004 announcement that a new tender was being launched for the award of Claimants' rights over the Gemerská Poloma deposit and the subsequent the notification of the revocation of Claimants' rights – Slovakia had already engaged in discussions with third parties interested in acquiring rights over the Gemerská Poloma deposit. In other words, well before the expiration of the critical three-year period on which Respondent relies to justify the cancellation of the mining rights held by Rozmin sro ("Rozmin"), Claimants' investment vehicle in the Slovak Republic, Respondent had already resolved to reassign the deposit to another entity. Thus, not only had the three-year period not yet elapsed when Respondent announced that a new tender was being launched for the award of mining rights over the Gemerská Poloma deposit, but the dice were in fact cast even before this announcement.
11. Tellingly, the said negotiations were led, on the side of the State, by Mr. Peter Čorej, who appears as a witness in these proceedings on behalf of the State. Mr. Čorej is no other than the CEO and a shareholder of Rima Muráň sro ("Rima Muráň"), one of three original shareholders of Rozmin, but also the very person who was responsible for the deterioration of the relationship between Rozmin and Rima Muráň when the latter was acting as the former's contractor, the husband of Ms. Zdenka Čorejová, Rozmin's

former accountant who founded and owns the company Economy Agency which was awarded mining rights over the Gemerská Poloma immediately after their unlawful revocation from Rozmin, and the person who, as an informant for the State, filed the criminal complaint against Rozmin and Claimants, which led to the initiation of criminal proceedings in the Slovak Republic against Rozmin and the seizure of all of its records and property.

12. The above updates being made, Claimants proceed with Section I of their Reply Memorial on jurisdiction over EuroGas.

## **I. THE TRIBUNAL HAS JURISDICTION OVER EUROGAS**

13. Faced with a bulletproof case on the merits, and after having in bad faith delayed the initiation of arbitration proceedings for over two years, Respondent has resorted to the oldest trick in the book – dirt digging. It has managed to manufacture two objections to the Tribunal’s jurisdiction over EuroGas. These objections fail as neither one of them is raised in good faith or has any merit.
14. Although Respondent takes great care in portraying itself both as the white knight that has uncovered what no one else had uncovered before, and as a virtuous, yet struggling, emerging economy that is once again victim of an abusive claim drawing on outdated stereotypes, the illusion it is attempting to create fades upon closer examination, and gives way to an entirely different reality.
15. There is nothing virtuous about Respondent’s first objection to jurisdiction, namely that “*EuroGas [...] never made an investment in the Slovak Republic, does not own the alleged investment [...], and has no standing to bring its claim.*”<sup>1</sup> There was no misrepresentation and even less any fraud under Slovak law that would rise to a level such as to justify the dismissal of the case under international law. Nor was there any damage to third parties. In fact, if the Tribunal were to declare Respondent’s first objection well-founded, this would be to the detriment of literally all other interested parties. This would be all the more unacceptable that these other interested parties are precisely the very parties which U.S. law – the only relevant law to govern these issues

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<sup>1</sup> Respondent’s Counter-Memorial, ¶ 30.



– seeks to protect and which would have everything to lose if the Tribunal were to decide to endorse Respondent’s objection to jurisdiction, crafted by the Slovak Republic in a poor attempt to escape an examination of its many breaches of international law. Moreover and in any event, assuming for the sake of argument that Respondent were to prevail on the basis of this jurisdictional objection, this would mean that after its dissolution, EuroGas could not have performed any agreement with Belmont for the purpose of acquiring the latter’s interest in Rozmin. This would thus further reinforce the standing of Belmont as the majority shareholder of Rozmin, as set out in detail in paragraphs 174-179 below.

16. As to Respondent’s second objection to jurisdiction, namely that “*the Slovak Republic validly denied the benefits of the U.S.-Slovak BIT to EuroGas*,”<sup>2</sup> it constitutes at best an unacceptable attempt at denying EuroGas the protections granted to it under international law at the time of the investment. At worst, it constitutes an abuse of the applicable norms of international law, intended to defeat the very purpose of these norms.
17. For the above reasons, both of Respondent’s objections to the Tribunal’s jurisdiction over EuroGas should be dismissed by the Tribunal. As will be demonstrated below, EuroGas is the rightful owner of the investment (**A**), and any attempt to deny it the benefit of the international protections afforded by the U.S.-Slovak Republic BIT should be denied (**B**).

#### **A. EUROGAS IS THE RIGHTFUL OWNER OF THE INVESTMENT**

18. Throughout these proceedings, Respondent has acted as if it had uncovered the juiciest of secrets, one which no one else had uncovered before. Boldly, it uses words such as “misrepresentation” and “concealment” in reference to EuroGas’ actions, only to portray itself as an emerging economy that is victim of abusive claims drawing on outdated stereotypes, in a failed attempt to obscure the fact that the illegality of the taking of Claimants’ investment was recognized on no less than three occasions by its very own Supreme Court.

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<sup>2</sup> Respondent’s Counter-Memorial, ¶ 30.

19. But what Respondent fails to understand is that there is a very valid reason why the said “secret” that it allegedly uncovered – but which was in fact publicly available information – never sparked any particular attention from interested parties.
20. This reason is obvious. Strictly no one with an interest in the affairs of the 1985 Company or EuroGas, be it the creditors or the shareholders thereof, would have any interest in adopting Respondent’s position that EuroGas does not own the investment. This would in fact be very detrimental to them. The only one that would benefit from the position put forward by Respondent is the Slovak Republic itself. Yet, it does not have standing to do so, because U.S. law cannot be used merely to allow the Slovak Republic to simply exit these arbitration proceedings and escape liability for the very serious breaches of international law.
21. Moreover and in any event, Respondent’s position fails on the merits, as confirmed by David E. Leta, and Brad W. Merrill (hereafter “Claimants’ Legal Experts”) in their Expert Report. Messrs. Leta and Merrill are – unlike Respondent’s expert, Ms. Annette Jarvis – truly independent experts and their expertise in matters of Federal Bankruptcy law and Utah Corporate law, respectively, is widely recognized.<sup>3</sup> Their Expert Report is detailed and comprehensive. It is submitted together with, and hereby incorporated by reference in, this Reply Memorial.
22. As explained below, Respondent’s objection to the Tribunal’s jurisdiction over EuroGas is intended to benefit the Slovak Republic alone and would cause, if endorsed by the Tribunal, detriment to all other interested and protected parties under U.S. law (1). In any event, Respondent objection is groundless. It is undeniable that the trustee appointed in the 1985 Company’s bankruptcy proceedings was very much aware of the Rozmin asset, but had no interest, let alone the financial resources, to go through the time and very significant expense of financing a challenge, before national courts or an international tribunal, against the Slovak Republic’s decision to revoke Rozmin’s mining rights. This is all the more so that, at a time, the Slovak Republic had not yet confirmed the illegality of the taking, and that the chances of success of a challenge would have appeared very uncertain. The trustee therefore decided not to administer

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<sup>3</sup> Expert Report of David E. Leta and Brad W. Merrill, dated September 28, 2015 (hereafter “SW Expert Report”).

such a litigious asset and to abandon it back to the 1985 Company, which accordingly emerged from the Chapter 7 reorganization process with the Rozmin asset. (2); neither its administrative dissolution nor the Chapter 7 reorganization process prevented the 1985 Company from undertaking any act necessary to wind up its affairs (3); and the 1985 Company validly merged with EuroGas and is the rightful owner of the investment (4).

**1. Respondent's position only benefits the Slovak Republic and would cause detriment to all other interested and protected parties under U.S. law**

23. The core of Respondent's position is the following. The 1985 Company's interest in EuroGas GmbH, hence in the Rozmin – Claimants' investment vehicle whose mining rights were illegally taken by the Slovak Republic – did not emerge from the bankruptcy proceedings and remained in the bankruptcy estate. It could not, be it by way of contractual transfer or merger, have been transferred to EuroGas. Moreover, once the Chapter 7 bankruptcy proceedings initiated against the 1985 Company were closed, the corporate shell that emerged was a defunct corporation unable to undertake any act whatsoever, and even if this were not the case, the merger which the 1985 Company and EuroGas purported to carry out could under no circumstance be effective under Utah law.

24. If the Tribunal were to adopt Respondent's position, it would imply the following:

24.1. The ownership interest would remain in the bankruptcy estate of the 1985 Company, and it would make strictly no business sense to reopen the bankruptcy proceedings to administer the same. This is because:

- i. Following the liquidation of its most valuable assets and the distribution of the proceeds thereof, the bankruptcy estate of the 1985 Company would have no financial means of prosecuting the claim attached thereto under the U.S.-Slovak Republic BIT, let alone the very significant financial means – in the amount of several USD millions – that would be required to prosecute this claim to its conclusion.
- ii. It would also be entirely unrealistic to expect that a trustee would accept to administer the bankruptcy estate, find the necessary third-party funder, and go through the burden and expense of prosecuting this claim

on behalf of the bankruptcy estate during the years that ICSID proceedings are known to last. This is all the more so that the fees and expenses of this *pro bono* trustee would not be paid until the arbitration would be concluded.

- iii. It would be equally unrealistic, or at the very least nonsensical from a business point of view, to expect that putting the Rozmin asset at auction would generate any significant return. This is all the more so that any proceeds from such auction would be reduced by the cost of reopening of the bankruptcy proceedings and administering the same. Indeed, the value of the Rozmin asset would be virtually non-existent in the hands of any entity other than the 1985 Company (unless that other entity were to be a company that had genuinely stepped into the shoes of the 1985 Company before there was even any prospect of arbitration), because any such entity would not be viewed as a genuine investor, but as a mere bounty hunter abusing a framework that is intended to foster and protect genuine cross-border investment.
- 24.2. The shareholders of the 1985 Company would therefore remain shareholders of a defunct corporate shell with no liquidities or valuable asset, and would not have become the shareholders of EuroGas, a corporation in good standing with a variety of business activities in the U.S. and in Europe.
- 24.3. For the same reasons, the unsatisfied creditors of the 1985 Company would remain the creditors of a defunct and bankrupt corporate shell with no valuable asset, and would not have become creditors of EuroGas, which – again – is a corporation in good standing with business activities in the U.S. and in Europe. In other words, the unsatisfied creditors of the 1985 Company could have no hope of recovering, even partially, their losses.
- 24.4. The Slovak Republic, on the other hand, would be able to escape in part liability, up to the percentage of EuroGas' shareholding in Rozmin, for the illegal taking of Rozmin's mining rights, despite the fact that the illegality thereof was recognized under domestic law by its very own Supreme Court on no less than three occasions, and that the taking also constituted very real and

serious breaches of international law for which Respondent would never be held accountable.

25. In other words, if the challenge of EuroGas' ownership interest in Rozmin were to be accepted by the Tribunal, despite the fact that Respondent does not have standing under U.S. law to raise this challenge and that it would in fact be prevented in a U.S. court from doing so,<sup>4</sup> the Slovak Republic would literally be the only one to benefit from this decision.
26. All other interested parties, namely the creditors and the shareholders of the 1985 Company, which are moreover the only parties that would have standing under U.S. law to challenge EuroGas' merger with the 1985 Company and its ownership interest in Rozmin, would be adversely affected by the Tribunal's decision if it were to side with Respondent. This is because the only alternative to having EuroGas pursue the claim arising out of the taking of Rozmin's mining rights and allowing creditors and shareholders of the 1985 Company to benefit from the proceeds of the arbitration, would be to reopen the bankruptcy proceedings, which for the reasons set out above at paragraph 24.1, would make no business sense whatsoever. The simple truth is that today, EuroGas is the only party capable of successfully holding the Slovak Republic liable for its breaches.
27. Even if – most likely at the behest of the Slovak Republic – a creditor were to seek the reopening of the bankruptcy proceedings in order to administer the Rozmin asset (assuming for the sake of argument that there are valid grounds for making such a request, which there are not), the court, or at the very least the petitioning creditor, provided it was endowed with the slightest business sense, would be easily convinced, in light of the considerations set out above at paragraph 24.1, that the best course of action would be to recognize that the Rozmin asset was validly abandoned at the conclusion of the Chapter 7 proceedings, and that the 1985 Company validly merged with and into EuroGas. Such a position would enable the creditor to negotiate a satisfactory settlement with, or at the very least assert its claim against, a company not only in good standing and with substantial business activities in the U.S. around Europe, but also with a strong claim against the Slovak Republic, potentially leading to

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<sup>4</sup> See SW Expert Report, ¶¶ 23, 95-99.

an award up to EUR 234 million.<sup>5</sup> Any other solution would be entirely nonsensical as only EuroGas, being – or having genuinely stepped into the shoes of – the original investor, is able to successfully prosecute the claim against the Slovak Republic.

28. For all of the above reasons, the Tribunal should refrain from even entertaining Respondent’s jurisdictional objection, and reject the same for lack of standing. This is all the more so that Respondent’s jurisdictional objection fails on the merits, as demonstrated below.

**2. The 1985 Company emerged from the Chapter 7 reorganization process with the interest in EuroGas GmbH**

29. Respondent argues that the 1985 Company’s interest in EuroGas GmbH “*could not have emerged from the bankruptcy*,”<sup>6</sup> because this asset was not properly scheduled by the 1985 Company in the bankruptcy proceedings, and therefore could not have been abandoned back to the debtor by operation of law. For the reasons set out at paragraphs 23 to 28 above, the Slovak Republic does not have standing to take this position, and would moreover be prevented before U.S. courts from relying on the same to resist EuroGas’ claims.<sup>7</sup>
30. In any event, when arguing that the 1985 Company’s interest in EuroGas GmbH “*could not have emerged from the bankruptcy*,” Respondent relies on the strictest interpretation of the applicable provisions of the U.S. Bankruptcy Code, one which U.S. courts themselves do not follow, and which moreover blatantly disregards the very peculiar circumstances of this case, not to mention the very strong policy reasons that would prohibit finding that the 1985 Company did not emerge from the Chapter 7 reorganization process, as set out below, in disregard of the good faith interpretation required under international law and the principle of form over substance.
31. Claimants’ Legal Experts explain that, pursuant to Section 554 of the U.S. Bankruptcy Code, “*property can either be abandoned by order of the Court under § 554(a) or by operation of law under § 554(c)*.”<sup>8</sup> By way of reminder, the designated debtor in

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<sup>5</sup> KPMG Expert Report, Table 11.

<sup>6</sup> Respondent’s Counter-Memorial, ¶ 76.

<sup>7</sup> See SW Expert Report, ¶¶ 95-99.

<sup>8</sup> SW Expert Report, ¶ 72.

Chapter 7 proceedings (hereafter the “Debtor”) is supposed, at the outset of the proceedings, to file so-called “schedule of assets,” which identify all of the Debtor’s assets. The assets identified on these schedules are then administered and liquidated, or not, by the trustee. Any assets that are not administered by the trustee, although properly scheduled, are deemed “abandoned” back to the Debtor by operation of law. In this respect, Claimants’ Legal Experts also acknowledge that some bankruptcy courts have ruled that “*if an asset is not properly scheduled, then it is not abandoned under § 554(c).*”<sup>9</sup>

32. They however go on to clarify, with reference to authoritative case law, including the Bankruptcy Appellate Panel for the Sixth Circuit Court of Appeals, that “*other bankruptcy courts have ruled, however, that where a Chapter 7 trustee is aware of an unscheduled asset and elects not to administer that asset, then the asset is deemed abandoned by operation of law under § 554(c) and (d).*”<sup>10</sup> And indeed, in that particular situation, the debtor’s interest in the asset at issue having been brought to the attention of the trustee, the purpose of the schedule of assets has been fulfilled. If the trustee is aware of the asset’s existence, and nevertheless decides not to administer it, it would be nonsensical, and moreover contrary to the underlying rationale of U.S. Bankruptcy code, to consider that the asset has not been abandoned back to the Debtor.
33. One court succinctly summarized as follows the test for finding that an asset has been abandoned by operation of law:

*The party claiming the abandonment must demonstrate the trustee had knowledge of the asset as property to the estate such that the court could impute an intent to abandon the asset upon the closing of the case. [...] The claiming party must also show an absence of active administration of the asset at the time of the abandonment.*<sup>11</sup>

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<sup>9</sup> SW Expert Report, ¶ 73.

<sup>10</sup> *Ibid.*

<sup>11</sup> **Exhibit CL-214**, *Starrett v. Starrett*, 225 N.J. Super. 150, 156-57, 541 A.2d 1119, 1121-22 (App. Div. 1988) dated May 24, 1988 (internal citations omitted), p. 3; *see also* **Exhibit CL-332**, *Abandonment of Assets by A Trustee in Bankruptcy*, 53 Colum. L. Rev. 415 (1953) (noting elements of abandonment are trustee’s knowledge and intent).

34. Applying this test to the circumstances of the case at hand – which is all the more exceptional that there is virtually no case law where the abandonment of an asset was discussed in a context where *no schedules* were ever filed and where the *entire administration* Chapter 7 estate was based on knowledge obtained by the trustee from external sources – Claimant’s Legal Experts conclude that the 1985 Company’s interest in EuroGas GmbH was abandoned by operation of law. This is because Trustee Marker knew of the 1985 Company’s interest in Rozmin, and nevertheless took no action to administer the same.
35. The fact that Trustee Marker knew of, or ought to have known about the 1985 company’s interest in EuroGas GmbH, and in turn, in Rozmin, is undeniable.
36. This is demonstrated by the following facts taken individually, let alone collectively:
- 36.1. The 1985 Company’s interest in Rozmin was disclosed in its public filings with the SEC. A summary of these multiple pre-bankruptcy public disclosures are attached as Appendix D to the Expert Report of Claimant’s Legal Experts. At least two of those filings – namely the 1985 Company’s 2003 10-K,<sup>12</sup> filed on July 16, 2004, and Third Quarter 2005 10-Q, filed on or about February 22, 2006<sup>13</sup> – were attached to a pleading filed in The 1985 Company Bankruptcy Case.<sup>14</sup> As Trustee Marker filed an opposition to this pleading, he was undeniable aware of it and of the attached SEC filings.<sup>15</sup> In its Third Quarter 2005 10-Q, the 1985 Company explained, among other things, that it had “*acquired a direct 43% interest in Rozmin s.r.o.,*” that “*Rozmin s.r.o. holds a talc deposit in Eastern Slovakia,*” that “*Rozmin s.r.o. was notified that the concession regarding the Talc deposit had been cancelled by the Slovakian Government for unspecified and*

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<sup>12</sup> **Exhibit C-319**, 1985 Company Bankruptcy Case, Dkt. No. 15, pp. 12-13, 55.

<sup>13</sup> **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 I Bankruptcy, Docket No. 89.

<sup>14</sup> **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 I Bankruptcy, Docket No. 89.

<sup>15</sup> **Exhibit C-70**, Trustee’s Response to Motion to Reconsider or Grant New Trial Filed by W. Steve Smith dated March 22, 2006, EuroGas I Bankruptcy, Docket No. 96.



*dubious reasons,”* and that it “*will be forced to impair the cost of the assets, \$3,843,560, because of the cancellation of the concession.*”<sup>16</sup> Thus, the information provided in the 1985 Company’s SEC filings, and which Trustee Marker undeniably had in his possession, provided more comprehensive information on the Rozmin asset than the schedule of assets would have.

36.2. According to Trustee Marker’s very own time records, he obtained and reviewed the tax documents he compelled EuroGas’ former accountants, namely Hansen, Barnett & Maxwell, to produce.<sup>17</sup> These tax documents repeatedly disclosed the 1985 Company’s interest in EuroGas GmbH, Rima Murán, and Rozmin.<sup>18</sup>

36.3. PwC – namely the accountant employed by Trustee Marker to “*provide advisory services including tax advice and return preparation and consulting or forensic work relating to the Debtor’s financial records and statements*”<sup>19</sup> – performed, according to its application for approval of fees and costs, the following tasks: (i) “[b]usiness records of the prior accountants were reviewed in detail to identify possible assets of the company which were unknown to the Trustee;” (ii) “*accumulated accounting data for calendar year 2002, 2003, 2004, 2005, and 2006;*” and (iii) prepared and filed federal and state tax returns for the 1985

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<sup>16</sup> **Exhibit C-70**, Trustee’s Response to Motion to Reconsider or Grant New Trial Filed by W. Steve Smith dated March 22, 2006, EuroGas I Bankruptcy, Docket No. 96, Ex. 2 at pp. 12-13.

<sup>17</sup> **Exhibit C-328**, Final Report and Application for Compensation and Motion for Order Approving Payment of Administrative Costs and Expenses, EuroGas I Bankruptcy, Docket No. 140, p. 8. *See also* SW Expert Report, ¶ 44: “*On June 6, 2006, Trustee Marker filed a motion for an order to compel Hansen, Barnett & Maxwell, who was “familiar with accounting services performed for [The 1985 Company],” to produce all documents in its possession regarding tax returns and assets of The 1985 Company. On June 7, 2006, the Court granted the motion and directed HBM to make available for review the five most recent filed yearly tax returns for The 1985 Company, among other things.*”

<sup>18</sup> **Exhibit C-309**, The 1985 Company 1997 Tax Return, pp. 42-46, 48-49, 94, 98-99, and 144; **Exhibit C-310**, The 1985 Company 1998 Tax Return, pp. 17-22, 113, 118-19, **Exhibit C-311**, The 1985 Company 1999 Tax Return, pp. 31-37, 158, 165, 169, 181; **Exhibit C-312**, The 1985 Company 2000 Tax Return, pp. 80-85, 173-79, 215-16, 253-54, 257-58, 263. *See also* SW Expert Report, ¶ 46: “*I have reviewed the tax returns and other documents provided to Trustee Marker by HBM. These documents include, among other things, the finalized tax returns for The 1985 Company for the taxable years of 1997, 1998, 1999, and 2000. In the tax returns for the taxable years of 1997, 1998, 1999, and 2000, The 1985 Company disclosed its interest in EuroGas GmbH, RimaMuran, and/or Rozmin. These documents also included, among other things, a narrative description that disclosed that EuroGas GmbH is “a wholly-owned subsidiary of [The 1985 Company]” that holds “stock in Rem Muran s.r.o, which indirectly hold . . . a 24% interest in a talc deposit in Slovakia.*”

<sup>19</sup> **Exhibit C-66**, Trustee’s Motion to Approve Employment of Accountants, dated May 1, 2006, EuroGas I Bankruptcy, Docket No. 106, ¶ 1.

Company for the years of 2002, 2003, 2004, 2005 and 2006.<sup>20</sup> The time records of PwC also demonstrate that it searched the “*SEC filings for additional information*,”<sup>21</sup> which SEC filings, as demonstrated above, clearly disclosed EuroGas’ interest in EuroGas GmbH, and in turn, in Rozmin.

36.4. The 1985 Company’s 2006 tax return, which was prepared by PwC, namely Trustee’s Marker’s very own accountants, stated that the 1985 Company held 500 shares of common stock in EuroGas GmbH, which constituted 100% of the outstanding stock of EuroGas GmbH, and EuroGas GmbH in turn owned shares in Rozmin.<sup>22</sup> This same consolidated tax return also identified that the 1985 Company had 400,000 shares of common stock in Rozmin.<sup>23</sup> On September 22, 2006, Trustee Marker reviewed, signed and filed all estate tax returns.<sup>24</sup>

37. For all the above reasons, taken individually, let alone collectively, it is undeniable that Trustee Marker was aware, or should have been aware, of the 1985 Company’s interest in EuroGas GmbH and, in turn, in Rozmin.
38. Ms. Jarvis conveniently avoids addressing this point, instead stating – in one very lengthy footnote – that “*there is no evidence that such review [of the SEC filings] informed [Trustee Marker] or his accountants of the claimed Slovakian Talc Mine Interest*,”<sup>25</sup> that EuroGas’ SEC filings gave the impression that “[the 1985 Company] no longer had any interest in [EuroGas GmbH],” and that the 1985 Company only disclosed in 2009, for the first time, that it was challenging the cancellation of Rozmin’s mining rights over the Gemerska Talc Deposit.<sup>26</sup>

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<sup>20</sup> **Exhibit C-328**, Final Report and Application for Compensation and Motion for Order Approving Payment of Administrative Costs and Expenses, EuroGas I Bankruptcy, Docket No. 140, p. 27.

<sup>21</sup> **Exhibit C-328**, Final Report and Application for Compensation and Motion for Order Approving Payment of Administrative Costs and Expenses, EuroGas I Bankruptcy, Docket No. 140, p. 35.

<sup>22</sup> **Exhibit C-329**, The 1985 Company 2006 Tax Return, p. 61.

<sup>23</sup> **Exhibit C-329**, The 1985 Company 2006 Tax Return, p. 67.

<sup>24</sup> **Exhibit C-328**, Final Report and Application for Compensation and Motion for Order Approving Payment of Administrative Costs and Expenses, EuroGas I Bankruptcy, Docket No. 140, p. 8.

<sup>25</sup> Expert Report of Annette Jarvis, ¶ G.3.

<sup>26</sup> Expert Report of Annette Jarvis, ¶ 78, n. 169.

39. This is entirely irrelevant. The only reason why EuroGas did not immediately report in its SEC filings the fact that it was challenging Respondent's decision to revoke Rozmin's mining rights is because, until 2008, EuroGas had very little hope of having the Slovak Republic publicly admit the illegality of its decision. And indeed, until the decision of the Slovak Supreme Court, on February 27, 2008, all of Rozmin's prior challenges had been unsuccessful. However, as soon as, on February 27, 2008, the Slovak Supreme Court rendered a decision in favour of Rozmin, the 1985 Company filed, on May 1, 2008, a Form 8-K SEC Filing reporting that it had "*been notified of a decision from Najvyšší súd Slovenskej republiky, the highest Court of the Slovak Republic, which ruled in favour of Rozmin s.r.o. (a closely held Slovak company in which EuroGas has an agreement to acquire a 57% interest).*"<sup>27</sup> Shortly thereafter, the 1985 Company filed an amended Form 10-Q SEC filing for the year 2007, in which it disclosed that challenges had been brought against the Slovak Republic's decision to revoke Rozmin's mining rights, and a Form 10-Q SEC filing 2008, in which it reported the February 27, 2008 decision of the Slovak Supreme Court ruling in favour of Rozmin. These two filings were filed almost simultaneously, namely on February 6, 2009 and February 17, 2009, respectively.
40. Based on the above, there can be no doubt that the only reason why the attempted challenge against the Slovak Republic's decision to revoke Rozmin's mining rights was not reported in the 1985 Company's SEC Filings is that EuroGas had very little hope that the Slovak Republic would acknowledge the illegality of its own decision to revoke Rozmin's mining rights.
41. In any event, it remains that all of the SEC filings filed by EuroGas from 1998 to 2006 clearly disclosed the 1985 Company's interest in Rozmin, and reported, as of 2005, the status of Rozmin's mining rights over the Gemerská Poloma talc deposit, namely the fact that the concession had been cancelled by the Slovak Government. And, as explained by Claimants' Legal Experts, Trustee Marker had, on the basis of Claimants' SEC filings, a duty to investigate what, if anything, he could have done, or what actions had already been undertaken to recover Rozmin's interest in the Deposit and to see if

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<sup>27</sup> **Exhibit C-334**, Form 8-K dated May 1, 2008, Item 8.01.

there was any other asset of value in either Rozmin or EuroGas GmbH.<sup>28</sup> The 1985 Company, on the other hand, had no duty to “*supervise and double check the actions of the trustee,*”<sup>29</sup> who was “*accountable for all property received.*”<sup>30</sup>

42. This is all the more so that Claimants’ Legal Experts were able, when they were writing their Expert Report, to find online news articles from September 2005 reporting the challenges brought by Rozmin against the Slovak Republic’s decision to revoke Rozmin’s mining rights.<sup>31</sup> It would therefore have been very easy for Trustee Marker or its accountants to find this information and, in any event, U.S. courts have found that in case of “*contingent, equitable legal claim,*” such as Rozmin’s claim against the Slovak Republic, “*the amount of disclosure necessary in a bankruptcy proceeding is much lower.*”<sup>32</sup> Indeed, Claimants’ Legal Experts refer to the case of *In re Kane*,<sup>33</sup> where the debtor’s inchoate property interest in a potential lawsuit against her former husband was both ‘disclosed’ and ‘unscheduled’.<sup>34</sup> Yet, the Third Circuit Court of Appeals determined that “*the record before [it] permits the conclusion that the Trustee abandoned [debtor’s] equitable distribution interest to her, either having determined its relative ‘value and benefit’ to the estate, or having considered it scheduled and not otherwise administering prior to discharge.*”<sup>35</sup>
43. In the present case, Claimants’ Legal Experts conclude that if Trustee Marker had at all considered challenging, or supporting the challenge brought against the cancellation of the concession by the Slovak Republic, he would have concluded that the expense of attempting to recover the concession, and the uncertainties of the effort, did not warrant administering it as an asset in the bankruptcy case, and instead decided to abandon the asset to the Debtor. This is because, in the opinion of Claimant’s Legal Experts, the two SEC filings submitted in the Chapter 7 proceedings against the 1985 Company

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<sup>28</sup> **Exhibit CL-215**, 11 U.S.C. § 704(a)(1), (2) (listing the duties of the trustee to, among other things, collect and reduce to money the property of the estate and be accountable for all property received).

<sup>29</sup> **Exhibit CL-216**, *Hutchins v. I.R.S.*, 67 F.3d 40, 44 (3d Cir. 1995) dated October 3, 1995.

<sup>30</sup> **Exhibit CL-216**, *Hutchins v. I.R.S.*, 67 F.3d 40, 44 (3d Cir. 1995) dated October 3, 1995.

<sup>31</sup> SW Expert Report, ¶ 86.

<sup>32</sup> SW Expert Report, ¶ 87.

<sup>33</sup> **Exhibit CL-217**, *In Re Kane*, 628 F.3d 631 (3d Cir. 2010) dated December 21, 2010.

<sup>34</sup> **Exhibit CL-217**, *In Re Kane*, 628 F.3d 631 (3d Cir. 2010) dated December 21, 2010, at ¶ 641.

<sup>35</sup> **Exhibit CL-217**, *In Re Kane*, 628 F.3d 631 (3d Cir. 2010) dated December 21, 2010, at ¶ 643.

provided the exact same information that otherwise would have been contained in a schedule of assets typically filed by the debtor in bankruptcy proceedings, and were therefore sufficient to make Trustee Marker aware of the 1985 Company's interest in Rozmin.<sup>36</sup> This is all the more so that, no schedule of assets having been filed, *all* of the knowledge that Trustee Marker relied upon to administer the 1985 Company Bankruptcy Case was information obtained from *external sources*. Thus, Trustee Marker had the same opportunity to learn of, administer or not administer the equitable interest in EuroGas GmbH as he did with regard to the other assets that he was able to sell. Yet, he did not administer the asset, and the same would therefore, in the opinion of Claimants' Legal Experts, be deemed to have been abandoned.<sup>37</sup>

44. Moreover, rather than incurring further expense in investigating the assets of the 1985 Company or the causes of action that might have generated additional liquidities to distribute to creditors of the Company, or alternatively to request the bankruptcy court to dismiss the case under Section 707(a)(1) of the Bankruptcy Code for "*unreasonable delay by the debtor that is prejudicial to creditors*," Trustee Marker concluded that he had sufficient information from external sources to administer the estate, and elected to close the case by distributing the proceeds of the assets liquidated to creditors in partial satisfaction of their allowed claims, after payment of his own administrative expenses. This again demonstrates not only that Trustee Marker did not wish to pursue and finance uncertain causes of action, but that he instead willingly decided not to administer the Rozmin asset and to abandon it back to the Debtor.
45. Second, although Trustee Marker knew or should have known of the 1985 Company's interest in EuroGas GmbH, he did not actively administer this asset. Having examined all the circumstances of the case, Claimants' Legal Experts conclude that this is because Trustee Marker considered the administration of the Rozmin asset to have been too burdensome to justify the cost thereof.<sup>38</sup>

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<sup>36</sup> SW Expert Report, ¶ 89.

<sup>37</sup> SW Expert Report, ¶¶ 23, 93, 94.

<sup>38</sup> SW Expert Report, Section IV(C)(2).

46. This is best demonstrated by the fact that Trustee Marker did locate and sell the 1985 Company's interests in four subsidiaries of The 1985 Company,<sup>39</sup> even though none of these interests were scheduled by the 1985 Company.<sup>40</sup> On the other hand, he took no action with respect to EuroGas GmbH because, as stated by Claimants' Legal Experts, he probably determined, in light of the cancellation of the concession over the Gemerská Poloma deposit, that the estate's interest in EuroGas GmbH was overly burdensome, of inconsequential value and/or too expensive and risky to liquidate for the benefit of creditors.<sup>41</sup>
47. This is all the more so that Trustee Marker had the duty to notably "*collect and reduce to money property of the estate for which the trustee serves*" and "*investigate the financial affairs of*" the 1985 Company.<sup>42</sup> In this respect, he could have requested that the Debtor and/or its principals be held in contempt of court for failing to file the company's schedules as per the bankruptcy court's order. Yet he did not, apparently believing that the 1985 Company's bankruptcy schedules were unnecessary for him to satisfy his duties and that he had enough information from the public records and from the disclosures made by creditors, to permit the case to be fully administered. And, in his final report, Trustee Marker declared to the Bankruptcy Court that he had "*faithfully and properly fulfilled the duties of the trustee.*"<sup>43</sup>
48. Based on the foregoing, Claimants' Legal Experts find that "*it is both reasonable and fair to conclude [...] that Trustee Marker investigated The 1985 Company's financial affairs, located all assets that Trustee Marker believed had value, administered those assets, and that all remaining assets (including the estate's interest in EuroGas GmbH) were abandoned back to The 1985 Company.*"<sup>44</sup>

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<sup>39</sup> **Exhibit C-71**, Order Confirming Four-Lot Auction of Debtors Interests in Certain Affiliates, dated March 30, 2006, EuroGas I Bankruptcy, Docket Entry No. 97, EuroGas I Bankruptcy, Docket No. 97, pp. 2 *et seq.*

<sup>40</sup> It is undisputed that The 1985 Company never filed any schedules in its bankruptcy case.

<sup>41</sup> SW Expert Report, ¶ 93.

<sup>42</sup> **Exhibit CL-215**, 11 U.S.C. § 704(a)(1), (4).

<sup>43</sup> **Exhibit C-28**, Final Report and Application for Compensation and Motion for Order Approving Payment of Administrative Costs and Expenses, EuroGas I Bankruptcy, Docket No. 140.

<sup>44</sup> SW Expert Report, ¶ 94.

49. And indeed, this is not surprising. While it is undeniable that Trustee Marker was very much aware of the Rozmin asset, it is equally undeniable that the latter would have had no interest, let alone the financial resources, to go through the time and very significant expense of financing a challenge, before national courts or an international tribunal, against the Slovak Republic's decision to revoke Rozmin's mining rights. This is all the more so that, at a time, the Slovak Republic had not yet confirmed the illegality of the taking, and that therefore the chances of success of any challenge against the Slovak Republic's decision to revoke Rozmin's mining rights would have appeared extremely weak – to Trustee Marker but also to any potential third party funder (assuming for the sake of argument that third party funding would have been a realistic option, which, for the reasons set out above, it would not). It would accordingly have made no business sense whatsoever for Trustee Marker to administer such a litigious asset, rather than to abandon it back to the 1985 Company.
50. For all the above reasons, there can be no doubt that the interest in EuroGas GmbH, and in turn in Rozmin, was abandoned to the 1985 Company. This is all the more so that Respondent does not have standing under U.S. law to challenge the abandonment of the interest in EuroGas GmbH – in a U.S. court, it would in fact be prevented from doing so<sup>45</sup> – and that, as stated above, no creditor of the 1985 Company would have any interest in challenging the same, especially today. Indeed, under Chapter 7, corporate debtors are not granted a discharge,<sup>46</sup> and any unsatisfied creditor would therefore be able to assert its claims against the assets abandoned to the 1985 Company, or in the present case, against EuroGas which, as demonstrated below, has assumed all assets and liabilities of the 1985 Company by way of a *de facto* merger.

**3. Neither its administrative dissolution nor the Chapter 7 reorganization process prevented the 1985 Company from undertaking any act necessary to wind up its affairs**

51. Respondent's allegation that the 1985 Company "*cannot even carry on activities to wind up and liquidate its business*" is entirely without merit and must be dismissed because it relies on the repealed Utah Business Corporation Act (the "Repealed Act"), and case law that is without authority, and moreover wrong in law.

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<sup>45</sup> See SW Expert Report, ¶ 95.

<sup>46</sup> SW Expert Report, ¶ 62.

52. Indeed, in order to support her allegation that a dissolved corporation has no legal existence, cannot assert a cause of action, and lacks standing to maintain an action,<sup>47</sup> Ms. Jarvis relies on *Holman v. Callister, Duncan & Nebeker*, 905 P.2d 895 (UT App. 1995) (“Holman”) and *Bio-Thrust, Inc. v. Div. of Corps.*, 2003 UT App 360 (UT App. 2003) (“Bio-Thrust”).<sup>48</sup>
53. Yet, as extensively demonstrated by Claimants’ Legal Experts, both of these decisions were rendered in the context of corporations that were dissolved prior to the entry into force, on July 1, 1992, of the Utah Revised Business Corporation Act § 16-10a *et seq.* (as amended from time to time, the “Current Act”). They were therefore decided on the basis of the Repealed Act.<sup>49</sup>
54. The 1985 Company, on the other hand, was a domestic corporation in existence on July 1, 1992. As such, it automatically became subject to the Current Act upon enactment thereof, and ceased being subject to, or in any way governed by, the Repealed Act. As a result, all corporate actions taken by or related to the 1985 Company after July 1, 1992 were governed by the Current Act.<sup>50</sup>
55. This is critical as the Repealed Act provided that, upon dissolution, a corporation could only pursue legal remedies “*for any right or claim existing [...] prior to such dissolution if action [...] is commenced within two years after the date of such dissolution.*”<sup>51</sup> Therefore, the Repealed Act allowed a dissolved corporation to pursue a claim only if it had arisen prior to its dissolution, and if action had been initiated within two years of the corporation’s dissolution.
56. The Current Act however, as acknowledged by Ms. Jarvis herself,<sup>52</sup> provides that a dissolved corporation is able to undertake any “*act necessary to wind up the*

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<sup>47</sup> Expert Report of Annette Jarvis, ¶ 44.

<sup>48</sup> Expert Report of Annette Jarvis, ¶ 44.

<sup>49</sup> SW Expert Report, Section IV(E)(3)(d).

<sup>50</sup> SW Expert Report, Section IV(E)(3)(d).

<sup>51</sup> **Exhibit RA-1**, *Holman v. Callister, Duncan & Nebeker*, 905 P.2d 895, 899 (Utah Ct. App. 1995) dated 26 October 1995, at 897; emphasis in original.

<sup>52</sup> Expert Report of Annette Jarvis, ¶ 49.



*business.*”<sup>53</sup> Moreover, instead of imposing a two-year time limit, the Current Act states that the “*dissolution of a corporation does not prevent commencement of a proceeding by or against the corporation in its corporate name*” or “*abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution.*”<sup>54</sup>

57. Based on the above provisions of the Current Act, and as confirmed by Claimants’ Legal Experts, there can be no doubt that, following its dissolution, and until the winding up of affairs was complete, the 1985 Company was able to undertake any act necessary to achieve this goal. And indeed, as demonstrated by Claimants’ Legal Experts, the only two cases which Respondent was able to cite in support of its position, namely *Hillcrest Invest v. Sandy City*, 2009 WL 7347353 (Utah Dist. Ct. Jan. 27, 2009), aff’d 238 P.3d 1067 (Utah App. 2010) and *In re Flavor Brands, Inc. et al*, SD-06-0057 to – 0060 (Utah Dep’t of Commerce, Div. of Sec.), are cases which have no precedential value whatsoever, and which are moreover wrong in law, having disregarded the very plain language of the Current Act.
58. This state of affairs is unaffected by the fact the 1985 Company went through a Chapter 7 reorganization process. This is for the following non-exhaustive reasons.
59. First, Chapter 7 proceedings are, by nature, unable to cause the dissolution of a corporation. This is because, in the United States, bankruptcies are governed by federal law, whereas the creation, life and dissolution of corporate entities are matters of state law. Accordingly, “*Chapter 7 proceedings cannot dissolve a corporation,*” and if an entity’s principals want to dissolve their company, they must use state-law procedures to do so.<sup>55</sup>
60. Second, nowhere is it even suggested in the U.S. Bankruptcy Code that Chapter 7 proceedings can cause the dissolution of a State corporation. In fact, the preparatory works thereof suggest that the drafters of Chapter 7 very much contemplated the survival of the debtor. Section 727 of the Bankruptcy Code provides that a corporation

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<sup>53</sup> **Exhibit CL-197**, Utah Revised Business Corporation Act, hereafter “Current Act” § 1405(2) (b).

<sup>54</sup> **Exhibit CL-197**, § 1405(2) of the Current Act.

<sup>55</sup> **Exhibit CL-102**, *N.L.R.B. v. Better Bldg. Supply Corp.*, 837 F.2d 377 (9th Cir. 1988), dated January 13, 1988 (stating that if the principals “sought to dissolve their corporation, they should have used state procedures”).

cannot receive a discharge of its debts at the conclusion of Chapter 7 proceedings. The purpose of this provision was to “*avoid trafficking in corporate shells and in bankrupt partnerships.*”<sup>56</sup> Indeed, the “*drafters chose not to make corporate debt dischargeable so that corporations continuing to operate could not avoid previously incurred debt.*”<sup>57</sup> As a result, “[i]n 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.”<sup>58</sup>

61. Third, the large majority of decisions, as well as a United State Supreme Court Decision, confirm that Chapter 7 proceedings are unable to cause the dissolution of a State corporation,<sup>59</sup> and as demonstrated by Claimants’ Legal Expert, the few cases which Respondent was able to put forward in support of its position are “*outlier decisions*” which, moreover, have since been disavowed and/or heavily criticized.<sup>60</sup>
62. Lastly, Ms. Jarvis’ position is even contrary to a common-sense interpretation of the Bankruptcy Code. As succinctly stated by the Wyoming Supreme Court in *Catamount Construction v. Timmis Enterprises*, “[i]f the corporation were ‘defunct’ or de facto dissolved and incapable of maintaining or defending an action, as the Liberty Trust case concluded, it would be unnecessary to deny it a discharge of corporate debt.”<sup>61</sup> Furthermore, her argument is inherently inconsistent with her admission that property of a Chapter 7 bankruptcy estate can be abandoned back to a debtor at the closing of the case.<sup>62</sup> It would indeed be nonsensical for property to be abandoned back to an entity that does not exist after the bankruptcy is closed.

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<sup>56</sup> *Id.* (quoting H.R.Rep. No. 595, 95th Cong., 1st Sess. 384 (1977) reprinted in 1978 U.S.Code Cong. and Admin.News, pp. 5787, 6340, and S.Rep. No. 989, 95th Cong.2nd Sess. 98 (1978) reprinted in 1978 U.S.Code Cong. and Admin.News, p. 5884) (**Exhibit CL-103**).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> SW Expert Report, Section IV(B).

<sup>60</sup> SW Expert Report, ¶¶ 68 *et seq.*

<sup>61</sup> **CL-205**, *Catamount Const. v. Timmis Enterprises*, 2008 WY 122 dated October 9, 2008 at 1158 (holding that corporation that has standing to maintain an action after the closing of its Chapter 7 bankruptcy proceeding).

<sup>62</sup> Expert Report of Annette Jarvis, ¶¶ 75, 76.

63. For all the above reasons, the unescapable conclusion is that neither its administrative dissolution, nor the Chapter 7 reorganization process, prevented the 1985 Company from undertaking any act necessary to wind up its affairs. Claimants' Legal Experts indeed confirm that such "*act necessary to wind up the business*" of the dissolved corporation would encompass the sale of abandoned assets or, as a more radical manner of winding up its affairs, the merger of the dissolved corporation with and into another corporation in good standing.
64. EuroGas took advantage of both these possibilities. On July 13, 2007, the 1985 Company sold its interest in EuroGas GmbH to a third party company, namely McCallan Oil & Gas (UK) (hereafter "McCallan"). EuroGas thereafter acquired the entirety of McCallan's issued shares, and ultimately, on June 4, 2012, caused McCallan to transfer its interest in EuroGas GmbH, and thus Rozmin, to its new Swiss subsidiary, EuroGas AG.
65. Further, in order to complete the winding up process, and at the same time maintain the interest of its shareholders, the 1985 Company validly merged with EuroGas on July 31, 2008, as set out below.

**4. The 1985 Company validly merged with EuroGas and is the rightful owner of the investment**

66. In its desperate attempt to challenge the merger of the 1985 Company with and into EuroGas, Respondent has resorted to a number of convoluted and/or formal arguments that are entirely misplaced and in any event wrong as a matter of law.
67. This is no surprising considering that, as demonstrated above, the Slovak Republic does not have standing to challenge the merger consummated by the 1985 Company and EuroGas, and that no one with actual standing under U.S. law to challenge the same, be it the creditors or the shareholders of the 1985 Company, would have any interest in challenging the validity of the merger, assuming there were any valid grounds to do so (which there are not). In other words, Respondents is seeking to achieve a result that it would be the only one to benefit from, despite not having standing to do so. This is all the more unacceptable that, if the Tribunal were to endorse Respondent's position, the result would go against the wish of, and be detrimental to, those who U.S. law has expressly sought to protect, namely the 1985 Company's creditors and/or shareholders,

who are the only ones to arguably have standing to challenge – or not – the actions of the 1985 Company and EuroGas.

68. In any event, the arguments on the basis of which Respondent attempts to challenge the validity of the merger between the 1985 Company and EuroGas must fail for the reasons set out below.
69. First, Respondent argues that in order to be effective, a merger must be registered with the Utah Division of Corporations. This argument of pure form cannot stand.
70. This is because nothing in the Current Act, including the provisions on statutory mergers or the dissolution of corporations, prevents a corporation, dissolved or otherwise, from pursuing or consummating a merger, be it statutory or on the basis of common law. Rather, section 1405 of the Current Act grants broad authority to dissolved corporations, going in so far as stating that a dissolved corporation may do every “*act necessary to wind up and liquidate its business and affairs.*” The Current Act further clarifies that dissolution of a corporation does *not* “*prevent transfer of its shares or securities.*”<sup>63</sup> The Utah legislature could easily have carved out mergers from the category of act that a dissolved corporation can undertake, but it did not do so and instead, it unambiguously granted a dissolved corporation the power to do every act necessary to wind up its affairs. And indeed, Claimants’ Legal Experts confirm that “*given the very nature of a merger – to combine two companies into one surviving legal entity where the surviving entity assumes all assets, rights and liabilities of the extinguished entity – a merger into an active corporation would in fact be one of the most effective and efficient ways to wind up and liquidate a dissolved corporation.*”<sup>64</sup>
71. Moreover, it is widely recognized in case law and doctrinal writings that registration with the Utah Division of Corporations is a purely formal requirement that is mandatory only in the case of statutory – as opposed to common law – mergers.

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<sup>63</sup> **Exhibit CL-197**, § 1405(2)(b) of the Current Act.

<sup>64</sup> SW Expert Report, ¶ 103.

72. This is confirmed first and foremost by the official commentary to the Current Act which, in relation to the provision on the statutory merger, provides that.<sup>65</sup>

[a] transaction may have the same economic effect as a statutory merger even though it is cast in the form of a nonstatutory transaction. For example, assets of the disappearing corporations may be sold for consideration in the form of shares of the surviving corporation, followed by the distribution of those shares by the disappearing corporations to their shareholders and their subsequent dissolution. Transactions have sometimes been structured in nonstatutory form for tax reasons or in an effort to avoid some of the consequences of a statutory merger, particularly appraisal rights to dissenting shareholders [...]. [Some courts] have developed or accepted the “de facto merger” concept.

73. In addition to the official commentary of the Current Act, which recognizes the validity of mergers cast in a “nonstatutory form” and of *de facto* mergers, Utah courts have often discussed the *de facto* merger doctrine in connection with assessing possible successor liability.<sup>66</sup> Utah courts have in fact accepted the concept of the *de facto* merger doctrine in the very context currently before the Tribunal, namely that of a dissolved corporation merging into a corporation in good standing.<sup>67</sup>
74. Based on the foregoing, a *de facto* merger is not a “magic act,” as Respondent has suggested. Claimants’ Legal Experts describe the doctrine, and its implications for the merger of the 1985 Company with and into EuroGas, as follows:

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<sup>65</sup> **Exhibit CL-240**, Official commentary to section 1101 of the Current Act.

<sup>66</sup> **Exhibit CL-227**, *Macris & Associates, Inc. v. Neways, Inc.* 986 P.2d 748, 751-52, aff’d, 2000 UT 93 dated December 5, 2002 (citing Exhibit CL-228, *Florum v. Elliott*, 867 F.2d 570, 575 n. 2 (10th Cir.1989) dated July 12, 1989

<sup>67</sup> See **Exhibit RL-0035**, *In the Matter of Syntex Group Inc*, Case No. 080500140 (3<sup>rd</sup> Dist. Utah, Mar. 21, 2008) (hereafter “*In the Matter of Syntex*”) and **Exhibit RL-0034**, *In the Matter of Bio-Thrust* Case No. 040908769 (3<sup>rd</sup> Dist. Utah, July 1, 2004) (hereafter “*In the Matter of Bio Thrust*”). These cases represent judicial acceptance of the *de facto* merger doctrine in Utah. Both court orders hold that a dissolved predecessor has “merged or reorganized with and into” an entity in good standing, created specifically to continue on the business of the dissolved corporation. *In the Matter of Bio-Thrust, Inc.*, at ¶ 2. The doctrine of *de facto* merger is a doctrine of equity, rather than statutory compliance. The court orders state that the judgments affirming the existence of the merger are needed to be “fair and equitable to the shareholders of the predecessor corporation.” *Id.* at ¶1. Although the phrasing “*de facto* merger” is not used in either order, the underlying doctrine is the same in that a merger has occurred without full compliance with all statutory formalities.

[The de facto merger] is a legal doctrine that has been employed by Utah courts and contemplated by commentary to the Current Act as an “equivalent nonstatutory transaction” that may occur when the transaction is structured in a nonstatutory form, such as the nonstatutory structure of the EuroGas merger.

[...]

While it is true that a statutory merger takes effect upon the effective date of articles of merger which are filed with the Corporations Division, as discussed, The 1985 Company and EuroGas did not undergo a statutory merger. Rather, they merged pursuant to a de facto, common-law merger. In the context of a de facto merger, the Resolution is an agreement among the directors of two separate governing boards reflecting the parties’ clear intentions to merge with EuroGas as the surviving entity, but is not an authoritative statement of what the proper legal conclusion and merger structure would be under Utah law. The Resolution is, however, particularly relevant in showing the facts and the intent of the parties at the time of its execution to effectively merge The 1985 Company and EuroGas.

The effectiveness of a de facto merger is not based upon proper compliance with corporate statutory merger formalities, such as a formal shareholder vote or filing of articles of merger [citing **Exhibit CL-229**, *Nettis v. Levitt*, 241 F.3d 186 (2nd Cir. 2001)].<sup>68</sup>

75. Claimants’ Legal Experts thereafter sets out the four factors that need to be met for a *de facto* merger to be recognized under common law, namely:
1. continuity of management, personnel, physical location, assets and general business operation;
  2. continuity of shareholders;
  3. cessation of ordinary business, by the predecessor; and

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<sup>68</sup> SW Expert Report, ¶ 114.

4. assumption by the successor of liabilities ordinarily necessary for continuation of the predecessor's business.<sup>69</sup>
76. All of the above four factors are met in the present case, as confirmed by Claimants' Legal Experts.
77. With respect to the first factor, namely the continuity of management, personal, physical location, assets and general business operation, the Resolution indicates, "*the management, namely, the directors and officers of both [the 1985 Company] and [EuroGas], are the same individuals and therefore, to the extent that [EuroGas] assumes and recognizes the business, assets and shareholder base of [the 1985 Company], there is and will be complete continuity of management.*"<sup>70</sup> Additionally, the Resolution states that "*both corporations currently have the same principal place of business*" and that "*[EuroGas] is in fact a continuation of [the 1985 Company] such that all of the assets...of [The 1985 Company] are in fact the assets...of [EuroGas].*"<sup>71</sup> Accordingly, there is no question that there is a continuity of management between EuroGas and the 1985 Company.
78. With respect to the second factor, namely the continuity of shareholders, Claimants' Legal Experts confirm that this requirement is met when "*when the shareholders of the predecessor corporation become a constituent part of the shareholders of the successor corporation by receiving stock in the successor corporation. This factor does not focus as much on the shareholders of the predecessor and the successor being identical, but rather on the shareholders of the predecessor becoming shareholders of the successor.*"<sup>72</sup>
79. In this respect, the Resolution confirms that the 1985 Company and EuroGas intended to achieve a continuity of shareholders:

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<sup>69</sup> SW Expert Report, ¶ 114. See also **Exhibit CL-230**, *Decius v. Action Collection Serv., Inc.*, 2004 UT App 484 dated December 23, 2004 (citing **Exhibit CL – 231**, *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797, 800-01, (W.D. Mich. 1974) dated May 31, 1974 as to certain factors of a de facto merger); see also **Exhibit CL-232**, *Ekotek Site PRP Comm. v. Self*, 948 F. Supp. 994, 1001-02 (D. Utah 1996) dated September 27, 1996.

<sup>70</sup> **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, at 2.

<sup>71</sup> *Id.* at 3.

<sup>72</sup> SW Expert Report, ¶ 117.

*(1) [EuroGas] hereby complete[s] the...reorganization with [The 1985 Company], 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]...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 1985 Company's] shareholders as its own and that therefore, the new, successor [EuroGas], is and shall NOT be issuing any new securities of its own.<sup>73</sup>*

80. Based on the above provisions of the Resolution, all of the 1985 Company's shareholders were to become shareholders of EuroGas, and EuroGas intended to recognize as its own the stock issued by the 1985 Company, in the exact same denominations as held in the 1985 Company. There is therefore no question that the 1985 Company and EuroGas intended to achieve a continuity of shareholders.
81. Moreover, Claimants' Legal Experts have reviewed a copy of the share ledger of EuroGas, dated as of November 14, 2011, and confirmed that EuroGas did indeed recognize the shareholders of the 1985 Company as its own shareholders.<sup>74</sup> There is therefore no question that the 1985 Company and EuroGas intended to achieve a continuity of shareholders.
82. With respect to the third factor, namely the cessation of ordinary business and dissolution of the predecessor, at the time of the merger, the 1985 Company had been administratively dissolved and had ceased ordinary business operations as a result thereof. When the merger was therefore consummated, the 1985 completed the winding up of its affairs and ceased to exist entirely, therefore fulfilling the third factor.

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<sup>73</sup> **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 at 3.

<sup>74</sup> SW Expert Report, ¶¶ 117-119.



83. With respect to the fourth factor, namely the assumption of successor liability, the Resolution states that “*all assets, liabilities, rights privileges, and obligations of [the 1985 Company] are in fact the assets, liabilities, rights privileges, and obligations of [EuroGas].*”<sup>75</sup> As a result, there again can be no question that the fourth factor was fulfilled, and that the 1985 Company effectively and validly merged with and into EuroGas under the *de facto* merger doctrine.
84. As summarized by Claimants’ Legal Experts upon their analysis of the four factors for a *de facto* merger:

*The 1985 Company meets all four of the De Facto Merger Factors and if the issue were presented to a Utah court with proper jurisdiction [we are of the opinion] that such court would affirm the occurrence of such merger, as the trial courts did in In the Matter of Bio-Thrust and In the Matter of Syntex and that an appellate court would adopt the de facto merger doctrine which Utah appellate courts have discussed in dicta. This is all the more so that all parties with an interest in The 1985 Company, EuroGas, or the merger between the two, have benefitted from said merger.*<sup>76</sup>

85. Based on the foregoing, there can be no doubt that the merger of the 1985 Company with and into EuroGas was valid and effective pursuant to the *de facto* merger doctrine. It is only by abundance of caution that Claimants address below two other arguments raised by Respondent.
86. Second, Respondent argues that the joint resolution entered into between the 1985 and EuroGas, and pursuant to which the two companies performed a merger in the form of a type-f reorganization (the “Resolution”), is void because it purported to interfere with the automatic stay imposed on the Debtor’s assets during the Chapter 7 proceedings.
87. This argument is nonsensical. The Resolution was entered into on July 31, 2008, namely more than a year after the Chapter 7 proceedings were closed, and the automatic stay lifted, on March 19, 2007. At that time, it was therefore impossible to

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<sup>75</sup> **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 at 3.

<sup>76</sup> SW Expert Report, ¶ 122.

violate the automatic stay, and Respondent fails to put forward any evidence or authority that would support a different conclusion.

