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)

MEMORIAL

Case No. ARB/14/14

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March 31, 2015

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INTRODUCTION

1. This Memorial, together with supporting factual exhibits numbered C-75 to C-307 and legal exhibits numbered CL-125 to CL-195; witness statements from Dr. Ondrej Rozložník, Mr. Vojtech Agyagos, and Mr. Wolfgang Rauball; and a mining expert report prepared by Mr. Alex Hill from Wardell Armstrong International (the "WAI 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.

2. This Memorial sets out the facts in dispute and EuroGas' and Belmont's claims on the merits and damages arising out of the numerous breaches committed by the Slovak Republic (hereafter also referred to as "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 "US-Slovak Republic BIT"), which entered into force on December 19, 1992,[1] and under the Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments (the "Canada-Slovak Republic BIT"), which entered into force on March 14, 2012[2] (collectively the "BITs"), in relation to Claimants' investments in a talc deposit in the Slovak Republic.

3. EuroGas and Belmont are foreign investors in the Slovak Republic. They collectively hold a 90% shareholding interest in Rozmin s.r.o. ("Rozmin"), a Slovakia-incorporated company which was awarded, in 1998, exclusive rights for mining activities at the Gemerská Poloma deposit in the Slovak Republic, one of the world's largest talc deposits.

4. From that year onwards, Claimants devoted their geological know-how, expertise, time, and management skills, and invested well above 5 millions of dollars in the Gemerská Poloma deposit to confirm its talc reserves and the quality thereof by way of bankable

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[1] **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. After the breakup of Czechoslovakia in 1993, this Treaty remained in effect for the successor States, namely the Slovak Republic and the Czech Republic.

[2] **Exhibit C-2**, Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments, dated July 20, 2010.

studies meeting the highest western industry standards, to secure a myriad of permits from Slovak organs, to prepare the deposit for its commercial development, and to market the sale of talc to be extracted from the deposit.

5. In early 2005, however, 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 commissioned and/or paid for, 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, the Slovak Republic expropriated Claimants' rights and investment and committed a series of other breaches of the BITs.

6. The taking by the Slovak Republic of Claimants' rights and investment is a textbook case of expropriation. It is so first and foremost considering the timing of the expropriation which occurred, as set out above, once Claimants had de-risked the deposit at their own expense. Second, 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. Third, the expropriation was not accompanied by any valid justification, but rather based on the alleged interruption of activities at the deposit for a period exceeding three years which, under a newly-enacted piece of legislation, purportedly authorized the revocation of mining rights. This piece of legislation, however, did not apply to Claimants' mining rights as it did not have and could not have had any retroactive effect, and was not only wrongly construed by Respondent, as ultimately confirmed by its own Supreme Court, but also interpreted in contradiction with the Slovak Republic's own representations. Finally and in any event, the expropriation was not accompanied by a single cent in compensation, let alone the prompt, adequate, and effective compensation that Claimants were entitled to under the BITs.

7. In other words, heads or tails, whether or not the expropriation was procedurally and/or substantially flawed, Claimants are entitled under the BITs to receive from the Slovak Republic prompt, adequate, and effective compensation for the genuine value of their rights and investment.

8. Since the expropriation, the Slovak Republic has further aggravated the dispute and its case by using the cooling-off period – which was extended upon its request – for purposes clearly other than settlement negotiations. Indeed, while representing that a settlement was possible and requesting a valuation of Claimants' damages as a prerequisite to a settlement offer, Respondent used the cooling-off period to delay the arbitration while progressively raising frivolous and often contradictory jurisdictional defenses, and to seize all of Claimants' records in the Slovak Republic, including confidential and privileged documents, of which Respondent openly admitted it had kept a full set of copies and from which Respondent has already gathered information that it used in the context of its application for provisional measures and answer to Claimants' application for provisional measures. Respondent must be held accountable for these shameless retaliatory measures – which are no less than reminiscent of this EU member State's Soviet-era practices – including by way of compensation.

9. Claimants seek compensation under the BITs as a result of the unlawful expropriation of, and other BIT violations committed by the Slovak Republic in relation to, Claimants' investments in the Gemerská Poloma deposit. A nine-digit figure has been determined by Mr. John Ellison, a consultant to KPMG's London office, to represent the loss of profits sustained by Claimants. An exact quantification of these losses will be provided to the Tribunal in due course.

10. Claimants' Memorial is divided into the following six sections:

- presentation of the Parties (**Section I**);
- introduction to talc **(Section II**);
- facts and description of the dispute (**Section III**);
- Respondent's breaches of its obligations under international law (**Section IV**);
- kind of damages sustained by Claimants, to be quantified at a later stage in accordance with the Tribunal's directions (**Section V**); and
- relief sought (**Section VI**).

I. PARTIES

11. This section introduces the Parties and provides associated relevant information for a better understanding, by the Tribunal, of Claimants and Respondent as well as of the general context of the dispute.

A. CLAIMANTS

12. Claimants are EuroGas Inc. (**1**) and Belmont Resources Inc. (**2**), two companies considered "junior mining companies," a well-established and recognized category of investors in the mining industry (**3**).

1. EuroGas Inc.

13. EuroGas is an oil and gas company. It was incorporated on November 15, 2005 under the laws of the United States. Its registered office is located at 3098 South Highland Drive, Suite 323, Salt Lake City, Utah, 84106-6001.[3]

14. By way of background, on July 31, 2008, EuroGas took on the surviving corporate existence, business, and affairs of a company that had been incorporated on October 7, 1985 under the name Northhampton Inc. and that had been renamed EuroGas Inc. in 1994 (the "1985 Company").

15. As acknowledged by Respondent,[4] the 1985 Company was the sole shareholder of EuroGas GmbH, an Austrian company which held, between March 16, 1998 and March 25, 2002, an indirect shareholding interest in Rozmin. On March 16, 1998, EuroGas GmbH indeed purchased a 55% shareholding interest in Rima Muráň s.r.o. ("Rima Muráň"),[5] one of Rozmin's three initial shareholders with a 43% shareholding interest

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3 **Exhibit C-5**, Excerpt from Utah Business Search – Utah.gov regarding EuroGas Inc., retrieved on June 17, 2014.

4 Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, dated September 10, 2014, ¶ 15.

5 **Exhibit C-6**, Contract on the Transfer of a Business Share in the Commercial Company Rima Muráň 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 Muráň 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 Muráň 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 Muráň sro between EuroGas GmbH and Mr. Ján Baláž, dated March 16, 1998.

in that company.[6] On March 16, 1998, the 1985 Company, which held 100% of EuroGas GmbH's shares, thus became an indirect shareholder of Rozmin.

16. In 2002, several agreements were entered into whereby EuroGas GmbH transferred back its 55% shareholding interest in Rima Muráň to the latter's shareholders,[7] and Rima Muráň transferred its 43% shareholding interest in Rozmin to EuroGas GmbH.[8] Eventually, a 10% shareholding interest was transferred by EuroGas GmbH to a third party, EuroGas GmbH remaining the legal owner of a 33% shareholding interest in Rozmin. This 33% interest was indirectly held by the 1985 Company, given that, as mentioned above, the latter wholly owned EuroGas GmbH.[9]

17. While the 1985 Company was administratively dissolved in 2001, it continued its corporate existence and carried out activities necessary to wind up and liquidate its business and affairs, in accordance with Utah State law.[10] Involuntary bankruptcy proceedings were then initiated in 2004.

18. In accordance with US federal law, the 1985 Company survived the Chapter 7 bankruptcy proceedings,[11] from which it emerged with the assets that the trustee had

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6 **Exhibit C-21**, Memorandum of Association on the Establishment of the Company Rozmin sro, dated May 7, 1997.

7 **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.

8 **Exhibit C-14**, Agreement on the Transfer of Business Share between Rima Muráň sro and EuroGas GmbH, dated March 25, 2002.

9 Claimants' Request for Arbitration, dated June 25, 2014, ¶ 8.

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

11 No provision of the United States Bankruptcy Code provides for the dissolution of a corporation through a Chapter 7 proceeding, be it during bankruptcy proceedings or when the case is closed (*see* United States Code, Title 11 – Bankruptcy, 2006 Edition, Supplement 5, ¶¶ 101-1352 (available at http://www.gpo.gov/fdsys/pkg/USCODE-2011-title11/pdf/USCODE-2011-title11.pdf)). Numerous US courts have in fact explicitly recognized that corporations cannot be dissolved through a bankruptcy process and that they continue to exist after the bankruptcy proceedings are closed. These courts include the Ninth Circuit Court of Appeals (*see* **Exhibit CL-102**, *Better Bldg. Supply Corp*, p.379: "*Contrary to this assertion, Chapter 7 proceedings cannot dissolve a corporation. If the* [principals] *sought to dissolve their corporations, they should have used state procedures*"), the Eight Circuit Court of Appeals (*see* **Exhibit CL-104**, *Kramer v. Cash Link Sys.*, 652 F.3d (8th Cir. 2011), dated August 26, 2011, p. 840: "[A] *corporation is not entitled to a discharge of its debts in a Chapter 7 proceeding,* see *11 U.S.C. §*

decided not to administer – in this case, the 1985 Company's interest in EuroGas GmbH.

19. The trustee was well aware of the 1985 Company's interest in EuroGas GmbH and/or Rozmin. This interest was disclosed in SEC public filings,[12] and so was the fact that Rozmin's mining rights had been revoked.[13] These SEC public filings were reviewed by both the trustee[14] and its accountant,[15] and at least one of these public filings was even filed in the Chapter 7 proceedings.[16]

727(a)(1), and the final bankruptcy decree did not purport to grant [the debtor] *a discharge.* [The plaintiff] *is thus free to pursue his claims against* [the debtor] *after the expiration of the automatic stay*"), the Third Circuit Court of Appeals (see **Exhibit CL-105**, *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, (3d Cir. 2004), dated September 20, 2004, p. 126, stating, in the context of a Chapter 11 liquidation, that "[d]*issolution* […] *is not an objective that can be attained in bankruptcy*"), the District Court for the Northern District of California (**Exhibit CL-106**, *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 103 F. Supp. 2d (N.D. Cal. 2000), dated June 20, 2000, pp. 1183-1184: "*In addition, any dissolution of a corporation must be effectuated under state law, since the Bankruptcy Code does not provide for the dissolution of corporations*. […] *Even if* [the debtor] *has been dissolved, California law provides that a corporation continues to exist even after dissolution for the purposes of,* inter alia, '*prosecuting and defending actions by or against it and enabling it to collect and discharge obligations*.' *Cal.Corp.Code § 2010(a). Furthermore, Cal.Corp.Code § 2011(a)(1) provides for the enforcement of causes of action against dissolved corporations. Therefore,* [the debtor's] *status as 'out of business and inactive' does not insulate it from the present action*."), and the District Court for the Eastern District of Pennsylvania (**Exhibit CL-107**, *F.P. Woll & Co. v. Fifth & Mitchell St. Corp.*, No. CIV.A. 96-CV-5973, 2001 WL 34355652 (E.D. Pa. 2001), dated December 13, 2001, at *3 (hereafter "*F.P. Woll & Co*"): "*The relevant case law also supports the conclusion that 'defunct' corporations are not dissolved and therefore retain the capacity to sue and be sued.*").

12 **Exhibit R-74**, EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2004, pp. 46-47; **Exhibit R-75**, EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, pp. 45-46; **Exhibit C-69**, Memorandum of Law in Support of Motion Pursuant to Federal Rule of Bankruptcy Procedure 9023 and Federal Rule of Civil Procedure 59 for New Trial on or to Alter or Amend the Court's "Order Authorizing Sale of the Debtor's Interest in Certain Affiliates," Ex. 2, pp. 12-13, EuroGas Inc. Bankruptcy, Docket Entry No. 89.

13 **Exhibit R-74**, EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2004; **Exhibit R-75**, EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005.

14 **Exhibit R-27**, Trustee's Final Report and Application for Compensation and Motion for Order Approving Payment of Administrative Costs and Expenses, Time Sheet Report period 01/01/00-02/23/07 (attachment), p. 4, EuroGas Inc. Bankruptcy, Docket No. 140.

15 **Exhibit C-66**, Trustee's Motion to Approve Employment of Accountants, dated May 1, 2006, ¶¶ 1-2, EuroGas Inc. Bankruptcy, Docket Entry No. 106; Exhibit C-67, Order Granting Trustee's Motion to Approve Employment of Accountants, dated May 11, 2006, EuroGas Inc. Bankruptcy, Docket Entry No. 125; **Exhibit C-68**, First and Final Application of Trustee's Accountant for Allowance of Compensation as an Administrative Expense, pp. 2 (¶ 5.a-b), and 10, EuroGas Inc. Bankruptcy, Docket No. 138.

16 **Exhibit C-69**, Memorandum of Law in Support of Motion Pursuant to Federal Rule of Bankruptcy Procedure 9023 and Federal Rule of Civil Procedure 59 for New Trial on or to Alter or Amend the Court's "Order Authorizing Sale of the Debtor's Interest in Certain Affiliates," Ex. 2, EuroGas Inc. Bankruptcy, Docket Entry No. 89; **Exhibit C-70**, Trustee's Response to Motion to Reconsider or Grant New Trial Filed by W. Steve Smith., EuroGas Inc. Bankruptcy, Docket Entry No. 96.

20. As a litigious property with no short-term value, however, the interest in Rozmin, which no third party had expressed any interest in acquiring, was overly burdensome to be administered. Challenging the revocation of Rozmin's mining rights in order to create value for the estate would indeed have required a great amount of time and money, especially considering that by the time the bankruptcy proceedings were closed, the Slovak Supreme Court's first decision (discussed below at paragraphs 181 *et seq.*), which held the revocation to have been in breach of Slovak law, had not yet been handed down, and Rozmin's appeals thus far had been repeatedly rejected.

21. When the Chapter 7 proceedings were closed, the interest in Rozmin had therefore not been administered and hence remained with the 1985 Company. On July 23, 2008, EuroGas' corporate documents were amended to mirror those of the 1985 Company,[17] and in order to wind up and liquidate its business and affairs, in accordance with Utah State law, the 1985 Company entered into a joint resolution with EuroGas and performed a type-F reorganization, whereby EuroGas assumed all of the assets, liabilities and issued stock certificates of the 1985 Company.[18]

22. As a matter of Utah State law, EuroGas is thus a mere continuation of the 1985 Company. Until March 2011, EuroGas was listed and its Common Shares traded on the Over-The-Counter Market in the United States as well as on various German Stock Exchanges, including the Frankfurt and Berlin Stock Exchanges. In April 2011, EuroGas withdrew its 1933 Registration with the Securities and Exchange Commission in Washington DC. EuroGas, however, continues to this day to operate in the United States.

2. Belmont Resources Inc.

23. Belmont was legally constituted under the laws of Canada on January 18, 1978.[19] Its corporate head office is located at 625 Howe Street – Suite 600, Vancouver, British Columbia, Canada V6C 2T6.

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17 **Exhibit C-56**, Amended Articles of Incorporation of EuroGas Inc., dated July 23, 2008.

18 **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.

19 **Exhibit C-75**, "Companies Act" Certificate of Belmont Resources Inc., dated January 18, 1978.

24. Belmont is listed on the Canadian TSX Venture Exchange and the Frankfurt Stock Exchange in Germany. Belmont is an emerging resource company engaged in the acquisition, exploration, and development of mineral properties in Canada and abroad.

25. Belmont has recently optioned 32 mineral claims (1,696 hectares) known as the KM 140 Property in the James Bay Region of northern Quebec. Belmont had previously acquired four claim blocks comprising 2,252 hectares located within the Abitibi Harricana-Turgeon volcanic greenstone belt of Northwestern, Quebec. This belt hosts several world class deposits that have produced both gold and base metals. Belmont has also been exploring a 3,040 hectares property in the Atikokan, Ontario area, known as the Lumby/Bufo claims. Finally, Belmont owns significant uranium properties located in the Uranium City region of Northern Saskatchewan.

26. On February 24, 2000, Belmont acquired a 57% interest in Rozmin, when it purchased the interest of the two initial shareholders of Rozmin other than Rima Muráň, namely Östu Industriemineral Consult GmbH ("ÖIMC"), which held a 24.5% participation in Rozmin,[20] and Gebrüder Dorfner GmbH Co. Kaolin- und Kristallquarzsand- Werke KG ("Dorfner"), which held a 32.5% participation in Rozmin.[21]

27. In March 2001, Belmont and EuroGas entered into a Share Purchase Agreement (the "SPA") for the sale of Belmont's interest in Rozmin to EuroGas.[22] Belmont's 57% interest in Rozmin was, however, never transferred to EuroGas because the conditions precedent, under the SPA, for the transfer of this interest were never satisfied.[23] In particular, Belmont was unable to recover 125% of its investment through the sale of shares to be transferred by EuroGas to Belmont under the SPA, as required under the SPA for the transfer of Belmont's 57% interest in Rozmin. Respondent itself has

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20 **Exhibit C-16**, Agreement on the Assignment of Company Shares in the Rozmin sro Corp. between ÖSTU Industriemineral GmbH and Belmont Resources Inc., dated February 24, 2000.

21 **Exhibit C-17**, Agreement on the Assignment of Company Shares in the Rozmin sro Corp. between Gebrüder Dorfner GmbH & Kaolin- und Kristallquarzsand-Werke KG and Belmont Resources Inc., dated February 24, 2000.

22 **Exhibit R-15**, Share Purchase Agreement between Eurogas and Belmont, dated March 27, 2001.

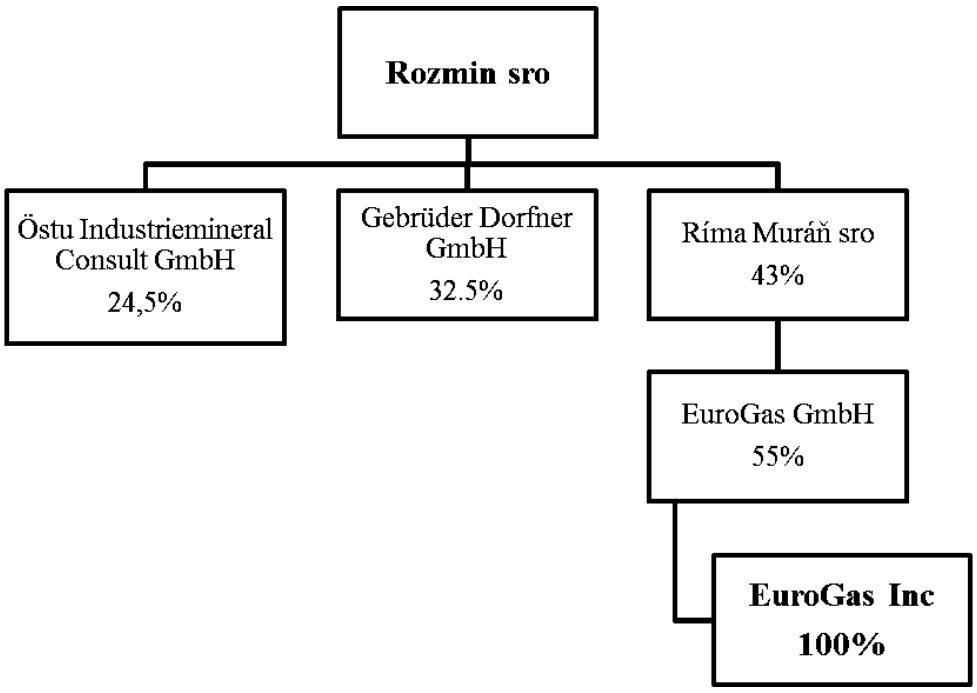
23 *See* the Witness Statement of Mr. Vojtech Agyagos, ¶¶ 19-31.

acknowledged that as late as in 2006, the conditions precedent of the March 2001 SPA had not yet been performed.[24]

28. In conclusion, Belmont remains, to date, Rozmin's majority shareholder with a 57% interest.[25]

29. For the sake of clarity, Claimants' shareholding interest in Rozmin over time is summarized in the figures below:

Figure 1 – Shareholding interest in Rozmin in March 1998:



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

[25] **Exhibit C-74**, Extract from the Business Register of the Slovak Republic, dated December 21, 2014. *See* also the Witness Statement of Mr. Vojtech Agyagos, ¶ 30, and the Witness Statement of Mr. Wolfgang Rauball, ¶ 28.

Figure 2 – Shareholding interest in Rozmin in February 2000:

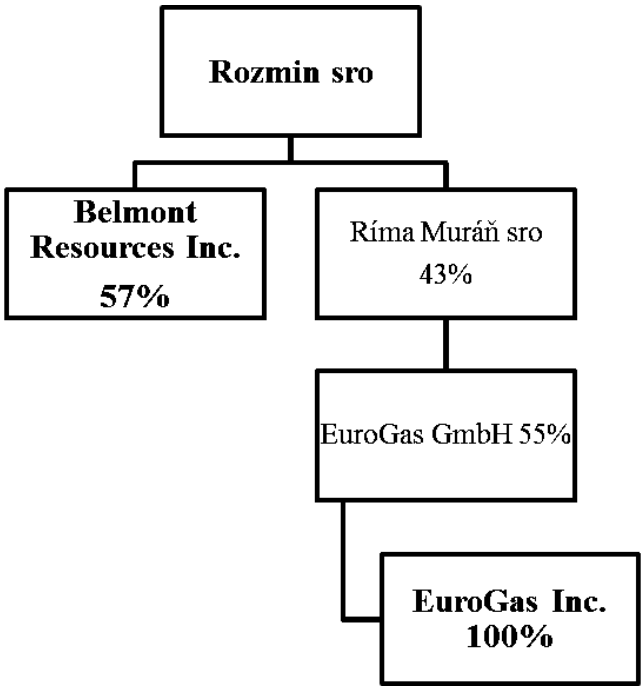


Figure 3 – Shareholding interest in Rozmin in March 2002:

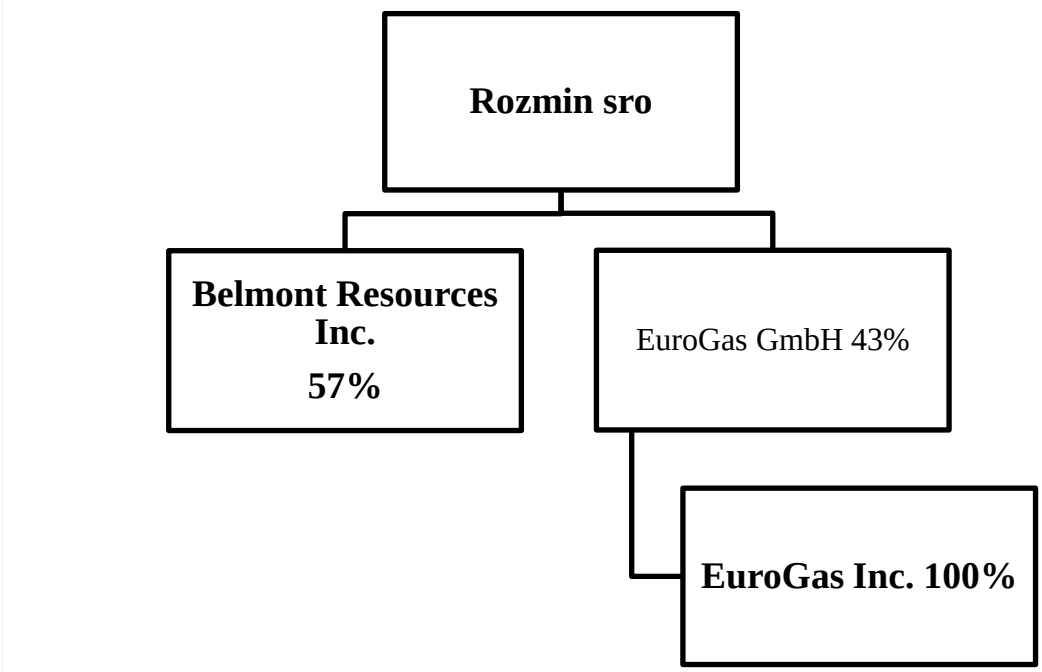
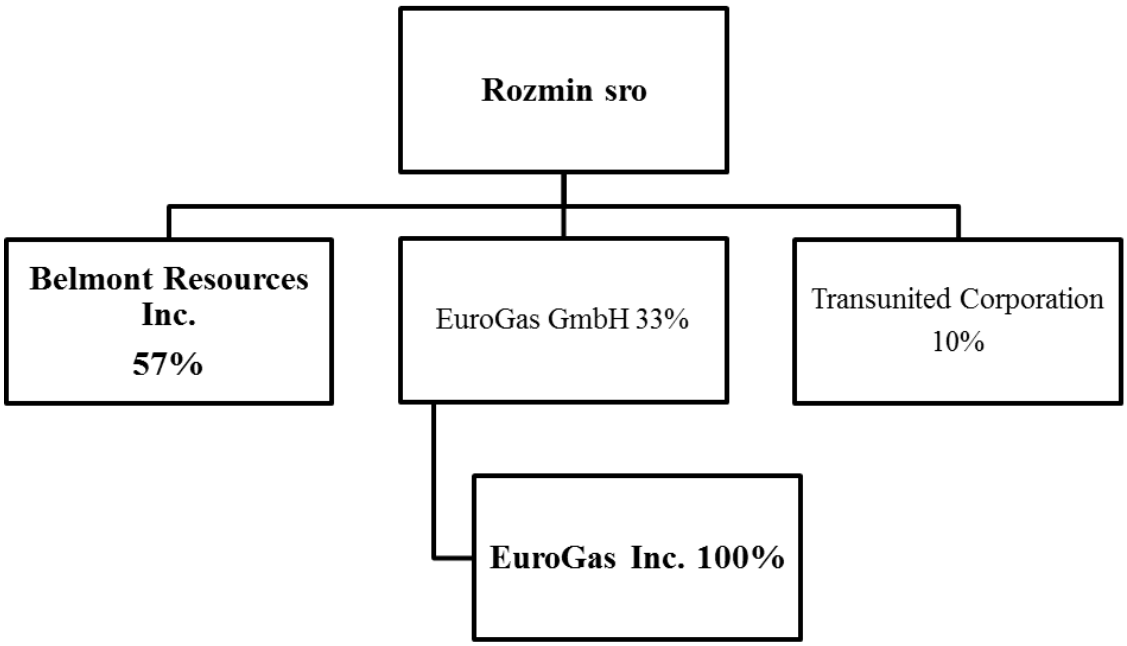


Figure 4 – Shareholding interest in Rozmin in June 2004:



3. Junior Mining Companies

30. Claimants submit that they have a bullet-proof case.

31. When such is the claimant's case, the respondent is left with no alternative but to try to discredit the claimant by all means, including shortcuts, in order notably to minimize liability. This is precisely what Respondent has attempted to do, by relying on clichés regarding small companies so as to portray Claimants as underdogs with limited resources, incapable of carrying out a project as important as the Gemerská Poloma project. Claimants' capacities were, however, not the reason relied upon to justify the expropriation of their rights and investment, and the reality is that Respondent knew very well and at all times whom it was dealing with, namely with "junior mining companies," a well-established and recognized category of investors in the mining industry, as set out below.

32. Junior mining companies emerged in the 1980s. These companies do not need to be heavily staffed or to directly own equipment for the development of a mine and

production.[26] Indeed, the advent of powerful computer and reserve modeling algorithms has allowed small-team companies and even self-employed geologists, formerly with larger mining organizations, 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.[27] Junior mining companies then go on to prepare bankable feasibility studies and either raise financing or attract equity investment to develop deposits or to sell their equity share in part or in full to larger organizations.

33. In fact, it has become customary for larger companies to wait for 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.[28] As explained by Adrian Day in his book entitled "Investing in Resources: How to Profit from the Outsized Potential and Avoid Risks," "[m]*any of the major companies have drastically reduced their greenfields exploration and look to juniors to do the high-risk exploration. They will pay big bucks after a discovery has been made and most of the risk (including the permitting risk) has been removed. They prefer to pay up for known quantity than take the risk early on*."[29] He adds: "*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*."[30]

34. Today, exploration, reserves confirmation, and project preparation work by junior mining companies has become normal industry practice.[31] And it is undisputed that it is

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26 *See* WAI Expert Report, pp. 18-19.

27 *See* WAI Expert Report, p. 19.

28 *See* WAI Expert Report, p. 18.

29 **Exhibit C-76**, Adrian Day, "Investing in Resources: How to Profit from the Outsized Potential and Avoid Risks" (2010), p. 156.

30 **Exhibit C-76**, Adrian Day, "Investing in Resources: How to Profit from the Outsized Potential and Avoid Risks" (2010), p. 150.

31 *See* WAI Expert Report, p. 18.

precisely the exploration, confirmation and project development stages of a mineral deposit that are the riskiest and thus by far the most value-making in a mining project.[32]

35. The junior mining company practice is not only well received by Sovereign States but also by banks, which have built up the expertise to fund the implementation of mining projects of junior companies.[33] This explains why "[t]*he days when South African gold mines, for example, were financed entirely by equity (still common in the early 70s) have passed, and banks, through their specialist corporate finance departments, now regularly seek to provide the required finance. Most mines these days are financed on a non-recourse basis*."[34]

36. Throughout the years, junior mining companies, such as EuroGas and Belmont, have become full and well-respected members of the mining industry.