88. At best, when the Resolution purported to apply retroactively to November 15, 2005, namely the date of incorporation of EuroGas, it could only have intended to apply to those assets that were abandoned back to the 1985 upon the conclusion of the Chapter 7 reorganization process. And even assuming, for the sake of argument, that the Resolution and *de facto* merger could not apply retroactively to November 15, 2005 with respect to such assets abandoned at the conclusion of the Chapter reorganization process, the merger would still have validly been consummated on July 31, 2008, and applied from that point forward without violating the automatic stay.<sup>77</sup>
89. Lastly, Respondent argues that Section 368(a)(1)(F) of the U.S. Internal Revenue Code could not, in and of itself, serve to realize the merger contemplated by the 1985 Company and EuroGas.
90. This argument is however entirely misplaced. The reference in the Resolution to Section 368(a)(1)(F) of the U.S. Internal Revenue Code only reflected the parties' intention to treat the merger as a tax-free transaction. It did not however constitute the legal basis pursuant to which the merger would be operated and become effective.
91. As explained above at paragraphs 71 to 85, it is pursuant to the common law doctrine of *de facto merger* that the 1985 Company validly merged with and into EuroGas. And whether the merger contemplated by the parties did in fact qualify as a tax-free transaction under Section 368(a)(1)(F) of the U.S. Internal Revenue Code is entirely irrelevant for purpose of assessing the validity and effectiveness of the merger between the 1985 Company and EuroGas.<sup>78</sup>
92. For all the above reasons, Respondent's allegation that EuroGas does not own an interest in the investment should be rejected. The unescapable conclusion is that, as confirmed by Claimants' Legal Experts, "*EuroGas is a mere continuation of The 1985 Company, in the common use of the phrase,*" and moreover the rightful and legal

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<sup>77</sup> SW Expert Report, ¶¶ 138-141.

<sup>78</sup> SW Expert Report, ¶ 142.

owner, through EuroGas AG (see above at paragraph 64), of EuroGas GmbH and, in turn of Rozmin.

93. This is all the more so that, even assuming for the sake of argument, that the 1985 Company's interest in EuroGas GmbH was not abandoned by the bankruptcy trustee and, therefore, that the sale to McCallan and EuroGas AG were arguably ineffectual, EuroGas would still have an interest in EuroGas GmbH because EuroGas, as successor to the 1985 Company, would have the same standing as the 1985 Company to seek the remedies to which the 1985 Company would be entitled as a result of the revocation of Rozmin's mining rights over the Gemerská Poloma deposit.<sup>79</sup>
94. Based on the foregoing, Claimants respectfully request that the Tribunal dismiss Respondent's objection to jurisdiction arising out of EuroGas' interest in the investment.

**B. RESPONDENT HAS FAILED TO VALIDLY EXERCISE ITS RIGHT TO DENY EUROGAS THE BENEFITS OF THE U.S.-SLOVAK REPUBLIC BIT**

**1. Respondent's attempt to deny EuroGas the benefits of the U.S.-Slovak Republic BIT is inadmissible**

95. Claimants submit that Respondent has not only failed to even attempt to discharge "*as early as possible*"<sup>80</sup> its burden of proving that it has validly exercised its right to deny EuroGas the benefits of the U.S.-Slovak Republic BIT, but that it has now failed to discharge its burden of proof on every single occasion that it was given to do so.
96. Indeed, Claimants have repeatedly invited the Slovak Republic to discharge its burden of proof and to demonstrate that the conditions to a valid denial of the benefits of the U.S.-Slovak Republic were satisfied at the time of its purported exercise. Claimants invited Respondent to do so in their Notice of Dispute dated December 23, 2013, in their Request for Arbitration dated June 25, 2014, in their Answer to Respondent's Application for Provisional Measures dated October 16, 2014, and in their Rejoinder to Respondent's Application for Provisional Measures dated November 21, 2014.

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<sup>79</sup> SW Expert Report, ¶ 153.

<sup>80</sup> ICSID Arbitration Rules, Rule 41(1).

97. Yet, it is only in its Counter-Memorial that Respondent attempted for the first time to discharge its burden of proof with respect to the second cumulative condition for a valid denial of benefits under the U.S.-Slovak Republic BIT, namely that EuroGas does not have substantial business activities in the U.S. And even then, Respondent again failed to even attempt to determine what constitutes substantial business activities for purpose of Article I(2) of the U.S.-Slovak Republic BIT, and to identify the exact point in time when the lack of substantial business activities must be established for purposes of a valid exercise of the right to deny benefits under Article I(2) of the U.S.-Slovak BIT.
98. For this reason alone, considering that in accordance with general principles of international arbitration and pursuant to ICSID Arbitration Rule 41, jurisdictional objections are to be raised *in limine litis* in order to be admissible, and that the party raising such objections, while not bound to immediately discharge its burden of proof, should at least attempt to do so at the earliest opportunity, which Respondent has repeatedly failed to do, this jurisdictional objection should be declared inadmissible and/or deemed to have been waived by the Slovak Republic.
99. This is all the more so that Respondent's failure to even attempt to discharge its burden of proof, after three opportunities to do so, pertains to critical elements thereof. In circumstances where Claimants will not be afforded the opportunity to have the last word on Respondent's jurisdictional objections before the hearing – which in itself is at odds with generally recognized practices in international arbitration – the infringement on Claimants' due process rights is unacceptable, and moreover irreparable. Any decision other than declaring Respondent's jurisdictional objection inadmissible would essentially be rewarding Respondent for its recurrent failure to meet its procedural obligations, and would moreover put Claimants at a substantial procedural disadvantage, because Claimants are now forced to preemptively address matters for which Respondent bears the burden of proof, without having the benefit of first reading Respondent's position thereon, or of being at the very least afforded an opportunity to address Respondent's reply thereto in writing.
100. In any event, should the Tribunal nevertheless declare Respondent's jurisdictional objection admissible, Claimants submit that Respondent's attempt to deny EuroGas the benefits of the U.S.-Slovak BIT is entirely without merit and should fail. Indeed,

Respondent's allegation that EuroGas does not have substantial business activities in the U.S. – which is, as acknowledged by Respondent itself,<sup>81</sup> is a cumulative condition for a valid exercise of the denial of benefits – cannot withstand scrutiny from any perspective and therefore fails.

## **2. The conditions for a valid denial of benefits are not met**

101. For the reasons set out below, the Slovak Republic has failed to discharge its burden of proof that EuroGas “*has no substantial business activities*” in the U.S. The burden of proof in this respect rests solely on Respondent.<sup>82</sup>
102. First, the category of claimants that the drafters of the U.S.-Slovak Republic BIT intended to exclude from the Treaty's benefit is very narrow, and EuroGas does not even come close to falling into that category. By way of reminder, Article I(2) of the U.S.-Slovak BIT provides as follows:

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

103. This Article, like any treaty provision, must be interpreted in light of “*its object and purpose*.”<sup>83</sup> This is all the more so that a “*good faith*” interpretation of this Article, “*in accordance with the ordinary meaning*” of its terms, provides little guidance as to the type and extent of the “*substantial business activities*” that must be lacking for the right to deny benefits under Article I(2) of the U.S.-Slovak BIT to be validly exercised.
104. In this respect, especially if the Tribunal were to side with Respondent and find that the explanations provided by the U.S. in the Amicus Curiae submitted in *Pac Rim v. El Salvador*, constitutes probative evidence of the object and purpose of the denial of benefits clause, it would have no choice but to lend an equally strong probative value to the explanation provided by the U.S. in that very same Amicus Curiae with respect to

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<sup>81</sup> Respondent's Counter-Memorial, ¶ 93.

<sup>82</sup> **Exhibit RA-5**, *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, dated September 16, 2003, ¶ 15.7.

<sup>83</sup> Vienna Convention of the Law of Treaties, Article 31(1).

the object and purpose of the denial of benefits clauses inserted by the U.S. as a matter of “policy” in its investment agreements:

*This treaty right is consistent with a long-standing U.S. policy to include a denial of benefits provision in investment agreements 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. In testimony before the U.S. House of Representatives, Ambassador Peter Allgeier, one of the U.S. negotiators of CAFTA-DR, explained that the denial of benefits provision of CAFTA-DR was intended “to protect against . . . establish[ment of] an affiliate that is merely a ‘shell.’” A similar provision, included in Article 1113 of the North American Free Trade Agreement, has been described by commentators as permitting a Party “to deny benefits to an enterprise if it is merely a ‘sham company’ having no ‘substantial business activities’ in the . . . country in which it is established.”<sup>84</sup>*

105. Based on the above, the object and purpose of the denial of benefits clause in the investments agreements concluded by the U.S., is to protect the Contracting States from what is commonly referred to as “*treaty shopping*,” namely the artificial use of paper companies to benefit from a favorable investment treaty. In other words, the only entities that such denial of benefits clauses are intended to exclude from the benefit of the treaty are “*shell*” and/or “*sham compan[ies]*” that are only formally incorporated in one of the Contracting States for the sole purpose of benefitting from procedural and substantive advantages.
106. Yet, it is not possible to seriously claim that EuroGas is anything but a genuine and long-standing U.S. company. As demonstrated above at paragraphs 71 to 85, EuroGas has, by way of a *de facto* merger, stepped into the shoes of the 1985 Company. For all intents and purposes, EuroGas has therefore been operating on the territory of the U.S. since 1985<sup>85</sup> – that is for 13 years before EuroGas’ first investment in Rozmin, and 20 years before Claimants’ investment was taken. To suggest that EuroGas was incorporated 20 years ago to secure procedural and substantive advantages under the U.S.-Slovak BIT would be nonsensical.

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<sup>84</sup> **Exhibit CL-241**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Submission Of The United States Of America, dated May 20, 2011, ¶ 3.

<sup>85</sup> **Exhibit C-3**, Articles of Incorporation of the 1985 Company.

107. Moreover, up until March 2011, and for more than a decade, EuroGas was registered with the United States Securities Exchange Commission, which implied that it was under strict scrutiny and regular controls of the U.S. regulator. During that time, the shares of EuroGas were publicly traded on the Over-The-Counter Market in the United States, as well as the Frankfurt and Berlin Stock Exchanges. To this day, EuroGas has at least 711 different registered shareholders in the U.S. and across Europe, and probably thousands more beneficial shareholders whose stock is held in trust by Cede and Company.<sup>86</sup> The situation therefore has nothing in common with the situation at issue in the *Pac Rim v. El Salvador* case, where the Tribunal concluded that the claimant was and had always been “*akin to a shell company with no geographical location for its nominal, passive, limited and insubstantial activities.*”<sup>87</sup>
108. All of the above characteristics, taken individually, let alone collectively, simply exclude the possibility of EuroGas being, or having been at any time, a mere “*free rider,*” let alone a “*sham company.*” EuroGas’ situation has absolutely nothing to do with the situation of the claimant in the *Pac Rim v. El Salvador* case, the one and only case relied upon by Respondent. Respondent’s attempt to challenge the same demonstrates a deep misunderstanding of EuroGas’ business activities.
109. Even assuming that after 2011, when EuroGas was deregistered from the Security and Exchange Commission and had transferred all of its European assets to EuroGas AG, it continued to own its U.S. assets, namely EuroGas Silver & Gold and Tombstone, both of which conducted mining exploration activities in the U.S..
110. Second, in its attempt to challenge the business activities undertaken by EuroGas, Respondent not only fails to identify the legal standard and threshold applicable, but also appears to settle for a number of disjointed allegations without ever explaining how these allegations – assuming for the sake of argument that they were true – could serve, let alone suffice, to demonstrate the absence of business activities under Article I(2) of the U.S.-Slovak Republic BIT. They cannot, and they are in fact entirely

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<sup>86</sup> **Exhibit C-336**, Complete Stock Holders List of EuroGas, Inc. – Common (as of Nov. 14, 2011).

<sup>87</sup> **Exhibit RA-18**, *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID CaseNo.ARB/09/12, Decision on Jurisdiction, dated June 1, 2012, ¶ 4.75.

irrelevant for purposes of assessing the reality of Claimant's main business activity. In this respect, again, Respondent fails to discharge its burden of proof.

111. By way of reminder, EuroGas is, as set forth at paragraphs 30 to 36 of Claimants' Memorial, a typical junior mining company. Like any such junior mining company, its activity consists in raising capital on stock markets in order to search for and explore deposits, conduct estimations, confirm reserves, secure mining rights, and prepare mines for their commercial development, so as to capture the high value created in the earliest stages of the life cycle of a mining project.<sup>88</sup> The end goal of the activity of junior mining companies is to either sell their equity share in part or in full to larger organizations, or to develop deposits by way of further equity investment – which is precisely what EuroGas was prevented from doing as a result of Respondent's taking of Rozmin's mining rights.
112. Until it is able to monetize its investment, however, a junior mining company does not need to be heavily staffed, to have a permanent office or to directly own equipment.<sup>89</sup> It is in fact counter productive for a junior mining company to have high fixed operating costs, because until it is able to successfully de-risk a deposit through substantial investment, it cannot turn a profit and is by nature of loss making activity. Junior mining companies usually finance themselves by issuing stock to private investors or on capital markets, and then carry out the exploration works through subsidiaries incorporated locally in the country where the deposit is located – such as Rozmin. The actual junior mining company itself however is incorporated in a State where it will be able to raise financing on stock markets, approach potential private investors, and manage the different ongoing projects, without necessarily being heavily staffed, maintaining a permanent office, or having any substantial assets other than a shareholding interest in exploration projects it is financing. The bulk of its activity is indeed of a managerial and public relation nature, in order to raise the financing necessary to fund its exploration projects.
113. This does not mean that the activity of a junior mining company such as EuroGas is any less real or substantial than another type of activity. To the contrary, it has become

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<sup>88</sup> See WAI Supplemental Expert Report, p. 19.

<sup>89</sup> See WAI Supplemental Expert Report, pp. 18-19.



customary for larger companies to wait for the de-risking to be completed by junior companies before trying to purchase the corresponding development rights from these junior companies, which may be tempted to make a large short or mid-term profit.<sup>90</sup> As explained by Adrian Day in his book entitled “Investing in Resources: How to Profit from the Outsized Potential and Avoid Risks:”

*Many of the major companies have drastically reduced their greenfields exploration and look to juniors to do the high-risk exploration.*<sup>91</sup>

[...]

*In fact, for the most part, the major companies have grown in recent years largely from acquiring other companies, not from exploring, discovering, and developing ounces.*<sup>92</sup>

114. Based on the foregoing, even assuming for the sake of argument that the string of disjointed allegations made by the Slovak Republic were true, Respondent has failed to demonstrate how such allegations would be relevant for the assessment of EuroGas’ business activity as a junior mining company. And indeed, for purposes of assessing the substantial nature of EuroGas’ activity as a junior mining company, it is entirely irrelevant:

- whether “EuroGas has had no operational revenues either in the U.S. or elsewhere” over an extended period of time<sup>93</sup> – this is because the accumulation of substantial losses is inherent to the very nature of the activity of junior mining companies;
- whether Eurogas had very few assets, other than shareholding interests in mining projects outside of the U.S., that could be auctioned off during the Chapter 7 Bankruptcy proceedings – considering that junior mining companies typically do

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<sup>90</sup> See WAI Supplemental Expert Report, p. 18.

<sup>91</sup> **Exhibit C-76**, Adrian Day, “Investing in Resources: How to Profit from the Outsized Potential and Avoid Risks” (2010), p. 156.

<sup>92</sup> **Exhibit C-76**, Adrian Day, “Investing in Resources: How to Profit from the Outsized Potential and Avoid Risks” (2010), p. 150.

<sup>93</sup> Respondent’s Counter-Memorial, ¶ 100.

not own many assets, and their most valuable one is their investment in the exploration of newly discovered deposits, in the hope of a high rate of return;

- whether, in order to save costs, EuroGas may have at times, and especially after the taking of Rozmin's mining rights in 2005, had to delocalize its management outside of the U.S.<sup>94</sup> – given that its activity as a junior mining company, which consisted mainly in raising capital to fund exploration projects, remained in the U.S. (Respondent makes no allegation in this respect);
- whether, again to save costs, EuroGas would have at times maintained only a so-called mail drop in the U.S. and not an actual physical office – given that the latter is far from being critical to the activity of junior mining companies. In any event, Respondent itself acknowledges that EuroGas maintained, at all times, a physical address, be it a P.O. Box, where it could be contacted by existing shareholders and/or potential investors, and moreover does not even attempt to demonstrate how the type of physical presence maintained by EuroGas would be evidence of a lack of substantial activities in the context of junior mining companies.

115. Third, Respondent fails yet again to discharge its burden of proof by not even attempting to set forth the time at which the lack of substantial business activities must be demonstrated for the denial of benefits to be validly exercised.

116. In this respect, neither Article I(2) of the U.S.-Slovak Republic BIT, nor the Amicus Curiae submitted by the U.S. in *Pac Rim v. El Salvador* are of any guidance. As for the arbitral awards that have already dealt with denial of benefit clauses, they have never had to specifically determine the relevant point in time at which the investor must be shown to have lacked substantial business activities for the denial of benefit to be valid. The reason for this is that, contrary to the element of foreign control, it takes much more time for the level of a company's business activities to vary significantly, and arbitral tribunals have therefore not yet been confronted with a case where such a significant change in the level of business activities had occurred between the date of the initial investment and the date of the arbitration.

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<sup>94</sup> Respondent's Counter-Memorial, ¶ 99.

117. And indeed, out of the two cumulative conditions required for the denial of benefits to be valid, the element of foreign control is by far and large the most volatile. In other words, it takes much more time and money to “fake” substantial activities, even if only for a limited period of time, than it does to “fake” domestic ownership.
118. Thus, if the object and purpose of the denial of benefits clause is to avoid an abuse of the treaty’s protection by nationals of third-party countries who are seeking to benefit therefrom on the basis of a mere shell company, without however any genuine commitment to the economy of the home State, it would be in line with the treaty’s object and purpose to strip such shell companies from the treaty’s protection the moment that the purely formal vehicle is taken over by a third party national.
119. The same is not true when the requirement of substantial business activities has been fulfilled at one point during the life of the investment. It would indeed take so much more time, money, and commitment to “fake” substantial business activities, that the abuse-related and formalistic element of the object and purpose underlying the right to deny benefits would have lost all meaning.
120. Claimants therefore submit that if the investor has at any time during the life of the investment satisfied the substantive business activities requirement under Article I(2), which in itself would demonstrate a high level of commitment to the country’s economy, it would in fact go against the very object and purpose of the Treaty to deny the benefit thereof to a *bona fide* investor on the basis of what would essentially constitute a formal requirement.
121. This is all the more so that the preamble of the U.S.-Slovak Republic BIT memorializes the Contracting States’ recognition of the fact that the “*agreement upon the treatment to be accorded*” to investments in their territory “*will stimulate the flow of capital and the economic development of the Parties.*”<sup>95</sup> It is therefore clearly one of the objects and purposes of the U.S.-Slovak Republic BIT to stimulate investment by providing investors with a certain number of agreed and foreseeable substantive protections.

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<sup>95</sup> **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, Preamble.

122. Based on the foregoing, Claimants submit that once the existence of substantial business activities has been ascertained at one point during the life of the investment, or at the very least at the time of the initial investment, namely when the prospective investor would have assessed whether its investment would be protected under the U.S.-Slovak Republic BIT or would be likely to be denied the benefits thereof, any purported attempt to invoke the denial of benefits clause would go against the object and purpose of the Treaty and should fail. Any other conclusion would defeat the object and purpose of the Treaty, especially in circumstances where it may very well be the host State's very own breaches that could have caused the investor to cease having any substantial activities in the U.S.
123. Yet, Respondent has not even attempted to demonstrate that Claimants did not have any substantial business activities in the U.S. at the time of its initial investment, namely in 1998, and the same is in any event undisputable notably for the reasons set out above at paragraphs 106 to 108.
124. For all of the above reasons, Respondent has failed to discharge its burden of proof and its objection to jurisdiction must fail.
125. In conclusion, Respondent's objections to the Tribunal's jurisdiction over EuroGas should be dismissed. EuroGas, a minority shareholder of Rozmin, is only one of the two claimants, the other being Belmont, with a 57% interest in Rozmin. As explained below, Respondent's objections to the Tribunal's jurisdiction over Belmont ought to also be dismissed.

## **II. THE TRIBUNAL HAS JURISDICTION OVER BELMONT**

126. In its Counter-Memorial, Respondent argues that the Tribunal lacks jurisdiction over Belmont on the ground, first, that Belmont purportedly sold his interest in Rozmin to the 1985 Company in 2001 and, second, that the dispute between Belmont and the Slovak Republic does not fall within the temporal scope of application of the Canada-Slovak Republic BIT.
127. Respondent not only contradicts itself in relation to its first argument, having itself acknowledged in its submissions on provisional measures, that the agreement whereby Belmont had sold its interest in Rozmin to the 1985 Company had never been

performed, but in relation to the second argument, having itself claimed, well after the entry into effect of the Canada-Slovak Republic BIT, that the dispute was not ripe.

128. Respondent cannot have it both ways.

129. As demonstrated below, the Tribunal has jurisdiction over Belmont *ratione materiae* given that Belmont is, to this day, Rozmin's majority shareholder (**A**), and it has jurisdiction over Belmont *ratione temporis*, given that the international dispute between Belmont and the Slovak Republic arose less than three years before the entry into effect of the Canada-Slovak Republic BIT (**B**).

**A. THE TRIBUNAL HAS JURISDICTION *RATIONE PERSONAE* OVER BELMONT**

130. As explained in the Request for Arbitration<sup>96</sup> and in Claimants' Memorial,<sup>97</sup> Belmont became an investor in Rozmin on February 24, 2000, when it acquired a 57% interest in this company from two of its initial shareholders, namely Östu Industriemineral Consult GmbH<sup>98</sup> and Gebrüder Dorfner GmbH.<sup>99</sup>

131. Contrary to Respondent's contention, Belmont continues to hold, to this date, a 57% shareholding interest in Rozmin.

132. As noted by Respondent, on March 27, 2001, Belmont and the 1985 Company entered into a Share Purchase Agreement (the "SPA") for the sale of the former's 57% interest in Rozmin to the latter.<sup>100</sup> In its Counter-Memorial, Respondent argues that the Tribunal lacks jurisdiction over Belmont as "*Belmont sold its ownership in the alleged investment to EuroGas I in 2001 and thus does not own the alleged investment.*"<sup>101</sup> Respondent is mistaken.

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<sup>96</sup> Request for Arbitration, ¶ 10.

<sup>97</sup> Claimants' Memorial, ¶ 26.

<sup>98</sup> **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.

<sup>99</sup> **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.

<sup>100</sup> **Exhibit R-0015**, Share Purchase Agreement between EuroGas Inc. and Belmont Resources Inc., dated April 17, 2001.

<sup>101</sup> Respondent's Counter-Memorial, ¶ 128.

133. The SPA subjected the transfer of Belmont's interest in Rozmin to the 1985 Company to certain conditions, some of which were never satisfied. As a result, the transfer never occurred, and Belmont remained the legal and beneficial owner of this 57% interest and continued, even after the conclusion of the SPA, to invest in, and to be involved in the management of, the Gemerská Poloma project **(1.a)**. In fact, after its dissolution became final, in 2003, the 1985 Company could no longer issue new shares or acquire new assets. Thus, while the 1985 Company did validly enter into the SPA in 2001, before its dissolution, the conditions precedent to the transfer of Belmont's 57% interest in Rozmin had not yet been performed by the time that this Company's dissolution became final, and the 1985 Company could thereafter not have acquired Belmont's shares in Rozmin **(1.b)**.
134. Furthermore, even if one were to follow the opinion put forth by Respondent's expert, Mr. John Anderson, that Belmont's 57% interest in Rozmin was effectively transferred to the 1985 Company under the SPA and that Belmont retained a security interest in this 57%, Belmont would still hold an investment in Rozmin, hence it would still be an investor in the Slovak Republic, and would therefore still have standing **(2)**.

**1. Belmont Resources Inc. Is Rozmin sro's Majority Shareholder**

- a. The conditions precedent to the transfer of Belmont's interest in Rozmin to the 1985 Company were never performed and Belmont remains the legal and beneficial owner of this interest

135. Article 2 of the SPA provided for the performance of the following obligations:

- (1) the payment, by the 1985 Company, of a non-refundable advance royalty in the amount of USD 100,000;<sup>102</sup>
- (2) the transfer, by the 1985 Company to Belmont, of 12,000,000 common shares in the 1985 Company (the "Purchase Price Shares");<sup>103</sup> and

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<sup>102</sup> **Exhibit R-15**, Share Purchase Agreement between EuroGas Inc. and Belmont Resources Inc., dated March 27, 2001, Article 2.1(e).

<sup>103</sup> **Exhibit R-15**, Share Purchase Agreement between EuroGas Inc. and Belmont Resources Inc., dated March 27, 2001, Article 2.1(a).

- (3) the payment, by the 1985 Company, of a 2% royalty to Belmont, calculated on the gross sale revenue of any talc sold, at different specified times of the year during the mining life of the talc deposit.<sup>104</sup> In this respect, the 1985 Company “agree[d] to arrange the necessary financing to place the Gemerska Poloma talc deposit into Commercial Production within one year from the date of execution of this Agreement by all parties[:]; however if this [were to] not [be] accomplished [...] then [the 1985 Company] [would] pay [Belmont] an advance royalty of U.S.\$ 10,000 per month for each month of delay in achieving commercial production.”<sup>105</sup>
136. Article 6.1 of the SPA also stipulated that “[w]ithin 30 days of the date of approval by the Canadian Venture Exchange of the transactions described in this Agreement the Vendor shall deliver In trust to the solicitor (the ‘Trust’) for Rozmin s.r.o. any and all transfer documentation necessary for the transfer of the Shares to the Purchaser against payment of the Purchase Price Shares and the US\$100,000 NRAR (if not already paid).” Furthermore, 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.”<sup>106</sup>
137. The condition that Belmont receive 125% of its investment, equal to CND 3,000,000, through the sale of the Purchase Price Shares, thus constituted a condition precedent to the transfer of Belmont’s 57% interest in Rozmin to EuroGas. In this respect, Article 4.1(c) of the SPA 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

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<sup>104</sup> **Exhibit R-15**, Share Purchase Agreement between EuroGas Inc. and Belmont Resources Inc., dated March 27, 2001, Article 2.1(d).

<sup>105</sup> **Exhibit R-15**, Share Purchase Agreement between EuroGas Inc. and Belmont Resources Inc., dated March 27, 2001, Article 4(d).

<sup>106</sup> **Exhibit R-15**, Share Purchase Agreement between EuroGas Inc. and Belmont Resources Inc., dated March 27, 2001, Article 6(1); emphasis added.

*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 [...].”<sup>107</sup>*

138. Neither the condition precedent to the transfer of Bemont’s interest in Rozmin to the 1985 Company, provided for in Article 6.1 of the SPA, nor any of the conditions laid down in Article 2 of the SPA, were ever satisfied. Indeed, while the 1985 Company did transfer the 12,000,000 Purchase Price Shares to Belmont, as required under Article 2.1(a) of the SPA,<sup>108</sup> it did not comply with the first two requirements of Article 2.1 of the SPA, and Belmont was not able to recover 125% of its initial investment.
139. Indeed, first, the 1985 Company fell short by about USD 26,000 in its payment of the USD 100,000 non-refundable advance royalty (“NRAR”).<sup>109</sup>
140. In respect, Respondent’s expert on British Columbia law states the following: “*With respect to the NRAR, there is evidence that at least US\$74,000 was paid by April 2002. In the absence of further evidence, I assume that the amounts received were sufficient or, if insufficient, the shortfall was waived, as the documents exchanged between Belmont and EuroGas subsequent to the Share Purchase Agreement make no mention of this shortfall.*”<sup>110</sup> Mr. Anderson’s inference is startling, to say the least. If one were to follow his logic, the absence of evidence of the payment of any amount would be the best evidence of the payment of the full amount due. This cannot stand. In the absence of subsequent consideration, Belmont would not have had any reason to waive its

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<sup>107</sup> **Exhibit R-15**, Share Purchase Agreement between EuroGas Inc. and Belmont Resources Inc., dated March 27, 2001, Article 4(1)(c).

<sup>108</sup> **Exhibit C-294**, Belmont’s audited Consolidated Financial Statements Years Ended January 31, 2003 and 2002, p. 13; **Exhibit R-43**, Belmont’s Consolidated Financial Statements Years Ended January 31, 2004 and 2003, p. 15.

<sup>109</sup> The 1985 Company indeed made eleven payments to Belmont by check, for a total amount of only CND 114,000 (approximately USD 74,000). See **Exhibit C-293**, EuroGas Inc. check No. 001 dated May 30, 2001 for CND 25,000; EuroGas Inc. check No. 010 dated June 8, 2001 for CND 5,000; Bank of Montreal check No. 011 dated June 11, 2001 for CND 5,000; Bank of Montreal check No. 015 dated June 22, 2001 for CND 25,000; Bank of Montreal check No. 019 dated June 29, 2001 for CND 5,000; EuroGas Inc. check No. 0030 dated October 18, 2001 for CND 4,000; EuroGas Inc. check No. 0041 dated October 29, 2001 for CND 15,000; EuroGas Inc. check No. 0057 dated November 22, 2001 for CND 5,000; EuroGas Inc. check No. 0061 dated December 13, 2001 for CND 10,000; EuroGas Inc. check No. 0083 dated January 14, 2002 for CND 5,000; and EuroGas Inc. check No. 0134 dated April 22, 2002 for CND 10,000.

<sup>110</sup> Expert Report of John Anderson, ¶ 14.



entitlement to the remaining USD 26,000 of the NRAR due by the 1985 Company under the SPA.

141. Mr. Anderson's reference to "*letters from Belmont to EuroGas on November 8, 2003 and April 27, 2004, [which] only identify the breach of the advance royalty obligation under section 4.1(d) of the Share Purchase Agreement [and in which] [t]here is no mention of payment of the remainder of the NRAR,*" in no way supports his position that Belmont waived the payment of the USD 26,000 balance. In fact, the letter of April 27, 2004 expressly stated that "[e]xcept as provided in this Letter of Understanding ('LOU'), all other terms and conditions of the March 27/01 Share Purchase Agreement and November 8/03 Agreement shall continue to have the same effect and force as though the parties had not entered into this LOU,"<sup>111</sup> including the payment of the outstanding amount of USD 26,000 as non-refundable royalty payment. In any event, there is no ground to assume an implicit waiver of any of the conditions stipulated in the SPA.
142. As a result of the 1985 Company's failure to pay the USD 100,000 non-refundable advance royalty and in accordance with Article 6.1 of the SPA, Belmont did not deliver in trust to Rozmin's solicitor the transfer documentation necessary for the transfer of its 57% interest in Rozmin to the 1985 Company.
143. Second, the 1985 Company's obligation to pay a 2% royalty over talc gross sale revenue (as required under Article 2.1(d) of the SPA) was never performed, as the mine never went into commercial production, and the 1985 Company never made any USD 10,000 advance royalty payment for each month of delay in achieving commercial production (as required under Article 4(d) of the SPA).
144. Third, Belmont was never able to recover 125% of its initial investment, equal to CND 3,000,000, and *the condition precedent to the transfer of Belmont's 57% interest in Rozmin to the 1985 Company, clearly spelt out as such under Article 6.1 of the SPA, was thus never satisfied*. In addition to the 12,000,000 Purchase Price Shares, in 2002, EuroGas issued and transferred to Belmont 3,830,000 restricted shares (in accordance

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<sup>111</sup> **Exhibit C-296**, Letter from Belmont Resources Inc. to EuroGas Inc. dated April 27, 2004.

with the guarantee provided for under Article 4.1(c) of the SPA).<sup>112</sup> By the end of 2003, however, Belmont was only able to convert the original 12,000,000 Purchase Price Shares into proceeds of approximately CND 1,379,690.<sup>113</sup> An outstanding balance of approximately CND 1,620,000 therefore remained to be paid out as part of the 1985 Company's monetary obligations under the SPA.

145. As set out below, correspondence between Belmont and the 1985 Company followed, but the 1985 Company never performed its outstanding obligations under the SPA and, as acknowledged by these parties throughout their exchanges, the 1985 Company never became the owner of Belmont's 57% interest in Rozmin.
146. On October 30, 2003, Belmont notified the 1985 Company of the latter's breach under Article 4.1(d) of the SPA, stating that up until October 27, 2003, the 1985 Company had accrued advance royalty payments in the amount of USD 180,000.<sup>114</sup> On November 8, 2003, in order to safeguard the Gemerská Poloma talc project, Belmont and the 1985 Company agreed, *inter alia*, to the following: (i) Belmont would provide financing in working capital so as to immediately comply with certain Slovak mining requirements for the extension and development of the mine, estimated to be around USD 150,000 to USD 200,000; (ii) for each USD 10,000 provided by Belmont to this effect, Belmont would reduce by 1% the ownership interest in Rozmin to be transferred to the 1985 Company under the SPA; and (iii) should the 1985 Company arrange and complete the sale of a portion of its interest or secure the financing of the Gemerská Poloma talc mine, then the 1985 Company would reimburse Belmont for all advances and Belmont's 57% interest in Rozmin would be transferred to the 1985 Company.<sup>115</sup>

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<sup>112</sup> **Exhibit C-295**, EuroGas Inc. Share Certificate No. 7945 dated December 3, 2002; **Exhibit C-294**, Belmont's audited Consolidated Financial Statements Years Ended January 31, 2003 and 2002, p. 13; **Exhibit R-43**, Belmont's audited Consolidated Financial Statements Years Ended January 31, 2004 and 2003, p. 15.

<sup>113</sup> **Exhibit R-43**, Belmont Resources Inc. Consolidated Financial Statements for Years Ended 31 January 2004 and 2003, p. 15.

<sup>114</sup> **Exhibit C-337**, Letter from Belmont Resources Inc. to EuroGas Inc., dated October 30, 2003.

<sup>115</sup> **Exhibit C-298**, Letter Agreement between Belmont Resources and EuroGas Inc. dated November 8, 2003.

147. EuroGas was, however, unable to sell its interest in Rozmin and did not provide any financing.<sup>116</sup>
148. Therefore, on April 27, 2004, in light of the 1985 Company's outstanding obligations under the SPA, the two companies agreed that the 1985 Company would: (i) pay the outstanding royalties of USD 10,000 amounting, as of April 27, 2004, to USD 250,000; (ii) reimburse CND 70,000, plus interest, injected by Belmont in Rozmin as advance working capital, amounting to CND 86,250; and (iii) pay CND 1,620,000 as the outstanding amount due under the SPA.<sup>117</sup>
149. With respect to the third item, Belmont and the 1985 Company therefore agreed that either the latter would pay Belmont the full guarantee amount of CND 1,620,000 (covering the difference between CND 3,000,000 and the actual proceeds of CND 1,379,690 from the sale of the 12,000,000 shares disposed of by Belmont), in which case Belmont would return to the 1985 Company the 3,830,000 common shares it held in guarantee, or receive 50% of CND 1,620,000 in cash "*in consideration for keeping the 3,830,000 EuroGas common shares Belmont [then held], and receipt of a Promissory Note for payment of the balance [...]*."<sup>118</sup> The agreement also provided that *legal title to the 57% interest in Rozmin would be transferred only once the remaining 50% would have been paid in accordance with the promissory note.*<sup>119</sup>
150. Belmont and the 1985 Company thus acknowledged that in April 2004, Belmont still owned its 57% interest in Rozmin. And on June 18, 2004, as the 1985 Company had not complied with any of the terms of the April 27, 2004 agreement, Belmont threatened "*offer for sale [its] 57% interest in Rozmin s.r.o. to any interested third*

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<sup>116</sup> Witness statement of Vojtech Agyagos, ¶ 29.

<sup>117</sup> **Exhibit C-296**, Letter of Understanding between Belmont Resources and EuroGas Inc. dated April 27, 2004.

<sup>118</sup> **Exhibit C-296**, Letter from Belmont Resources Inc. to EuroGas Inc. dated April 27, 2004; **Exhibit R-43**, Belmont's audited Consolidated Financial Statements Years Ended January 31, 2004 and 2003, p. 18. See also Witness statement of Vojtech Agyagos, ¶ 24.

<sup>119</sup> **Exhibit C-296**, Letter from Belmont Resources Inc. to EuroGas Inc. dated April 27, 2004 ("*Belmont agrees, once the remaining 50% is paid (Item3/Promissory Note) to transfer without any delay the recorded ownership of the 57% interest in Rozmin from Belmont to EuroGas Inc.*").

party”<sup>120</sup> if, by June 30, 2004, the 1985 Company were to not have performed the terms of the April 27, 2004 agreement.

151. As explained by Mr. Agyagos in his witness statement, the 1985 Company and Belmont eventually agreed that the latter would keep the 3,830,000 shares in the common stock of the 1985 Company instead of claiming the payment of CND 1,620,000.<sup>121</sup> Accordingly, by letter dated September 24, 2004, Mr. Rauball stated that the 1985 Company was ready to provide Belmont with the necessary documentation to authorize the completion of the transfer of 3,830,000 shares to Belmont, towards the transfer to the 1985 Company of the 57% interest in Rozmin, which still stood in the name of Belmont.<sup>122</sup>
152. By January 31, 2006, Belmont had disposed of all 15,830,000 shares of the 1985 Company, but had only recovered approximately USD 1,505,400.<sup>123</sup> In other words, Belmont was never able to sell EuroGas’ shares for the total amount of CAD 3,000,000, and the condition precedent, under the SPA, for the transfer of Belmont’s 57% shareholding interest in Rozmin to the 1985 Company was never satisfied.
153. As acknowledged by Respondent itself in its pleadings on provisional measures, as late as in 2006, the conditions to the transfer of Belmont’s 57% interest in Rozmin to the 1985 Company, under the SPA, had not yet been performed.<sup>124</sup> In particular, the condition precedent that Belmont sell the Purchase Price Shares for at least CND 3,000,000 was never satisfied. 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*

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<sup>120</sup> **Exhibit C-338**, Letter from Belmont Resources Inc. to EuroGas Inc., dated June 18, 2004.

<sup>121</sup> Witness statement of Vojtech Agyagos, ¶ 25.

<sup>122</sup> **Exhibit C-297**, Letter from EuroGas Inc. to Belmont Resources Inc., dated September 24, 2004, accepted and counter-signed by Mr. Agyagos on behalf of Belmont Resources Inc.

<sup>123</sup> **Exhibit R-44**, Belmont Resources Inc. Financial Statements for Years Ended January 31, 2006 and 2005, p. 14.

<sup>124</sup> Respondent’s Application for Provisional Measures and Opposition to Claimants’ Application for Provisional Measures, dated September 10, 2014, ¶¶ 41-43, emphasis added.

*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.*

*As of 31 January 2006, Belmont had disposed of all of the 15,830,000 EuroGas I shares for approximately US\$1,505,400.*<sup>125</sup>

154. It is surprising that Respondent would now call into question the accuracy of its own position.
155. Furthermore, Mr. Anderson's reliance on the 1985 Company's contacts with third parties for the sale of a portion of the shares in Rozmin, in support of Respondent's position that Belmont's 57% interest in Rozmin were effectively transferred to the 1985 Company, is unavailing. Both the October 30, 2003 and the April 27, 2004 letters referred to above anticipated the possibility that the 1985 Company obtain financing or arrange for the sale of a portion of the shares in Rozmin.<sup>126</sup> In accordance therewith, the 1985 Company contacted potential buyers.
156. Neither the conditions of the SPA nor the conditions of any subsequent agreement were ever performed. As a result, ownership of Belmont's 57% interest in Rozmin was never transferred to the 1985 Company, which is why Belmont remains, to date, registered as a shareholder of Rozmin.<sup>127</sup> In this respect, Respondent contends that in 2001, "*the registration of the change in ownership of shares in a limited liability company was not dispositive of ownership.*"<sup>128</sup> This is perfectly irrelevant: even assuming that Rozmin was under no obligation to register the change of ownership from Belmont to the 1985 Company, the absence of re-registration cannot in any way be deemed proof than an actual change of ownership occurred. Also, the fact that Belmont and EuroGas might have agreed, at one point in time, that "*Belmont [would] only receive 3.5% interest in*

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<sup>125</sup> Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, dated September 10, 2014, ¶¶ 41-43.

<sup>126</sup> **Exhibit C-337**, Letter from Belmont Resources Inc. to EuroGas Inc., dated October 30, 2003; **Exhibit C-296**, Letter of Understanding between Belmont Resources and EuroGas Inc. dated April 27, 2004.

<sup>127</sup> **Exhibit C-74**, Extract from the Business Register of the Slovak Republic, dated December 21, 2014.

<sup>128</sup> Respondent's Counter-Memorial, ¶ 141.

*any award that EuroGas obtains in this proceeding and will not be responsible for any of the costs of arbitration*”<sup>129</sup> has nothing to do with, and certainly is no evidence of, Belmont’s ownership of an interest in Rozmin or lack thereof.

157. Besides the fact that the 57% interest in Rozmin was never transferred to the 1985 Company, the latter also never acted as the beneficial owner of Belmont’s 57% interest in Rozmin.
158. Indeed, first, even after the execution of the SPA, Belmont continued to be involved in the management of the Gemerská Poloma talc deposit. As Mr. Agyagos explained in his witness statement of March 31, 2015, “*even after the conclusion of the SPA, EuroGas never had exclusive control over the allocation of working capital injected by Belmont, nor did EuroGas ever hold sole decision-making power with respect to exploration or mining activities at the Gemerská Poloma deposit. No decision related to the project was ever taken exclusively by EuroGas. All decisions were taken collectively.*”<sup>130</sup> In other words, Belmont never stepped back to allow the 1985 Company to take charge, *de facto*, of the management of the Gemerská Poloma talc deposit, and the 1985 Company never exerted exclusive control over Rozmin.
159. Second, the 1985 Company never reimbursed any of the advances of working capital in the Gemerská Poloma project, made by Belmont after the execution of the SPA:<sup>131</sup> not the injection of April 23, 2001,<sup>132</sup> not that of September 9, 2003,<sup>133</sup> not that of

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<sup>129</sup> Respondent’s Counter-Memorial, ¶ 138, referring to **Exhibit R-0158**, Belmont’s News Release, dated November 20, 2013.

<sup>130</sup> Witness statement of Vojtech Agyagos, ¶ 31.

<sup>131</sup> Prior to the SPA, Belmont had already made five injections of working capital into Rozmin, as the latter’s participating shareholder. First, on September 18, 2000, Belmont had made a contribution of approximately US\$ 32,750 (SKK 1,643,955.44; see **Exhibit C-217**, Monthly Report for the Activities of Rozmin sro of August and September 2000, dated October 18, 2000 and **Exhibit C-340**, Rozmin March 2001 Monthly Report dated April 3, 2001). Second, on September 26, 2000, Belmont had made another contribution of approximately US\$ 40,700 (SKK 2,033,611.55; see **Exhibit C-217**, Monthly Report for the Activities of Rozmin sro of August and September 2000, dated October 18, 2000). Third, on November 27, 2000, Belmont had made a contribution of approximately US\$ 32,600 (SKK 1,628,475.21; see **Exhibit C-341**, Rozmin November – December 2000 Monthly Report dated January 8, 2001). Fourth, on February 7, 2001, Belmont had made a contribution of approximately US\$ 50,000 (SKK 2,307,607.57; see **Exhibit C-342**, Rozmin’s October 2001 Monthly Statement – there is, however, no record of the actual credit in Rozmin’s bank statement).

<sup>132</sup> **Exhibit C-299**, Bank Statement dated April 23, 2001.

<sup>133</sup> **Exhibit C-300**, Rozmin s.r.o. Bank Statement from HVB Group, dated September 9, 2003.

November 13, 2003,<sup>134</sup> not that of November 27, 2003,<sup>135</sup> and not that of June 29, 2004.<sup>136</sup> None of these injections of capital was ever paid back to Belmont, be it by the 1985 Company or by any other entity.<sup>137</sup>

160. In support of its misguided position that “*Belmont sold its ownership in the alleged investment to EuroGas I in 2001 and thus does not own the alleged investment,*”<sup>138</sup> Respondent produced, together with its Counter-Memorial, an expert report prepared by Mr. John Anderson. Mr. Anderson presents his report as a legal expert opinion on the law of British Columbia. As far as the law of British Columbia is concerned, however, his opinion is strictly limited to the following one paragraph:

*Under British Columbia law, the interpretation of a contract is an objective exercise. Courts applying British Columbia law will:*

- (a) initially interpret a contract by giving the words of a contract their ordinary meaning;*
- (b) have reference to the contract as a whole in interpreting the words of a contract — individual words and phrases must be read in the context of the entire document;*
- (c) examine the factual circumstances that gave rise to the contract to assist in interpreting the contract; ambiguity is not a prerequisite to considering the surrounding circumstances, but these circumstances must not overwhelm the meaning of the contract; and*
- (d) give commercial efficacy to the parties’ agreement in business settings. Interpretation which is commercially absurd should be avoided, but the purpose of the interpretation is not to rewrite the contract nor relieve a party from the consequence of an improvident contract.*<sup>139</sup>

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<sup>134</sup> **Exhibit C-301**, Rozmin s.r.o. Bank Statement from HVB Group, dated November 13, 2003.

<sup>135</sup> **Exhibit C-302**, Rozmin s.r.o. Bank Statement from HVB Group, dated November 27, 2003.

<sup>136</sup> **Exhibit C-303**, Rozmin s.r.o. Bank Statement from HVB Group, dated June 29, 2004.

<sup>137</sup> See, *inter alia*, **Exhibit R-42**, Belmont Resources Inc. Consolidated Financial Statements for Years Ended January 31, 2005 and 2004, p. 16; **Exhibit C-296**, Letter from Belmont Resources Inc. to EuroGas Inc. dated April 27, 2004. See also the Witness Statement of Vojtech Agyagos, ¶ 33.

<sup>138</sup> Respondent’s Counter-Memorial, ¶ 128.

<sup>139</sup> Expert Report of John Anderson, ¶ 10; citations omitted.

161. There are no legal considerations in Mr. Anderson’s report other than the above. The rest of the report is constituted of references to the text of the SPA and of declarations made by Belmont and by the 1985 Company – as a matter of fact, precisely the same declarations that are quoted in Respondent’s Counter-Memorial. Mr. Anderson does not make a single comment as to the legal effect of such declarations under British Columbia laws, precisely because mere declarations by one party alone – be it in press releases, in financial statements, or even in criminal proceedings – cannot bind or create rights and/or obligations for the other party, and can therefore not have had the effect of actually transferring Belmont’s 57% interest in Rozmin to the 1985 Company.
162. Mr. Anderson’s conclusion, which would astonish anyone who has any knowledge of basic principles of contract law, are the following:

*[A] court applying British Columbia law, if asked to interpret the Share Purchase Agreement, would arrive at the conclusion that, at the time of Closing (as the term is defined in the Share Purchase Agreement):*

- (a) Belmont transferred to EuroGas ownership over Belmont’s 57% interest in Rozmin s.r.o. (“Rozmin”); and*
- (b) Belmont retained a security interest in the 57% interest, to secure EuroGas’ compliance with its covenants under sections 4.1(c) and 4.1(d) of the Share Purchase Agreement.*<sup>140</sup>

163. As noted above, Mr. Anderson starts his opinion by stating that under the law of British Columbia, “*the interpretation of a contract is an objective exercise,*”<sup>141</sup> “[c]ourts applying British Columbia law will [...] initially interpret a contract by giving the words of a contract their ordinary meaning [and] have reference to the contract as a whole in interpreting the words of a contract.”<sup>142</sup> He then nevertheless argues that the terms of the one provision of the SPA whose meaning is the “*crux of [his] opinion*”<sup>143</sup> – namely Article 6.1 – “*cannot be given their plain meaning.*”<sup>144</sup> Despite the crystal clear

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<sup>140</sup> Expert Report of John Anderson, ¶ 5.

<sup>141</sup> Expert Report of John Anderson, ¶ 10.

<sup>142</sup> Expert Report of John Anderson, ¶ 10(a) and (b).

<sup>143</sup> Expert Report of John Anderson, ¶ 16.

<sup>144</sup> Expert Report of John Anderson, ¶ 16.



language and meaning of Article 6.1 of the SPA – namely that *“the ownership of the Shares shall not pass to the Purchaser; and no instructions to proceed with the share transfer in the Slovak Republic District Court will be given to the Rozmin s.r.o. Solicitor, unless and until the Vendor has received 125% of its initial investment equal to CDN \$3,000,000 through the sale of the Purchase Price Shares”*<sup>145</sup> – Mr. Anderson maintains that *“the words cannot be given their plain meaning, that is, that a pre-condition to EuroGas actually receiving ownership of the 57% interest is that Belmont previously receives CAD\$3 million from the sale of the Purchase Price Shares.”*<sup>146</sup>

164. After having provided two *“reasons for why this cannot be the appropriate or correct interpretation,”* both of which presuppose that Article 6.1 be read in isolation from the rest of the SPA and that all other clauses thereof be disregarded (despite Mr. Anderson’s assertion that *“[c]ourts applying British Columbia law will [...] have reference to the contract as a whole in interpreting the words of a contract”*<sup>147</sup>), Mr. Anderson is however forced to acknowledge that Article 6.1 of the SPA must be read in conjunction with Article 4.1 of the SPA. And the content of Article 4.1 in fact makes it plain that the terms of Article 6.1 are to be given its ordinary meaning and that none of the reasons provided by Mr. Anderson to depart from a literal interpretation stands.
165. As mentioned above, Mr. Anderson lists two reasons to justify his position that the condition that Belmont receive CAD 3,000,000 from the sale of the Purchase Price Shares did not constitute a condition precedent to the transfer of Belmont’s 57% interest in Rozmin to the 1985 Company. Neither one of these two reasons stands if the SPA is read in its entirety.
166. The first reason given by Mr. Anderson is that *“the Purchase Price Shares could all be sold for less than the specified threshold of CAD\$3 million (as turned out to be the case) and then the condition would never be capable of being satisfied – in particular, the Purchase Price Shares, since they were all sold for less than the specified CAD\$3 million, could not thereafter generate any additional proceeds for Belmont to achieve*

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<sup>145</sup> **Exhibit R-15**, Share Purchase Agreement between EuroGas Inc. and Belmont Resources Inc., dated March 27, 2001, Article 6, emphasis added.

<sup>146</sup> Expert Report of John Anderson, ¶ 16.

<sup>147</sup> Expert Report of John Anderson, ¶ 10(b).

*the CAD\$3 million threshold.”*<sup>148</sup> This is simply inaccurate. Under the SPA, Belmont and the 1985 Company had agreed on specific terms precisely against the risk that Belmont would be unable to realize CAD 3,000,000 from the sale of the Purchase Price Shares. Indeed, Article 4(c) *in fine* of the SPA provided that in such a case, the 1985 Company would “*issue such additional common shares to compensate for any shortfall from the CDN\$3,000,000, with the deemed price of such shares to be the average weighted trading price for the 10 day period prior to the date of receipt of the written notice by the Purchaser.*”<sup>149</sup>

167. The second reason given by Mr. Anderson is that “*the Share Purchase Agreement contains no positive obligation on the part of Belmont to use reasonable efforts to sell the Purchase Price Shares with dispatch, or at all – with the potential illogical result that the 57% interest would never be transferred, despite EuroGas having delivered the Purchase Price Shares and otherwise having fully complied with its obligations under the Share Purchase Agreement.*”<sup>150</sup> This is, again, inaccurate and, in any event, no “reason” to alter the parties’ explicit agreement. Article 4(c) of the SPA was meant to be applied if Belmont were to be “*unable from the sale of the Purchase Price Shares to recover 125% of its initial investment in the Deposit equal to CDN\$3,000,000.*” This language implies that Belmont was under a duty to use reasonable efforts to recover 125% of its initial investment through the sale of the Purchase Price Shares.

168. Mr. Anderson’s conclusion that Belmont’s receipt of 125% of its initial investment, equal to CND 3,000,000, through the sale of the Purchase Price Shares, was not a condition precedent to the transfer of Belmont’s 57% interest in Rozmin on the ground that such an interpretation of the SPA would imply that “*EuroGas would have paid the NRAR, the Purchase Price Shares, and given the covenants regarding other royalties and registration rights, all as consideration under the Share Purchase Agreement, and would receive nothing in exchange,*”<sup>151</sup> is based on a gross misrepresentation of the facts. The 1985 Company never paid the full USD 100,000 royalty payment, which

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<sup>148</sup> Expert Report of John Anderson, ¶ 16(a).

<sup>149</sup> **Exhibit R-15**, Share Purchase Agreement between EuroGas Inc. and Belmont Resources Inc., dated March 27, 2001, Article 4.1(c).

<sup>150</sup> Expert Report of John Anderson, ¶ 16(b).

<sup>151</sup> Expert Report of John Anderson, ¶ 16(c).

was, in any event, as per clear contractual terms, “non-refundable;” it also never performed its obligation to pay a 2% royalty over talc gross sale revenue and never made any USD 10,000 advance royalty payment for each month of delay in achieving commercial production; and Belmont was never able to recover 125% of its initial investment through the sale of the Purchase Price Shares. The 1985 Company therefore did not perform its obligations under the SPA, the conditions for the transfer of Belmont’s 57% interest in Rozmin were consequently never satisfied, and Belmont remained the owner of this interest.

169. It is telling that instead of examining the SPA’s conditions or the parties’ performance thereof, Respondent solely relies, in its Counter-Memorial, on public statements made by Belmont to support its position that Belmont “*sold its alleged ‘investment’—a 57% interest in Rozmin—to EuroGas I in 2001.*”
170. In 2001 and 2002, when Belmont was still hopeful that the 1985 Company would perform its obligations under the SPA, it declared, as noted by Respondent, that it “[held] *the shares as a collateral measure only.*”<sup>152</sup> In this respect, Belmont explained, in its 2002 financial statement, that it held “*the Rozmin s.r.o. shares pending settlement of the amount of guarantee shares to be issued by EuroGas and completion of the U.S. registration statement which requires the inclusion of certain financial information from EuroGas.*”<sup>153</sup>
171. It was also at that time that, as noted by Mr. Anderson, one of the directors of Belmont was appointed to the board of directors of the 1985 Company.<sup>154</sup> As explained in a 2001 news release issued by Belmont, which clearly spelt out that Belmont had

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<sup>152</sup> Respondent’s Counter-Memorial, ¶ 132, referring to **Exhibit R-0114**, Belmont Resources Inc.’s Audited Consolidated Financial Statements Years Ended 31 January 2002 and 2001, note 2, p. 10.

<sup>153</sup> **Exhibit R-0114**, Belmont Resources Inc.’s Audited Consolidated Financial Statements Years Ended January 31, 2002 and 2001, note 2, p. 8. As noted above, in 2005, the 1985 Company had not yet performed all conditions of the SPA and Belmont’s interest in Rozmin had therefore not yet been transferred to the 1985 Company. Belmont therefore explained, in its year-end 2004 and 2005 financial statements, that “[t]he collateral security interest is not considered by management to be a controlling or significant interest in the shares or operations of Rozmin, nor does management intend to take an active role in Rozmin through its security unless other avenues of recovery are exhausted and the uncertainties over ownership of Rozmin are resolved” (**Exhibit R-0042**, Belmont Resources Inc. Consolidated Financial Statements for Years Ended 31 January 2005 and 2004, p. 15)

<sup>154</sup> Expert report of John Anderson, ¶ 20, referring to **Exhibit R-0114**, Belmont Resources Inc.’s Audited Consolidated Financial Statements Years Ended January 31, 2002 and 2001, note 2, p. 8.

*“conditionally accepted the sale of Belmont’s 57% interest in Rozmin s.r.o. to EuroGas, Inc.”*<sup>155</sup> the purpose of the appointment of the directors of Belmont to the board of the 1985 Company was to ensure that the conditions of the SPA would be duly performed by the latter.<sup>156</sup> Contrary to Mr. Anderson’s misleading allegations, the appointment of Mr. Agyagos on the board of the 1985 Company was decided when the SPA was concluded and before any of its conditions was performed, not thereafter and certainly not as a result of the actual transfer of Belmont’s interest in Rozmin, given that no such transfer ever took place.

172. Subsequent press releases issued by Belmont made it clear that Belmont continued to own the 57% interest in Rozmin. On January 18, 2005, Belmont declared: *“Belmont owns 57% of Rozmin s.r.o. which holds the interest in Gemerska Poloma talc deposit concession.”*<sup>157</sup> Then, on August 25, 2008, Belmont declared: *“EuroGas, Inc. [...] announced that it has officially requested an acceleration of the return of the Gemerska Poloma talc mining concession to Rozmin s.r.o. by filing official requests with the Government of the Slovak Republic and the European Commission. EuroGas filed these requests on behalf of Rozmin, a company in which EuroGas owns 33% interest and has an agreement to acquire a further 57% interest from Belmont Resources Inc.”*<sup>158</sup>
173. In any event, as explained hereafter, the characterization of Belmont’s interest in Rozmin as a “collateral” is without any impact on the nature of this interest as an investment under the Canada-Slovak Republic BIT (see Section II(A)(2) below). In its Annual Information Form dated September 30, 2002, issued eighteen months after the execution of the SPA, Respondent itself noted that *“[t]he Issuer [Belmont] still [held]*

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<sup>155</sup> See **Exhibit R-0111**, News Release and Material Change Report issued by Belmont and filed on SEDAR in anticipation of the transaction, May 16, 2001; emphasis added.

<sup>156</sup> See **Exhibit R-0111**, News Release and Material Change Report issued by Belmont and filed on SEDAR in anticipation of the transaction, May 16, 2001 (*“Under the terms of the sale agreement Mr. Vojtech Agyagos a Managing Director of Rozmin s.r.o. and President of Belmont Resources Inc. will be joining the Board of Directors of EuroGas, Inc. to oversee the transfer of ownership and liaison with the Slovakian partners”*).

<sup>157</sup> **Exhibit C-343**, Belmont Resources Inc. press release, dated January 18, 2005.

<sup>158</sup> **Exhibit C-344**, Belmont Resources Inc. press release, dated August 25, 2008; emphasis added. See also **Exhibit C-345**, Belmont Resources Inc. press release, dated June 14, 2011.

the Rozmin shares pending realization of an agreed \$ amount upon sale of restricted common shares issued by EuroGas, Inc.”<sup>159</sup>

- b. After its dissolution, the 1985 Company could not issue new shares or acquire new assets and could therefore not have acquired Belmont’s interest in Rozmin

174. In its Counter-Memorial, Respondent argues that “[c]ontrary to Claimants’ suggestion at the provisional measures hearing, this SPA was signed and took effect before EuroGas I was dissolved on 11 July 2001, before the two-year period for seeking reinstatement expired under Utah law, and before EuroGas I was put into involuntary bankruptcy in 2004. Therefore, as of the date of the SPA, EuroGas I still had legal capacity to enter into the SPA to purchase the 57% interest.”<sup>160</sup>
175. To set the record straight, the following ought to be noted. At the hearing on provisional measures, Claimants did not deny that the 1985 Company lacked the capacity to enter into the SPA with Belmont. Rather, they explained that given the 1985 Company’s failure to perform the SPA’s conditions precedent to the transfer of Belmont’s 57% interest in Rozmin, the 1985 Company had not acquired this interest by the time of its dissolution, and that it could not have acquired it thereafter.
176. Indeed, under Utah law and as noted above, a dissolved company may enter into agreements after its dissolution only for purposes of winding up and liquidating its business and affairs. That does not include acquiring new assets or issuing new shares. Hence, after its dissolution in July 2001, the 1985 Company could no longer acquire Belmont’s 57% interest in Rozmin.
177. Assuming, for the sake of argument, that Respondent were to prevail with respect to its argument that EuroGas does not have standing in the present proceedings, Belmont’s standing would be all the more undisputable. Indeed, if the Tribunal were to agree with Respondent’s argument that the 1985 Company, which invested in the Gemerská Poloma project in the Slovak Republic and was dissolved in 2001, could not, after its dissolution, have entered into a joint resolution with EuroGas and performed a type-F

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<sup>159</sup> **Exhibit R-0116**, Belmont Annual Information Form, 30 September 2002, pp. 3, Section 2.2.; emphasis added.

<sup>160</sup> Respondent’s Counter-Memorial, ¶ 130.

reorganization, whereby EuroGas would assume all of the 1985 Company's assets, liabilities and issued stock certificates, the tribunal would also have to conclude that the 1985 Company could not have acquired Belmont's 57% interest in Rozmin after its dissolution.

178. Considering the foregoing, it is most surprising that Respondent would argue, on the one hand, that after its dissolution, the 1985 Company could not have merged with EuroGas,<sup>161</sup> while implying, on the other hand, that EuroGas could have issued new shares and acquired new assets after its dissolution.

179. Respondent surely cannot have it both ways.

**2. The characterization of Belmont's 57% interest in Rozmin as a collateral or as a security interest has no impact on its nature as an investment under international law**

180. Even if the Tribunal were to follow Mr. Anderson's conclusion that "*Belmont retained a security interest in the 57% ownership interest*,"<sup>162</sup> this would not change anything with respect to Belmont's standing in the present arbitration: Belmont would remain an "investor" for purposes both of the Canada-Slovak Republic BIT and of the ICSID Convention.

181. Under the Canada-Slovak Republic BIT, shares, stock, bonds, and debentures or any other form of participation in a company, business enterprise or joint venture constitute an investment (Article I(d)(ii) of the Canada-Slovak Republic BIT).

182. In *Saluka v. Czech Republic*, a company from the Japanese Nomura group of companies had acquired shares in one of the major Czech banks, namely IPB, and then transferred these shares to another company of the Nomura group, namely Saluka Investments BV ("Saluka"), a legal entity incorporated under the laws of The Netherlands. Saluka initiated arbitration proceedings against the Slovak Republic under the 1991 Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of The Netherlands and the Czech and Slovak Federal Republic (the "Netherlands-Czech Republic BIT"), which had remained in force between the

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<sup>161</sup> Respondent's Counter-Memorial, ¶¶ 44-91.

<sup>162</sup> Expert Report of John Anderson, ¶ 29.

Czech Republic and the Kingdom of The Netherlands after the separation of the Czech and Slovak Federal Republic into two separate Republic.<sup>163</sup> Under this BIT, the term “investment” covers, *inter alia*, “shares, bonds and other kinds of interests in companies and joint ventures” (Article 1(a)(ii)). The respondent objected to the tribunal’s jurisdiction, among others on the ground that “*the purchase of IPB shares was not an investment since Nomura/Saluka had invested nothing in IPB,*”<sup>164</sup> that “*the real party in interest in the arbitration was not the Claimant, Saluka, but Nomura, which was not an eligible claimant under the Treaty,*”<sup>165</sup> hence that “*Saluka had no real and continuous social and economic links with The Netherlands.*”<sup>166</sup> In this respect, the tribunal held the following:

*Even if it were possible to know an investor’s true motivation in making its investment, nothing in Article 1 makes the investor’s motivation part of the definition of an “investment”.*<sup>167</sup>

183. With respect to the respondent argument that “*Saluka itself invested nothing in IPB but was merely a conduit for the investment made by Nomura, which retained the voting rights associated with the IPB shares, participated in the management of IPB, and conducted all the dealings with the Czech authorities. Saluka was a mere surrogate for*

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<sup>163</sup> **Exhibit CL-151, Saluka Investments BV (The Netherlands) v. The Czech Republic**, UNCITRAL, Partial Award, dated March 17, 2006, ¶ 2.

<sup>164</sup> **Exhibit CL-151, Saluka Investments BV (The Netherlands) v. The Czech Republic**, UNCITRAL, Partial Award, dated March 17, 2006, ¶ 199(a).

<sup>165</sup> **Exhibit CL-151, Saluka Investments BV (The Netherlands) v. The Czech Republic**, UNCITRAL, Partial Award, dated March 17, 2006, ¶ 199(c).

<sup>166</sup> **Exhibit CL-151, Saluka Investments BV (The Netherlands) v. The Czech Republic**, UNCITRAL, Partial Award, dated March 17, 2006, ¶ 199(h). The tribunal noted: “*The argument that Saluka had invested nothing in IPB and for that reason the purchase of IPB shares could not be considered an ‘investment’ seems to [have been] based on two considerations. The first [was] that Nomura, in making the original purchase of IPB’s shares, and Saluka, in subsequently acquiring them, had no intention to make any true investment in the Czech Republic or in IPB’s banking operations. The acquisition of IPB shares was never intended, so it is said, to be anything more than a short-term holding of shares with a view to the making of a large profit from the sale of major assets controlled by IPB, to be followed by the sale of the shares at an appropriate moment; Nomura and Saluka, so it is said, showed by their conduct throughout the events to which this case relates that they were not true investors*” (**Exhibit CL-151, Saluka Investments BV (The Netherlands) v. The Czech Republic**, UNCITRAL, Partial Award, dated March 17, 2006, ¶ 207).

<sup>167</sup> **Exhibit CL-151, Saluka Investments BV (The Netherlands) v. The Czech Republic**, UNCITRAL, Partial Award, dated March 17, 2006, ¶ 209.

Nomura, being no more than an agent for Nomura and not itself a true investor,”<sup>168</sup> the tribunal held the following:

*To a considerable extent, this argument seeks to replace the definition of an “investment” in Article 2 of the Treaty with a definition which looks more to the economic processes involved in the making of investments. However, the Tribunal’s jurisdiction is governed by Article 1 of the Treaty, and nothing in that Article has the effect of importing into the definition of “investment” the meaning which that term might bear as an economic process, in the sense of making a substantial contribution to the local economy or to the wellbeing of a company operating within it. Although the chapeau of Article 2 refers to “every kind of asset invested”, the use of that term in that place does not require, in addition to the very broad terms in which “investments” are defined in the Article, the satisfaction of a requirement based on the meaning of “investing” as an economic process: the chapeau needs to contain a verb which is apt for the various specific kinds of investments which are listed, and since all of them are being defined as various kinds of investment it is in the context appropriate to use the verb “invested” without thereby adding further substantive conditions.*<sup>169</sup>

184. The Tribunal concluded that there was no reason to decline to consider the claimant’s holding of IPB shares as an “investment” within the meaning of the definition of that term in Article 1 of the Netherlands-Czech Republic BIT.

185. The same applies here, irrespective of whether Belmont’s interest in Rozmin was temporarily characterized as a security or collateral interest.

#### **B. THE TRIBUNAL HAS JURISDICTION *RATIONE TEMPORIS* OVER THE DISPUTE WITH BELMONT**

186. By way of reminder, a first Notice of Dispute was sent to the Slovak Republic on October 31, 2011.<sup>170</sup> 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

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<sup>168</sup> **Exhibit CL-151**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, dated March 17, 2006, ¶ 210.

<sup>169</sup> **Exhibit CL-151**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, dated March 17, 2006, ¶ 211.

<sup>170</sup> **Exhibit C-39**, Letter from EuroGas Inc. to the Government of the Slovak Republic, dated October 31, 2011.



local proceedings were still ongoing, and that it would be premature to engage in pre-arbitration settlement negotiations.<sup>171</sup> In fact, Respondent stated, as late as in January 2014, that it was unaware of the existence of a dispute with Belmont.<sup>172</sup> Yet, today, the Slovak Republic shamelessly claims that the dispute arose more than three years before the entry into force of the Canada-Slovak Republic BIT, *i.e.* before March 14, 2009, and that this Tribunal therefore lacks jurisdiction *ratione temporis* over Belmont.

187. 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 is of the most extraordinary motions that could be made by a State in investor-State arbitration. Surely the Slovak Republic cannot have it both ways and must be estopped from arguing, today, that the dispute does not fall within the temporal ambit of the Canada-Slovak Republic BIT (1).

188. In any event, while some of the events that gave rise to the dispute may have occurred prior to the March 14, 2009 critical date, the dispute itself arose only thereafter, and the Tribunal's jurisdiction *ratione temporis* over the dispute with Belmont is therefore undeniable (2).

**1. Respondent is estopped from arguing that the dispute does not fall within the temporal ambit of the 2010 Canada-Slovak Republic BIT**

189. A first Notice of Dispute was sent to the Slovak Republic on October 31, 2011.<sup>173</sup> As noted above, 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.<sup>174</sup> In the words of Mr. Kažimír, then Deputy Prime Minister and Minister of Finance of the Slovak Republic: “*the*

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<sup>171</sup> **Exhibit C-40**, Letter from the Slovak Republic, dated May 2, 2012.

<sup>172</sup> 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 Kažimír, Deputy Prime Minister and Minister of Finance of the Slovak Republic to Dr. Hamid Gharavi, Counsel for Claimants, dated January 28, 2014.

<sup>173</sup> **Exhibit C-39**, Letter from EuroGas Inc. to the Government of the Slovak Republic, dated October 31, 2011.

<sup>174</sup> **Exhibit C-40**, Letter from the Slovak Republic, dated May 2, 2012.

*administrative procedure before the Slovak mining offices is still pending, therefore any discussions regarding the alleged claims of EuroGas Inc. seems to me to be premature prior relevant decisions of local authorities are rendered.*”<sup>175</sup>

190. Thus, at a time when the 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. In its Counter-Memorial, the Slovak Republic however shamelessly claims that the dispute arose more than three years before the entry into force of the Canada-Slovak Republic BIT, *i.e.* before March 14, 2009, and that this Tribunal therefore lacks jurisdiction *ratione temporis* over Belmont.
191. When the Slovak Republic replied, on May 2, 2012, to EuroGas’ first Notice of Dispute dated October 31, 2011, the Supreme Court had rendered two decisions – on February 27, 2008 and May 18, 2011 – confirming that the revocation of Rozmin’s mining rights was in breach of Slovak procedural and substantive laws. On March 30, 2012, the DMO had nevertheless re-assigned exclusive mining rights over the Gemerská Poloma deposit to VSK Mining sro (“VSK Mining”), in total disregard of these Supreme Court decisions. The Main Mining Office confirmed the DMO’s decision on August 1, 2012. According to Mr. Kažimr’s letter of May 2, 2012, it is only when the DMO rendered this decision that the dispute became fully ripe.
192. The Slovak Republic cannot have it both ways. It cannot, today, argue in good faith that the dispute arose before March 14, 2009 and that Belmont should have initiated arbitration proceedings when Rozmin’s mining rights were revoked in 2005 when, on May 2, 2012, it claimed that the dispute was not yet ripe and, moreover, requested that the initiation of the arbitration proceedings be delayed. More specifically, Respondent 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. Respondent’s position is inconsistent and Respondent is therefore estopped from

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<sup>175</sup> **Exhibit C-40**, Letter from the Slovak Republic, dated May 2, 2012; emphasis added.

raising, in the proceedings, any timing issue with respect to the initiation of the proceedings. This is all the more so considering the following.

193. Respondent having failed to proceed with the reinstatement of Claimants' mining rights as per the Slovak Supreme Court's rulings, Claimants eventually sent the Slovak Republic a new Notice of Dispute on December 23, 2014.<sup>176</sup> Although the dispute and underlying facts described therein were exactly the same as the ones outlined by EuroGas in its first Notice of Dispute, the Slovak Republic requested that the Parties observe the six-month period of negotiation and consultation contemplated under the Canada-Slovak Republic BIT. Claimants expressed concerns that this was yet another attempt by the Slovak Republic to delay the initiation of proceedings, but ultimately were led to believe that an amicable settlement of the dispute could be contemplated. Respondent even went so far as to request that Claimants prepare a preliminary quantification of their damages. Claimants reluctantly complied with the request and agreed to meet with representatives of the Slovak Republic on April 16, 2014. Respondent, however, never reverted with a serious settlement proposal, multiplying instead meaningless requests for clarifications. It is now obvious that the Slovak Republic, which was represented at the time by counsel, was purposefully delaying the filing of the Request for Arbitration while preparing the seizure of Claimants' records that was carried out on July 2, 2014,<sup>177</sup> immediately after the filing of Claimants' Request for Arbitration, and which Respondent hoped would give it an unfair advantage, and while gathering information which it hoped would discredit EuroGas and Belmont in the eyes of the Tribunal.

## **2. The dispute arose after the March 14, 2009 cut-off date**

194. In its Counter-Memorial, Respondent argues that the Tribunal does not have "*jurisdiction over Belmont's claim because it predates the three-year 'reach-back' period under the Canada-Slovak BIT.*"<sup>178</sup> More specifically, Respondent argues that Claimants' "*claim for wrongful reassignment of Rozmin's Excavation Area in 2005*"<sup>179</sup>

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<sup>176</sup> **Exhibit C-42**, Letter from EuroGas Inc. and Belmont Resources Inc. to the Government of the Slovak Republic, dated December 23, 2013.

<sup>177</sup> **Exhibit C-51**, Minutes on Performance of House Search, dated July 2, 2014.

<sup>178</sup> Respondent's Counter-Memorial, ¶ 143.

<sup>179</sup> Respondent's Counter-Memorial, ¶ 146.

*“arose upon the assignment of the Excavation Area on 3 May 2005 and thus falls outside the Tribunal’s jurisdiction *ratione temporis* under the Canada-Slovak BIT.”*<sup>180</sup>

195. Respondent’s position is flawed for the reasons set out below.
196. First, Respondent confuses the events that led up to the dispute, whose timing is irrelevant for purposes of determining whether the Tribunal has jurisdiction *ratione temporis* over the dispute with Belmont, and the dispute itself, which must, under Article XV(6) of the 2010 Canada-Slovak Republic BIT, have arisen and did in fact arise after March 14, 2009.<sup>181</sup> For purposes of objecting to the Tribunal’s jurisdiction, Respondent indeed mistakenly focuses on what it refers to as the “‘*real cause*’ of the dispute between the Slovak Republic and Belmont [namely] the reassignment of the Excavation Area.”<sup>182</sup>
197. Article XV(6) of the Canada-Slovak Republic BIT clearly provides that it “*shall apply to any dispute which has arisen not more than three years prior to its entry into force.*”<sup>183</sup> The wording of this provision is unequivocal: what must not have arisen earlier than three years before the entry into force of the Treaty – that is, before March 14, 2009 – is the dispute itself. A distinction must therefore be drawn between the time of the events leading up to a dispute and the time when the dispute itself arises, only the latter being relevant to determine whether a tribunal has jurisdiction *ratione temporis*. As pointed out by Dolzer and Schreuer:

*The time of the dispute is not identical with the time of the events leading to the dispute. By definition, the allegedly illegal acts must have occurred some time before the dispute. Therefore, the exclusion of disputes occurring before the treaty’s entry into force should not be read as excluding jurisdiction over events occurring before that date.*<sup>184</sup>

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<sup>180</sup> Respondent’s Counter-Memorial, ¶ 148.

<sup>181</sup> **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*.

<sup>182</sup> Respondent’s Counter-Memorial, ¶ 159.

<sup>183</sup> **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*; emphasis added.

<sup>184</sup> **Exhibit CL-36**, Rudolf Dolzer/Christoph Schreuer, Principles of International Investment Law (2008), p. 44. See also **Exhibit CL-37**, Christoph Schreuer, “At What Time Must Jurisdiction Exist?” University

198. In *Maffezini v Spain*, the tribunal held that it had jurisdiction *ratione temporis* in a case in which, although the events on which the parties disagreed had begun prior to the entry into force of the relevant BIT, the dispute itself, in its technical and legal sense, had begun to shape thereafter. The tribunal clearly explained:

*[T]here tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. In time these events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter stage, even though the underlying facts predate them. It has also been rightly commented that the existence of the dispute presupposes a minimum of communications between the parties, one party taking up the matter with the other, with the latter opposing the Claimant's position directly or indirectly.*<sup>185</sup>

199. The cut-off date under a bilateral investment treaty such as the Canada-Slovak Republic BIT thus differs from the one that applied, for instance, in cases decided by the Permanent Court of International Justice (“PCIJ”) and the International Court of Justice (“ICJ”) under the optional clause of Article 36(2) of the PCIJ’s Statute and under the European Convention for the Peaceful Settlement of Disputes, respectively. Whether the tribunal had jurisdiction, in those cases, depended on the moment when the situation or facts that had given rise to the dispute had occurred, not when the dispute – necessarily subsequent to this situation or these facts – had arisen.<sup>186</sup>

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of Vienna 2013, p. 2; **Exhibit CL-38**, Christoph 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. 975; **Exhibit CL-23**, Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009), p. 96, ¶ 50.

<sup>185</sup> **Exhibit CL-39**, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, dated January 25, 2000, ¶ 96. See also **Exhibit CL-40**, *Duke Energy International Peru Investments No. 1, Ltd v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction, dated February 1, 2006, ¶ 148; **Exhibit CL-41**, *ABCI Investments NV v. Republic of Tunisia*, ICSID Case No. ARB/04/12, Decision on Jurisdiction, dated February 18, 2011, ¶ 168 (French version available at <http://www.italaw.com/sites/default/files/case-documents/italaw1346.pdf>).

<sup>186</sup> See, for instance, **Exhibit CL-33**, *Phosphates in Morocco*, Judgment of June 14, 1938, PCIJ, Series A/B, No. 74, discussed below at paragraph 200. In the *Electricity Company of Sofia and Bulgaria* case, the objection *ratione temporis* was based on the Belgian declaration of adherence to the Optional Clause of the PCIJ’s Statute, which recognized the jurisdiction of the Court “*in any disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification*” (**Exhibit CL-34**, *Electricity Company of Sofia and Bulgaria*, Judgment of April 4, 1939, PCIJ, Series

200. Respondent's reliance on the PCIJ's approach in *Phosphates of Morocco*<sup>187</sup> is therefore unwarranted. In this case, the French government disputed the PCIJ's jurisdiction based on the declaration by which the French government had accepted, under Article 36(2) of the PCIJ's Statute, the Court's compulsory jurisdiction in "*disputes which may arise after the ratification of the present declaration with regard to situations or facts subsequent to such ratification.*"<sup>188</sup> Accordingly, in Respondent's own words (referring to terms used by the PCIJ), the critical question was that of the timing of the dispute's "*real causes,*" not the timing of the dispute itself.<sup>189</sup> The Court interpreted the terms "*situations*" and "*facts*" as reflecting "*the intention of the signatory State to embrace, in the most comprehensive expression possible, all the different factors capable of giving rise to a dispute,*"<sup>190</sup> and upheld France's objection *ratione temporis* on the grounds that the facts with regard to which the dispute had arisen preceded the critical date.<sup>191</sup> Furthermore, it was also because the PCIJ's jurisdiction depended on the time at which the facts that had given rise to the dispute that the PCIJ rejected Italy's attempt to bring the dispute within its temporal jurisdiction by virtue of a plea of a denial of justice.<sup>192</sup>

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A/B, No. 77, p. 81). The Court stressed that "[t]he only situations or facts which must be taken into account from the standpoint of the compulsory jurisdiction accepted in the terms of the Belgian declaration are those which must be considered as being the source of the dispute" (**Exhibit CL-34**, *id.*, p. 82; emphasis added). In the *Case Concerning Certain Property*, the International Court of Justice had to determine whether it had jurisdiction under Article 27(a) of the European Convention for the Peaceful Settlement of Disputes. This provision provides that the Convention "*shall not apply to disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute.*" In this case, again, it was because the facts with regard to which the dispute had arisen were found to have predated the critical date that the objection *ratione temporis* was upheld (**Exhibit CL-35**, *Case Concerning Certain Property (Liechtenstein v. Germany)*, Judgment of February 10, 2005, ICJ Reports 2005, pp. 6 *et seq.*, ¶ 52).

<sup>187</sup> See Respondent's Counter-Memorial, ¶¶ 156-158.

<sup>188</sup> **Exhibit CL-33**, *Phosphates in Morocco*, Judgment of June 14, 1938, PCIJ, Series A/B, No. 74, p. 22; emphasis added.

<sup>189</sup> Respondent's Counter-Memorial, ¶ 157.

<sup>190</sup> **Exhibit CL-33**, *id.*, p. 24; emphasis added.

<sup>191</sup> **Exhibit CL-33**, *id.*, p. 29. In Respondent's own words, "*France [...] objected to Italy's claim on the ground that the dispute concerned facts that preceded the cut-off date of its ratification of the declaration of acceptance of PCIJ's jurisdiction*" (Respondent's Counter-Memorial, ¶ 157).

<sup>192</sup> **Exhibit CL-33**, *id.*, p. 28.

201. Similarly, Respondent’s reference to *African Holding Company v. Congo*<sup>193</sup> is to no avail. In the *Sentence sur les déclinatoires de compétence et la recevabilité*, which Respondent quotes, the tribunal explained that the relevant provision of the 1984 Treaty between the United States of America and the Republic of Zaïre on the Reciprocal Promotion and Protection of Investment, was Article VII(6), which provided that “[a]ux fins de toute procédure entamée devant le Centre ... toute société dûment constituée aux termes des lois et des règlements applicables de l’une ou de l’autre des parties mais qui, avant l’événement ou les événements donnant lieu au différend, était la propriété ou tombait sous le contrôle de ressortissants ou d’une société de ladite autre partie est traitée comme un ressortissant ou une société de ladite autre partie.” Thus, as the tribunal went on to explain, it was the date of the events that had led up to the dispute – not the dispute itself – that was critical to determine whether the tribunal had jurisdiction.
202. Respondent’s assertion that the “*expropriation was completed on 3 May 2005—the day when the DMO reassigned the Excavation Area to Economy Agency RV, s.r.o. (“Economy Agency”) and when Rozmin’s rights to the Excavation Area lapsed*”<sup>194</sup> is thus perfectly irrelevant to determine whether the Tribunal has jurisdiction *ratione temporis* over the dispute with Belmont, given that this assertion pertains to the facts that led up to the dispute, not to the dispute itself.
203. Similarly, the fact that on March 16, 2009, Mr. Agyagos may have told the Slovak criminal authorities that the Slovak Republic had caused EuroGas “direct damage”<sup>195</sup> is immaterial. Belmont does not dispute that some of the events that led to the dispute (and which caused Claimants to sustain substantial damages) did not occur prior to the March 14, 2009 cut-off date. This is, however, not to say that the present dispute arose before that date. Similarly, damages may very well be incurred before a dispute arises. This is in fact generally the case and it is precisely the fact that a party sustains damages as a result of the other party’s actions and/or omissions that leads up to a

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<sup>193</sup> **Exhibit RA-22**, *African Holding Company of America, Inc. and Societe Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No.ARB/05/21, Decision on Jurisdiction and Admissibility.

<sup>194</sup> Counter-Memorial, ¶ 150.

<sup>195</sup> **Exhibit R-0115**, Witness Statement of Mr. Vojtech Agyagos provided with respect to criminal proceedings No. PPZ-155/BPK-S-2008, dated March 16, 2009.

dispute. As a result, Respondent's reliance on the fact that "*Mr. Agyagos admitted that whatever alleged damage had been caused by the Slovak Republic had already been incurred before the Canada-Slovak BIT became applicable*"<sup>196</sup> does not support Respondent's position that the Tribunal does not have jurisdiction *ratione temporis* over the dispute with Belmont.

204. Second, Respondent is wrong when it argues that the articulation of claims is irrelevant for purposes of determining the moment when a dispute arises and that this moment is not dependent on opposing views being formulated in terms of international investment law.<sup>197</sup>

205. Schreuer describes the requirements of a "dispute" in the following passage:

*The dispute must relate to clearly identified issues between the parties and must not be merely academic. This is not to say that a specific action must have been taken by one side or that the dispute must have escalated to a certain level of confrontation, but merely that it must be of immediate interest to the parties. The dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim.*<sup>198</sup>

206. In accordance with the terms of Article 25 of the ICSID Convention, the dispute must indeed be of a legal nature,<sup>199</sup> that is, "[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."<sup>200</sup> Schreuer explains that "fact patterns alone do not determine the legal or non-legal character of a dispute. Rather, it is the type of claim that is put forward and the prescription that is invoked that decides whether a dispute is legal or not. [...] The dispute will only qualify as legal if legal rules contained, for

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<sup>196</sup> Respondent's Counter-Memorial, ¶ 144.

<sup>197</sup> Respondent's Counter-Memorial, ¶ 169.

<sup>198</sup> **Exhibit CL-23**, Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009), p. 94, ¶ 44; emphasis.

<sup>199</sup> **Exhibit CL-38**, Christoph 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. 965.

<sup>200</sup> **Exhibit CL-50**, Report of the Executive Directors on the ICSID Convention, ¶ 26.



*example, in treaties or legislation are relied upon and if legal remedies such as restitution or damages are sought.*”<sup>201</sup>

207. The Report of the Executive Directors on the ICSID Convention precisely clarifies 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.”<sup>202</sup> ICSID tribunals have accordingly consistently held that “the decisive factor in determining the legal nature of the dispute was the assertion of legal rights and the articulation of the claims in terms of law.”<sup>203</sup>
208. In *Toto Costruzioni v. Lebanon*, the tribunal drew a clear distinction between a “breach,” a “problem,” and a “dispute” and found that a dispute could only be deemed to have crystallized when one party had invited the other to have recourse to the

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<sup>201</sup> **Exhibit CL-38**, Christoph 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. 966.

<sup>202</sup> **Exhibit CL-50**, Report of the Executive Directors on the ICSID Convention, ¶ 26.

<sup>203</sup> **Exhibit CL-38**, Christoph 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; **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, ¶¶ 20-23; **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; **Exhibit CL-54**, *AES Corporation v. The Argentina Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, dated April 26, 2005, ¶¶ 40-47; **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; **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; **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; **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; **Exhibit CL-59**, *National Grid PCL v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, dated June 20, 2006, at ¶¶ 142 and 143, and 160; **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; **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. In **Exhibit CL-61**, *Helnan International Hotels A/S v The Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Jurisdiction, dated October 17, 2006, ¶ 52, 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.”

applicable bilateral investment treaty's dispute settlement clause. In the words of the tribunal:

*A “breach” arises when contractual or treaty obligations are not honored. A “problem” arises when that party’s claim is not accepted by the other side, i.e., when the engineer and the contractor have different views which need to be referred for final decision to the employer/administration. On September 12, 2002, Toto requested to be compensated for the additional works and the delay occurred.<sup>[...]</sup> However, the CDR did not take a position, so Toto invited it on June 30, 2004, to have recourse to Article 7 of the Treaty (“Settlement of Disputes”). Thus, the dispute, which had been in limbo for months, crystallized then.*<sup>204</sup>

209. When drafting Article XV(6) of the Canada-Slovak Republic BIT, the drafters were careful not to use the wording provided for in the Canadian Model BIT, which provides that a disputing investor may submit a claim to arbitration only if “*not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby.*”<sup>205</sup> Under Article XV(6) of the 2010 Canada-Slovak Republic BIT, knowledge of the breach or of the loss or damage is irrelevant.
210. Considering the foregoing, Respondent is wrong to maintain that the dispute arose upon Rozmin’s mere mention that a withdrawal of its mining rights would amount to a breach of international law. In the words of Schreuer, “[t]he dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim.”<sup>206</sup>

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<sup>204</sup> **Exhibit CL-62**, *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, dated June 7, 2012, ¶ 63.

<sup>205</sup> This wording was incorporated in the 2009 Agreement between the government of Canada and the government of the Republic of Latvia for the promotion and the protection of investments, the 2009 Agreement between Canada and the Czech Republic for the promotion and protection of investments, and the 2009 Agreement between the government of Canada and the government of Romania for the promotion and the reciprocal protection of investments, but not in the 2010 Canada-Slovak Republic BIT.

<sup>206</sup> **Exhibit CL-23**, Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009), p. 94, ¶ 44; emphasis.

211. Furthermore, in international law, a dispute arises only when “*the claim of one party was positively opposed by the other.*”<sup>207</sup> In other words, “*it is not sufficient for one party to assert that there is a dispute,*”<sup>208</sup> let alone that neither party assert the existence of a dispute but one merely seek from the other due compliance with its obligations. “*Whether there exists an international dispute is a matter for objective determination.*”<sup>209</sup> As explained by the tribunal in the *Railroad Development Corporation* case, a dispute is “*a conflict of views on points of law or fact which requires sufficient communication between the parties for each to know the other’s views and oppose them.*”<sup>210</sup> In *Helnan International Hotels v. Egypt*, the tribunal’s explanation was even more explicit:

[I]n 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 [sic] to have it resolved, whether or not by a third party.<sup>211</sup>

212. Considering the foregoing, a dispute cannot be deemed to have arisen upon Rozmin’s mere observation, in January 2005, that “*the unlawful withdrawal of the excavation area, which will evidently occur without any compensation, is in conflict with [bilateral*

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<sup>207</sup> **Exhibit CL-42**, *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment of December 21, 1962, ICJ Reports 1962, pp. 319 *et seq.*, p. 328; **Exhibit CL-43**, *Empresa Lucchetti SA and Lucchetti Peru SA v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, dated February 7, 2005, ¶ 48. See also **Exhibit CL-44**, *Northern Cameroons (Cameroon v. UK)*, Judgment of December 2, 1963, ICJ Reports 1963, pp. 15 *et seq.*, p. 27.

<sup>208</sup> **Exhibit CL-45**, *Nuclear Tests (Australia v France)*, Judgment of December 20, 1974, ICJ Reports 1974, pp. 253 *et seq.*, p. 271, ¶ 55; **Exhibit CL-46**, *Nuclear Tests (New Zealand v France)*, Judgment of December 20, 1974, ICJ Reports 1974, pp. 457 *et seq.*, p. 476, ¶ 58.

<sup>209</sup> **Exhibit CL-47**, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion of March 30, 1950, ICJ Reports 1950, pp. 65 *et seq.*, p. 74; **Exhibit CL-48**, *Case concerning East Timor (Portugal v. Australia)*, Judgment of June 30, 1995, ICJ Reports 1995, pp. 90 *et seq.*, p. 100, ¶ 22. See also **Exhibit CL-49**, *Lao Holdings N.V. v. Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, dated February 21, 2014, ¶ 124.

<sup>210</sup> *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, dated May 18, 2010, ¶ 129; emphasis added.

<sup>211</sup> **Exhibit CL-61**, *Helnan International Hotels A/S v The Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Jurisdiction, dated October 17, 2006, ¶ 52.

investment treaties concluded with the Federal Republic of Austria and with Canada] *that have precedence over the Slovak laws, i.e., also over Act No. 44/1988 Coll.*”<sup>212</sup> Neither did a dispute arise by way of Mr. Agyagos’ statement that “*the Slovak courts and the relevant international institutions to which [he] intend[ed] to subsequently refer, [would] make any allowances for the interests of the former Minister, and they [would] proceed strictly under law and international treaties on mutual support and protection of investments (because the shareholders of Rozmin a.s.ro. are foreign companies).*”<sup>213</sup> It is in fact absurd to suggest that a dispute crystallized when these one-sided observations, which were not accompanied by any claim, were made. Finally, the following statement made by EuroGas GmbH cannot be deemed to have triggered a dispute: “[T]he Ministry’s mining offices have *infringed upon the legal rights of Rozmin s .r.o . and its foreign shareholders and have opened the Slovak Republic to potentially class-action lawsuits with foreign investors which potentially will claim damages because of their investment in Rozmin s .r.o. and the loss of the mining concession as well as potential loss of profit from one of the largest talc mines in the world. [...] We therefore would like to believe that the Slovak Republic as a full Member of the European Union is finally also protecting the rights of foreign investors.*”<sup>214</sup> EuroGas GmbH is not even a party to the instant proceedings and neither any grievance nor any claim was formulated in the letter, which only hypothetically referred to potential future proceedings in which damages would potentially be claimed. As confirmed by the tribunal in *Teinver v. Argentina*, “[t]o instigate a dispute [...] refers to the time at which the disagreement was formed, which can only occur once there has been at least some exchange of views by the parties. It does not refer to the commission of the act that caused the parties to disagree, for the very simple reason a breach or violation does not become a ‘dispute’ until the injured party identifies the breach or violation and objects to it.”<sup>215</sup>

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<sup>212</sup> **Exhibit R-0161**, Rozmin’s complaint against DMO’s acts, dated January 13, 2005.

<sup>213</sup> **Exhibit R-0162**, Letter from Mr. Agyagos and Belmont to the Minister of Economy, dated November, 3 2005; emphasis added.

<sup>214</sup> **Exhibit R-0163**, Letter from EuroGas GmbH to the Minister of Economy of the Slovak Republic, September 22, 2008.

<sup>215</sup> **Exhibit RL-0109**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, dated December 21, 2012, ¶ 110.

213. Third, Respondent is wrong to argue that “[t]he dispute in fact arose as soon as Rozmin asserted conflicting claims immediately after the reassignment in 2005”<sup>216</sup> and to contend that “[i]t is wholly irrelevant that the dispute regarding the reassignment before Slovak authorities was not articulated in the terms of an investment treaty in 2005 and that no specific violations of international law were made at that time.”<sup>217</sup>
214. As a general rule, the fact that local proceedings may have been initiated prior to the critical date does not necessarily imply that a dispute had arisen before that date for purposes of determining the scope of application *ratione temporis* of a bilateral investment treaty.
215. Accordingly, in *Jan de Nul v. Egypt*, for instance, the tribunal held that it had jurisdiction under Article 12 of the bilateral investment treaty between the BLEU and Egypt – which provided that it would not apply to disputes that had arisen prior to its entry into force, that is, before 24 May 2002 – despite the fact that a dispute between the parties had been submitted to local courts well before the entry into force of the said treaty. Indeed, at that time, the dispute was pending before the Administrative Court of Ismaïlia, which eventually rendered an adverse decision in 2003, approximately one year after the new BIT’s entry into force. The Tribunal accepted the claimants’ contention that the dispute before it was different from the dispute that had been brought to the Egyptian court, explaining the following:

*The purpose of Article 12 of the 2002 BIT 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. [...]*

*In the present case, 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.*

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<sup>216</sup> Respondent’s Counter-Memorial, ¶ 166.

<sup>217</sup> Respondent’s Counter-Memorial, ¶ 167.

*There is 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.*

*[...] The fact that the most important part of the Claimants' SoC is devoted to alleged BIT violations in connection with the very facts that founded the claim before the Ismaïlia court (and only a minor part to the alleged wrongdoings of the court system) does not change the situation. In Professor's Schreuer's words, the (relevant) fact is that "the domestic dispute antedated the international dispute and ultimately led towards it" [...].*

*[A]s set forth by the Claimants' legal expert, there is a clear trend of cases requiring an attempt to seek redress in domestic courts before bringing a claim for violations of BIT standards irrespective of any obligation to exhaust local remedies<sup>[...]</sup>. Although it agrees with the Respondent that there is no requirement for a mandatory "pre-trial" before the local courts, this consideration reinforces the Tribunal in its conclusion that the dispute only crystallized after 22 May 2003 when the Ismaïlia Court rendered its judgment.<sup>218</sup>*

216. Respondent falsely interpret the wording of the Canada-Slovak Republic BIT when it states "*the Canada-Slovak BIT expressly distinguishes between the moment when a dispute is initiated, i.e., notified to the host state and articulated in terms of the investment treaty, and the moment when the dispute arises.*"<sup>219</sup> A plain reading of Articles X(2) and XV(6) of the Canada-Slovak BIT indicates that a distinction is not to be drawn between the terms "initiate" and "arise," but rather between the terms "submit" and "initiate," and that the latter term is to be assimilated with the term "arise."
217. Indeed, Article XV(6) provides that "[u]pon the entry into force of this Agreement, the Agreement between the Government of Canada and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments, *done at*

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<sup>218</sup> **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, ¶¶ 116-121.

<sup>219</sup> Respondent's Counter-Memorial, ¶ 167.

*Prague on 15 of November 1990 [(the “1990 Canada-Slovak Republic BIT”)], shall be terminated except that its provisions shall continue to apply to any dispute between either Contracting Party and an investor of the other Contracting Party that has been submitted to arbitration pursuant to that Agreement by the investor prior to the date that this Agreement enters into force. Apart from any such dispute, this Agreement shall apply to any dispute which has arisen not more than three years prior to its entry into force.”* In other words, whereas the provisions of the 1990 Canada-Slovak Republic BIT are to apply to a dispute that arose and was submitted to arbitration prior to the entry into effect of the Canada-Slovak Republic BIT, the provisions of the latter BIT are to apply to a dispute that arose not more than three years prior to its entry into force but which was only submitted to arbitration thereafter. As per Article X(2) of the Canada-Slovak Republic BIT, the outset of the dispute – i.e., the moment when the dispute arises or is “initiated” – corresponds to the moment one party articulates its claims, which triggers the parties’ duty to engage in settlement negotiations (Article X(1)) for a period of six months (Article X(2)).

218. It is also of relevance that Article X(5) of the Canada-Slovak Republic BIT provides that to “*submit a dispute under this Article to arbitration,*” an investor need not waive its right to initiate or continue “*procedures for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Contracting Party.*” Local proceedings and arbitration proceedings may thus take place simultaneously even if they both pertain to a “*measure of the disputing Contracting Party that is alleged to be a breach referred to in paragraph 1 of this Article,*” provided that the relief sought by the investor before local courts (for instance, performance in kind) differ from the relief sought in the arbitration proceedings, namely the payment of damages. It would actually be incongruent to interpret the Canada-Slovak Republic BIT – which expressly provides that a party need not waive the right to initiate or continue local proceedings to submit a dispute to arbitration – as implying that if local proceedings, in the context of which performance in kind is requested, have been initiated more than three years before the entry into effect of the BIT, the investor is definitely precluded from seeking monetary compensation by way of arbitration, when nothing in the BIT suggests such an interpretation.

219. *In casu*, the dispute before Slovak local courts and the present dispute differ *ratione personae* and *ratione materiae*.
220. The disputes are not the same *ratione personae* as Belmont was not a party to the local proceedings. 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 Ismailia 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, whereby the former would have alleged a breach by the latter of its international obligations, and the latter would have disputed the existence of such a breach.
221. 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. 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.<sup>220</sup>
222. In this respect, Respondent's *post facto* argument that "[t]he Slovak Republic's letter related solely to the claims of EuroGas II, not Belmont"<sup>221</sup> is to no avail. Respondent cannot argue, on the one hand, that the dispute arose for both claimants when Rozmin's mining rights were revoked, but then contend that Respondent's position, laid down in its letter of May 2, 2012, is irrelevant for purposes of assessing the tribunal's jurisdiction over Belmont on the ground that this letter related to EuroGas' claims, not to Belmont's, when Belmont's claims are the very same as those of EuroGas.

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<sup>220</sup> **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.

<sup>221</sup> Respondent's Counter-Memorial, ¶ 183.



Furthermore, Respondent cannot reasonably claim that the position it took in its letter of May 2, 2012 would not have applied to Belmont, when Respondent itself argues, with respect to EuroGas, that the dispute arose when a third party – neither EuroGas nor Belmont, but rather EuroGas GmbH – made a vague reference to potential claims of “foreign investors” against the Slovak Republic.<sup>222</sup>

223. As to Respondent’s argument that “*the Slovak Republic’s statements were limited to the possibility of settlement discussions*,”<sup>223</sup> it cannot reasonably stand. If the dispute was not ripe for negotiations, it cannot possibly have been ripe for submission to arbitration, which ought to be preceded by settlement negotiations.
224. Finally, Respondent’s allegation that “*the Slovak Republic’s letter concerned the requirement of finality for a Denial-of-Justice Claim rather than jurisdiction ratione temporis*”<sup>224</sup> cannot stand. Irrespective of the label that Respondent is attempting to place, today, on the May 2, 2012 letter, for purposes of its objection to the tribunal’s jurisdiction over Belmont, this letter’s content related to the ripeness of the dispute, which Respondent clearly disputed at the time, that is, more than two years after the entry into effect of the Canada-Slovak Republic BIT.
225. The local proceedings were concluded only on August 1, 2012, when the Main Mining Office confirmed the decision of the District Mining Office to award mining rights to VSK Mining. Thereafter, as late as on January 28, 2014, the Deputy Prime Minister and Minister of Finance of the Slovak Republic stated that 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.*”<sup>225</sup> Thus, almost two years after the entry into force of the Canada-Slovak Republic BIT, Respondent claimed to have been unaware of the existence of a dispute between itself and Belmont. There can therefore not have been a “legal dispute” as defined above, as Belmont would have had to have raised a breach by Respondent and Respondent would have had to have opposed it. By

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<sup>222</sup> See Respondent’s Counter-Memorial, ¶ 174.

<sup>223</sup> Respondent’s Counter-Memorial, ¶ 183.

<sup>224</sup> Respondent’s Counter-Memorial, ¶ 183.

<sup>225</sup> **Exhibit C-59**, Letter from Mr. Peter Kažimír, Deputy Prime Minister and Minister of Finance of the Slovak Republic to Dr. Hamid Gharavi, Counsel for Claimants, dated January 28, 2014.

Respondent's own admission, neither one of these conditions was met in January 2014, that is, almost two years after the entry into force of the Canada-Slovak Republic BIT.

226. *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 possible and would not have been awarded in arbitration proceedings under either one of the BITs on which Claimants hereby rely.
227. *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.*”<sup>226</sup>
228. In the present instance, it is perfectly incongruent to argue that the dispute under the Canada-Slovak Republic BIT had crystallized before the completion of the local proceedings. It is indeed absurd to argue that Claimants should have launched arbitration proceedings before Rozmin had even sought the reinstatement of its mining rights before local courts.
229. After Rozmin's mining rights were revoked in January 2005, domestic proceedings were launched in the Slovak Republic by Rozmin on the ground – to be repeatedly declared well-founded by the Slovak Supreme Court – that the revocation of Rozmin's mining rights and their allocation to another entity was in breach of Slovak domestic

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<sup>226</sup> **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, ¶ 117; emphasis added.

laws. After the first February 27, 2008 decision of the Supreme Court, which cancelled the DMO's decision to assign the Gemerská Poloma "concession" to Economy Agency on the ground that this decision was in breach of Slovak law,<sup>227</sup> Rozmin had all the more reason to seek the reinstatement of its mining rights by the DMO. As mentioned above, Respondent itself took the position, in a letter dated May 2, 2012, that is, in a letter sent after the entry into force of the Canada-Slovak Republic BIT, that the dispute was not ripe as long as domestic proceedings were ongoing.<sup>228</sup> These proceedings were concluded only on August 1, 2012, when the MMO confirmed the DMO's decision to award mining rights to VSK Mining.

230. As long as there was a chance of reinstatement of Rozmin's rights through local court proceedings, the dispute was not ripe for purposes of arbitration. The fact that "*the taking was performed abruptly, without warning or prior notice, let alone an invitation to cure any default or an opportunity for Rozmin or Claimants to set out their position as required by the most basic rules of due process*"<sup>229</sup> does not change this. Indeed, if the dispute were deemed to have arisen at the time of the taking of Rozmin's mining rights, this means that Claimants would have had to launch arbitration proceedings to claim compensation, but would inevitably have had to stay the proceedings until a determination would have been issued at the local level to determine whether Rozmin could in fact obtain the reinstatement of its right,s and to assess the extent of the damage sustained by Claimants as a result of Respondent's breach of its international obligations.

231. Respondent has itself acknowledged that a dispute arises when there are "*conflicting factual claims bearing on the relevant rights and obligations*."<sup>230</sup> The relevant rights and obligations in the local proceedings (Rozmin's rights and the State's obligations under Slovak law) were 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

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<sup>227</sup> **Exhibit C-33**, Decision of the Supreme Court of the Republic of Slovakia, dated February 27, 2008 (Ref. 6Szo/61/2007-121).

<sup>228</sup> **Exhibit C-40**, Letter from the Slovak Republic, dated May 2, 2012.

<sup>229</sup> Claimants' Memorial, ¶ 6, quoted in Respondent's Counter-Memorial, ¶ 152.

<sup>230</sup> Respondent's Reply Application for Provisional Measures and Rejoinder Opposition to Claimants' Application for Provisional Measures, dated November 21, 2014, ¶ 64.

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.

232. In its Counter-Memorial, Respondent however argues that “[i]t is wholly irrelevant that the dispute regarding the reassignment before Slovak authorities was not articulated in the terms of an investment treaty in 2005 and that no specific violations of international law were made at that time.”<sup>231</sup> In support of its revised position, Respondent refers to *Lucchetti v. Peru*. The factual background of that case however fundamentally differs from that of the present case.
233. First, whereas the claimant was the same in the local proceedings and in the arbitration proceedings in *Lucchetti v. Peru*, Rozmin was the claimant in the local proceedings and EuroGas and Belmont are the claimants in the instant arbitration proceedings. Second, whereas in the *Lucchetti v. Peru* case, no bilateral investment treaty was in force at the time of a pre-Treaty dispute before local courts, in the present case – just as, in fact, in the *Jan de Nul* case – a prior bilateral investment treaty was in force. The rationale of the retroactive application, under Article XV(6) *in fine* of the Canada-Slovak Republic BIT, of this Treaty, differs from the rationale of Article 2 of the Peru-Chile BIT, which provides that “[t]his Treaty [...] shall not [...] apply to differences or disputes that arose prior to its entry into force.” The tribunal clearly explained the purpose of the *ratione temporis* reservation of Article 2 of the Peru-Chile BIT, namely that an investor may not invoke international law guarantees that simply did not exist when the dispute arose. In the words of the tribunal:

*Lucchetti did not have an a priori entitlement to this international forum. It cannot say that it made its investment in reliance on the BIT, for the simple reason that the treaty did not exist until years after Lucchetti had acquired the site, built its factory, and was well into the second year of full production. It cannot conceivably contend that it invested in reliance on the existence of this international remedy. The only question entertained by this Tribunal is precisely whether the claim brought by Lucchetti falls within the scope of Peru's consent to international adjudication under the BIT. Lucchetti has not satisfied the Tribunal that this is the case, and thus finds*

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<sup>231</sup> Respondent's Counter-Memorial, ¶ 167.

*itself in the same situation as it would have been if the BIT had not come into existence.*<sup>232</sup>

Accordingly, since no BIT claim could possibly have been formulated before the entry into effect of the Peru-Chile BIT, the tribunal could not conclude that a new dispute had arisen merely on the ground that BIT claims were articulated after this BIT's entry into effect.

234. The situation that the tribunal had to consider in *Lucchetti v. Peru* thus differed radically from the one in the present case, as well as from the one in the *Jan de Nul* case, in which the tribunal held that it had jurisdiction despite the fact that a dispute between the parties had been submitted to local courts well before the entry into force of the bilateral investment treaty between the BLEU and Egypt (see paragraph 125 above). In the present case and in the *Jan de Nul* case, a first bilateral investment treaty was succeeded and replaced by a second one. Thus, even prior to the entry into effect of the second BIT – the Canada-Slovak Republic BIT in the present case – the investors did make their investments in reliance of a bilateral investment treaty and did have an *a priori* entitlement to the settlement of international disputes with the host State by way of arbitration. The purpose or the effect of the *ratione temporis* reservation of Article XV(6) therefore cannot be to deprive the investor of a means of enforcing its rights under international law. The purpose of the succession of two bilateral investment treaties was to ensure a continued protection of foreign investors and a continued access to arbitration to investors claiming that their rights have been breached by the host State.

235. Fourth, one of the many breaches raised by Claimants is the failure of Slovak mining authorities, hence of Respondent, to comply with the decisions of the Slovak Supreme Court. Damages sustained by Belmont as a result of the revocation of Rozmin's mining rights were indeed 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 Main

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<sup>232</sup> **Exhibit CL-43**, *Empresa Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, dated February 7, 2005, ¶¶ 61-62.

Mining Office confirmed the District Mining Office’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.<sup>233</sup> 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 Ismailia adopted the judgment which – according to the Claimants – definitively eliminated all prospects that the Claimants could obtain redress from the Egyptian State*”<sup>234</sup> – 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 definitively eliminated all prospects that Claimants could obtain redress from the Slovak State.

236. Indeed, 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 U.S.-Slovak Republic and 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 Canada-Slovak Republic. In this respect, Respondent mistakenly argues that “*the Slovak Republic’s administrative bodies and courts are not alleged to have worsened Claimants’ status after the reassignment of the Excavation Area.*”<sup>235</sup> They surely are.

237. Finally, Respondent cannot reasonably argue that Claimants’ claim related to the mining authorities’ failure to implement the Supreme Court’s decisions and to reinstate Rozmin’s rights was not ripe as long as all local remedies had not be exhausted,<sup>236</sup> and at the same convincingly maintain that Claimants should nonetheless have initiated

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<sup>233</sup> **Exhibit C-37**, Decision of the District Mining Office, dated March 30, 2012 (Ref. 157-920/2012).

<sup>234</sup> **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, ¶ 118.

<sup>235</sup> Respondent’s Counter-Memorial, ¶ 181.

<sup>236</sup> This argument is examined below at ¶¶ 602 *et seq.*

arbitration before the exhaustion of these remedies.<sup>237</sup> This is simply absurd: if there was no claim, there cannot have been a dispute. How could a dispute under the BIT have arisen upon the filing of an appeal against a low-level administrative decision if, to use Respondent's own words, "*low-level administrative or judicial decisions cannot constitute an international delict [...]*"?<sup>238</sup>

238. 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 was not ripe on the March 14, 2009 critical date, let alone had it crystallized in January 2005. It had in fact not even occurred by the time the Treaty entered into force. Accordingly, the dispute between Belmont and the Slovak Republic falls within the scope *ratione temporis* of the Canada-Slovak Republic BIT and the tribunal accordingly has jurisdiction in respect of Belmont.

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239. It is in the context described above that Claimants made their investment in the Slovak mining industry and that Respondent's breaches were committed, as set out in **Sections III and V** below.

### **III. FACTS**

#### **A. THE SLOVAK REPUBLIC'S INITIAL LACK OF INTEREST IN TALC EXPLORATION**

240. The discovery, through a State-sponsored exploration program, of the Gemerská Poloma deposit (the "Deposit") was an accident. While today, the Slovak Republic proudly describes the Deposit as one of the "*the largest European talc deposits*,"<sup>239</sup> at the time of its discovery, it was of very little interest to the State. It is reasonable to assume that the reason why the Slovak Republic initially had no interest in itself developing the Deposit was that it did not have the expertise and/or did not wish to

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<sup>237</sup> See Respondent's Counter-Memorial, ¶ 183.

<sup>238</sup> Respondent's Counter-Memorial, ¶ 21.

<sup>239</sup> **Exhibit C-346**, Slovak Minerals Yearbook 2005, Geological Survey of Slovak Republic, 2005, p. 119, available at [http://www.geology.sk/images/obchod/roc\\_ns/Roc\\_NS05.rar](http://www.geology.sk/images/obchod/roc_ns/Roc_NS05.rar).

incur the cost of further exploring the Deposit at a time when demand for talc was low.<sup>240</sup>

241. By way of reminder, in the mid-eighties, *Geologický prieskum, n. p. Spišská Nova Ves* (“Geologický prieskum”), a State institute responsible for the nation-wide exploration of mineral deposits, launched a surveying and exploration project in search for highly-thermal mineralization,<sup>241</sup> in particular tin and tungsten, in the Deposit.<sup>242</sup> The Gemerská Poloma Deposit was located in the cadastral districts of Gemerská Poloma and Henclová, in the districts of Rožňava and Spišská Nová Ves, respectively, between the Dlhá dolina region and the village of Henclová, some 20 kilometers from the city of Rožňava, under the main Volovec ridge.
242. In 1992, findings of highly-thermal mineralization were reported in a document titled “Final Report Gemerská Poloma Sn, PS,” and then again in 1993, in a document titled “Final Report SGR – Highly-Thermal Mineralisation, PS.” Based on these findings, a “protected mineral deposit” was defined by decision of the Spišská Nová Ves District Mining Office on November 3, 1993.<sup>243</sup> While it was searching for highly-thermal mineralization, Geologický prieskum also detected, in 1986, the presence of magnesite-talc mineralisation.<sup>244</sup> By the end of 1992, nineteen boreholes had been drilled,<sup>245</sup> eight of which yielded positive results.<sup>246</sup> As a result, on May 21, 1993, the Ministry of Environment of the Slovak Republic issued a “Certificate of Exclusive Mineral Deposit,” certifying that in the course of tin exploration, the presence of magnesite-talc mineralisation of the highest quality had been detected.<sup>247</sup>

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<sup>240</sup> See Witness Statement of Ondrej Rozložník, ¶ 10.

<sup>241</sup> Witness statement of Vojtech Agyagos, ¶ 7.

<sup>242</sup> Witness Statement of Ondrej Rozložník, ¶ 9.

<sup>243</sup> See **Exhibit C-23**, Agreement on the Transfer of the Gemerská Poloma Mining Area, dated June 11, 1997, which refers to the Decision of the District Mining Office dated November 3, 1993 (Ref. 2331-702-S-Fi/93).

<sup>244</sup> Borehole V-DD-10. See Witness Statement of Ondrej Rozložník, ¶ 10.

<sup>245</sup> Boreholes V-DD-20, V-DD-21, V-DD-22, V-DD-23, V-DD-24, V-DD-25, V-DD-26, V-DD-27, V-DD-28, V-DD-29, V-DD-30, V-DD-31, V-DD-32, V-DD-33, V-DD-34, V-DD-35, V-DD-36, VHO-1, and VHO-2.

<sup>246</sup> Boreholes V-DD-26, V-DD-27, V-DD-28, V-DD-29, V-DD-30, V-DD-33, V-DD-34, V-DD-36.

<sup>247</sup> **Exhibit C-118**, Certificate of Exclusive Mineral Deposit issued by the Ministry of Environment of the Slovak Republic on May 21, 1993 (Ref. 6.3/638-792/93).



243. The discovery of magnesite-talc mineralisation through the State's initial drilling eventually led to the preparation and issuance, on March 31, 1995, of a report entitled "Final Report and the Supply Calculation, Gemerská Poloma – Talc – VP," prepared by J. Kilík *et al.* (the "Kilík Report"),<sup>248</sup> for *Slovenská geológia, š. p. Spišská Nová Ves* ("Slovenská geológia"). The authors of the Kilík Report estimated the presence in the Deposit of approximately 146 million tons of Z3 "possible geological" or "non-economic" reserves, that is, of *low-grade* reserves of *any* kind of mineral, including magnesite, dolomite, shale, quartz, and talc, and of 85,384 million tons of mineralized rock containing an average of 60% of talc.<sup>249</sup> Both the 146.6 million tons figure of "non-economic reserves" of mineralized rock, and the 85,384 million tons figure of mineralized rock containing an average of 60% of talc, were approved by the Ministry of Environment on November 13, 1995.<sup>250</sup>
244. However, long before the issuance of the Kilík Report, the State had decided not to engage in talc exploration. As early as 1992, it had started to explore the possibility of handing over the financing of the project to interested private investors, and eventually had approached Dorfner,<sup>251</sup> a German world-renowned group of companies specialized in the mining and refining of kaolin and crystalline quartz sand, to that effect.
245. In fact, as of 1993, the State ceased nearly all financial involvement in the exploration of the talc deposit. Indeed, contrary to what Respondent suggests in its Counter-Memorial,<sup>252</sup> the State did not finance the drilling of any further borehole after 1993. The only exception is borehole V-DD-40, which again revealed the presence of magnesite-talc mineralization, and was drilled in 1994.<sup>253</sup>
246. Rather, and instead of financing any further exploration of the Deposit, as early as in 1992, the State allowed Dorfner to gather information and samples regarding the

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<sup>248</sup> **Exhibit C-119**, Ján Kilík *et al.*, "Final Report and the Supply Calculation, GEMERSKÁ POLOMA – Talc – VP," dated March 31, 1995.