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[32] *See* **Exhibit C-77**, Dr. Victor Rudenno, "The Mining Valuation Handbook: Mining and Energy Valuation for Investors and Management" (4th ed., 2012) p. 3 ("[s]*uccessful exploration can result in a dramatic increase in the value of a company and is therefore of great significance to the equity (stock markets).* […] *Once a mineral discovery has been made it is important to define the size of the orebody in tones and the grade or quality* […]. *This will ultimately set the parameters by which the deposit will be valued and hence the value to the company and, if listed, the company's share price*") and p. 6 ("[f]*ollowing an exploration success, a mining company will undertake a drilling programme to define the resource. As the number of holes drilled increases and additional information is obtained, the confidence level in the amount of ore (tonnage) or hydrocarbons (volume) available will also increase. Confidence will also grow in the quality or level of economic element contained within the resource*"); **Exhibit C-76**, Adrian Day, "Investing in Resources: How to Profit from the Outsized Potential and Avoid Risks" (2010), p. 150 ("[i]*n 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*"), pp. 169-170 ("[g]*rowing junior producers can be attractive.* [...] *They are not without risk, however, since moving from exploration to production is a giant step fraught with risk. Many have stumbled. But once a company had demonstrated an ability to get a property into production successfully – and it is never smooth all the way – then it becomes very attractive*. […] *Major companies usually like to see most of the risk taken out by a junior, including the exploration and even permitting risk, before making an acquisition. They prefer to pay up for greater certainty")*, and p. 173 ("[s]*tocks go through a typical pattern throughout this cycle. A much stylized depiction of the life cycle of a mining share is shown. You can see there are two main opportunities for big gains: after the discovery hole as the deposit grows and is defined and after a feasibility study until the mine reaches full production*").

[33] *See* WAI Expert Report, p. 19.

[34] **Exhibit C-78**, Michael Coulson, "An Insider's Guide to the Mining Sector: An In-Depth Study of Gold and Mining Shares" (2008), p. 193.

B. RESPONDENT

37. Respondent is the Slovak Republic.

38. As set forth below, it has acted in breach of its international obligations towards Claimants *inter alia* through acts and omissions of the District Mining Office in Spišská Nová Ves (the "District Mining Office" or "DMO"), Slovakia's Main Mining Office (the "MMO"), the Office of the President of the Slovak Republic, the Office of the Prime Minister of the Slovak Republic, the Ministry of Economy, the Ministry of Justice, the Prosecutor from the Office of the Special Prosecution in Bratislava, and enforcement agencies including police forces (notably the National Criminal Agency, the National Troop of the Financial Police, the National Anti-corruption Troup, and the Public Order Police). These entities are all organs of Respondent[35] and, under international law, their conduct is attributable to it.[36] References in this arbitration to these entities shall accordingly be deemed to be references to Respondent.

39. While Claimants do not in any way wish to cast unwarranted or gratuitous negative aspersions on Slovakia, they need to draw the Tribunal's attention to publicly-available information, based on independent reports, relevant to place the present dispute into context. This information pertains to the investment climate, in general, in the Slovak Republic (**1**) and, more specifically, to the lack of transparency in, and pre-determined outcomes of, Slovak tender proceedings (**2**).

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35 **Exhibit CL-125**, International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("ILC Articles on State Responsibility"). Article 4.2 provides that "[a]*n organ includes any person or entity which has that status in accordance with the internal law of the State*."

36 **Exhibit CL-125**, ILC Articles on State Responsibility. Article 4.1 provides that under international law, "[t]*he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State*."

1. Investment Climate in General

40. Over the last two decades, the Slovak Republic has taken steps to attract foreign investment. In particular, Slovakia has promulgated and ratified a number of bilateral investment treaties[37] and passed foreign investment laws intended to promote foreign investment in the country.

41. Nonetheless, as of the mid-2000s, the flow of foreign direct investment started to decline due to regular negative amendments brought to the newly-adopted investment policies[38] and a track record of hostile conduct in relation to foreign investors, as set out below.

42. Thus, for instance, as recently as in December 2012, the Dutch insurer, Achmea B.V., was awarded EUR 22.1 million by an arbitral panel of the Permanent Court of Arbitration, following Slovakia's breach of the fair and equitable treatment standard under the Netherlands-Slovak Republic BIT.[39] The breach stemmed from a profit ban imposed by Slovakia in 2007 on health insurers against a backdrop of accusations that the latter profited from public funds.[40] The Constitutional Court of Slovakia had itself overturned the law, affirming that the interdiction made to health insurance companies to pay dividends was in conflict with the Slovak Constitution.[41]

43. In numerous other instances, Slovakia has adopted an adverse posture towards investors. For example, the Regulatory Network Authority increased, in 2011, electricity grid fees for self-producers of electricity from 30% to 100%. In this context,

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37 From the mid-1995s to the mid-2000s, Slovakia concluded Bilateral Investment Treaties with States including, *inter alia*, Portugal, Egypt, Latvia, Malta, Israel, Turkey, Uzbekistan and Korea.

38 **Exhibit C-79**, US Department of State, Bureau of Economic and Business Affairs: "2014 Investment Climate Statement – Slovakia, June 2014 Report," p. 2 available at http://www.state.gov/e/eb/rls/othr/ics/2014/228396.htm.

39 **Exhibit CL-126**, *Achmea BV v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Final Award, dated December 7, 2012, available at http://www.italaw.com/sites/default/files/case-documents/italaw3206.pdf; *See* also Bloomberg: "Achmea Wins Arbitration Against Slovakia Over Insurance," December 10, 2012, available at http://www.bloomberg.com/news/2012-12-10/achmea-wins-arbitration-against-slovakia-over-insurance.html.

40 **Exhibit C-80**, US Department of State, Bureau of Economic and Business Affairs: "2013 Investment Climate Statement – Slovakia, April 2013 Report," p. 2 available at: http://www.state.gov/e/eb/rls/othr/ics/2013/204731.htm.

41 **Exhibit C-81**, US Department of State, Bureau of Economic and Business Affairs: "2011 Investment Climate Statement – Slovakia, March 2011 Report," p. 4 available at: http://www.state.gov/e/eb/rls/othr/ics/2011/157356.htm.

US Steel Global Holdings I BV, the Dutch subsidiary of the American company, initiated arbitral proceedings against Slovakia in 2012. The proceedings were abandoned on June 13, 2014,[42] following a rapid implementation by Slovakia of the European Commission's Steel Action Plan and the signing of a memorandum of understanding between the State and the company, creating certain incentives to the latter's benefit.[43]

44. In another ICSID case, a tribunal awarded USD 867 million to a Czech commercial bank in 2004, following Slovakia's failure to honor a tripartite agreement concluded with the Czech Republic and this bank.[44]

45. This adverse treatment of foreign investors is aggravated by corruption, including in the allocation of tenders, as set out below. This is particularly relevant to the dispute at hand given that Claimants' investment was taken to be ultimately awarded to a newly-established and inexperienced local company.

2. Corruption and Pre-Determined Outcomes in Tender Proceedings

46. Despite the Slovak Republic's accession to the European Union in 2004, large scale corruption has been reported to remain one of the country's most important social problems.[45] Today, 35% of Slovakian citizens accept corruption as part of daily life,[46] and widespread non-transparent and clientelistic practices persist.[47] According to the

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42 **Exhibit CL-127**, *US Steel Global Holdings I BV v. The Slovak Republic*, UNCITRAL, PCA Case No. 2013-6, Procedural Order No. 6, dated June 16, 2014, available at http://www.italaw.com/sites/default/files/case-documents/italaw3237.pdf.

43 **Exhibit C-82**, Memorandum of Understanding between the Slovak Republic and United States Steel Corporation, March 26, 2013. *See* also **Exhibit C-83**, The Slovak Spectator, "Slovakia could pay U.S. Steel Euro 260m," September 16, 2013, available at http://spectator.sme.sk/articles/view/51345/3/slovakia_could_pay_us_steel_260m.html.

44 **Exhibit CL-128**, *Ceskoslovenska Obchodni Banka, AS v. The Slovak Republic*, ICSID Case No. ARB/97/4, Award, dated December 29, 2004, available at http://www.italaw.com/sites/default/files/case-documents/ita0146_0.pdf.

45 **Exhibit C-84**, US Department of State, Bureau of Democracy, Human Rights, and Labor: "Slovak Republic 2005 Report," p.2, available at http://www.state.gov/j/drl/rls/hrrpt/2005/61674.htm.

46 **Exhibit C-85**, European Commission: "Special Eurobarometer 374 – Corruption Report" (February 2012), p. 67, available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_374_en.pdf.

47 **Exhibit C-86**, Freedom House: "Nations in Transit 2005: Slovakia," p. 2, available at http://www.freedomhouse.org/report/nations-transit/2006/slovakia#.VA3bk_l_voE; **Exhibit C-87**, Freedom House: "Nations in Transit 2013: Slovakia," available at http://www.freedomhouse.org/report/freedom-world/2013/slovakia#.VA7Kxfl_vON.

report on corruption prepared by the World Bank at the request of Slovakia at the beginning of the 2000 years, "*corruption* [was] *common and affect*[ed] *all key sectors of the economy.*"[48] A decade later, little, if anything, has changed. Slovak authorities themselves acknowledge that corruption in the economic sector remains widespread[49] and constrains economic growth.[50]

47. Corrupt practices have weakened government bodies and administrations.[51] This is to the point that business actors consider several Slovakian regulatory bodies "*as less than fully independent.*"[52]

48. This lack of independence has, in particular, resulted in a significant lack of transparency and integrity of public tender procedures, and political pressure has proved to influence the outcome of regulatory adjudications.[53] This lack of transparency and integrity in public tenders is now among the most important concerns of foreign investors in Slovakia.[54] Thirty percent of enterprises surveyed by the World

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48 **Exhibit C-88**, World Bank, United States Agency for International Development: "Corruption in Slovakia – Results of Diagnostic Surveys," December 1, 2012, p. V, available at http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/slovrep44.pdf.

49 **Exhibit C-89**, Reuters: "Corruption hurting Slovak economy, secret service says," October 25, 2012, available at http://www.reuters.com/article/2012/10/25/us-slovakia-corruption-idUSBRE89O1BM20121025; **Exhibit C-90**, Slovak Information Service (SIS): 2011 SIS Annual Report, 2.2 Economic Sector – "Corruption and Cronyism", available at http://www.sis.gov.sk/for-you/sis-annual-report-2011.html#economic-sector; **Exhibit C-91**, 2013 SIS Annual Report, 2.2 Economic Sector – "Corruption and Cronyism", available at http://www.sis.gov.sk/for-you/sis-annual-report.html. In the *Corruption Perceptions Index 2013*, published by Transparency International, Slovakia appears in the top 23% most corrupt countries of the European Union and Western Europe. Slovakia's score according to this Index – 47 out of 100 in 2013 – is considered by Transparency International to reveal a "*serious corruption problem*" (**Exhibit C-92**, Corruption Perceptions Index 2013, Transparency International, available at http://www.transparency.org/cpi2013/results).

50 **Exhibit C-93**, Central Intelligence Agency: The World Factbook 2013-4: Slovakia, p. 5, available at https://www.cia.gov/library/publications/the-world-factbook/docs/contributor_copyright.html.

51 **Exhibit C-94**, Bertelsmann Stifung, "Bertelsmann Stifung's transformation Index (BTI) 2006: Slovakia Country Report," p.4, available at http://www.bti-project.org/fileadmin/Inhalte/reports/2006/pdf/BTI%202006%20Slovakia.pdf.

52 **Exhibit C-80**, US Department of State, Bureau of Economic and Business Affairs: "2013 Investment Climate Statement – Slovakia, April 2013 Report," p. 3, available at: http://www.state.gov/e/eb/rls/othr/ics/2013/204731.htm.

53 **Exhibit C-79**, US Department of State, Bureau of Economic and Business Affairs: "2014 Investment Climate Statement – Slovakia, June 2014 Report," p. 8, available at http://www.state.gov/e/eb/rls/othr/ics/2014/228396.htm.

54 **Exhibit C-80**, US Department of State, Bureau of Economic and Business Affairs: "2013 Investment Climate Statement – Slovakia, April 2013 Report," p. 1, available at: http://www.state.gov/e/eb/rls/othr/ics/2013/204731.htm.

Bank at the request of Slovakia have declared in this regard that bribery for public sector tenders occurs frequently.[55]

49. The Slovak Information Service – the central intelligence and security service of the Slovak Republic[56] – partly declassified its annual report on two occasions only since 2005.[57] On these two occasions, this Service acknowledged the pressing threat represented by epidemic corruption in public tenders. In its 2011 annual report, the Service pointed to corruption practices taking the form of manipulation of tenders "*in favour of vendors determined in advance.*"[58] The following year, it recorded again a "*non-transparent allocation*" of projects "*given to companies chosen in advance.*"[59] Furthermore, "[i]*n addition to the practice of state interference through direct legislation, on the practice side there are the negative trends of abusing office and engaging in pre-fabricated overpriced tenders*."[60]

50. On several occasions, this outrageous lack of transparency in public tender procedures also raised concerns at the European level.[61] The European Commission has indeed sought explanation and investigated corruption complaints in relation to multiple suspicious public tenders in Slovakia.[62]

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55 **Exhibit C-88**, World Bank, United States Agency for International Development: "Corruption in Slovakia – Results of Diagnostic Surveys," December 1, 2012, p. 53, available at http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/slovrep44.pdf.

56 **Exhibit C-95**, Slovak Information Service Home page, available at http://www.sis.gov.sk/about-us/about-sis.html.

57 **Exhibit C-96**, Slovak Information Service (SIS): For You – FAQ, available at http://www.sis.gov.sk/for-you/faq.html.

58 **Exhibit C-90**, Slovak Information Service (SIS): 2011 SIS Annual Report, 2.2 Economic Sector – "Corruption and Cronyism", p. 6, available at http://www.sis.gov.sk/for-you/sis-annual-report-2011.html#economic-sector.

59 **Exhibit C-97**, Slovak Information Service (SIS): 2013 SIS Annual Report, 2.2 Economic Sector – "Corruption and Cronyism", p. 5, available at http://www.sis.gov.sk/for-you/sis-annual-report.html.

60 *Ibid.*

61 **Exhibit C-80**, US Department of State, Bureau of Economic and Business Affairs: "2013 Investment Climate Statement – Slovakia, April 2013 Report," p. 3, available at: http://www.state.gov/e/eb/rls/othr/ics/2013/204731.htm.

62 *See* for instance, **Exhibit C-98**, European Commission – European Anti-Fraud Office Press Release: "OLAF external investigation on EU subsidies paid in Slovakia," April 30, 2011, available at http://ec.europa.eu/anti_fraud/media-corner/press-releases/press-releases/2001/20010430_01_en.htm ; http://europa.eu/rapid/press-release_IP-09-768_en.htm ; http://europa.eu/rapid/press-release_IP-10-1244_en.htm ; http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-000296&language=FR.

51. The lack of transparency and integrity in public tenders has naturally engendered numerous political scandals throughout the years in Slovakia and has led, in particular, to the resignation and dismissal of several ministers and local officials.[63]

52. One may recall the 2007 "bulletin board" or "notice board" scandal.[64] The Slovak Construction and Regional Development Ministry had published a public tender concerning a 119 million euros contract solely on a bulletin board in the hallway of the Ministry, an area closed to the public. The contract was then awarded to a favoured consortium without further bids.[65] Following intense media coverage and an investigation by the European Commission that requested full details of the tender procedure, the Minister resigned and the remaining balance of the contract was cancelled.[66] The European Commission consequently closed the infringement case it had opened against Slovakia.[67]

53. Another case worth mentioning is the 2005-2006 "Gorilla scandal." Government officials and private parties had reportedly met to agree on the outcome of public tenders in exchange for kickbacks.[68] Despite clear public concern, investigations have,

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63 **Exhibit C-99**, US Department of State, Bureau of Democracy, Human Rights, and Labor: "2009 Human Rights Report: Slovakia," p. 8, available at http://www.state.gov/j/drl/rls/hrrpt/2009/eur/136057.htm; **Exhibit C-80**, U.S. Department of State, Bureau of Economic and Business Affairs: "2013 Investment Climate Statement – Slovakia, April 2013 Report," p. 3, available at: http://www.state.gov/e/eb/rls/othr/ics/2013/204731.htm; **Exhibit C-100**, Freedom House: "Nations in transit 2010: Slovakia," p. 7, available at http://www.freedomhouse.org/report/nations-transit/2010/slovakia#.VA7H4vl_vOM; **Exhibit C-101**, Freedom House: "Freedom in the World 2013: Slovakia," p. 2, available at http://www.freedomhouse.org/report/freedom-world/2013/slovakia#.VA8XsPl_vOM.

64 **Exhibit C-102**, The Slovak Spectator, "Tender under the magnifying glass of Brussels (updated)," April 20, 2009, available at http://spectator.sme.sk/articles/view/34991/2/tender_under_the_magnifying_glass_of_brussels_updated.html.

65 **Exhibit C-103**, The New York Times, "EU Cash Tunnel Ends in Slovakia," November 9, 2010, available at http://www.nytimes.com/2010/11/10/world/europe/10slovakia.html?pagewanted=all&_r=0.

66 **Exhibit C-99**, US Department of State, Bureau of Democracy, Human Rights, and Labor: "2009 Human Rights Report: Slovakia," p. 8, available at http://www.state.gov/j/drl/rls/hrrpt/2009/eur/136057.htm.

67 **Exhibit C-104**, European Commission – Press Release Database: "Public procurement: Commission closes infringement case against Slovakia after the cancellation of a service contract awarded by the Slovak Ministry of Infrastructure," November 20, 2009, available at http://europa.eu/rapid/press-release_IP-09-1759_en.htm.

68 **Exhibit C-105**, The Guardian: "Central Europe's centre-right teeters under corruption claims," March 29, 2012, available at http://www.theguardian.com/world/2012/mar/29/central-europe-centre-right-corruption-claims; **Exhibit C-106**, Financial Times: "Slovaks protest over corruption claims," February 10, 2012, available at http://www.ft.com/intl/cms/s/0/6fc1858c-48cd-11e1-954a-00144feabdc0.html#axzz1vnHfrPLW; **Exhibit C-107**, The Economist: "The multi-million euro gorilla,"

to this day, not yet been completed.[69] As recently as the end of August 2014, another case involving a European company which won 70 out of 70 tenders applied for in Slovakia has raised concerns at both the national and the European levels.[70]

54. Whereas Claimants neither need to nor in fact rely on corruption to substantiate their claims, the above is relevant to the dispute and its overall context, given the tender that immediately followed the expropriation of Rozmin's mining rights and their allocation to an unknown and inexperienced local company.

55. As explained below, also relevant are the manifold uses of talc in everyday life, hence the high demand for this mineral, and the fact that through the studies that Claimants commissioned and carried out, they were able to assess the value of the deposit and establish that it is in fact a world-class deposit.

II. TALC AND THE GEMERSKÁ POLOMA DEPOSIT

56. Talc is a hydrated magnesium silicate. It is the world's softest mineral.[71] High-quality (pure) talc has many physical and chemical properties favourable to its use, such as its softness, purity, fragrance retention, whiteness, luster, moisture content, chemical inertness, and low electrical and high thermal conductivity.[72] These characteristics grant it "*manifold uses*" and a wide variety of applications in many industries, including

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January 27, 2012, available at http://www.economist.com/blogs/easternapproaches/2012/01/scandal-slovakia.

69 **Exhibit C-87**, Freedom House: "Nations in Transit 2013: Slovakia," available at http://www.freedomhouse.org/report/freedom-world/2013/slovakia#.VA7Kxfl_vON.

70 **Exhibit C-108**, The Slovak Spectator, Michaela Terenzani – Stankova, "Star Eu win 70 out of 70 tenders it applied for," September 1, 2014, available at http://spectator.sme.sk/articles/view/55094/2/star_eu_won_70_out_of_70_tenders_it_applied_for.html.

71 **Exhibit C-109**, Industrial Minerals Association (IMA) Europe, "Talc," available at http://www.ima-europe.eu/about-industrial-minerals/industrial-minerals-ima-europe/talc.

72 **Exhibit C-110**, US Department of the Interior, U.S. Geological Survey, "U.S. Talc – Baby Powder and Much More, U.S. Geological Survey Fact Sheet 0065-00, Version 1.0," available at http://pubs.usgs.gov/fs/fs-0065-00/; **Exhibit C-111**, Scientific Association of the European Talc Industry (Eurotalc), "What is talc? – Functions and Applications," available at http://www.eurotalc.eu/functionsapplication.html.

paper-making, plastic, paint and coatings, rubber, food, electric cables, pharmaceuticals, cosmetics, and ceramics.[73] In brief, talc is part of everyday life.[74]

57. The Gemerská Poloma deposit in Košice is believed to hold one of the world's largest talc deposits. Local sources have suggested that "[t]*he deposit in Slovakia is most likely the third largest in the world, right after deposits in Pakistan and India*," and are expecting the discovery to yield a "*20-percent share of the world's talc market.*"[75] These findings are supported by independent bankable studies that were commissioned and/or paid for by Rozmin and Claimants, including:

- a feasibility study which estimated that the deposit contained at least 146.6 million tons of mineralized rock including 28.9 million tons of talc and approximately 9 million tons of mineralized rock with more than 40% of talc (see paragraphs 72 *et seq. infra*), as confirmed by the independent German company Hansa GeoMin Consult, GmbH (see paragraphs 93 *et seq. infra*);
- an independent report issued by Technical Bureau DI Skacel & Kloibhofer OEG, which concluded that the most western portion of the deposit, where the concentration of talc is particularly high and where the first extractions were to be carried out, hosted at least 1.4 million tons of pure talc (see paragraphs 104 *et seq. infra*); and
- three independent reports issued by ARP/ECV GesmbH, which concluded that talc to be extracted from the deposit would be of particularly high purity and whiteness (see paragraphs 109 *et seq. infra*).

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73 **Exhibit C-112**, Industrial Minerals Association North America, "What is talc?," available at http://www.ima-na.org/?page=what_is_talc; **Exhibit C-113**, Geology.com, "Talc: The softest Mineral – What is Talc? How does it Form? How is Talc Used?," available at http://geology.com/minerals/talc.shtml; **Exhibit C-114**, Industrial Minerals Association (IMA) Europe, "Talc Fact Sheet," available at http://www.ima-europe.eu/sites/ima-europe.eu/files/minerals/Talc_An-WEB-2011.pdf.

74 **Exhibit C-115**, US Department of the Interior, "U.S. Geological Survey, U.S. Talc – Baby Powder and Much More, U.S. Geological Survey Fact Sheet 0065-00, Version 1.0," available at http://pubs.usgs.gov/fs/fs-0065-00/; **Exhibit C-114**, Industrial Minerals Association (IMA) Europe, "Talc Factsheet," available at http://www.ima-europe.eu/sites/ima-europe.eu/files/minerals/Talc_An-WEB-2011.pdf; **Exhibit C-113**, Geology.com, "Talc: The softest Mineral – What is Talc? How does it Form? How is Talc Used?," available at http://geology.com/minerals/talc.shtml.

75 **Exhibit C-116**, The Slovak Spectator, "Austrian firm to open talc mine in Gemerská Poloma in Košice region," dated October 4, 2011, available at http://spectator.sme.sk/articles/view/44098/10/austrian_firm_to_open_talc_mine_in_Gemerská_poloma_in_Košice_region.html.

58. When Claimants began investing in the Gemerská Poloma deposit, they were investing in a nascent industry with a largely untapped potential, at a time when few foreign investors were investing in the newly-independent Slovak Republic. When Rozmin's mining rights were revoked, on the other hand, the deposit's reserves had been confirmed and a detailed development plan provided to the State.

59. Of relevance is also the fact that the revocation of Rozmin's mining rights followed by less than a year the Slovak Republic's accession to the EU. Before this country's accession to the EU, welcoming foreign investors was a strategic decision, it carried a symbolic message. Thereafter, the incentive was gone. Furthermore, given the Gemerská Poloma deposit's strategic location – only three and a half hours by car away from Vienna – the State knew that the deposit would rapidly gain in business significance within the European market. Talc excavated at the deposit would be cost-effectively delivered to Western Europe over the Bratislava harbor and through the European water transportation network (Danube, Rhein-Main-Danube canal), as well as to neighboring Eastern European countries and their densely-populated areas (such Poland and Ukraine) via the European rail transportation network.

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60. 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 AND DESCRIPTION OF THE DISPUTE

A. STATE-SPONSORED EXPLORATION PROJECT IN SEARCH FOR HIGHLY-THERMAL MINERALIZATION

61. In the mid-eighties, a State-sponsored exploration program was launched in Eastern Czechoslovakia, north of the village of Gemerská Poloma in the Slovak Socialist Republic. *Geologický prieskum, n. p. Spišská Nova Ves* ("Geologický prieskum"), a State institute responsible for the nation-wide exploration of mineral deposits, indeed launched a surveying and exploration project in search for highly-thermal mineralization,[76] in particular tin and tungsten, in a metasomatic type deposit, the "Gemerská Poloma deposit,"[77] 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.

62. Findings of highly-thermal mineralization were reported in a 1983 "Final Report SGR – Highly-Thermal Mineralisation, PS" and a 1992 "Final Report Gemerská Poloma Sn, PS." Furthermore, a "protected mineral deposit" was defined by decision of the Spišská Nová Ves District Mining Office on November 3, 1993.[78]

63. While searching for highly-thermal mineralization, Geologický prieskum also detected the presence of magnesite-talc mineralisation in the District of Rožňava, near the Gemerska Poloma municipality.[79] Indeed, in 1986, magnesite-talc mineralisation was detected in one of the boreholes drilled during this survey.[80] Thereafter, between 1988

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76 Witness statement of Vojtech Agyagos, ¶ 7.

77 Witness Statement of Ondrej Rozložník, ¶ 9.

78 *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).

79 *See* **Exhibit C-117**, Ján Kilík, Geological Characteristics of the Talc Deposit in Gemerská Poloma – Dlhá dolina, Acta Montanistica Slovaca Year Vol. 2 (1997), 1, 71-80, p. 71, available at: http://actamont.tuke.sk/pdf/1997/n1/11kilik.pdf.

80 Borehole V-DD-10. *See* Witness Statement of Ondrej Rozložník, ¶ 10.

and 1995, 20 additional boreholes were drilled.[81] Nine of them yielded positive results.[82]

64. The State chose, however, not to engage in talc exploration. This lack of interest on the part of the State may be explained by the fact that the State may not have had the expertise or sufficient resources to carry out a proper and thorough drilling program in search for talc.[83]

65. This is why, as further explained below, as of 1992, the State allowed Dorfner, a German world-renowned group of companies specialized in the mining and refining of kaolin and crystalline quartz sand, to gather information regarding the deposit and samples from the Rožňava regional center of *Slovenská geológia, š. p. Spišská Nová Ves* ("Slovenská geológia"), for laboratory testing purposes.[84]

66. On May 21, 1993, the Ministry of Environment of the Slovak Republic merely 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.[85]

B. INITIAL ASSESSMENT OF THE DEPOSIT'S TALC RESERVES BY FOREIGN INVESTORS

67. In May 1993, an agreement was entered into by Dorfner and Geologický prieskum, granting the former the option to acquire rights over the deposit.[86]

68. By March 1995, Slovenská geológia had estimated the presence of approximately 146 million tons of *Z3* "possible geological" or "non-economic" reserves, that is, of *low-*

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81 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, V-DD-40, VHO-1, and VHO-2.

82 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, V-DD-40.

83 *See* Witness Statement of Ondrej Rozložník, ¶ 10.

84 *See* Witness Statement of Ondrej Rozložník, ¶ 11.

85 **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).

86 *See* Witness Statement of Ondrej Rozložník, ¶ 13.

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.[87] These figures were presented in a March 31, 1995 report entitled "Final Report and the Supply Calculation, Gemerská Poloma – Talc – VP," prepared by J. Kilík *et al.* (the "Kilík Report").[88] 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.[89]

69. Following contacts between Dorfner and the German group Thyssen Schachtbau ("Thyssen"), a world leader in the field of mining techniques, in particular with respect to building shafts and winzes, engineers employed by Thyssen's Austrian subsidiary, namely ÖIMC, started a technical evaluation of the deposit.[90] In parallel, as of March 1994, Dorfner re-assayed some of the State's old drill cores and carried out additional drilling, performed both vertical and horizontal cross-sections to calculate the deposit's talc reserves, tested new samples, and evaluated the works that would need to be carried out to prepare the deposit for excavation.[91]

70. In May 1995, Dorfner, Thyssen (through its subsidiary ÖIMC), and Slovenská geológia entered into discussions regarding the exploration of the deposit, whereby they agreed that Dorfner and Thyssen would finance the project of further exploration. Slovenská geológia, on the other hand, would make the area of exploration available to the two foreign investing companies, and a privately-owned company, yet to be constituted, would proceed with the exploration of the Gemerská Poloma deposit.[92] Multiple meetings with various State entities followed and, as further described below, Dorfner and Thyssen compiled a feasibility study which provided, *inter alia*, an assessment of the reserves and of the quality of talc at the Gemerská Poloma deposit.

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87 Witness Statement of Ondrej Rozložník, ¶ 15.