<sup>249</sup> Witness Statement of Ondrej Rozložník, ¶ 15.

<sup>250</sup> **Exhibit C-120**, Decision of the Ministry of Environment of the Slovak Republic, dated November 13, 1995 (Ref. 2204/95-min). *See* Witness Statement of Ondrej Rozložník, ¶ 17.

<sup>251</sup> Witness Statement of Mr. Stephan Dorfner, ¶ 6.

<sup>252</sup> Respondent's Counter-Memorial, ¶ 210.

<sup>253</sup> **Exhibit R-120**, Ján Kilík *et al.*, "Final Report and the Supply Calculation, GEMERSKÁ POLOMA – Talc – VP," 31 March 1995, p. 36.

deposit from the Rožňava regional center of Slovenská geológia, for laboratory testing purposes.<sup>254</sup>

247. On February 28, 1994, Dorfner, Geologický prieskum and two Slovak companies, namely Hell, spol. Sro, and MR Trading, a.s., entered into an agreement pursuant to which the parties would assess the qualitative and quantitative parameters of the deposit and prepare a feasibility study.<sup>255</sup> While Geologický prieskum remained involved, it is undisputed that Dorfner was from there on the driving force behind the project.<sup>256</sup>
248. Indeed, it is Dorfner that provided the financing necessary to move forward with the additional exploration, and that approached the German group Thyssen Schachtbau (“Thyssen”), a world leader in the field of mining techniques, in particular with respect to building shafts and winzes, to start a technical evaluation of the deposit. This technical evaluation of the deposit was carried out with engineers employed by ÖIMC, an Austrian subsidiary of Thyssen.<sup>257</sup> It is also Dorfner that started, as of March 1994, re-assaying some of the State’s old drill cores and carrying out additional drilling (Borehole No. V-DD-37).<sup>258</sup> Finally, it is Dorfner that performed both vertical and horizontal cross-sections in order to calculate the deposit’s talc reserves, that tested new samples, and that evaluated the works that would need to be carried out to prepare the deposit for excavation.<sup>259</sup>
249. Thereafter, in December 1996, further to the technical evaluations initiated in 1993 and carried out in cooperation with ÖIMC, a feasibility study was compiled by geologists employed by Dorfner and Thyssen (the “Feasibility Study”).<sup>260</sup> This Feasibility Study was meant to provide technical, economical, and ecological data related to talc exploration and to the commercial development of the deposit, and was intended both for the companies that would run the project and for potential investors.

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<sup>254</sup> See Witness Statement of Ondrej Rozložník, ¶ 11.

<sup>255</sup> See Respondent’s Counter-Memorial, ¶ 207; **Exhibit R-121**, Feasibility Study Outline, TALC – GEMERSKA POLOMA, E. Haidecker, February 1997 (“Feasibility Study”).

<sup>256</sup> Witness Statement of Stephan Dorfner, ¶ 8.

<sup>257</sup> Witness Statement of Ondrej Rozložník, ¶ 14.

<sup>258</sup> Witness Statement of Stephan Dorfner, ¶ 8.

<sup>259</sup> Witness Statement of Ondrej Rozložník, ¶ 14.

<sup>260</sup> **Exhibit C-121**, Feasibility Study.

250. By way of reminder, the Feasibility Study estimated that the western side of the Mining Area (the “Western Area”) contained:

- 146.6 million tons of mineralized rock (“non-economic reserves”), as stated in the 1995 Killik Report approved on November 13, 1995 by the Ministry of Environment;
- 28.9 million tons of talc;
- approximately 9 million tons of mineralized rock containing more than 40% of talc.<sup>261</sup>

251. The Feasibility Study also identified a specific location, within the Western Area, where talc concentration was determined to be high and where the opening of the deposit and first extraction were planned to be carried out (the “Extraction Area”). The Feasibility Study indicated that the Extraction Area contained:

- 5,94 million tons of mineralized rock;
- 1,6 million tons of mineralized rock in rich ore zones with an average talc content of 60%;
- hence approximately 0,9 million tons of talc in such rich ore zones.<sup>262</sup>

252. Based on the foregoing, the Western Area was expected to have a lifespan, in terms of talc excavation, of several decades. As to the Extraction Area, it was expected to have a lifespan of approximately 13 years, assuming an extraction volume of 120,000 tons of raw material per year.<sup>263</sup>

253. The results of the exploration works carried out by Dorfner and ÖIMC were therefore very positive, and it was decided that Dorfner, ÖIMC, and Rima Muráň would

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<sup>261</sup> **Exhibit C-121**, Feasibility Study, p. 10.

<sup>262</sup> **Exhibit C-121**, Feasibility Study, p. 10.

<sup>263</sup> **Exhibit C-121**, Feasibility Study, p. 10.

incorporate a privately-owned Slovak company to proceed with the exploration of the Gemerská Poloma deposit.<sup>264</sup>

254. This privately-owned company would ultimately take the form of Rozmin, and all parties involved at the time understood that in order to proceed with the exploration of the Deposit, Rozmin would have to secure financing from third party investors. Indeed, although the Feasibility Study was comprehensive in nature,<sup>265</sup> it was still necessary *inter alia* to map the location and distribution of high-grade talc, primarily in the Extraction Area, in order to refine, if not confirm the estimation of this Area's talc reserves, to assess the quality of talc at Gemerská Poloma, to prepare a program of works for the excavation of the deposit, to evaluate and select the most economical talc processing method, and to plan how to market and distribute the talc that would be extracted from the deposit.

255. And, as demonstrated below, had it not been for the ultimate involvement of Claimants, Rozmin would never have been able to secure the said financing.

#### **B. INCORPORATION OF, AND AWARD OF MINING RIGHTS TO, ROZMIN**

256. The string of events that led to the incorporation of, and the award of mining rights to, Rozmin is not hardly disputed by Respondent. It is therefore only for purposes of comprehensiveness that the same is restated below.

257. Pending the incorporation of Rozmin, on July 25, 1996, the District Mining Office in Spišská Nová Ves assigned to Slovenská geológia's successor, namely *Geologická služba Slovenskej republiky* ("Geological Survey"), a 4,965 km<sup>2</sup> mining area (the "Gemerská Poloma Mining Area" or "Mining Area"), in accordance with Article 27(1) of Act No. 44/1988 on Protection and Utilization of Mineral Resources.<sup>266</sup>

258. Thereafter, Rozmin was legally constituted under the laws of Slovakia on May 7, 1997, with a registered capital of SKK 400,000,<sup>267</sup> for purposes of carrying out mining

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<sup>264</sup> See Witness Statement of Ondrej Rozložník, ¶ 16.

<sup>265</sup> Witness Statement of Ersnt Haidecker, ¶ 10.

<sup>266</sup> **Exhibit C-20**, Decision on the Assignment of the Gemerská Poloma Mining Area, dated July 25, 1996.

<sup>267</sup> Rozmin's original shareholders were Dorfner (with a 32.5% shareholding interest for which Dorfner made an initial investment of SKK 130,000), ÖIMC (with a 24.5% shareholding interest for which ÖIMC made an initial investment of SKK 98,000), and a Slovakia-incorporated company by the name of

activities in the Slovak Republic.<sup>268</sup> It immediately filed an application to acquire the rights over the Mining Area.

259. On May 14, 1997, pursuant to Article 4a of Act No. 51/1988 on Mining Activities, Explosives and on State Mining Administration (the “Act on Mining Activities”), the DMO issued Rozmin a general mining authorization (the “General Mining Authorization”) for an indefinite period of time.<sup>269</sup> This authorization encompassed, *inter alia*, the “opening, preparation and mining of the exclusive deposits.”<sup>270</sup>

260. Shortly thereafter, on June 5, 1997, the DMO approved the contractual transfer of the Gemerská Poloma Mining Area from Geological Survey to Rozmin.<sup>271</sup> Accordingly, on June 11, 1997, Geological Survey and Rozmin entered into an “Agreement for the Transfer of the Gemerská Poloma Mining Area” to Rozmin.<sup>272</sup> This Agreement stipulated, *inter alia*, that:

*As of the day of concluding this agreement, all rights and obligations concerning this mining area shall be transferred on to the acquirer, mainly the right to mine the exclusive deposit, the right to handle with mined minerals in the scope and under conditions determined by the decision about the mining area designation or determined at the time of its re-registration.*<sup>273</sup>

261. Rozmin thus held rights over the entire Mining Area, which contained the 146.6 million tons of non-economic reserves estimated in the Kilík Report and approved by the Ministry of Environment in 1995. On the same date, Geological Survey informed the

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Rima Muráň sro (with a 43% shareholding interest for which Rima Muráň sro made an initial investment of SKK 172,000). As further described below, Rima Muráň sro subsequently acted as Rozmin’s main contractor (*see* paragraphs 133 to 136 *infra*).

<sup>268</sup> **Exhibit C-21**, Memorandum of Association on the Establishment of the Company Rozmin sro, dated May 7, 1997. Rozmin’s registered seat and main office are located at Karadžičova 8/A, 821 08 Bratislava, Slovak Republic.

<sup>269</sup> This followed Rozmin’s request to the District Mining Office for a mining authorization, dated May 9, 1997 (Ref. RM/112/97 RNDr. Rozložník) (**Exhibit C-122**).

<sup>270</sup> **Exhibit C-22**, Mining Authorisation issued by the District Mining Office, dated May 14, 1997.

<sup>271</sup> **Exhibit C-123**, Letter from the District Mining Office to Geological Survey, dated June 5, 1997 (Ref. 1432-465-V/97).

<sup>272</sup> **Exhibit C-23**, Agreement on the Transfer of the Gemerská Poloma Mining Area, dated June 11, 1997.

<sup>273</sup> **Exhibit C-23**, Agreement on the Transfer of the Gemerská Poloma Mining Area, dated June 11, 1997, Section IV(2); emphasis added.

DMO of the execution of the Agreement for the Transfer of the Gemerská Poloma Mining Area to Rozmin.<sup>274</sup>

262. On June 24, 1997, this transfer was certified by the DMO.<sup>275</sup> The certificate confirmed that “*ROZMÍN, s.r.o., domiciled in Rožňava, ha[d] acquired [...] all rights under Art. 24 of Act No. 44/1988 on Protection and Utilization of Mineral Resources.*”<sup>276</sup> One of the said rights was the right to “*mine the exclusive deposit in the determined mining area,*” provided that Rozmin be granted by the DMO an authorization to carry out mining activities, in accordance with Article 10 of the Act on Mining Activities.<sup>277</sup> On July 10, 1997, the Department of Trade Licenses and Customer Protection of the Rožňava District Office also issued a Trade License to Rozmin for the performance of blasting activities.<sup>278</sup>
263. On October 31, 1997, November 3, 1997, and December 10, 1997, the Ministry of Health of the Slovak Republic,<sup>279</sup> Slovenský Plynárenský Priemysel šp (which stands for “Slovak Natural Gas Industry – State enterprise”) – Slovtransgaz Division,<sup>280</sup> Vychodoslovenské Energetické Závody (which stands for “Eastern Slovak Power Plants”),<sup>281</sup> and Slovenský Vodohospodársky Podnik (which stands for “Slovak Water Management Company – State enterprise”) – Povodie Hrona (the Hron River Basin)<sup>282</sup> consented in writing to Rozmin carrying out geological exploration and construction layout works.

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<sup>274</sup> **Exhibit C-124**, Letter from Geological Survey to the District Mining Office, dated June 11, 1997.

<sup>275</sup> **Exhibit C-24**, Certificate on acquisition of rights to the mining area issued by the District Mining Office, dated June 24, 1997 (Ref. 1520-465-V/97).

<sup>276</sup> *Ibid.*

<sup>277</sup> See Article 24(4) of Act No. 44/1988 on Protection and Utilization of Mineral Resources.

<sup>278</sup> **Exhibit C-125**, Trade License issued by the Rožňava District Authority of the Department of Trade Licenses and Customer Protection on July 10, 1997.

<sup>279</sup> **Exhibit C-126**, Letter from the Ministry of Health of the SR – Inspectorate of Spas and Springs to Rozmin, dated October 31, 1997.

<sup>280</sup> **Exhibit C-127**, Letter from Slovenský Plynárenský Priemysel šp (Slovak Natural Gas Industry) – Slovtransgaz Division to Rozmin, dated October 31, 1997.

<sup>281</sup> **Exhibit C-128**, Letter from Vychodoslovenské Energetické Závody (Eastern Slovak Power Plants) to Rozmin, dated November 3, 1997.

<sup>282</sup> **Exhibit C-129**, Letter from Slovensky Vodohospodársky Podnik (Slovak Water Management Company – State enterprise) – Povodie Hrona (Hron River Basin) to Rozmin, dated December 10, 1997.

264. On November 28, 1997, the Ministry of Environment of the Slovak Republic also issued a Decision on the Assignment of an Exploration Area, namely the Gemerská Poloma deposit, thus conferring upon Rozmin “*the exclusive right to perform geological work in order to search for talc deposit,*” as well as a “*pre-emptive right to the assignment of a mining area in order to exploit the explored talc deposit in this exploration area within six months of the date of approval of the calculation of reserves during the exploration period.*”<sup>283</sup>
265. This Decision on the Assignment of an Exploration Area confirmed the assignment of the Mining Area to Rozmin under the same conditions as the original assignment thereof to Geological Survey under the Decision dated July 25, 1996. The latter Decision arguably contained, as contended by Respondent, a requirement that “*opening works at the deposit Gemerska Poloma [be initiated] no later than on 31 July 1998.*”<sup>284</sup> However, Respondent does not identify the consequences under Slovak law of a failure to meet this requirement. Nor does the Decision of July 25, 1996, in which the section setting out the underlying reasoning of the DMO does not even mention this requirement, let alone provide an explanation/justification for the same. In fact, nowhere in the Decision dated July 25, 1996, is the validity of the assignment of the Exploration Area made conditional upon opening works being initiated before July 31, 1998. Moreover and in any event, the failure of Rozmin’s initial shareholders to meet this alleged requirement would have nothing to do with Claimants.
266. If anything, it would have been the inability of Rozmin’s initial shareholders to secure the necessary financing, from third party investor or otherwise, that prevented Rozmin from launching the opening works before July 31, 1998.

### **C. INABILITY OF ROZMIN’S ORIGINAL SHAREHOLDERS TO FIND INVESTORS**

267. By the admission of Respondent itself, the original shareholders of Rozmin were unable to secure the financing necessary to move forward with the project. This is further confirmed by one of Respondent’s key witnesses, namely Mr. Stephan Dorfner, who

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<sup>283</sup> **Exhibit C-130**, Decision of the Ministry of Environment of the Slovak Republic, dated November 28, 1997 (Ref. 3609/1327/97-3.3).

<sup>284</sup> **Exhibit C-20**, Decision on the Assignment of the Gemerská Poloma Mining Area, dated July 25, 1996.

“joined the project in Gemerska Poloma in 1992”<sup>285</sup> and was “responsible for ‘foreign activities’ of Dorfner Group in the Gemerska Poloma talc project”<sup>286</sup> at the time that Dorfner first got involved in the project in 1992.

268. The fact that Dorfner and the other original shareholders of Rozmin were unable to secure the necessary financing to move forward with the project is directly attributable to the fact that the data available at the time, though promising, did not meet the level of confidence necessary for potential third-party investors to agree to commit significant funds to the project. It is indeed undisputable, and in fact undisputed, that the data available at the time suggested that the exploitation of the deposit would be profitable (as demonstrated below at paragraphs 270 *et seq.*), but did not eliminate all risks associated with it. Additional data gathered by Claimants, as well as additional studies commissioned by them, however allowed them to raise this level of confidence to the satisfaction of potential third-party investors.
269. One of the first sources of financing considered by the original shareholders of Rozmin, namely Dorfner, ÖIMC, and Rima Muran, was the German State-owned company Deutsche Investitions- und Entwicklungsgesellschaft GmbH (“DEG”). DEG was and still is one of the largest European development finance institutions for long-term projects and company financing. It is a wholly-owned subsidiary of the German Kreditanstalt für Wiederaufbau, the largest national development bank in the world and, by total assets, the third largest bank in Germany. For more than 40 years, it has been financing and structuring the investments of private companies in developing and transitioning countries.
270. In 1997, DEG and Rozmin’s initial shareholders reached a preliminary agreement regarding the participation of DEG in Rozmin.<sup>287</sup> In this context, DEG requested that a due diligence report on the Feasibility Study, which it ultimately commissioned, be carried out by an independent German company, namely Hansa GeoMin Consult, GmbH (“Hansa GeoMin”). This independent review of the Feasibility by Hansa

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<sup>285</sup> Witness Statement of Stephan Dorfner, ¶ 3.

<sup>286</sup> Witness Statement of Stephan Dorfner, ¶ 3.

<sup>287</sup> Respondent’s Counter-Memorial, ¶ 227, **Exhibit R-122**, Share Purchase Agreement between DEG – Deutsche Investitions – und Entwicklungsgesellschaft mbH, Gebrüder Dorfner GmbH & Co. Kaolin-und Kristallquarzsand-Werke KG, ÖSTU Industriemineral Consult GmbH and RimaMurán s.r.o., 1997.



Geomin was approved by the shareholders of Rozmin during their first Shareholder Meeting on May 26, 1997.<sup>288</sup>

271. For purposes of this review, Hansa GeoMin “*studied in detail*” the Feasibility Study and all the available documentation in relation thereto.<sup>289</sup> In particular, it had the opportunity “*to inspect additional plans, sections, drawings and documents*” kept by Thyssen and Dorfner, to seek clarifications from those who had prepared the Feasibility Study at Thyssen and Dorfner, and to visit the Mining Area.<sup>290</sup>
272. Hansa GeoMin issued its final report in January 1998 (“the DEG Report”), which confirmed not only “*the existence of a huge talc deposit*” in the Mining Area, but also the “*technical and financial viability*” of the project.<sup>291</sup>
273. By way of reminder, the DEG Report addressed and examined *inter alia* the following:
- Talc mineralization and reserves: The Report confirmed the findings, in terms of mineral reserves in both the Mining Area and the Extraction Area, laid down in the Feasibility Study.<sup>292</sup>
  - Potential Market: The Report anticipated that the market would be the European market, to be supplied with 1.2 million tons of talc per year.<sup>293</sup>
  - Financial analysis: The Report, relying on the two stage investment program proposed in the Feasibility Study, found the sales price assumptions in the Feasibility Study to be very conservative, and therefore considered a 10% increase in the sales price. In respect of the financial viability of the Extraction Area, the Report further anticipated, based on a conservative assessment of talc

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<sup>288</sup> **Exhibit C-131**, Minutes of Rozmin’s Shareholder Meeting held on May 26, 1997, p. 4.

<sup>289</sup> **Exhibit C-137**, Analysis and Evaluation of the Feasibility Study Talk Gemerská Poloma, Slovakia, dated January 1998, p. 7.

<sup>290</sup> *Ibid.*

<sup>291</sup> *Ibid.*

<sup>292</sup> **Exhibit C-137**, Analysis and Evaluation of the Feasibility Study Talk Gemerská Poloma, Slovakia, dated January 1998, p. 5.

<sup>293</sup> **Exhibit C-137**, Analysis and Evaluation of the Feasibility Study Talk Gemerská Poloma, Slovakia, dated January 1998, p. 12 *et seq.*

prices in 1997 and a mine lifetime of 14.5 years, that the project would generate a yearly Internal Rate of Return on equity of at least 17.2%.<sup>294</sup>

274. Overall, the DEG Report concluded that the commercial development of the ore body would be profitable, considering the quantity and quality of talc contained in the deposit.<sup>295</sup>
275. Respondent does not seriously challenge the positive and encouraging nature of the DEG Report's findings.
276. At best, what Respondent suggests – in a rather convoluted and highly speculative manner – is that the limited reservations included by Hansa GeoMin in its Report with respect to the structure and shape of the deposit are the reasons why DEG “*ultimately decided not to invest in the project.*”<sup>296</sup>
277. This cannot be true. If that had been the case, Mr. Dorfner, who was at the time “*responsible for ‘foreign activities’ of Dorfner Group in the Gemerska Poloma talc project,*”<sup>297</sup> and therefore necessarily involved in the negotiations with DEG, would undoubtedly have confirmed the same in his witness statement. Yet he did not, and the only reasonable inference is that DEG’s decision not to invest in the project could not have been related to any alleged uncertainty as to the profitability of the deposit.
278. The fact that Hansa GeoMin took into consideration all potential elements of doubt with respect to the Deposit’s structure and shape, only gives credence to the independent and objective nature of its assessment. The undeniable reality is that, while Hansa GeoMin acknowledged that the structure and shape of the deposit in the Feasibility Study constituted “*an interpretation which [could] change*”<sup>298</sup> and that “*the*

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<sup>294</sup> **Exhibit C-137**, Analysis and Evaluation of the Feasibility Study Talk Gemerská Poloma, Slovakia, dated January 1998, p. 24.

<sup>295</sup> **Exhibit C-137**, Analysis and Evaluation of the Feasibility Study Talk Gemerská Poloma, Slovakia, dated January 1998, p. 5.

<sup>296</sup> Respondent’s Counter-Memorial, ¶ 228.

<sup>297</sup> Witness Statement of Stephan Dorfner, ¶ 3.

<sup>298</sup> **Exhibit C-137**, Analysis and Evaluation of the Feasibility Study Talk Gemerská Poloma, Slovakia, dated January 1998, p. 5.

*mining plan [was] based on this interpretation and [was] subject to change,*<sup>299</sup> notably due to potential folding and faulting in the deposit's structure, Hansa GeoMin nonetheless concluded that that available data was sufficient to confirm the profitability of the project, especially in light of the mining method envisaged, which would allow flexible and selective mining. More specifically, taking all existing data into consideration, the DEG Report concluded the following:

- the “*quantity of talc and quality of talc-magnesite deposit of Gemerska Poloma as described in the feasibility study is likely to be correct,*”<sup>300</sup>
- the “*dimension of this huge talc deposit with geological reserves of near to 150 million tons of mineralized rock is confirmed by a total of 40 boreholes,*”<sup>301</sup> and
- the “*proposed mining method [...] has the advantage to be extremely flexible for selective mining and to assure a mine output at a grade of 47% talc at a cut-off rate of 40%.*”<sup>302</sup>

279. Even Respondent's mining expert was compelled to acknowledge that “the analysis and evaluation of this Study confirms the results of the feasibility Study and the viability of the project.”<sup>303</sup>

280. For the above reasons, and regardless of the reasons why DEG “*ultimately decided not to invest in the project,*”<sup>304</sup> the findings of the DEG Report confirmed the very high value of the Deposit. These findings bear great probative value as the DEG Report was prepared long before any dispute or the prospect of an arbitration, and moreover by an independent and financially uninterested third party. For these very same reasons, the

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<sup>299</sup> **Exhibit C-137**, Analysis and Evaluation of the Feasibility Study Talk Gemerská Poloma, Slovakia, dated January 1998, p. 5.

<sup>300</sup> **Exhibit C-137**, Analysis and Evaluation of the Feasibility Study Talk Gemerská Poloma, Slovakia, dated January 1998, p. 17.

<sup>301</sup> **Exhibit C-137**, Analysis and Evaluation of the Feasibility Study Talk Gemerská Poloma, Slovakia, dated January 1998, p. 17.

<sup>302</sup> **Exhibit C-137**, Analysis and Evaluation of the Feasibility Study Talk Gemerská Poloma, Slovakia, dated January 1998, p. 6.

<sup>303</sup> Expert Report of Gregory Sparks, ¶ 43.

<sup>304</sup> Respondent's Counter-Memorial, ¶ 228.

DEG Report played a material role in Claimants' decision to participate in the project at a time when no one else was willing to do so.

281. Indeed, Mr. Dorfner mentions in his witness statement two alternative potential sources of third-party financing, namely Deutsche Bank and Talc de Lucenac, a French company specialized in the production and distribution of talc. Both of these potential third-party investors ultimately decided not to invest. And while Respondent attempts to blame this on Claimants' involvement in the project, Mr. Dorfner's testimony does not support this allegation. In fact, Mr. Dorfner – unfortunately – offers no explanation as to why these companies ultimately decided not to participate in the project, let alone any documentation that would support such an explanation. He merely states that Deutsche Bank and Talc de Lucenac “*lost interest in financing the project.*”<sup>305</sup> This lack of explanation, which in any event does not point a finger towards Claimants, is particularly telling of Dorfner's inability to find suitable financing.
282. This is all the more so that, according to Mr. Čorej, Dorfner was originally against the involvement of EuroGas in the project. It is therefore safe to say that if Claimants' involvement in the project had anything to do with the inability of Rozmin's initial shareholders to secure the necessary third-party funding, Mr. Stephan Dorfner would have explicitly stated so in his witness statement. Yet, he did not, and there is indeed nothing on the record that would suggest that Claimants were anything but good faith investors who believed, and were willing to invest, in the development of the deposit, at a time no one else would.
283. In fact, Dorfner's inability to attract third-party investment, despite its expertise and international network in the industry, is best demonstrated by the fact that it is ultimately its local partner, Rima Muran, that took it upon itself to reach out to EuroGas for financing so as to “*finally start works at the deposit.*”<sup>306</sup>
284. Once involved in the project, Claimants extensively invested in it, which in turn further de-risked the deposit and enhanced its attractiveness to potential investors. As demonstrated below, Claimants' extensive investments in the project allowed them to

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<sup>305</sup> Witness Statement of Stephan Dorfner, ¶ 12.

<sup>306</sup> Witness Statement of Peter Čorej, ¶¶ 26-27.

gather additional data that further confirmed the Deposit's potential profitability, and ultimately sparked substantial interest from third-party investors.

285. It is in fact on the basis of the additional de-risking achieved by Claimants that Economy Agency was able not only to secure the mining rights illegally taken from Rozmin, but also to attract third party investors. Indeed, upon being awarded the mining rights taken away from Rozmin, Economy Agency was, in Mr. Čorej's own words, "*repeatedly contacted by various companies for the purpose of entering into the project,*"<sup>307</sup> when Rozmin's initial shareholders had in fact never been able to create such an appetite for the Deposit. The only possible explanation for this change of attitude from third-party investors is the additional works and studies undertaken by Claimants, which produced additional data and enhanced the potential profitability of the deposit in the eyes of potential sources of financing.

286. This change of dynamic with respect to third party interest in the Deposit is undeniable, and moreover apparent from Respondent's very own description of the facts.

#### **D. CLAIMANT'S EXTENSIVE INVESTMENTS TO DE-RISK THE DEPOSIT**

287. During the first three years of their involvement, namely from 1998 to 2001, Claimants together invested over EUR 4.2 million into the development and de-risking of the project. Contrary to Respondent's assertion, and as demonstrated by the substantial interest expressed by third party investors thereafter, the investments carried out by Claimants were critical to generating interest in the deposit.

288. Most importantly, Claimants were able, via further drilling and studies, to prove an increased level of talc reserves in the Extraction Area, from 0.9 million tons to *at least* 1.428 million tons of pure talc. By the same token, Claimants also increased the level of confidence in the overall reserves of the deposit, as attested to by Mr. Alex Hill of the world renowned WAI and as further described below.<sup>308</sup> This is conveniently ignored by Respondent.

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<sup>307</sup> Witness Statement of Peter Čorej, ¶ 60.

<sup>308</sup> WAI Supplemental Expert Report, section 1.2.

289. By way of reminder, one of Claimants' first investment was the purchase of the Feasibility Study, the cost of which, based on Dorfner's invoice in the amount of DM 2,485,000,<sup>309</sup> was to be borne by Rozmin's shareholders on a *pro rata* basis.<sup>310</sup> Ultimately, however, EuroGas financed 43%, *i.e.* DM 1,068,550.00, of the purchase by Rozmin of the Feasibility Study, by financing the entirety of Rima Murán's contribution.<sup>311</sup> In other words, out of all of Rozmin's direct and indirect shareholders, EuroGas is the one that contributed the most to the purchase of the Feasibility Study.
290. This is because, as early as 1998, the working capital in Rozmin was injected primarily by EuroGas, either directly or through its wholly-owned subsidiary, EuroGas GmbH. Indeed, pursuant to a financing agreement dated March 16, 1998, EuroGas GmbH acquired a 55% shareholding interest in Rima Murán (before actually acquiring, in 2002, a 43% shareholding interest in Rozmin,<sup>312</sup> see paragraph 290 below), and agreed, in consideration for the 13,75% shareholding interest that EuroGas GmbH was acquiring from each of the company's shareholders,<sup>313</sup> to finance Rima Murán's contributions as a 43% shareholder of Rozmin – that is, not only to make contributions to Rozmin based on its 55% shareholding in Rima Murán, but also on behalf of the

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<sup>309</sup> **Exhibit C-132**, Invoice No. 1-005 from Gebrüder Dorfner, dated June 10, 1998.

<sup>310</sup> **Exhibit C-131**, Minutes of Rozmin's Shareholder Meeting held on May 26, 1997, p. 3.

<sup>311</sup> See **Exhibit C-133**, Informational and Work Materials for the Shareholder Meeting on February 5, 1999, pp. 12-13, "Shareholder contributions (in DM)," showing on p. 13 that Rima Muran paid DM 1,135,000 towards the purchase of the Feasibility Study. See also **Exhibit C-134**, Bank Statement from Creditanstalt, dated December 29, 1998, showing that EuroGas injected DM 250,000 into Rozmin as a shareholder contribution; and **Exhibit C-135**, Bank Statement from Creditanstalt, dated December 31, 1998, showing that EuroGas injected DM 885,000 into Rozmin as a shareholder contribution (totalling DM 1,135,000 together with the DM 250,000 shareholder contribution of EuroGas on December 29, 1998).

<sup>312</sup> **Exhibit C-10**, Contract on Transfer of a Business Share between EuroGas GmbH and Mr. Viliam Komora, dated March 25, 2002; **Exhibit C-11**, Contract on the Transfer of a Business Share between EuroGas GmbH and Mr. Peter Čorej, dated March 25, 2002; **Exhibit C-12**, Contract on the Transfer of a Business Share between EuroGas GmbH and Mr. Pavol Krajec, dated March 25, 2002; **Exhibit C-13**, Contract on the Transfer of a Business Share between EuroGas GmbH and Mr. Ján Baláž, dated March 25, 2002; **Exhibit C-14**, Agreement on the Transfer of Business Share between Rima Murán sro and EuroGas GmbH, dated March 25, 2002.

<sup>313</sup> **Exhibit C-6**, Contract on the Transfer of a Business Share between the Commercial Company Rima Murán sro between EuroGas GmbH and Mr. Villiam Komora, dated March 16, 1998; **Exhibit C-7**, Contract on the Transfer of a Business Share in the Commercial Company Rima Murán sro between Eurogas GmbH and Mr. Peter Čorej, dated March 16, 1998; **Exhibit C-8**, Contract on the Transfer of a Business Share in the Commercial Company Rima Murán sro between EuroGas GmbH and Mr. Pavol Krajec, dated March 16, 1998; **Exhibit C-9**, Contract on the Transfer of a Business Share in the Commercial Company Rima Murán sro between EuroGas GmbH and Mr. Ján Baláž, dated March 16, 1998.

45% shareholding in Rozmin that was still held by Rima Muráň's other four shareholders.<sup>314</sup>

291. Thereafter, Rozmin commissioned the drilling of additional boreholes. In August 1997, Rozmin instructed Rima Muráň to drill borehole No. V-DD-38.<sup>315</sup> Shortly thereafter, in January and June 2008, Rozmin ordered the drilling of two additional boreholes, namely boreholes Nos. V-DD-39<sup>316</sup> (which was an inclined borehole) and V-DD-41.<sup>317</sup>
292. With EuroGas as its main source of financing, and on the basis of the data collected from these first three boreholes (namely boreholes No. V-DD-38, V-DD-39, and V-DD-41), Rozmin then launched a new drilling program. This additional – larger scale – drilling program would prove critical for the preparation of the studies that eventually enabled Rozmin to prove an increased level of talc reserves in the Extraction Area, and by the same token, to increase the level of confidence in the overall reserves of the deposit.<sup>318</sup>
293. On November 9, 1998, Rozmin entered into a contract with Rima Muráň for the drilling of four additional boreholes, namely boreholes Nos. V-DD-42, V-DD-43, V-DD-44 and V-DD-45, all of which were designed by Mr. Čorej and were of much larger diameter and tonnage.<sup>319</sup> The last of these boreholes was drilled in April 1999.<sup>320</sup> Throughout these drilling works, the core extracted from the boreholes was measured, logged, and analysed. For this purpose, Rozmin had outsourced part of the task to sub-

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<sup>314</sup> **Exhibit C-136**, Financing Agreement between EuroGas GmbH and Rima Muráň sro, dated March 16, 1998, whereby EuroGas GmbH agreed to finance Rima Muráň's shareholder contributions to Rozmin, including the share of the contribution incumbent on the other shareholders of Rima Muráň, corresponding to their 45% shareholding interest. As explained by Mr. Rauball in his witness statement, although the shareholder contributions EuroGas GmbH made on behalf of Rima Muráň's other shareholders under the 1998 Financing Agreement were initially considered a loan, these were never repaid, but instead set off against the purchase price paid in 2002 by EuroGas GmbH for Rima Muráň's direct 43% shareholding interest in Rozmin (Witness Statement of Wolfgang Rauball, ¶¶ 23-25).

<sup>315</sup> **Exhibit C-138**, Rima Muráň sro Invoice No. 436/021097-C, dated October 2, 1997.

<sup>316</sup> **Exhibit C-139**, Rima Muráň Invoice No. 14/300198-B, dated January 30, 1998; **Exhibit C-140**, Rima Muráň sro Invoice No. 63/300398-C, dated March 30, 1998; **Exhibit C-141**, Rima Muráň sro Invoice No. 73/200498-C, dated April 20, 1998.

<sup>317</sup> **Exhibit C-142**, Rima Muráň sro Invoice No. 115/100698-C, dated June 10, 1998.

<sup>318</sup> WAI Supplemental Expert Report, section 1.2.

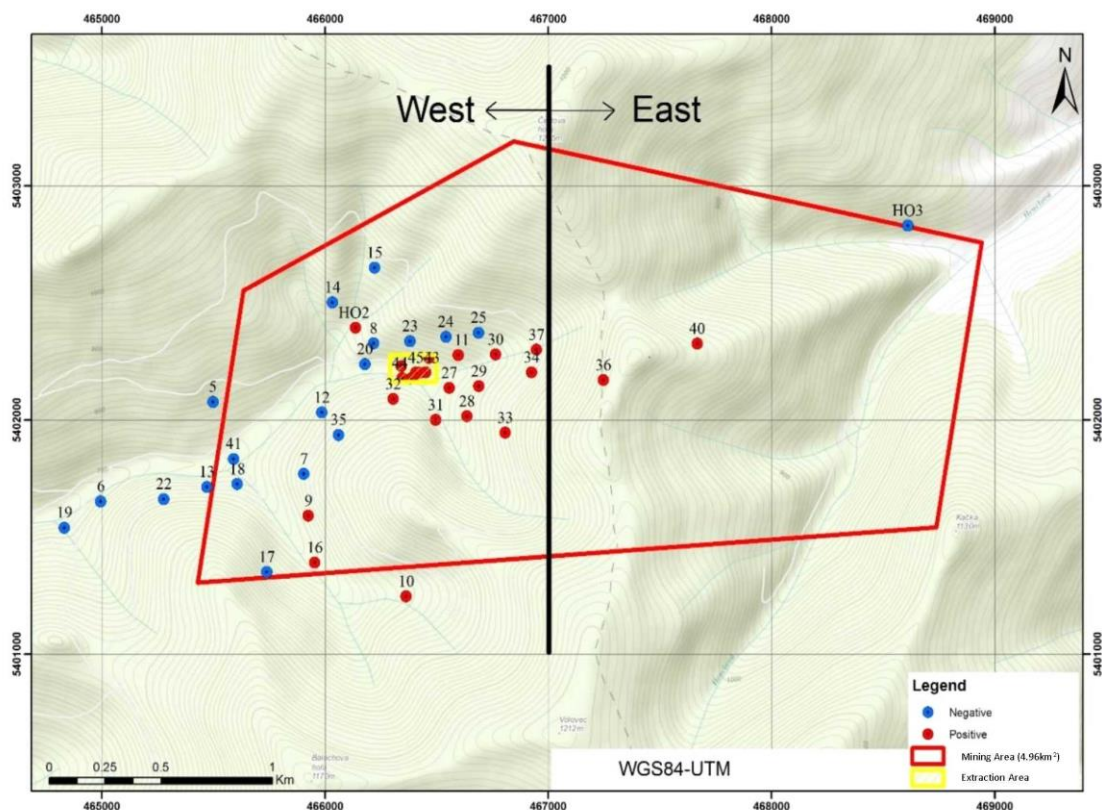
<sup>319</sup> **Exhibit C-143**, Exploration Drilling Contract between Rozmin sro and Rima Muráň sro, dated November 9, 1998.

<sup>320</sup> **Exhibit C-144**, Rima Muráň sro Invoice No. 78/010699-C, dated June 1, 1999.

contractors such as, *inter alia*, GEOMER,<sup>321</sup> KORAL s.r.o. SNV,<sup>322</sup> and UJPAL – SNV.<sup>323</sup>

294. The location of each of these seven new boreholes, as identified on the maps below, clearly illustrates Rozmin's extensive efforts to refine its findings regarding the reserves available in the Extraction Area.

295. Mining Area:



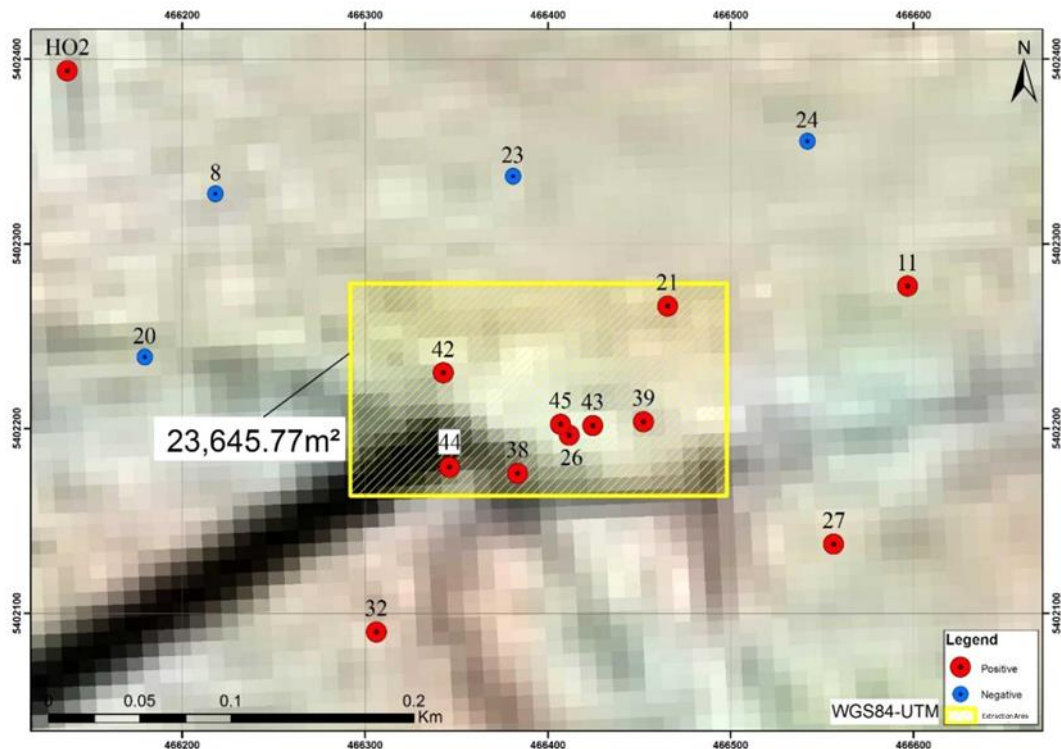
<sup>321</sup> See **Exhibit C-145**, GEOMER Invoice No. 16/98, dated December 15, 1998; **Exhibit C-146**, GEOMER Invoice No. 2/99, dated April 21, 1999.

<sup>322</sup> See **Exhibit C-147**, KORAL sro SNV Invoice No. 38/97, dated October 8, 1997; **Exhibit C-148**, KORAL sro SNV Invoice No. 40/97, dated October 28, 1997; **Exhibit C-149**, KORAL sro SNV Invoice No. 33/98, dated May 6, 1998.

<sup>323</sup> **Exhibit C-150**, UJPAL – SNV Invoice No.1/1999, dated January 25, 1999; **Exhibit C-151**, UJPAL – SNV Invoice No. 2/1999, dated April 21, 1999; **Exhibit C-152**, UJPAL – SNV Invoice No. 3/1999, dated May 10, 1999; **Exhibit C-153**, UJPAL – SNV Invoice No. 4/1999, dated June 6, 1999.



296. Extraction Area:



(WAI Expert Report, p. 12)

297. On the basis of the data gathered from the seven additional boreholes, Rozmin mandated two Austrian companies to carry out further studies, as set out below.

298. Rozmin instructed the Technical Bureau DI Skacel & Kloibhofer OEG (“Kloibhofer”), to compile a 3D model of the Extraction Area. The second company, ARP/ECV GesmbH (“ARP”), a State-accredited testing agency, was provided with samples from borehole No. V-DD-45 and requested to verify the quality of the talc in the deposit and to determine the most efficient method of processing raw materials to be extracted from the deposit.

299. Kloibhofer issued its report on April 4, 2000 (“the Kloibhofer Report”). Its findings, invoiced to Rozmin for a total amount of SKK 202,167.24,<sup>324</sup> went beyond the

<sup>324</sup> **Exhibit C-155**, Kloibhofer Invoice No. 200004, dated May 10, 2000; **Exhibit C-156**, Kloibhofer Invoice No. 200005, dated May 10, 2000; **Exhibit C-157**, Kloibhofer Invoice No. 200006, dated May 10, 2000; **Exhibit C-158**, Kloibhofer Invoice No. 200007, dated May 10, 2000; **Exhibit C-159**, Kloibhofer Invoice No. 200008, dated May 10, 2000.

expectations of Rozmin and its shareholders. With this study, Rozmin critically increased the proven reserves of talc in the Extraction Area, and at the same time greatly enhanced the level of confidence that could be placed on the reserves expected to lie in the remainder of the deposit.<sup>325</sup>

300. Indeed, whereas the Feasibility Study had identified 1,6 million tons of mineralized rock located in rich sections with an average talc content of 60%, thus representing reserves of pure talc in the amount of 0,9 million tons, the Kloibhofer Report concluded that the reserves in the Extraction Area yielded “*reserves amount[ing] to at least 1.428 million*” tons of pure talc, *i.e.* 55% more than those estimated in the Feasibility Study.<sup>326</sup>
301. More specifically, Kloibhofer identified, based on the new data collected by Rozmin, approximately 850,000 m<sup>3</sup> of mineralized rock located in rich sections containing at least 60% of talc, which translated into at least 1.428 million tons of pure talc,<sup>327</sup> that is, a tonnage that exceeded European yearly talc consumption. Importantly, the rich sections of mineralization were defined in the Kloibhofer Report as yielding not an average talc content of 60% – as provided in the Feasibility Study – but *at least* 60% of talc.<sup>328</sup> In other words, Kloibhofer’s calculations, according to which the Extraction Area contained at least 1.428 million tons of pure talc, were very conservative, and the Kloibhofer Report concluded that the “*talc reserve is even greater still.*”<sup>329</sup>
302. In addition to confirming and refining the talc reserves in the Extraction Area, Kloibhofer designed an “Ideal Core Ore Deposit” to support and guide the extraction process once access to the deposit would have been opened. While compiling a 3D representation of the Extraction Area’s rich sections, Kloibhofer found that, contrary to the assumption on the basis of which the Feasibility Study had been prepared, namely that the distribution of talc in the deposit was not systematic, “*almost all of the rich*

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<sup>325</sup> **Exhibit C-154**, Kloibhofer Report, dated April 4, 2000.

<sup>326</sup> **Exhibit C-154**, Kloibhofer Report, dated April 4, 2000, p. 17.

<sup>327</sup> **Exhibit C-154**, Kloibhofer Report, dated April 4, 2000, p. 17.

<sup>328</sup> **Exhibit C-154**, Kloibhofer Report, dated April 4, 2000, p. 4.

<sup>329</sup> **Exhibit C-154**, Kloibhofer Report, dated April 4, 2000, p. 16.

*sections are contiguous.*”<sup>330</sup> From a technical standpoint, this implied that the talc extraction process would be much more cost effective than initially anticipated.

303. This was very important as, even when the assumption was that the structure of the Deposit could potentially not be contiguous, but folded and faulted, the DEG Report had concluded that its exploitation would be profitable.<sup>331</sup> But even more important is the fact that, as explained by Mr. Alex Hill in his Supplemental Expert Report, such positive results significantly enhanced the level of confidence in the reserves of the remainder of the deposit.<sup>332</sup>
304. In light of the above, the findings of the Kloibhofer Report were, to use Kloibhofer’s own words, “*extremely positive.*”<sup>333</sup>
305. Yet, Respondent entirely fails to address the findings of this report in its Counter-Memorial. As for its mining expert, he did not dedicate more than one paragraph to the assessment of the Kloibhofer Report’s findings, choosing instead – for unspecified reasons – to give precedence to the Feasibility Study and DEG Report, both of which had been prepared several years before the Kloibhofer Report, and without the benefit of the data produced by the additional, and much more closely spaced, drilling carried out by Rozmin since 1997.<sup>334</sup>
306. As for ARP, it issued three reports: a Survey Report dated December 17, 1999 (the “ARP Survey Report”), an Interim Report on the use of flotation as a processing method, dated May 5, 2000 (the “ARP Interim Report”), and a Final Report on the flotation processing method and overall cost of the optimal processing method, dated May 29, 2000 (the “ARP Final Report”). All three reports, which were invoiced to Rozmin for a total amount of SKK 693,846.49,<sup>335</sup> concluded that the talc to be extracted from the Extraction Area would be of particularly high purity and whiteness.

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<sup>330</sup> **Exhibit C-154**, Kloibhofer Report, dated April 4, 2000, p. 16.

<sup>331</sup> WAI Supplemental Expert Report, section 1.2.

<sup>332</sup> WAI Supplemental Expert Report, section 1.2.

<sup>333</sup> **Exhibit C-154**, Kloibhofer Report, dated April 4, 2000, p. 16.

<sup>334</sup> Expert Report of Gregory Sparks, ¶ 45.

<sup>335</sup> **Exhibit C-163**, ARP Invoice No. 102/99, dated August 8, 1999; **Exhibit C-164**, ARP Invoice No. 159/99, dated December 1, 1999; **Exhibit C-165**, ARP Invoice No. 170/99, dated December 20, 1999;

307. More specifically, in its Survey Report, ARP concluded that: (i) manual sorting of the raw material would achieve the highest quality, talc concentration and whiteness; (ii) optical grading of the raw material would not result in the best products but would significantly improve the overall yield; and (iii) sorting by way of flotation would result in a product with the highest levels of talc concentration but a reduced degree of whiteness.<sup>336</sup> ARP recommended that the flotation method be further investigated as it might produce better results.<sup>337</sup>
308. Upon Rozmin's instructions, ARP therefore conducted further investigations in respect of the flotation method. In its Interim Report, it concluded that processing the raw material by way of flotation would result in a talc product "*which should be characterized as high grade.*" Indeed, "*at approx. 98%, the talc content is very high.*"<sup>338</sup> The only drawback was that the degree of whiteness of the talc product would "only" be in the range of 84% to 87%.<sup>339</sup> However, ARP stated that sorting by way of flotation did not have to be used on the entirety of the extracted raw material.<sup>340</sup> In other words, the extracted raw material could first be processed by way of manual sorting, in order to achieve the highest levels of talc content and whiteness, before processing the remainder of the raw material by way of flotation.
309. On the basis of its previous findings, ARP then prepared the Final Report dated May 29, 2000, in which it set out the optimal sorting process, designed the corresponding processing facilities, and provided an estimate of the associated production costs. ARP concluded that the raw material extracted from the mine should be processed using a combination of all three processing methods, namely manual sorting, optical sorting, and flotation, which would result in the following distribution of grades in the end product obtained:<sup>341</sup>

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**Exhibit C-166**, ARP Invoice No. 171/99, dated December 20, 1999; **Exhibit C-167**, ARP Invoice No. 065/2000, dated June 2, 2000.

<sup>336</sup> **Exhibit C-160**, ARP Survey Report, dated on December 17, 1999, pp. 24-26.

<sup>337</sup> **Exhibit C-160**, ARP Survey Report, dated on December 17, 1999, p. 26.

<sup>338</sup> **Exhibit C-161**, ARP Interim Report, dated on May 5, 2000.

<sup>339</sup> **Exhibit C-161**, ARP Interim Report, dated on May 5, 2000.

<sup>340</sup> **Exhibit C-161**, ARP Interim Report, dated on May 5, 2000.

<sup>341</sup> **Exhibit C-162**, ARP Final Report, dated on May 29, 2000, p. 26.

- 10% processed by way of manual sorting, with a talc content of at least 98% and a degree of whiteness of 92%;
- 23% processed by way of optical sorting, with a talc content between 85% and 88% and a degree of whiteness between 83% and 90%;
- 67% processed by way of flotation, with a talc content of at least 98% and a degree of whiteness between 84% and 88%.

310. It follows from ARP's findings that 77% of the end product (*i.e.* the product processed by way of manual sorting and flotation) would be a high grade end-product with a talc content of at least 98%. In addition, ARP indicated that the sorting process may result in the production of a magnesite "side product" which could, with further processing, become a sellable product and thus enhance the profitability of the process.<sup>342</sup>
311. Once again, Respondent carefully avoided to address the findings of ARP. And neither did its mining expert. This is because the added value that these findings represented with respect to the Deposit's value for its investors and any other potential third party investors was critical.
312. The extensive exploration and further studies carried out by Rozmin (and thus by Belmont and EuroGas) between 1997 and 2001, described above at paragraphs 287 *et seq.*, constitute irrefutable proof of Rozmin's critical role in confirming that the talc reserves in the Extraction Area, and in turn the Mining Area, went well beyond the assumptions made in the 1997 Feasibility Study (of which EuroGas was in any event the largest financier, as set out in paragraphs 289 to 290 above).
313. The Kloibhofer Report, dated April 4, 2000, confirmed that the talc reserves in the Extraction Area exceeded by more than 55% the initial assumptions made in the January 1997 Feasibility Study. It also confirmed that the distribution of the talc-rich sections in the Extraction Area was such that the extraction process would be much more cost effective and profitable than that initially anticipated. This, in turn, greatly enhanced the level of confidence in the reserves expected to lie in the remainder of the Deposit. Lastly, Rozmin confirmed the quality and quantity of the end-product which

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<sup>342</sup> **Exhibit C-162**, ARP Final Report, dated on May 29, 2000, p. 11.

could be expected to be produced from the raw material extracted, as well as the most efficient way of processing the raw material to meet these expectations. None of this, be it the recalculation of the reserves or the assessment of the talc quality, would have been possible without the extensive exploration program designed, carried out, and financed by Rozmin upon the participation of Claimants in the project.

314. In sum, in 2000, once Rozmin had concluded its initial drilling program and increased its knowledge of the Deposit with the Kloibhofer and ARP studies, any uncertainties regarding the commercial and financial viability of the reserves in the Extraction area had been wiped out: the deposit had essentially been de-risked. All that remained was to open the deposit and start exploitation. In that respect, Rozmin had had the foresight of already carrying out preparatory works and securing all required authorizations and permits via a time consuming and difficult bureaucratic process, as set out below.

**E. THE START OF MINING ACTIVITIES AND THEIR SUSPENSION PENDING THE RESOLUTION OF DISAGREEMENTS WITH RIMA MURÁŇ**

315. The process of securing all the necessary authorizations in order to initiate the opening works at the Deposit was a very time-consuming and tedious one. The shareholders of Rozmin had the foresight of expecting this. They therefore hired a local and competent geologist, namely Dr. Rozložník, in order to facilitate the process and ensure that all necessary regulatory requirements would be complied with.
316. Contrary to Respondent's unsubstantiated suggestion, which it does not even attempt to support with documentary evidence, the reason Rozmin was not able to start mining activities before 2000 is not because of its "*inadequate handling of permit issues*," but because the number of permits, authorizations, leases, and officials approvals which Rozmin had to request and obtain from various authorities was overwhelming, and the process of applying for, and securing, the same was extremely time consuming due to the excessively bureaucratic administration inherited by the Slovak Republic from the Soviet era. Indeed, since Rozmin's very incorporation in early 1997, there is not one single significant period of time during which Rozmin did not apply for, supplement, and/or eventually secure, the permits necessary to move forward towards the development of the Deposit.

317. In short, and as further explained below, in order to start opening works at the deposit, Rozmin had to *inter alia*:

- prepare a Plan for the Opening, Preparation, Development, and Exploitation of the Mining Area;
- apply for, and obtain, an authorization to carry out mining activities;
- apply for, and obtain, a land use permit for each of the land parcels where Rozmin intended to carry out opening works;
- apply for, and obtain, from the relevant forestry authorities, a temporary exclusion from the forest land fund for each of the land parcels where Rozmin intended to carry out opening works;
- negotiate and enter into leases with the relevant forestry authorities over the same land parcels;
- apply for, and obtain, building permits for each of the above-ground structures;
- apply for, and obtain, an authorization to store and use explosives;
- apply for, and obtain, an authorization to use motor vehicles on forest roads;
- apply for, and obtain, for each of the above, the required official approvals from a variety of public authorities; and
- organize a tender for the award of the contract for the opening works.

318. In order to oversee and carry through this tedious exercise, the shareholders of Rozmin hired Dr. Rozložník. He was a local accomplished geologist, who had, at the time, no less than four decades of experience in surveying and exploring deposits in the Slovak Republic and who had spent his career, as a geologist, working for Slovak State mining entities, until he joined Rozmin as a Managing Director in 1997.<sup>343</sup> He therefore had a detailed knowledge of, *inter alia*, local mining requirements and permits necessary to start opening works in the Slovak Republic.

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<sup>343</sup> Witness Statement of Ondrej Rozložník, ¶ 5.

319. Immediately upon its incorporation on May 7, 1997, Rozmin instructed Dr. Rozložník to start preparing, on the basis of the Feasibility Study, a Plan for the Opening, Preparation, Development, and Exploitation of the Gemerská Poloma mining area (the “1998 POPD”). The 1998 POPD described how Rozmin intended to open and exploit the deposit.<sup>344</sup>
320. Barely eight months later, namely on January 16, 1998, Rozmin filed the 1998 POPD for approval by the authorities, and requested an authorization to carry out mining activities at the Gemerská Poloma deposit.<sup>345</sup> To this end, Rozmin had also secured and submitted official statements from a wide range of public entities – including the Department of Environment of the Regional Office of Košice, the Municipality of Gemerská Poloma, the Department of Lands, Agriculture and Forestry of the District Office of Rožňava, the Municipality of Henclova, the Water Management Company of Revuca, the Hron River Basin Branch of the Slovak Water Management Company, and the Department of Environment of the District Office of Rožňava – endorsing Rozmin’s plan for the opening, preparation, development, and exploitation of the deposit and/or providing recommendations. These official statements of approval were necessary before Rozmin’s 1998 POPD could be approved by the DMO and a mining permit could be delivered.<sup>346</sup> They were necessary, in particular, because the area identified in the 1998 POPD as the most suitable place to open and access the reserves in the Extraction Area was in the Dlhá dolina valley (the “Work Area”). This Area was located on forest land owned and administered by the Slovak State, and classified as a protected area due to its proximity to sources of drinkable water serving nearby municipalities, including Rožňava. Special measures therefore needed to be taken in order to avoid any risk of contamination. In addition, given the location of the Work Area, the forest road leading up to it needed to be adapted to manage heavy-duty traffic.

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<sup>344</sup> **Exhibit C-168**, Plan for the Opening, Preparation, Development, and Exploitation submitted by Rozmin sro on January 15, 1998.

<sup>345</sup> **Exhibit C-169**, Rozmin’s Mining Authorization Request to the District Mining Office, dated January 16, 1998.

<sup>346</sup> See **Exhibit C-25**, Authorisation of Mining Activities under the “Plan for the Opening, Development and Mining of an Exclusive Soapstone Deposit in the Gemerská Poloma Mining Area (Registration Number 74/e) for the 1998 – 2002 Period,” p. 3.



321. On May 29, 1998, the DMO approved Rozmin's 1998 POPD and issued, in accordance with Article 10 of the Act on Mining Activities, Decision No. 1003-511-Ka-Bz/98, a permit to carry out mining activities in the Mining Area until 2002 (the "Authorization on Mining Activities at Gemerská Poloma").<sup>347</sup>
322. Once the 1998 POPD, and therefore the proposed method of opening the deposit, had been approved by the DMO, Rozmin could start preparing the design for the construction works, and obtaining the necessary permits.
323. For the design of the construction works, the State-owned company *Rudný projekt a.s.* ("Rudný") was mandated to design all the construction works necessary for the opening of the deposit (the "Project Design"). Rudný completed its task in October 1998 for a price of SKK 2,792,000.<sup>348</sup> The exhaustiveness of the Project Design prepared by Rudný is not disputed by Respondent.
324. By way of reminder, the Project Design first laid out the mining works *per se*. They comprised the construction of a 12.2 meter-long portal (the "Portal"), the excavation of the main winze leading to the deposit with a projected length of 1,300 meters and decline of 12% (the "Winze"), and the construction, 63 meters into the Winze, of an underground warehouse for the storage of explosives (the "Explosives Warehouse"). The Project Design also covered auxiliary works, such as temporary above-ground structures which were to be used for the mining works and additional on-site examination of the deposit (the "Above-Ground Structures"), water management facilities necessary to supply the Work Area with drinkable water and to treat the mine/waste waters in accordance with the applicable sanitary regulations (the "Water Management Facilities"), the relocation and improvement of the forest road leading to the Work Area, and the construction of a bridge over the Dlhý potok stream.
325. Thereafter, based on the 1998 POPD and the Project Design prepared by Rudný, Rozmin started applying for all the necessary permits, authorizations, and leases.

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<sup>347</sup> **Exhibit C-25**, Authorisation of Mining Activities under the "Plan for the Opening, Development and Mining of an Exclusive Soapstone Deposit in the Gemerská Poloma Mining Area (Registration Number 74/e) for the 1998 – 2002 Period," dated May 29, 1998.

<sup>348</sup> **Exhibit C-170**, Rudný Invoice dated November 6, 1998.

326. As stated above, the Work Area was located on land parcels owned and administered by the State. A first set of land parcels (land parcels Nos. 2278/1, 2278/8, 2278/9, 2278/10, and 2282, referred to individually or collectively as the “Forest Land Parcels”) was administered by LESY Košice, š.p. (“LESY Košice”), the local branch of the public entity in charge of forest lands, and a second set of land parcels (land parcels Nos. 3578 and 1868, referred to as the “Water Management Land Parcels”) was administered by Slovenský vodohospodársky podnik š.p., Povodie Hrona branch, (“SVP Povodie Hrona”), the local branch of the public entity in charge of water management.
327. Rozmin therefore had to first secure from the Department of Environment in the District Office of Rožňava a permit to use the land parcels where it intended to carry out works (hereafter “Land Use Permit”).
328. Less than a month after the 1998 POPD having been approved, namely on July 2, 1998, Rozmin applied to the Department of Environment in the District Office of Rožňava. After having further supplemented its application on October 12, 1998, it was granted a Land Use Permit on October 23, 1998.<sup>349</sup> In order to be granted this Permit, Rozmin had again obtained and submitted official statements of approval from several public entities, including the Department of Lands, Agriculture and Forestry in the District Office of Rožňava,<sup>350</sup> the Hron River Basin Branch of the Slovak Water Management Company,<sup>351</sup> the Eastern Slovak Waterworks and Sewers, Branch Revuca,<sup>352</sup> the Department of Fire Protection in the District Office of Rožňava,<sup>353</sup> the Department of

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<sup>349</sup> **Exhibit C-171**, Decision of the Department of Environment of the District Office of Rožňava, No SP 98/06072/003-OL, dated October 23, 1998; amended by **Exhibit C-172**, Decision of the Department of Environment of the District Office of Rožňava, No. SP 98/09631/001-OL, dated December 7, 1998.

<sup>350</sup> **Exhibit C-173**, Statement of the Department of Lands, Agriculture, and Forestry of the District Office of Rožňava, dated June 17, 1998 (Ref. 98/05648).

<sup>351</sup> **Exhibit C-174**, Statement of the Slovak Water Management Company – Hron River Basin Branch, September 30, 1998 (Ref. 123 – 580/98).

<sup>352</sup> **Exhibit C-175**, Statement of the Eastern Slovak Waterworks and Sewer, Branch 050 01 in Revúca, dated September 24, 1998 (Ref. 2127/98).

<sup>353</sup> **Exhibit C-176**, Statement of the Department of Fire Protection of the District Office of Rožňava, dated June 17, 1998 (Ref. PO/5-98/00437/133).

Civil Protection in the District Office of Rožňava,<sup>354</sup> and the State Health Officer of the Rožňava District.<sup>355</sup>

329. Then, as the land parcels were owned by the Slovak Republic and administered by public entities, Rozmin had to secure a temporary five year exclusion of the Forest Land Parcels from the forest land fund,<sup>356</sup> and to enter into a lease agreement with LESY Košice over the said land parcels.<sup>357</sup> It also entered into a lease agreement with SVP Povodie Hrona over the Water Management Land Parcels.<sup>358</sup> This lease agreement was initially set to expire in December 2000, before being extended until September 1, 2001.<sup>359</sup>
330. The process of obtaining an exclusion of the Forest Land Parcels from the land parcels, and entering into the necessary land leases, extended from the summer of 1998 to January 1999.
331. Thereafter, Rozmin was able to obtain building permits for (i) the erection of the temporary Above-Ground Structures,<sup>360</sup> (ii) the construction of the Water Management Facilities,<sup>361</sup> and (iii) the relocation of the forest road and construction of a bridge over the Dlhý potok stream.<sup>362</sup> For each of these permits, Rozmin had again obtained and submitted official statements of approval from several public entities, including LESY

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<sup>354</sup> **Exhibit C-177**, Statement of the Department of Civil Protection of the District Office of Rožňava, dated June 18, 1998 (Ref. 7 – 14/98).

<sup>355</sup> **Exhibit C-178**, Statement of the State District Health Officer of the District Office of Rožňava, dated October 15, 1998 (Ref. 08066-001-1381-672-215.1-1.2/98).

<sup>356</sup> **Exhibit C-179**, Decision of the Department of Lands, Agriculture, and Forestry of the District Office of Rožňava (land plots No. 2278/8, 2278/9 and 2278/10), dated October 27, 1998; **Exhibit C-180**, Decision of the Department of Lands, Agriculture, and Forestry of the District Office of Rožňava (land plot No. 2278/1), dated January 25, 1999.

<sup>357</sup> **Exhibit C-181**, Lease Agreement with LESY Košice dated December 22, 1998, approved by the Ministry of Agriculture on July 9, 1999 (**Exhibit C-182**) and amended on October 2, 1999 (**Exhibit C-183**).

<sup>358</sup> **Exhibit C-184**, Lease Agreement with SVP dated February 22, 1999.

<sup>359</sup> **Exhibit C-185**, Minutes of handover between SVP and Rozmin, dated August 28, 2001.

<sup>360</sup> **Exhibit C-186**, Decision of the Department of Environment of the District Office of Rožňava, dated March 23, 1999 (Ref. SP 99/01195/003-OL).

<sup>361</sup> **Exhibit C-187**, Decision of the Department of Environment of the District Office of Rožňava, dated February 23, 1999 (Ref. ŠVS - 98/ 09586-Kú).

<sup>362</sup> **Exhibit C-188**, Decision of the Department of Transport and Road Management of the District Office of Rožňava, dated February 24, 1999 (Ref. 99/01138-00005).

Košice, the Hron River Basin Branch of the Slovak Water Management Company, the Department of Lands, Agriculture and Forestry in the District Office of Rožňava, the Eastern Slovak Waterworks and Sewers – Revuca Branch, the Department of Fire Protection in the District Office of Rožňava, the Department of Civil Protection in the District Office of Rožňava, and the State Health Officer of the Rožňava District.<sup>363</sup>

332. This process of securing the building permits for the erection of the Above-Ground Structure, the Water Management Facilities, the relocation of the forest road, and the construction of the bridge of the Dlhý potok stream was completed in April 1999.
333. In addition, at the beginning of the year 2000, Rozmin also obtained, *inter alia*, an authorization for the storage and use of explosives,<sup>364</sup> an authorization to use roads,<sup>365</sup> as well as an exemption from the ban, under Article 19(1)(b) of Act No. 100/1977 Coll. on Forest Management and State Forest Administration, on the use of motor vehicles in forest areas.<sup>366</sup>
334. Lastly, Rozmin secured an authorization and enter into an agreement for the cleaning and deforestation of the land upon which ran a high-voltage line supplying electricity to the Work Area.<sup>367</sup> Indeed, given that Rozmin's contractor would be prohibited from using fuel engines for the drilling and instead would have to use electrical power engines, Rozmin had to rent a 4-km high-voltage line from Rima Muráň.<sup>368</sup> This high-voltage line was owned by Rima Muráň, an information which Mr. Čorej only

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<sup>363</sup> See **Exhibit C-186**, Decision of the Department of Environment of the District Office of Rožňava, dated March 23, 1999 (Ref. SP 99/01195/003-OL), p. 5; **Exhibit C-187**, Decision of the Department of Environment of the District Office of Rožňava, dated February 23, 1999 (Ref. ŠVS - 98/ 09586-Kú), pp. 6-7; **Exhibit C-188**, Decision of the Department of Transport and Road Management of the District Office of Rožňava, dated February 24, 1999 (Ref. 99/01138-00005), p. 3.

<sup>364</sup> **Exhibit C-189**, District Mining Office Decision dated November 23, 1998 (Ref. 2740-53.5-Ks-KI/98).

<sup>365</sup> **Exhibit C-190**, Contract with Lesy Betliar, dated June 18, 1998. See also **Exhibit C-191**, Approval of Lesy Košice No. 501/260/98, dated March 31, 1998.

<sup>366</sup> **Exhibit C-192**, Permit granted by the Department of Lands, Agriculture, and Forestry of the District Office of Rožňava, dated August 16, 2000 (Ref. 2000/005860).

<sup>367</sup> **Exhibit C-193**, Authorization of LESY Rožňava, dated July 27, 2000 (Ref. 2284/1-270/2000), and **Exhibit C-194**, Contract on deforestation and cleaning of the lands dated August 14, 2000, amended on September 21, 2000 (see **Exhibit C-195**).

<sup>368</sup> **Exhibit C-196**, Agreement on Temporary Use of the High Voltage Line by Rima Muran, dated July 26, 2000.

disclosed at the last moment (see paragraph 345 below), causing Rozmin to make a monthly payment to Rima Muráň for the use of this high-voltage electricity line.<sup>369</sup>

335. By May 2000, Rozmin had secured most of the necessary permits, authorizations and leases. It had also had substantial topographic and mapping works carried out *inter alia* by GEOMER<sup>370</sup> and KORAL s.r.o. SNV,<sup>371</sup> as well geological cuts notably by GEOENVEX.<sup>372</sup>
336. In June 2000, Rozmin therefore initiated a tender for the award of the construction works.<sup>373</sup> The tender was based on the Project Design prepared by Rudný and contained a description of the mining works, the Above-Ground Structures, the Water Management Facilities, and the other auxiliary works that were to be carried out to prepare the deposit for excavation. With respect to the Above-Ground Structures and the Water Management Facilities, the contractor was bound to meet all conditions laid down in the permits secured by Rozmin and described above at paragraphs 325 *et seq.*
337. Five companies, namely Rima Muráň, Banské stavby Prievidza, Váhostav Žilina, Geotechnik SNV, Kovalčík SNV, Uránpress SNV, Siderit s.r.o. Nižná Slaná (“Siderit”), presented bids. The bids were opened before, and certified by, a notary.<sup>374</sup> Eventually, based on financial and technical considerations, Rima Muráň’s bid was

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<sup>369</sup> See Witness Statement of Ondrej Rozložník, ¶ 40.

<sup>370</sup> See **Exhibit C-197**, Invoice from GEOMER No. 16/97, dated October 28, 1997; **Exhibit C-198**, Invoice from GEOMER No. 18/97, dated November 10, 1997; **Exhibit C-199**, Invoice from GEOMER No. 1/98, dated February 13, 1998; **Exhibit C-200**, Invoice from GEOMER No. 7/98, dated June 11, 1998; **Exhibit C-201**, Invoice from GEOMER No. 9/99, dated August 20, 1999; **Exhibit C-202**, Invoice from GEOMER No. 14/99, dated November 4, 1999; **Exhibit C-203**, Invoice from GEOMER No. 4/00, dated June 7, 2000; **Exhibit C-204**, Invoice from GEOMER No. 012/00, dated December 8, 2000; **Exhibit C-205**, Invoice from GEOMER No. 05/01, dated March 12, 2001; **Exhibit C-206**, Invoice from GEOMER No. 07/01, dated May 7, 2001; **Exhibit C-207**, Invoice from GEOMER No. 0801, dated July 4, 2001.

<sup>371</sup> See **Exhibit C-208**, Invoice from KORAL sro SNV No. 59/98, dated August 3, 1998; **Exhibit C-209**, Invoice from KORAL sro SNV No. 62/98, dated August 18, 1998.

<sup>372</sup> See **Exhibit C-210**, Invoice from GEOENVEX No. 72/97, dated November 4, 1997; **Exhibit C-211**, Invoice from GEOENVEX No. 2/98, dated May 12, 1998; **Exhibit C-212**, Invoice from GEOENVEX No. 6/99, dated April 12, 1999; **Exhibit C-213**, Invoice from GEOENVEX No. 13/99, dated November 14, 1999; **Exhibit C-214**, Invoice from GEOENVEX No. 3/00, dated March 16, 2000; **Exhibit C-215**, Invoice from GEOENVEX No. 7/00, dated May 5, 2000; **Exhibit C-216**, Invoice from GEOENVEX No. 14/00, dated June 13, 2000.

<sup>373</sup> **Exhibit C-217**, Monthly Report for the Activities of Rozmin sro of August and September 2000, dated October 18, 2000, p. 2.

<sup>374</sup> **Exhibit C-217**, Monthly Report for the Activities of Rozmin sro of August and September 2000, dated October 18, 2000, p. 2.

selected. It was among the least expensive and Rima Muráň was already familiar with the project and had already carried out extensive work at the deposit.

338. On September 22, 2000, Rozmin and Rima Muráň entered into an “Agreement on Commission of Works on: ‘The Opening of the Talc Deposit Gemerská Poloma’.”<sup>375</sup> The scope of this contract reflected the Project Design prepared by Rudný and described above at paragraph 324. The price initially agreed was SKK 71,500,000 and was later increased to 73,417,000 SKK.<sup>376</sup>
339. Three days later, namely on September 25, 2000, works at the Deposit started.<sup>377</sup>
340. Very shortly thereafter, however, Rima Muráň began encountering very serious financial difficulties which prevented it from progressing with the works as originally expected. This, together with the fact that Rima Muráň, while regularly requesting additional payment from Rozmin and its shareholders, failed to carry out the works in a satisfactory and professional manner, eventually led to a fallout between Rozmin and its shareholders on the one hand, and Rima Muráň on the other hand.
341. Contrary to the allegations of Respondent and Mr. Čorej, this fallout was in no way attributable to Rozmin and/or Claimants.
342. In fact, already in early 2000, the unpredictable behavior of Mr. Čorej had begun to cause EuroGas some concern.
343. Notably, at a meeting of Rozmin’s shareholders held on March 29, 2000, Mr. Čorej voted against a number of proposed motions and adopted a position that was at odds with the other shareholders’ efforts, including those of EuroGas, to move forward with the opening of the Deposit. By way of example, Dorfner and OĽMC had submitted a motion to immediately prepare the documents necessary to put the Deposit’s opening works to tender.<sup>378</sup> The majority of the permits having been secured, and the studies of

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<sup>375</sup> **Exhibit C-218**, Contract on giving the contract for works on “Opening of Talc Deposit Gemerská Poloma” entered into between Rima Muráň sro and Rozmin sro, dated September 22, 2000.

<sup>376</sup> **Exhibit C-219**, Amendment No. 2 to the Contract on giving the contract for works on “Opening of Talc Deposit Gemerská Poloma” entered into between Rima Muráň sro and Rozmin sro, dated July 3, 2001.

<sup>377</sup> **Exhibit C-217**, Monthly Report for the Activities of Rozmin sro of August and September 2000, dated October 18, 2000, p. 2.

<sup>378</sup> **Exhibit C-347**, Minutes of Rozmin’s shareholder meeting held on March 29, 2000, p. 3.

Kloibhofer and ARP having been completed, the next logical step was indeed to start moving forward with the opening works.

344. Yet, for reasons which are only known to him, Mr. Čorej, acting on behalf of Rima Muráň, voted against this motion. Taken aback by this attitude, EuroGas GmbH asked that its disagreement with Mr. Čorej's vote be recorded in the minutes of the shareholder meeting.<sup>379</sup> On March 31, 2000, it also sent Rima Muráň a letter recording the same in the following terms:

*At the shareholder meeting of the company Rozmin s.r.o., which Mr. Preuss and Mr. Rauball attended as representatives of the majority shareholder of your company, you opposed in your capacity as representative of the company Rima Muran s.r.o. several of the motions filed as recorded in the minutes.*

*Your oppositional attitude greatly surprised us as majority shareholder of the company Rima Muran s.r.o. You might remember that I had our surprise about your solo efforts recorded in the minutes.*

*Carefully said, I have no clue why you did not discuss such a course of action beforehand with the company EuroGas GmbH Vienna as your majority shareholder.*

*EuroGas GmbH considers your conduct a breach of trust that requires urgent clarification.*<sup>380</sup>

345. This was not an isolated event. As explained above, due to the location of the works, Rozmin was prohibited from using fuel engines in order to power the machinery necessary for the opening works, and instead has to use electrical power engines. This, in turn, meant that Rozmin had to use the high voltage line built in the eighties to power the initial drilling works. What Mr. Čorej failed to disclose until August 2000 – despite the fact that Rozmin had planned to, and in fact had no alternative but to, make use of this high voltage line since the very beginning – is that the high voltage line had been purchased by Rima Muráň. As a result, Rozmin had to rent a 4-km high-voltage line from Rima Muráň,<sup>381</sup> and pay it a monthly fee of SKK 61,500.<sup>382</sup> It is this kind of

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<sup>379</sup> **Exhibit C-347**, Minutes of Rozmin's shareholder meeting held on March 29, 2000, p. 3.

<sup>380</sup> **Exhibit C-348**, Letter from EuroGas GmbH to Rima Muráň sro, dated March 31, 2000.

<sup>381</sup> **Exhibit C-196**, Agreement on Temporary Use of the High Voltage Line by Rima Muran, dated July 26, 2000.

strange behavior that initially put a strain on the relationship between Rima Muráň and Rozmin's other shareholders.

346. The deterioration of this relationship, caused by Mr. Čorej's unpredictable and suspicious behavior, was further aggravated when Rima Muráň failed to carry out the works in a diligent and professional manner.
347. This was recorded as early as in March 2001, in Rozmin's Monthly Report for the month of February 2011, in which Rozmin documented the fact that Rima Muráň had implement certain alterations to the initial Project Design without any "*submitted and approved project documentation*."<sup>383</sup>
348. Even Respondent's very own exhibits demonstrate that Rozmin and its shareholders had an understanding entirely different from that of Respondent of the reasons underlying the ultimate termination of the contract with Rima Muráň. In the handover protocol signed by Rozmin and Rima Muráň on October 24, 2002, Rozmin described the situation as follows:

*The contractor and at the same time a shareholder of the investor (RM) was supposed to complete the construction of surface facilities within two months of the commencement of works. Due to modifications of structures, the contractor was supposed to prepare and submit to the investor the necessary project documentation. After several postponements (see the enclosed itemization), the contractor submitted the said documentation on 19 September 2001.*

*The contractor inconsistently concentrated on mining activities which, on the one hand, had to be commenced before the approaching winter, but on the other hand, the contractor commenced to carry out mining works without a project and approved excavation technology. The contractor also underestimated the necessary budgeted costs for certain structures such as the explosives storage, shotcrete, facility SO - 018.2 as well as necessary own machinery. All that led to the fact that the funds provided by the investor were insufficient to complete in particular*

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<sup>382</sup> See for instance, **Exhibit C-349**, Rozmin Monthly Report for August and September 2001, dated October 18, 2001, Pt. 2.2.

<sup>383</sup> **Exhibit C-350**, Rozmin's Monthly Report for the month of February 2001, dated March 8, 2001, pt. 2.1.



*the surface structures monitored by the state administration, which are located in the protected area of the water source. Those structures have not received an occupancy permit yet.*

*The indicated is one of the reasons of acceptance of termination of the contract.*<sup>384</sup>

349. Based on the foregoing, it is not surprising that Rozmin and its shareholders were highly disappointed with Rima Murán's performance of the opening works. Not only had Rima Murán failed, due to alterations having been made to the original design, to complete the Above-Ground structures within the contractually-agreed two-month period, and then failed to submit the required documentation with respect to these alterations until September 19, 2001, namely close to a year after the signature of the initial contract, but Rima Murán had in fact decided to proceed with the works on the basis of these alterations without any instruction from Rozmin, let alone the required permits and/or approvals. This was wholly unacceptable, and again demonstrative of the unpredictable and elusive manner in which Mr. Čorej conducted his affairs and the works of Rima Murán.
350. Moreover and in any event, the undeniable reality is that, starting in 2001, Rima Murán had begun experiencing very serious financial difficulties. By Mr. Čorej's own admission, Rima Murán was, in 2001, "*getting into bigger and bigger financial problems, [...] did not have money to pay for the works at the deposit, [and was] under threat of bankruptcy.*"<sup>385</sup> The cause of these financial difficulties was not, however, Rozmin's alleged failure to pay Rima Murán's invoices in a timely fashion, but the culmination of a variety of other factors, including a number of poor business decisions made prior to EuroGas' involvement in Rima Murán.
351. This situation was a major cause for concern to EuroGas, and understandably so. Indeed, the only reason why EuroGas had acquired a shareholding interest in Rima Murán, was to invest in, and develop, the Gemerska Poloma Deposit. This was

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<sup>384</sup> **Exhibit C-222**, Technical Report – Inventory of Structures “Drifting an exploratory winze for the Gemerská Poloma tal deposit – temporary structures” signed by Rozmin sro and Rima Muran sro on October 24, 2002.

<sup>385</sup> Witness Statement of Peter Čorej, ¶ 44.

recorded in the Financing Agreement,<sup>386</sup> pursuant to which EuroGas agreed to not only purchase a 55% shareholding interest in Rima Muráň, but also to finance in their entirety the shareholder contributions of Rima Muráň into Rozmin, including the payments owed to Rima Muráň for the opening works. What EuroGas had not agreed to, however, was to both finance the development of the Deposit and cover Rima Muráň's growing losses as a result of its poor business decisions.

352. While Rozmin may arguably have been late in settling certain of Rima Muráň's invoices, it was absolutely not the cause of the financial difficulties that prevented Rima Muráň from progressing with the works, let alone from doing so in an efficient and timely manner. This is evidenced by the fact that, based on Respondent's very own exhibits, the sums paid by Rozmin to Rima Muráň as advance payment exceeded by far any amounts invoiced by Rima Muráň on account of works affectively carried out, as set out below.

353. On July 23, 2011, Rima Muráň threatened to suspend works at the Deposit.<sup>387</sup> The reasons put forward was that:

*[Rima Muráň] owes, for electric power, diesel oil, concrete mixture, metallurgical material and other outstanding contractor invoices, approximately SKK 2,500,000. It is not possible to continue in this trend any more. Our contractors refuse to supply us with the material and therefore we cannot risk safety and health of people. The company employees were not paid wages, travel expenses, and subsistence allowances, which represents additional approximately SKK 750,000.*<sup>388</sup>

354. This was categorically denied by Rozmin on July 25, 2001. In particular, Rozmin demonstrated, with reference to every invoice issued by, and every payment made to,

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<sup>386</sup> **Exhibit C-136**, Financing Agreement between EuroGas GmbH and Rima Muráň sro, dated March 16, 1998, whereby EuroGas GmbH agreed to finance Rima Muráň's shareholder contributions to Rozmin, including the share of the contribution incumbent on the other shareholders of Rima Muráň, corresponding to their 45% shareholding interest. As explained by Mr. Rauball in his witness statement, although the shareholder contributions EuroGas GmbH made on behalf of Rima Muráň's other shareholders under the 1998 Financing Agreement were initially considered a loan, these were never repaid, but instead set off against the purchase price paid in 2002 by EuroGas GmbH for Rima Muráň's direct 43% shareholding interest in Rozmin (Witness Statement of Wolfgang Rauball, ¶¶ 23-25).

<sup>387</sup> **Exhibit R-0127**, Letter from Rima Muráň s.r.o to Rozmin s.r.o., dated July 23, 2001.

<sup>388</sup> **Exhibit R-0127**, Letter from Rima Muráň s.r.o to Rozmin s.r.o., dated July 23, 2001.

Rima Muráň, that the latter had received more than SKK 2 million in excess of all amounts invoiced up to that date, hence that Rozmin could not possibly have been responsible for Rima Muráň's financial difficulties:

*It is clear from the table above that even if we include the two invoices submitted in July 2001 - no. 06/RM/Z, invoice amount: SKK 3,842,223.90, and no. 107/110701-C, invoice amount: SKK 231,960, amounting in total to SKK 4,074,183.90, which have not been paid yet, you received an extra advance payment of SKK 2,073,824.14.*

[...]

*We therefore cannot recognize and accept the suspension of works due to non-funding of works by Rozmin s.r.o.*<sup>389</sup>

355. This was not even denied by Rima Muráň. Only with respect to its renewed threats of suspension, did Rima Muráň rely on alleged promises of additional payments made by Rozmin's shareholders.<sup>390</sup> But even assuming for the sake of argument that the said alleged promises of additional payments had been binding under the Agreement on Commission of Works on: "The Opening of the Talc Deposit Gemerská Poloma" between Rima Muráň and Rozmin – which is hereby denied – the failure to make good on these promises, in circumstances where Rozmin had advanced Rima Muráň more than SKK 2 million in excess of all works carried out and invoiced at the time, could not have justified the threats of work suspension repeatedly proffered by Rima Muráň at the time. Such threats were not justifiable from a *bona fide* contractor and, in any event, a failure to keep the alleged promises to make additional payments did not and could not have caused Rima Muráň to perform the opening works at a loss. The advance paid to Rima Muráň ensured that the latter would have a positive cash flow. The cause of Rima Muráň's financial difficulties therefore lied elsewhere.
356. Ultimately, however, whether Rima Muráň would overcome its very own financial difficulties and proceed with the works was beyond Rozmin's control. Rozmin therefore had no alternative but to reluctantly accept Rima Muráň's suspension of the works on the opening of the Deposit.

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<sup>389</sup> **Exhibit R-0169**, Letter from Rozmin s.r.o. to Rima Muráň s.r.o., dated July 25, 2001.

<sup>390</sup> **Exhibit R-0126**, Letter from Rima Muráň s.r.o. to Rozmin s.r.o., dated July 30, 2001.

357. By letter dated September 28, 2001, Rima Muráň informed Rozmin that it would cease working at the Mining Area on October 1, 2001, and on October 15, 2001, Rozmin accordingly notified the DMO of the suspension of mining activities consequent to Rima Muráň's cessation of works.<sup>391</sup>
358. Thereafter, on November 30, 2001, as a result of Rima Muráň's failure to complete the works in accordance with the conditions laid down in the relevant permits and of its unrelenting requests for additional payments, Rozmin notified the DMO of the suspension of mining activities for a period exceeding 30 days, in accordance with Decree No. 89/1988 of the Slovak Mining Office dated May 20, 1988.<sup>392</sup> At that time, the Portal and the Explosives Warehouse had in large part been completed, albeit not in accordance with the original Project Design. The Winze, on the other hand, had only been driven to a length of 84 meters and neither the Above-Ground Structures nor the Water Treatment Facilities had been completed.<sup>393</sup>
359. Importantly, neither the DMO nor any other State entity reacted to, let alone disputed, the suspension of works at the Gemerská Poloma deposit, which occurred transparently, in compliance with the applicable procedure and with the full knowledge and blessing of the competent Slovak organs.

#### **F. DISCUSSIONS WITH POTENTIAL TALC PURCHASERS AND INTERESTED INVESTORS WHILE WORKING TOWARDS RESUMPTION OF WORKS**

360. The 2001 suspension of mining activities did not bring the activities of Rozmin or of its shareholders to a standstill. After settling outstanding issues with Rima Muráň, Claimants continued to provide the working capital Rozmin needed for the project, and Rozmin undertook, as further described below, all necessary steps to ensure that the project would remain in compliance with Slovak laws, by securing the permits, authorizations, and leases that would allow it to resume works as soon as possible, to the full knowledge and satisfaction of the competent Slovak authorities. During this

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<sup>391</sup> **Exhibit C-221**, Letter from Rozmin sro to the District Mining Office, dated October 15, 2001(Ref. No. 2274).

<sup>392</sup> **Exhibit C-26**, Letter from Rozmin sro to the District Mining Office, dated November 30, 2001 (Ref. 2304).

<sup>393</sup> **Exhibit C-222**, Technical Report – Inventory of Structures “Drifting an exploratory winze for the Gemerská Poloma tal deposit – temporary structures” signed by Rozmin sro and Rima Muran sro on October 24, 2002, pp. 2-13.

time, Claimants also entered into discussions with potential talc purchasers, and secured offers from third party investors who were willing to acquire an interest in Rozmin for an amount far beyond what the original shareholders of Rozmin – namely Dorfner, OĭMC, and Rima Muráň – had been able to generate prior to Claimants’ involvement in the project.

361. The first item on Claimants order of business after the November 2001 suspension of works was, however, to settle all outstanding matters with Rima Muráň, and to remove Mr. Čorej from the project, due to the ambiguous and unpredictable behavior he had exhibited over the past years (as set out above at paragraphs 342 to 346). In this respect, Respondent, in its Counter-Memorial, and Mr. Čorej, in his witness statement of June 29, 2015, make a number of inaccurate representations.
362. Notably, the effect of the March 26, 2002 settlement agreement entered into between EuroGas GmbH and Rima Muráň, was not, as Mr. Čorej incorrectly represents, a “*de facto waiving [of Rima Muráň’s] shareholding in Rozmin for free*,”<sup>394</sup> or the transfer of Rima Muráň’s “*shareholding interest [in Rozmin] for no consideration*.”<sup>395</sup> This simply could not be farther from the truth. If anything, it is EuroGas GmbH that waived a monetary claim against Rima Muráň, and the amount thereof was far more important than any claim which the latter may have had against EuroGas GmbH or Rozmin.
363. It is particularly telling that Mr. Čorej does not even attempt to identify which claims Rima Muráň would purportedly have had against EuroGas GmbH. This is because there were none. EuroGas GmbH paid a steep price to enter the share capital of Rima Muráň, and thereafter financed all of the company’s shareholder contributions on behalf of all its shareholders.
364. By way of reminder, not only did EuroGas GmbH pay more than DM 1,550,000 to the shareholders of Rima Muráň to acquire a 55% shareholding interest therein,<sup>396</sup> but pursuant to the financing agreement entered into between EuroGas GmbH and Rima Muráň on March 16, 1998, EuroGas GmbH undertook to finance Rima Muráň’s

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<sup>394</sup> Witness Statement of Peter Čorej, ¶ 49.

<sup>395</sup> Witness Statement of Peter Čorej, ¶ 50.

<sup>396</sup> **Exhibit C-284**, Acknowledgment of receipt signed by Mr. Peter Čorej on March 23, 1998. See also Witness Statement of Wolfgang Rauball, ¶ 23.

contributions as a 43% shareholder of Rozmin – that is, not only to make contributions to Rozmin based on its 55% shareholding in Rima Muráň, but also on behalf of the 45% shareholding in Rozmin that was still held by Rima Muráň's other four shareholders.<sup>397</sup>

365. Any contributions made by EuroGas GmbH on behalf of Rima Muráň's other four shareholders were however made as a loan to Rima Muráň. And indeed, there is no evidence on the record suggesting that, following the execution of this financing agreement, any shareholder of Rima Muráň other than EuroGas GmbH made any contribution to Rozmin. Shareholder contributions alone, made by EuroGas GmbH on behalf of Rima Muráň from March 1998 to March 2002, were in excess of EUR 1.5 million. As 45% of these shareholder contributions were made on behalf of, and as a loan to Rima Muráň, EuroGas GmbH had by that time advanced a sum in excess of EUR 675,000, which it was entitled to recover against Rima Muráň. The mere financing of Rima Muráň's contribution to Rozmin's purchase of the Feasibility Study, amounting to DM 1,068,550 (EUR 546,341), constituted a loan of DM 480,847.5 (EUR 245,853) in favour of Rima Muráň.
366. Yet, under the settlement agreement entered into on March 26, 2002, EuroGas GmbH waived its rights to recover from Rima Muráň all the above contributions, which amounted to at least EUR 675,000. It also made a cash payment to Rima Muráň in the amount of SKK 5,061,812 (EUR 168,021). In other words, EuroGas GmbH's financial liability under the settlement agreement amounted to a total of EUR 843,021. And the only consideration provided in return was that Rima Muráň would withdraw from the project, transfer its shareholding interest in Rozmin to EuroGas GmbH, and waive any and all claims against EuroGas GmbH or even Rozmin.

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<sup>397</sup> **Exhibit C-136**, Financing Agreement between EuroGas GmbH and Rima Muráň sro, dated March 16, 1998, whereby EuroGas GmbH agreed to finance Rima Muráň's shareholder contributions to Rozmin, including the share of the contribution incumbent on the other shareholders of Rima Muráň, corresponding to their 45% shareholding interest. As explained by Mr. Rauball in his witness statement, although the shareholder contributions EuroGas GmbH made on behalf of Rima Muráň's other shareholders under the 1998 Financing Agreement were initially considered a loan, these were never repaid, but instead set off against the purchase price paid in 2002 by EuroGas GmbH for Rima Muráň's direct 43% shareholding interest in Rozmin (Witness Statement of Wolfgang Rauball, ¶¶ 23-25).

367. Considering the foregoing, Mr. Čorej's allegation that, following the March 26, 2002 settlement agreement<sup>398</sup> and the hand over of the works by Rima Muráň on October 23-24, 2002,<sup>399</sup> amounts remained outstanding and owed by Rozmin, is entirely wrong.
368. Out of the total amount invoiced by Rima Muráň, namely SKK 22,470,587.70 (EUR 745,887), Rozmin paid SKK 19,359,081.84 (EUR 642,604), having applied, as it was entitled to under the contract, a 7% withholding on the total amount invoiced, namely, SKK 1,251,605.30 (EUR 41,545.7) to account for the defects in the works performed. Thus, if any monies remained outstanding, the amount thereof would not have exceeded SKK 1,859,900.56 (EUR 61,737.4).
369. Yet, following the hand over of the works on October 23-24, 2002, Rima Muráň *never* claimed that there remained any amounts outstanding and owed to it by Rozmin, thereby waiving any claim it may have had against Rozmin (the existence of which is denied). Moreover and in any event, even if the 7% withholding rightfully applied by Rozmin were to be taken into account (and it should not, because Rima Muráň never remedied its defective work), this would bring the sums allegedly owed to Rima Muráň to a total SKK 3,111,505.86 (EUR 103,283). This represents a mere fraction of the total financial liability of EuroGas GmbH under the settlement agreement, namely EUR 843,021.
370. In other words, under the March 26, 2002 settlement agreement, Rima Muráň was more than compensated both for the transfer of its shareholding interest in Rozmin to EuroGas GmbH, and for any amount owed to it by Rozmin, which is further demonstrated by the fact that Rima Muráň never sought to recover any allegedly outstanding monies from Rozmin. In fact, the purpose of the March 26, 2002 settlement agreement was precisely to ensure that all liabilities to Rima Muráň were paid off, that its shareholding interest were purchased by EuroGas GmbH, and that Mr. Čorej would no longer be involved in the management of Rozmin. This goal was achieved, but only until Mr. Čorej started working with the Slovak government in the process that ultimately led to the revocation of Rozmin's mining rights.

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<sup>398</sup> **Exhibit R-130**, Settlement Agreement between EuroGas GmbH and RimaMuráň s.r.o., dated March 26, 2002.

<sup>399</sup> **Exhibit R-131**, Handover Protocol between Rozmin s.r.o. and RimaMuráň s.r.o., dated October 24, 2002.

371. The second item on Claimants' order of business was to resume the opening works. However, when all outstanding matters with Rima Muráň were at last settled by way of the March 26, 2002 agreement,<sup>400</sup> and the works were handed over by Rima Muráň on October 23-24, 2002,<sup>401</sup> the Authorization on Mining Activities at Gemerská Poloma was about to expire.
372. Rozmin therefore undertook all necessary steps to obtain an extension of this Authorization, and to ensure that in the meantime, the project remained in compliance with Slovak laws, by securing the permits, authorizations, and leases that would allow it to resume works as soon as possible. This process, which was very time consuming due to the bureaucratic process involved and outlined above at paragraphs 316 to 335, ultimately delayed the resumption of works until late 2004.
373. Respondent has attempted to blame this delay on Rozmin's failure to comply with, and provide, the necessary documentation. For the reasons set out below, this position is untenable. Rather, it is the multitude of documents required, and the unpredictable decision making of the mining authorities, that prevented Rozmin from securing an extension of its Authorization on Mining Activities at Gemerská Poloma. Moreover and in any event, the undeniable reality is that at all times between the suspension and the resumption of works at the Deposit, Rozmin relentlessly applied for, supplemented, and ultimately obtained all the necessary authorizations, leases and permits. There is not one period in time where Rozmin stayed idle.
374. By way of reminder, on September 5, 2002, Rozmin applied to the DMO for an extension of its Authorization on Mining Activities at Gemerská Poloma, initially set to elapse on December 31, 2002. On November 12, 2002, the DMO requested Rozmin to submit, within 45 days, statements of approval from the relevant public entities, an evaluation of the works already carried out under the original Authorization, and a new Plan for the Opening, Preparation, Development, and Exploitation of the deposit, amended to incorporate an evaluation of irrecoverable and irremovable dangers.<sup>402</sup> This

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<sup>400</sup> **Exhibit R-130**, Settlement Agreement between EuroGas GmbH and RimaMuráň s.r.o., dated March 26, 2002.

<sup>401</sup> **Exhibit R-131**, Handover Protocol between Rozmin s.r.o. and RimaMuráň s.r.o., dated October 24, 2002.

<sup>402</sup> **Exhibit C-223**, Decision of the District Mining Office, dated November 12, 2002 (Ref. 2118/2002).



request, especially with respect to renewed statements of approval, came as a surprise to Rozmin, as all the required statements of approval had been submitted with Rozmin's initial application, and it did not expect that renewed statements of approval would have to be submitted in support of its application for an extension of its Authorization on Mining Activities at Gemerská Poloma. This was a typical example of the unpredictable nature of the DMO's decision-making process, and of the unexpected administrative hurdles which Rozmin had to overcome. This was all the more so that the time period granted to provide new statements of approval from the relevant public entities, an evaluation of the works already carried out under the original Authorization, and a new Plan for the Opening, Preparation, Development, and Exploitation, was so short that, in practice, it was impossible to comply with.

375. On December 20, 2002, Rozmin thus submitted both an evaluation of the works already carried out under the 1998 POPD initially approved by the DMO, and a new Plan for the Opening, Preparation, Development, and Exploitation,<sup>403</sup> amended to incorporate an evaluation of irrecoverable and irremovable dangers. As for the required statements, Rozmin could only undertake to submit them as soon as it would receive them.<sup>404</sup>
376. On January 16, 2003, the DMO however closed the procedure for extension on the ground that Rozmin had not submitted, within the allocated time, the necessary statements of approval or a revised Plan for the Opening, Preparation, Development, and Exploitation of the deposit, which included an evaluation of irrecoverable and irremovable dangers, and considered the mining authorization to have lapsed on December 31, 2002.<sup>405</sup>
377. Upon Rozmin's appeal, on May 15, 2003, the Main Mining Office however reversed the DMO's decision.<sup>406</sup> One of the grounds on which the MMO reversed the DMO's decision to close the procedure was that Rozmin *had* submitted a new Plan for the Opening, Preparation, Development, and Exploitation of the deposit, amended to incorporate an evaluation of irrecoverable and irremovable danger, but that the DMO,

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<sup>403</sup> **Exhibit C-224**, Letter from Rozmin sro to District Mining Office, dated December 20, 2002.

<sup>404</sup> **Exhibit C-224**, Letter from Rozmin sro to District Mining Office, dated December 20, 2002.

<sup>405</sup> **Exhibit C-225**, Decision of the District Mining Office No. 46/2003, dated January 16, 2003, p. 3.

<sup>406</sup> **Exhibit C-226**, Decision of the MMO, dated May 15, 2003 (Ref. 230 367/2003).

having found the same insufficient, had simply considered that an evaluation of irrecoverable and irremovable danger had not been submitted and had failed to provide any indication as to how to supplement the same.<sup>407</sup>

378. The DMO then reopened the proceedings and requested Rozmin, on August 12, 2003, to submit the statements of approval from the relevant public entities and an amended Plan for the Opening, Preparation, Development, and Exploitation to incorporate an evaluation of irrecoverable and irremovable dangers.<sup>408</sup> No indication was, however, given in respect of the DMO's requirements for the evaluation of irrecoverable and irremovable danger, which made compliance therewith all the more difficult and unpredictable.
379. On November 4, 2003, Rozmin submitted the required documents, namely the requested statements of approval and a revised Plan for the Opening, Preparation, Development, and Exploitation of the deposit, which included an evaluation of irrecoverable and irremovable danger. On November 27, 2003, the DMO found Rozmin's application to be missing one statement of approval, namely that of the Rožňava branch of Lesy SR, s.p. Banská Bystrica ("LESY Rožňava"), and added that it was not satisfied with the amendments to the Plan for the Opening, Preparation, Development, and Exploitation.<sup>409</sup>
380. This decision was again unduly formalistic and unfair. The only reason Rozmin had been unable to submit the requested document from LESY Rožňava was because it was precisely in the process of negotiating the renewal of the lease contracts over the land parcels Nos. 2278/8, 2278/9, 2278/10, and 2278/11, which were set to expire on November 25, 2003,<sup>410</sup> and for which Rozmin had already secured a further exclusion from the forest land fund on October 21, 2003 (see paragraph 388 below).<sup>411</sup> And indeed, Rozmin was able to conclude the renewed lease agreements for the said land

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<sup>407</sup> **Exhibit C-226**, Decision of the MMO, dated May 15, 2003 (Ref. 230 367/2003).

<sup>408</sup> **Exhibit C-227**, Decision of the District Mining Office, dated August 12, 2003 (Ref. 1494/2003).

<sup>409</sup> **Exhibit C-228**, Decision of the District Mining Office, No. 367/2003, dated November 27, 2003.

<sup>410</sup> **Exhibit C-228**, Decision of the District Mining Office, No. 367/2003, dated November 27, 2003.

<sup>411</sup> **Exhibit C-233**, Decision of the Department of Lands, Agriculture, and Forestry of the District Office of Rožňava, dated October 21, 2003.

parcels on November 30, 2003,<sup>412</sup> namely three days after the DMO decided to unnecessarily terminate the proceedings on the basis of a purely formalistic requirement.

381. As for Rozmin's alleged failure to submit an evaluation of irrecoverable and irremovable dangers, Rozmin cannot in any way be blamed therefor given that since January 16, 2003, when the proposed evaluation was first rejected, Rozmin was never provided with any guidance whatsoever as to the precise nature of the DMO's requirements. Rozmin was essentially shooting in the dark, each time doing its best to guess and meet the DMO's requirements for the evaluation of irrecoverable and irremovable dangers. This was an excessively and unnecessarily cumbersome exercise.
382. For all of the above reasons, the DMO's decision of November 27, 2003 to once again deny Rozmin's request for an extension of its Authorization on Mining Activities at Gemerská Poloma, was unwarranted. This time however, rather than appealing yet again the DMO's decision – which had led to an almost five-month long process the last time around – Rozmin decided to submit a new application in order to save time.
383. On January 8, 2004, Rozmin thus submitted a fresh application, together with an amended Plan for the Opening, Preparation, Development, and Exploitation (the “2003 POPD”) and the requested statements of approval, including notably the statements of approval of the Municipality of Gemerská Poloma, the Municipality of Henclova, the Department of Environment of the Košice District Office, the Hron River Basin Branch of the Slovak Water Management Company, and the Revuca Branch of the Eastern Slovak Waterworks and Sewers.<sup>413</sup>
384. On February 6, 2004, the DMO requested further amendments to the 2003 POPD,<sup>414</sup> which Rozmin swiftly incorporated, having by then received guidance on the DMO's expectations.<sup>415</sup>

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<sup>412</sup> **Exhibit C-234**, Lease contract dated November 30, 2003.

<sup>413</sup> **Exhibit C-27**, Authorisation of Mining Activity in the Mining Area “Gemerská Poloma,” dated May 31, 2004 (Ref. 1023/511/2004), pp. 5-6.

<sup>414</sup> **Exhibit C-229**, Decision of the District Mining Office, No. 155/2004, dated February 6, 2004.

<sup>415</sup> **Exhibit C-230**, Plan for the Opening, Preparation, Development, and Exploitation approved on May 31, 2004.

385. Eventually, after holding a hearing on April 1, 2004,<sup>416</sup> the DMO approved – at last – the request and, on May 31, 2004, extended Rozmin’s Authorization on Mining Activities at Gemerská Poloma to November 13, 2006.<sup>417</sup>
386. For all the reasons set out above, the delay in obtaining this Authorization cannot in any way be attributed to Rozmin, which relentlessly endeavoured in good faith to meet the many unexpected and unspecified requirements of the DMO, and to overcome its unduly formalistic and unpredictable decision-making process.
387. Throughout the lengthy process of having Rozmin’s Authorization on Mining Activities at Gemerská Poloma extended to November 13, 2006, Rozmin followed up on all the administrative permits it had secured to ensure that they did not expire, as non-exhaustively set out below.
388. In respect of the land parcels where the works were to be carried out, Rozmin entered into a new lease with LESY Košice, extending Rozmin’s right to use the land parcels required for construction (land parcels Nos. 2278/1, 2278/8, 2278/9, and 2278/10) from June 30, 2002 to November 25, 2003,<sup>418</sup> *i.e.* the date on which the initial temporary exclusion of the land parcels from the forest land fund expired. Thereafter, Rozmin secured a further three-year temporary exclusion of the land parcels (plots Nos. 2278/8, 2278/9, 2278/10, and 2278/11) from the forest land fund on October 21, 2003,<sup>419</sup> and entered into a new lease contract with LESY Košice, extending Rozmin’s right to use the land parcels (plots Nos. 2278/8, 2278/9, 2278/10, and 2278/11) until November 13, 2006.<sup>420</sup> This lease contract was approved by the Ministry of Agriculture on April 28, 2004.<sup>421</sup>

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<sup>416</sup> **Exhibit C-231**, Notification of the District Mining Office, dated March 17, 2004 (Ref. 556/2004).

<sup>417</sup> **Exhibit C-27**, Authorisation of Mining Activity in the Mining Area “Gemerská Poloma,” dated May 31, 2004 (Ref. 1023/511/2004).

<sup>418</sup> **Exhibit C-232**, Lease contract dated July 1, 2002.

<sup>419</sup> **Exhibit C-233**, Decision of the Department of Lands, Agriculture, and Forestry of the District Office of Rožňava, dated October 21, 2003.

<sup>420</sup> **Exhibit C-234**, Lease contract dated November 30, 2003.

<sup>421</sup> **Exhibit C-234**, Lease contract dated November 30, 2003.

389. In respect of the Above-Ground Structures, Rozmin applied, on May 31, 2001, for an extension of the building permit issued on March 23, 1999.<sup>422</sup> The application was approved on June 21, 2001, thereby extending the completion date from June 30, 2001 to March 31, 2002.<sup>423</sup>
390. On October 11, 2001, Rozmin applied for an amendment to the building permit for the Above-Ground Structures issued on March 23, 1999. The request was approved on October 4, 2002, together with an extension for the completion of works until December 30, 2002.<sup>424</sup> In order to be granted this amendment to the Permit, Rozmin had obtained and submitted a statement of approval issued by the following institutions: the Municipality of Gemerská Poloma, the State Health Officer for the District of Rožňava, the Directorate of the Fire and Rescue Service of Rožňava, the Hron River Basin Branch of the Slovak Water Management Company, and the State-owned enterprise for the Forests in Rožňava.<sup>425</sup> Upon Rozmin's request dated December 4, 2002, the completion date for the Above-Ground Structures was further extended to October 31, 2003.<sup>426</sup>
391. In respect of the Water Management Facilities, Rozmin applied, on April 23, 2002, for an amendment to the building permit issued on February 23, 1999. The application was approved on August 9, 2002, together with an extension for the completion of works until December 31, 2002.<sup>427</sup> In order to be granted this amendment to the permit, Rozmin had obtained and submitted a statement of approval issued by the following State entities: the State-owned enterprise for the Forests in Rožňava, the Hron River Basin Branch of the Slovak Water Management Company, the DMO, the State District Health Officer in Rožňava, the Eastern Slovak Waterworks and Sewers Revuca Branch,

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<sup>422</sup> See **Exhibit C-235**, Rozmin sro's Request to the Department of Environment of the Rožňava District Office of Rožňava, dated May 31, 2001 (Ref. No. 2126).

<sup>423</sup> See **Exhibit C-236**, Decision of the Department of Environment of the District Office of Rožňava, dated June 21, 2001 (Ref. SP 2001/02784 – O).

<sup>424</sup> **Exhibit C-237**, Decision of the Department of Environment of the District Office of Rožňava, dated October 4, 2002 (Ref. SP 2002/00325/001-OL).

<sup>425</sup> **Exhibit C-237**, Decision of the Department of Environment of the District Office of Rožňava, dated October 4, 2002 (Ref. SP 2002/00325/001-OL), p. 3.

<sup>426</sup> **Exhibit C-238**, Decision of the Department of Environment of the District Office of Rožňava, dated December 17, 2002 (Ref. SP-2002/04990-002-Po), p. 1.

<sup>427</sup> **Exhibit C-239**, Decision of the Department of Environment of the District Office of Rožňava, dated August 9, 2002 (Ref. ŠVS-2002/02214), pp. 3 – 5.

and the Department of Environment, the State Nature and Landscape Protection Administration in Rožňava.<sup>428</sup>

392. Thereafter, the completion date for the Water Management Facilities was extended on December 19, 2002 to October 31, 2003,<sup>429</sup> and on May 17, 2004 to September 30, 2004.<sup>430</sup>
393. By the time the May 17, 2004 extension was granted, Rozmin had completed the plant for mine waters treatment (the “Mining Wastewater Treatment Plant”), which was one of the Water Management Facilities. Rozmin therefore requested, on February 12, 2004, the issuance of a final approval decision in respect of the Mining Wastewater Treatment Plant. The request was accompanied by a report of the Regional Public Health Office in Rožňava, dated February 2, 2004,<sup>431</sup> and supplemented, on April 19, 2004, with the statement of the Slovak Water Management Company of Banská Bystrica, dated March 31, 2004.<sup>432</sup> It was approved on July 28, 2004 and Rozmin was allowed to use the Mining Wastewater Treatment Plant for a trial period until June 30, 2005.<sup>433</sup> Eventually, on October 26, 2004, Rozmin was granted an extension for the completion of the remaining Water Management Facilities until May 30, 2005.<sup>434</sup>
394. In respect of the relocation of the forest road and construction of a bridge over the Dlhý potok stream, Rozmin obtained, on August 12, 2002, an amendment to the corresponding building permit,<sup>435</sup> was granted an extension on its permit to enter and

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<sup>428</sup> **Exhibit C-239**, Decision of the Department of Environment of the District Office of Rožňava, dated August 9, 2002 (Ref. ŠVS-2002/02214), p. 4.

<sup>429</sup> **Exhibit C-240**, Decision of the Department of Environment of the District Office of Rožňava, dated December 19, 2002 (Ref. SVS-2002/02214-Kú), extending the completion date to October 31, 2003.

<sup>430</sup> **Exhibit C-241**, Decision of the Department of Environment of the District Office of Environment in Rožňava, dated May 17, 2004 (Ref. ŠVS-2003/03792-Kú), extending the completion date to September 30, 2004.

<sup>431</sup> **Exhibit C-242**, Report of the Regional Office of Public Health in Rožňava, dated February 2, 2004 (Ref. 00235-00003-44-212.31-I.2/2004).

<sup>432</sup> **Exhibit C-243**, Statement of the Water Management Company in Banská Bystrica, dated March 31, 2004 (Ref. 262-125/2004).

<sup>433</sup> **Exhibit C-244**, Decision of the Department of Environment of the District Office of Rožňava, dated July 28, 2004 (Ref. ŠVS-2004/00172-Ku), p. 4.

<sup>434</sup> **Exhibit C-245**, Decision of the Department of Environment of the District Office of Rožňava, dated October 26, 2004 (Ref. No. ŠVS-2004/00685-Kú).

<sup>435</sup> **Exhibit C-246**, Decision of the Department of Transport and Road Administration of the District Office of Rožňava, dated August 12, 2002.

use vehicles in forest areas until November 13, 2006,<sup>436</sup> and entered into an new contract with Lesy Rožňava authorizing Rozmin to use forest roads until November 13, 2006.<sup>437</sup>

395. Lastly, and throughout the lengthy process of securing an extension on Rozmin's Authorization on Mining Activities at Gemerská Poloma to November 13, 2006, Claimants engaged in a number of negotiations with potential talc purchasers and third-party investors who were willing to acquire a shareholding interest in Rozmin for sums ranging from USD 15 million to EUR 26 million (see paragraphs 399 to 400 below).
396. With respect to potential purchasers of talc to be extracted from Gemerská Poloma, notably, a team of experts from Mondo Minerals BV ("Mondo"), the world's second largest talc producer, supplying customers in over 70 countries, had visited the deposit as early as in March 1999 and then again in September 2001.
397. On June 27, 2002, Mondo expressed an interest in either purchasing lump talc from Rozmin once production would have been launched, or in cooperating for the sale of finished talc products using Mondo's large sales network throughout Europe.<sup>438</sup> In September 2002, Mr. Wulf Dietrich Keller, then CEO of Mondo, expressed Mondo's interest in purchasing talc exclusively from the Gemerská Poloma deposit, once production would have been launched.<sup>439</sup>
398. On September 10, 2004, as Rozmin was resuming the opening works at the Deposit, Mondo reiterated its interest in purchasing talc from Rozmin by way of an official letter to EuroGas GmbH, in which it moreover expressed "*its interest in entering in a long-term sales agreement representing an annual tonnage of 50,000 to 60,000 mt.*"<sup>440</sup>

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<sup>436</sup> **Exhibit C-247**, Decision of the Department of Lands, Agriculture, and Forestry of the District Office of Rožňava, dated October 28, 2002 (Ref. 2002/01006-00004), granting an exemption until November 25, 2003; and **Exhibit C-248**, Decision of the Department of Lands, Agriculture, and Forestry of the District Office of Rožňava, dated September 23, 2004 (Ref. 04/00184), granting an extension until November 13, 2006.

<sup>437</sup> **Exhibit C-249**, Contract on Common Use and Funding of Maintenance and Repairs of Forestry Roads, dated August 13, 2004.

<sup>438</sup> **Exhibit C-250**, Email from Mondo Omya, dated June 27, 2002.

<sup>439</sup> See **Exhibit C-251**, Emails exchanged with Mondo Omya between September 26, 2002 and September 30, 2002.

<sup>440</sup> **Exhibit C-351**, Letter from Mondo Minerals to EuroGas GmbH, dated September 10, 2004.

399. With respect to potential third party investors, the first who approached EuroGas GmbH was a Swiss company named Brombilla Finanz AG, the subsidiary of a large German paper factory. On April 2, 2003, EuroGas GmbH and Brombilla Finanz AG entered into a share purchase agreement for sale of a 15% shreholding interest in Rozmin for the price of USD 15 million, subject to the buyer securing an overall financing agreement for a larger scale paper factory.<sup>441</sup> Brombill Finanz was unfortunately not able to obtain this overall financing facility, and the share purchase agreement with EuroGas GmbH was terminated on October 7, 2003.<sup>442</sup>
400. Following this initial failure, EuroGas approached Protec Industries on November 28, 2003,<sup>443</sup> and was met with much enthousiasm. On January 12, 2004, the two companies entered into a Letter Agreement pursuant to which Protec Industries was granted an option until March 31, 2005 to purchase a 49% interest in Rozmin from EuroGas (which was working on the assumption that the SPA with Belmont would be consummated), for the price of EUR 26 million.<sup>444</sup> The option was conditional upon the payment of a EUR 500,000 option price, which was paid on January 21, 2004. However, the Slovak Republic revoked Rozmin's mining rights before Protec was able to exercise the option.