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

89 **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.

90 Witness Statement of Ondrej Rozložník, ¶ 14.

91 Witness Statement of Ondrej Rozložník, ¶ 14.

92 *See* Witness Statement of Ondrej Rozložník, ¶ 16.

71. 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^2 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.[93]

72. In January 1997, further to the technical evaluations initiated in 1993 by ÖIMC (see paragraph 69 *supra*), a feasibility study was compiled by geologists employed by Dorfner and Thyssen (the "Feasibility Study").[94] 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.

73. 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.[95]

74. 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%;

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93 **Exhibit C-20**, Decision on the Assignment of the Gemerská Poloma Mining Area, dated July 25, 1996.

94 **Exhibit C-121**, Feasibility Study Outline, TALC – GEMERSKA POLOMA, E. Haidecker, February 1997 ("Feasibility Study").

95 **Exhibit C-121**, Feasibility Study, p. 10.

- hence approximately 0,9 million tons of talc in such rich ore zones.[96]

75. 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.[97]

76. After the issuance of the Feasibility Study, it remained, however, necessary *inter alia* to map the location and distribution of high-grade talc, primarily in the Extraction Area, to confirm, if not refine 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.

C. AWARD OF MINING RIGHTS TO ROZMIN

77. Rozmin was legally constituted under the laws of Slovakia on May 7, 1997, for purposes of carrying out mining activities in the Slovak Republic.[98] The company was constituted with a registered capital of SKK 400,000.[99]

78. The first item on Rozmin's order of business was to acquire rights over the Mining Area in order to develop and exploit the deposit.

79. 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

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96 **Exhibit C-121**, Feasibility Study, p. 10.

97 **Exhibit C-121**, Feasibility Study, p. 10.

98 **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.

99 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 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*).

Authorization") for an indefinite period of time.[100] This authorization encompassed, *inter alia*, the "*opening, preparation and mining of the exclusive deposits*."[101]

80. Shortly thereafter, on June 5, 1997, the DMO approved the contractual transfer of the Gemerská Poloma Mining Area from Geological Survey to Rozmin.[102] Accordingly, on June 11, 1997, Geological Survey and Rozmin entered into an "Agreement for the Transfer of the Gemerská Poloma Mining Area" to Rozmin.[103] 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.*"[104]

81. 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 DMO of the execution of the Agreement for the Transfer of the Gemerská Poloma Mining Area to Rozmin.[105]

82. On June 24, 1997, this transfer was certified by the DMO.[106] 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*."[107] 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 a mining permit for mining

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100 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**).

101 **Exhibit C-22**, Mining Authorisation issued by the District Mining Office, dated May 14, 1997.

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

103 **Exhibit C-23**, Agreement on the Transfer of the Gemerská Poloma Mining Area, dated June 11, 1997.

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

105 **Exhibit C-124**, Letter from Geological Survey to the District Mining Office, dated June 11, 1997.

106 **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).

107 *Ibid.*

activity, in accordance with Article 10 of the Act on Mining Activities.[108] 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 mining activities.[109]

83. On October 31, 1997, November 3, 1997, and December 10, 1997, the Ministry of Health of the Slovak Republic,[110] Slovenský Plynárenský Priemysel šp (which stands for "Slovak Natural Gas Industry – State enterprise") – Slovtransgaz Division,[111] Vychodoslovenské Energetické Závody (which stands for "Eastern Slovak Power Plants"),[112] and Slovenský Vodohospodársky Podnik (which stands for "Slovak Water Management Company – State enterprise") – Povodie Hrona (the Hron River Basin)[113] consented in writing to Rozmin carrying out geological exploration and construction layout works.

84. 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*."[114]

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108 *See* Article 24(4) of Act No. 44/1988 on Protection and Utilization of Mineral Resources.

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

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

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

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

113 **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.

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

D. ROZMIN'S PAYMENT OF THE FEASIBILITY STUDY AND FINANCIAL ASSESSMENT OF THE PROJECT

85. The second item on Rozmin's order of business was to purchase the Feasibility Study prepared by Thyssen and Dorfner. During Rozmin's first Shareholder Meeting, which was held on May 26, 1997, it was indeed unanimously decided that Rozmin would purchase the Feasibility Study from Thyssen and Dorfner, and that the cost thereof would be borne by the shareholders on a *pro rata* basis.[115] The Feasibility Study was therefore invoiced by Dorfner to Rozmin in the amount of DM 2,485,000.[116]

86. Ultimately, however, EuroGas financed entirely Rima Muráň's contribution, which amounted to 43% of the Feasibility Study's cost, *i.e.* DM 1,068,550.00.[117] 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.

87. In fact, as early as of 1998, the working capital in Rozmin was injected primarily by EuroGas, either directly or through its wholly-owned subsidiary, EuroGas GmbH, given that as of March 1998, EuroGas GmbH held a 55% shareholding interest in Rima Muráň, before actually acquiring, in 2002, a 43% shareholding interest in Rozmin[118] (see paragraphs 15 and 16 above). To purchase its 55% shareholding interest in Rima Muráň (and thus become a majority shareholder in Rima Muráň and, by the same token, an indirect 23,65% shareholder in Rozmin), EuroGas GmbH entered, on March 16, 1998, into four separate share transfer agreements with each of Rima Muráň's four

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115 **Exhibit C-131**, Minutes of Rozmin's Shareholder Meeting held on May 26, 1997, p. 3.

116 **Exhibit C-132**, Invoice No. 1-005 from Gebrüder Dorfner, dated June 10, 1998.

117 *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).

118 **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 Muráň sro and EuroGas GmbH, dated March 25, 2002.

shareholders.[119] In consideration for the 13,75% shareholding interest that EuroGas GmbH was acquiring from each of the shareholders, EuroGas GmbH agreed, *inter alia*, to finance Rima Muráň's 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.[120]

88. Following the purchase of the Feasibility Study by Rozmin's shareholders, critical drilling of the deposit was performed and studies undertaken by Rozmin to further confirm both the nature and extent of the reserves and the project's financial viability, as set out below.

E. CRITICAL EXPLORATION PERFORMED BY ROZMIN, IMPROVEMENT OF TALC RESERVES, ASSESSMENT OF THE TALC'S QUALITY AND SELECTION OF A PROCESSING METHOD

89. Promptly after the DMO's issuance of Rozmin's General Mining Authorization[121] and the transfer, from Geological Survey to Rozmin, of the Gemerská Poloma Mining Area,[122] Rozmin ordered that a number of new boreholes be drilled for purposes of further investigating and refining the assessment of the reserves in the Extraction Area,

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119 **Exhibit C-6**, Contract on the Transfer of a Business Share between the Commercial Company Rima Muráň 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 Muráň 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 Muráň 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 Muráň sro between EuroGas GmbH and Mr. Ján Baláž, dated March 16, 1998.

120 **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).

121 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**).

122 **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; **Exhibit C-24**, Certificate on acquisition of rights to the mining area issued by the District Mining Office, dated June 24, 1997.

which the Feasibility Study had identified as being at least one of the areas with the highest concentration of talc.

90. As Rozmin was then considering possible ways of securing financing, it consulted the German State-owned company Deutsche Investitions- und Entwicklungsgesellschaft GmbH ("DEG"). DEG is one of the largest European development finance institutions for long-term projects and company financing, and 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 countries and countries in transition.

91. Initial contacts with DEG had in fact been initiated by Thyssen and Dorfner as early as in September 1995, and several meetings had taken place thereafter. DEG suggested that an independent assessment of the Feasibility Study be carried out in order to ensure that the project would be profitable. During its first Shareholder Meeting on May 26, 1997, Rozmin therefore decided to proceed with the review of the Feasibility Study by an independent entity, and DEG thereafter instructed the German company Hansa GeoMin Consult, GmbH ("Hansa GeoMin") to carry out this independent review of the Feasibility Study.[123]

92. For purposes of this review, Hansa GeoMin "*studied in detail*" the Feasibility Study and all the available documentation in relation thereto.[124] 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.[125]

93. 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

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123 **Exhibit C-131**, Minutes of Rozmin's Shareholder Meeting held on May 26, 1997, p. 4.

124 **Exhibit C-137**, Analysis and Evaluation of the Feasibility Study Talk Gemerská Poloma, Slovakia, dated January 1998, p. 7.

125 *Ibid.*

the "*technical and financial viability*" of the project.[126] More specifically, the DEG Report dealt *inter alia* with 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.[127]
- Market: The Report anticipated that the market would be the European market, to be supplied with 1.2 million tons of talc per year.[128]
- Financial analysis: The Report relied on the investment proposed in the Feasibility Study, considered an investment program in two stages, 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 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%.[129]

94. 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.[130]

95. The findings of the DEG Report, just like those of all of Rozmin's other studies (discussed below at paragraphs 103 *et seq*.), which confirmed the very high value of the deposit, bare great probative value. All of these reports were indeed prepared long before any dispute or prospects of arbitration, all of them by independent entities that had no financial interest in the project and, in the case of the DEG Report, upon the

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126 *Ibid.*

127 **Exhibit C-137**, Analysis and Evaluation of the Feasibility Study Talk Gemerská Poloma, Slovakia, dated January 1998, p. 5.

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

129 **Exhibit C-137**, Analysis and Evaluation of the Feasibility Study Talk Gemerská Poloma, Slovakia, dated January 1998, p. 24.

130 **Exhibit C-137**, Analysis and Evaluation of the Feasibility Study Talk Gemerská Poloma, Slovakia, dated January 1998, p. 5.

instruction of a potential third-party funder whose only goal was to examine the profitability of the project.

96. While Hansa Geomin was reviewing the Feasibility Study and other available documentation, Rozmin launched the drilling of additional boreholes in the Extraction Area, intended to allow a refined assessment of the reserves.

97. In this respect, Rozmin initially issued individual orders to Rima Muráň, instructing it to drill new boreholes one at a time. In August 1997, Rozmin instructed Rima Muráň to drill borehole No. V-DD-38.[131] Shortly thereafter, in January and June 2008, Rozmin ordered the drilling of two additional boreholes, namely boreholes Nos. V-DD-39[132] (which was an inclined borehole) and V-DD-41.[133] Then, on the basis of data collected from these three boreholes, Rozmin launched a new – larger scale – drilling program.

98. On November 9, 1998, it 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 of much larger diameter and tonnage.[134] The last of these boreholes was drilled in April 1999.[135]

99. Drilling these seven additional boreholes (V-DD-38, V-DD-39, and V-DD-41 to V-DD-45) was critical to the confirmation of the Extraction Area's "blocked out" or "proven" talc reserves.[136] The purpose of this additional drilling was thus to transform the assets of the Slovak Republic into proven – commercially viable – reserves.

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131 **Exhibit C-138**, Rima Muráň sro Invoice No. 436/021097-C, dated October 2, 1997.

132 **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.

133 **Exhibit C-142**, Rima Muráň sro Invoice No. 115/100698-C, dated June 10, 1998.

134 **Exhibit C-143**, Exploration Drilling Contract between Rozmin sro and Rima Muráň sro, dated November 9, 1998.

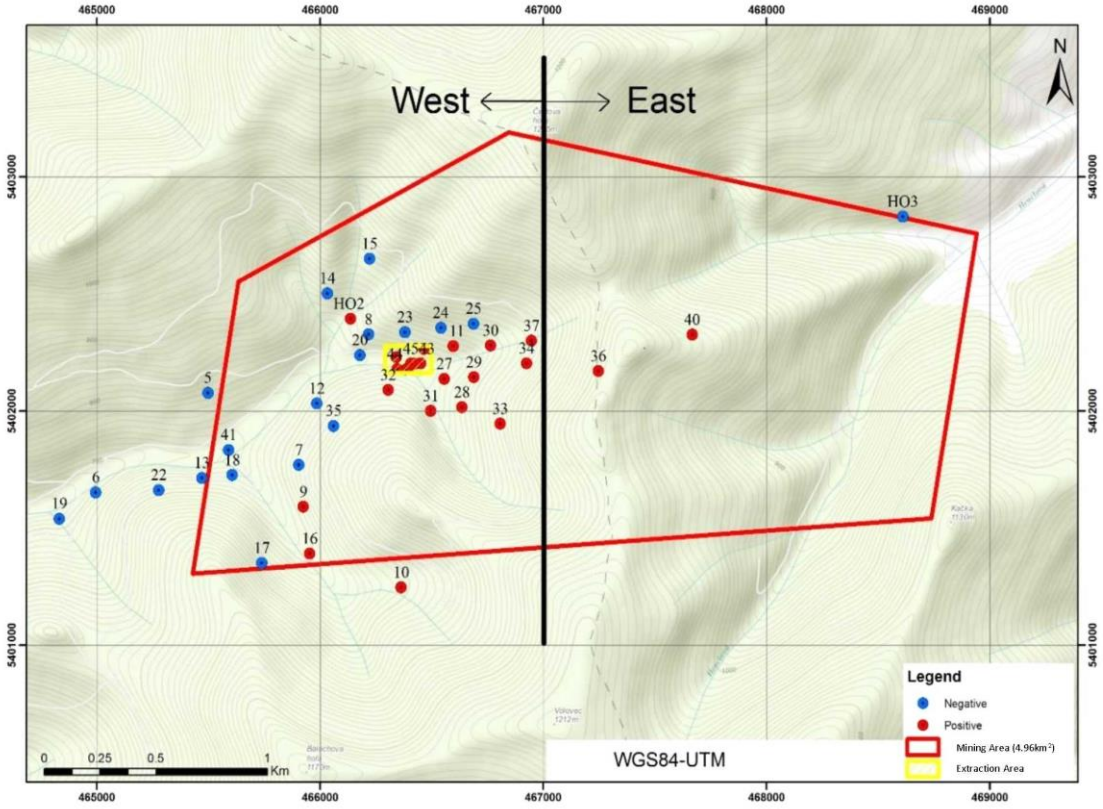
135 **Exhibit C-144**, Rima Muráň sro Invoice No. 78/010699-C, dated June 1, 1999.

136 Witness Statement of Ondrej Rozložník, ¶ 28.

100. Throughout these drilling works, the core extracted from the boreholes had to be measured, logged, and analysed. Rozmin outsourced part of the task to sub-contractors including, *inter alia*, GEOMER,[137] KORAL s.r.o. SNV,[138] and UJPAL – SNV.[139]

101. 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.

Mining Area:

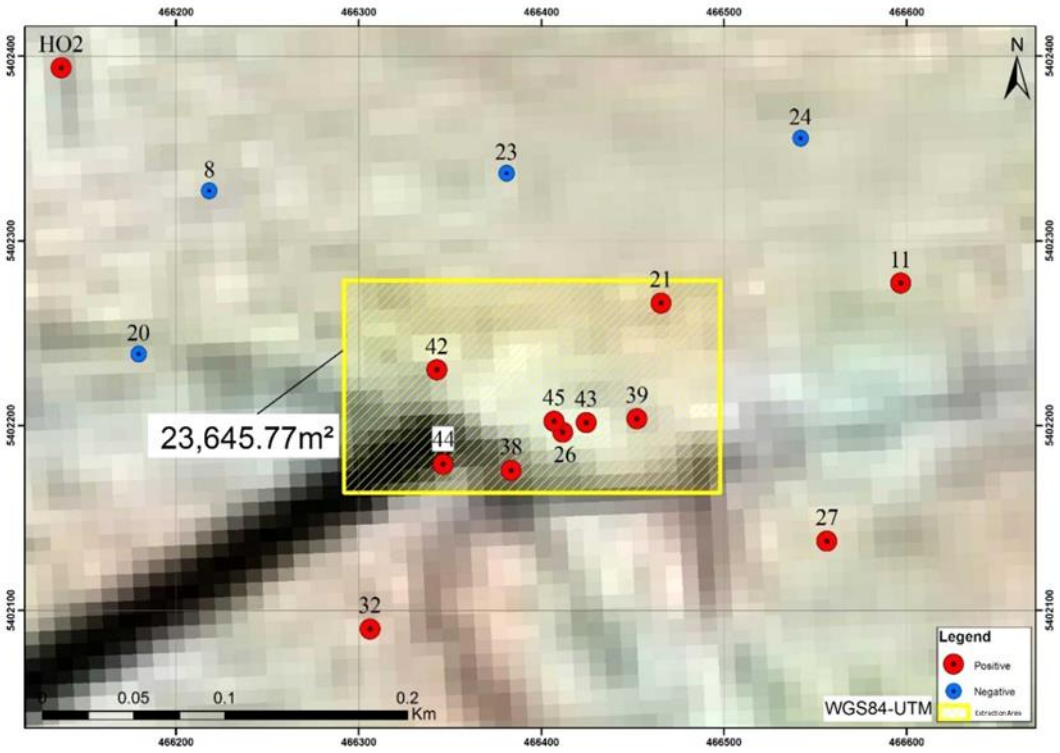


137 *See* **Exhibit C-145**, GEOMER Invoice No. 16/98, dated December 15, 1998; **Exhibit C-146**, GEOMER Invoice No. 2/99, dated April 21, 1999.

138 *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.

139 **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.

Extraction Area:



(WAI Expert Report, p. 12)

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

103. Rozmin instructed the first company, namely 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.

104. Kloibhofer issued its report on April 4, 2000 ("the Kloibhofer Report"). Its findings went beyond the expectations of Rozmin and its shareholders.[140]

105. 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

140 **Exhibit C-154**, Kloibhofer Report, dated April 4, 2000.

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.[141]

106. Indeed, Kloibhofer identified, based on the new data collected by Rozmin, approximately 850,000 m^3 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,[142] 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.[143] 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*."[144]

107. 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 sections are contiguous*."[145] From a technical standpoint, this implied that the talc extraction process would be much more cost effective than initially anticipated.

108. In light of the above, the findings of the Kloibhofer Report were, to use Kloibhofer's own words, "*extremely positive*."[146] The work performed by Kloibhofer was invoiced to Rozmin for a total amount of SKK 202,167.24[147]

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141 **Exhibit C-154**, Kloibhofer Report, dated April 4, 2000, p. 17.

142 **Exhibit C-154**, Kloibhofer Report, dated April 4, 2000, p. 17.

143 **Exhibit C-154**, Kloibhofer Report, dated April 4, 2000, p. 4.

144 **Exhibit C-154**, Kloibhofer Report, dated April 4, 2000, p. 16.

145 **Exhibit C-154**, Kloibhofer Report, dated April 4, 2000, p. 16.

146 **Exhibit C-154**, Kloibhofer Report, dated April 4, 2000, p. 16.

109. ARP, in turn, 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 concluded that the talc to be extracted from the Extraction Area would be of particularly high purity and whiteness.

110. 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.[148] ARP recommended that the flotation method be further investigated as it might produce better results.[149]

111. 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*."[150] The only drawback was that the degree of whiteness of the talc product would "only" be in the range of 84% to 87%.[151] However, ARP stated that sorting by way of flotation did not have to be used on the entirety of the extracted raw material.[152] 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.

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147 **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.

148 **Exhibit C-160**, ARP Survey Report, dated on December 17, 1999, pp. 24-26.

149 **Exhibit C-160**, ARP Survey Report, dated on December 17, 1999, p. 26.

150 **Exhibit C-161**, ARP Interim Report, dated on May 5, 2000.

151 **Exhibit C-161**, ARP Interim Report, dated on May 5, 2000.

152 **Exhibit C-161**, ARP Interim Report, dated on May 5, 2000.

112. 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:[153]

- 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%.

113. 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.[154]

114. The three Reports prepared by ARP were invoiced to Rozmin for a total amount of SKK 693,846.49.[155]

115. The extensive exploration and further studies carried out by Rozmin (and thus by Belmont and EuroGas) between 1997 and 2001, described above at paragraphs 96 *et seq.*, constitute irrefutable proof of Rozmin's critical role in confirming the talc reserves in the Extraction Area, well beyond the Feasibility Study it was provided in

153 **Exhibit C-162**, ARP Final Report, dated on May 29, 2000, p. 26.

154 **Exhibit C-162**, ARP Final Report, dated on May 29, 2000, p. 11.

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

January 1997 (and which EuroGas moreover and in any event reimbursed, as set out in paragraphs 85 to 87 above).

116. 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, the cost of which was borne in most part by EuroGas (see paragraphs 85 to 87 above). 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 than initially anticipated. Lastly, Rozmin confirmed the quality and quantity of the end-product which 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.

117. In sum, in 2000, once Rozmin had concluded its initial drilling program, and received 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 been de-risked. All that remained to be done was to open the deposit and start exploitation. In the meantime, Rozmin had carried out preparatory works and secured all required authorizations and permits via a time consuming and difficult bureaucratic process, as set out below.

F. WORKS CARRIED OUT AND PERMITS SECURED BETWEEN 1998 AND 2001

118. Immediately upon its incorporation, 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"), which described how Rozmin intended to open and exploit the deposit.[156] Dr. Rozložník is a geologist who had, at the time, no less than four decades of experience in surveying and exploring deposits in the Slovak Republic and who spent his career, as a geologist, working for Slovak State mining entities, until he joined Rozmin as a Managing

[156] **Exhibit C-168,** Plan for the Opening, Preparation, Development, and Exploitation submitted by Rozmin sro on January 15, 1998.

Director in 1997.[157] He therefore had detailed knowledge of local mining requirements, *inter alia*, in respect of permits.

119. On January 16, 1998, Rozmin filed a request to carry out mining activities at the Gemerská Poloma deposit, together with the 1998 POPD submitted for approval by the authorities.[158] Rozmin also secured and submitted official statements from public entities – including the Department of Environment of the Regional Office of Košice, the Municipality of Germerská 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, and which were necessary before Rozmin's 1998 POPD could be approved by the DMO and a mining permit could be delivered. [159]

120. These official approvals 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.

121. 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

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157 Witness Statement of Ondrej Rozložník, ¶ 5.

158 **Exhibit C-169**, Rozmin's Mining Authorization Request to the District Mining Office, dated January 16, 1998.

159 *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.

permit to carry out mining activities in the Mining Area until 2002 (the "Authorization on Mining Activities at Gemerská Poloma").[160]

122. Rozmin then mandated the State-owned company *Rudný projekt a.s.* ("Rudný") 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.[161]

123. The Project Design prepared by Rudný was exhaustive. It first described the mining works *per se*. These 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.

124. On the basis of the Project Design prepared by Rudný, Rozmin started applying for all the necessary permits, authorizations, and leases.

125. 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,

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160 **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.

161 **Exhibit C-170**, Rudný Invoice dated November 6, 1998.

("SVP Povodie Hrona"), the local branch of the public entity in charge of water management.

126. Rozmin therefore first had to 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").

127. Rozmin applied to the Department of Environment in the District Office of Rožňava on July 2, 1998 and, after having further supplemented its application on October 12, 1998, was granted a Land Use Permit on October 23, 1998.[162] In order to be granted this Permit, Rozmin had 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,[163] the Hron River Basin Branch of the Slovak Water Management Company,[164] the Eastern Slovak Waterworks and Sewers, Branch Revuca,[165] the Department of Fire Protection in the District Office of Rožňava,[166] the Department of Civil Protection in the District Office of Rožňava,[167] and the State Health Officer of the Rožňava District.[168]

128. Then, as the land parcels were owned by the Slovak Republic and administered by public entities, Rozmin duly secured a temporary five year exclusion of the Forest Land Parcels from the forest land fund,[169] and entered into a lease agreement with LESY

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162 **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.

163 **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).

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

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

166 **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).

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

168 **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).

169 **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.

Košice over the said land parcels.[170] It also entered into a lease agreement with SVP Povodie Hrona over the Water Management Land Parcels.[171] This lease agreement was initially set to expire in December 2000, before being extended until September 1, 2001.[172]

129. Thereafter, Rozmin was able to obtain building permits for (i) the erection of the temporary Above-Ground Structures,[173] (ii) the construction of the Water Management Facilities,[174] and (iii) the relocation of the forest road and construction of a bridge over the Dlhý potok stream.[175] For each of these permits, Rozmin had obtained and submitted official statements of approval from several public entities, including LESY 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.[176]

130. In addition, Rozmin also obtained, *inter alia*, an authorization for the storage and use of explosives,[177] an authorization to use roads,[178] as well as an exemption from the ban, under Article 19(1)(b) of Act No. 100/1977 Coll. on Forest Management and State

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170 **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**).

171 **Exhibit C-184**, Lease Agreement with SVP dated February 22, 1999.

172 **Exhibit C-185**, Minutes of handover between SVP and Rozmin, dated August 28, 2001.

173 **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).

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

175 **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).

176 *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.

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

178 **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.

Forest Administration, on the use of motor vehicles in forest areas.[179] 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.[180] 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.[181] Each month, Rozmin made a payment to Rima Muráň for the use of this high-voltage electricity line.[182] All payments were made on time.

131. By the end of 1999, Rozmin had secured all the necessary permits, authorizations and leases. It also had substantial topographic and mapping works carried out *inter alia* by GEOMER[183] and KORAL s.r.o. SNV,[184] as well geological cuts notably by GEOENVEX.[185]

132. In June 2000, Rozmin therefore initiated a tender for the award of the construction works.[186] The tender was based on the Project Design prepared by Rudný and contained

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179 **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).

180 **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)**.

181 **Exhibit C-196,** Agreement on Temporary Use of the High Voltage Line by Rima Muran, dated July 26, 2000.

182 *See* Witness Statement of Ondrej Rozložnik, ¶ 40.

183 *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.

184 *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.

185 *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.

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

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 119 *et seq*.

133. 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.[187] Eventually, based on financial and technical considerations, Rima Muráň's bid was selected. It was among the cheapest and Rima Muráň was already familiar with the project and had already carried out extensive work at the deposit.

134. 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'."[188] The scope of this contract reflected the Project Design prepared by Rudný and described above at paragraph 123.

135. The price initially agreed between Rozmin and Rima Muráň was SKK 71,500,000, and works started on September 25, 2000.[189] However, the contract price was later increased to 73,417,000 SKK (VAT not included) by way of amendment.[190] Rima Muráň's requests for additional payments, among other issues, led to the falling out between Rozmin and Rima Muráň, and eventually to a suspension of works.[191]

136. By letter dated September 28, 2001, Rima Muráň informed Rozmin that it would cease working at the Mining Area on October 1, 2001, and warned Rozmin of the consequences of the stoppage of opening works, in particular that electricity supply

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

188 **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.

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

190 **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.

191 *See* Witness Statement of Ondrej Rozložník, ¶ 43.

would be shut down on October 3, 2001, which would result in the inundation of the mining facilities. Rima Muráň also indicated that if the works were not resumed by October 10, 2001, it would be forced to start removing the voltage unit.[192]

137. In October 2001, the works at the deposit were thus temporarily suspended, due primarily to the fact that Rozmin's contractor, Rima Muráň, was seeking the payment of additional, extra-contractual, amounts.

138. On October 15, 2001, Rozmin accordingly notified the DMO of the suspension of mining activities consequent to Rima Muráň's cessation of works.[193]

139. 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.[194]

140. At the time of the suspension of work, 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.[195]

141. 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.

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192 **Exhibit C-220**, Letter from Rima Muráň sro to Rozmin sro, dated September 28, 2001.

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

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

195 **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.

G. ROZMIN'S EFFORTS TO RESUME WORKS AS OF 2002 AND INITIAL DISCUSSIONS WITH POTENTIAL TALC PURCHASERS

142. The 2001 suspension of mining activities did not bring Claimants' investments to a standstill. Despite the suspension of works, not only did Rozmin attempt to settle outstanding issues with its contractor, Rima Muráň, but Belmont and EuroGas also continued to provide the working capital Rozmin needed for the project.

143. In addition, as further described below, Rozmin undertook all necessary steps to ensure that the project would remain in compliance with Slovak laws and to secure 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.

144. Finally, as of 2002, EuroGas entered into negotiations with potential purchasers of talc to be extracted from the deposit, including the Mondo Minerals group, which is the world's second largest talc producer.

145. 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 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.[196]

146. On December 20, 2002, Rozmin 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[197] amended to incorporate an evaluation of irrecoverable and irremovable dangers. It further undertook to submit the requested statements of approval as soon as it would receive them.[198] On January 16, 2003, the DMO closed the procedure for extension on the ground that Rozmin had not submitted the necessary documents within the allocated time, and considered the

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

197 **Exhibit C-224**, Letter from Rozmin sro to District Mining Office, dated December 20, 2002.

198 **Exhibit C-224**, Letter from Rozmin sro to District Mining Office, dated December 20, 2002.

mining authorization to have lapsed on December 31, 2002.[199] Upon Rozmin's appeal, the Main Mining Office however reversed the decision on May 15, 2003.[200]

147. 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.[201] On November 4, 2003, Rozmin submitted the requested documents. On November 27, 2003, the DMO found Rozmin's application to be missing a statement of approval from the Rožňava branch of Lesy SR, s.p. Banska Bystrica ("LESY Rožňava"), and added that it was not satisfied with the amendments to the Plan for the Opening, Preparation, Development, and Exploitation.[202] On January 8, 2004, Rozmin submitted the requested statement of approval and an amended Plan for the Opening, Preparation, Development, and Exploitation (the "2003 POPD"). On February 6, 2004, the DMO requested further amendments to the 2003 POPD,[203] which Rozmin incorporated.[204]

148. Eventually, after holding a hearing on April 1, 2004,[205] the DMO approved the request and, on May 31, 2004, extended Rozmin's Authorization on Mining Activities at Gemerská Poloma to November 13, 2006.[206]

149. In order to be granted this extension, 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

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

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

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

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

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

204 **Exhibit C-230**, Plan for the Opening, Preparation, Development, and Exploitation approved on May 31, 2004.