#### **G. AUTHORIZATION TO CARRY OUT MINING ACTIVITIES UNTIL 2006 AND RESUMPTION OF MINING WORKS**

401. On May 31, 2004, the DMO authorized Rozmin to resume mining activities pursuant to Article 10 of the Act on Mining Activities.<sup>445</sup> The DMO did not raise any issue, let alone any timing issue in relation to the suspension of works, and the DMO's official authorization to carry out mining activities was to remain valid until November 13, 2006. Rozmin therefore prepared all documentation necessary to initiate, in June 2004,

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<sup>441</sup> **Exhibit C-352**, Share Purchase Agreement between EuroGas GmbH and Brombilla Finanz AG, dated April 2, 2003.

<sup>442</sup> **Exhibit C-353**, Amendment to the Share Purchase Agreement between EuroGas GmbH and Brombilla Finaz AG, dated October 7, 2003.

<sup>443</sup> **Exhibit C-354**, Letter from EuroGas to Protec Industries, dated November 28, 2003.

<sup>444</sup> **Exhibit C-355**, Letter Agreement between Protect Industries and EuroGas Inc., dated January 12, 2004.

<sup>445</sup> **Exhibit C-27**, Authorisation of Mining Activity in the Mining Area "Gemerská Poloma," dated May 31, 2004 (Ref. 1023/511/2004).



a new tender so as to enter into an agreement with a contractor that would resume the opening works.

402. As explained in Claimants' Memorial, four companies presented bids, namely Banské stavby as Prievdza, Uranpress s.r.o. Spišská Nová Ves, Váhostav a.s. Žilina, and Siderit. Siderit was selected by the members of the company because it had presented the most thorough yet most economic bid, because Siderit had extensive experience in the kind of works that were to be carried out at the deposit, and because in August 2004, during the suspension of mining activities, Siderit had satisfactorily carried out preparatory works towards the completion of above-ground structures, pursuant to individual orders. Finally, Siderit had already built the necessary infrastructure to operate its mining plant near the village of Nižná Slaná, located about 18 kilometers away from the ore body, which meant that workers would be able to easily reach the deposit by car, and that additional facilities would likely not be needed at the site.
403. Accordingly, on November 5, 2004, Rozmin and Siderit entered into a Contract for Work, in accordance with the 2003 POPD, for a price of SKK 76,780,100.00 (VAT not included).
404. For the excavation of the mine, Siderit ordered a new drill rig from the Swedish company Atlas Copco as well as transportation equipment, and began, in the fall of 2004, designing and completing structures that either had been started but never completed by the previous contractor, Rima Muráň, or that were to be built from scratch, such as, for instance, oil and water cleaning installations and separation plant, and a discharge system for clarified water. Furthermore, Siderit pumped out water that had flooded the mine as a result of the suspension of works, performed some repair works on the Winze and electrical installations, and completed the Portal.
405. On October 14, 2004, a meeting was held at the DMO, which was attended, inter alia, by Mr. Baffi, the director of the District Mining Office, Mr. Agyagos on behalf of Belmont, and Dr. Rozložník on behalf of Rozmin. In the course of that meeting, the DMO was informed that Rozmin had initiated construction works at the site. The DMO did not raise any objections, let alone make any reference to the possibility of a cancellation of the assignment of the Mining Area to Rozmin.

406. On November 8, 2004, Rozmin officially announced to the DMO that it would resume mining activities by November 18, 2004. Here again, the DMO did not react to the announcement, nor did it argue that the works had been suspended for too long for Rozmin to be entitled to resume its activities at the site.
407. Siderit started excavation works so as to allow Rozmin to start production by November 2006. Furthermore, on November 16, 2004, to ensure the supply of energy needed at the deposit, Rozmin entered into an agreement with Rima Muráň to purchase from the latter, for an amount of SKK 4 million, the high-voltage line which had been built at Dlhá dolina.
408. On December 8, 2004, the Director of the DMO, Mr. Antonín Baffi, carried out an inspection at the Gemerská Poloma talc deposit, which lasted over two hours and led him to conclude that everything was in good standing and to confirm that Rozmin was authorized to continue mining activities until November 2006. This inspection in fact resulted in Minutes of Meetings drafted and signed by Mr. Baffi himself, in which he recorded the work in progress, concluded that Rozmin's activities were in compliance with all legal regulations in force, and confirmed that Rozmin was entitled to carry out mining activities until November 13, 2006. These minutes indeed provided:

*[...] On the basis of the administrative process in the matter of permitting mining activity, the Mining Office issued a new permit no. 1023/511/2004 of 31 May 2004, by which it allowed mining activity in the Gemerská Poloma mining area until 13 November 2006. [...]*

*At the time of the onsite inspection, a T 148 truck and an Avia van, owned by the company SIDERIT, s.r.o. Nižná Slaná (hereinafter "Siderit"), were parked in the Gemerská Poloma mining area. Siderit's employees (6 people) were carrying out the final – completion work on the drain system – SO 018 – Sanitary and storm sewer with oil trap, which concerned removal of sheeting and modification of part of the covering on the technological sump with a carbon oil catchment filter.*

*It was found onsite that since 18 November 2004, Siderit performed and completed construction work on SO 024 – Mining water treatment plant, which was specified in the conditions of the Decision of the Rožňava District Environment Authority no. ŠVS-2004/00172-Kú of 28 July 2004, which chiefly concerned the opening of the outflow*

*pipe into the surface watercourse and completion of landscaping around the object including the outflow building.*

*Furthermore, it was discovered that Siderit had performed other works in connection with securing the safety of the opening mouth of the mining works – raise, in terms of limiting the influence of erosion on the state and safety of the framing caused by meteorological and climatic conditions.*

*For further performance of the mining activity, Rozmin secures electricity supply to the main electricity distributor along the opening of the mining works – raise by contracting with the company RimaMuráň, s.r.o. The cables of the aerial HV lines are installed at a distance of ca. 400 m from the abovementioned main distributor. At the time of the onsite inspection, work was being performed on deforestation of the HV line protection zone.*

*As part of the inspection Rozmin submitted the Decision of the Rožňava District Environment Authority no. ŠVS-2004/00172-Kú of 28 July 2004, which specifies the conditions of the discharging of mine water into the Dlhý potok watercourse, which permits temporary use of part of the water management building SO 024 – Mining water treatment plant and approves the mining water treatment plant operating code.*

*Rozmin has performed and performs works related to the completion of surface water management construction due to the limitation of mining activity by Decision of Rožňava District Authority, Environment Department no. ŠVS-2002/02214 of 9 August 2002, which is conditional on putting temporary surface buildings into use.*

*Rozmin has works related to performance of mining activity elaborated in Chapter 1.2.2 of the Talc deposit development, preparation and extraction plan for the Gemerská Poloma mining area, which was a basis for the Decision of the Mining Office no. 1023/511/2004 of 31 May 2004.*

*During today's inspection no facts were discovered indicating breach of legal regulations in force.<sup>446</sup>*

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

409. At the time, Claimants had confirmed extensive high-quality talc resources and fully de-risked the deposit. They had secured all required permits and resumed works on site in view of production, in full compliance with their obligations and with the full satisfaction of the Slovak Republic.
410. It is at that time and under these circumstances that the Slovak Republic's Soviet era reflexes resurfaced, as they often do when material interests such as the one at hand are at stake, as reported in the independent studies in relation to the allocation of natural resources or rights. The Slovak Republic indeed decided to expropriate Claimants' rights and investment and to "tender" the deposit to a local, newly-established company.

#### **H. PROCEDURALLY AND SUBSTANTIVELY UNJUSTIFIED REVOCATION AND REASSIGNMENT OF ROZMIN'S MINING RIGHTS**

411. As explained in Claimants' Memorial, on December 30, 2004, that is, no more than 22 days after the December 8, 2004 inspection, the Slovak Republic announced, by way of a publication in the Business Journal, that it was initiating a new tender procedure for the assignment of the deposit without ever notifying or informing Rozmin of the same, let alone putting it on notice of the grounds thereof and giving it an opportunity to address the same.<sup>447</sup> In other words, Slovakia simply decided, abruptly and without the slightest notice, to take away Rozmin's rights once the deposit's reserves had been confirmed and the works were in progress. The fact that the tender was announced on December 30, 2004 meant that it was decided and planned months earlier. Worse, as related below, documentary evidence recently obtained demonstrates that Respondent was in fact, at the time, engaged in discussions with third-party companies to pre-cook the tender. In other words, the dice were cast by Respondent, and this by some civil servants who seemed to have their own agenda.
412. Then, on January 3, 2005, Mr. Baffi – the very same 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 with its obligations, and reiterated Rozmin's right to carry out mining activities until November 13, 2006 –

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<sup>447</sup> **Exhibit C-29**, Initiation of the Selection Procedure for the Determination and Assignment of the Extraction Area, Business Journal No. 253/2004, dated December 30, 2004, p. 99.

wrote to Rozmin to inform it *post facto* that Rozmin's rights had *de facto* been revoked and were to be awarded to a new organization.<sup>448</sup>

413. The above is, as set out below, sufficient for a finding of BIT breaches ranging from a failure to meet the the fair and equitable to an unlawful expropriation for lack of due process. This is undisputable under the circumstances. The revocation was similarly flawed substantively, as set out below.
414. The explanation offered by the DMO to justify the initiation of a new tender was that no mining activity ("*banská činnost*") had been carried out for over three years.<sup>449</sup> This purported justification was based on Act No. 558/2001, amending Act No. 44/1988 on Protection and Utilization of Mineral Resources (the "2002 Amendment"), which had come into effect on January 1, 2002 and allowed the revocation of mining rights by the DMO in the event of an interruption of activities for a period exceeding three years.<sup>450</sup> In other words, to justify the revocation of Rozmin's mining rights on January 3, 2005, the DMO relied on the 2002 Amendment despite the fact that on May 31, 2004, that is, well after the suspension of works and well after the entry into effect of this 2002 Amendment, it had explicitly authorized Rozmin to resume and pursue mining activities at the Gemerská Poloma talc deposit until November 13, 2006.
415. On April 21, 2005, the DMO held a tender procedure and assigned the Gemerská Poloma deposit to Economy Agency RV s.r.o. ("Economy Agency"), a shell company, founded and owned by Ms. Zdenka Čorejová,<sup>451</sup> Rozmin's former accountant and spouse of Mr. Peter Čorej, CEO and shareholder of Rima Muráň.
416. The deposit was awarded to Economy Agency only once the exceptional quality and extraordinary extent of reserves of talc at the deposit had been assessed, traced, and confirmed by Rozmin, in accordance with the highest western industry standards, by way of a series of bankable feasibility studies that Rozmin and Claimants had

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<sup>448</sup> **Exhibit C-30**, Letter from the District Mining Office to Rozmin sro, dated January 3, 2005 (Ref. 2405/451.14/2004-I).

<sup>449</sup> **Exhibit C-30**, Letter from the District Mining Office to Rozmin sro, dated January 3, 2005 (Ref. 2405/451.14/2004-I).

<sup>450</sup> See Article 27(12) of Act No. 44/1988 on Protection and Utilization of Mineral Resources, as amended by Act No. 558/2001.

<sup>451</sup> See Witness Statement of Vojtech Agyagos, ¶ 45.

commissioned and/or paid for, and at a time when works were ongoing at site – with the full knowledge and satisfaction of the competent Slovak organs – towards the site’s preparation for excavation and commercial development, and negotiations of agreements for the sale of talc to be extracted from the deposit had been initiated.

417. To try to justify this outright expropriation, Respondent asserts that the deposit was re-assigned to Economy Agency as a result of Rozmin’s failure to perform excavation for a period of three years, which purportedly triggered a mandatory reassignment of Rozmin’s assigned Mining Area by the DMO. This is the one and only defense raised by Respondent in its Counter-Memorial. Indeed, according to the Slovak Republic, “[a]fter three years of no excavation under the 2002 Amendment (indeed, seven years if one counts from when Rozmin was first assigned the Excavation Area), the relevant DMO followed the mandatory provisions of the 2002 Amendment and assigned the Excavation Area to a third-party on 3 May 2005 after an open tender.”<sup>452</sup> Respondent also vaguely implies that Claimants did not have the financial capacity to carry through the project.
418. Respondent not only misinterprets the 2002 Amendment, in blatant contradiction with its own Supreme Courts’ holding, but also misrepresents the facts of this case. As further explained below:
- The rationale and purpose of the 2002 Amendment implied that each situation had to be examined for itself and that the cancellation or reassignment of a mining area was not an automatic operation. As confirmed by the Slovak Republic’s own Supreme Court, the applicable test was whether the assignee of a mining area had carried out activities as opposed to remaining idle for a period exceeding three years, not whether it had performed excavation. The absence of excavation alone could not justify the cancellation or reassignment of a mining area under the 2002 Amendment (1).
  - Respondent’s suggestion that Claimants did not have the financial capacity to carry through the project is an unsubstantiated *post facto* allegation, which

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<sup>452</sup> Respondent’s Counter-Memorial, ¶ 14.

Respondent should be barred from making and which is, in any event, inaccurate (2).

- Considering that the 2002 Amendment provided that mining rights could be revoked or reassigned only if mining activities had been suspended for a period exceeding three years, that Rozmin did resume mining activities before the expiration of this three-year period, and that its mining rights were actually extended until November 2006, Rozmin's actual knowledge of the 2002 Amendment did not and could not have prevented it from being taken by surprise by the announcement, on December 30, 2004, of the initiation of a new tender procedure for the assignment of the deposit (3).
- The record shows that Respondent had already decided to revoke Rozmin's mining rights and reassign the Mining Area well before the expiration of the three-year period that had started running on January 1, 2002, when the 2002 Amendment had come into force. As early as in November 2004, indeed, Respondent had already entered into discussions – via its intermediary and witness in these proceedings, Mr. Peter Čorej, and the MMO – with a third interested party, for the re-assignment of mining rights over the Gemerská Poloma deposit. Once these negotiations failed, mining rights were awarded to Economy Agency, over which Mr. Čorej – a State agent – exerted actual control and which would therefore follow Respondent's instructions, and which was the only entity that had had access to all of Rozmin's studies and development plans (4).

**1. The absence of excavation for a period of three years was no ground for the cancellation or re-assignment of the Mining Area, which was not mandated by the 2002 Amendment**

419. As noted above, the explanation offered by the DMO, in its letter of January 3, 2005, to justify the initiation of a new tender was that no mining activity (“banská činnosť”) had been carried out for a period of more than three years.<sup>453</sup> This purported justification was based on the 2002 Amendment, which had come into effect on January 1, 2002 and

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<sup>453</sup> **Exhibit C-30**, Letter from the District Mining Office to Rozmin sro, dated January 3, 2005 (Ref. 2405/451.14/2004-I).

allowed the revocation of mining rights by the DMO in the event of an interruption of activities for a period exceeding three years.<sup>454</sup> Thus, the January 3, 2005 letter, which explicitly referred to the 2002 Amendment, made no reference whatsoever to the absence of excavation, but rather focused on the suspension of “mining activities.”

420. Nevertheless, today Respondent contends that “[t]he 2002 Amendment provided that, if mining companies did not commence ‘excavation’ (in Slovak, ‘dobývanie’) of the excavation area to which they were assigned within three years after the statute took effect, then the local mining authority was required to cancel the excavation area or to reassign it to a third-party.”<sup>455</sup> Accordingly, considering that “[i]t is undisputed that Rozmin never commenced Excavation,”<sup>456</sup> Respondent concludes that “under the mandatory terms of the 2002 Amendment, the DMO had the obligation to cancel the Excavation Area or transfer it to a third party.”<sup>457</sup>

421. Respondent is mistaken. It is in blatant disregard of its own Supreme Court’s findings that Respondent maintained in its submissions on provisional measures and reiterates in its Counter-Memorial that the term “*dobývanie*,” found in the 2002 Amendment, should be translated into English as “excavation,” which it defines as “*the actual commercial production of the minerals from the deposit*.”<sup>458</sup> At the time of the facts contemporaneous with the dispute, the Slovak Republic’s Supreme Court expressly disavowed such a translation, holding that the “*restrictive*” interpretation of the term “*dobývanie*” adopted by the administrative bodies in December 2004 to argue that Rozmin should have started extracting minerals within a three-year period, and which is central to Respondent’s attempt to justify the revocation of Rozmin’s rights, was “*not correct*.”<sup>459</sup>

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<sup>454</sup> See Article 27(12) of Act No. 44/1988 on Protection and Utilization of Mineral Resources, as amended by Act No. 558/2001.

<sup>455</sup> Respondent’s Counter-Memorial, ¶ 9.

<sup>456</sup> Respondent’s Counter-Memorial, ¶ 295.

<sup>457</sup> Respondent’s Counter-Memorial, ¶ 295.

<sup>458</sup> Respondent’s Counter-Memorial, ¶ 192(c).

<sup>459</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), p. 25.



422. Respondent's argument that the taking of Rozmin's mining rights was lawful because Rozmin had not started *excavating* minerals within a three-year period has thus already been examined and rejected by the Slovak Supreme Court. The Supreme Court found that it was illegal to revoke Rozmin's mining rights on the basis of this restrictive interpretation, without taking into account Rozmin's substantial investments, the fact that it had been authorized to carry out mining activities until November 13, 2006, and that its activities had been explicitly found to be in compliance with all regulations in force.
423. The reality is that from the moment the works were suspended in 2001, Rozmin never ceased to work towards their resumption. Among other steps undertaken towards the resumption of mining activities, Rozmin applied for new permits and authorizations or extensions of existing ones,<sup>460</sup> organized a new tender and hired a new development contractor,<sup>461</sup> engaged in negotiations for the sale and distribution of talc to be extracted from the deposit,<sup>462</sup> and entered into discussions with third party investors who were willing to acquire a shareholding interest in Rozmin for sums ranging from USD 15 million to EUR 26 million (see paragraphs 399 to 400 above). Furthermore, Belmont and EuroGas continued to inject working capital in Rozmin during the suspension of works.<sup>463</sup>
424. Well before the expiration of the three-year period, Rozmin was in a position to resume works and it did communicate its readiness to do so to the mining authorities. Rozmin indeed attempted to extend the Authorization on Mining Activities at Gemerská Poloma as of December 2002,<sup>464</sup> and resubmitted a formal request, on January 8 2004, to carry out mining activities. This request was finally granted by decision dated May 31, 2004,<sup>465</sup> in which the DMO did not raise any issue, let alone any timing issue. There is not one period in time during which Rozmin remained idle.

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<sup>460</sup> See Claimants' Memorial, ¶¶ 146 *et seq.*

<sup>461</sup> See Claimants' Memorial, ¶¶ 160 *et seq.*

<sup>462</sup> See Claimants' Memorial, ¶¶ 158 and 159.

<sup>463</sup> See Witness Statement of Vojtech Agyagos, ¶¶ 32-33.

<sup>464</sup> See Claimants' Memorial, ¶ 415.

<sup>465</sup> **Exhibit C-27**, Authorisation of Mining Activity in the Mining Area "Gemerská Poloma," dated May 31, 2004 (Ref. 1023/511/2004).

425. Preparatory works towards the completion of above-ground structures were carried out by Siderit as early as in August 2004, pursuant to individual orders,<sup>466</sup> and mining activities *per se* were resumed at the site in November 2004, that is well before the expiration of the three-year period, following the conclusion of the November 5, 2004 Contract for Work between Rozmin and Siderit (see paragraphs 402 to 407 above).<sup>467</sup>
426. Nothing therefore justified the re-assignment of the Mining Area and the revocation of Rozmin's mining rights, least of all the absence of excavation, which the Supreme Court had explicitly stated was irrelevant for purposes of the application of the 2002 Amendment.
427. In fact, it was because Rozmin had resumed mining works before the expiration of the three-year period, and because it had been able to secure all required permits, authorizations, and leases, to the satisfaction of the mining authorities, that the DMO concluded on May 31, 2004 – that is, two years and five months after the entry into effect of the 2002 Amendment – that Rozmin was not to be deprived of its mining rights before November 13, 2006.<sup>468</sup> This is also why, after the resumption of works at the deposit, the DMO confirmed, on December 8, 2004, the extension of Rozmin's mining rights to November 13, 2006.<sup>469</sup> On both occasions, the DMO must have come to the conclusion that depriving Rozmin of its Mining Area or of its mining rights would not be in line with the 2002 Amendment's rationale and would not serve its stated purpose, namely – in the words of Respondent itself – *“to foster effective use of Slovakia's mineral resources by preventing persons with assigned excavation areas from sitting on their rights indefinitely and engaging in speculative practices.”*<sup>470</sup>

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<sup>466</sup> **Exhibit C-254**, Individual Order for Works from Rozmin sro to Siderit, dated September 14, 2004; **Exhibit C-255**, Individual Order for Works from Rozmin sro to Siderit, dated September 27, 2004; **Exhibit C-256**, Individual Order for Works from Rozmin sro to Siderit, dated October 6, 2004; **Exhibit C-257**, Individual Order for Works from Rozmin sro to Siderit, dated November 15, 2004.

<sup>467</sup> **Exhibit C-259**, Contract for the development of the Gemerská Poloma talc deposit entered into between Siderit and Rozmin sro on November 5, 2004.

<sup>468</sup> **Exhibit C-27**, Authorisation of Mining Activity in the Mining Area “Gemerská Poloma,” dated May 31, 2004 (Ref. 1023/511/2004).

<sup>469</sup> **Exhibit C-28**, Minutes of the December 8, 2004 inspection by the District Mining Office.

<sup>470</sup> Respondent's Counter-Memorial, ¶ 285.

428. Finally, as noted above at paragraphs 309 to 314, it was Claimants’ de-risking of the deposit – through extensive investments in the project that had allowed them to gather additional data that further confirmed the Deposit’s potential profitability – that enabled Economy Agency to attract third party investors immediately after the revocation of Rozmin’s mining rights,<sup>471</sup> contrary to Rozmin’s initial shareholders which had, by Respondent’s own admission, never been able to generate an interest in the Deposit. The only possible explanation for this change of attitude from third-party investors is the fact that additional works and studies undertaken by Claimants increased the level of confidence in the deposit’s profitability.
429. In sum, the record – namely the nature and extent of Rozmin’s investments, the many authorizations and permits issued by the Slovak Republic before, during, and after the suspension, the works contracted and carried out, the actual cause of the works suspension (namely the interruption of works by the development contractor) – confirms that Rozmin was a *bona fide* investor, genuinely committed to the development of the Gemerská Poloma deposit, and that the Republic of Slovakia was perfectly aware of this.
430. Rozmin’s rights were nonetheless revoked, in circumstances that did not warrant that such measures be taken (as confirmed by the Slovak Republic’s own Supreme Court), and without any compensation, let alone the prompt, effective and adequate compensation due to Claimants under international law.<sup>472</sup>

**2. Claimants’ financial situation, raised *post facto* by Respondent, was not one of the parameters considered at the time of the revocation of Rozmin’s mining rights**

431. Respondent’s indirect suggestion that Claimants did not have the financial means to take the project to term carries no weight for purposes of the present dispute.
432. First, at the time of the facts contemporaneous with the dispute, the Slovak Republic never raised any issue with respect to Rozmin’s or Claimants’ ability to finance the

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<sup>471</sup> In Mr. Čorej’s own words, “repeatedly contacted by various companies for the purpose of entering into the project” (Witness Statement of Peter Čorej, ¶ 60).

<sup>472</sup> See ¶¶ 458 *et seq.* below.

project. The assumption that Claimants would not have had the financial means to carry the project to term is a defense fabricated *post facto* by Respondent.

433. In fact, Respondent's suggestion that Claimants would not have had the financial capacity of commercially develop the deposit is a speculative argument, purely intended to serve Respondent's case. Given that, precisely as a result of Respondent's revocation of Rozmin's mining rights in breach of domestic and international laws, Respondent's suggestion cannot be verified, Respondent should be barred from raising it *post facto* in the present proceedings.
434. Second and in any event, assuming for the sake of argument that the issue had been raised in good faith at the time of the facts in dispute, the record shows, as set out in detail above, that Claimants did have the financial capacity to commercially develop the deposit. The record indeed shows that Rozmin was able to resume works in 2004, that it entered into a contract with Siderit to which it made a payment in the amount of SKK 4,000,000 as an advance towards to total contract price of SKK 76,780,100.00 SKK (VAT not included),<sup>473</sup> and that it also entered into an agreement with Rima Murán to purchase from the latter, for an amount of SKK 4 million, the high-voltage line which had been built at Dlhá dolina. No payments were outstanding, be it at the time of the resumption of works in 2004 or when Rozmin's mining rights were revoked.
435. Third and again in any event, assuming for the sake of argument that Respondent had raised in good faith, at the time of the facts in dispute, the issue of Claimants' financial capacity, Claimants' independent expert on quantum, Mr. John Ellison, has assessed the value of the Mining Area, back at the time of the expropriation, at EUR 76 million.<sup>474</sup> Considering the value of the Mining Area, Claimants could easily either have raised financing or have brought in new shareholders or they could have sold Rozmin had they wished to do so. And in fact, as noted above, between 2003 and 2004, Claimants were indeed approached by potential talc purchasers and third-party investors who were

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<sup>473</sup> **Exhibit C-277**, Siderit Invoice No. 590010, dated November 30, 2004; **Exhibit C-278**, VUB Bank Statement dated November 30, 2004.

<sup>474</sup> KPMG Expert Report, Table 11.

willing to acquire a shareholding interest in Rozmin for sums ranging from USD 15 million to EUR 26 million.

**3. The revocation of Rozmin’s mining rights took Rozmin by surprise, in breach of its legitimate expectations**

436. In its Counter-Memorial, Respondent argues that Rozmin could not have been taken by surprise by the DMO’s decision to revoke its mining rights, given that “*there is a fundamental rule in the Slovak Republic—as there is in all legal systems—to know the law,*”<sup>475</sup> that “[t]he 2002 Amendment was subject to widespread discussion within the mining community in the Slovak Republic,”<sup>476</sup> and that Dr. Rozloznik and Mr. Agyagos had declared that they were aware of the 2002 Amendment.
437. Claimants have never pretended that they were unaware of the change in legislation that took effect on January 1, 2002. They were in fact well aware that under the 2002 Amendment, they needed to resume mining activities at the site within a three-year period as of January 1, 2002. This is precisely what Dr. Rozloznik and Mr. Agyagos declared, in the excerpts quoted by Respondent. Indeed, Dr Rozloznik announced that “[u]nder the new Act, Rozmin will have to start the mining activity the next year, otherwise it will lose the authorization for extraction.”<sup>477</sup> In turn, Mr. Agyagos reported that Mr. Baffi had stated, “in September 2004 in the office of the District Mining Office, during our visit, that if [Rozmin] did not start carrying out works, on midnight of the last November day 2004, the mining rights would be revoked from [it] and a new selection procedure would be announced in order to assign the mining rights to a new holder.”<sup>478</sup>
438. Being familiar with the terms of the 2002 Amendment (which, as confirmed by the Supreme Court, did *not* provide for the revocation of mining rights in case of failure to perform *excavation* for a period exceeding three years), Claimants needed not fear that

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<sup>475</sup> Respondent’s Counter-Memorial, ¶ 299.

<sup>476</sup> Respondent’s Counter-Memorial, ¶ 300.

<sup>477</sup> **Exhibit R-0181**, Hospodárske noviny, The Talc Saint Barbora Has Been Waiting for Extraction for Years, dated November 18, 2003; emphasis added. See Respondent’s Counter-Memorial, ¶ 297.

<sup>478</sup> **Exhibit R-0115**, Witness Statement of Mr. Vojtech Agyagos provided with respect to criminal proceedings No. PPZ- 155/BPK-S-2008, dated March 16, 2009; emphasis added.

Rozmin's rights be revoked, since Rozmin did resume mining activities at the deposit before the expiration of the three-year period.

439. Indeed, as noted above, not only were preparatory works towards the completion of above-ground structures carried out by Siderit as early as in August 2004,<sup>479</sup> but mining activities *per se* were also resumed at the site in November 2004, that is, well before the expiration of the three-year period.<sup>480</sup> And this is in fact precisely why, well after the entry into effect of the 2002 Amendment, Rozmin's mining rights were extended to November 2006,<sup>481</sup> and Rozmin was given specific and explicit assurances, as late as on December 8, 2004, that it would be authorized to continue its mining activities at the deposit until November 2006.<sup>482</sup>
440. Given the circumstances, Claimants could not possibly not have been taken by surprise by the announcement, on December 30, 2004, of the initiation of a new tender for the re-assignment of mining rights over the Gemerská Poloma deposit. In particular, as confirmed by the Supreme Court, Claimants had no reason to fear or even suspect that Rozmin's mining rights would be revoked merely because it had not started excavation within the three-year time period (see paragraphs 437 to 441 above).
441. In sum, Respondent's proposition that because Claimants and Rozmin were aware of the 2002 Amendment, the revocation of their rights could not have come as a surprise, does not stand.
442. As to Respondent's isolated comment that the extension of Rozmin's authorization to carry out mining activities until November 2006, issued on May 31, 2004 and reconfirmed on December 8, 2004, "*cannot have been a source of any specific commitment given by the Slovak Republic to Claimants with regard to Rozmin's right to*

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<sup>479</sup> **Exhibit C-254**, Individual Order for Works from Rozmin sro to Siderit, dated September 14, 2004; **Exhibit C-255**, Individual Order for Works from Rozmin sro to Siderit, dated September 27, 2004; **Exhibit C-256**, Individual Order for Works from Rozmin sro to Siderit, dated October 6, 2004; **Exhibit C-257**, Individual Order for Works from Rozmin sro to Siderit, dated November 15, 2004.

<sup>480</sup> **Exhibit C-259**, Contract for the development of the Gemerská Poloma talc deposit entered into between Siderit and Rozmin sro on November 5, 2004.

<sup>481</sup> **Exhibit C-27**, Authorisation of Mining Activity in the Mining Area "Gemerská Poloma," dated May 31, 2004 (Ref. 1023/511/2004).

<sup>482</sup> **Exhibit C-28**, Minutes of the December 8, 2004 inspection by the District Mining Office.

carry out mining activities in the Excavation Area,”<sup>483</sup> hence that this authorization cannot have generated legitimate expectations on the part of Claimants that it would not be deprived of its mining rights, it is simply baffling.

443. As explained in Claimants’ Memorial, the June 11, 1997 Agreement for the Transfer of the Gemerská Poloma Mining Area from Geological Survey to Rozmin,<sup>484</sup> certified by the DMO on June 24, 1997,<sup>485</sup> conferred upon Rozmin the right to mine the Gemerská Poloma Mining Area, provided that Rozmin be granted by the DMO a mining permit for mining activity, in accordance with Article 10 of the Act on Mining Activities.<sup>486</sup>
444. The very purpose of the assignment of a mining area was to allow the assignee to carry out mining activities in this area. The *nine qua non* condition for the assignee to be authorized to carry out such activities was the award of a mining permit for mining activities, such as the Authorization on Mining Activities at Gemerská Poloma that was issued to Rozmin on May 29, 1998<sup>487</sup> and the one that was issued on May 31, 2004.<sup>488</sup>
445. Being assigned a mining area served no purpose if it was not followed by an authorization to carry out mining activities. Conversely, being awarded such an authorization was pointless if the mining entity authorized to carry out mining activities were to be deprived of its mining area. Accordingly and in all logic, the award or extension of an authorization to carry out mining activities in a given mining area necessarily presupposed that the mining entity that was granted this authorization would not be deprived of its mining area.
446. Considering the foregoing, to claim that the extension of Rozmin’s Authorization on Mining Activities at Gemerská Poloma, on May 31, 2004, did not create a legitimate expectation on the part of Claimants that Rozmin would be allowed to carry mining

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<sup>483</sup> Respondent’s Counter-Memorial, ¶ 393.

<sup>484</sup> **Exhibit C-23**, Agreement on the Transfer of the Gemerská Poloma Mining Area, dated June 11, 1997.

<sup>485</sup> **Exhibit C-24**, Certificate on acquisition of rights to the mining area issued by the District Mining Office, dated June 24, 1997 (Ref. 1520-465-V/97).

<sup>486</sup> See Article 24(4) of Act No. 44/1988 on Protection and Utilization of Mineral Resources.

<sup>487</sup> **Exhibit C-25**, Authorisation of Mining Activities under the “Plan for the Opening, Development and Mining of an Exclusive Soapstone Deposit in the Gemerská Poloma Mining Area (Registration Number 74/e) for the 1998 – 2002 Period,” dated May 29, 1998.

<sup>488</sup> **Exhibit C-24**, Certificate on acquisition of rights to the mining area issued by the District Mining Office, dated June 24, 1997 (Ref. 1520-465-V/97).

activities until, and that it would not be deprived of its Mining Area before, November 13, 2006, is incongruous.

447. Furthermore, it was the award of the May 31, 2004 Authorization on Mining Activities at Gemerská Poloma, not the transfer of the Mining Area from Geological Survey to Rozmin, that was conditioned on the submission by Rozmin of statements of approval from a series of public entities, of an evaluation of the works already carried out under the original Authorization of May 29, 1998, and of a new Plan for the Opening, Preparation, Development, and Exploitation of the deposit, incorporating an evaluation of irrecoverable and irremovable dangers.<sup>489</sup> The procedure followed by Rozmin to secure the May 31, 2004 Authorisation of Mining Activity in the Mining Area “Gemerská Poloma” (as described above at paragraphs 374 to 382) was so cumbersome and tedious that once all of the DMO’s requirements had been met and Rozmin’s authorization to carry out mining activities had been extended to November 13, 2006, Rozmin had no reason to expect a cancellation of the Mining Area or re-assignment thereof to a third entity.
448. Respondent cannot mislead the Tribunal in this respect by characterizing *post facto*, in its Counter-Memorial, the May 31, 2004 Authorization as “*just one in a series of mining permits necessary to carry out mining activities in Slovakia*,”<sup>490</sup> when the DMO’s requirements for the award of this authorization were such, at the time of the facts in dispute, that the DMO closed twice the procedure for the extension of Rozmin’s mining rights, on the ground that Rozmin had allegedly failed to supply all required documentation, before eventually awarding Rozmin the requested authorization. As explained in detail above at paragraphs 374 to 382, it took Rozmin some twenty months (from Rozmin’s application of September 5, 2002 for an extension of its May 29, 1998 Authorization on Mining Activities at Gemerská Poloma, to May 31, 2004) to secure the extension of the Authorization on Mining Activities at Gemerská Poloma, under

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<sup>489</sup> **Exhibit C-223**, Decision of the District Mining Office, dated November 12, 2002 (Ref. 2118/2002); **Exhibit C-227**, Decision of the District Mining Office, dated August 12, 2003 (Ref. 1494/2003).

<sup>490</sup> Respondent’s Counter-Memorial, ¶ 392.



which it was entitled, pursuant to Article 10 of the Act on Mining Activities, to resume and carry out mining activities until November 13, 2006.<sup>491</sup>

449. When it awarded this Authorization, the DMO did not raise any issue, let alone any timing issue in relation to the suspension of works.<sup>492</sup> As a result and in reliance of this authorization, which was to remain valid until November 13, 2006, Rozmin moved on to the next step including, *inter alia*, organizing a tender and selecting a new contractor to resume mining works, issuing individual orders for a number of works, particularly in respect of the Water Management Facilities, purchasing a high-voltage line, and making a series of substantial related payments. On October 14, 2004, when Mr. Agyagos and Dr. Rozložník informed the DMO that Rozmin had initiated construction works at the site, the DMO did not raise any objections, let alone made any reference to the possibility of a cancellation of the assignment of the Mining Area to Rozmin.<sup>493</sup> Nor did the DMO react, let alone argue that the works had been suspended for too long for Rozmin to be entitled to resume its activities at the site, when Rozmin officially announced to the DMO, on November 8, 2004, that it would resume mining activities by November 18, 2004.<sup>494</sup>
450. Finally, by the time the inspection at the Gemerská Poloma talc deposit was carried out by the Director of the DMO, Mr. Antonín Baffi, on December 8, 2004, mining activities had been resumed and the DMO was well aware that no excavation had been performed. Mr. Baffi nonetheless concluded that everything was in good standing and confirmed that Rozmin was authorized to continue its mining activities at Gemerská Poloma until November 2006.<sup>495</sup>
451. Considering the foregoing, it is understandable, to say the least, that the announcement of the initiation of a new tender procedure for the re-assignment of the deposit, only 22

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<sup>491</sup> **Exhibit C-27**, Authorisation of Mining Activity in the Mining Area “Gemerská Poloma,” dated May 31, 2004 (Ref. 1023/511/2004).

<sup>492</sup> **Exhibit C-27**, Authorisation of Mining Activity in the Mining Area “Gemerská Poloma,” dated May 31, 2004 (Ref. 1023/511/2004).

<sup>493</sup> Witness Statement of Ondrej Rozložník, ¶ 59; Witness Statement of Vojtech Agyagos, ¶ 35.

<sup>494</sup> **Exhibit C-267**, Letter from Rozmin sro to the District Mining Office, dated November 8, 2004.

<sup>495</sup> **Exhibit C-28**, Minutes of the December 8, 2004 inspection by the District Mining Office.

days after Mr. Baffi's inspection of the site,<sup>496</sup> came as a shock to Claimants. It came all the more as a shock as this announcement was made before Rozmin was even informed that its mining rights were being revoked and were to be awarded to a third party. And in reality, as set out in sub-section 4 below, the dice were cast even well before the announcement of the tender. This is undisputable considering not only as the launching of a new tender necessarily followed a process to which Rozmin was not privy, but also the documentary evidence that demonstrates that civil servants were cheating for some time already on Claimants, with lovers.<sup>497</sup>

**4. The revocation of Rozmin's mining rights was in fact decided well before the expiration of the three-year period for reasons entirely unrelated to Rozmin's progress at the deposit**

452. The reality is that well before the expiration of the three-year period, Respondent had already decided to revoke Rozmin's mining rights, and that even assuming, for the sake of argument, that the 2002 Amendment required Rozmin to start excavation within this three-year period (which it did not, as demonstrated above and as confirmed by the Slovak Supreme Court), the revocation could thus not have been justified by Rozmin's failure to meet this requirement.
453. As noted by the Slovak Supreme Court, and as Respondent has had no choice but to acknowledge in its Counter-Memorial,<sup>498</sup> the 2002 Amendment could not have applied retroactively.<sup>499</sup> 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, that is, from January 1, 2002, and the three-year period could have elapsed, at the earliest, on December 31, 2004.

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<sup>496</sup> **Exhibit C-29**, Initiation of the Selection Procedure for the Determination and Assignment of the Extraction Area, Business Journal No. 253/2004, dated December 30, 2004, p. 99.

<sup>497</sup> *See, inter alia*, **Exhibit C-356**, Email message from Mr. Wulf-Dietrich Keller to Mr. Peter Čorej, dated December 1, 2004; **Exhibit C-357**, Email message from Mr. Wulf-Dietrich Keller to Mr. Dusan Cellar, dated December 13, 2004; **Exhibit C-358**, Email message from Mr. Peter Čorej to Mr. Wulf-Dietrich Keller, dated February 16, 2005.

<sup>498</sup> Respondent's Counter-Memorial, ¶ 291.

<sup>499</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), pp. 22, 24-25.

454. In the case of Rozmin, however, the three-year period had not yet elapsed by the time that Respondent engaged in discussions with third parties regarding the re-assignment of mining rights over the Gemerská Poloma deposit, nor had this time-period in fact elapsed by the time a new tender was initiated.
455. Indeed, contrary to Respondent's assertion that the three-year period was observed by the Slovak Republic before the revocation of Rozmin's mining rights, the Supreme Court found that "*already in December 2004*," in fact on December 20, 2004, that is less than three years after the date of entry into force of the 2002 Amendment, the DMO had requested the Ministry of Justice to publish a Notification of the Initiation of the Tender Procedure for the Assignment of the Mining Area.<sup>500</sup> This Notification was published on December 30, 2004, before Rozmin had even been notified of the revocation of its mining rights.
456. This is not all. Respondent had in fact been in contact with interested third parties even before December 20, 2004, to negotiate the award of mining rights over the Gemerská Poloma deposit.
457. Indeed, there is documentary evidence – which Respondent has conveniently omitted to produce, despite it being responsive to Claimants' documents production requests No. 2 and 10, which were granted by the Tribunal – that as early as in November 2004, the Deputy Prime Minister and Minister of Economy of the Slovak Republic, Mr. Pavel Rusko, was considering the reassignment of the Gemerská Poloma Mining Area and had in fact already engaged in discussions with Mondo Minerals. The decision to initiate a new tender for the reassignment of mining rights over Gemerská Poloma was thus taken well before the expiration of the three-year period.
458. On December 1, 2004, Mr. Wulf-Dietrich Keller, then Managing Director of Mondo Minerals, wrote to Mr. Rusko in the following terms:

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<sup>500</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010) p. 22. See also **Exhibit C-37**, Decision of the District Mining Office, dated March 30, 2012 (Ref. 157-920/2012), p. 27.

*Dear Mr Rusko,*

*I confirm that the Finnish talc company Mondo Minerals Oy, a wholly owned subsidiary of the Omya Group of companies registered in Switzerland, is seriously interested in the development and exploitation of the Gemerska Poloma talc deposit near Roznava.*

*In order to discuss this matter in more depth it is proposed that we meet in Kosice on Sunday 12th December.*

*Mondo Minerals is prepared to invest in the development of the project directly with the backing of its parent company.*

*For your information Mondo Minerals is one of the largest talc producers in Europe with an annual production of some 60,000 tonnes from its own mines in Finland. It is a leader in the supply of special talc grades to the paper industry for filling and coating and is a major supplier to the paint industry as well as for ceramics and plastics. [...]*<sup>501</sup>

459. Mr. Keller sent a copy of this message to Mr. Čorej,<sup>502</sup> who appears to have acted as an intermediary between Respondent (the Ministry of Economy and the MMO), on the one hand, and Mondo Minerals, on the other hand, in the context of discussions that took place between November and December 2004 regarding the reassignment of mining rights over the Gemerská Poloma deposit.
460. Mr. Čorej is not only the CEO and a shareholder of Rima Muráň, but also the very person who was responsible for the deterioration of the relationship between Rozmin and Rima Muráň when the latter was acting as the former's contractor (see paragraphs 342 *et seq.* above). Furthermore, he is the husband of Ms. Zdenka Čorejová, Rozmin's former accountant who founded and owns the company Economy Agency, which was awarded mining rights over the Gemerská Poloma right after their unlawful revocation from Rozmin.<sup>503</sup> Mr. Čorej himself stated, in his witness statement of June 29, 2015, that he had "*decided to submit a bid to the selection procedure through [his] spouse's*

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<sup>501</sup> **Exhibit C-356**, Email message from Mr. Wulf-Dietrich Keller to Mr. Peter Čorej, dated December 1, 2004.

<sup>502</sup> **Exhibit C-356**, Email message from Mr. Wulf-Dietrich Keller to Mr. Peter Čorej, dated December 1, 2004.

<sup>503</sup> **Exhibit C-31**, Report on the Course and Results of the Selection Procedure for the Designation of the MA GP to Another Organisation Performed on April 21, 2005.

company, Economy agency [...], in which [he had] later also became a shareholder.”<sup>504</sup>

Finally, and most importantly, Mr. Čorej is the very person who filed the criminal complaint against Rozmin and Claimants, on May 5, 2014,<sup>505</sup> which led to the initiation of criminal proceedings in the Slovak Republic against Rozmin.

461. Indeed, by way of reminder, two days before the filing of Claimants’ Request for Arbitration, the date of which had been communicated to Respondent in the course of negotiations, criminal proceedings were launched in the Slovak Republic,<sup>506</sup> leading to the seizure and confiscation of all the property and records, including privileged and confidential documents, of Rozmin. By Respondent’s own admission, these criminal proceedings were launched against Claimants and Rozmin for having initiated arbitration proceedings against the Slovak Republic.<sup>507</sup> And it was only after Claimants filed an application for provisional measures before this Tribunal that Respondent

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<sup>504</sup> Witness statement of Peter Čorej, ¶ 58.

<sup>505</sup> See Respondent’s Application for Provisional Measures and Opposition to Claimants’ Application for Provisional Measures, dated September 10, 2014, ¶¶ 49 and 88.

<sup>506</sup> The Request for Arbitration was filed on June 25, 2014. Two days before, on June 23, 2014, JUDr. Špirko Vasil, Prosecutor from the Office of the Special Prosecution in Bratislava, Slovak Republic, launched criminal proceedings by issuing an “Order for Preservation and Handing over of Computer Data” (**Exhibit C-50**). This Order was followed by an “Order for a House Search” issued on June 25, 2014 (**Exhibit C-49**).

<sup>507</sup> Respondent’s Application for Provisional Measures and Opposition to Claimants’ Application for Provisional Measures, dated September 10, 2014, ¶ 49. Both orders pursuant to which the criminal proceedings were launched and Rozmin’s records and property were seized in fact explicitly set out that they have been issued considering “*an especially serious crime of fraud [...] in the stage of attempt [...], assumed to have been committed by currently unidentified individuals, who acted in the name of the shareholders of the company Rozmin, s.r.o., with registered seat in Bratislava, and EuroGas, with registered seat in Vienna, and Belmont Resources, with registered seat in Canada, with the intent to elicit financial resources, make significant financial profits and mislead the relevant state authorities by claiming the amount of 3,2 billion Euros from the Slovak Republic in an unspecified arbitration procedure in connection with a revocation of mining rights of the company Rozmin s.r.o. by the relevant administrative authorities of the SR related to the mining area Gemerská Poloma*” (**Exhibit C-50**, Order for Preservation and Handing over of Computer Data, dated June 23, 2014, p. 2; **Exhibit C-49**, Order for a House Search, dated June 25, 2014, p. 2; emphasis added). The Resolution of September 5, 2014, in turn, made it clear that the object of the criminal proceedings was the same as that of the arbitration proceedings. According to this Resolution, “[i]t is clear from the indicated that the legally relevant circumstances being resolved by the investigator in these criminal proceedings are at the same time the subject of separate proceedings in the Slovak Republic – in particular before mining offices and courts and in an international arbitration to which the Slovak Republic is a party” (**Exhibit R-2**, Resolution Suspending Criminal Proceedings, dated September 5, 2014, p. 6; emphasis added). Furthermore, the Resolution concluded that “[u]nder the provision of Section 228, paragraph 4 of the Code of Criminal Procedure, a prosecutor shall suspend criminal prosecution if he has filed a motion to commence proceedings on an issue he is not competent to resolve in the current proceedings” (**Exhibit R-2**, Resolution Suspending Criminal Proceedings, dated September 5, 2014, p. 5). Finally, the Resolution explicitly provided for the suspension of criminal proceedings against Claimants and Rozmin (**Exhibit R-2**, Resolution Suspending Criminal Proceedings, dated September 5, 2014, pp. 1-2).

ordered, on September 5, 2014, the suspension of the criminal proceedings, and that the seized property and documents were eventually returned on October 1, 2014, almost four weeks after the issuance of the resolution ordering their release. In the Resolution of September 5, 2014, Mr. Čorej is identified as an “informant” for the Slovak Republic.<sup>508</sup> The record today shows that in 2004, at the time of the revocation of Rozmin’s rights, Mr. Čorej was already acting as one such informant for the State.

462. Mr. Keller visited the Gemerská Poloma deposit on December 12, 2004, together with Mr. Dušan Čellár from the MMO, and met with Mr. Rusko.<sup>509</sup> Mr. Čorej then met again with Mr. Keller, on January 10, 2005, after which Mr. Čorej wrote to Mr. Keller in the following terms:

*Dear Mr Keller,*

*I would like to inform you, that the closing date of the tender is approaching and I have not heard from you since our last meeting which took place on 1.10.2005. Please let me know if you are still interested in the deposit of Gemerska Poloma as you have previously stated in December 2004.*

*Please be advised that if we will not receive your response in near future we would have to consider it as a loss of interest and start negotiations with other interested parties.*

*Regards,*

*Peter Čorej<sup>510</sup>*

463. This letter makes is plain not only that Mr. Čorej was acting as a representative of Respondent, prospecting for parties that would be interested in acquiring Rozmin’s mining rights over the Gemerská Poloma deposit, but also that the State had engaged in discussions regarding the reassignment of these rights in December 2004, if not in November 2004, in any event before the expiration of the three-year period.

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<sup>508</sup> **Exhibit R-2**, Resolution Suspending Criminal Proceedings, dated September 5, 2014, p. 3.

<sup>509</sup> **Exhibit C-357**, Email message from Mr. Wulf-Dietrich Keller to Mr. Dusan Cellar, dated December 13, 2004.

<sup>510</sup> **Exhibit C-358**, Email message from Mr. Peter Čorej to Mr. Wulf-Dietrich Keller, dated February 16, 2005.

464. In any event, Respondent's allegation that "[a] committee composed of seven individuals—one representative from the District Office in Rožňava, Department of Environment, one representative each from the municipalities of Gemerská Poloma and Henclova, one representative from the Slovak Mining Chamber, and three representatives from DMOs in Košice and Banská Bystrica—was assembled to review the bids that were submitted by interested persons,"<sup>511</sup> cannot be trusted. The evidence on the record shows that the members of this committee were appointed between April 18 and April 21, 2005, that is,<sup>512</sup> in the course of the four days that immediately preceded the DMO's decision of April 22, 2005 to award the mining rights over the Gemerská Poloma to Economy Agency.<sup>513</sup> Furthermore, Respondent's allegation that the committee carried out a "thorough review of [the] bids" cannot reflect what really happened. Days before the appointment of the said committee, the bids had already been ranked. Indeed, on April 11, 2005, Mr. Čellár disclosed, in an email to Mr. Keller, the names of the entities that had so far bid for the project, with specific indications as to which bids were more interesting to the State.
465. The negotiations with Mondo Minerals did not come to fruition and the rights over Gemerská Poloma were eventually awarded to Mr. Čorej who had been acting on behalf of the State in negotiations with Mondo Minerals, and who was to the sole person who had had access to all of Rozmin's data (first as an indirect shareholder of Rozmin and then as its contractor).

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<sup>511</sup> Respondent's Counter-Memorial, ¶ 305.

<sup>512</sup> **Exhibit R-0185**, Letter from the District Mining Office to Mr. Chanas, dated April 20, 2005; **Exhibit R-0186**, Letter from the District Mining Office to Mr. Piovarczy, dated April 19, 2005; **Exhibit R-0187**, Letter from the District Mining Office to Mr. Nedeljak, dated April 19, 2005; **Exhibit R-0188**, Letter from the District Mining Office to Mr. Mihalík, dated April 20, 2005; **Exhibit R-0189**, Letter from the District Mining Office to Mrs. Somsáková, dated April 18, 2005; **Exhibit R-0190**, Letter from the District Mining Office to Mr. Kapusta, dated April 21, 2005; **Exhibit R-0191**, Letter from the District Mining Office to Mrs. Kúdelová, dated April 19, 2005.

<sup>513</sup> **Exhibit C-31**, Report on the Course and Results of the Selection Procedure for the Designation of the MA GP to Another Organisation Performed on April 21, 2005.

**I. THE SLOVAK SUPREME COURT’S ANNULMENT OF THE DMO’S DECISIONS TO REVOKE ROZMIN’S MINING RIGHTS AND THE DMO’S FAILURE TO REINSTATE THE SAME**

**1. The revocation of Rozmin’s rights over the Gemerská Poloma Deposit**

466. By way of reminder, the Supreme Court cancelled, on February 27, 2008, the DMO’s decision to assign the Gemerská Poloma deposit to Economy Agency, on the ground that this decision was in breach of Slovak law.<sup>514</sup> The DMO nevertheless re-assigned rights over the Gemerská Poloma deposit to Economy Agency’s successor, namely VSK Mining s.r.o. (“VSK Mining”), by a corporate sleight of hand.<sup>515</sup> Indeed, on July 2, 2008, without initiating new tender proceedings, the DMO simply awarded these rights to another Slovak-owned company – VSK Mining – which had acquired equity capital in Economy Agency on June 18, 2005, before becoming this company’s sole shareholder on December 10, 2005, and eventually absorbing it on February 3, 2006.<sup>516</sup>
467. Furthermore, notwithstanding a second decision of the Supreme Court, handed down on May 18, 2011 and declaring the award of mining rights to VSK Mining to be unlawful,<sup>517</sup> the DMO re-assigned exclusive mining rights, on March 30, 2012, to this same entity, thus definitively depriving Claimants of their rights and the benefits of their investment in the Gemerská Poloma project.<sup>518</sup>
468. In its Counter-Memorial, Respondent contends that if Rozmin was able to successfully appeal the DMO’s reassignment of the Mining Area and if the Slovak Supreme Court held that the revocation of Rozmin’s mining rights was in breach of Slovak law, this was because the 2002 Amendment was silent as to the procedure according to which an area was to be cancelled or reassigned and that Rozmin had been able to successfully allege that procedural breaches had been committed.

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<sup>514</sup> **Exhibit C-33**, Decision of the Supreme Court of the Republic of Slovakia, dated February 27, 2008 (Ref. 6Szo/61/2007-121). See Claimants’ Memorial, ¶¶ 187-191.

<sup>515</sup> **Exhibit C-34**, Decision of the District Mining Office on the Assignment of the Gemerská Poloma Mining Area to VSK Mining sro, dated July 2, 2008 (Ref. 329-1506/2008).

<sup>516</sup> **Exhibit C-269**, Extract from the company Business Register in respect of Economy Agency RV, sro, dated June 5, 2008.

<sup>517</sup> **Exhibit C-36**, Decision of the Supreme Court of the Republic of Slovakia, dated May 18, 2011 (Ref. 2Szo/132/2010). See Claimants’ Memorial, ¶¶ 195 *et seq.*

<sup>518</sup> **Exhibit C-37**, Decision of the District Mining Office, dated March 30, 2012 (Ref. 157-920/2012), pp. 82 *et seq.*



469. Respondent's allegation that Rozmin prevailed solely on procedural grounds is belied by the evidence on the records.
470. On no less than two occasions, the Slovak Supreme Court held that the revocation of Rozmin's mining rights over Gemerská Poloma was in breach of both procedural and substantive Slovak laws. The grounds of the Slovak Supreme Court's May 18, 2011 decision, in particular, were numerous and went far beyond mere procedural considerations.
471. First, the Supreme Court found that the DMO had wrongly interpreted and applied the legal basis for its decision to revoke Rozmin's mining rights, namely the 2002 Amendment. The Supreme Court held that the 2002 Amendment could not have applied retroactively,<sup>519</sup> which Respondent has finally acknowledged in its Counter-Memorial.<sup>520</sup> 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 period could, at the earliest, only have elapsed on December 31, 2004. In the case of Rozmin, however, on December 20, 2004, that is, 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.<sup>521</sup> 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 injustice'.*"<sup>522</sup>

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<sup>519</sup> **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.

<sup>520</sup> In its Counter-Memorial, Respondent indeed acknowledges that under the 2002 Amendment, the three-year period was not to apply retroactively, but to "*inactivity taking place after 1 January 2002, the effective date of the 2002 Amendment*" (Respondent's Counter-Memorial, ¶ 291, with reference to **Exhibit R-0061**, Judgment of the Supreme Court of the Slovak Republic, Case No. 2Sžo/132/2010, 18 May 2011, p. 82).

<sup>521</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), pp. 21-22. See also **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010) p. 22.

<sup>522</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), p. 25.

472. Second, the Supreme Court found that the DMO had wrongly interpreted and applied the legal basis for its decision to revoke Rozmin’s mining rights, namely the 2002 Amendment. The Supreme Court explained, in its decision of May 18, 2011, the purpose of the 2002 Amendment was to avoid mining areas being left unexploited for speculative purposes and to ensure that genuine investors committed to the development of mines retained mining rights. In this respect, Respondent itself acknowledges that the 2002 Amendment was enacted in reaction to the Slovak Republic’s “*systemic problem with entities assigned to excavation areas simply ‘sitting’ on them.*”<sup>523</sup> In Respondent’s own words, “*one of the goals of the 2002 Amendment was to foster effective use of Slovakia’s mineral resources by preventing persons with assigned excavation areas from sitting on their rights indefinitely and engaging in speculative practices.*”<sup>524</sup>
473. Considering the rationale underlying the 2002 Amendment, the fact that, as stated by Respondent, the revocation or reassignment of mining rights was not discretionary<sup>525</sup> could not and did not mean that the revocation or reassignment of mining rights was an automatic operation. The factual background of each case had to be examined and the applicable procedure had to be complied with.<sup>526</sup> This is precisely why, as acknowledged by Respondent, “[t]he Supreme Court held that the DMO’s decision on the reassignment of the Excavation Area should have been made in formal administrative proceedings [...] and that Rozmin should have been a party to such proceedings.”<sup>527</sup> If the revocation and/or reassignment of mining rights were an automatic operation, dependent solely on whether the assignee had performed excavation, the Supreme Court would not have – in the words of Respondent itself – “instructed DMO to perform a more detailed examination of Rozmin’s activity with the correct three-year period.”<sup>528</sup>

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<sup>523</sup> Respondent’s Counter-Memorial, ¶ 284.

<sup>524</sup> Respondent’s Counter-Memorial, ¶ 285.

<sup>525</sup> See Respondent’s Counter-Memorial, ¶ 287.

<sup>526</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), pp. 17 *et seq.*

<sup>527</sup> Respondent’s Counter-Memorial, ¶ 319. [refers to Resolution of the Supreme Court of the Slovak Republic, Case No. 6Sžo/61/2007, 27 February 2008, p. 31- 33, R-0060]

<sup>528</sup> Respondent’s Counter-Memorial, ¶ 327; emphasis added.

474. As noted above at paragraph 421, the Slovak Republic’s Supreme Court expressly stated that the “*restrictive*” interpretation of the term “*dobývanie*” adopted by the administrative bodies in December 2004 to argue that Rozmin should have started extracting minerals within a three-year period, and which is central to Respondent’s attempt to justify the revocation of Rozmin’s rights, was “*not correct*.”<sup>529</sup> Hence, if, as stated by Respondent, if “*at no time did the Supreme Court ever conclude that Rozmin had commenced excavation within the three-year period*,”<sup>530</sup> it is simply because such a conclusion would have been perfectly irrelevant. Furthermore, if “*at no time did the Supreme Court ever conclude [...] that the DMO should have not engaged in the process of reassigning the Excavation Area*,”<sup>531</sup> it is because, as explained by the Supreme Court itself, it did not have the power to draw such factual conclusions, which is a task to be carried out by administrative authorities.<sup>532</sup>
475. Third, the Supreme Court also found that the decision to revoke Rozmin’s rights under the 2002 Amendment and to award them to another company was “*premature, unclear and insufficiently reasoned*.”<sup>533</sup> 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*,”<sup>534</sup> given that it was not based on a “*thorough investigation*.”<sup>535</sup> As explained by the Supreme Court, the revocation of Rozmin’s mining rights could only have been appropriate if it had been determined that the Mining Area had been left unexploited, or that the exploitation of the Mining Area had been artificially delayed for speculative purposes, that interference with Rozmin’s

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<sup>529</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), p. 25.

<sup>530</sup> Respondent’s Counter-Memorial, ¶ 20.

<sup>531</sup> Respondent’s Counter-Memorial, ¶ 20.

<sup>532</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), p. 26: “*the role of courts when revising decisions of administrative bodies is not to supplement their duties, mainly an appropriate evaluation of the state of facts in question.*”

<sup>533</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), p. 25.

<sup>534</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), p. 26.

<sup>535</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), p. 23.

rights was justified by a public purpose, and that the revocation of these rights was proportionate to said public purpose.<sup>536</sup>

476. In this respect, the Supreme Court noted<sup>537</sup> that:

- (i) on May 31, 2004, Rozmin had been specifically authorized to resume and carry out mining activities until November 13, 2006;<sup>538</sup>
- (ii) on December 8, 2004 – that is, no less than 22 days before the revocation of Rozmin’s rights – an inspection of the Mining Area had been carried out by the Director of the District Mining Office, Mr. Antonín Baffi, during which it had been recorded that the works were ongoing and that Rozmin’s activities were in compliance with the legislation in force;<sup>539</sup>
- (iii) Rozmin had invested approximately SKK 120,000,000 in the Mining Area.<sup>540</sup>

477. These considerations were of a substantive nature and went far beyond a mere finding that “*the DMO had to follow a different procedure and analysis.*”<sup>541</sup> The Supreme Court confirmed that Rozmin had made very substantial investments in order to start exploitation of the Gemerská Poloma Mining Area, that it had been authorized by the competent administrative authorities to carry out mining works until November 13, 2006, and that, no less than 22 days before the revocation of Rozmin’s rights, a representative of the Slovak Republic had confirmed that Rozmin’s activities were in compliance with all regulations in force. In light of these facts, which the administrative bodies had failed to take into account when assessing whether Rozmin’s mining rights could lawfully be revoked under the 2002 Amendment, the Supreme Court found that the “*the action of the defendant, and the appealed decision [were] not in conformity*

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<sup>536</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), pp. 25-26.

<sup>537</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), pp. 25-27.

<sup>538</sup> *See Exhibit C-27*, Authorisation of Mining Activity in the Mining Area “Gemerská Poloma,” dated May 31, 2004 (Ref. 1023/511/2004).

<sup>539</sup> *See Exhibit C-28*, Minutes of the December 8, 2004 inspection by the District Mining Office.

<sup>540</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), p. 26.

<sup>541</sup> Respondent’s Counter-Memorial, ¶ 20.

with the legislation.”<sup>542</sup> As confirmed by the Supreme Court in its May 18, 2011 decision, Rozmin simply did not fall within the scope of the 2002 Amendment.

478. The Supreme Court thus identified serious substantive deficiencies, each independently fatal to the decision’s validity. The Supreme Court found that 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.
479. The foregoing and the Slovak Supreme Court’s decisions of February 7, 2008 and May 18, 2011, both of which are on the record, disprove and defeat Respondent’s contention that “*Rozmin challenged the DMO’s reassignment of the Excavation Area to the Slovak courts, complaining that the procedure by which it was reassigned was incorrect,*”<sup>543</sup> and that the Supreme Court “*simply held that the DMO had to follow a different procedure and analysis*”<sup>544</sup> for the reassignment of the Mining Area.
480. This is as ludicrous as Respondent’s conclusion that that “*Claimants could not have suffered any harm from [acts by the State that occurred after the reassignment of the Excavation Area] because nothing the State did after the three-year period can change the fact that Rozmin did not commence Excavation within the three-year period.*”<sup>545</sup> Respondent’s position indeed flies in the face of the content of, and grounds underlying, the Supreme Court’s decisions, which clearly spelt out that under the 2002 Amendment, the absence of excavation for a period exceeding three years should not have led to the revocation and reassignment of Rozmin’s mining rights.
481. Also, contrary to Respondent’s allegation, the DMO did not “*follow[...] the Supreme Court’s instructions.*”<sup>546</sup> Rather, in its decision of March 30, 2012, in which the DMO re-assigned exclusive mining rights to VSK Mining notwithstanding the Supreme

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<sup>542</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), pp. 25-26.

<sup>543</sup> Respondent’s Counter-Memorial, ¶¶ 16 and 17.

<sup>544</sup> Respondent’s Counter-Memorial, ¶ 20.

<sup>545</sup> Respondent’s Counter-Memorial, ¶ 313; see also ¶ 321.

<sup>546</sup> Respondent’s Counter-Memorial, ¶ 18.

Court's decision of May 18, 2011,<sup>547</sup> the DMO attempted, over several pages, to challenge the Supreme Court's interpretation of the term "*dobývanie*" under the 2002 Amendment, only to conclude that the 2002 Amendment provided for the cancellation or re-assignment of a mining area in case of failure to perform excavation (not simply to carry out mining activities) for a period exceeding three years.<sup>548</sup>

482. The DMO ultimately upheld its own two prior decisions and confirmed the revocation of Rozmin's licence precisely on the ground – also recurrently stated by Respondent in its Counter-Memorial – that Rozmin had failed to perform excavation for a period exceeding three years, despite the Supreme Court's clear holding that this was perfectly irrelevant.

## **2. The revocation of Rozmin's General Mining Authorization**

483. By way of reminder, Rozmin's General Mining Authorization, delivered on May 14, 1997, was revoked by the DMO on August 12, 2008.<sup>549</sup> This revocation was confirmed by the MMO,<sup>550</sup> and Rozmin's challenge thereof<sup>551</sup> was dismissed by the Regional Court in Košice.<sup>552</sup> Notwithstanding a Supreme Court decision rescinding the Regional Court's dismissal of Rozmin's challenge and remanding the case for further proceedings,<sup>553</sup> the Regional Court in Košice confirmed yet again, on January 31, 2013, the DMO's decision to revoke Rozmin's General Mining Authorization.<sup>554</sup>

484. In its Counter-Memorial, Respondent argues that the revocation of Rozmin's General Mining Authorization was justified because "(i) *Rozmin had not appointed a*

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<sup>547</sup> **Exhibit C-37**, Decision of the District Mining Office, dated March 30, 2012 (Ref. 157-920/2012), pp. 82 *et seq.*

<sup>548</sup> **Exhibit C-37**, Decision of the District Mining Office, dated March 30, 2012 (Ref. 157-920/2012), pp. 19-23.

<sup>549</sup> **Exhibit C-35**, Decision on the Revocation of the Authorization for Mining, dated August 12, 2008 (Ref. 104-1620/2008). See Claimants' Memorial, ¶ 79.

<sup>550</sup> **Exhibit C-274**, Decision of the Main Mining Office, dated January 12, 2009 (Ref. 25-32/2009).

<sup>551</sup> **Exhibit C-271**, Appeal to the Regional Court in Košice, dated March 12, 2009 (Ref. 439-9/09).

<sup>552</sup> **Exhibit C-275**, Decision of the Regional Court in Košice, dated January 19, 2012 (Ref. 6S/28/2009-175).

<sup>553</sup> **Exhibit C-38**, Decision of the Supreme Court of the Republic of Slovakia, dated January 31, 2013 (Ref. 5Sžp/10/2012).

<sup>554</sup> **Exhibit C-276**, Decision of the Regional Court in Košice, dated September 26, 2013 (Ref. 6S/28/2009 – 308).

*responsible representative for several years and thus that the conditions for obtaining the General Mining Permit were not met for more than three months, and (ii) Rozmin did not perform any mining activities at any site in the Slovak Republic for a period longer than three years. The DMO therefore cancelled Rozmin's General Mining Permit.*"<sup>555</sup>

485. Respondent's defense, if it may even be characterized as such, is flawed from every possible angle and must therefore fail.
486. As shown above, before the revocation of its mining rights, Rozmin never suspended mining activities for a period exceeding three years. Furthermore, the revocation of Rozmin's General Mining Authorization could not be grounded on the absence of mining activities following the re-assignment of the Mining Area to Economy Agency. Indeed, the Act on Mining Activities on which the revocation of Rozmin's mining rights was purportedly based specified that the provision according to which the DMO could initiate proceedings for the cancellation of a general mining authorization in case of suspension of mining activities for a period of three years, did not apply if this suspension was the result of the cancellation or re-assignment of a given mining area (Article 4(b), Section 4(d) *in fine* of the Act on Mining Activities).<sup>556</sup> Moreover and in any event, the re-assignment of the Gemerská Poloma Mining Area, first to Economy Agency and then to VSK Mining, was condemned by the Supreme Court and Rozmin should thereafter not have been deprived of its General Mining Authorization on the ground that it was unlawfully prevented from carrying out mining activities.
487. As to the first reason invoked by Respondent, namely that "*Rozmin had not appointed a responsible representative for several years,*" such a grievance had never been raised by the Slovak Republic and, assuming for the sake of argument that it was well-founded, Rozmin was never given an opportunity to cure the alleged defect.

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<sup>555</sup> Respondent's Counter-Memorial, ¶ 341.

<sup>556</sup> Respondent guilefully produced an excerpt of the Act of Mining Activities which does not include the very provision on which it relies, namely Article 4(b).

#### IV. RESPONDENT'S BREACHES OF ITS OBLIGATIONS UNDER INTERNATIONAL LAW

488. As set out in Claimants' Memorial,<sup>557</sup> the U.S.-Slovak Republic BIT and Canada-Slovak Republic BIT impose on Respondent, either directly or by way of their most-favored nation ("MFN") clauses (Article II(1) *in initio* of the U.S.-Slovak Republic BIT; Article III(2) and (3) of the Canada-Slovak Republic BIT), the following obligations under international law:

- the obligation to ensure Claimants' investments fair and equitable treatment;<sup>558</sup>
- the obligation to ensure Claimants' investments full protection and security;<sup>559</sup>
- the obligation to ensure protection against arbitrary, unreasonable, and discriminatory measures;<sup>560</sup>
- the obligation to ensure protection against expropriation except if it is performed for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, in accordance with due process of law<sup>561</sup> and, under the U.S.-Slovak Republic BIT, in accordance with the general principles of treatment provided for in Article II(2), i.e., the general principles of fair and equitable treatment, full protection and security, treatment no less than required by international law, protection against arbitrary and discriminatory measure, and compliance with specific undertakings;<sup>562</sup>
- the obligation to "*observe any obligations it may have entered into with regard to [Claimants'] investments;*"<sup>563</sup> and

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<sup>557</sup> See Claimants' Memorial, ¶¶ 210-219.

<sup>558</sup> Article II(2)(a) of the U.S.-Slovak Republic BIT; Article III(1)(a) of the Canada-Slovak Republic BIT.

<sup>559</sup> Article II(2)(a) of the U.S.-Slovak Republic BIT; Article III(1)(a) of the Canada-Slovak Republic BIT.

<sup>560</sup> Article II(2)(b) of the U.S.-Slovak Republic BIT; Article IX(1) *a contrario* of the Canada-Slovak Republic BIT.

<sup>561</sup> Article III(1) of the U.S.-Slovak Republic BIT; Article VI(1) of the Canada-Slovak Republic BIT.

<sup>562</sup> Article III(1) of the U.S.-Slovak Republic BIT.

<sup>563</sup> Article II(1)(c) of the U.S.-Slovak Republic BIT; Article III(2) and (3) of the Canada-Slovak BIT together with Article II(1)(c) of the U.S.-Slovak Republic BIT.



- the obligation to accord Claimants' investments a treatment that is no less than that required by international law.<sup>564</sup>

489. Both the U.S.-Slovak Republic BIT and the Canada-Slovak Republic BIT also afford U.S. and Canadian investors, respectively, protection no less favorable than that afforded to domestic investors and investors of third countries.<sup>565</sup> The international obligations assumed by Respondent in other BITs are thus applicable to the instant case, and reinforce the above provisions when required. The same applies to obligations derived from customary international law.<sup>566</sup>

490. As explained in detail in Claimants' Memorial, to which reference is made, through its various State organs, Respondent has committed multiple breaches, both procedural and substantive, of the above obligations under the BITs and international law.

491. Indeed, the taking of Claimants' mining rights and investment constituted a substantively and procedurally unlawful expropriation for which Claimants were, in any event, offered no compensation. When Respondent revoked Claimants' rights, it also failed to act consistently, to meet Claimants' legitimate expectations, and to act transparently. It did not afford Claimants the non-arbitrary and reasonable treatment they were entitled to, nor did it act in good faith. Respondent thus breached its obligation to treat Claimants and their investment fairly and equitably, in a reasonable and non-arbitrary manner, and to accord Claimants full protection and security, both procedurally and substantively. Finally, Respondent failed to comply with its specific undertakings towards Claimants.

492. As shown in Claimants' Memorial<sup>567</sup> and below, each of these breaches, described below, justifies the award of damages.

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<sup>564</sup> Article II(2)(a) of the U.S.-Slovak Republic BIT; Article III(1)(a) of the Canada-Slovak Republic BIT.

<sup>565</sup> Article II(1) *in initio* of the U.S.-Slovak Republic BIT; Article III(2), (3), and (4) of the Canada-Slovak Republic BIT.

<sup>566</sup> Via Article II(2)(a) of the U.S.-Slovak Republic BIT, Article III(1)(a) of the Canada-Slovak Republic BIT, and as a general principle in investment arbitration, the Slovak Republic is bound to comply with customary international law.

<sup>567</sup> See Claimants' Memorial, ¶¶ 220 *et seq.*

493. In Section VII of its Counter-Memorial, Respondent however argues that Claimants are not entitled to the protection afforded by the U.S.-Slovak Republic BIT and the Canada-Slovak Republic BIT, and that Respondent did not breach its obligations under the BITs.
494. More specifically, Respondent argues that the re-assignment of the Gemerská Poloma Mining Area constituted a legitimate exercise of regulatory powers and that this could not have amounted to a breach either of the U.S.-Slovak Republic BIT or of the Canada-Slovak Republic BIT; that the administrative and judicial processes in the Slovak Republic did not deny Claimants justice; and that the Slovak Republic did not otherwise breach international law.
495. Claimants have dedicated more than seventy pages of the Memorial to defining the content and scope of Respondent's obligations under international law and the BITs and to describing how Respondent breached these obligations. Claimants have discussed in detail the prohibition of expropriation, Respondent's obligation to afford Claimants fair and equitable treatment and, thereby, its obligation to act consistently and to meet Claimants' legitimate expectations, its obligation to act transparently and to threat Claimants' investments in a non-arbitrary and reasonably manner, to act in good faith, to afford Claimants full protection and security, as well as its obligation to observe its specific commitments. Claimants fully maintain, in the present submission, their position with respect to the definition of these standards as laid down in their Memorial, in accordance with the most recent case-law and pre-eminent scholarly writing, and focus below on arguments specifically raised by Respondent in its Counter-Memorial.

#### **A. EXPROPRIATION**

496. As explained in the Memorial,<sup>568</sup> both BITs prohibit Respondent from nationalizing or expropriating a foreign investment or from subjecting it to measures having an effect equivalent to expropriation or nationalization, if certain specific conditions are not met. In particular, Claimants explained that although the host State's intent may play a role in determining whether its conduct was contrary to international law, such an intention

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<sup>568</sup> See Claimants' Memorial, ¶¶ 212 and 224-229.

is not decisive – it is the actual impact of the measure that is critical.<sup>569</sup> Similarly, whether the State derives benefits from a taking is irrelevant to a finding of expropriation.<sup>570</sup>

497. Both the Canada-Slovak Republic BIT and the U.S.-Slovak Republic BIT stipulate four conditions that must be met for an expropriatory measure to be deemed lawful: the measures must have been taken in the public interest, in a non-discriminatory manner, under due process of law, and upon payment of prompt, adequate and effective compensation.
498. In the present case, it is undisputed and undisputable that the mining rights of Rozmin, hence those of Claimants, have been taken by Respondent, as confirmed by the DMO's letter of January 3, 2005, which informed Rozmin – once the decision of revocation of Rozmin's mining rights had, in fact, already been taken<sup>571</sup> and a new tender publicly announced<sup>572</sup> – that Rozmin's rights had *de facto* been revoked and were to be awarded to a new organization.<sup>573</sup>
499. The present case is a textbook example of a substantively (1) and procedurally (2) unlawful expropriation,<sup>574</sup> each one a standalone BIT violation. Moreover and in any event, even assuming, for the sake of argument, that the Tribunal were to consider that Respondent's actions constituted a legitimate exercise of its regulatory authority and that it served a public purpose and was carried out with due process and in compliance with procedural safeguards, Respondent would still be in breach of its international obligations for failure to pay compensation to Claimants, yet another standalone BIT violation (3). Each one of these three independent grounds for a finding of expropriation is set out in turn below.

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<sup>569</sup> See Claimants' Memorial, ¶¶ 227-228.

<sup>570</sup> See Claimants' Memorial, ¶ 229.

<sup>571</sup> See **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010) p. 22. See also **Exhibit C-37**, Decision of the District Mining Office, dated March 30, 2012 (Ref. 157-920/2012), p. 27.

<sup>572</sup> **Exhibit C-29**, Initiation of the Selection Procedure for the Determination and Assignment of the Extraction Area, Business Journal No. 253/2004, dated December 30, 2004, p. 99.

<sup>573</sup> **Exhibit C-30**, Letter from the District Mining Office to Rozmin sro, dated January 3, 2005 (Ref. 2405/451.14/2004-I).

<sup>574</sup> Contrary to Respondent's allegation in its Counter-Memorial, there is no allegation by Claimants of creeping expropriation, be it in their submissions on provisional measures or in their Memorial.

**1. Respondent's Substantively Unlawful Expropriation of Claimants' Investment: the revocation of Rozmin's mining rights was neither motivated nor mandated by the 2002 Amendment**

500. As pointed out in Claimants' Memorial, the condition that an expropriation be conducted for a public purpose is intended as a safeguard against governmental abuses.<sup>575</sup> It requires that a public purpose not only be advanced, but that the State do so in good faith and that *the expropriatory measure actually serve this public purpose*.<sup>576</sup>
501. In the present case, the explanation offered by the DMO to justify the revocation of Rozmin's mining rights and the initiation of a new tender was that no mining activity ("banská činnosť") had been carried out for more than three years.<sup>577</sup> This purported justification was based on the 2002 Amendment, which allowed the revocation of mining rights by the DMO in the event of an interruption of activities for a period exceeding three years.<sup>578</sup>
502. In its Counter-Memorial, Respondent claims that the 2002 Amendment was enacted to address the "*widespread problem of entities assigned to an excavation area sitting idly on those sites and thus reducing the amount of potential revenue that the State could be achieving*,"<sup>579</sup> and that "[t]he reassignment of the Excavation Area was [...] a rational and justifiable regulation seeking to protect and maximize the effective utilization of the Slovak Republic's natural resources."<sup>580</sup> Respondent's *post facto* justification of the revocation of Claimants' mining rights does not stand.
503. The revocation of Rozmin's mining rights constitutes an expropriation of Claimants' investments (a). As explained above, the revocation of Rozmin's mining rights was not mandated by – as it did not serve – the public purpose underlying the 2002

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<sup>575</sup> **Exhibit CL-132**, Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* 61 (1995), at p.104-05.

<sup>576</sup> See Claimants' Memorial, ¶ 233.

<sup>577</sup> **Exhibit C-30**, Letter from the District Mining Office to Rozmin sro, dated January 3, 2005 (Ref. 2405/451.14/2004-I).

<sup>578</sup> See Article 27(12) of Act No. 44/1988 on Protection and Utilization of Mineral Resources, as amended by Act No. 558/2001.

<sup>579</sup> Respondent's Counter-Memorial, ¶ 352.

<sup>580</sup> Respondent's Counter-Memorial, ¶ 363.

Amendment. In fact, considering that Rozmin resumed its mining activities within the three-year period, as confirmed by the Slovak Supreme Court, it did not fall under the provision of the 2002 Amendment providing for the cancellation or reassignment of a mining area, and the revocation of Rozmin's rights could therefore not have been intended to serve the 2002 Amendment's public purpose (b). In any event, the record shows that the revocation of Rozmin's mining rights was decided well before the expiration of the three-year period stipulated under the 2002 Amendment. In other words, the record shows that this revocation could not have been carried out in application of this Amendment or in pursuance of any public purpose underlying it (c).

a. The revocation of Rozmin's mining rights constitutes an expropriation of Claimants' investments

504. In its Counter-Memorial, Respondent argues that “[t]he Slovak Republic’s conduct did not constitute an expropriatory taking because it did not substantially affect Claimants’ investment—i.e., the shares in Rozmin, the company through which Claimants purportedly hoped to carry out their business plan. Claimants merely complain that the value of their shareholding decreased as a result of the reassignment of the Excavation Area.”<sup>581</sup>

505. The U.S.-Slovak Republic BIT defines an investment as “every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; [including] [...] a company or shares of stock or other interests in a company or interests in the assets thereof [and] any right conferred by law or contract, and any licenses and permits pursuant to law.”<sup>582</sup> Such an investment “shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization.”<sup>583</sup>

506. Similarly, the Canada-Slovak Republic BIT defines an investment as “any kind of asset held or invested either directly or indirectly by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter’s laws and, in

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<sup>581</sup> Respondent’s Counter-Memorial, ¶ 388.

<sup>582</sup> Article I(1)(a)(ii) and (v) of the U.S.-Slovak Republic BIT.

<sup>583</sup> Article III(1) of the U.S.-Slovak Republic BIT; emphasis added.

*particular, though not exclusively, includ[ing] [...] shares, stock, bonds, and debentures or any other form of participation in a company, business enterprise or joint venture [and] rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources.”*<sup>584</sup> *“Investments or returns of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation.”*<sup>585</sup>

507. Under both the U.S.-Slovak Republic BIT and the Canada-Slovak Republic BIT, an outright taking is therefore not required for a finding of expropriation, if the incriminated measures have an effect equivalent to that of a taking.

508. As stated by the Iran-U.S. Claims Tribunal, *“it is recognized in international law that measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.”*<sup>586</sup>

509. In *Tecmed v. Mexico*, the tribunal clearly explained:

*Generally, it is understood that the term “...equivalent to expropriation...” or “tantamount to expropriation” included in the Agreement and in other international treaties related to the protection of foreign investors refers to the so-called “indirect expropriation” or “creeping expropriation”, as well as to the above-mentioned de facto expropriation. Although these forms of expropriation do not have a clear or unequivocal definition, it is generally understood that they materialize through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect. [...]*

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<sup>584</sup> Article I(d)(ii) and (v) of the Canada-Slovak BIT.

<sup>585</sup> Article VI(1) of the Canada-Slovak BIT; emphasis added.

<sup>586</sup> See **Exhibit CL-242**, *Starrett Housing Corp., Starrett Systems, Inc. Starrett Housing Int’l Inc. v. Gov’t of the Islamic Rep. of Iran, Bank Markazi Iran, Bank Omran, Bank Mellat*, Interlocutory Award No. ITL – 32-24-1, Case No. 24 (Dec. 19, 1983) 4 Iran – U.S. Cl. Trib. Rep. 122, Section IV (b), in Karen Lee, ICSID Reports, Volume 11, p. 55, footnote 65.

*To establish whether the Resolution is a measure equivalent to an expropriation under the terms of section 5(1) of the Agreement, it must be first determined if the Claimant, due to the Resolution, was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto [...] had ceased to exist. In other words, if due to the actions of the Respondent, the assets involved have lost their value or economic use for their holder and the extent of the loss. [...] Upon determining the degree to which the investor is deprived of its goods or rights, whether such deprivation should be compensated and whether it amounts or not to a de facto expropriation is also determined. Thus, the effects of the actions or behavior under analysis are not irrelevant to determine whether the action or behavior is an expropriation. [...]*

*[I]t is understood that the measures adopted by a State, whether regulatory or not, are an indirect de facto expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that “...any form of exploitation thereof...” has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed. Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary. The government’s intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects. To determine whether such an expropriation has taken place, the Arbitral Tribunal should not [...]... restrict itself to evaluating whether a formal dispossession or expropriation took place, but should look beyond mere appearances and establish the real situation behind the situation that was denounced.[’]’<sup>587</sup>*

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**Exhibit CL-137**, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, dated May 29, 2003, ¶¶ 114-116; emphasis added. See also **Exhibit CL-140**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, dated September 13, 2001, ¶ 604 (“The expropriation claim is sustained despite the fact that the Media Council did not expropriate CME by express measures of expropriation. De facto expropriations or indirect expropriations, i.e. measures that do not involve an overt taking but that effectively neutralize the benefit of the property of the foreign owner, are subject to expropriation claims. This is undisputed under international law”).

510. In this respect, Dolzer and Stevens explain:

*In determining whether a taking constitutes an “indirect expropriation”, it is particularly important to examine the effect that such taking may have had on the investor’s rights. Where the effect is similar to what might have occurred under an outright expropriation, the investor could in all likelihood be covered under most BIT provisions.*<sup>588</sup>

511. In *Metalclad v. Mexico*, the Tribunal also stated that “expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State”<sup>589</sup>

512. Thus, in *CME v. Czech Republic*, the tribunal found that the Czech Republic’s alteration of an exclusive license to operate a television station had “caused the destruction of ČNTS’ [the claimant’s investment] operations, leaving ČNTS as a company with assets but without business.”<sup>590</sup>

513. In *Middle East Cement v. Egypt*, the tribunal also evaluated the revocation of the investor’s license to import cement, its main business, with four months remaining on the license. Because the revocation had effectively terminated the investor’s business, the tribunal found that it constituted a measure tantamount to expropriation under the Egypt-Greece BIT. In the words of the tribunal:

*When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a “creeping” or “indirect” expropriation or, as in the BIT, as measures “the effect of*

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<sup>588</sup> **Exhibit CL-132**, Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* 61 (1995), at p.100.

<sup>589</sup> **Exhibit CL-143**, *Metalclad Corp v. United Mexican States*, ICSID Case No. ARB (AF)/97/1 Award dated August 30, 2000, ¶ 103.

<sup>590</sup> **Exhibit CL-140**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, dated September 13, 2001, ¶ 591.



*which is tantamount to expropriation.” As a matter of fact, the investor is deprived by such measures of parts of the value of his investment. This is the case here, and, therefore, it is the Tribunal’s view that such a taking amounted to an expropriation within the meaning of Art. 4 of the BIT and that, accordingly, Respondent is liable to pay compensation therefor.<sup>591</sup>*

514. Considering the foregoing, it is undeniable that in the present case, the reassignment of the Gemerská Poloma Mining Area and revocation of Rormin’s mining rights deprived Claimants of the use and benefit of their investment and thus constituted an expropriation thereof.

b. The revocation of Rozmin’s mining rights did not serve any public purpose

i. As confirmed by the Slovak Supreme Court, the 2002 Amendment did not mandate the revocation of Rozmin’s mining rights

515. As explained by the Supreme Court in its decision of May 18, 2011, upon review of the 2002 Amendment and the accompanying documents, “*the purpose of this Amendment was to avoid mining areas being left unexploited for speculative purposes, and to ensure that only genuine investors committed to the development of the deposit would be granted the mining rights.*”<sup>592</sup> In other words, the revocation of mining rights on the basis of the 2002 Amendment, in the event of an interruption of activities for a period exceeding three years, was not an automatic operation, but required a case-by-case examination by the DMO of the circumstances. In particular, as explained by the Slovak Republic Supreme Court, the absence of excavation alone was no ground to cancel or re-assign a mining area or to revoke an entity’s mining rights.<sup>593</sup> Furthermore, the Slovak Supreme Court confirmed that the 2002 Amendment did not have retroactive effect, and that the three-year period could therefore only have started running on January 1, 2002.

516. Considering the foregoing, the Supreme Court concluded that the revocation of Rozmin’s mining rights could only have been “*appropriate*” if, “*after a thorough*

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<sup>591</sup> **Exhibit CL-142**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, dated April 12, 2002, ¶ 107.

<sup>592</sup> See Claimant’s Memorial, ¶ 241.

<sup>593</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), p. 25.

*investigation*,<sup>594</sup> the DMO had determined that the Mining Area had been left unexploited, or that the exploitation of the Mining Area had been artificially delayed for speculative purposes. This was not the case.

517. Indeed, the Supreme Court noted 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 by Mr. Baffi, the Director of the DMO, during which he had observed and recorded the work in progress, concluded that Rozmin's activities were in compliance with all legal regulations in force, and confirmed that Rozmin was entitled to carry out mining activities until November 13, 2006;<sup>595</sup> and (iii) Rozmin had invested at least SKK 120,000,000 in the Mining Area.

518. The 2002 Amendment could therefore not have justified – let alone justified *post facto* – the revocation of Rozmin's rights. The administrative bodies having failed to take into account the above circumstances and to address them, the Supreme Court found that the “*the action of the defendant, and the appealed decision [were] not in conformity with the legislation.*”<sup>596</sup>

519. In fact, the record shows that Rozmin was in a position to resume works well before the expiration of the three-year period (and in fact even before the expiration of a three-year period that would have started running retroactively at the time of the suspension of works), that Rozmin did communicate its readiness to do so to the mining authorities, that the latter were kept informed by Rozmin of the progress of works at the deposit, and that they were fully satisfied with it. Rozmin simply did not fall within the scope of the 2002 Amendment. Indeed:

- Rozmin remained fully committed to the project during the suspension and was never inactive, even after having notified the DMO, on October 15, 2001, of the suspension of mining activities consequent to Rima Muráň's cessation of

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<sup>594</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), p. 23.

<sup>595</sup> **Exhibit C-28**, Minutes of the December 8, 2004 inspection by the District Mining Office.

<sup>596</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), p. 26.

works,<sup>597</sup> and after having notified it, on November 30, 2001, of the suspension of mining activities for a period exceeding 30 days, in accordance with Decree No. 89/1988 of the Slovak Mining Office dated May 20, 1988.<sup>598</sup> In fact, from the moment that works were suspended in 2001, Rozmin never ceased to work towards their resumption:

- EuroGas and Belmont continued to inject working capital in Rozmin during the suspension of works;<sup>599</sup>
  - Rozmin also applied for new permits and authorizations or extensions of existing ones, so as to ensure that all the necessary permits and authorizations were secured by Rozmin;<sup>600</sup> and
  - Claimants also engaged in negotiations for the sale and distribution of talc to be extracted from the deposit.<sup>601</sup>
- Rozmin sought an extension of the Authorization of Mining Activities at Gemerská Poloma as of December 2002,<sup>602</sup> and submitted, on January 8 2004, its latest formal request to resume mining activities.
  - On May 31, 2004, the DMO granted Rozmin's long-sought authorization to resume works and carry out mining activities in the Mining Area without raising any issue, let alone any timing issue.<sup>603</sup>

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<sup>597</sup> **Exhibit C-221**, Letter from Rozmin sro to the District Mining Office, dated October 15, 2001 (Ref. No. 2274).

<sup>598</sup> **Exhibit C-26**, Letter from Rozmin sro to the District Mining Office, dated November 30, 2001 (Ref. 2304).

<sup>599</sup> See Claimants' Memorial, ¶ 200.

<sup>600</sup> See Claimants' Memorial, ¶¶ 145 *et seq.*

<sup>601</sup> See Claimants' Memorial, ¶¶ 158-159. **Exhibit C-250**, Email from Mondo Omya, dated June 27, 2002; **Exhibit C-251**, Emails exchanged with Mondo Omya between September 26, 2002 and September 30, 2002.

<sup>602</sup> See Claimants' Memorial, ¶¶ 146 *et seq.*

<sup>603</sup> **Exhibit C-27**, Authorisation of Mining Activity in the Mining Area "Gemerská Poloma," dated May 31, 2004 (Ref. 1023/511/2004).

- Rather, the DMO’s authorization allowed Rozmin to carry out mining activities until November 13, 2006, and made no mention whatsoever of any potential ground for the revocation of Rozmin’s mining rights.
- In reliance of this mining authorization granted by the DMO and the assurances therein, Rozmin organized a tender and selected a new contractor, Siderit, which first carried out, on the basis of individual orders, a number of works, particularly in respect of the Water Management Facilities. On November 5, 2004, Siderit and Rozmin formalized their relationship by way of contract, and on November 30, 2004, Rozmin made a payment in the amount of SKK 4,000,000 as an advance to Siderit towards to total contract price of SKK 76,780,100.00 SKK (VAT not included).<sup>604</sup>
- On November 8, 2004, Rozmin officially announced to the DMO that it would resume mining activities by November 18, 2004.<sup>605</sup> The DMO did not protest.
- On November 16, 2004, to ensure the supply of energy needed at the Work Area, Rozmin entered into an agreement with Rima Muráň to purchase from the latter, for an amount of SKK 4 million, the high-voltage line which had been built at Dlhá dolina.
- On December 8, 2004, the DMO conducted a site inspection, following which it expressed its full satisfaction and confirmed that Rozmin was entitled to carry out mining activities until November 13, 2006, as recorded in Minutes of Meetings prepared and signed by the DMO’s Director himself.<sup>606</sup>

520. Respondent’s blanket statement that “*the police powers doctrine applies to Claimant’s expropriation and non-expropriation claims alike*”<sup>607</sup> is unavailing. Domestic legislation is inapposite to foreign investors whose rights are protected by a bilateral investment treaty and customary international law. This is precisely why Respondent is

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<sup>604</sup> **Exhibit C-277**, Siderit Invoice No. 590010, dated November 30, 2004; **Exhibit C-278**, VUB Bank Statement dated November 30, 2004.

<sup>605</sup> **Exhibit C-267**, Letter from Rozmin sro to the District Mining Office, dated November 8, 2004.

<sup>606</sup> **Exhibit C-28**, Minutes of the December 8, 2004 inspection by the District Mining Office.

<sup>607</sup> See Respondent’s Counter-Memorial, ¶ 358.

unable to cite to single authority or case-law supporting its assertion that “[i]t is widely recognized in international law that a measure does not violate international law if it is a result of a legitimate exercise of a good faith regulatory power of the State.”<sup>608</sup> What is, in fact, a widely accepted principle of international law is that an expropriation can be unlawful and an internationally wrongful act even if it was undertaken by the State in accordance with its domestic laws. Not only is this principle set out in the ILC Articles on State Responsibility,<sup>609</sup> but it has also been confirmed in the case-law.<sup>610</sup> What matters, in an international perspective, is the State’s commitments towards foreign investors. Accordingly, there surely is no recognized “all encompassing” or “carte blanche” police powers that a State may fall back upon to justify its actions.

521. As explained by the tribunal in *ADC v. Hungary*, “while a Sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such a right is not unlimited and must have its boundaries. [...] [T]he rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment protection obligations it undertook therein must be honored rather than be ignored by a later argument of the State’s right to regulate.”<sup>611</sup>
522. *In casu*, Rozmin was awarded a General Mining Authorization for an indefinite period of time.<sup>612</sup> The Gemerská Poloma Mining Area and the award of mining rights over this Area were then transferred, from Geological Survey to Rozmin, prior to the enactment

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<sup>608</sup> Respondent’s Counter-Memorial, ¶ 352.

<sup>609</sup> **Exhibit CL-120**, James Crawford, *The International Law Commission’s Articles on State Responsibility*, Cambridge University Press, (2003), at pp. 86-90: Article 3: “*The characterization of an act of a State as internationally 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.*”

<sup>610</sup> **Exhibit CL-121**, *Treatment of Polish Nationals, 1932*, P.C.I.J., Series A/B No. 44, at ¶62: “[...] 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”.

<sup>611</sup> **Exhibit CL-153**, *ADC Affiliate Ltd. and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, dated October 2, 2006, ¶ 423; emphasis added.

<sup>612</sup> This followed Rozmin’s request to the District Mining Office for a mining authorization, dated May 9, 1997 (Ref. RM/112/97 RNDr. Rozložník) (**Exhibit C-122**).

of the 2002 Amendment.<sup>613</sup> Rozmin's rights were revoked by the DMO on January 3, 2005 by the DMO, following the same authority's decision of May 31, 2004 explicitly authorized Rozmin to resume and pursue mining activities at the Gemerská Poloma talc deposit until November 13, 2006.<sup>614</sup> The decision of May 31, 2004 was, however, issued well after the entry into effect of the 2002 Amendment and well after the suspension of works, and it was confirmed in December 2004, after the resumption of works. The revocation of Rozmin's mining rights can therefore not possibly have been motivated by the fact that it had temporarily suspended works. In other words, it cannot have been based on the 2002 Amendment, which can therefore certainly not successfully be raised *post facto* as a justification.

523. The nature and extent of Rozmin's investments, the many authorizations and permits issued by the Slovak Republic before, during, and after the suspension, the works contracted and carried out, demonstrate that Rozmin remained at all times a *bona fide* investor, genuinely committed to the development of the Gemerská Poloma deposit, and that the Republic of Slovakia was perfectly aware of this. Claimants thus fell outside the ambit of the 2002 Amendment, as confirmed by the Slovak Supreme Court in its decision of May 18, 2011,<sup>615</sup> and the taking of Claimants' investment could not have been made in pursuance of public purpose underlying the 2002 Amendment. At best, this taking was grossly disproportionate to the purpose allegedly pursued and invoked only *post facto*, hence in breach of the fair and equitable standard.<sup>616</sup>

524. As explained by the tribunal in the *Azurix* case:

*The public purpose criterion as an additional criterion to the effect of the measures under consideration needs to be*

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<sup>613</sup> **Exhibit C-123**, Letter from the District Mining Office to Geological Survey, dated June 5, 1997 (Ref. 1432-465-V/97); **Exhibit C-23**, Agreement on the Transfer of the Gemerská Poloma Mining Area, dated June 11, 1997 (Ref. 01-75-991/97); **Exhibit C-24**, Certificate on acquisition of rights to the mining area issued by the District Mining Office, dated June 24, 1997; **Exhibit C-125**, Trade License issued by the Rožňava District Authority of the Department of Trade Licenses and Customer Protection on July 10, 1997.

<sup>614</sup> **Exhibit C-27**, Authorisation of Mining Activity in the Mining Area "Gemerská Poloma," dated May 31, 2004 (Ref. 1023/511/2004).

<sup>615</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), pp. 25-26.

<sup>616</sup> **Exhibit CL-149**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, dated May 25, 2004, ¶109.

*complemented. [...] [I]n the case of James and Others[,] [t]he [European Court of Human Rights] held that “a measure depriving a person of his property [must] pursue, on the facts as well as in principle, a legitimate aim ‘in the public interest’”, and bear “a reasonable relationship of proportionality between the means employed and the aim sought to be realized”. This proportionality will not be found if the person concerned bears “an individual and excessive burden”. The Court considered that such “a measure must be both appropriate for achieving its aim and not disproportionate thereto.” The Court found relevant that non-nationals “will generally have played no part in the election or designation of its [of the measure] authors nor have been consulted on its adoption”, and observed that “there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.”<sup>617</sup>*

525. In this respect, it should be noted that in support of its position that “[t]he principle of proportionality only applies where the decision-making authority has discretionary powers,”<sup>618</sup> Respondent refers to an excerpt of the *Occidental Petroleum v. Ecuador* case. In that case, the tribunal merely recorded that “[i]t was [...] common ground between the parties that, where the Minister has a discretion, the principle of proportionality is relevant.”<sup>619</sup> In the present case, as clearly stated by the Slovak Republic’s own Supreme Court, the cancellation or reassignment of mining rights did not occur automatically. In particular, such cancellation or reassignment was not merely dependent on whether no excavation had been performed for a period of three years. This is precisely why the Supreme Court “*instructed DMO to perform a more detailed examination of Rozmin’s activity with the correct three-year period.*”<sup>620</sup> The DMO enjoyed some discretion to the extent that the cancellation or reassignment of mining rights depended on the level of “activity with the correct three-year period.”<sup>621</sup>

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<sup>617</sup> **Exhibit CL-152**, *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Final Award, dated July 14, 2006, ¶ 311.

<sup>618</sup> Respondent’s Counter-Memorial, ¶ 398.

<sup>619</sup> **Exhibit CL-131**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, dated October 5, 2012, ¶ 425.

<sup>620</sup> Respondent’s Counter-Memorial, ¶ 327; emphasis added.

<sup>621</sup> Respondent’s Counter-Memorial, ¶ 327, referring to **Exhibit R-0061**, Judgment of the Supreme Court of the Slovak Republic, Case No.2Sžo/132/, dated May 18, 2011, p. 84-86.

526. In *Tecmed v. Mexico*, the tribunal was to rule on the expropriatory nature of Mexico's refusal to renew a license on the basis of infringements of its terms committed by the claimants, and therefore examined whether this was "*proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality.*"<sup>622</sup> The *Tecmed* tribunal concluded that the responsible regulatory agency was predominantly influenced and/or motivated by socio-political factors beyond the license violations which had been alleged against Tecmed.<sup>623</sup> Although the license and applicable regulations *prima facie* permitted a refusal to renew the license in the case of such violations, the tribunal held that:

*[T]he actions undertaken by the authorities to face these socio-political difficulties, where these difficulties do not have serious emergency or public hardship connotation, or wide-ranging and serious consequences, may not be considered from the standpoint of the [BIT] or international law to be sufficient to deprive the foreign investors of its investment with no compensation.*<sup>624</sup>

527. Similarly, in the present case, the Supreme Court made it plain that the absence of actual excavation at the deposit could not justify the revocation of Rozmin's mining rights under the 2002 Amendment. Rather, the DMO was to consider 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 by Mr. Baffi, the Director of the DMO, during which he had observed and recorded the work in progress, concluded that Rozmin's activities were in compliance with all legal regulations in force, and confirmed that Rozmin was entitled

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<sup>622</sup> **Exhibit CL-137**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No ARB(AF)/00/2), Award, dated May 29, 2003, ¶ 122.

<sup>623</sup> **Exhibit CL-137**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No ARB(AF)/00/2), Award, dated May 29, 2003, ¶ 130.

<sup>624</sup> **Exhibit CL-137**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No ARB(AF)/00/2), Award, dated May 29, 2003, ¶ 147. See also **Exhibit CL-131**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID case No. ARB/06/11, Award, dated October 5, 2012, ¶ 450.



to carry out mining activities until November 13, 2006;<sup>625</sup> and (iii) Rozmin had invested at least SKK 120,000,000 in the Mining Area.

528. As confirmed by the Slovak Supreme Court, Rozmin was a *bona fide* investor, genuinely committed to the development of the Gemerská Poloma deposit. As a result, Rozmin did not fall within the scope of the 2002 Amendment, which the Republic of Slovakia knew perfectly well. The DMO's strict and shortsighted interpretation of the 2002 Amendment failed to take into account the discretion that the DMO enjoyed under this Amendment, which completely defeated the original purpose of the 2002 Amendment.

529. In sum, there was no substantive justification to the taking of Claimants' rights and investment, let alone any public purpose which could have been served by this taking. At best, the actions of the Slovak Republic were grossly disproportionate to any conceivable public purpose which such actions may purportedly have served. The taking of Claimants' rights and investment was thus substantively unlawful.

ii. *In any event, the revocation of Rozmin's mining rights was decided before the expiration of the three-year period and could therefore not have been justified by the 2002 Amendment*

530. As demonstrate above at paragraphs 452 *et seq.*, the reality is that well before the expiration of the three-year period, Respondent had already decided to revoke Rozmin's mining rights. Hence, even assuming, for the sake of argument, that the 2002 Amendment required Rozmin to start excavation within this three-year period (which it did not, as demonstrated above and as confirmed by the Slovak Supreme Court), the revocation could thus not have been justified by Rozmin's failure to meet this requirement.

531. Indeed, the three-year period had not yet elapsed by the time that Respondent engaged in discussions with third parties regarding the re-assignment of mining rights over the Gemerská Poloma deposit,<sup>626</sup> nor had this time-period in fact elapsed by the time the

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<sup>625</sup> **Exhibit C-28**, Minutes of the December 8, 2004 inspection by the District Mining Office.

<sup>626</sup> *See, inter alia*, **Exhibit C-356**, Email message from Mr. Wulf-Dietrich Keller to Mr. Peter Čorej, dated December 1, 2004; **Exhibit C-357**, Email message from Mr. Wulf-Dietrich Keller to Mr. Dusan Cellar, dated December 13, 2004; **Exhibit C-358**, Email message from Mr. Peter Čorej to Mr. Wulf-Dietrich Keller, dated February 16, 2005.

DMO had requested the Ministry of Justice to publish a Notification of the Initiation of the Tender Procedure for the Assignment of the Mining Area<sup>627</sup> or by the time Notification was published.<sup>628</sup>

532. Well before the expiration of the three-year period, the dice were cast.

## **2. Respondent's Procedurally Unlawful Expropriation of Claimants' Investment**

533. As explained in Claimants' Memorial, irrespective of any purported purpose that Respondent's actions may have served, the taking of Claimants' rights and investment was procedurally unlawful. This alone is constitutive of a prohibited expropriation.

534. Indeed, as explained by the tribunal in *ADC v. Hungary*,

*"[D]ue process of law", in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that "the actions are taken under due process of law" rings hollow.*<sup>629</sup>

535. In the present case, first, the taking was performed abruptly, without any consideration for Claimants' most basic rights or due process of law. Claimants were neither notified that the revocation of their mining rights was contemplated by the Slovak authorities, nor afforded an opportunity to present their case on the same. In fact, Respondent's

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<sup>627</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010) p. 22. See also **Exhibit C-37**, Decision of the District Mining Office, dated March 30, 2012 (Ref. 157-920/2012), p. 27.

<sup>628</sup> **Exhibit C-29**, Initiation of the Selection Procedure for the Determination and Assignment of the Extraction Area, Business Journal No. 253/2004, dated December 30, 2004, p. 99.

<sup>629</sup> **Exhibit CL-153**, *ADC Affiliate Ltd. and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, dated October 2, 2006, ¶ 435.

taking was found illegal, both procedurally and substantively, by the Slovak Republic's own Supreme Court on three separate occasions.<sup>630</sup>

536. As explained in Claimants' Memorial, the sequence of events that led to the revocation of Claimants' mining rights is particularly telling of the abruptness of the taking and complete lack of consideration for Claimants' basic right to due process:

- From the moment the works were suspended in 2001, Rozmin never ceased to work towards their resumption and took all necessary measures to ensure that all the required permits and authorizations were secured by Rozmin and/or remained in force.<sup>631</sup>
- On May 31, 2004, the DMO granted Rozmin an authorization to carry out mining activities until November 13, 2006, without mentioning any potential ground for the revocation of Rozmin's mining rights. On the contrary, the authorization granted by the DMO was tantamount to an assurance by the Slovak Republic that Rozmin and its foreign investors would be able to carry out mining activities in the Mining Area until November 13, 2006.
- In reliance of the mining authorization granted by the DMO and the assurances therein, Rozmin therefore moved on to the next step including, *inter alia*, organizing a tender and selecting a new contractor to resume mining works, issuing individual orders for a number of works, particularly in respect of the Water Management Facilities, purchasing a high-voltage line, and making a series of substantial related payments.
- On November 8, 2004, Rozmin officially announced to the DMO that it would resume mining activities by November 18, 2004.<sup>632</sup> The DMO did not react to the announcement or warn Rozmin of potential grounds for the revocation of its

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<sup>630</sup> **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); **Exhibit C-38**, Decision of the Supreme Court of the Slovak Republic, dated January 31, 2013 (Ref. 5Sžp/10/2012).

<sup>631</sup> See Claimants' Memorial, ¶¶ 145 *et seq.*

<sup>632</sup> **Exhibit C-267**, Letter from Rozmin sro to the District Mining Office, dated November 8, 2004.

mining rights, let alone claim that the works had been suspended too long for Rozmin to be entitled to resume its activities at the site.

- To the contrary, on December 8, 2004, the Director of the DMO, Mr. Baffi, carried out an inspection at the Gemerská Poloma talc deposit that lasted over two hours and resulted in Minutes of Meetings drafted and signed by Mr. Baffi himself. Yet, far from mentioning potential grounds for the revocation of Rozmin's mining rights, Mr. Baffi observed and recorded the work in progress, concluded that Rozmin's activities were in compliance with all legal regulations in force, and confirmed that Rozmin was entitled to carry out mining activities until November 13, 2006.<sup>633</sup>

537. Based on the foregoing, it understandably came as a shock to Claimants when the Slovak Republic wrote to Rozmin, on January 3, 2005, not even a month after the December 8, 2004 inspection, to announce that its mining rights had been *de facto* revoked and that these would be awarded to a new organization, and that a tender for the re-assignment of the Gemerská Poloma Mining Area had been issued the month before. Worse even, it is now clear that back in November 2004, Respondent was in negotiations with third party companies to replace Rozmin, with an agenda that moreover appeared to be at odds with the notion of public purpose and the requirements of good faith and transparency.

538. In this context, the fact that “[t]he 2002 Amendment was subject to widespread discussion within the mining community in the Slovak Republic,”<sup>634</sup> and that Dr. Rozloznik and Mr. Agyagos were aware of the 2002 Amendment is irrelevant. As noted above, having knowledge of the content of the 2002 Amendment, Rozmin and Claimants were aware that mining activities at the deposit were to be resumed before the expiration of the three-year period. This was confirmed by the Slovak Supreme Court, which clearly disavowed Respondent's interpretation of the 2002 Amendment as requiring that excavation be performed within that time period. Considering that preparatory works towards the completion of above-ground structures were carried out

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<sup>633</sup> **Exhibit C-28**, Minutes of the December 8, 2004 inspection by the District Mining Office.

<sup>634</sup> Respondent's Counter-Memorial, ¶ 300.

by Siderit as early as in August 2004,<sup>635</sup> and that mining activities *per se* were resumed at the site in November 2004, the revocation of Rozmin's rights was against all odds. This is all the more so considering the authorization granted to Rozmin on May 31, 2004, that is well after the suspension of work, to continue mining activities until November 2006, and the confirmation of this authorization on December 8, 2004, that is, well after the resumption of works.

539. Even more shocking was the fact that the Slovak Republic had already announced on December 30, 2004, by way of a publication in the Business Journal, that it was initiating a new tender procedure for the assignment of the Mining Area.<sup>636</sup> Once Rozmin had confirmed the reserves of the Mining Area, and once the works on the Mining Area had, in reliance on the Slovak Republic's own representations, already been resumed, Respondent simply decided to take away Rozmin's rights without giving any prior notice to Rozmin, without giving Rozmin or Claimants an opportunity to be heard, and without a valid justification, let alone any compensation.
540. The Slovak Republic's blatant disregard for the due process of law and Claimants' most basic rights is obvious from the fact that Rozmin was not even afforded an opportunity to present its case on the taking but rather was kept in the dark and presented *post facto* with a *fait accompli*. Both Rozmin and Claimants were totally unaware of the fact that the revocation of Rozmin's mining rights was under consideration by the Slovak authorities. To the contrary, they had actually been given the assurance that Rozmin would be allowed to carry out works in the Mining Area at least until November 13, 2006 and told upon inspection dated December 8, 2004 that everything was in good order.
541. The present dispute is rather unique in that the illegality – not only substantive but also procedural – of Respondent's taking was confirmed by the Slovak Republic's very own Supreme Court on three separate occasions.

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<sup>635</sup> **Exhibit C-254**, Individual Order for Works from Rozmin sro to Siderit, dated September 14, 2004; **Exhibit C-255**, Individual Order for Works from Rozmin sro to Siderit, dated September 27, 2004; **Exhibit C-256**, Individual Order for Works from Rozmin sro to Siderit, dated October 6, 2004; **Exhibit C-257**, Individual Order for Works from Rozmin sro to Siderit, dated November 15, 2004.

<sup>636</sup> **Exhibit C-29**, Initiation of the Selection Procedure for the Determination and Assignment of the Extraction Area, Business Journal No. 253/2004, dated December 30, 2004, p. 99.

542. Indeed, upon Rozmin's appeal against the revocation of its mining rights, the Supreme Court of the Slovak Republic itself concluded that Rozmin's due process rights had been breached when the DMO reassigned the Mining Area to another entity without affording Rozmin an opportunity to appeal the DMO's decision and to put forward its case.<sup>637</sup> It is therefore undeniable, as confirmed by the Slovak Republic's highest judicial organ, that the taking of Claimants' investment was in breach of Claimants' due process rights.
543. Second, the Slovak Republic did not put forward any public purpose despite the fact that the existence of a public purpose is one of the elements required for an expropriation to be deemed lawful under international law.
544. In the DMO's letter of January 3, 2005, whereby the Slovak Republic informed Rozmin that its mining rights had been *de facto* revoked, the explanation offered was that more than three years had elapsed between the suspension of works and their resumption.<sup>638</sup> The Slovak Republic made no reference to the surrounding circumstances, let alone explain how the revocation would serve a public purpose.
545. Furthermore, even assuming, for the sake of the argument, that the State invoked *post facto*, in the course of the appeal proceedings initiated by Rozmin, a public purpose to justify the revocation of the latter's mining rights, the Slovak Republic's own Supreme Court held, in its decision of May 18, 2001, that the revocation of Rozmin's mining rights could not have been motivated by the underlying purpose of the 2002 Amendment, namely to avoid mining areas being left unexploited for speculative reasons and to ensure that only genuine investors would be granted mining rights (see paragraph 472 *supra*).
546. Lastly, irrespective of the revocation, *per se*, of Rozmin's mining rights, the Slovak Republic's subsequent disregard of the decisions of its own Supreme Court, when the DMO stubbornly reassigned Rozmin's mining rights, first in July 2008 and then again

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<sup>637</sup> **Exhibit C-33**, Decision of the Supreme Court of the Slovak Republic, dated February 27, 2008 (Ref. 6Sžo/61/2007-121), pp. 8-10; **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), p. 26; **Exhibit C-38**, Decision of the Supreme Court of the Slovak Republic, dated January 31, 2013 (Ref. 5Sžp/10/2012), p. 9.

<sup>638</sup> **Exhibit C-30**, Letter from the District Mining Office to Rozmin sro, dated January 3, 2005 (Ref. 2405/451.14/2004-I).

in March 2012, to VSK Mining, in and of itself constituted an expropriation of Claimants' rights under international law. Indeed, the failure of mining authorities to reinstate Rozmin's rights notwithstanding the decisions of the Supreme Court condemning the revocation of these rights, definitively deprived Rozmin of its rights and Claimants of the benefits of their investment, and thus amounted not only to a denial of justice (discussed below at paragraphs 598 *et seq.*) but also to an expropriation of Claimants' rights and investment. Again, this expropriation was in blatant disregard of Claimants' right to due process of law and not justified by any public purpose.

547. For all of the above reasons taken individually, let alone collectively, Respondent unlawfully expropriated Claimants' rights and deprived the latter of the use and enjoyment of their investment, which gives rise to Respondent's liability under international law and obligation to compensate for the losses sustained.

### 3. Respondent's Failure to Compensate Claimants for the Taking

548. Assuming, for the sake of argument, that the taking was lawful, namely that it was performed for a public purpose and in accordance with due process of law, it was in any event not accompanied by any compensation, let alone the "*immediate, adequate and effective compensation*" to which Claimants were entitled. The Slovak Republic would therefore still have to be held in breach of its obligation, under Article III(1) of the U.S.-Slovak Republic BIT, Article VI(1) of the Canada-Slovak Republic BIT, and customary international law,<sup>639</sup> to provide "*prompt, adequate and effective compensation.*"

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<sup>639</sup> See, e.g., **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 ("Reinhard Unglaube"), at ¶ 222 ("Prompt and adequate compensation is also, of course, a requirement of customary international law").