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

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

Basin Branch of the Slovak Water Management Company, and the Revuca Branch of the Eastern Slovak Waterworks and Sewers.[207]

150. Furthermore, throughout the lengthy process of having a revised Plan for the Opening, Preparation, Development, and Exploitation approved, Rozmin followed up on all the administrative permits it had secured to ensure that they did not expire, as non-exhaustively set out below.

151. 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,[208] *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,[209] 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.[210] This lease contract was approved by the Ministry of Agriculture on April 28, 2004.[211]

152. 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.[212] The application was approved on June 21, 2001, thereby extending the completion date from June 30, 2001, to March 31, 2002.[213]

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207 **Exhibit C-27**, Authorisation of Mining Activity in the Mining Area "Gemerská Poloma," dated May 31, 2004 (Ref. 1023/511/2004), pp. 5-6.

208 **Exhibit C-232**, Lease contract dated July 1, 2002.

209 **Exhibit C-233**, Decision of the Department of Lands, Agriculture, and Forestry of the District Office of Rožňava, dated October 21, 2003.

210 **Exhibit C-234**, Lease contract dated November 30, 2003.

211 **Exhibit C-234**, Lease contract dated November 30, 2003.

212 *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).

213 *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).

153. 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.[214] 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.[215] Upon Rozmin's request dated December 4, 2002, the completion date for the Above-Ground Structures was further extended to October 31, 2003.[216]

154. 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.[217] 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, and the Department of Environment, the State Nature and Landscape Protection Administration in Rožňava. [218]

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214 **Exhibit C-237**, Decision of the Department of Environment of the District Office of Rožňava, dated October 4, 2002 (Ref. SP 2002/00325/001-0L).

215 **Exhibit C-237**, Decision of the Department of Environment of the District Office of Rožňava, dated October 4, 2002 (Ref. SP 2002/00325/001-0L), p. 3.

216 **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.

217 **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.

218 **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.

155. Thereafter, the completion date for the Water Management Facilities was extended on December 19, 2002 to October 31, 2003,[219] and on May 17, 2004 to September 30, 2004.[220]

156. 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,[221] and supplemented, on April 19, 2004, with the statement of the Slovak Water Management Company of Banská Bystrica, dated March 31, 2004.[222] 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.[223] Eventually, on October 26, 2004, Rozmin was granted an extension for the completion of the remaining Water Management Facilities until May 30, 2005.[224]

157. Lastly, on August 12, 2002, Rozmin obtained an amendment to the building permit for the relocation of the forest road and construction of a bridge over the Dlhý potok stream,[225] was granted an extension on its permit to enter and use vehicles in forest areas until November 13, 2006,[226] and entered into an new contract with Lesy Rožňava authorizing Rozmin to use forest roads until November 13, 2006.[227]

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219 **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.

220 **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.

221 **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).

222 **Exhibit C-243**, Statement of the Water Management Company in Banska Bystrica, dated March 31, 2004 (Ref. 262-125/2004).

223 **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.

224 **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).

225 **Exhibit C-246**, Decision of the Department of Transport and Road Administration of the District Office of Rožňava, dated August 12, 2002.

226 **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,

158. As to contacts with 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.

159. 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.[228] 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.[229]

H. RESUMPTION OF MINING ACTIVITIES AND AUTHORIZATION TO CARRY OUT MINING ACTIVITIES UNTIL NOVEMBER 2006

160. On May 31, 2004, the DMO authorized Rozmin to resume mining activities pursuant to Article 10 of the Act on Mining Activities.[230] 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.[231] Rozmin therefore 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.

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.

227 **Exhibit C-249**, Contract on Common Use and Funding of Maintenance and Repairs of Forestry Roads, dated August 13, 2004.

228 **Exhibit C-250**, Email from Mondo Omya, dated June 27, 2002.

229 *See* **Exhibit C-251**, Emails exchanged with Mondo Omya between September 26, 2002 and September 30, 2002.

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

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

161. Four companies presented bids, namely Banské stavby as Prievidza, Uranpress s.r.o. Spišská Nová Ves, Váhostav a.s. Žilina, and Siderit.[232] 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,[233] 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.[234] 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,[235] 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.[236]

162. Accordingly, 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).[237]

163. 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.[238] Furthermore, Siderit pumped out water

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232 **Exhibit C-252**, Letter from JUDr. Straka to Rozmin sro, dated August 10, 2004.

233 **Exhibit C-253**, Bid for Opening the Talc Deposit in Gemerská Poloma – Legal and Organizational Documents, submitted by Siderit on August 3, 2004, pp. 24-25.

234 **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.

235 **Exhibit C-258**, Bid for Opening the Talc Deposit in Gemerská Poloma – Legal and Organizational Documents, submitted by Siderit on August 3, 2004, p. 24.

236 Witness Statement of Ondrej Rozložník, ¶ 56.

237 **Exhibit C-259**, Contract for the development of the Gemerská Poloma talc deposit entered into between Siderit and Rozmin sro on November 5, 2004.

238 *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.

that had flooded the mine as a result of the suspension of works.[239] Finally, Siderit performed some repair works on the Winze and electrical installations, and completed the Portal.[240]

164. 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 made any reference to the possibility of a cancellation of the assignment of the Mining Area to Rozmin.[241]

165. On November 8, 2004, Rozmin officially announced to the DMO that it would resume mining activities by November 18, 2004.[242] Here again, 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.

166. 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.

167. 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 the latter 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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239 *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.

240 *See inter alia* **Exhibit C-264**, Invoice from Siderit No. 510847, dated December 29, 2004.

241 Witness Statement of Ondrej Rozložník, ¶ 59; Witness Statement of Vojtech Agyagos, ¶ 35.

242 **Exhibit C-267**, Letter from Rozmin sro to the District Mining Office, dated November 8, 2004.

to carry out mining activities until November 13, 2006.[243] 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-*

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

> *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.*[244]

168. 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.

169. 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 set out in Section I.B. above 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.

[244] **Exhibit C-28**, Minutes of the December 8, 2004 inspection by the District Mining Office; emphasis added.

I. REVOCATION OF ROZMIN'S MINING RIGHTS AND AWARD OF THESE RIGHTS TO THIRD PARTIES

170. 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.[245] In other words, Slovakia simply decided to take away Rozmin's rights once the deposit's reserves had been confirmed and the works were in progress. Slovakia did so not only without valid justification, but also abruptly, without any prior notice to Rozmin, and moreover without compensation.

171. On January 3, 2005, once the decision of revocation of Rozmin's mining rights had, in fact, already been taken and a new tender publicly announced, the Slovak Republic wrote to Rozmin, ironically by way of a letter signed by Mr. Baffi himself (namely, the Director of the DMO who had carried out the above-mentioned site inspection less than a month earlier, acknowledged and recorded Rozmin's full compliance of its obligations, and reiterated Rozmin's right to carry out mining activities until November 13, 2006), to announce *post facto* that Rozmin's rights had *de facto* been revoked and were to be awarded to a new organization.[246]

172. The explanation offered by the DMO to justify the initiation of a new tender was that more than three years had elapsed between the suspension of the works on site (October 1, 2001) and their resumption (November 18, 2004).[247] 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.[248]

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245 **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.

246 **Exhibit C-30**, Letter from the District Mining Office to Rozmin sro, dated January 3, 2005 (Ref. 2405/451.14/2004-I).

247 **Exhibit C-30**, Letter from the District Mining Office to Rozmin sro, dated January 3, 2005 (Ref. 2405/451.14/2004-I).

248 *See* Article 27(12) of Act No. 44/1988 on Protection and Utilization of Mineral Resources, as amended by Act No. 558/2001.

173. 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.

174. On April 21, 2005, the DMO held a tender procedure. Given the quality and extent of reserves confirmed by Claimants and the price of talc at the time, two of the world's largest talc producers, namely Mondo and IMI Fabi llc ("IMI Fabi"), took part in the tender.

175. The DMO nevertheless assigned the Gemerská Poloma deposit to Economy Agency RV s.r.o. ("Economy Agency"), a Slovak Republic-incorporated company with little if any expertise at all in the mining sector.[249] Economy Agency was essentially a shell company, founded and owned by Ms. Zdenka Čorejová,[250] Rozmin's former accountant and spouse of Mr. Peter Corej, CEO and shareholder of Rima Muráň. Nothing suggests that Ms. Čorejová had any expertise in the field of talc mining, or that Economy Agency had the technical or the financial capacity to carry through the project. Furthermore, to carry out the project, Economy Agency only benefited from a none-binding financing promise from a bank.[251] Mondo Minerals and IMI Fabi were ranked fourth and sixth in the bidding results.[252] Companies that ranked second and third were, just like Economy Agency, far less experienced Slovak-owned companies. Rozmin was merely informed of the outcome of the tender process on May 3, 2005.[253]

176. Although, as further discussed below, the Supreme Court thereafter cancelled, on February 27, 2008, the DMO's decision to assign the Gemerská Poloma "concession" to Economy Agency, on the ground that this decision was in breach of Slovak

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249 **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.

250 *See* Witness Statement of Vojtech Agyagos, ¶ 45.

251 **Exhibit C-268**, Complaint of Mondo Minerals before the District Mining Office, dated May 18, 2005.

252 **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.

253 **Exhibit C-32**, Letter from the District Mining Office to Rozmin sro, dated May 3, 2005 (Ref. 887/485/2005).

substantive and procedural law (see paragraphs 187 and 191),[254] the DMO nevertheless awarded 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.[255] 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.[256]

177. Thereafter, on August 12, 2008, the District Mining Office also revoked Rozmin's General Mining Authorization, which had been delivered on May 14, 1997 (see paragraph 79 above).[257]

178. Finally, notwithstanding a second decision of the Supreme Court (further discussed below at paragraphs 195 *et seq*.), handed down on May 18, 2011 and declaring the award of mining rights to VSK Mining to be unlawful,[258] 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.[259]

J. LOCAL PROCEEDINGS FOR THE REINSTATEMENT OF ROZMIN'S MINING RIGHTS

179. Immediately after having been informed, on January 3, 2005, of the revocation of its mining rights over the Gemerská Poloma deposit, Rozmin initiated local proceedings to seek the reinstatement of its rights under Slovak law. As explained in greater detail

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254 **Exhibit C-33**, Decision of the Supreme Court of the Republic of Slovakia, dated February 27, 2008 (Ref. 6Sz0/61/2007-121).

255 **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).

256 **Exhibit C-269**, Extract from the company Business Register in respect of Economy Agency RV, sro, dated June 5, 2008.

257 **Exhibit C-35**, Decision on the Revocation of the Authorization for Mining, dated August 12, 2008 (Ref. 104-1620/2008).

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

259 **Exhibit C-37**, Decision of the District Mining Office, dated March 30, 2012 (Ref. 157-920/2012), pp. 82 *et seq*.

below, these proceedings led to two Slovak Supreme Court decisions which unequivocally confirmed that the revocation of Rozmin's mining rights over the Gemerská Poloma deposit was in breach of Slovak procedural and substantive laws. Notwithstanding these Supreme Court judgments, the DMO failed to reinstate Rozmin's rights, and instead awarded these rights to other entities.

180. Rozmin also challenged the DMO's revocation, by way of decision dated August 12, 2008, of its General Mining Authorization. The Supreme Court issued a third decision holding that this revocation constituted yet again a breach of Slovak law.

1. Supreme Court Decision of February 27, 2008

181. On January 13, 2005, Rozmin challenged the DMO's notification of January 3, 2005, by which the DMO had announced that it had requested a new tender for the assignment to another company of mining rights over the Gemerská Poloma deposit.

182. On February 16, 2005, in the presence of representatives of the MMO, Rozmin executives met with Mr. Pavol Rusko, then Minister of Economy of the Slovak Republic, in order to discuss the revocation of Rozmin's mining rights. In the course of this meeting, instead of trying to remedy Slovakia's breaches, Mr. Rusko attempted to discourage Rozmin from undertaking any legal action. He opined that a legal action would be lengthy and stated that the DMO was determined to go through with the new tender procedure. In other words, Mr. Rusko asked Claimants to simply let go of the project and forgo their mining rights.

183. Mr. Rusko's warning was no empty threat. On April 21, 2005, the DMO held a tender procedure and assigned the Gemerská Poloma deposit to Economy Agency, a Slovak-incorporated company with little if any expertise at all in the mining sector.[260] Economy Agency had been incorporated by Rozmin's former accountant[261] who had neither the expertise nor the means required to carry through the Gemerská Poloma project. Rozmin, itself embroiled in the process of actively challenging the unlawful

[260] **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.

[261] *See* Witness Statement of Vojtech Agyagos, ¶ 45.

withdrawal of its rights over the Gemerská Poloma deposit, was merely informed of the outcome of the tender process on May 3, 2005.[262]

184. On September 27, 2005, Rozmin initiated legal proceedings before the Slovak judiciary, namely before the Regional Court in Košice, seeking a revision of the DMO's decision of April 22, 2005, on the ground that the procedure by which mining rights over the Gemerská Poloma deposit had been assigned to Economy Agency was unlawful under Slovak law.

185. By decision dated February 7, 2007, the Regional Court in Košice rejected Rozmin's complaint on the ground that Rozmin did not have standing to bring an action as it was not and should not have been a party to the procedure that had led to the DMO's decision of April 22, 2005.[263]

186. Rozmin appealed the decision of the Regional Court, arguing that the District Mining Office's request for the publication of a new tender on the ground that there had been an interruption of works by Rozmin between October 1, 2001 and November 18, 2004 was factually and legally incorrect. More specifically, Rozmin contended, first, that "*the Mining Act* [did] *not stipulate such grounds for assignment of mining area of exploitation to another organization.*"[264] Second in any event, since a notification of suspension of mining activities was not filed before November 20, 2001, mining activities had in fact not been interrupted for more than three years. Third, Rozmin's authorization to exploit the reserved deposit could not have lapsed *de jure* after expiry of a three-year period, given that according to Article 27(1) of the Mining Act, the authorization could only have expired once a judgment on cancellation of the area of

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262 **Exhibit C-32**, Letter from the District Mining Office to Rozmin sro, dated May 3, 2005 (Ref. 887/485/2005).

263 *See* **Exhibit C-33**, Decision of the Supreme Court of the Republic of Slovakia, dated February 27, 2008 (Ref. 6Sz0/61/2007-121), pp. 1-3. The Regional Court of Košice concluded "*from the provision of Art. 27 par. 12 second sentence of the Mining Act, that the organization originally holding the mining area cannot be a participant of the tender procedure or any following legal procedures to assign the mining area to the winning organization. It claimed also that the Act does not oblige the defendant to file any decision concerning its deprivation of the mining area*" (p. 2). The Court therefore holds that the legal action has been filed by an "*unauthorized person, who was not a participant of the administrative procedure and was not even supposed to be a participant, and therefore pursuant to Art. 250d par. 3 of the Civil Procedure Act (CPA) the court stopped the civil law procedure*" (p. 2).

264 **Exhibit C-33**, Decision of the Supreme Court of the Republic of Slovakia, dated February 27, 2008 (Ref. 6Sz0/61/2007-121), p. 2.

exploitation or assignment of an area of exploitation to another organization would have become valid. Fourth, the District Mining Office's decision to award the Gemerská Poloma Mining Area to Economy Agency failed to comply with the applicable administrative procedure, in particular because the Office had failed to recognize Rozmin as a party to the administrative procedure.

187. Rozmin's appeal was successful. Indeed, on February 27, 2008, the Supreme Court of the Republic of Slovakia revoked the decision of the Regional Court in Košice dated February 7, 2007, confirming the decision to assign the Gemerská Poloma talc deposit to Economy Agency, and remanded the case to the DMO for further proceedings.[265] The Supreme Court reached its decision principally on the ground that Rozmin had not received any notification of the revocation of its mining rights but rather a mere notification of a new tender, and that its due process right had thus been violated.[266]

188. The Supreme Court explained that by assigning the Gemerská Poloma Mining Area to Economy Agency, the District Mining Office had simultaneously cancelled Rozmin's license to carry out mining activities in the Mining Area, and that as a result, this decision also affected Rozmin's rights and obligations.

189. Furthermore, Rozmin's administrative rights in the procedure of re-assignment of the Mining Area, under the Administrative Procedure Code and the Mining Act, were breached given that the DMO had assigned the Gemerská Poloma Mining Area to another entity by way of an official letter, that is, without issuing a proper decision in the form of a notice. As a result, Rozmin was deprived of the opportunity to raise objections, of the right to put forth evidence, to comment on materials and on the reasons on which the decision was based, and to appeal the decision.[267] The Regional Court of Košice had plainly mistakenly failed to consider Rozmin a participant to the administrative procedure conducted by the DMO for the award of mining rights.

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265 **Exhibit C-33**, Decision of the Supreme Court of the Republic of Slovakia, dated February 27, 2008 (Ref. 6Sz0/61/2007-121), pp. 7 - 9.

266 **Exhibit C-33**, Decision of the Supreme Court of the Republic of Slovakia, dated February 27, 2008 (Ref. 6Sz0/61/2007-121), pp. pp. 8 - 10.

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

190. This was a major breach of Rozmin's due process rights. After having de-risked the deposit, Rozmin was simply deprived of its mining rights, without any kind of prior notice or warning, and without even an opportunity to defend itself.

191. The Supreme Court concluded that the DMO's decision on the assignment of the Gemerská Poloma "concession" to Economy Agency, in the form of a letter, was to be cancelled, and that the DMO had to carry out further proceedings.

2. Supreme Court Decision of May 18, 2011

192. On July 2, 2008, however, despite the Supreme Court's finding that the April 22, 2005 tender was unlawful, and without any new tender proceedings having been organized, the DMO awarded the rights over the deposit to VSK Mining by a corporate sleight of hand.[268] As explained above, VSK Mining was another Slovak-owned company which had first acquired equity capital in Economy Agency and then been absorbed the latter.[269] The DMO merely stated that as legal successor to Economy Agency, VSK Mining was a "party to the proceedings," and awarded the latter mining rights over the Gemerská Poloma deposit without raising any issue.

193. On January 12, 2009, the MMO of the Slovak Republic confirmed the above decision of the DMO dated July 2, 2008 awarding the rights over the Gemerská Poloma deposit to VSK Mining, as well as the decision of the DMO dated August 12, 2008, revoking Rozmin's General Mining Authorization.[270]

194. On March 12, 2009, Rozmin filed an action before the Regional Court in Košice, challenging both the January 12, 2009 decision of the MMO and the August 12, 2008 decision of the DMO.[271]

195. On February 3, 2010, the Regional Court in Košice confirmed the DMO's decision of July 2, 2008, which awarded the rights over the Gemerská Poloma deposit to VSK

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268 **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).

269 **Exhibit C-269**, Extract from the Business Register in respect of Economy Agency RV, sro, dated June 5, 2008.

270 **Exhibit C-270**, Decision of the Main Mining Office, dated January 12, 2009 (Ref. 26-34/2009).

271 **Exhibit C-271**, Appeal to the Regional Court in Košice, dated March 12, 2009 (Ref. 449-9109).

Mining and which had been confirmed by the MMO on January 12, 2009, as mentioned above.[272] This decision was appealed successfully by Rozmin. Indeed, on May 18, 2011, the Supreme Court of the Slovak Republic rescinded the February 3, 2010 decision of the Regional Court in Košice.[273]

196. In its May 18, 2011 decision, the Supreme Court first stated that the 2002 Amendment – namely the statute on which the District Mining Office had relied to revoke Rozmin's mining authorization, on the alleged ground that Rozmin had suspended the works at the site for a period that exceeded three years, and which had entered into force after Rozmin was awarded mining rights and after the suspension of works in 2001 – had, in fact, no retroactive effect.[274] In other words, even if the three-year period applied to Rozmin, it could only have started running on the date upon which the amendment had taken effect, that is, on January 1, 2002, and the three-year period could not have elapsed before December 31, 2004. In the case of Rozmin, however, the three-year period had not yet elapsed by the time a new tender produce was initiated for the award of mining rights over Gemerská Poloma. Indeed, the Supreme Court found that "*already in December 2004,*" that is less than three years after the date of entry into force of the 2002 Amendment, the Ministry of Justice had been requested to publish a Notification of the Initiation of the Tender Procedure for the Assignment of the Mining Area.[275] This Notification was published on December 30, 2004, before Rozmin had even been notified of the revocation of its mining rights.

197. Second, the Supreme Court held that even if the three-year period had lapsed, Rozmin's mining rights would in any event not have been terminated *ex officio*. Rather, the

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272 **Exhibit C-272**, Decision of the Regional Court in Košice, dated February 3, 2010 (Ref. 7S/25/2009-207).

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

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

275 **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010) pp. 22, 25-26.

District Mining Office would have had to cancel these rights or award the Mining Area to another entity in accordance with the applicable procedure.[276]

198. Third, the Supreme Court 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*."[277] 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*,"[278] given that it was not based on a "*thorough investigation*"[279] ascertaining notably whether the Mining Area had been left unexploited or the exploitation of the Mining Area been artificially delayed for speculative purposes, whether the inference with Rozmin's rights was justified by a public purpose, and whether it was proportionate to said public purpose.[280] As explained by the Supreme Court, 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.

199. In this respect, 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. Among other steps undertaken towards the resumption of mining activities, Rozmin had applied for new permits and authorizations or extensions of existing ones (see paragraphs 146 *et seq*. *supra*), organized a new tender and hired a

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276 **Exhibit C-36**, Decision of the Supreme Court of the Slovak Republic, dated May 18, 2011 (Ref. 2Sžo/132/2010), pp. 17 *et seq*.

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

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

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

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

new development contractor (see paragraphs 160 *et seq*. *supra*), and engaged in negotiations for the sale and distribution of talc to be extracted from the deposit (see paragraphs 158 and 159 *supra*).

200. Furthermore, the Supreme Court itself 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, during which it had been recorded that the works were ongoing and that Rozmin's activities were in compliance with the legislation in force; and (iii) Rozmin had already invested at least SKK 120,000,000 in the Mining Area.[281] Belmont and EuroGas even continued to inject working capital in Rozmin during the suspension of works.[282] Finally, during the December 8, 2004 inspection, the DMO had observed and recorded that Rozmin was working towards reaching the extraction phase and was acting in compliance with all of its legal obligations.

201. 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 Act No. 44/1988 on Protection and Utilization of Mineral Resources, as amended by the 2002 Amendment, the Supreme Court found that the "*the action of the defendant, and the appealed decision* [were] *not in conformity with the legislation*."[283] As confirmed by the Supreme Court in its May 18, 2011 decision, Rozmin simply did not fall within the scope of the 2002 Amendment. 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.

202. Finally, even if one were to assume, for the sake of argument, that the three-year period applied retroactively and notwithstanding the authorization granted to Rozmin to carry out works until November 13, 2006, and that development works *per se* had been

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

282 *See* Witness Statement of Vojtech Agyagos, ¶¶ 32-33.

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

suspended for more than three years, one would be compelled to acknowledge that Claimants remained fully committed to the project during the suspension and were never inactive.

203. In any event, the reality is that 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 (see paragraph 415 *supra*), and resubmitted a formal request, on January 8 2004, to carry out mining activities. It is precisely this request that was granted by decision dated May 31, 2004,[284] in which the DMO did not raise any issue, let alone any timing issue.

204. Based on the foregoing, by decision dated May 18, 2011, the Supreme Court declared the District Mining Office's decision of July 2, 2008 assigning mining right to VSK Mining unlawful, rescinded the decision of the Regional Court in Košice of February 3, 2010, and remanded the case to the District Mining Office for further proceedings.

205. Notwithstanding this Supreme Court decision of May 18, 2011, the DMO re-assigned exclusive mining rights, on March 30, 2012, to VSK Mining.[285] On appeal, the DMO's decision was confirmed by the MMO on August 1, 2012.[286]

3. Supreme Court Decision of January 31, 2013

206. As noted above, the DMO's revocation, on August 12, 2008, of Rozmin's General Mining Authorization,[287] was confirmed by the MMO on January 12, 2009.[288] On March 12, 2009, Rozmin challenged the revocation before the Regional Court in Košice.[289] The latter however dismissed the challenge on January 19, 2012.[290]

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

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

286 **Exhibit C-273**, Decision of the Main Mining Office, dated August 1, 2012 (Ref. 808-1482/2012).

287 **Exhibit C-35**, Decision on the Revocation of the Authorization for Mining, dated August 12, 2008 (Ref. 104-1620/2008).

288 **Exhibit C-274**, Decision of the Main Mining Office, dated January 12, 2009 (Ref. 25-32/2009).

289 **Exhibit C-272**, Appeal to the Regional Court in Košice, dated March 12, 2009 (Ref. 439-9/09).

207. On January 31, 2013, however, the Supreme Court rescinded the Regional Court's decision of January 19, 2012 and remanded the case for further proceedings.[291]

208. The Regional Court in Košice however confirmed the DMO's decision to revoke Rozmin's General Mining Authorization.[292]

209. In sum, the efforts deployed by Rozmin, for over eight years, to obtain specific performance before local courts, were fruitless. Even though Rozmin obtained three favorable decisions from the Slovak Supreme Court, the competent local bodies relentlessly disregarded them and recurrently frustrated the findings of the Slovak judiciary's highest organ.

IV. RESPONDENT'S OBLIGATIONS UNDER INTERNATIONAL LAW

210. Respondent's actions and omissions in this dispute constitute blatant breaches of its obligations under the US-Slovak Republic BIT,[293] the Canada-Slovak Republic BIT,[294] and customary international law.

211. Given the expertise of all members of the Arbitral Tribunal, Claimants will hereafter mainly enunciate, rather than define, Respondent's obligations under the US-Slovak Republic and Canada-Slovak Republic BITs and under customary international law. Claimants will examine further the scope and content of these obligations below in Section V only where this is necessary in the context of, and relevant to, the present dispute.

212. The applicable BITs impose on Respondent, either directly or by way of their most-favored nation ("MFN") clauses (Article II(1) *in initio* of the US-Slovak Republic BIT;

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290 **Exhibit C-275**, Decision of the Regional Court in Košice, dated January 19, 2012 (Ref. 6S/28/2009-175).

291 **Exhibit C-38**, Decision of the Supreme Court of the Republic of Slovakia, dated January 31, 2013 (Ref. 5Sžp/10/2012).

292 **Exhibit C-276**, Decision of the Regional Court in Košice, dated September 26, 2013 (Ref. 6S/28/2009 – 308).

293 **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.

294 **Exhibit C-2**, Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments, dated July 20, 2010.

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 (Article II(2)(a) of the US-Slovak Republic BIT; Article III(1)(a) of the Canada-Slovak Republic BIT);

- the obligation to ensure Claimants' investments full protection and security (Article II(2)(a) of the US-Slovak Republic BIT; Article III(1)(a) of the Canada-Slovak Republic BIT);

- the obligation to ensure protection against arbitrary, unreasonable, and discriminatory measures (Article II(2)(b) of the US-Slovak Republic BIT; Article IX(1) *a contrario* of the Canada-Slovak Republic BIT);

- 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 (Article III(1) of the US-Slovak Republic BIT; Article VI(1) of the Canada-Slovak Republic BIT) and, under the US-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 (Article III(1) of the US-Slovak Republic BIT);

- the obligations to "*observe any obligations it may have entered into with regard to* [Claimants'] *investments*" (Article II(1)(c) of the US-Slovak Republic BIT; Article III(2) and (3) of the Canada-Slovak BIT together with Article II(1)(c) of the US-Slovak Republic BIT); and

- the obligation to accord Claimants' investments a treatment that is no less than that required by international law (Article II(2)(a) of the US-Slovak Republic BIT; Article III(1)(a) of the Canada-Slovak Republic BIT).

213. Both the US-Slovak Republic BIT and the Canada-Slovak Republic BIT also afford US and Canadian investors, respectively, protection no less favorable than that afforded to domestic investors and investors of third countries.

214. Article II(1) *in initio* of the US-Slovak Republic BIT indeed provides:

> *Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty.*

In this respect, Article I(1)(g) and (h) of the US-Slovak Republic BIT specify that:

> *"national treatment" means treatment that is at least as favorable as the most favorable treatment accorded by a Party to companies or nationals of third Parties in like circumstances; and*
>
> *"most favored nation treatment" means treatment that is at least as favorable as that accorded by a Party to companies and nationals of third Parties in like circumstances.*

215. Article III(2), (3), and (4) of the Canada-Slovak Republic BIT, in turn, reads as follows:

> *Each Contracting Party shall grant to investments or returns of investors of the other Contracting Party in its own territory treatment no less favourable than that which it grants, in like circumstances, to investments or returns of investors of any third state.*
>
> *Each Contracting Party shall grant investors of the other Contracting Party, as regards their management, use, enjoyment or disposal of their investments or returns in its territory, treatment no less favourable than that which it grants, in like circumstances, to investors of any third state.*
>
> *Each Contracting Party shall, to the extent possible and in accordance with its laws and regulations, grant to investments or returns of investors of the other Contracting Party treatment no less favourable than that which it grants, in like circumstances, to investments or returns of its own investors.*

216. The international obligations assumed by Respondent in other BITs are thus applicable to the instant case, and reinforce the above provisions when required.

217. The same applies to obligations derived from customary international law. Via Article II(2)(a) of the US-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.

218. Under the ICSID Convention, the Slovak Republic has the obligation to act in accordance with "such rules of international law as may be applicable."[295] As Schreuer explains, "[t]*he mandatory rules of international law, that provide an international minimum standard of protection for aliens exist independently of any choice of law made for a specific transaction* [and] *constitute a framework of public order within which such transactions operate*."[296]

219. The minimum standard of protection is therefore mandatory by nature.[297] It includes, *inter alia*, the duty to provide fair and equitable treatment and full protection and security as well as protection against arbitrary measures and expropriation save for a public purpose and subject to effective, prompt and adequate compensation,[298] and compliance with the principle of proportionality.[299]

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295 *See* Article 42(1) of the ICSID Convention: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

296 **Exhibit CL-129**, Christoph H. Schreuer, The ICSID Convention: A Commentary (2nd ed.), 2009 ("Schreuer"), at p. 587, ¶115.

297 **Exhibit CL-130,** Christoph H. Schreuer, International and Domestic Law in Investment Disputes: The Case of ICSID, 1 Austrian Rev. Int'l & Eur. L. 89 (1996), at p. 101.

298 **Exhibit CL-88**, *Mondev v. the United States*, ICSID Case No. ARB(AF)/99/2, Award, dated October 11, 2002, at ¶¶111 *et seq*, available at http://www.italaw.com/sites/default/files/case-documents/ita1076.pdf.

299 **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 ("Occidental"), ¶427 available at http://italaw.com/sites/default/files/case-documents/italaw1094.pdf.

V. RESPONDENT'S BREACHES

220. Respondent, through its various State organs, has committed multiple breaches, both procedural and substantive, of its obligations under the BITs and international law, in respect of Claimants' investments in the Slovak talc mining industry.

221. 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.

222. Each of these breaches, described below, justifies the award of damages requested by Claimants.

A. EXPROPRIATION

223. As noted above at paragraph 212, 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.

224. The term "expropriation" is not usually defined in bilateral investment treaties because there may be a number of different measures a host State may take which may have a similar effect to expropriation but which would not constitute an act of outright expropriation.[300] The fundamental requirement is that the claimant be substantially deprived of the use and benefits of the investments, as recently confirmed in *Railroad Development Corporation v. Republic of Guatemala*.[301]

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300 **Exhibit CL-132**, Rudolf Dolzer and Margrete Stevens, Bilateral Investment Treaties 61 (1995), at p.99.

301 **Exhibit CL-133**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (June 29, 2012) ("Railroad"), at ¶151, available at http://italaw.com/sites/default/files/case-documents/ita1051.pdf.

225. Public international law distinguishes between direct and indirect expropriations. The former amounts to the straightforward taking of an investment by the State. It "*involves the investor being deprived of property and a corresponding appropriation by the state, or state-mandated beneficiary, of specific property rights*."[302] As put by the tribunal in *LG&E v. Argentina*, direct expropriation is "*understood as the forcible appropriation by the State of the tangible or intangible property of individuals by means of administrative or legislative action*."[303]

226. As to indirect or creeping expropriation, it has been defined as "a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property."[304] Creeping expropriations may be carried out "through a single action, through a series of actions in a short period of time or through simultaneous actions."[305] The arbitral tribunal in Spyridon Roussalis v. Romania reinforced the element of effective loss of management, use or control in its definition, holding that "indirect expropriation may occur when measures 'result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor.'"[306]

227. Although the host State's intent may play a role in determining whether its conduct was contrary to international law, such intention is not decisive. The host State's intent is "*less important than the effects of the measures on the owner, and the form of the*

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302 **Exhibit CL-134**, A. Newcombe and L. Paradell, Law and Practice of Investment Treaties: Standards of Treatment (Kluwer Law International, 2009), at p.340. **Exhibit CL-135**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, dated October 3, 2006 ("LG&E"), ¶ 187, available at http://italaw.com/documents/ARB021_LGE-Decision-on-Liability-en.pdf (direct expropriation is "*understood as the forcible appropriation by the State of the tangible or intangible property of individuals by means of administrative or legislative action*").

303 **Exhibit CL-135**, *LG&E* at ¶187.

304 **Exhibit CL-136**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, dated September 16, 2003, ¶20.22, available at http://italaw.com/documents/GenerationUkraine_000.pdf (emphasis in the original text).

305 **Exhibit CL-137**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No ARB(AF)/00/2), Award, dated May 29, 2003 ("Tecmed"), ¶114, available at http://italaw.com/documents/Tecnicas_001.pdf.

306 **Exhibit CL-138**, *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, dated December 7, 2011 ("Spyridon Roussalis"), ¶327, available at http://italaw.com/documents/SpyridonRoussalis_v_Romania_Award_7Dec2011.pdf.

measures of control or interference is less important than the reality of their impact."[307] The Commentary to Article 2 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("ILC Articles on State Responsibility") goes even further and states that the intention of the State is irrelevant to the determination of whether or not the State committed an internationally wrongful act.[308] Rather, only the act of the State matters, irrespective of any intention.

228. In essence, therefore, the standard for determining whether a State's conduct amounts to an expropriation "*is the actual effect of the measures on the investor's property*."[309] An expropriation occurs when the "actual effect" of a State's actions is to deprive the investor "*of parts of the value of his investment*"[310] or "*of the use or reasonably-to-be-expected economic benefit of property*."[311]

229. Finally, whether the State derives benefits from a taking is irrelevant to a finding of expropriation. As explained by the tribunal in *Tecmed v. Mexico*:

> *Although formally an expropriation means a forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect, the term also covers a number of situations described as* de facto *expropriation, where such actions or laws transfer assets to third parties different from the expropriating State or where such laws or actions deprive persons of their ownership over such*

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307 **Exhibit CL-139**, *Tippetts, Abbett, McCarthy, Stratton v. TAMS AFFA (Iran)*, Award, dated June 29, 1984, 6 CTR 219 (1984), at ¶¶225-226, available at http://www.kluwerarbitration.com/document.aspx?id=IPN2360&query=AND(content%3A%22sanders%22,content%3A%22tippetts%22).

308 **Exhibit CL-125**, ILC Articles on State Responsibility**,** Article 2, commentary, at ¶10. *See* also, **Exhibit CL-140**, *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL), Partial Award, dated September 13, 2001, ("CME Czech Republic B.V."), at ¶602, available at http://italaw.com/documents/CME-2001PartialAward.pdf ("*The Media Council's possible motivation for such action* [...] *is irrelevant*").

309 **Exhibit CL-141**, Alan Redfern, Martin Hunter, Nigel Blackaby, and Constantine Partasides, Redfern and Hunter on International Arbitration, (2009), at ¶8.83.

310 **Exhibit CL-142**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case ARB/99/6, Award, dated April 12, 2002 ("Middle East Cement"), at ¶107, available at http://italaw.com/documents/MECement-award.pdf.

311 **Exhibit CL-143**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1 Award, dated August 30, 2000 ("Metalclad"), at ¶103, available at http://www.italaw.com/sites/default/files/case-documents/ita0510.pdf.

> *assets, without allocating such assets to third parties or to the Government.*[312]

This is supported by a footnote referring to the following passage in *Metalclad v. Mexico*:

> *Thus, expropriation* […] *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 the property which has the effect of depriving the owner, in whole or 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.*[313]

230. In the present case, the Slovak Republic has expropriated Claimants of their investment, and therefore breached its obligations. It is indeed 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 and a new tender publicly announced[314] – that Rozmin's rights had *de facto* been revoked and were to be awarded to a new organization.[315]

231. The question therefore is whether this taking was justified under international law. As noted above at paragraph 212, under the BITs, Claimants were entitled to protection against direct or indirect expropriation of their investment unless the expropriation was carried out:

a) for a public purpose,

b) in a non-discriminatory manner,

c) in accordance with due process of law, and

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312 **Exhibit CL-137**, *Tecmed*, at ¶113.

313 **Exhibit CL-143**, *Metalclad, at* ¶103.

314 **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.

315 **Exhibit C-30**, Letter from the District Mining Office to Rozmin sro, dated January 3, 2005 (Ref. 2405/451.14/2004-I).

d) upon payment of prompt, adequate and effective compensation.

232. Considering the above and as set out below, the present case is a textbook example of a substantively and procedurally unlawful expropriation.

1. Respondent's Substantively Unlawful Expropriation of Claimants' Investment

233. The condition that an expropriation be conducted for a public purpose is intended as a safeguard against governmental abuses.[316] It requires that a public purpose not only be advanced, but that the State do so in good faith and that the measure truly serve this public purpose. This excludes obviously personal or unreasonable or disproportionate objectives, or measures adopted for private or capricious purposes.

234. 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 more than three years had elapsed between the suspension of the works on site (October 1, 2001) and their resumption (November 18, 2004). As noted above at paragraph 172, 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.[317]

235. As explained below, however, the 2002 Amendment could not have justified – let alone justified *post facto* – the revocation of Rozmin's rights. This revocation was clearly incongruous from all conceivable angles.

236. First, the 2002 Amendment entered into force after Rozmin was awarded mining rights (and after the suspension of works in 2001) and, as confirmed by the Slovak Supreme Court in its decision of May 18, 2011 (discussed at paragraph 196 *supra*), did not have retroactive effect. In other words, even if the three-year period had applied to Rozmin, it would only have started running on January 1, 2002. In fact, if the three-year period applied and could have justified a revocation of Rozmin's mining rights, Slovak mining

316 **Exhibit CL-132**, Rudolf Dolzer and Margrete Stevens, Bilateral Investment Treaties 61 (1995), at p.104-05.

317 *See* Article 27(12) of Act No. 44/1988 on Protection and Utilization of Mineral Resources, as amended by Act No. 558/2001.

authorities would not have confirmed, as late as in December 2004, that Rozmin was entitled to continue its mining activities until November 2006.[318]

237. Upon receipt of Rozmin's notice of work resumption, dated November 9, 2004, the DMO did not protest. Rather, it conducted a site inspection on December 8, 2004, following which it expressed its full satisfaction and confirmed that Rozmin was entitled to carry out mining activities until November 13, 2006, as confirmed by Minutes of Meetings prepared and signed by the DMO's Director himself.[319]

238. Second, even if one were to assume, for the sake of argument, that the three-year period applied retroactively and notwithstanding the deadline of November 13, 2006, Rozmin was in fact in a position to resume works well before the expiration of the three-year period, and it did communicate its readiness to do so to the mining authorities.

239. Indeed, Rozmin sought an extension of the Authorization of Mining Activities at Gemerská Poloma as of December 2002 (see paragraphs 146 *et seq*. *supra*), and submitted, on January 8 2004, its latest formal request to resume mining activities. On May 31, 2004, the DMO finally 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.[320] 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.

240. Third, even if one were to assume, for the sake of argument, that the three-year period applied retroactively and notwithstanding the November 13, 2006 deadline, and that development works *per se* were suspended for more than three years, one would be compelled to acknowledge that Claimants had remained fully committed to the project during the suspension and were never inactive, hence that they did not fall within the scope of the 2002 Amendment.

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

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

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

241. As explained by the Supreme Court in its decision of May 18, 2011 (discussed at paragraph 198 *supra*), upon review of the 2002 Amendment and the accompanying report, 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.

242. 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 neither automatic nor mandatory. The DMO had the latitude to determine whether the circumstances of the case indeed warranted the revocation of the mining rights at hand.

243. The Supreme Court concluded that, in the present case, the revocation of Rozmin's mining rights could only have been "*appropriate*" if, "*after a thorough investigation*,"[321] 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. Yet this was not the case.

244. 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;[322] and (iii) Rozmin had invested at least SKK 120,000,000 in the Mining Area. The administrative bodies having failed to take these circumstances into account 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*."[323]

245. In fact, the reality is that Claimants remained fully committed to the project during the suspension and were never inactive.

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

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

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

246. By way of reminder, on October 15, 2001, Rozmin notified the DMO of the suspension of mining activities consequent to Rima Muráň's cessation of works[324] and, on November 30, 2001, 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.[325] Rozmin thus acted fully transparently towards Slovak mining authorities, which did not protest when they received these letters. Furthermore, from the moment that works were suspended in 2001, Rozmin never ceased to work towards their resumption.

247. EuroGas and Belmont indeed continued to inject working capital in Rozmin. Among other steps undertaken towards the resumption of mining activities, 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, as set out above at paragraphs 145 *et seq*. Claimants also engaged in negotiations for the sale and distribution of talc to be extracted from the deposit. Following visits in 1999 and 2001 by a team of Mondo's experts, this company expressed, as early as in 2002, 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 (see paragraphs 158 and 159 *supra*).[326]

248. As of December 2002, Rozmin sought an extension of the Authorization on Mining Activities at Gemerská Poloma (see paragraph 146 *supra*), and submitted its latest formal request to carry out mining activities on January 8 2004. This request was granted on May 31, 2004.[327]

249. In reliance of this mining authorization granted by the DMO and the assurances therein, Rozmin moved on to the next step, namely resuming works, which naturally implied incurring substantial costs. Rozmin organized a tender and selected a new contractor,

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

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

326 **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.

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

Siderit, to resume mining works. Without even waiting for a formal contract to be signed, Rozmin instructed Siderit to carry out, on the basis of individual orders, a number of works, particularly in respect of the Water Management Facilities. Eventually, 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).[328] In addition, 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.

250. On November 8, 2004, Rozmin officially announced to the DMO that it would resume mining activities by November 18, 2004.[329] The DMO did not react to the announcement, let alone claim that Rozmin would not be entitled to carry out mining activities until the November 2006 deadline as a result of the 2002 Amendment.

251. 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,[330] and the taking of Claimants' investment was made in blatant disregard of Claimants' right to due process of law. At best, this taking was grossly disproportionate to the purpose allegedly pursued and invoked only *post facto*.

252. With respect to proportionality, the Tribunal in *Tecmed v. Mexico*, ruling on the expropriatory nature of Mexico's refusal to renew a license on the basis of infringements of its terms committed by the claimants, has explained the following:

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328 **Exhibit C-277**, Siderit Invoice No. 590010, dated November 30, 2004; **Exhibit C-278**, VUB Bank Statement dated November 30, 2004.

329 **Exhibit C-267**, Letter from Rozmin sro to the District Mining Office, dated November 8, 2004.

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

> *After establishing that regulatory actions and measures will not be initially excluded from the definition of expropriatory acts, in addition to the negative financial impact of such actions or measures, the Arbitral Tribunal will consider, in order to determine if they are to be characterised as expropriatory, whether such actions or measures are 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*.[331]

253. 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.[332] 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:

> [I]*t would be excessively formalistic, in light of the above considerations, the* [BIT] *and international law, to understand that the Resolution is proportional to such violations when such infringements do not pose a present or imminent risk to the ecological balance or to people's health, and the Resolution, without providing for the payment of compensation* […] *leads to the neutralization of the investment's economic and business value and the Claimant's return on investment and profitability expectations upon making the investment.*[333]

254. *In casu*, as confirmed by the Slovak Supreme Court, Rozmin was a *bona fide* investor, genuinely committed to the development of the Gemerská Poloma deposit. Hence, Rozmin did not fall within the scope of the 2002 Amendment, which the Republic of Slovakia knew perfectly. 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.

255. Fourth and in any event, the taking of Claimants' rights and investment could not have been justified by the 2002 Amendment as this Amendment is inapposite to foreign

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331 **Exhibit CL-137**, *Tecmed*, ¶122.

332 **Exhibit CL-137**, *Tecmed*, ¶130.

333 **Exhibit CL-137**, *Tecmed*, at ¶149. *See also* **Exhibit CL-131**, *Occidental*, ¶450.

investors whose rights are protected by a bilateral investment treaty and customary international law.

256. It is indeed a widely accepted principle of international law 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. This principle is set out in the ILC Articles on State Responsibility,[334] and has been confirmed in the case-law.[335] What matters, in an international perspective, is the State's commitments towards foreign investors.

257. *In casu*, what therefore matters is the General Mining Authorization that Rozmin was granted for an indefinite period of time,[336] the transfer, from Geological Survey to Rozmin, of the Gemerská Poloma Mining Area and the award of mining rights over this Area prior to the enactment of the 2002 Amendment[337] and, finally, the renewed authorization of May 31, 2004 to carry out mining activities at the Gemerská Poloma deposit until November 13, 2006.[338]

258. Clearly, the revocation of Rozmin's rights on January 3, 2005 by the DMO, following the same authority's decision of May 31, 2004 – issued well after the suspension of works and well after the entry into effect of the 2002 Amendment – by which the DMO had explicitly authorized Rozmin to resume and pursue mining activities at the

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334 **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.*"

335 **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*".

336 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**).

337 **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.

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

Gemerská Poloma talc deposit until November 13, 2006, cannot possibly have been based on the 2002 Amendment.

259. 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. The unlawfulness of the taking was confirmed by the Supreme Court in its decisions of February 27, 2008[339] (discussed at paragraphs 187 *et seq*. *supra*), May 18, 2011[340] (discussed at paragraphs 195 *et seq. supra*), and January 31, 2013[341] (discussed at paragraph 207 *supra*).

260. The absence of substantive justification to the taking is also obvious considering the content of the Slovak Republic's answers to Claimants' notices of dispute, in which the Slovak Republic did not address Claimants' expropriation claim, let alone attempt to justify the taking.

261. By way of reminder, the Slovak Republic was notified of the existence of an investment dispute under the US-Slovak Republic BIT by letter from EuroGas dated October 31, 2011.[342]

262. In response, in a letter dated May 2, 2012, Mr Kažimír, Deputy Prime Minister and Minister of Finance of the Slovak Republic, stated that the dispute could not be settled amicably as long as an administrative procedure before Slovak mining offices was pending. Mr Kažimír did not, however, address EuroGas' allegation that the company's rights and investment had been unlawfully expropriated.[343]

263. Thereafter, by letter dated December 21, 2012, Mr Kažimír informed EuroGas that the Republic of Slovakia was attempting to exercise the right to deny this company the benefits of the US-Slovak Republic BIT, yet again instead of responding to, or even

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

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

341 **Exhibit C-38**, Decision of the Supreme Court of the Slovak Republic, dated January 31, 2013 (Ref. 5Sžp/10/2012).

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

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

simply denying, EuroGas' allegation that its rights under the US-Slovak Republic BIT had been breached.[344]

264. Following Claimants' notice of dispute dated December 23, 2014,[345] Respondent yet again failed to deny the unlawfulness of the expropriation of Claimants' rights and investment. Instead, Respondent chose to point out that "*the Slovak Republic has successfully deterred or avoided investment treaty claims, short of an arbitral award, in the past,*"[346] despite the irrelevance of this statement knowing that each dispute rests on a specific set of facts and legal parameters.

265. Most importantly, the Slovak Republic declared that it was "*open to meeting with* [counsel for Claimants] *for the purpose of evaluating the possibility of amicable negotiation*"[347] and, having reiterated that there was "*an opportunity to open discussions,*"[348] even invited Claimants to "*present at least on which grounds the Claimants calculated the alleged compensation sought*,"[349] specifying that it was "[b]*ased on information provided by Claimants in relation to compensation the Ministry of Finance of the Slovak Republic* [would] *consider* [that it would] *then propose date and venue of amicable negotiations*."[350] Thereafter, Respondent even requested that Claimants "*specify what they believe their alleged damages to be* […] *including grounds for calculation of costs for investment realized for works related to exploitation of talc, calculation of alleged expected future earnings arising from such realized investment and calculation of value of the resource reserve of talc.*"[351] The parties met on April 16, 2014, following Claimants' submission to Respondent of a preliminary assessment of the minimum loss of profits sustained by Claimants.

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

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

346 **Exhibit C-59**, Letter from the Slovak Republic dated January 28, 2014.

347 **Exhibit C-59**, Letter from the Slovak Republic dated January 28, 2014.

348 **Exhibit C-279**, Letter from the Slovak Republic dated February 13, 2014.

349 **Exhibit C-279**, Letter from the Slovak Republic dated February 13, 2014.

350 **Exhibit C-279**, Letter from the Slovak Republic dated February 13, 2014.

351 **Exhibit C-60**, Letter from the Slovak Republic dated February 20, 2014.

266. In conclusion, the taking of Claimants' mining rights and investment did not serve any public purpose, let alone a valid one. At best, the actions of the Slovak Republic were grossly disproportionate to any conceivable public purpose which such actions may purportedly have served. Hence, the taking of Claimants' rights and investment was substantively unlawful.

2. Respondent's Procedurally Unlawful Expropriation of Claimants' Investment

267. 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.

268. First, the taking was performed abruptly, without any consideration for Claimants' most basic rights or due process of law, let alone the general principles of fair and equitable treatment. 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 taking was found illegal, both procedurally and substantively, by the Slovak Republic's own Supreme Court on three separate occasions.[352]

269. 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.

270. As noted above, 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 (see paragraphs 145 *et seq. supra*).

271. 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

[352] **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).

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.

272. 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.

273. On November 8, 2004, Rozmin officially announced to the DMO that it would resume mining activities by November 18, 2004.[353] 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 too long for Rozmin to be entitled to resume its activities at the site.

274. 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.[354]

275. 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, 2014 inspection, to announce that its mining rights had been *de facto* revoked and that these would to be awarded to a new organization. Ironically, the Slovak Republic's letter was signed by Mr. Baffi himself, namely the Director of the DMO who had carried out the December 8, 2014 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.

353 **Exhibit C-267**, Letter from Rozmin sro to the District Mining Office, dated November 8, 2004.

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

276. 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.[355] In other words, 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 any prior notice to Rozmin, without giving Rozmin or Claimants an opportunity to be heard, and without a valid justification, let alone any compensation.

277. 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. Both Rozmin and Claimants were kept in the dark, hence 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 induced to believe that Rozmin would be allowed to carry out works in the Mining Area at least until November 13, 2006.

278. 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.

279. 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.[356] 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.

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355 **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.

356 **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.

280. 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.

281. 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.[357] The Slovak Republic thus relied on the strict application of a newly enacted legal provision, without even taking into consideration the surrounding circumstances as explained in detail above, let alone explaining how the revocation would serve a public purpose.

282. 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 198 *supra*).

283. 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 in March 2012, to VSK Mining, in itself constituted an expropriation of Claimants' rights under international law. Again, this expropriation was in blatant disregard of Claimants' right to due process of law and not justified by any public purpose.

284. For all 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 gave rise to Respondent's liability and obligation to compensate for the losses sustained.

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357 **Exhibit C-30**, Letter from the District Mining Office to Rozmin sro, dated January 3, 2005 (Ref. 2405/451.14/2004-I).

3. Respondent's Failure to Compensate Claimants for the Taking

285. 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 US-Slovak Republic BIT, Article VI(1) of the Canada-Slovak Republic BIT, and customary international law,[358] to provide "*prompt, adequate and effective compensation.*"

286. The taking of Claimants' rights and investment occurred after the deposit had been fully de-risked. The fact that compensation is due is therefore undisputable. In fact, the cooling-off period was extended, at the request of the Slovak Republic, precisely and solely for the purpose of assessing the damages sustained by Claimants. Respondent indeed requested that Claimants provide a quantification of their claims.[359] This assessment was duly sent to Respondent, which reviewed it and promised to revert with an offer. Respondent however never even commented on Claimants' preliminary assessment of their claim, let alone provided an offer. Instead, Respondent used this time to seize all of Rozmin's records and property in the Slovak Republic, including privileged and confidential documents.

287. In past cases, tribunals have granted compensation in cases of taking which, although ruled to be legal, were not accompanied by such compensation.[360] In other words, heads

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358 *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, available at http://www.italaw.com/sites/default/files/case-documents/ita1052.pdf ("*Prompt and adequate compensation is also, of course, a requirement of customary international law*").

359 **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.

360 *See*, e.g., **Exhibit CL-144**, *Santa Elena v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, dated February 17, 2000, ¶71, available at http://italaw.com/documents/santaelena_award.pdf: "*In approaching*

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 to be quantified by Claimants in due course.

B. MULTIPLE BREACHES OF THE FAIR AND EQUITABLE TREATMENT STANDARD

288. 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, applicable as set out at Section IV above.

289. Respondent's obligation to afford "fair and equitable treatment" to Claimants and their investments is set forth in Article II(2)(a) of the US-Slovak Republic BIT and Article III(1)(a) of the Canada-Slovak Republic BIT.

290. By way of preliminary remark, this obligation has to be "placed squarely in the context of an obligation to 'encourage and create' favourable conditions for investors."[361] In other words, it has to be "understood in the context of [the] aim of encouraging the

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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 of the measure of the compensation to be paid for the taking.*" *See* also **Exhibit CL-145**, C*ompañía 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 ("Vivendi I"), ¶7.5.21, available at http://www.italaw.com/sites/default/files/case-documents/ita0215.pdf: "*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*." Finally, *see* **Exhibit CL-146**, *Rumeli and Telsim v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, dated July 29, 2008 ("*Rumeli")* ¶706, available at: http://www.italaw.com/sites/default/files/case-documents/ita0728.pdf, where 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*" (Award,).

361 **Exhibit CL-147**, *National Grid P.L.C. v. Argentina Republic*, UNCITRAL, Award, dated November 3, 2008, ("National Grid") at ¶170, available at http://italaw.com/sites/default/files/case-documents/ita0555.pdf.

inflow and retention of foreign investment,"[362] considering both the wording of the above-mentioned provisions and that of the Preambles of the BITs.

291. In arbitral case-law relevant to this case, tribunals have identified six categories of obligations that are encompassed by the fair and equitable treatment standard:

a) The State must act consistently vis-à-vis an investor and cannot modify the legal framework when specific commitments have been made (see *CME*,[363] *MTD Equity*,[364] *El Paso*[365], *Waste Management*[366], and *Arif*[367]).

b) The State must meet an investor's legitimate expectations (see *Tecmed*,[368] *Saluka*,[369] *Azurix*,[370] *ADC*,[371] and *Total*[372]).

c) The State must act in a transparent manner (see *Metalclad*,[373] *Siemens*,[374] *LG&E*,[375] *Saluka*,[376] *Tecmed*,[377] *Maffezini*,[378] *Rumeli*,[379] and *Spyridon*[380]).

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362 **Exhibit CL-148**, *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case No. ARB/07/15, Award, dated March 3, 2010, at ¶ 433, available at http://italaw.com/sites/default/files/case-documents/ita0347.pdf.

363 **Exhibit CL-140**, *CME Czech Republic B.V.*, at ¶611.

364 **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 ("MTD"), at ¶99, available at http://italaw.com/documents/MTD-Award_000.pdf.

365 **Exhibit CL-27**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, dated October 31, 2011 ("El Paso Energy"), at ¶¶375-379, available at http://italaw.com/documents/El_Paso_v._Argentina_Award_ENG.pdf.

366 **Exhibit CL-83**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, dated April 30, 2004 ("Waste Management"), available at http://italaw.com/documents/laudo_ingles.pdf, at ¶98: "*In applying* [the standard of treatment of fair and equitable treatment] *it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant*."

367 **Exhibit CL-150**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, dated April 08, 2013 ("Arif"), at ¶547, available at: http://italaw.com/sites/default/files/case-documents/ita1069.pdf;

368 **Exhibit CL-137**, *Tecmed*, at ¶154.

369 **Exhibit CL-151**, *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, dated March 17, 2006 ("Saluka"), at ¶¶301-302.

370 **Exhibit CL-152**, *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Final Award, dated July 14, 2006 ("Azurix"), at ¶372, available at http://italaw.com/documents/AzurixAwardJuly2006.pdf.

371 **Exhibit CL-153**, *ADC Affliate Limited and ADC & ADMC Management Limited v. Hungary*, ICSID Case No. ARB/03/16, Award, dated October 2, 2006 ("ADC"), at ¶424, available at http://italaw.com/documents/ADCvHungaryAward.pdf.

372 **Exhibit CL-154**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, dated December 27, 2010 ("Total"), at ¶117, available at http://italaw.com/sites/default/files/case-documents/ita0868.pdf.

d) The State must act in good faith (see *Tecmed*,[381] *Waste Management*,[382] *Rumeli*,[383] *Spyridon*,[384] *Tokios Tokeles*,[385] and *Pope & Talbot*[386]).

e) The State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lack due process (*Waste Management*,[387] *Rumeli*,[388] *Spyridon*,[389] *SD Myers*,[390] and *Occidental*[391]).

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373 **Exhibit CL-143**, *Metalclad*, at ¶99: "*Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA*."

374 **Exhibit CL-155**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, dated February 6, 2007 ("Siemens"), at ¶¶308-309, available at http://www.italaw.com/documents/Siemens-Argentina-Award.pdf: The tribunal held that there had been a "*lack of transparency of Argentina in respect of the investment"* and that for this reason, *inter alia*, the "*fair and equitable treatment* [obligation] *under the Treaty (had been breached by Argentina)*."

375 **Exhibit CL-135**, *LG&E*, at ¶128.

376 **Exhibit CL-151**, *Saluka*, at ¶307 ("*The fair and equitable treatment standard implies that the host state implement "its policies* bona fide *by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination*").