549. While Respondent requested, during the cooling-off period, that Claimants provide a quantification of their claims,<sup>640</sup> today it argues, in its Counter-Memorial, that it “cannot be required to indemnify against the adverse effects of reasonable governmental regulation.”<sup>641</sup> Respondent’s position is in direct contradiction with the clear letter of both the U.S.-Slovak Republic BIT and the Canada-Slovak Republic BIT. Furthermore, the fact that compensation is required even if the taking serves a public purpose has been widely recognized by tribunals.

550. In *Compañía del Desarrollo de Santa Elena v. Costa Rica*, where the State was found to be acting within the “public purpose” exception, the tribunal expressly stated that the environmental purpose that was served by the taking had no bearing on the principle of compensation. The tribunal held the following:

*In approaching the question of compensation for the Santa Elena Property, the Tribunal has borne in mind [that] International law permits the Government of Costa Rica to expropriate foreign-owned property within its territory for a public purpose and against the prompt payment of adequate and effective compensation. This is not in dispute between the Parties. While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.*<sup>642</sup>

551. The tribunal further held that “[e]xpropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies:

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<sup>640</sup> **Exhibit C-279**, Letter from the Slovak Republic, dated February 13, 2014; **Exhibit C-60**, Letter from the Slovak Republic, dated February 20, 2014; **Exhibit C-61**, Letter from the Slovak Republic, dated March 13, 2014; **Exhibit C-280**, Email message from the Slovak Republic, dated March 28, 2014.

<sup>641</sup> Respondent’s Counter-Memorial, ¶ 355.

<sup>642</sup> **Exhibit CL-144**, *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, dated February 17, 2000, ¶ 71.



*where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.*”<sup>643</sup>

552. The *Santa Elena* case is no isolated case in respect of compensation due in case of lawful expropriation. The *Vivendi I* tribunal, in turn, stated:

*If public purpose automatically immunises the measure from being found to be expropriatory, then there would never be a compensable taking for a public purpose. As the tribunal in Santa Elena correctly pointed out, the purpose for which the property was taken 'does not alter the legal character of the taking for which adequate compensation must be paid.' The legal element in question is whether the act is expropriatory or not. If Respondent's invocation of public purpose were correct, Costa Rica would have prevailed in the Santa Elena case and thus would not have faced the prospect of having to compensate.*<sup>644</sup>

553. In *Rumeli v. Kazakhstan*, the tribunal ruled that the State's decision to take the investment was made for a public purpose, however “*the valuation placed on Claimants' shares was manifestly and grossly inadequate compared to the compensation which the Tribunal there holds to be necessary in order to afford adequate compensation under the BIT and the FIL. The Tribunal accordingly holds that the expropriation by the Presidium was unlawful.*”<sup>645</sup>

554. Respondent's partial reading of *Feldman v. Mexico* is misleading. Respondent relies on this case to support its allegation that “*States cannot be required to indemnify against the adverse effects of reasonable governmental regulation.*”<sup>646</sup> In that case, however, the tribunal focused on the distinction to be drawn between “expropriation or nationalization,” on the one hand, and “valid governmental activity,” on the other hand,<sup>647</sup> and made it plain that “[i]f there is a finding of expropriation, compensation is

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<sup>643</sup> **Exhibit CL-114**, *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, dated February 17, 2000, ¶ 72.

<sup>644</sup> **Exhibit CL-145**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (Resubmitted), ICSID Case No. ARB/97/3 (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*), Award, dated August 20, 2007, ¶ 7.5.21.

<sup>645</sup> **Exhibit CL-146**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, dated July 29, 2008, ¶ 706.

<sup>646</sup> Respondent's Counter-Memorial, ¶ 355.

<sup>647</sup> **Exhibit RL-118**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case, No. ARB (AF/99/1), Award, dated December 16, 2002, ¶ 98.

*required, even if the taking is for a public purpose, non-discriminatory and in accordance with due process of law and Article 1105(1).*”<sup>648</sup> The tribunal also stated that “*decisions as to when regulatory action becomes compensable under article 1110 and similar provisions in other agreements appear to be made based on the facts of specific cases,*”<sup>649</sup> thus making it clear that regulatory actions may have to be compensated for, if they amount to expropriatory measures (including indirect or “creeping” expropriation, or measures tantamount to expropriation). This is clearly the case here, as shown above (see Section IV.A.1.a. above), and compensation would therefore be due even if the revocation of Rozmin’s mining rights were found to have been mandated by the 2002 Amendment (which it was not) and to have served a public purpose (which it did not).

555. As shown above, in past cases, tribunals have recognized, in line with the clear wording of the applicable bilateral investment treaties, that to be lawful, an expropriation must not only serve a public purpose, but also be non-discriminatory, carried out in accordance with due process of law, and be compensated. The few cases in which tribunals have held that States cannot be required to indemnify against the adverse effects of reasonable governmental regulation have been criticized in subsequent awards.
556. In *Azurix*, the tribunal rejected outright the S.D. Myers approach that “*parties [to the Bilateral Treaty] are not liable for economic injury that is the consequence of bona fide regulation within the accepted police powers of the State.*” The *Azurix* tribunal explained:

*This Tribunal finds the criterion insufficient and shares the concern expressed by Judge R. Higgins, who questioned whether the difference between expropriation and regulation based on public purpose was intellectually viable:*

*“Is not the State in both cases (that is, either by a taking for a public purpose, or by regulating) purporting to act in the*

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<sup>648</sup> **Exhibit RL-118**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case, No. ARB (AF/99/1), Award, dated December 16, 2002, ¶ 98; emphasis in the original text.

<sup>649</sup> **Exhibit RL-118**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case, No. ARB (AF/99/1), Award, dated December 16, 2002, ¶ 102.

*common good? And in each case has the owner of the property not suffered loss? Under international law standards, a regulation that amounted (by virtue of its scope and effect) to a taking, would need to be 'for a public purpose' (in the sense of in general, rather than for a private interest). And just compensation would be due. At the same time, interferences with property for economic and financial regulatory purposes are tolerated to a significant extent."*

*The argument made by the S.D. Myers tribunal is somehow contradictory. According to it, the BIT would require that investments not be expropriated except for a public purpose and that there be compensation if such expropriation takes place and, at the same time, regulatory measures that may be tantamount to expropriation would not give rise to a claim for compensation if taken for a public purpose. The public purpose criterion as an additional criterion to the effect of the measures under consideration needs to be complemented.<sup>650</sup>*

557. The same observations could be made in respect of the tribunal's holding regarding compensation in *Saluka v. Czech Republic* (in which the Czech Republic was represented for the same counsel as Counsel for Respondent in the instant case and on which the latter relies heavily in support of its position that no compensation is due), in which the tribunal in fact expressly relies on the *S.D. Myers* award criticized in *Azurix*.
558. In none of the other cases cited by Respondent – *Chemtura v. Canada*, *Suez v. Argentina*, *Les Laboratoires Servier, S.A.S. v. Poland*, *Total v. Argentina*, *Glamis Gold v. USA*, and *Tza Yap Shum v. Peru* – did the tribunal hold that no compensation was due in case of expropriation serving a public purpose. In fact, in *Les Laboratoires Servier, S.A.S. v. Poland*, the tribunal clearly stated that it was “*well aware that any divestment as such must be followed by compensation pursuant to the second subparagraph of Article 5(2), regardless of whether the divestment entails illicit actions covered by the first subparagraph of that section which prohibits certain types of expropriations. The Tribunal must take BIT Article 5(2) as drafted. One portion of that provision imposes a negative rule that expropriation or nationalization measures not be taken except for reasons of public necessity and provided that such measures are not*

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**Exhibit CL-152**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award dated July 14, 2006, ¶¶ 310-311.

*discriminatory or contrary to a particular obligation. Another portion of the provision imposes a positive mandate that any divestment shall give rise to adequate compensation.*<sup>651</sup>

559. Considering the above, even assuming, for the sake of argument, that the taking was lawful, namely that it was performed for a public purpose, in a non-discriminatory manner, and in accordance with due process of law, it was in any event not accompanied by any compensation, let alone the “*immediate, adequate and effective compensation*” to which Claimants were entitled under the U.S.-Slovak Republic BIT and Canada – Slovak Republic BIT. The Slovak Republic would therefore still have to be held in breach of its obligation, under Article III(1) of the U.S.-Slovak Republic BIT, Article VI(1) of the Canada-Slovak Republic BIT, and customary international law.<sup>652</sup>

560. In sum, heads or tails, Respondent has breached its obligations under international law to compensate Claimants for the losses sustained as a result of the taking of their investment, calling for the payment of damages.

## **B. MULTIPLE BREACHES OF THE FAIR AND EQUITABLE TREATMENT STANDARD**

561. The Slovak Republic’s acts and omissions, set out below, taken individually, let alone collectively, also constitute substantive and procedural breaches of the fair and equitable standard (laid down in Article II(2)(a) of the U.S.-Slovak Republic BIT and Article III(1)(a) of the Canada-Slovak Republic BIT, discussed in Section IV of Claimants’ Memorial), as set out in Section V.B. of Claimants’ Memorial, to which reference is made.

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<sup>651</sup> **Exhibit RL-117**, *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progrès S.A.S v. Republic of Poland*, PCA, Final Award, 14 February 2012, ¶¶ 572-573.

<sup>652</sup> See, e.g., **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 (“Reinhard Unglaube”), at footnote 222 (“Prompt and adequate compensation is also, of course, a requirement of customary international law”).

**1. Respondent's Failure to Act Consistently, to Meet Claimants' Legitimate Expectations, and to Act in Good Faith**

562. In their Memorial, to which reference is made in full, Claimants addressed in detail the obligation of the host State under the fair and equitable treatment standard, and Respondent's failure in the instance case, to act in a consistent manner,<sup>653</sup> to meet the legitimate expectations of foreign investors,<sup>654</sup> and to act in good faith.<sup>655</sup>

563. In its Counter-Memorial, Respondent contends the following:

- that “*the Slovak Republic never gave to Claimants any specific commitment or guaranteed that it would not modify its regulation of the mining sector and enforce it against Claimants;*”<sup>656</sup>
- that the May 31, 2004 authorization to carry out mining activities could not have been the source of legitimate expectations protected under international investment law since this authorization was issued only after Claimants made their investment;<sup>657</sup> and
- that there has been no inconsistency between “*two arms of the State* [that would have] *acted differently towards the investment.*”<sup>658</sup>

564. Respondent misrepresents the facts and misapplies the law.

565. First, the issue in this case is not the enactment of the 2002 Amendment *per se*: Claimants do not argue that the Slovak Republic guaranteed that it would not modify its regulations of the mining sector. The issue rather is that the DMO agreed, after the entry into effect of the 2002 Amendment, to extend Rozmin's mining rights until

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<sup>653</sup> See Claimants' Memorial, ¶¶ 294-302.

<sup>654</sup> See Claimants' Memorial, ¶¶ 303-307.

<sup>655</sup> See Claimants' Memorial, ¶¶ 341-358.

<sup>656</sup> Respondent's Counter-Memorial, ¶ 391.

<sup>657</sup> Respondent's Counter-Memorial, ¶ 396.

<sup>658</sup> Respondent's Counter-Memorial, ¶ 394.

November 2006,<sup>659</sup> and even confirmed this extension after the resumption of works at the deposit, and nonetheless revoked Rozmin's rights before November 2006.

566. The May 31, 2004 authorization to resume and carry out mining activities until November 13, 2006, which made no reference to any potential grounds for the revocation of Rozmin's mining rights, was tantamount to an assurance by the Slovak Republic that Rozmin and its foreign investors would be able to carry out mining activities in the Mining Area until November 13, 2006. While Respondent asserts that "is simply not true" that "*this Authorization of Mining Activities gave [Rozmin] a right to resume and carry out mining activities in Gemerská Poloma until 13 November 2006,*"<sup>660</sup> the authorization of May 31, 2004 is clear. To evasively argue today that "*the fact that Rozmin was issued the Authorization of Mining Activities cannot guarantee that Rozmin will continue to hold the other permits*"<sup>661</sup> and that "[t]he Authorization of Mining Activities thus cannot have been a source of any specific commitment given by the Slovak Republic to Claimants with regard to Rozmin's right to carry out mining activities in the Excavation Area," borders bad faith. If Rozmin was able to secure the authorization of May 31, 2004 to resume and carry out mining activities until November 2006, it was precisely because it had obtained all required permits and authorizations. Indeed:

- Rozmin had obtained and submitted the statements of approval of the Municipality of Gemerská Poloma, the Municipality of Henclova, the Department of Environment of the Košice District Office, the Hron River Basin Branch of the Slovak Water Management Company, and the Revuca Branch of the Eastern Slovak Waterworks and Sewers.<sup>662</sup>
- Throughout the lengthy process of having a revised Plan for the Opening, Preparation, Development, and Exploitation approved, Rozmin had followed up on all the administrative permits (relating, *inter alia*, to land parcels, above-

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<sup>659</sup> **Exhibit C-27**, Authorisation of Mining Activity in the Mining Area "Gemerská Poloma," dated May 31, 2004 (Ref. 1023/511/2004).

<sup>660</sup> Respondent's Counter-Memorial, ¶ 392.

<sup>661</sup> Respondent's Counter-Memorial, ¶ 393.

<sup>662</sup> **Exhibit C-27**, Authorisation of Mining Activity in the Mining Area "Gemerská Poloma," dated May 31, 2004 (Ref. 1023/511/2004), pp. 5-6.

ground structures, water management facilities, and forest roads) it had secured to ensure that they would not expire, as set out in detail at paragraphs 151 through 157 of Claimants' Memorial.

567. On October 14, 2004, a meeting was held at the DMO, in the course of which the DMO was informed that Rozmin had initiated construction works at the site. The DMO did not raise any objections, let alone did it make any reference to the possibility of a cancellation of the assignment of the Mining Area to Rozmin.<sup>663</sup> Similarly, when Rozmin officially announced to the DMO, on November 8, 2004, that it would resume mining activities by November 18, 2004,<sup>664</sup> the DMO did not react to the announcement or warn Rozmin of potential grounds for the revocation of its mining rights, let alone claim that the works had been suspended for too long for Rozmin to be entitled to resume its activities at the site. To the contrary, following an inspection at the Gemerská Poloma talc deposit on December 8, 2004, the Director of the DMO, Mr. Baffi, concluded that Rozmin's activities were in compliance with all legal regulations in force, and confirmed that Rozmin was entitled to carry out mining activities until November 13, 2006.<sup>665</sup>

568. Respondent's contention that "*the issuance of the Authorization of Mining Activities was in no way contradicted by DMO's later decision assigning the Excavation Area to a third party*"<sup>666</sup> is scandalous. It suggests that no authorization to carry out mining activities may be relied upon by an investor as it carries no weight in the Slovak Republic given that it may, at any point in time, be superseded by a subsequent decision to reassign a mining area to another entity. In other words, Respondent suggests that irrespective of the procedure that it may have had to be followed by a foreign investor to acquire mining rights and irrespective of the extent of its investments, the Slovak Republic remains free to reassign a mining area and deprive the current right holders of its deposit. If such are the foundations of Slovak mining law, they surely are in conflict with this country's international obligations towards foreign investors.

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<sup>663</sup> Witness Statement of Ondrej Rozložník, ¶ 59; Witness Statement of Vojtech Agyagos, ¶ 35.

<sup>664</sup> **Exhibit C-267**, Letter from Rozmin sro to the District Mining Office, dated November 8, 2004.

<sup>665</sup> **Exhibit C-28**, Minutes of the December 8, 2004 inspection by the District Mining Office.

<sup>666</sup> Respondent's Counter-Memorial, ¶ 394.

569. Second, Respondent's contention that the May 31, 2004 authorization to carry out mining activities could not have been the source of legitimate expectations protected under international investment law since this authorization was issued only after Claimants made their investment, in unavailing.

570. As explained by Schreuer and Kriebaum:

*An investment is often a process rather than an instantaneous act. This implies that it will often not be a single step on the basis of a single decision that needs to be taken. Rather, during the process of establishing an investment as well as during the lifetime of an investment project, a number of business decisions have to be taken by investors. [...]*

*[Thus,] investments can take place incrementally over a certain period of time. The host State may well take steps during that period that create legitimate expectations with the foreign investor and have an impact on its further investment decisions. [...] In addition, a typical investment is not a simple event. An investment operation is often composed of a number of diverse transactions and activities, which must be treated as an integrated whole. Therefore, an investment is often a complex process involving diverse transactions which have a separate legal existence but a common economic aim. [...]*

*It follows from [...] consistent case law that tribunals, when examining the existence of an investment for purposes of their jurisdiction, have not looked at specific transactions but at the overall operation. [...] What mattered for the identification and protection of the investment was the entire operation directed at the investment's overall economic goal.*

*The realization that an investment is often not a single right or an isolated transaction but a combination of rights and an integrated process of transactions is important also for the timing of the legitimate expectations upon which investment decisions rely. [...]*

*The acceptance of an investment as a complex processes involving a number of different transactions means that it is not possible to focus only on one particular point in time for the identification of legitimate expectations. Rather, it is necessary to identify the diverse transactions and activities, which combine to constitute the investment, and to examine individually whether they were based on contemporary*



*legitimate expectations. In other words, it is necessary to ascertain the existence of legitimate expectations held by the investor at the time of each individual decision. The key issue is the actual reliance on expectations which existed at the particular point in time when the relevant decision was taken.*

*This differentiated approach to the time of the investment necessitates differentiation also with respect to the timing of the creation of expectations. There is no limited canon of governmental actions leading to legitimate expectations. To be able to rely on legitimate expectations the foreign investor must have knowledge, or at least access to knowledge of the facts on which the legitimate expectations are based. Furthermore, the foreign investor must have taken relevant business decisions on the basis of these facts.*

*Expectations can be created through the general regulatory framework prevalent in a country. Expectations can also be created through specific transactions or governmental assurances. In some cases the expectations stemmed from the general regulatory framework as well as specific commitments contained in licenses.*

*A foreign investor may be presumed to know the general regulatory framework prevalent in a country at the time it first embarks upon the investment. But it is not only the framework existing at that early stage that can create legitimate expectations. [...]*

*In some cases the legitimate expectations are based on specific assurances by the host State, whether in the form of contracts, licenses or otherwise. These specific assurances may have been given either before the first step in the investment process or at a later stage. If the investor relied on assurances given after the investment's inception and adapted its subsequent investment decisions accordingly, these assurances may have created expectations which deserve protection.*<sup>667</sup>

571. In the present case, Claimants invested in the deposit throughout the years 1998-2004. Rozmin and Claimants relied specifically on the May 31, 2004 authorization<sup>668</sup>

<sup>667</sup> **Exhibit CL-37**, Christoph Schreuer, "At What Time Must Jurisdiction Exist?," University of Vienna 2013, pp. 4, 5, 7-8; emphasis added.

<sup>668</sup> **Exhibit C-27**, Authorisation of Mining Activity in the Mining Area "Gemerská Poloma," dated May 31, 2004 (Ref. 1023/511/2004).

(confirmed on December 8, 2004<sup>669</sup>) to resume and carry out mining activities at the deposit until November 2006, to invest further in the development of the deposit.

572. In reliance of this authorization, Rozmin prepared all documentation necessary to initiate, in June 2004, a new tender to enter into an agreement with a contractor that would resume the opening works, and on November 5, 2004, Rozmin and Siderit entered into a Contract for Work, in accordance with the 2003 POPD, for a price of 76,780,100.00 SKK (VAT not included).<sup>670</sup>
573. For the excavation of the mine, Siderit ordered a new drill rig from the Swedish company Atlas Copco as well as transportation equipment, and began, in the fall of 2004, designing and completing structures that either had been started but never completed by the previous contractor, Rima Muráň, or that were to be built from scratch, such as, for instance, oil and water cleaning installations and separation plant, and a discharge system for clarified water.<sup>671</sup> Furthermore, Siderit pumped out water that had flooded the mine as a result of the suspension of works.<sup>672</sup> Finally, Siderit performed some repair works on the Winze and electrical installations, and completed the Portal.<sup>673</sup>
574. Siderit started excavation works so as to allow Rozmin to start production by November 2006. Furthermore, on November 16, 2004, to ensure the supply of energy needed at the deposit, Rozmin entered into an agreement with Rima Muráň to purchase from the latter, for an amount of SKK 4 million, the high-voltage line which had been built at Dlhá dolina.
575. In sum, Claimants made investments over a period of time and legitimate expectations created by the host State during that time ought to have been honored.

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<sup>669</sup> **Exhibit C-28**, Minutes of the December 8, 2004 inspection by the District Mining Office.

<sup>670</sup> **Exhibit C-259**, Contract for the development of the Gemerská Poloma talc deposit entered into between Siderit and Rozmin sro on November 5, 2004.

<sup>671</sup> *See inter alia* **Exhibit C-260**, Fax from Rozmin sro to the Shareholders enclosing redesign prepared by Siderit of notably the Winze, dated October 8, 2004; **Exhibit C-261**, Invoice from Siderit No. 510669, dated October 27, 2004; **Exhibit C-262**, Invoice from Siderit No. 510799, dated December 2, 2004; **Exhibit C-263**, Invoice from Siderit No. 510801, dated December 3, 2004.

<sup>672</sup> *See inter alia* **Exhibit C-265**, Invoice from Siderit No. 520073, dated February 10, 2005; **Exhibit C-266**, Invoice from Siderit No. 520075, dated February 21, 2005.

<sup>673</sup> *See inter alia* **Exhibit C-264**, Invoice from Siderit No. 510847, dated December 29, 2004.

576. Third, contrary to Respondent's allegations, in the present case, it is not only that two arms of the State took inconsistent measures, but also the same State entity, namely the DMO, and even the same official within that entity, namely Mr. Baffi (the Director of the DMO), acted inconsistently, even contradictorily.
577. Indeed, the DMO recurrently reassigned rights over the Gemerská Poloma deposit to another entity on the ground that Rozmin had failed to perform excavation for a period of three years,<sup>674</sup> notwithstanding the Supreme Court's clear holding that the "restrictive" interpretation of the term "*dobývanie*," adopted by the administrative bodies in December 2004 to argue that Rozmin should have started extracting minerals within a three-year period, was "*not correct*."<sup>675</sup>
578. Furthermore, Rozmin was informed that its mining rights had been *de facto* revoked, by way of a letter from Mr. Baffi from the DMO, dated January 3, 2005, which followed by less than a month Mr. Baffi's own visit inspection of the deposit, at the close of which he had confirmed that Rozmin would hold mining rights over the deposit until November 13, 2006.
579. Clearer inconsistencies are hardly conceivable.

## **2. Respondent's Failure to Act Transparently**

580. As explained in detail in Claimants' Memorial, the fair and equitable treatment standard requires that the State act in a transparent manner which implies, in particular, that any decision affecting an investor must be traceable to the legal framework relating to its operations.<sup>676</sup>
581. In the present case, Respondent did not comply with its duty to observe due process of law, it did not act transparently or reasonably, and thus failed to treat Claimants fairly and equitably.

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<sup>674</sup> See, *inter alia*, Respondent's Counter-Memorial, ¶ 321.

<sup>675</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), p. 25.

<sup>676</sup> See Claimants' Memorial, ¶¶ 246 and 313-314.

582. First, as explained in the Memorial,<sup>677</sup> Claimants were neither notified that the revocation of their mining rights was contemplated by the Slovak authorities, nor afforded an opportunity to present their case on the same. Upon Rozmin's appeal against the revocation of its mining rights, the Supreme Court of the Slovak Republic itself concluded that Rozmin's due process rights had been breached when the DMO reassigned the Mining Area to another entity without affording Rozmin the opportunity to appeal the DMO's decision and to put forward its case.<sup>678</sup>
583. Second, before Rozmin was informed by Respondent, by way of Mr. Baffi's letter of January 3, 2005, that its mining rights had been *de facto* revoked and that they were to be awarded to a new organization, the Republic of Slovakia had in fact already announced on December 30, 2004, by way of a publication in the Business Journal, that it was initiating a new tender procedure for the assignment of the Mining Area.<sup>679</sup> Rozmin was not even afforded an opportunity to present its case on the taking.
584. Worse even, Claimants have uncovered exchanges between Mr. Čorej, acting as a representative of, or informant for, the State, on the one hand, and Mr. Keller from Mondo Mineral, on the other hand, as well as correspondence between the MMO and Mr. Keller relating to contacts that took place as early as in November and December 2004, in the course of which Respondent expressed its intention to reassign the mining area to a third entity, hence to revoke Rozmin's mining rights.
585. Both Rozmin and Claimants were kept in the dark and were therefore totally unaware of the fact that the revocation of Rozmin's mining rights was under consideration by the Slovak authorities, and had no reason to suspect the same after the issuance of the May 31, 2004 authorization, and even less so after the confirmation of December 8, 2004, by Mr. Baffi himself, that Rozmin's rights were being extended until November 2006.

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<sup>677</sup> See Claimants' Memorial, ¶¶ 268 *et seq.*

<sup>678</sup> **Exhibit C-33**, Decision of the Supreme Court of the Slovak Republic, dated February 27, 2008 (Ref. 6Sžo/61/2007-121).

<sup>679</sup> **Exhibit C-29**, Initiation of the Selection Procedure for the Determination and Assignment of the Extraction Area, Business Journal No. 253/2004, dated December 30, 2004, p. 99.

586. It is perfectly irrelevant, for purposes of Claimants’ claim of unfair and inequitable treatment in the present case, that in past instances, “[t]he requirement of transparency has been mostly addressed by investment tribunals in the context of claims alleging that ‘the law has been changed to the detriment of the investor following the making of its investment.’”<sup>680</sup>
587. Third, the DMO’s decision to revoke Rozmin’s mining rights could not be traced back to the 2002 Amendment, which yet again demonstrates a lack of transparency.<sup>681</sup>
588. As confirmed by the Slovak Supreme Court, the “*restrictive*” interpretation of the term “*dobývanie*” adopted by the administrative bodies in December 2004 to argue that Rozmin should have started extracting minerals within a three-year period, was “*not correct*.”<sup>682</sup> Respondent’s argument that the taking of Rozmin’s mining rights was lawful because Rozmin had not started *excavating* minerals within a three-year period has thus already been examined and rejected by the Slovak Supreme Court. The Supreme Court in fact went so far as to conclude that it was illegal to revoke Rozmin’s mining rights on the basis of this restrictive interpretation, without taking into account Rozmin’s substantial investments, the fact that it had been authorized to carry out mining activities until November 13, 2006, and that its activities had been explicitly found to be in compliance with all regulations in force. Such a revocation simply could not be traced back to the 2002 Amendment.

### **3. Respondent’s Abuse of Powers**

589. Respondent abused its powers and breached its fair and equitable treatment obligation towards Claimants when it launched criminal proceedings targeting Rozmin and Claimants, in direct and exclusive reaction to Claimants’ legitimate exercise of their right to initiate ICSID arbitration proceedings against the Slovak Republic. By Respondent’s own admission, these criminal proceedings were launched against Claimants and Rozmin for having initiated arbitration proceedings against the Slovak

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<sup>680</sup> Respondent’s Counter-Memorial, ¶ 397.

<sup>681</sup> At paragraph 397 of its Counter-Memorial, Respondent agrees with Claimants that the requirement of transparency requires that any decision affecting the latter be traceable to that legal framework.

<sup>682</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), p. 25.

Republic.<sup>683</sup> Reference is made to paragraphs 333 to 340 of Claimants' Memorial, in which Claimants set out their position in respect of Respondent's abuse of powers.

590. Claimants will limit their comments, here, to Respondent's fallacious assertion that "*the criminal proceedings were prompted by a complaint filed by a private individual unrelated to the government*,"<sup>684</sup> to set the record straight.
591. In the Resolution of September 5, 2014, which ordered the suspension of the criminal proceedings launched in June 2014, Mr. Čorej is clearly identified as an "informant" for the Slovak Republic.<sup>685</sup> Furthermore, the record shows that Mr. Čorej has acted as a representative of the State in the context of exchanges between Respondent (the Ministry of Economy and the MMO) and Mondo Minerals, as early as in November and December 2004, regarding the reassignment of the Gemerská Poloma Mining Area.
592. Indeed, as early as in November 2004, the Deputy Prime Minister and Minister of Economy of the Slovak Republic, Mr. Pavel Rusko, considered the reassignment of the Gemerská Poloma Mining Area and had therefore engaged in discussions with Mondo

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<sup>683</sup> Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, dated September 10, 2014, ¶ 49. Both orders pursuant to which the criminal proceedings were launched and Rozmin's records and property were seized in fact explicitly set out that they have been issued considering "*an especially serious crime of fraud [...] in the stage of attempt [...], assumed to have been committed by currently unidentified individuals, who acted in the name of the shareholders of the company Rozmin, s.r.o., with registered seat in Bratislava, and EuroGas, with registered seat in Vienna, and Belmont Resources, with registered seat in Canada, with the intent to elicit financial resources, make significant financial profits and mislead the relevant state authorities by claiming the amount of 3,2 billion Euros from the Slovak Republic in an unspecified arbitration procedure in connection with a revocation of mining rights of the company Rozmin s.r.o. by the relevant administrative authorities of the SR related to the mining area Gemerská Poloma*" (**Exhibit C-50**, Order for Preservation and Handing over of Computer Data, dated June 23, 2014, p. 2; **Exhibit C-49**, Order for a House Search, dated June 25, 2014, p. 2; emphasis added). The Resolution of September 5, 2014, in turn, made it clear that the object of the criminal proceedings was the same as that of the arbitration proceedings. According to this Resolution, "[i]t is clear from the indicated that the legally relevant circumstances being resolved by the investigator in these criminal proceedings are at the same time the subject of separate proceedings in the Slovak Republic – in particular before mining offices and courts and in an international arbitration to which the Slovak Republic is a party" (**Exhibit R-2**, Resolution Suspending Criminal Proceedings, dated September 5, 2014, p. 6; emphasis added). Furthermore, the Resolution concluded that "[u]nder the provision of Section 228, paragraph 4 of the Code of Criminal Procedure, a prosecutor shall suspend criminal prosecution if he has filed a motion to commence proceedings on an issue he is not competent to resolve in the current proceedings" (**Exhibit R-2**, Resolution Suspending Criminal Proceedings, dated September 5, 2014, p. 5). Finally, the Resolution explicitly provided for the suspension of criminal proceedings against Claimants and Rozmin (**Exhibit R-2**, Resolution Suspending Criminal Proceedings, dated September 5, 2014, pp. 1-2).

<sup>684</sup> Respondent's Counter-Memorial, ¶ 406.

<sup>685</sup> **Exhibit R-2**, Resolution Suspending Criminal Proceedings, dated September 5, 2014, p. 3.

Minerals. On December 1, 2014, Mr. Wulf-Dietrich Keller, then Managing Director of Mondo Minerals, wrote to Mr. Rusko in the following terms:

*Dear Mr Rusko,*

*I confirm that the Finnish talc company Mondo Minerals Oy, a wholly owned subsidiary of the Omya Group of companies registered in Switzerland, is seriously interested in the development and exploitation of the Gemerska Poloma talc deposit near Roznava.*

*In order to discuss this matter in more depth it is proposed that we meet in Kosice on Sunday 12th December.*

*Mondo Minerals is prepared to invest in the development of the project directly with the backing of its parent company.*

*For your information Mondo Minerals is one of the largest talc producers in Europe with an annual production of some 60,000 tonnes from its own mines in Finland. It is a leader in the supply of special talc grades to the paper industry for filling and coating and is a major supplier to the paint industry as well as for ceramics and plastics. [...]*<sup>686</sup>

593. Mr. Keller sent a copy of this message to Mr. Peter Čorej, before visiting the Gemerská Poloma deposit on December 12, 2004, together with Mr. Dušan Čellár from the MMO, and met with Mr. Rusko.<sup>687</sup> On January 10, 2005, Mr. Čorej met with Mr. Keller, following which Mr. Čorej wrote to Mr. Keller in the following terms:

*Dear Mr Keller,*

*I would like to inform you, that the closing date of the tender is approaching and I have not heard from you since our last meeting which took place on 1.10.2005. Please let me know if you are still interested in the deposit of Gemerska Poloma as you have previously stated in December 2004.*

*Please be advised that if we will not receive your response in near future we would have to consider it as a loss of interest and start negotiations with other interested parties.*

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<sup>686</sup> **Exhibit C-356**, Email message from Mr. Wulf-Dietrich Keller to Mr. Peter Čorej, dated December 1, 2004.

<sup>687</sup> **Exhibit C-357**, Email message from Mr. Wulf-Dietrich Keller to Mr. Dusan Cellar, dated December 13, 2004.

*Regards,*

*Peter Čorej*<sup>688</sup>

594. Mr. Čorej was thus acting as a representative of Respondent, prospecting for parties that would be interested in acquiring Rozmin's mining rights over Gemerská Poloma.
595. Respondent's allegation that "*the criminal proceedings were prompted by a complaint filed by a private individual unrelated to the government*"<sup>689</sup> is plainly contradicted by the record. The criminal proceedings were launched by the Slovak Republic, via a complaint filed by its informant, in direct reaction to Claimants' exercise of their legitimate right to initiate international arbitration proceedings, hence as a pure measure of retaliation.
596. These retaliatory and self-serving measures were intended to deprive Claimants of records necessary to substantiate their case and to place the State in a privileged position with a full access to all of Claimants' files including legally privileged materials. They have had the effect not only of aggravating the dispute but also of jeopardizing the integrity of the arbitration process, including the principle of equality of arms and the right to the protection of legally privileged materials and information, and of intimidating Claimants and their witnesses.
597. The Tribunal cannot turn a blind eye to such conduct and leave it unpunished, as this would amount to granting immunity to the State for any such unfair and inequitable treatment of investors. Retaliatory measures taken by Respondent justify an award of moral damages to Claimants, which will be addressed in greater detail in due course.

#### **4. Respondent's Denial of Justice**

598. As noted in Claimants' Memorial, the duty to respect due process and not to deny justice also forms part of the fair and equitable treatment standard.<sup>690</sup>

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<sup>688</sup> **Exhibit C-358**, Email message from Mr. Peter Čorej to Mr. Wulf-Dietrich Keller, dated February 16, 2005.

<sup>689</sup> Respondent's Counter-Memorial, ¶ 406.

<sup>690</sup> See Claimants' Memorial, ¶¶ 318-324.



599. In the present case, the Slovak Republic's repeated disregard of the decisions of its own Supreme Court, when the DMO stubbornly reassigned Rozmin's mining rights to VSK Mining, first in July 2008 and then again in March 2012, amounts to a denial of justice, hence to a breach of the fair and equitable standard.

600. Respondent's sole attempted defense to this claim is the following:

*It is well settled [...] that denial of justice claims can only be brought where the aggrieved party has exhausted local remedies. Here, Claimants complain of first instance procedural decisions that either were corrected upon appeal or were not appealed. Thus, the first instance decisions cannot constitute a denial of justice.*

*The requirement of finality is lacking here. After prevailing twice before the Supreme Court, and after the DMO followed the Supreme Court decisions in both cases, Claimants abandoned the domestic proceedings by not appealing to the courts the decision of the DMO confirming the assignment of the Excavation Area on 1 August 2012.*<sup>691</sup>

601. Respondent however itself acknowledges that “a low-level administrative or judicial decision can constitute an international delict only if no effective remedy is available or if the aggrieved party's applications for remedy do not lead to redress,”<sup>692</sup> and that a State will “be held liable if the overall process of its decision-making is erroneous.”<sup>693</sup> Furthermore, in Respondent's own words, the “substantive requirement to exhaust local remedies [...] must be distinguished from the procedural requirement to exhaust local remedies.”<sup>694</sup>

602. The rule according to which local remedies must be exhausted before a tribunal may find an investor to have been denied justice suffers several exceptions, including the futility of the available local remedies. “What is futile or ineffective depends on the circumstances of the case.”<sup>695</sup>

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<sup>691</sup> Respondent's Counter-Memorial, ¶¶ 375-376.

<sup>692</sup> Respondent's Counter-Memorial, ¶ 370; emphasis added.

<sup>693</sup> Respondent's Counter-Memorial, ¶ 371; emphasis added.

<sup>694</sup> Respondent's Counter-Memorial, ¶¶ 374-375.

<sup>695</sup> **Exhibit CL-243**, Mummery, The Content of the Duty to Exhaust Local Remedies, 58 Am. J. Int'l L. at 400-401

603. In the Draft Articles on Diplomatic Protection, the International Law Commission explained that local remedies need not be exhausted where “*there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress.*”<sup>696</sup> This reflects Sir Hersch Lauterpacht’s opinion in the *Norwegian Loans* case, that the requirement of previous exhaustion of local remedies would be inoperative if one could “*rule out, as a matter of reasonable possibility, any effective remedy before Norwegian courts.*”<sup>697</sup>
604. A litigant need not exhaust local remedies if such exhaustion would be ineffective – for example, if the pursuit of the available remedy would be futile, or the remedy on offer is theoretical – because it would not provide meaningful redress for the wrong complained of.<sup>698</sup> Neither do local remedies need to be resorted to where they offer no reasonable possibility of effective redress to the foreign litigant.<sup>699</sup> The term “reasonable” implies an objective standard of analysis, both under international law and domestic systems around the world. The fundamental question therefore is whether “*the remedies in question were reasonably available and adequate.*”<sup>700</sup>
605. Futility or ineffectiveness of “local courts” can occur where the international tribunal is satisfied that even where remedies are theoretically available, a factor in the relevant domestic jurisdiction renders the pursuit of those remedies futile, with the consequence that the claimant is not obliged to pursue them.<sup>701</sup> “[T]he actual ineffectiveness of a

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<sup>696</sup> **Exhibit CL-244**, International Law Commission Draft Articles on Diplomatic Protection (2006), adopted by General Assembly Resolution 62/27, Article 15(a).

<sup>697</sup> **Exhibit CL-245**, *Certain Norwegian Loans* [1957] ICJ Reports 9, dated July 6, 1957, p. 39.

<sup>698</sup> See **Exhibit CL-246**, *U.S. v Great Britain (Robert E. Brown Case)*, Vol VI UNRIAA 120 (1923) November 13, 1923, p. 129; **Exhibit CL-247**, *Finnish Ships Arbitration Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Finland, Great Britain)*, (1934) 3 RIAA, May 9, 1934, p. 1479; **Exhibit CL-248**, *Panevezys – Saldutiskis Railway Case*, PDIJ Series, A/B, No 76 (1939), dated February 28, 1939, p. 19; **Exhibit CL-249**, *Ambatielos Claim (Greece v United Kingdom)*, Vol XII UNRIAA 83 (1956), dated March 6, 1956, pp. 122-123; **Exhibit CL-250**, *Interhandel Case* (Preliminary Objections) [1959] ICJ Reports 6, dated March 21, 1959, pp. 27-29.

<sup>699</sup> **Exhibit CL-251**, *Chevron Corporation v. The Republic of Ecuador*, Opinion of Jan Paulsson, dated March 12, 2012, ¶ 17.

<sup>700</sup> **Exhibit CL-252**, Dugan, Wallace, Rubins & Sabahi, *Investor-State Arbitration*, Oxford University Press, 2008, p. 363, citing Loewen, on Loewen’s settlement of the dispute, Chapter XVII, at p.530.

<sup>701</sup> **Exhibit CL-246**, *U.S. v Great Britain (Robert E. Brown Case)*, Vol VI UNRIAA 120 (1923) November 13, 1923, p. 129. In the Robert E. Brown case, the lack of independence of the judiciary rendered the pursuit of local remedies futile.

*remedy may be the result of some defect in the administration of justice, such as complete subservience of the judiciary to the government of the State.”*<sup>702</sup>

606. In the words of the Inter-American Court of Human Rights: “it is not enough that such recourses exist formally; they must be effective [...] remedies that, due to the general situation of the country or even the particular circumstances of any case, prove illusory cannot be considered effective. This may happen, when, for example, they prove to be useless in practice because the jurisdictional body does not have the independence necessary to arrive at an impartial decision or because they lack the means to execute their decisions.”<sup>703</sup> Accordingly, “[t]he rule on the exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism and is neither absolute nor capable of being applied automatically.”<sup>704</sup>

607. Another tribunal has held that:

*The requirement of exhaustion of local remedies is not a purely technical or rigid rule. It is a rule which international tribunals have applied with a considerable degree of elasticity. In particular, they have refused to act upon it in cases in which there are, in fact, no effective remedies available owing to the law of the State concerned or the conditions prevailing in it.*<sup>705</sup>

608. In *Ambiente v. Argentina*, the ICSID tribunal also found that “the test is not whether a successful outcome is likely or possible but whether the municipal system of the respondent State is reasonably capable of providing effective relief.”<sup>706</sup> The same tribunal went on to state that “*this must be determined in the context of the local law and the prevailing circumstances. This is a question to be decided by the competent international tribunal charged with the task of examining the question whether local*

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<sup>702</sup> **Exhibit CL-251**, *Chevron Corporation v. The Republic of Ecuador*, Opinion of Jan Paulsson, dated March 12, 2012, p. 25, citing E. Jimenez de Arechaga, “International Law in the Past Third of a Century”, 159, *Receuil des Cours* 1 (1978) p. 294.

<sup>703</sup> **Exhibit CL-253**, *Las Palmeras Case*, Judgment on Preliminary Objections of February 4, 2000, Inter-Am. Ct. H.R. (Ser. C) No. 67 (2000), dated December 6, 2001, ¶ 58.

<sup>704</sup> **Exhibit CL-252**, Dugan, Wallace, Rubins & Sabahi, *Investor-State Arbitration*, Oxford University Press, 2008, p. 365, citing *Sovtransavto Holding v. Ukraine*, 38 E.H.R.R. 44 (2004).

<sup>705</sup> **Exhibit CL-245**, *Certain Norwegian Loans* [1957] ICJ Reports 9, dated July 6, 1957, p. 39.

<sup>706</sup> **Exhibit CL-254**, *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, February 8, 2013, ¶609.

*remedies have been exhausted.*”<sup>707</sup> Furthermore, the tribunal specified that “*it was not convinced that ‘according to international arbitration panels, the test of futility was ‘obvious futility’ or ‘manifest ineffectiveness.’*”<sup>708</sup>

609. Recently, another tribunal supported the view that applicants are only required to exhaust domestic remedies that are available and effective and that to determine whether any particular remedy meets the criteria of availability and effectiveness, regard must be had to the particular circumstances of the individual case.<sup>709</sup>

610. In *Jan de Nul v. Egypt*, the tribunal clearly stated:

*The Tribunal considers that the respondent State must be put in a position to redress the wrongdoings of its judiciary. In other words, it cannot be held liable unless “the system as a whole has been tested and the initial delict remained uncorrected.” An exception to this rule may be made when there is no effective remedy or “no reasonable prospect of success” [...]*<sup>710</sup>

611. While the *Amto v. Ukraine* tribunal noted that “[t]he investor that fails to exercise his rights within a legal system, or exercises its rights unwisely, cannot pass his own responsibility for the outcome to the administration of justice, and from there to the host State in international law,”<sup>711</sup> Claimants were no such investors.

612. The efforts deployed by Rozmin to obtain specific performance before local courts were exhaustive and beyond what could reasonably have been expected of any investor. Rozmin was embroiled in local proceedings for more than eight years and obtained three favorable decisions from the Slovak Supreme Court. Yet, despite the supposedly “*thorough due process*” granted to Rozmin, the local administrative bodies continued to relentlessly disregard and frustrate the findings of the Slovak Supreme Court. Rozmin

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<sup>707</sup> **Exhibit CL-254**, *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, February 8, 2013, ¶609.

<sup>708</sup> **Exhibit CL-254**, *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, February 8, 2013, ¶610.

<sup>709</sup> **Exhibit CL-255**, *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06.

<sup>710</sup> **Exhibit RL-125**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008), ¶ 258.

<sup>711</sup> **Exhibit RL-127**, *Limited Liability Company Amto v. Ukraine*, Arbitration No. 080/2005, Final Award, 26 March 2008, ¶ 76.

could not reasonably be expected to appeal the DMO's decision of March 30, 2012, when it had successfully challenged, all the way up to the Supreme Court, the reassignment of its rights to a third entity on two prior occasions, and the DMO had thereafter nonetheless failed both times to reinstate Rozmin's rights. Following the DMO's failure to reinstate Rozmin's rights notwithstanding the Supreme Court's decision of May 18, 2011 and, in particular, the DMO's stubborn reliance on the lack of excavation performed by Rozmin notwithstanding the Supreme Court's clear holding that the absence of excavation was no relevant factor, Rozmin had every reason to believe that no further appeal would lead to the reinstatement of its rights. It could not reasonably be expected to keep appealing each DMO's decision to reassign its rights to another entity handed down in total disregard of the Slovak Republic's own Supreme Court's findings.

613. Rozmin simply could not be expected to continue appealing any new decision of the DMO *ad infinitum* when, in the words of the *Jan de Nul* tribunal, there was simply “*no reasonable prospect of success.*”<sup>712</sup> To use the word of the *Ambatielos* tribunal: “*Remedies which could not rectify the situation cannot be relied upon by the defendant State as precluding an international action.*”<sup>713</sup>
614. Even though this has no bearing on Claimants' denial of justice claim, Respondent's assertion that the “*substantive requirement to exhaust local remedies [...] has been applied by all international tribunals assessing first-instance decisions rendered in multi-level administrative or court proceedings, whether the conduct was assessed under the standards of denial of justice or any other standard*”<sup>714</sup> must be corrected. As clearly stated by the tribunal in *Arif v. Moldova*, “[u]nder the ICSID Convention, there is no general requirement to exhaust local remedies for a treaty claim to exist (unless such a claim is for a denial of justice); the fact that the alleged wrongful acts mainly

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<sup>712</sup> **Exhibit RL-125**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008), ¶ 258.

<sup>713</sup> **Exhibit CL-249**, *Ambatielos Claim (Greece v United Kingdom)*, Vol XII UNRIAA 83 (1956), dated March 6, 1956, p. 119.

<sup>714</sup> Respondent's Counter-Memorial, ¶ 374.

*relate to acts of the judiciary does not necessarily mean that local remedies should be exhausted before an international claim can arise.*”<sup>715</sup>

615. As to the denial of justice threshold, in *Liman Caspian v. Kazakhstan*, the tribunal concluded that “Respondent can only be held liable for denial of justice if Claimants are able to prove that the court system fundamentally failed. Such failure is mainly to be held established in cases of major procedural errors such as lack of due process. The substantive outcome of a case can be relevant as an indication of lack of due process and thus can be considered as an element to prove denial of justice.”<sup>716</sup> In the present case, it is not merely the fact that the competent administrative authorities handed down a series of decisions in breach of Slovak procedural and substantive laws that must lead to a finding of denial of justice, but the fact that decisions were handed down in shameless disregard of findings of the Slovak Republic’s own Supreme Court, depriving Rozmin of the possibility to obtain the reinstatement of its rights notwithstanding the Supreme Court’s reiterated holding that these rights had been unlawfully revoked.
616. On February 27, 2008, the Supreme Court annulled the revocation of Rozmin’s mining rights and their assignment to another entity.<sup>717</sup> However, on July 2008, the DMO did not even initiate new tender proceedings but simply awarded these rights to VSK Mining by way of corporate sleight of hand, on the ground that the latter had absorbed Economy Agency to which mining rights had been awarded after their revocation from Rozmin.<sup>718</sup> On May 18, 2011, the Supreme Court, upon Rozmin’s appeal and on the basis of Slovak law, annulled yet again the revocation of Rozmin’s mining rights and their assignment to another entity.<sup>719</sup> However, on March 30, 2012, the DMO again disregarded the findings of the Supreme Court and assigned Rozmin’s mining rights to

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<sup>715</sup> **Exhibit CL-150**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, dated April 8, 2013, ¶ 334.

<sup>716</sup> **Exhibit RL-128**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, dated June 22, 2010, ¶ 279.

<sup>717</sup> **Exhibit C-33**, Decision of the Supreme Court of the Slovak Republic, dated February 27, 2008 (Ref. 6Sžo/61/2007-121).

<sup>718</sup> **Exhibit C-34**, Decision of the District Mining Office on the Assignment of the Gemerská Poloma Mining Area to VSK Mining sro, dated July 2, 2008 (Ref. 329-1506/2008).

<sup>719</sup> **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010).

another entity,<sup>720</sup> for the third consecutive time. Rozmin was never paid any compensation for the taking of its mining rights.

617. The *ECE v. Czech Republic* test of “systemic failure,” as characterized by Respondent,<sup>721</sup> is clearly satisfied here. Claimants do not take issue at a single decision of the DMO, but at its systematic disregard of, and failure to implement, the decisions of the Supreme Court, which found the revocation of Rozmin’s mining rights to be in breach of Slovak procedural and substantive laws. Both decisions of the DMO reassigning rights over Gemerská Poloma to VSK Mining were, in the words of the Helnan tribunal, “*part of a pattern of state conduct applicable to the case [and] that the investor took steps within the administration to achieve redress and was rebuffed in a way which compounded, rather than cured, the unfair treatment.*”<sup>722</sup>

### C. ARBITRARY AND UNREASONABLE TREATMENT

618. Respondent’s obligation to ensure that Claimants’ investment would be free from unreasonable and arbitrary measures, and Respondent’s failure to comply with this obligation, have been addressed in detail in Claimants’ Memorial, to which reference is made.<sup>723</sup>
619. In its Counter-Memorial, Respondent argues that “*the DMO’s reassignment of the Excavation Area was only incorrect in the procedure by which it did so*”<sup>724</sup> and that “*the DMO’s reassignment cannot violate the standard of arbitrariness because the*

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<sup>720</sup> **Exhibit C-37**, Decision of the District Mining Office, dated March 30, 2012 (Ref. 157-920/2012), p. 27.

<sup>721</sup> See Respondent’s Counter-Memorial, ¶ 380, quoting an excerpt of *ECE v. Czech Republic* in which the tribunal clarified that the role of an international tribunal is to “*assess whether the decision makers and the courts acted fairly and consistently with accepted standard of due process, and that their decision making was not tainted by improper motives. It follows that the possibility that a decision was wrong under domestic law is not in and of itself a breach of the standard of fair and equitable treatment, although it may in appropriate circumstances constitute a relevant factor to be weighed in the balance alongside the availability of effective remedies. In other words, the standard is about the operation of the State’s administrative and legal system as a whole*” (**Exhibit RL-111**, *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.764).

<sup>722</sup> **Exhibit RL-129**, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* committee on annulment, 14 June 2010, ¶ 50.

<sup>723</sup> See Claimants’ Memorial, ¶¶ 291 and 360-362.

<sup>724</sup> Respondent’s Counter-Memorial, ¶ 401.

*correct application of Slovak law ultimately would have led to the same result.*”<sup>725</sup>

These allegations simply do not stand, considering the evidence on the record:

- The Slovak Supreme Court held the reassignment of the Mining Area, first to Economy Agency and then to VSK Mining, to be in breach both of procedural and of substantive Slovak laws.
- In particular, the Slovak Supreme Court clarified that the 2002 Amendment did not require excavation to be performed within the three-year period. Had the DMO not disregarded the Supreme Court’s findings and continued to rely on the absence of excavation, Rozmin’s mining right would have been reinstated.

#### **D. FAILURE TO GRANT FULL PROTECTION AND SECURITY**

620. In their Memorial, Claimants addressed in detail the obligation of the host State to treat foreign investments fairly and equitably and Respondent’s failure to do so in the present case. Reference is made in full to paragraphs 364 to 371 of the Memorial.

621. Rather than attempt to rebut Claimants’ allegation of breach of the full protection and security standard by Respondent, the latter chooses to argue that “*the standard of full protection and security prescribes a minimum duty of due diligence applicable in the event of threats or actual injury to aliens attributable to a third party.*”<sup>726</sup> Respondent is mistaken.

622. As clearly stated by the tribunal in the *Biwater* case, the “full security” standard is limited to a State’s failure to prevent actions by third parties, but “*also extends to actions by organs and representatives of the State itself.*”<sup>727</sup> Accordingly, certain tribunals have considered, in particular, that the introduction of changes into a regulatory framework of undertakings and assurances, which effectively dismantled

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<sup>725</sup> Respondent’s Counter-Memorial, ¶ 401.

<sup>726</sup> Respondent’s Counter-Memorial, ¶ 404; emphasis added.

<sup>727</sup> **Exhibit CL-31**, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, dated July 24, 2008, at ¶¶ 729 *et seq.*



that framework, was contrary to the protection and constant security to be provided by the State under a BIT.<sup>728</sup>

623. As confirmed by Schreuer, “*unjustified coercive measures taken by organs of the host State against the investor and his property constitute violations of the ‘protection and security’ standard if they prejudice the investor to a material degree.*”<sup>729</sup>

#### **E. FAILURE TO COMPLY WITH SPECIFIC COMMITMENTS**

624. As explained in detail in Claimants’ Memorial, to which reference is made, both the U.S.-Slovak Republic BIT and the Canada-Slovak Republic BIT require that the Slovak Republic honor its specific commitments towards foreign investors.<sup>730</sup>
625. Contrary to Respondent’s contention, neither BIT limits the protection afforded under an umbrella clause to bilateral contractual obligations.
626. In the case at hand, the Slovak Republic specifically undertook to allow Rozmin to carry out mining activities at the Gemerská Poloma deposit until November 13, 2006, by way of a decision of the DMO issued on May 31, 2004,<sup>731</sup> which was reconfirmed on December 8, 2004 by Mr. Baffi, the DMO’s Director, following an inspection of the Mining Area.<sup>732</sup> The Slovak Republic’s obligation to allow Claimants to enjoy the mining rights they held via Rozmin, until November 13, 2006, constituted an international obligation under the BITs.
627. By revoking Rozmin’s mining rights less than a month after the inspection of the deposit by Mr. Baffi and thus depriving Claimants of their investment, the Slovak Republic failed to honour its specific undertaking towards Claimants and acted in breach of the U.S.-Slovak Republic BIT, the Canada-Slovak Republic BIT, and customary international law.

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<sup>728</sup> **Exhibit CL-147**, *National Grid P.L.C. v. Argentina Republic*, UNCITRAL, Award, dated November 3, 2008, ¶¶ 189-190.

<sup>729</sup> **Exhibit CL-256**, Christoph Schreuer, Full Protection & Security, *Journal of International Dispute Settlement*, (2010), p. 6.

<sup>730</sup> See Claimants’ Memorial, ¶¶ 372-379.

<sup>731</sup> **Exhibit C-27**, Authorisation of Mining Activity in the Mining Area “Gemerská Poloma,” dated May 31, 2004 (Ref. 1023/511/2004).

<sup>732</sup> **Exhibit C-28**, Minutes of the December 8, 2004 inspection by the District Mining Office.

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628. Based on the foregoing, the Slovak Republic has committed multiple breaches of its international obligations, substantively and procedurally, and must thus be held liable for the damages that it has caused.

## **V. DAMAGES**

629. Slovakia's breaches of its obligations under the BITs and international law, described above in Section IV, have caused significant direct material damage to EuroGas and Belmont (principally as a result of the expropriation of their investments in the Gemerská Poloma deposit), as well as moral and reputational harm, for which Respondent must be held accountable and Claimants are entitled to compensation.

630. In Section VI of their Memorial, Claimants discussed the assessment of the Mining Area's talc reserves and addresses the kind of damages sustained by Claimants, namely material damages, moral damages, and interest. In accordance with the Tribunal's instructions of March 24, 2015, a full submission on damages sustained by Claimants and a complete quantification of their claims will be filed at a later stage of the proceedings.

631. Together with the present Reply Memorial, Claimants have nonetheless filed an expert report on quantum prepared by Mr. John Ellison, which is relevant at this juncture to the merits of this case – in addition to the fact that it will be relevant for quantum purposes later on in the proceedings – as this report establishes the high value of the deposit. This report thus supports Claimants' alternative argument in rebuttal – advanced by an abundance of caution and for the sake of completeness, in response to the *post facto* defense raised by Respondent that Claimants did not have the resources necessary to take the project to term – that Claimants would have been able to raise financing to develop the deposit, had Rozmin's mining rights not been revoked.

## **VI. RELIEF SOUGHT**

632. Claimants respectfully requests the Arbitral Tribunal, without prejudice to any other or further claims to which Claimants might be entitled in this Arbitration, to:

- Declare that it has jurisdiction over Claimants under the BITs and the ICSID Convention.
- Declare that Respondent has breached its obligations toward Claimants under the U.S.-Slovak Republic BIT, the Canada-Slovak Republic BIT, and international law, including the obligation not to expropriate Claimants' investment safe for a public purpose, in accordance with due process of law, in a non-discriminatory manner, and upon payment of compensation; the obligation to afford Claimants fair and equitable treatment; the obligation to refrain from taking unreasonable and arbitrary measures; the obligation to afford Claimants full protection and security; and the obligation to comply with its specific undertakings.
- Order Respondent to pay Claimants damages, costs, and compounded interest, in an amount to be quantified at a later stage of the proceedings, in accordance with the Tribunal's instructions.

633. Claimants reserve the right to amend or supplement the present Memorial and Exhibits attached thereto, to make additional claims, and to request such alternative or additional relief as may be appropriate, including conservatory, injunctive or other interim relief.

Respectfully submitted,

[Signed]

Hamid G. Gharavi