377 **Exhibit CL-137**, *Tecmed*, at ¶154 ("[A] *foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor* […]"); and at ¶¶164, 174 ("*lack of transparency*" is a "*violation of the duty to accord fair and equitable treatment*").

378 **Exhibit CL-6**, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, dated November 13, 2000 ("Maffezini"), at ¶83, available at http://italaw.com/documents/Maffezini-Award-English.pdf: "*The lack of transparency with which this loan transaction was conducted is incompatible with Spain's commitment to ensure the investor a fair and equitable treatment*."

379 **Exhibit CL-146**, *Rumeli*, at ¶583.

380 **Exhibit CL-138**, *Spyridon Roussalis*, at ¶314.

381 **Exhibit CL-137**, *Tecmed*, at ¶153.

382 **Exhibit CL-83**, *Waste Management*, at ¶138.

383 **Exhibit CL-146**, *Rumeli*, at ¶583.

384 **Exhibit CL-138**, *Spyridon Roussalis*, at ¶314.

385 **Exhibit CL-11**, *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Dissenting Opinion of Daniel M. Price, dated July 26, 2007 ("Tokios Tokelés"), at ¶ 2, available at http://italaw.com/sites/default/files/case-documents/ita0866.pdf.

386 **Exhibit CL-156**, *Pope & Talbot Inc v. Canada*, Award on the Merits of Phase 2, dated April 10, 2001, ¶ 181, available at http://italaw.com/sites/default/files/case-documents/ita0678.pdf.

387 **Exhibit CL-83**, *Waste Management*, at ¶98.

388 **Exhibit CL-146**, *Rumeli*, at ¶583.

389 **Exhibit CL-138**, *Spyridon Roussalis*, at ¶314.

390 **Exhibit CL-157**, *SD Myers Inc. v. Government of Canada* (UNCITRAL), First Partial Award, dated November 13, 2000, at ¶263, available at http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf.

f) The State must ensure that there is a reasonable relationship of proportionality between the charge or weight imposed on a foreign investor and the aim sought to be realized by any expropriatory measure (*Occidental*[392] and *MTD*[393]).

292. These principles of fair and equitable treatment are all individually and directly relevant to the present case. Some of these principles nevertheless significantly overlap. For example, an act that is discriminatory against an investor may also amount to an act of bad faith by the State. Likewise, an absence of transparency in legal procedure may also amount to a denial of due process. Furthermore, the various principles making up the duty of fair and equitable treatment may also overlap with other duties contained in a bilateral investment treaty. Thus, for instance, the principle of full protection and security has been held to form part of the standard of fair and equitable treatment,[394] and where there has been a breach of the former obligation, it is not necessary to consider whether there has been a breach of the latter.[395]

293. Claimants have already addressed above Respondent's failure to act in accord with due process of law (see paragraphs 268 *et seq. supra*) and the disproportion between the expropriation of Claimants' investment and the purpose that the taking purportedly served (see paragraphs 251 *et seq. supra*). Claimants will therefore address, in the present section, Respondent's failure to act consistently and to meet Claimants' legitimate expectations (**1.**), Respondent's failure to act transparently and to treat Claimants' investment in a non-arbitrarily and reasonable manner (**2.**), and Respondent's failure to act in good faith (**3.**).

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391 **Exhibit CL-158**, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, dated July 1, 2004, at ¶¶162-163.

392 **Exhibit CL-131**, *Occidental*, at ¶427.

393 **Exhibit CL-149**, *MTD*, at ¶109.

394 **Exhibit CL-138**, *Spyridon Roussalis*, at ¶321.

395 **Exhibit CL-159**, *Impreglio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, dated June 21, 2011, available at http://italaw.com/sites/default/files/case-documents/ita0418.pdf, at ¶334.

1. Respondent's Failure to Act Consistently and to Meet Claimants' Legitimate Expectations

294. The fair and equitable treatment standard requires that the State act in a consistent manner. It cannot capriciously or unreasonably modify the legal framework or policy under which an investor first made its investment, when specific commitments have been made by the State to that investor. The rationale underpinning the principle of consistency is based on the need of investors to be able to understand the rules and regulations that will apply to its investment, and to accordingly be able to plan for, and comply with, these same rules.

295. The consistency of a State's conduct as an element of the fair and equitable treatment standard was first considered by the arbitral tribunal in *CME v. The Czech Republic*, which found that the State authority had breached its obligation of fair and equitable treatment "*by evisceration of the arrangements in reliance upon* [which] *the foreign investor was induced to invest*."[396]

296. The principle of consistency was also addressed in *MTD Equity v. Chile*, where the tribunal held that the State was a unit that could not, via its different organs, act in inconsistent ways towards the investor:

> *What the Tribunal emphasizes here is the inconsistency of action between two arms of the same Government* vis-à-vis *the same investor* […]. [The State] *also has an obligation to act coherently and apply its policies consistently, independently of how diligent an investor is. Under international law,* […] *the State* […] *needs to be considered by the Tribunal as a unit.*[397]

297. In *Tecmed*, the tribunal found that a refusal by a State organ to renew a permit amounted to a breach of the standard of consistency under the obligation of fair and equitable treatment:

> *The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all*

396 **Exhibit CL-140**, *CME Czech Republic B.V*, at ¶611.

397 **Exhibit CL-149**, *MTD*, at ¶¶163-166.

> *rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations* […].[398]

298. In *Arif v. Moldova*, the tribunal also found the inconsistency of the judiciary with the decisions of the other organs of the State to be inapposite to the investor:

> *There is a direct inconsistency between the attitudes of different organs of the State to the investment. The Airport State Enterprise and the State Administration of Civil Aviation endorsed and encouraged the investment in the airport premises, while the courts found the same investment to be illegal. This type of direct inconsistency in itself amounts to a breach of the fair and equitable treatment standard.*[399]

299. The arbitral tribunal in *El Paso v. Argentina* addressed consistency as an element of fair and equitable treatment and the applicability of the principle of consistency to specific commitments made by the State towards the investor. The arbitral tribunal held that where a specific commitment has been made by a State directly towards an investor and that commitment has been relied upon, the legal framework under which that commitment has been made can no longer be modified:

> *A reasonable general regulation can be considered a violation of the FET standard if it violates a specific commitment towards the investor. The Tribunal considers that a special commitment by the State towards an investor provides the latter with a certain protection against changes in the legislation* […] *The important aspect of the commitment is not so much that it is legally binding* […] *but that it contains a specific commitment directly made to the investor, on which the latter has relied*.[400]

300. Tribunals have thus made clear that while there is no obligation on a State to "freeze" its legal system, save for when specific commitments are made, it nevertheless has a

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398 **Exhibit CL-137**, *Tecmed*, at ¶154; emphasis added.

399 **Exhibit CL-150**, *Arif*, at ¶547.

400 **Exhibit CL-27**, *El Paso Energy*, at ¶¶375-376; emphasis added.

duty to ensure a stable and predictable business environment, and to act in a coherent, non-ambiguous manner.

301. The State's obligation of consistency as an integral part of the fair and equitable treatment standard is further reflected in the State's inability, under international law, to rely on its domestic laws to breach its international obligations. This principle is set out in the ILC Articles on State Responsibility,[401] and has been confirmed in international case-law.[402]

302. In sum, inconsistencies on the part of various organs of a State, let alone on the part of the same organ or the same State official, as in the present case (see paragraphs 308 to 310 *infra*), are inapposite to investors and have been sanctioned by tribunals as a violation of the fair and equitable standard.

303. As to the notion of an investor's legitimate expectations, it has also been repeatedly regarded, in recent case-law beginning with the award in *Tecmed*,[403] as one of the main typological elements contained in the fair and equitable treatment standard:

> *The standard of "fair and equitable treatment" is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard. By virtue of the "fair and equitable treatment" standard included in Article 3.1, the Czech Republic must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations*.[404]

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401 **Exhibit CL-120**, James Crawford, The International Law Commission's Articles on State Responsibility, Cambridge University Press, (2003), at p. 86: *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.*"

402 **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.*"

403 **Exhibit CL-137**, *Tecmed*, at ¶154: The tribunal defined fair and equitable treatment as "*treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.*"

404 **Exhibit CL-151**, *Saluka*, at ¶302.

304. An investor's expectations must be legitimate and reasonable considering the circumstances.[405] Legitimate expectations need not, however, be recorded in a written contract or in an agreement. "[A]*ssurances explicit or implicit, or* […] *representations, made by the State which the investor took into account in making the investment*"[406] are sufficient and should also be taken into account in order to ensure the respect of fair and equitable treatment.

305. It has thus been recognized that a law or a decree that alters the *status quo* as at the time the investment was made can thwart the legitimate expectations of the investor, as by doing so, the State may render useless or worthless the investment, thereby frustrating the investor's legitimate expectations and breaching the fair and equitable treatment standard enshrined in the BIT.[407]

306. This is even more so in cases in which the State has undertaken specific undertakings. As the arbitral tribunal explained in *Total v. Argentina*: "*expectation of the investor is undoubtedly 'legitimate', and hence subject to protection under the fair and equitable treatment clause, if the host State has explicitly assumed a specific legal obligation for the future, such as by contracts, concessions or stabilisation clauses on which the investor is therefore entitled to rely as a matter of law.*"[408]

307. Moreover, the notion of legitimate expectations incorporates the fact that an investor expects a State to comply with principles of international law, which include the State's inability to rely on its domestic laws to breach its international obligations, as set forth above at paragraph 256.

308. In the present case, as already explained above in great detail, following the suspension of works, in 2001, Rozmin was authorized by the DMO, on May 31, 2004, to resume and carry out mining activities until November 13, 2006.[409] In this authorization, the DMO did not make any reference, let alone stipulate any potential grounds for the

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405 **Exhibit CL-151**, *Saluka*, at ¶¶304-305.

406 **Exhibit CL-152**, *Azurix*, at ¶318.

407 **Exhibit CL-153**, *ADC*, at ¶304.

408 **Exhibit CL-154**, *Total*, at ¶117.

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

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.

309. On November 8, 2004, Rozmin officially announced to the DMO that it would resume mining activities by November 18, 2004.[410] Again, 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, 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.[411] 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.[412]

310. On January 3, 2005, however, not even a month after the December 8, 2014 inspection, the Slovak Republic wrote to Rozmin, by way of a letter signed by Mr. Baffi himself, to announce that Rozmin's mining rights had been *de facto* revoked and that they were to be awarded to a new organization.

311. Clearer inconsistencies are hardly conceivable. Unlike cases cited above, in which States acted in inconsistent ways towards investors via their different organs, in the present case, it is not only the same State entity, namely the DMO, that acted inconsistently, even contradictorily, but the same official within that entity, namely Mr. Baffi, the Director of the DMO. He first encouraged Rozmin and Claimants to continue to invest in the deposit and to resume works, only to then take away Rozmin's rights. The taking occurred once the deposit's reserves had been confirmed by Rozmin and the works at the Mining Area had been resumed precisely further to the Slovak Republic's

410 **Exhibit C-267**, Letter from Rozmin sro to the District Mining Office, dated November 8, 2004.

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

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

own representations, and despite assurances provided that Rozmin would be allowed to carry out mining activities until November 13, 2006.

2. Respondent's Failure to Act Transparently and to Treat Claimants' Investment Non-Arbitrarily and Reasonably

312. The fair and equitable treatment standard requires that the State act in a transparent manner, namely that there be no ambiguity in the legal framework relating to the investor's operations and that any decision affecting the latter be traceable to that legal framework.[413]

313. The requirement for transparency was confirmed by several arbitral tribunals as being encompassed by the fair and equitable treatment standard, including in *Waste Management*,[414] *Maffezini*,[415] *Tecmed*,[416] *Saluka*,[417] *LG&E*,[418] *Siemens*,[419] *Rumeli*[420] and, more recently, *Spyridon Roussalis*.[421] In particular:

> [A] *failure by a government to notify foreign investors of changes to laws, regulations and policies and to allow comments may well be one factor in determining whether there has been a breach of fair and equitable treatment.* […] *In addition, where changes to the legal framework would result in changing the terms of an acquired right (such as a business license or permit or changing a royalty rate under a concession), due process requirements of notification and an opportunity to be heard will apply*.[422]

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413 **Exhibit CL-160**, Christoph H. Schreuer, "Fair and Equitable Treatment in Arbitral Practice," 6 J. W. Inv. & T. at p. 374 (June 2005).

414 **Exhibit CL-83**, *Waste Management*, at ¶98.

415 **Exhibit CL-6**, *Maffezini*, at ¶83.

416 **Exhibit CL-137**, *Tecmed*, at ¶¶154, 162, 164 and 174.

417 **Exhibit CL-151**, *Saluka*, at ¶307.

418 **Exhibit CL-135**, *LG&E*, ICSID Case N° ARB/02/1, Decision on Liability, dated October 3, 2006 ("LG&E, Decision on Liability"), at ¶128, available at http://italaw.com/documents/ARB021_LGE-Decision-on-Liability-en.pdf.

419 **Exhibit CL-155**, *Siemens*, at ¶¶308-309, available at http://italaw.com/documents/Siemens-Argentina-Award.pdf.

420 **Exhibit CL-146**, *Rumeli*, at ¶583.

421 **Exhibit CL-138**, *Spyridon Roussalis*, at ¶314.

422 **Exhibit CL-134**, A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009), at pp. 292-293; emphasis added.

314. In sum, as explained by the tribunal in *LG&E*:

> *The fair and equitable standard consists of the host State's consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor.*[423]

315. As noted above at paragraph 291, the obligation of the host State to treat investors fairly and equitably also encompasses an obligation not to engage in conduct that is arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process.

316. In *Waste Management*, the arbitral tribunal summarized this obligation as amounting to a minimum standard of treatment under the fair and equitable treatment standard:

> [T]*he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.*[424]

317. Arbitrariness is defined as "not so much something opposed to a rule of law, as something opposed to the rule of law […]. It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[425] An act is arbitrary because it is "not founded on reason or fact […] but on mere fear reflecting national preference."[426]

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423 **Exhibit CL-135**, *LG&E*, Decision on Liability, at ¶131.

424 **Exhibit CL-83**, *Waste Management*, at ¶98.

425 **Exhibit CL-161**, *Elettronica Sicula S.P.A. (ELSI) Case* (United Stated of America v. Italy), Judgment of July 20, 1989, CIJ, Reports of Judgments, Advisory Opinions and Orders, 1989, at ¶128, available at http://www.icj-cij.org/docket/files/76/6707.pdf.

426 **Exhibit CL-90**, *Ronald S. Lauder v. Czech Republic* (UNCITRAL), Final Award, dated September 3, 2001, at ¶232, available at http://italaw.com/documents/LauderAward.pdf.

318. Finally, the duty to respect due process and not to deny justice arises from customary international law,[427] and forms part of the fair and equitable treatment standard. Arbitral tribunals have specifically found that the obligation for a State to respect judicial propriety and due process, i.e. the obligation not to deny justice, is an element of the fair and equitable treatment standard.[428] This obligation is also based on the fact that the judiciary is an organ of the State for purposes of attribution of responsibility under international law, as confirmed by Article 4 of the ILC Articles on State Responsibility.[429]

319. Denial of justice has been defined by tribunals and academics in different ways. At its most basic and fundamental level, denial of justice "*relates to serious inadequacies in the state's judicial or administrative system with respect to the judicial protection of foreigners and their rights*."[430]

320. In an early publication by Harvard Law School relating to the treatment of foreigners, this principle was articulated as follows:

> *Denial of justice exists where there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice or a manifestly unjust judgment.*[431]

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427 **Exhibit CL-165,** Jan Paulsson, *Denial of Justice in International Law*, at p. 1 (2005).

428 **Exhibit CL-162**, *Antoine Fabiani Case, (France v. Venezuela)*, 5 *Moore's International Arbitrations* 4878 (1898), at p. 4913, ¶6; **Exhibit CL-163**, *Robert E. Brown Case (United States v. Great Britain)*, Award (November 23, 1923), Reports of International Arbitral Awards, United Nations, VOLUME VI pp. 129-130, available at http://untreaty.un.org/cod/riaa/cases/vol_VI/120-131_Brown.pdf; **Exhibit CL-146**, *Rumeli*, at ¶651. **Exhibit CL-138**, *Spyridon Roussalis*, at ¶315.

429 **Exhibit CL-125**, ILC Articles on State Responsibility, Article 4: "*The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State*."

430 **Exhibit CL-134**, A. Newcombe and L. Paradell, Law and Practice of Investment Treaties: Standards of Treatment (Kluwer Law International, 2009), at p.239.

431 **Exhibit CL-164**, Draft Convention on "Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners", prepared by the Harvard Law School (1929), Yearbook of the International Law Commission, 1956, vol. II, pp. 229-230, Article 9.

321. The jurisprudence of international tribunals reveals that denial of justice is generally procedural. Yet, there may be cases where proof of the failed process may be substantiated by a decision so blatantly wrong that no honest or competent court could possibly have rendered it.[432] Tribunals have also held that collusion, either between a State, judicial authorities and a local party,[433] or among organs of the State,[434] can amount to a denial of justice.

322. The judicial system of the State must be driven by the principle of due process, a fundamental principle of law for the administration of justice, the breach of which could amount to a denial of justice. Due process is a course of legal proceedings according to the rules and principles which have been established to guarantee fairness and for the enforcement and protection of private rights. As held by the ICSID tribunal in *Rumeli*, "*a court procedure which does not comply with due process is in breach of the duty*."[435]

323. Procedural denial of justice thus corresponds to fundamental breaches of due process adversely affecting one party. These irregularities must be acts "*which* per se *cause damage due to their rendering a just decision impossible*."[436]

324. The notion of procedural denial of justice as an attack on judicial propriety was confirmed by the arbitral tribunal in *Loewen v. The United States of America*, which held that procedural denial of justice amounted to "*manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety*."[437]

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[432] **Exhibit CL-165**, Jan Paulsson, *Denial of Justice in International Law* 1 (2005), at 98.

[433] **Exhibit CL-162**, *Antoine Fabiani Case, (France v. Venezuela)*, 5 *Moore's International Arbitrations* 4878 (1898).

[434] **Exhibit CL-163**, *Robert E. Brown Case (United States v. Great Britain)*, Award (November 23, 1923), Reports of International Arbitral Awards, United Nations, VOLUME VI.

[435] **Exhibit CL-146**, *Rumeli*, at ¶653.

[436] **Exhibit CL-166**, *B. E. Chattin Case (United States v. United Mexican States)*, Award (July 23, 1927), Reports of International Arbitral Awards, United Nations, Volume IV, pp. 282-312, at 312, available at http://legal.un.org/riaa/cases/vol_IV/282-312.pdf.

[437] **Exhibit CL-167**, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, dated June 26, 2003, at ¶132, available at http://italaw.com/documents/Loewen-Award-2.pdf.

325. In the present case, Respondent did not act transparently or reasonably. In particular, Respondent did not comply with its duty to observe due process of law and therefore failed to treat Claimants fairly and equitably.

326. First, as explained above in greater detail at paragraphs 268 *et seq.*, 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.

327. 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.[438]

328. Rozmin was not even afforded an opportunity to present its case on the taking. 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. In fact, they had actually been induced to believe that Rozmin would be able to resume works in the Mining Area until, at least, November 13, 2006.

329. 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.[439] It is therefore undeniable that the taking of Claimants' investment was in breach of Claimants' due process rights, as confirmed by the Slovak Republic's highest judicial organ.

330. Third, the Slovak Republic's 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 in March 2012, to VSK Mining, amounts to a denial of justice, hence to a breach of the fair and equitable standard.

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438 **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.

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

331. In July 2008, notwithstanding the Supreme Court's decision of February 27, 2008, which cancelled the DMO's decision to assign the Gemerská Poloma "concession" to Economy Agency,[440] 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.[441]

332. Finally, 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.

333. By way of reminder, two days before the filing of Claimants' Request for Arbitration, the date of which had been communicated to Respondent both orally and in writing in the course of negotiations, criminal proceedings were launched in the Slovak Republic,[442] leading to the seizure and confiscation of all of Rozmin's original paper records (including privileged documents) and computer software.

334. Indeed, further to an Order for Preservation and Handing over of Computer Data, dated June 23, 2014,[443] and an Order for a House Search, dated June 25, 2014,[444] and after Respondent had been notified by ICSID of Claimants' Request for Arbitration on June 27, 2014, all of Rozmin's property and records were seized, even documents only remotely related to the company or its shareholders.[445] The Order for a House Search issued on June 25, 2014 entitled the police to secure, *inter alia*, all accounting and tax documents, all documents issued in the name of, or addressed to, Rozmin or its

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440 **Exhibit C-33**, Decision of the Supreme Court of the Republic of Slovakia, dated February 27, 2008 (Ref. 6Sz0/61/2007-121).

441 **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).

442 The Request for Arbitration was filed on June 25, 2014. Two days before, on June 23, 2014, JUDr. Spirko 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**).

443 **Exhibit C-50**, Order for Preservation and Handing over of Computer Data, dated June 23, 2014.

444 **Exhibit C-49**, Order for a House Search, dated June 25, 2014.

445 **Exhibit C-51**, Minutes on Performance of House Search, dated July 2, 2014.

shareholders since the creation of Rozmin without any limitation of scope on the subject-matter of these documents, as well as any documents in relation to the Gemerská Poloma Mining Area, whether such documents were available on hard copies or on data storage mediums. The scope of the search order was wide enough to encompass any and all correspondence and any document even remotely related to Rozmin, EuroGas or Belmont.

335. On July 2, 2014, a search was accordingly carried out at the home of Ms. Czmoriková, Rozmin's external accountant and safe-keeper of Rozmin's records and property, without prior warning.[446] The search, conducted by no less than eight members of the Slovak police force, the National Criminal Agency, the National Troop of the Financial Police, the National Anti-corruption Troup, and the Public Order Police, and in the presence of an "uninterested individual" and an "expert,"[447] lasted over 8 hours despite Ms. Czmoriková being cooperative.[448] All documents and records confiscated were original documents, and no copies were provided to Claimants. No proper inventory of the documents and items seized was prepared or handed to Claimants.

336. Following the search of her house, Ms. Czmoriková was summoned to appear for examination before the Police Corps in Rožňava on July 2, 2014.[449] At the examination, Ms. Czmoriková was questioned, *inter alia*, on her work as Rozmin's accountant, her contacts with Dr. Rozložník, Rozmin's assets and accounting, as well as studies and works carried out by Rozmin in relation to and at the Gemerská Poloma deposit. Even questions related directly to Ms. Czmoriková's knowledge of the arbitration proceedings were asked. Ms. Czmoriková was handed no copy of the minutes of her interrogation by the police. After the search carried out at her house and her examination by Slovak officials, Ms. Czmoriková who is a Slovak national and lives in the Slovak Republic with her husband and son, refused to appear in the present proceedings as a witness.

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446 Nothing indicates that the Order for Preservation and Handing over of Computer Data, dated June 23, 2014 or the Order for a House Search, dated June 25, 2014, had been notified to Ms. Czmoriková prior to this search.

447 **Exhibit C-51**, Minutes on Performance of House Search, dated July 2, 2014.

448 **Exhibit C-51**, Minutes on Performance of House Search, dated July 2, 2014.

449 **Exhibit C-52**, Witness Summons, dated July 2, 2014.

337. By Respondent's own admission, these criminal proceedings were launched against Claimants in reaction to their initiation of arbitration proceedings against the Slovak Republic.[450] In other words, Respondent abused its sovereign powers, through the taking of retaliatory measures against foreign investors, in direct reaction to the exercise, by the latter, of their legitimate right to initiate international arbitration proceedings.

338. 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.

339. While the Slovak Republic eventually ordered the return of property and documents seized, by resolution dated September 4, 2014, and ordered the suspension of the criminal proceedings, by resolution dated September 5, 2014, the Republic of Slovakia admitted that it had retained a full set of copies of the seized documents and material[451] and used them in the arbitration proceedings, in blatant violation of Claimants' right to the protection of privileged and confidential information and of the most basic procedural rules and principles, including the principles of equality of arms, fairness, and due process.

340. The Tribunal cannot turn a blind eye on 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. Therefore, in addition to warranting certain procedural relief and the drawing of negative inferences, which were addressed in due course by way of Claimants' application for provisional measures, retaliatory measures taken by Respondent justify an award of moral damages to Claimants, as further discussed below (see Section IV.C *infra*).

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450 Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, dated September 10, 2014, ¶ 49.

451 Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, dated September 10, 2014, ¶59.

3. Respondent's Failure to Act in Good Faith

341. Arbitral tribunals have confirmed that good faith – a principle by which States are bound under international law in their dealings with foreign investors[452] – is inherent to the fair and equitable treatment.[453]

342. In *Tecmed*, the arbitral tribunal concluded that the commitment of fair and equitable treatment was "*an expression and part of the bona fide principle recognized in international law*,"[454] even though bad faith from the State is not required for its violation.

343. Similarly, the tribunal in *Waste Management v. Mexico* found that the obligation to act in good faith was a basic obligation under the fair and equitable treatment standard and that a deliberate conspiracy by government authorities to destroy or frustrate the investment would violate this principle.[455] Specifically, the tribunal stated that "*a deliberate conspiracy – that is to say, a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement – would constitute a breach of* [the fair and equitable standard treatment]."[456]

344. This was also confirmed by F.A. Mann as follows:

> *In some cases, it is true, treaties merely repeat, perhaps in slightly different language, what in essence is a duty imposed by customary international law; the foremost example is the familiar provision whereby States undertake to 'accord fair and equitable treatment' to each other's nationals, and which in law is unlikely to amount to more than a confirmation of the obligation to act in good faith or to refrain from abuse or arbitrariness.*[457]

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452 **Exhibit CL-160**, Christoph H. Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (June 2005), 6 J. W. Inv. & T. 357, at 383.

453 **Exhibit CL-160**, Christoph H. Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (June 2005), 6 J. W. Inv. & T. 357, at 384.

454 **Exhibit CL-137**, *Tecmed*, at ¶153.

455 **Exhibit CL-83**, *Waste Management*, at ¶138.

456 **Exhibit CL-83**, *Waste Management*, at ¶138.

457 **Exhibit CL-168**, F.A. Mann, *The Legal Aspects of Money*, p.510 (1982); emphasis added.

345. Therefore, in order to comply with its duty to afford an investor fair and equitable treatment, a State does not only have a positive obligation to act in good faith, but must also refrain from acting in bad faith, which unquestionably includes refraining from using coercion, threats or harassment. This uncontroversial principle was affirmed by the arbitral tribunal in *Tokios Tokelés v. Ukraine*, when dissenting arbitrator Daniel Price expressed concurrence with the majority on this particular issue, stating that "[t]*here could be no serious debate that the fair and equitable treatment obligation* […] *is breached where a State exercises its sovereign powers – investigatorial, prosecutorial, regulatory or otherwise – to harass, intimidate, or retaliate against an investor for political purposes*."[458]

346. In the present case, Respondent did not just lack good faith. It acted in blatant bad faith.

347. First, Respondent acted in bad faith when it stated, on May 31, 2004[459] and December 8, 2004,[460] that Rozmin would be allowed to carry out mining activities until November 2006, only to revoke Rozmin's mining rights less than a month after these assurances were provided, on the purported ground that a law that was in effect since 2002, namely the 2002 Amendment, justified this revocation. Alternatively, even if there was no bad faith on Respondent's part when it authorized Rozmin, on May 31, 2004, to carry out mining activities until November 13, 2006, Respondent acted not only inconsistently but also in bad faith when it announced a new tender, on December 30, 2004[461] and informed Rozmin of the revocation of its rights on January 3, 2005,[462] less than a month after having confirmed the latter's right to carry out mining activities until November 2006.

348. Second and in any event, the Slovak Republic acted in bad faith by arguing *post facto* that the 2002 Amendment justified the taking of Rozmin's mining rights notwithstanding the purpose of the Amendment, which was to avoid mining areas being

458 **Exhibit CL-11**, *Tokios Tokelės*, at ¶2.

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

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

461 **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.

462 **Exhibit C-30**, Letter from the District Mining Office to Rozmin sro, dated January 3, 2005 (Ref. 2405/451.14/2004-I).

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.

349. As explained by the Slovak Supreme Court in its decision of May 18, 2011, the revocation of Rozmin's mining rights could only have been "*appropriate*" if, "*after a thorough investigation*,"[463] 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.

350. Yet, beyond the fact that Respondent must have known that the 2002 Amendment could not have applied retroactively, Respondent could not possibly have reached the conclusion that Rozmin or Claimants were not *bona fide* investors or that they were not committed to the development of the Gemerská Poloma deposit. In other words, Respondent could not in good faith consider that Rozmin fell within the purview of the 2002 Amendment.

351. 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 had 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.

352. Indeed, among other steps undertaken towards the resumption of mining activities, Rozmin had applied for new permits and authorizations or extensions of existing ones, conducted works related to the water treatment facilities, organized a new tender and hired a new development contractor, and engaged in negotiations for the sale and distribution of talc to be extracted from the deposit. Furthermore, as noted by the Supreme Court, approximately SKK 120 million had already been invested by Rozmin[464] and EuroGas and Belmont had continued to inject working capital in Rozmin during the suspension of works.

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

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

353. Respondent was well aware of this and therefore knew that the 2002 Amendment could not justify the revocation of Rozmin's mining rights. It nonetheless relied, in bad faith, on this Amendment in its revocation letter of January 3, 2005.[465]

354. Finally, the criminal proceedings launched by Respondent as a measure of retaliation in reaction to Claimants' initiation of arbitration proceedings and the seizure of all of Rozmin's property and records, including confidential and privileges documents (as described above at paragraphs 333 *et seq*.), in breach of the principle of equality of arms and Claimants' basic right to due process, are also manifestations of Respondent's bad faith towards Claimants.

355. In *Libananco v. Turkey*,[466] the respondent had intercepted privileged emails and communications between the investor and its counsel, among other materials. This was made possible by court orders issued in the course of a money laundering investigation.[467] Following the claimant's request for a "*summary judgment*," the tribunal stated with respect to the interception that "[t]*hese allegations* [struck] *at the very heart of the ICSID arbitral process*," considering that "*basic procedural fairness, respect for confidentiality and legal privilege* […] *and the right of parties to seek advice and to advance their respective cases freely and without interference*" were affected among other "*fundamental principles*."[468] In the words of the tribunal, "*parties have an obligation to arbitrate fairly and in good faith*" and it is the tribunal's role to ensure that the parties abide by it.[469]

356. The circumstances of the present case are even worse than those in *Libananco*, and warrant all the more a finding of breach of the principle of fair and equitable treatment. In the present case, Respondent expressly and shamelessly advanced, in several court orders and resolutions, the arbitration as the reason that had prompted the seizure of all

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465 **Exhibit C-30**, Letter from the District Mining Office to Rozmin sro, dated January 3, 2005 (Ref. 2405/451.14/2004-I).

466 **Exhibit CL-32**, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/08, Decision on Preliminary issues, dated June 23, 2008.

467 *Id*. at ¶¶19, 45.

468 *Id.* at ¶78.

469 *Id.* at ¶79.

of Rozmin's property and records, including privileged and confidential documents. Indeed, both Orders of June 23, 2015 and June 25, 2014 were 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.*[470]

357. 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.*"[471] 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.*" [472] Finally, the Resolution explicitly provided for the suspension of criminal proceedings *against Claimants and Rozmin*.[473]

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470 **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.

471 **Exhibit R-2**, Resolution Suspending Criminal Proceedings, dated September 5, 2014, p. 6; emphasis added.

472 **Exhibit R-2**, Resolution Suspending Criminal Proceedings, dated September 5, 2014, p. 5.

473 **Exhibit R-2**, Resolution Suspending Criminal Proceedings, dated September 5, 2014, pp. 1-2: "*The criminal prosecution was commenced on 2 July 2014* [...] *on the following factual basis that so far unidentified individuals, who acted on behalf of the shareholders of company Rozmin s.r.o.* […], *i.e. Belmont Resources Inc.* […] *and EuroGas GmbH* […], *whose parent company is the American company*

358. Again, the Tribunal cannot turn a blind eye on such conduct, which amounts to a blatant breach of the State's obligation to act in good faith and afford investors fair and equitable treatment.

C. ARBITRARY AND UNREASONABLE TREATMENT

359. Aside from fair and equitable treatment and full protection and security obligations, Respondent is under a specific obligation to ensure that Claimants' investment is free from unreasonable and arbitrary measures, pursuant to Article II(2)(b) of the US-Slovak Republic BIT, Article IX(1) *a contrario* of the Canada-Slovak Republic BIT, and customary international law.

360. Article II(2)(b) of the US-Slovak Republic BIT reads as follows:

> *Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.*

This provision further stipulates that "[f]or purposes of dispute resolution under Article 3 VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party."

361. In turn, Article IX(1) – to be read *a contrario* – of the Canada-Slovak Republic BIT provides:

EuroGas Inc. […] – *after a preceding notice of dispute dated 23 December 2013 pursuant to international treaties on the promotion and protection of investments, delivered to the Slovak Republic also via the Ministry of Finance of the Slovak Republic, under a threat that on 25 June 2014 they will submit the dispute to the International Center for Settlement of Investment Disputes (ICSID) – a request for arbitration was served on 27 June 2014 on the Ministry of Finance of the Slovak Republic, filed by the American company EuroGas Inc. and the Canadian company Belmont Resources Inc. against the Slovak Republic in the International Center for Settlement of Investment Disputes (ICSID) – thereby they claim damages for impaired investment in relation to the revocation of the authorization to excavate the exclusive deposit of talc in the Gemerská Poloma excavation area of company Rozmin, s.r.o. – but also through various media releases in the Slovak Republic with an intent to mislead the representatives of the Ministry of Finance of the Slovak Republic, the companies assert untrue information about impaired investment and illegal revocation of the authorization to excavate the exclusive deposit of talc in the Gemerská Poloma excavation area* […] *– whereas so far unidentified individuals who acted on behalf of the shareholders of company Rozmin, s.r.o. thus acted with an intent to unlawfully acquire funds amounting to USD 3.2 billion, i.e. approximately EUR 2,343,292,325 using the exchange rate of the National Bank of Slovakia, to the detriment of the Slovak Republic represented by the Ministry of Finance of the Slovak Republic because proceedings on a matter which cannot be resolved in these proceedings have commenced*" (emphasis added).

> *Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures necessary:*
>
> *(a) to protect human, animal or plant life or health;*
>
> *(b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agree1nent; or*
>
> *(c) for the conservation of living or non-living exhaustible natural resources.*

362. The standard of reasonableness does not have a different meaning from the fair and equitable treatment standard "*with which it is associated*."[474] Reasonableness therefore requires that the State's conduct must "*bear a reasonable relationship to some rational policy*."[475] Similarly, the standard of protection against arbitrariness "*is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment. The standard is next related to impairment*"[476] of the management, maintenance, use, enjoyment, conduct, operation, expansion, sale, disposal or liquidation of such investment.

363. In sum, the fair and equitable standard englobes the right to protection against arbitrary and unreasonable measures.[477] For this reason, Claimants submit that the acts and omissions of Respondent set out above at paragraphs 288 *et seq.*, which are constitutive of violations of the fair and equitable standard, also constitute a violation of their right to protection against arbitrary and unreasonable measures under Article II(2)(b) of the US-Slovak Republic BIT, Article IX(1) *a contrario* of the Canada-Slovak Republic BIT, and customary international law, with the same causation as set out above.

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474 **Exhibit CL-151**, *Saluka*, at ¶460.

475 **Exhibit CL-151**, *Saluka*, at ¶460.

476 **Exhibit CL-169,** *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005), at ¶290, available at http://italaw.com/documents/CMS_FinalAward_000.pdf.

477 **Exhibit CL-151**, *Saluka*, ¶ 460; **Exhibit CL-169**, *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, dated May 12, 2005 ("CMS Gas"), ¶290, available at http://italaw.com/documents/CMS_FinalAward_000.pdf; **Exhibit CL-161**, *Elettronica Sicula S.P.A. (ELSI) Case* (United Stated of America v. Italy), Judgment of July 20, 1989, CIJ, Reports of Judgments, Advisory Opinions and Orders, 1989, ¶128, available at http://www.icj-cij.org/docket/files/76/6707.pdf.

D. FAILURE TO GRANT FULL PROTECTION AND SECURITY

364. In addition to Respondent's obligation to treat Claimants' investments fairly and equitably, Respondent is also obliged to provide Claimants' investments with full protection and security, pursuant to Article II(2)(a) of the US-Slovak Republic BIT, Article III(1)(a) of the Canada-Slovak Republic BIT, and customary international law.

365. The obligation to accord full protection and security requires the host State to exercise due diligence in the protection of foreign investments.[478] International law has interpreted this due diligence obligation to impose an objective standard of vigilance and thus to require the State to afford the degree of protection and security that should be legitimately expected to be secured by a reasonably well-organized modern State.[479] The State has a "*primary obligation*" to exercise due diligence to provide adequate protection, "*failure to comply with which creates international responsibility*."[480]

366. The exercise of due diligence imposes on the State an objective obligation of vigilance and care:

> [The State has an objective obligation] […] *of vigilance, in the sense that* [the State] […] *shall take all measures necessary to ensure the full enjoyment of protection and security of* [the] *investment and should not be permitted to invoke its own legislation to detract from any such obligation* […]. [The State's obligation] *is thus an objective obligation which must not be inferior to the minimum standard of vigilance and of care required by international law*.[481]

367. The State's failure to comply with this objective obligation due to "*the mere lack or want of diligence*" is sufficient to constitute a violation of international law, "*without any need to establish malice or negligence.*"[482]

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478 **Exhibit CL-132**, Rudolf Dolzer and Margrete Stevens, Bilateral Investment Treaties 61 (1995).

479 **Exhibit CL-170**, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, dated June 27, 1990 ("Asian Agricultural Products"), at ¶77, available at http://italaw.com/documents/AsianAgriculture-Award.pdf.

480 **Exhibit CL-170**, *Asian Agricultural Products*, at ¶76.

481 **Exhibit CL-171**, *American Manufacturing & Trading v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, dated February 21, 1997, at ¶6.05 – 6.06, available at http://italaw.com/documents/AmericanManufacturing.pdf (emphasis added).

482 **Exhibit CL-170**, *Asian Agricultural Products*, at ¶77.

368. Finally, in assessing the scope of Respondent's obligation to provide protection and security to an investor and its investments, the tribunal in *Biwater Gauff v. Tanzania* considered the importance of the qualification of that protection and security as "full" in the language of the BIT. "Full", the tribunal found, "*implies a State's guarantee of stability in a secure environment, both physical, commercial and legal.* […] *The Arbitral Tribunal also does not consider that 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.*"[483]

369. Certain tribunals have thus considered, in particular, that the introduction of changes into a regulatory framework of undertakings and assurances, which effectively dismantled that framework, was contrary to the protection and constant security to be provided by the State under a BIT.[484]

370. The fair and equitable standard has been held to englobe the right to full protection and security: treatment that is not fair and equitable "*automatically entails an absence of full protection and security*,"[485] as was held by the arbitral tribunal in *Occidental*. A State therefore *ipso facto* breaches its obligation to provide full protection and security to an investor's investments if it is found to have breached its obligation to treat that investor fairly and equitably.

371. For this reason, Claimants submit that the acts and omissions of Respondent set out above, which amount to violations of the fair and equitable treatment standard, also constitute a violation of the standard of full protection and security,[486] with the same causation.

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483 **Exhibit CL-31**, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, dated July 24, 2008 ("Biwater"), at ¶729 *et seq.*, available at http://italaw.com/sites/default/files/case-documents/ita0095.pdf.

484 **Exhibit CL-147**, *National Grid* at ¶189-190, available at http://italaw.com/sites/default/files/case-documents/ita0555.pdf.

485 **Exhibit CL-158**, *Occidental Exploration & Production Co. v. The Republic of Ecuador* (UNCITRAL), Final Award, dated July 1, 2004, at ¶187.

486 *The standard of* full protection and security standard not only encompasses the physical security of foreign investors and their investments, but also the legal and commercial security in which the investment operates, *see* **Exhibit CL-152**, *Azurix*, ¶408; **Exhibit CL-31**, *Biwater*, at ¶729: ("*The Arbitral Tribunal adheres to the* ***Azurix*** *holding that when the terms "protection" and "security" are qualified by "full", the content of the standard may extend to matters other than physical security. It implies a*

E. FAILURE TO COMPLY WITH SPECIFIC COMMITMENTS

372. Both BITs require that the Slovak Republic honor its specific obligations towards foreign investors.

373. Respondent's obligation is set forth in Article II(2)(c) of the US-Slovak Republic BIT, an "umbrella clause" which reads as follows:

> *Each Party shall observe any obligation it may have entered into with regard to investments.*

374. The Canada-Slovak Republic BIT, on the other hand, does not contain a similar provision. Article II(2)(c) of the US-Slovak Republic BIT may, however, be applied to Canadian investors in the Slovak Republic via Article III(2) of Canada-Slovak BIT, namely this BIT's MFN clause. ICSID tribunals have indeed recognized that an umbrella clause may be imported into a BIT via its MFN clause.[487] Via the MFN clause of the Canada-Slovak Republic BIT, Canadian investors are thus entitled to broader and/or other guaranties accorded to foreign investors in the Slovak Republic under other bilateral investment treaties entered into by this country. In particular, the Slovak Republic must comply with its specific undertakings towards Canadian investors just as must comply with such undertakings towards US investors under the Slovak Republic's BIT with the United States.

375. Under the specific undertakings commitment, where a specific commitment is made by a State towards an investor with respect to its investment, the investor need only prove that the State failed to observe that commitment in order to bring a claim under the

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State's guarantee of stability in a secure environment, both physical, commercial and legal. It would in the Arbitral Tribunal's view be unduly artificial to confine the notion of "full security" only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments"); **Exhibit CL-155**, *Siemens*, at ¶303; **Exhibit CL-145**, *Vivendi I Award*, at ¶¶7.4.15 – 7.4.17.

487 *See* **Exhibit CL-150**, *Arif* at ¶396; **Exhibit CL-172**, *EDF International SA and others v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, dated June 11, 2012, at ¶937, available at http://italaw.com/sites/default/files/case-documents/ita1069.pdf; **Exhibit CL-149,** *MTD*, at ¶104.

umbrella clause. No abuse by the State of its sovereign power in committing that breach is necessary.[488]

376. In *Al-Bahloul v. Tajikistan*, the State's obligation to observe specific commitments was found to have been breached where exploration licenses promised under agreements were never issued. Tajikistan had entered into four agreements containing clear and unconditional obligations on the part of the State to ensure the issuance of licenses to the claimant, necessary for the commencement of oil and gas exploration works. Those licenses were never issued, and no excuse or justification for this failure on the part of the State was ever provided. As such, the arbitral tribunal held that by failing to comply with its obligations in the agreements, Tajikistan was in breach of its obligation under the umbrella clause of Article 10(1) of the Energy Charter Treaty,[489] which provides that, "[e]*ach Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party*."

377. Under the BITs and in the case at hand – be it by virtue of the fair and equitable treatment protection clause, customary international law, or the US-Slovak Republic BIT or the Canada-Slovak Republic BIT by way of its MFN clause – the Slovak Republic had the obligation to allow Claimants to enjoy the mining rights they held via Rozmin, until November 13, 2006.

378. Indeed, 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 decision of the DMO issued on May 31, 2004,[490] which was reconfirmed on December 8, 2004 by Mr. Baffi, the DMO's Director, following an inspection of the Mining Area.[491]

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488 **Exhibit CL-173**, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, dated February 10, 2012, at ¶74, available at http://www.italaw.com/sites/default/files/case-documents/italaw1525.pdf.

489 **Exhibit CL-174**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, ICSID Case No. V064/2008, Partial Award on Jurisdiction and Liability, dated September 2, 2009. at ¶¶263-268, available at http://italaw.com/sites/default/files/case-documents/ita0023_0.pdf.

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

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

379. By revoking Rozmin's mining rights less than a month later and thus depriving Claimants of their investment, the Slovak Republic failed to honour its specific undertaking towards Claimants and thus acted in breach of the US-Slovak Republic BIT, the Canada-Slovak Republic BIT, and customary international law.

* * *

380. Based 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.

VI. DAMAGES

381. Slovakia's breaches of its obligations under the BITs and international law, described above in Section V, 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.

382. The present Section discusses the assessment of the Mining Area's talc reserves (**A**) and addresses the kind of damages sustained by Claimants, namely material damages (**B**), moral damages (**C**), and interest (**D**). In accordance with the Tribunal's instructions of March 24, 2015, however, damages sustained by Claimants will be quantified at a later stage of the proceedings.

A. ASSESSMENT OF TALC RESERVES IN THE MINING AREA

383. Until their revocation, Rozmin's mining rights pertained to the entire Mining Area, namely a surface of 4,965 km^2. Indeed, this Mining Area was transferred by Geological Survey to Rozmin on June 11, 1997[492] (as certified by the District Mining Office in

[492] **Exhibit C-23**, Agreement on the Transfer of the Gemerská Poloma Mining Area, dated June 11, 1997. This followed a prior approval of the acquisition of the Mining Area by Rozmin sro, issued by the District Mining Office on June 5, 1997 (**Exhibit C-123**).

Spisska Nova Ves on June 24, 1997[493]), following the assignment of this Area to Geological Survey on July 25, 1996.[494]

384. Rozmin must therefore be compensated for the loss of profits suffered as a result of the deprivation of its mining rights over the entire Mining Area.

385. As noted above in Section III, the Feasibility Study estimated that the Mining Area contained approximately 9 million tons of mineralized rock containing more than 40% of talc.[495] With respect to the Extraction Area, the Kloibhofer Report concluded that the Extraction Area yielded "*reserve*[*s*] *amount*[ing] *to at least 1.428 million*" tons of pure talc[496] (*i.e.* 55% more than those estimated in the Feasibility Study with respect to the same Extraction Area[497]).

386. Mr. Alex Hill, a mining expert with Wardell Armstrong International ("WAI"), a leading English mining consultancy firm, confirms that according to the findings of the Feasibility Study and of the Kloibhofer Report, the Western Area of the deposit alone hosts at least 4,076 million tons of pure talc.[498] According to Mr. Hill, this is a conservative assessment, based on the data available from drilling carried out at the time of the facts prior to the dispute.

387. As Mr. Hill explains:

> [F]*ollowing the confirmation of minable resources based upon the known bore hole data, Rozmin would have continued to explore the extent of the overall talc deposit in order to confirm further high grade areas and, as such, further extraction areas by further and extensive bore hole drilling.*
>
> *Indeed, the initial plan by Rozmin was to develop the Mining Area by mining a access tunnel from which further bore hole exploration would have been carried out while the initial talc extraction production would take place.*

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493 **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).

494 **Exhibit C-20**, Decision on the Assignment of the Gemerská Poloma Mining Area, dated July 25, 1996.

495 **Exhibit C-121**, Feasibility Study, p. 6.

496 **Exhibit C-154**, Kloibhofer Report, dated April 4, 2000, p. 17.

497 **Exhibit C-121**, Feasibility Study, p. 6.

498 WAI Expert Report, p. 14.

> […] *it is reasonable to accept that further extensive minable areas do exist outside the identified Extraction Area as high talc grade bore holes within the Mining Area do exist and, when explored further, will prove the full scope and extent of the talc deposit.*[499]

388. In fact, based on WAI's re-modelling of the existing data, a total of 14,155,000 tons of talc are estimated to be present in the deposit, in mineralized rock containing at least 60% of talc.[500]

B. MATERIAL DAMAGES

389. Neither customary international law, the applicable BITs, nor Slovak law set forth any methodology with respect to, or any limitations on, how to assess compensation due following an unlawful expropriation. The BITs only set forth a standard of compensation in the event of a lawful expropriation, *i.e.*, an expropriation carried out for a public purpose, under due process of law, in a non-discriminatory manner, and upon payment of prompt, adequate and effective compensation (Article III(1) *in initio* of the US-Slovak Republic BIT and Article VI(1) *in initio* of the Canada-Slovak Republic BIT).[501]

390. Accordingly, in case of unlawful expropriation, compensation must be determined in accordance with general principles of international law,[502] which are set forth in the ILC Articles on State Responsibility. Article 31 lays down the obligation of States to make full reparation for the injury caused by their internationally wrongful act.[503] A compensable injury includes "*any damage, whether material or moral, caused by the*

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499 WAI Expert Report, pp. 15-16.

500 WAI Expert Report, p. 16.

501 In case of lawful expropriation, Article III(1) *in fine* of the US-Slovak Republic BIT provides that "[c]*ompensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable*." Article VI(1) *in fine* of the Canada-Slovak Republic BIT, in turn, provides that "[s]*uch compensation shall be based on the real value of the investment at the time of the expropriation, shall be payable from the date of expropriation at a normal commercial rate of interest, shall be paid without delay and shall be effectively realizable and freely transferable.*"

502 *See*, for example, **Exhibit CL-153**, *ADC*, at ¶483; **Exhibit CL-155**, *Siemens*, at ¶349; **Exhibit CL-157**, *S.D. Myers v. Canada* (UNCITRAL), First Partial Award dated November 13, 2000, at ¶¶309 *et seq.*, available at http://italaw.com/sites/default/files/case-documents/ita0747.pdf.

503 **Exhibit CL-125**, ILC Articles on State Responsibility, Article 31(1), "*The Responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act*."

internationally wrongful act."[504] A State – required to make full reparation for the injury it has caused – will be liable to make such reparation in the form of restitution, compensation and/or satisfaction, either separately or jointly.[505] In the case of compensation, such compensation shall cover any financially assessable damage.[506]

391. The principle of full reparation as the applicable standard under international law was confirmed by the decision of the Permanent Court of International Justice in the *Chorzow Factory* case:

> [R]*eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed*.[507]

392. Arbitral tribunals themselves have confirmed that unlawful expropriations are to be compensated under the international law standard set forth above.[508] Furthermore, the "*fair market value*" is the standard of compensation commonly applied for the assessment of damages in cases of expropriations.[509]

393. A distinction must be drawn between the date of expropriation (*i.e.*, the date on which the taking occurred in cases of direct expropriation), which goes to the question of liability,[510] and the date of valuation, which goes to the question of damages. The BITS Claimants are entitled to rely upon, namely the US-Slovak Republic and Canada-Slovak Republic BITs, do not provide for a date at which the investment must be

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504 **Exhibit CL-125**, ILC Articles on State Responsibility, Article 31 (2).

505 **Exhibit CL-125**, ILC Articles on State Responsibility, Article 34 ("*Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter*").

506 **Exhibit CL-125**, ILC Articles on State Responsibility, Article 36 (2).

507 **Exhibit CL-175**, *Chorzow Factory Case (Germany v. Poland)*, 1928 P.C.I.J. (Ser. A) No. 17, at p. 47, available at http://www.icj-cij.org/pcij/serie_A/A_17/54_Usine_de_Chorzow_Fond_Arret.pdf.

508 **Exhibit CL-153**, *ADC*, at ¶483; *see* also **Exhibit CL- 155**, *Siemens*, at ¶349.

509 **Exhibit CL-176**, UNCTAD Series on Issues in International Investment Agreements II, Expropriation, p. xiii (available at http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf) ("*While in theory, compensation for lawful expropriation should be different from reparation for an unlawful one, in many cases the two are determined by reference to the same fair market value of the expropriated investment*").

510 Arbitral tribunals have considered that, in cases of creeping expropriation, the date of expropriation is not necessarily the date of the first or of the last expropriatory event, but can be any point in time within that range when the owner has been irreversibly deprived of its property. The exact date on which this moment is deemed to have occurred is left to the discretion of the arbitral tribunal, which is entrusted to make a case-by-case assessment in this regard.

valued in the event of unlawful expropriation. It is clear, however, that the moment of valuation should be the date on which assessing the fair market value of a foreign investment for purposes of calculating compensation will enable the Tribunal to give effect to the principle of full reparation set forth in *Chorzow Factory*.

394. If it has traditionally been the case that the date of expropriation was considered as the date of valuation, it is only because the value of the investment in question invariably declined after the State had expropriated the investor.[511] In the past few years, however, arbitral tribunals have accepted that the application of the *Chorzow Factory* standard may require that the date of valuation be the date of the Award, and not the date of expropriation. For example, in *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, the tribunal found that "[t]*he present case is almost unique among decided cases concerning the expropriation by States of foreign owned property, since the value of the investment after the date of expropriation has risen very considerably* […]. [I]*n the present,* sui generis, *type of case the application of the* Chorzow Factory *standard requires that the date of valuation should be the date of the Award and not the date of expropriation, since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed*."[512]

395. Similarly, the tribunal in Siemens A.G. v. The Argentine Republic held that "[i]t is only logical that, if all the consequences of the illegal act need to be wiped out, the value of the investment at the time of this Award be compensated in full. Otherwise compensation would not cover all the consequences of the illegal act."[513] This position has since been reiterated by other arbitral tribunals including the tribunals in Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia[514] and Marion Unglaube and Reinhard Unglaube v. The Republic of Costa Rica.[515]

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511 **Exhibit CL-153**, *ADC*, at ¶496: "[…] *other arbitrations that apply the* Chorzow Factory *standard all invariably involve scenarios where there has been a decline in the value of the investment after regulatory interference. It is for this reason that application of the restitution standard by various arbitration tribunals has led to use of the date of the expropriation as the date for the valuation of damages*."

512 **Exhibit CL-153**, *ADC*, at ¶¶496-497.

513 **Exhibit CL-155**, *Siemens*, at ¶353.

514 **Exhibit CL-148**, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, dated March 3, 2010, at ¶514, available at http://italaw.com/sites/default/files/case-documents/ita0347.pdf: "*In certain circumstances full*

396. As to the breaches of Slovakia's obligations other than the unlawful expropriation of Claimants' mining rights and investment, be it under customary international law or under the BITs, some arbitral tribunals have applied the principle of full reparation set forth in the *Chorzow Factory* case.[516] Others have explicitly used the standard of fair market value in determining damages for violations of fair and equitable treatment, defined as "*the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts*."[517]

397. The damages sustained by Claimants consist in the losses resulting from the expropriation of Rozmin's mining rights and Claimants' other claims vis-à-vis the Slovak Republic. Article 36(2) of the ILC Articles provides that "*compensation shall cover any, financially assessable damage including loss of profits insofar as it is established*."[518] This requires that the profits not be speculative but established with reasonable probability. As the Tribunal explained in *Lemire v. Ukraine*:

> *Once causation has been established, and it has been proven that the* in bonis *party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss.*[519]

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reparation for an unlawful expropriation will require damages to be awarded as of the date of the arbitral Award. It may be appropriate to compensate for value gained between the date of expropriation and the date of the award in cases where it is demonstrated that the Claimants would, but for the taking, have retained their investment."

515 **Exhibit CL-123**, *Reinhard Unglaube*, at ¶307, available at http://italaw.com/sites/default/files/case-documents/ita1052.pdf: "*Under either approach* [treaty-based compensation or compensation based on customary international law], *for example, where property has been wrongfully expropriated, the aggrieved party may recover (1) the higher value that an investment may have acquired up to the date of the award and (2) incidental expenses.*"

516 **Exhibit CL-149**, *MTD*, at ¶238, available at http://italaw.com/sites/default/files/case-documents/ita0544.pdf.

517 **Exhibit CL-27**, *El Paso Energy*, at ¶702. *See also* **Exhibit CL-169**, *CMS Gas*, ¶¶402 and 410; **Exhibit CL-152**, *Azurix*, ¶424.

518 **Exhibit CL-125**, ILC Articles on State Responsibility, Article 36(2).

519 **Exhibit CL-177**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, dated March 28, 2011 ("Lemire"), ¶246, available at http://italaw.com/sites/default/files/case-documents/ita0454.pdf.

398. While it is true that arbitral tribunals do rely on the historical performance of companies in order to assess the reliability of the data used for projections of future profits, this practice may have led to the misconception that damages may only be awarded with respect to projects that have a track-record of profitability. Such a conclusion is, however, inaccurate and multiple arbitral tribunals had in fact already accepted to award damages even when a project has not started operations, provided that the data used for projections of future incomes could be established with sufficient certainty on the basis of additional elements, as explained below.

399. As set forth by the Arbitral Tribunal in *Micula v. Romania*:

> [B]efore *they are entitled to request a more lenient application of the standard of proof, the Claimants must first prove that they would have actually suffered lost profits, i.e., that they have been deprived of profits that would have actually been earned. In the Tribunal's view, this requires proving (i) that the Claimants were engaged in a profit-making activity (or, at the very least, that there is sufficient certainty that they had engaged or would have engaged in a profit-making activity but for the revocation of the incentives), and (ii) that that activity would have indeed been profitable (at the very least, that such probability was probable).*
>
> *In the Tribunal's view, the sufficient certainty standard is usually quite difficult to meet in the absence of a going concern and a proven record of profitability. But it places the emphasis on the word 'usually.' Depending on the circumstances of the case, there may be instances where a claimant can prove with sufficient certainty that it would have made future profits but for the international wrong. This might be the case, for example, where the claimant benefitted from a long-term contract or concession that guaranteed a certain level of profits or where, as here, there is a track record of similar sales. This must be assessed on a case by case basis, in light of all the factual circumstances of the case.*[520]

400. A number of tribunals have found these circumstances to exist and awarded loss of profits, as set out below.

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[520] **Exhibit CL-178**, *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award, dated December 11, 2012 ("Ioan Micula"), at ¶¶ 1009-1010; emphasis added.

401. This was for example the case in *Starrett v. Iran*.[521] By way of background, Starrett had undertaken to construct 6000 apartment units in three phases. During the first phase, it was to construct 1600 such apartment units, grouped in eight 26-storey buildings. At the time of the taking, this phase was incomplete, but the Tribunal observed that it would have taken another nine months for it to have been completed after remobilization of the work force.[522] The Tribunal held that an expropriation had occurred and instructed an independent expert to give an opinion on the issue of valuation. The expert based his valuation on the DCF method which the Tribunal accepted, stating that the claimant was entitled to "*just compensation*" which "*shall represent the full equivalent of the property taken*."[523] In his concurring opinion, Judge Holtzmann explained that he "*fully agree*[d] *with the Tribunal's holding that the proper standard of compensation for the expropriation of Starrett's property rights is the full equivalent of the fair market value of those rights on the date of taking, including future lost profits.*"[524]

402. Lost profits were also awarded based of the DCF method in *Sapphire International Petroleum (Sapphire) v. The National Iranian Oil Company* (NIOC).[525] In that case, NIOC and Sapphire, a Canadian company, had entered into a contract to expand the production and exportation of Iranian oil, and to that effect established the Iranian Canada Oil Company ("IRCAN"). Sapphire International, Sapphire's subsidiary to which Sapphire had assigned the contract shortly after its conclusion, had started works in the concession area and subsequently claimed the reimbursement of it expenses, which NIOC had refused, on the basis that Sapphire International had not consulted it before carrying out its operations. As a result, Sapphire International had not started drilling operations in the concession area as planned, and NIOC had subsequently repudiated the contract. Sapphire initiated arbitration proceedings invoking a breach of contract and requesting compensation for expenses (incurred before and after the

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521 **Exhibit CL-179**, *Starrett Housing Corporation v. Iran* (*Starrett*), Award, dated August 14, 1987, 16 Iran-US CTR 112 ("Starrett").

522 **Exhibit CL-179**, *Starrett*, at ¶308.

523 *Ibid.*

524 **Exhibit CL-179**, *Starrett*, Concurring Opinion of Judge Howard Holtzmann, at (I) 'Introduction', at p. 1.

525 **Exhibit CL-180**, *Sapphire International Petroleums Ltd v. National Iranian Oil Company (Sapphire)*, Ad hoc Tribunal (1964) ("Sapphire").

conclusion of the contract) and loss of profit. With respect to loss of profits, the sole arbitrator held, albeit *ex aequo et bono*, that even where the amount of profit could not be determined precisely, showing sufficient probability of making a profit was enough to show an entitlement to compensation:

> *It is not necessary to prove the exact damage in order to award damages. On the contrary, when such a proof is impossible, particularly as a result of the behaviour of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage.*[526]

403. In support of his conclusions to award compensation for loss of profits, the arbitrator considered that "[i]*n such cases* [*i.e.* land or unprospected mining or oil concessions], *there is no need to prove the success of the search; it is sufficient to establish a reasonable probability of success. This fact alone gives the land or the concession a market value, which the courts estimate by considering the following factors: transactions relating to neighboring territories, the appraisal of experts, and especially geologists, concerning the probability of profit, and the comparison with neighboring areas.*"[527]

404. In the 2007 Vivendi Award, the tribunal also recognized that "in an appropriate case, a claimant might be able to establish the likelihood of lost profits with sufficient certainty even in the absence of a genuine going concern. For example, a claimant might be able to establish clearly that an investment, such as a concession, would have been profitable by presenting sufficient evidence of its expertise and proven record of profitability of concessions it (or indeed others) had operated in similar circumstances."[528]

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526 **Exhibit CL-180**, *Sapphire*, at pp. 187-188.

527 **Exhibit CL-180**, *Sapphire*, at p. 188 (emphasis added).

528 **Exhibit CL-145**, *Vivendi I*, at ¶8.3.4. The *Al-Bahloul* case, the Tribunal also held that a DCF analysis may be appropriate even where the investment project at issue has not started operation (**Exhibit CL-174**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, June 8 2010, at ¶74), for instance where the exploration of hydrocarbons is at issue, given the existence of numerous hydrocarbon reserves around the world and sufficient data allowing for future cash flow projections, hence given that the determination of future cash flow from the exploitation of hydrocarbon reserves does not depend on a past record of profitability (*id.*, ¶75). The conditions were however not gathered in that case, whereas they are in the present case.

405. The mining industry is in fact a typical industry in which the award of loss of profits, without regard to the record of profitability once the existence of reserves is confirmed, are warranted. As noted by Crawford, "[t]*he method used to assess 'fair market value'* […] *depends on the nature of the asset concerned. Where the property in question or comparable property is freely traded on an open market, value is more readily determined.* […] *Where the property interest in question are unique or unusual, for example, art works or other cultural property, or are not the subject of frequent market transactions, the determination of value is more difficult.*"[529]

406. Mining companies derive their primary value on the existence of reserves and less on the ability to develop and extract such reserves and later sell them to the market. Losses can therefore be demonstrated with more than the "reasonable probabilities" required. Accordingly, as pointed out by Hardin and Milburn, "*there is a strong argument that provided a project has reached the point of economic viability (or with an acceptable degree of certainty would have reached this point absent the wrongful act), and provided the costs and revenues can be estimated with a reasonable degree of certainty, a DCF may be performed which would yield a reasonable determination of value. The remaining risks such as price risk, country risk (ie, political risk, disruption risk, etc), and any other risks specific to the region would have to be taken into account as well, as would also be the case for an entity with a proven track record.*"[530]

407. In accordance with the above, in the recent *Gold Reserve v. Venezuela* award, compensation was awarded in a case in which exploitation of a deposit had not yet been launched, further to a finding that Venezuela had failed to accord fair and equitable treatment to Gold Reserve's investment.

408. In this case, mining concessions had been terminated after the submission of several feasibility studies and the award of a series of permits to the investor, but before exploitation had been launched. The tribunal explained that in accordance with the relevant principles of international law, derived from the *Chorzów Factory* award, "*reparation should wipe-out the consequences of the breach and re-establish the*

529 **Exhibit CL-120**, J. Crawford, Commentaries to the ILC Articles on State Responsibility, pp.102-103, ¶ 22.

530 **Exhibit CL-181**, L. Hardin & Chr. Milburn, Valuation of "Start-Up" Oil and Gas and Mining Projects, The Arbitration Review of the Americas, 2011, pp.14-15.

situation as it is likely to have been absent the breach [and] *consider*[ed] *it appropriate that the remedy that would wipe-out the consequences of the breach* [was] *to assess damages using a fair market value methodology.*"[531]

409. The tribunal was "satisfied that the appropriate standard of proof is the balance of probabilities. This, of course, means that damages cannot be speculative or merely 'possible' […]. In the Tribunal's view, […] the balance of probabilities applies, even if some tribunals phrase the standard slightly differently. […] In particular, those cases that discuss the requirement for 'certainty' do so in the context of distinguishing 'proven' damages from speculative damages, rather than suggesting that a higher degree of proof is applied to damages than to liability."[532]

410. The tribunal further acknowledged that while a claimant must prove its damages to the required standard, the assessment of damages is often a difficult exercise and damages in an investment situation will seldom be established with scientific certainty, given that such an assessment will usually involve some degree of estimation and the weighing of competing (but equally legitimate) facts, valuation methods and opinions. This, the tribunal added, does not, however, in and of itself mean that the burden of proof has not been satisfied.[533]

411. Most importantly with respect to the fact that exploitation had not yet been launched, the tribunal explained the following: "Although the Brisas Project was never a functioning mine and therefore did not have a history of cashflow which would lend itself to the DCF model, the Tribunal accept[ed] the explanation of both [the claimant's and the respondent's technical experts] that a DCF method can be reliably used in the instant case because of the commodity nature of the product and detailed mining cashflow analysis previously performed."[534] Furthermore, "many of the arguments in favour of a DCF approach (a commodity product for which data such as reserves and price are easily calculated) mitigates against introducing other methods such as

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531 **Exhibit CL-182**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, dated September 22, 2014 ("Gold Reserve"), at ¶681, available at: http://www.italaw.com/cases/2727.

532 **Exhibit CL-182**, *Gold Reserve*, at ¶685.

533 **Exhibit CL-182**, *Gold Reserve*, at ¶686.

534 **Exhibit CL-182**, *Gold Reserve*, at ¶830.

comparable transactions or market capitalization, unless close comparables can be found."[535]

412. The tribunal relied heavily on "[t]he detailed feasibility study and various impact studies [which] all demonstrated that the level of analysis that had gone into the mine was significant. Moreover, Claimant demonstrated that its valuation was consistent with other independent valuations in 2006 and 2007 by Trevor Ellis, JP Morgan and RBC Capital."[536] The tribunal concluded that "[t]o suggest that all of these independent valuations are worthless is simply not credible. If mining the concessions had been uneconomic, the claimant would have been aware of this and no doubt would not have been proceeding with the venture."[537]

413. As Ripinsky and Williams explain with respect to oil projects, which are similar to mining projects to the extent that oil companies also derive their primary value on the existence of reserves, "*once the exploration campaign proves successful, the major risk of the investment is gone, and one should be able to predict with reasonable certainty the range of revenues that the concession will generate, even without a prior record of profitable operations*. […] [I]*t has been suggested that lost profits should be awarded where they can be proven with reasonable certainty and calculated on a rational basis, even if the claimant is a new business*."[538]

414. Industry experts therefore plainly assert:

> *In the oil and gas sector, neither being a start-up company (as opposed to a going concern) nor lacking a historic record of profitability are serious impediments for using the DCF method in estimating damages. Oil and gas companies derive their primary value on the existence of reserves, and much less so on the ability to develop and extract such reserves and later sell them to the market.*
>
> *Indeed, the usefulness of the DCF method must be judged on a case-by-case basis, an exercise that must be able to*

535 **Exhibit CL-182**, *Gold Reserve*, at ¶831.

536 **Exhibit CL-182**, *Gold Reserve*, at ¶833.

537 **Exhibit CL-182**, *Gold Reserve*, at ¶833.

538 **Exhibit CL-183**, S. Ripinsky, K. Williams, Damages in International Investment Law, British Institute of International and Comparative Law, 2008, pp. 283-4 (emphasis added).

> *identify if there are any company-specific constraints and geological or geographic difficulties. It must also take into account the degree of field development, crude oil characteristics, the quality of reserves, and the expectations of future crude oil prices. Given that the marketplace for crude oil is that of a tradable commodity, and given that oil companies derive their primary value from discovered certified reserves, the DCF cannot be ruled out simply because the company is a startup, or because the company has not yet established historic records of profitability.*[539]

415. DCF is in fact considered the common method in principle for valuation of exploration companies that have reasonable prospects.[540] And this is even more so when reserves have been confirmed, and this again irrespective of any track record and of whether the company is a junior or senior. As confirmed by another industry expert:

> *Consider a situation where an investor obtains a concession for the exploration and exploitation of oil: the investor will carry a risk of not discovering oil and thus losing the totality of its investment. At the same time, once the exploration campaign proves successful, the major risk of the investment is gone, and one should be able to predict with reasonable certainty the range of revenues that the concession will generate, even without a prior record of profitable operations. Perhaps with such situations in mind, it has been suggested that lost profits should be awarded where they can be proven with reasonable certainty and calculated on a "rational basis," even if the claimant is a new business.*[541]

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539 **Exhibit CL-184**, Manuel A. Abdala, *Key Damage* Compensation *Issues in Oil and Gas International Arbitration Cases*, 24 Am. U. Int'l L. Rev. 539 (2009) (available at http://www.auilr.org/pdf/24/24-3-4.pdf), pp. 550-551; emphasis added.

540 **Exhibit CL-185**, N. Antill, R. Arnott, Valuing Oil and Gas Companies A Guide to the Assessment and Evaluation of Assets, Performance and Prospects (2000), p. 121 ("*the principal method that the equity market uses to value the exploration companies, namely asset values (discounted cash flows)*").

541 **Exhibit CL-183**, S. Ripinsky, K. Williams, *Damages in International Investment l*aw, British Institute of International and Comparative Law, 2008, pp. 283-284 (emphasis added). *See also*, e.g, **Exhibit CL-186**, Mark Kantor, Valuation for Arbitration, 2008, p. 78, "*A company (even a start-up company) may have already entered into a long-term enforceable sales contract with a creditworthy purchaser. Examples of such long-term sales contracts include multi-year liquefied natural gas contracts and power purchase agreements – such 'output' contracts naturally reduce the risk that the covered products will be unable to find willing buyers at commercially reasonable prices. If the arbitrator is satisfied that the necessary pre-conditions for payments under that contract will be fulfilled, then an Income-Based calculation of damages for lost future earnings or a breach of contract lost profits claim may be reasonably certain even though development of the business did not proceed very far before the dispute arose*" (emphasis added).

416. In the case at hand, loss of profits is warranted in light of the following, taken individually, let alone collectively, namely:

- The commodity at hand is talc, in demand and tradable worldwide.

- The Tribunal has the benefit of an assessment of talc reserves, laid out in the Feasibility Study and the Kloibhofer Report, prepared by industry experts who were commissioned by Rozmin when the latter held mining rights over the Gemerská Poloma deposit, which reinforces the very merits of Claimants' entitlement to full compensation in return for their investment in the deposit and the risk they have taken. Both studies were moreover commissioned and prepared contemporaneously with the facts in dispute and prior to any dispute.

- The Tribunal also has the benefit of an assessment of talc reserves in the western – well explored – portion of the Mining Area, in the WAI Expert Report, which is based on contemporaneous drilling data and which was prepared by an independent mining expert from Wardell Armstrong International, a leading English mining consultancy firm.

- Finally, information is publicly available with respect to the current assessment of the deposit's reserves by VSK Eurotalc, the company which today holds mining rights over the deposit.[542]

417. The above reports and information provide this Tribunal with much more information than that required to meet the threshold of reasonable probability for an award of lost profits. These reports constitute proof well beyond that required in *Micula v. Romania*, namely "*(i) that the Claimants were engaged in a profit-making activity (or, at the very least, that there is sufficient certainty that they had engaged in a profit-making activity but for the revocation of the incentives), and (ii) that that activity would have indeed been profitable (at the least, that such probability was probable).*"[543]

418. Furthermore and in any event, any compensation other than full compensation by way of an award of lost profits would contradict the intention of the Parties and Claimants'

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542 WAI Expert Report, pp. 17-18.

543 **Exhibit CL-178**, *Ioan Micula*, at ¶1009.

legitimate expectations. In the mining industry, indeed, the investor assumes the risk of not being able to confirm the deposit's reserves. If an investor is unable to confirm a deposit's reserves, it must bear the costs it has incurred in trying to establish and/or confirm them. If, on the other hand, the investor confirms the reserves, it cannot be deprived of its mining rights without being awarded the profits it would have realized by way of the investment that allowed it to confirm the deposit's reserves. If the State were entitled to award the investor only its sunk costs once the latter has confirmed the deposit's reserves, then heads of tails, the State would win and the investor would lose. This would indeed imply that if the deposit's reserves are not confirmed, then the investor must bear its expenses, and if the reserves are confirmed, the State may expropriate the investor's rights and investment by way of mere reimbursement of the investor's expenses and pocket the profits generated by the deposit. Such an outcome would be grotesque, and defy common sense and the most rudimentary principles of fairness and business. It would lead to an outcome diametrically opposed to full reparation, encourage wrongdoing, and ultimately lead to the collapse of the mining industry.

419. In sum, the principle of full compensation, according to which the aggrieved investor must be placed in the financial situation in which it would have been had the injury not occurred, excludes the mere payment of sunk costs, be it with interest as of the date of the taking. Claimants must be compensated for the lost profits caused by the fact that they were deprived of the right to develop the Mining Area.

420. For the sake of completeness and as an abundance of caution, Claimants submit that should the Tribunal consider that their loss of profits cannot be established with a reasonable degree of certainty, they should still be entitled to compensation on the basis of the loss of an opportunity to make profits from the sale of talc to be extracted from the deposit, or from the sale of their interest in Rozmin.

421. It is indeed well settled that it is possible to grant compensation on the basis of a loss of opportunity when the wronged party was not capable of establishing loss of profits with reasonable certainty, particularly when this "condition precedent" is not met as a result of the acts and omissions of the respondent. It should therefore be enough for the tribunal to be able to admit with sufficient probability the existence and extent of the

damage on the grounds that the wronged party lost the opportunity to generate future income as a result of the wrongdoer's acts or omissions.

422. In this respect, the burden of proof will lie on Respondent, as the author of the damage, to show that there was no chance that Claimants could have extracted talc from the deposit as anticipated.[544] As put by the Tribunal in *SOABI v. Senegal*, despite the existence of numerous risks for the realization of profits, "[i]*n contrast to hypothetical damage, whose realization is completely speculative, damages may be analyzed as the certain loss of chance to obtain a probable result. It then calls for reparation*."[545]

423. Damages sustained by Claimants as a result of the loss of an opportunity should amount to the same as their loss of profits given the foregoing, namely the fact that the commodity at hand is talc, in demand and tradable worldwide, and that the deposit's reserves have been confirmed by way of studies carried out at the time of the facts contemporaneous with the dispute as well as by a mining expert from Wardell Armstrong International, based on contemporaneous drilling data.

424. A nine-digit figure has been determined by Mr. John Ellison, a consultant to KPMG's London office, to represent the loss of profits sustained by Claimants. An exact quantification of these losses will be provided to the Tribunal in due course.

C. MORAL DAMAGES

425. In addition to the material damages, Claimants shall seek compensation for the moral damages they has suffered. These moral damages are intended, first and foremost, to compensate Claimants for the harm caused to their reputation. Furthermore, they are intended as compensation for the stress, suffering and anxiety suffered by Rozmin's, EuroGas' and Belmont's executives and employees, as a direct result of Slovakia's acts and omissions in relation to Claimants' investments in the mining sector, as further explained below.

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544 **Exhibit CL-187**, *Gemplus S.A., SLP S.A. and Gemplus Industrial, S.A. de C.V. v. Mexico*, ICSID No. ARB(AF)/04/3, Award, dated June 16, 2010 ("Gemplus"), ¶13-92, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2112_En&caseId=C41.

545 **Exhibit CL-188**, *Société Ouest Africaine des Bétons Industriels v. Sénégal*, ICSID Case No. ARB/82/1, Award, dated February 25, 1988, at ¶6.18, available in French at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC667_Fr&caseId=C128, English translations of French original in 17 Y.B. Com. Arb. 42 (1992).

426. It is accepted in most legal systems that moral damages may be recovered in addition to pure economic damages. This is also the case in international law, as confirmed by Article 31 of the ILC Articles on State Responsibility, which provides that a compensable injury includes "*any damage, whether material or moral, caused by the internationally wrongful act*."[546] Moreover, investment treaties do not prevent a party from obtaining compensation for moral damages.

427. The notion of moral damages encompasses a broad range of elements which include personal injury that does not produce loss of income or generate financial expenses, emotional harm (such as, for example, humiliation, shame, defamation, injury to reputation and feelings), pathological harm (such as, for example, stress, pain and anguish, anxiety, suffering, threat or shock), and minor consequences of a wrongful act (such as, for example, the affront associated with the mere fact of a breach).[547]

428. Arbitral tribunals have long upheld the notion of moral damages. As Umpire Parker put it in the *Lusitania* cases, an individual is entitled to compensation for moral damages if "*an injury inflicted result*[ed] *in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or reputation*," and "*such compensation should be commensurate to the injury*."[548]

429. In the *Fabiani* case, the President of the Swiss Confederation concluded that the repeated denials of justice to which Fabiani had been subjected had led to his bankruptcy and loss of prestige.[549] As a result, Fabiani was awarded moral damages on the ground that, had it not been for the pain and suffering inflicted, he would have given another dimension to his business in general, and explored other sources of revenues, earning him profits over and beyond the lost profits.[550]

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546 **Exhibit CL-125**, ILC Articles on State Responsibility, Article 31 (2).

547 **Exhibit CL-189**, Stephan Wittich, "Non-Material Damage and Monetary Reparation in International Law," 15 *Finnish Yearbook of International Law* 329 (2004), at p. 329-330.

548 **Exhibit CL-190**, *US v. Germany*, Lusitania Cases, dated November 1, 1923, VII *Reports of International Arbitral Awards* 32 (1923), at p.40.

549 **Exhibit CL-162**, *France v. Venezuela (Antoine Fabiani case no. 1)*, 5 *Moore's International Arbitrations* 4878 (1898), at p. 4913, ¶6.

550 **Exhibit CL-162**, *France v. Venezuela (Antoine Fabiani case no. 1)*, 5 *Moore's International Arbitrations* 4878 (1898), at p. 4913-4915.

430. ICSID tribunals have also granted moral damages. International case-law makes it clear that damages can be awarded to either a legal person or a natural person. In *DLP v. Yemen*, an ICSID arbitration initiated under the Yemen-Oman bilateral investment treaty, the tribunal considered that "[e]*ven if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages*."[551] On this basis, the tribunal granted compensation to the claimant, a legal person, for moral damages, including loss of reputation.[552] The tribunal further recognized that an injury to a corporation's credit, reputation and prestige, as well as the fact that the physical health of the company's executives had been affected, constitutes a form of moral damages that could be compensated.[553]

431. It is therefore accepted that injury or damage to the executives or shareholders of a legal entity constitutes damage to the legal entity itself as those individuals are prevented from doing their job properly if not at all.

432. Most recently, an *ad hoc* investment tribunal constituted in *Al-Kharafi v. Libya* under the Unified Agreement for the Investment of Arab Capital in the Arab States, granted USD 30 million of compensation for moral damages. The tribunal decided that the claimant was entitled to a compensation of moral damages it had sustained as a result of the harm to its professional reputation caused by the respondent's actions.[554]

433. As was held in Lusitania, non-material damages may be "very real, and the mere fact that they are difficult to measure or estimate by monetary standards makes them

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551 **Exhibit CL-191**, *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, dated February 6, 2008 ("DLP"), at ¶289, available at http://italaw.com/sites/default/files/case-documents/ita0248_0.pdf.

552 **Exhibit CL-191**, *DLP*, at ¶290.

553 **Exhibit CL-191**, *DLP*, at ¶290.

554 **Exhibit CL-192**, *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Government of the State of Libya*, Ministry of Economy in the State of Libya, General Authority for Investment Promotion and Protection Affairs, Ministry of Finance in Libya and Libyan Investment Authority, Final Arbitral Award, dated March 22, 2013, pp. 368-369.

nonetheless real and affords no reason why the injured person should not be compensated."[555]

434. In *DLP v. Yemen*, the tribunal awarded USD 1 million to the claimant on the basis that the prejudice was substantial since it affected the physical health of the claimant's executives and the claimant's credit and reputation. The tribunal offered no indication as to how it had reached such a valuation except to say that the sum awarded was "*modest in proportion to the vastness of the project*".[556] In the case of *Benvenuti & Bonfant v. Congo*, the tribunal awarded damages on an equitable basis, again providing little reasoning for the amount.[557]

435. Both EuroGas and Belmont were dedicated and involved investors in the Slovak mining industry, contributing in geological know-how, expertise, management, and business contacts with potential talc purchasers. Claimants worked on a high-scale exploration campaign which allowed them to confirm the deposit's talc reserves and its commercial viability, employed Slovak nationals and mandated Slovak companies, namely Rima Muráň and Siderit, to carry out works at the deposit, not to mention the sums, well above USD 5 million, invested, directly or through Rozmin, in the Gemerská Poloma deposit not only for purposes of improving and confirming the deposit's reserves, but also to subscribe shares in Rozmin, pay for the 1997 Feasibility Study, cover the company's needs in working capital, pay off invoices related to the works carried out at the deposit, and build up from scratch the required infrastructure to prepare the deposit for excavation and commercial development.

436. In return, the Slovak Republic abruptly expropriated Claimants' rights and investment, once the deposit's talc reserves had been confirmed, all the construction works necessary for the opening of the deposit had been designed, and a processing method had been selected. This adversely affected Claimants' reputation and finances, turning them into expropriated companies begging for compensation on behalf of their shareholders.

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555 **Exhibit CL-190**, *US v. Germany*, Lusitania Cases, dated November 1, 1923, VII *Reports of International Arbitral Awards* 32 (1923), at p. 42.

556 **Exhibit CL-191**, *DLP*, at ¶290.

557 **Exhibit CL-193**, *Benvenuti et Bonfant srl v. The Government of the People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, dated August 8, 1980.

437. Furthermore, Respondent launched criminal proceedings targeting Rozmin and Claimants, in direct reaction to Claimants' legitimate exercise of their right to initiate ICSID arbitration proceedings against the Slovak Republic.[558] These criminal proceedings led to the seizure and confiscation of all of Rozmin's original paper records (including privileged documents) and computer software, and to the interrogation by police forces of Ms. Czmoriková,[559] Rozmin's external accountant, safe-keeper of all of this company's records and property, and potential witness in the present proceedings.

438. Indeed, as noted above at paragraphs 335 and 336, an unannounced search was carried out at the home of Ms. Czmoriková for over eight hours and by no less than eight members of the Slovak police force, the National Criminal Agency, the National Troop of the Financial Police, the National Anti-corruption Troup, and the Public Order Police, and in the presence of an "uninterested individual" and an "expert."[560] Ms. Czmoriková was then summoned to appear for examination before the Police Corps in Rožňava,[561] which questioned her, *inter alia*, on her work as Rozmin's accountant, her contacts with Dr. Rozložník, Rozmin's assets and accounting, as well as studies and works carried out by Rozmin in relation to and at the Gemerská Poloma deposit. Even questions related directly to Ms. Czmoriková's knowledge of the arbitration proceedings were asked. Ms. Czmoriková was handed no copy of the minutes of her interrogation by the police.

439. Regrettably, since the search carried out at her house and her examination by Slovak officials, Ms. Czmoriková who is a Slovak national and lives in the Slovak Republic with her husband and son, fears for her safety and has refused to appear in the present proceedings as a witness.

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558 The Request for Arbitration was filed on June 25, 2014. Two days before, on June 23, 2014, JUDr. Spirko 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**).

559 **Exhibit C-52**, Witness Summons, dated July 2, 2014.

560 **Exhibit C-51**, Minutes on Performance of House Search, dated July 2, 2014.

561 **Exhibit C-52**, Witness Summons, dated July 2, 2014.

440. These retaliatory and self-serving measures not only deprived Claimants of records necessary to substantiate their case, placed the State in a privileged position with a full access to all of Claimants' files including legally privileged materials, and aggravated the dispute notably by 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. These measures also had the effect of intimidating Claimants and their witnesses. As a result, they warrant an award of moral damages, which will be quantified in due course.

D. INTEREST

441. Claimants respectfully request the Tribunal to award interest on material and moral damages to be quantified in due course, running from the date of the revocation of Rozmin's mining rights, until the date of full payment.

442. Article III(1) of the US-Slovak Republic BIT and Article VI(1) of the Canada-Slovak Republic BIT provide for payment of interest for lawful compensation. This only confirms that interest is necessarily due in cases of unlawful expropriation.

443. Both Article III(1) of the US-Slovak Republic BIT and Article VI(1) of the Canada-Slovak Republic BIT specify that interest must be paid from the date of the expropriation, as commonly accepted by arbitral tribunals even when the BIT in question is silent on this issue.[562]

444. Claimants submit that the Arbitral Tribunal should make an award of compound interest at a rate of LIBOR +2 compounded semi-annually. Compounded interest is considered to be the most adequate and effective way to compensate an investor for the damages it has sustained, given that it mirrors most closely what an investor would normally receive commercially.[563] Furthermore, the rate of LIBOR + 2 qualifies as a normal commercial rate[564] and is considered standard BIT practice.[565]

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562 See, e.g., **Exhibit CL-194**, *Middle East Cement*, at ¶¶174-175; **Exhibit CL-149**, *MTD*, at ¶247; and **Exhibit CL-147**, *National Grid* at ¶294.

563 **Exhibit CL-134**, A. Newcombe and L. Paradell, Law and Practice of Investment Treaties: Standards of Treatment (Kluwer Law International, 2009), at 397. *See* also **Exhibit CL-194**, *Middle East Cement*, in which the tribunal considered that "*international jurisprudence and literature have recently, after detailed consideration, concluded that interest is an integral part of the compensation due after the award and that compound (as opposed to simple) interest is at present deemed appropriate as the*

445. Accordingly, Claimants seek an award of compound interest at a rate of LIBOR +2 compounded semi-annually, to be established on the awarded amounts as of the date these amounts are determined to have been due to Claimants.

VII. RELIEF SOUGHT

446. 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 Respondent has breached its obligations toward Claimants under the US-Slovak Republic BIT, the Canada-Slovak Republic BIT, and international law.

- Order Respondent to pay Claimants damages in an amount to be quantified at a later stage of the proceedings, in accordance with the Tribunal's instructions.

447. 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

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standard of international law in such expropriation cases" (¶174). An award of compound interest was therefore considered necessary "*to make the compensation 'adequate and effective' pursuant to* [the terms of] *the BIT* […]" (¶175).

564 **Exhibit CL-134**, A. Newcombe and L. Paradell, Law and Practice of Investment Treaties: Standards of Treatment (Kluwer Law International, 2009), at ¶397; **Exhibit CL-142**, *Middle East Cement*, at ¶¶174-175.

565 An award of LIBOR + 2% compound interest has been endorsed as commercially reasonable by recent arbitral tribunals. *See* **Exhibit CL-133**, *Railroad* at ¶279, available at http://italaw.com/sites/default/files/case-documents/ita1051.pdf; See also, e.g. **Exhibit CL-195**, *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Uretim ve Ticaret Limited Sirketi v. Turkey*, ICSID Case No. ARB/02/5, Award, dated January 19, 2007, available at http://italaw.com/sites/default/files/case-documents/ita0695.pdf, at ¶348; **Exhibit CL-146,** *Rumeli*, at ¶818; and **Exhibit CL-177,** *Lemire*, at ¶¶356 and 361.