INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

EUROGAS INC.

(United States)

and

BELMONT RESOURCES INC.

(Canada)

Claimants

–v–

THE SLOVAK REPUBLIC

Respondent

(ICSID Case No. Arb/14/14)

RESPONDENT'S REJOINDER

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29 December 2015

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

Secretary of the Tribunal
Lindsay Elizabeth Gastrell

SQUIRE PATTON BOGGS

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I. INTRODUCTION

1. Claimants have called the Slovak Republic's concern about their misrepresentations in this case and their history of "*conceal[ing] and misrepresent[ing] the facts*"[1] in a related case as "*bold*."[2] Claimants' Reply has now proven that concern to be well founded. It is no exaggeration to say that, had the Slovak Republic not discovered the truth about Claimants' misrepresentations, this arbitration would have proceeded on a fraud.

2. As the Slovak Republic will show in this Rejoinder, Claimants' Reply is based on a brand new set of theories invented because Claimants could no longer defend their old ones. Aside from these new theories, the Reply parrots the already-disproven assertions of Claimants' Memorial and advances propositions that the cited evidence does not support. Having boasted their case as "*bullet-proof*,"[3] Claimants have presented a case riddled with holes.

3. Perhaps the largest void in Claimants' case remains the one left after Claimants were caught misrepresenting to the Tribunal the identity of the lead claimant in this case to achieve ICSID jurisdiction (since EuroGas I[4] was the only U.S. entity that ever owned the alleged investment). And Claimants have been scrambling to fill that jurisdictional void ever since.

4. But as inexorably occurs when a claimant is forced to come up with new facts to justify an old position, the credibility of the position begins to erode. That can be seen no more clearly than in Claimants' ever-changing explanations for how the Tribunal has jurisdiction over the entity that they now say is the "real" claimant, EuroGas II. On this crucial issue, Claimants' explanation has literally changed with every major filing they have made to the Tribunal:

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1 *Smith v. McKenzie*, Bk. No. 95-48397-H5-7 (Admin. Cons. under 95-47219- H5-7), Adv. Nos. 97-4114 and 97-4155, Judgment (Bankr. S.D. Texas 7 June 2004), ¶¶ 102-103, **R-0010**.

2 Claimants' Reply, ¶ 18.

3 Claimants' Memorial, ¶ 30.

4 Defined terms in the Respondent's Counter-Memorial are also used in this submission.

THE EVOLUTION OF CLAIMANTS' EXPLANATION FOR THE JURISDICTIONAL BASIS OF EUROGAS[5]			
	Claimants' Request for Arbitration (25 June 2014)	**Claimants' Memorial (31 March 2015)**	**Claimants' Reply (29 Sept. 2015)**
Claimants' Explanation:	The claimant is the 1985 Company (EuroGas I), which owned the investment since the late 1990s. (a) Request for Arbitration ¶¶ 7 - 8	The claimant is the 2005 Company (EuroGas II), which acquired the investment through a 2008 Type-F Reorganization of EuroGas I. (b) Memorial ¶ 21	The claimant is the 2005 Company (EuroGas II), which acquired the investment from a U.K. entity McCallan at an unspecified date. (c) Reply ¶ 64

5. As this table shows, the record is now replete with instances of Claimants throwing out one false explanation after another, and the Slovak Republic consistently finding information that disproves each one. And these ever-changing explanations come—amazingly enough—from the party that bears the burden of proof to establish the facts necessary for the Tribunal's jurisdiction.

6. Claimants' most recent explanation is that, on 13 July 2007, EuroGas I sold its shareholding in EuroGas GmbH—and thus Rozmin—to the UK entity McCallan Oil & Gas ("**McCallan**") (the purchase price was only EUR 10,000[6]), and that EuroGas II later acquired McCallan at an unspecified date for an unspecified amount of money.[7] Not only do Claimants offer no direct evidence for EuroGas II's acquisition of McCallan—the "investment" on which the Tribunal's jurisdiction now apparently rests—but they do not even specify when this purported acquisition supposedly occurred.[8]

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

6 Notariatsakt (n. Dr. Gerhard Knechtel, LL.M), 13 July 2007, **C-0330**.

7 Claimants' Reply, ¶ 64.

8 Claimants' Reply, ¶ 64.

7. As explained below in Section II, this newest explanation—found *nowhere* in Claimants' prior submissions—raises a whole host of new jurisdictional problems. Most notably, McCallan is a UK entity with no rights under the U.S.-Slovak BIT and EuroGas II's purported acquisition of McCallan—and thus EuroGas II's alleged "investment"—did not occur until years after the Excavation Area was reassigned in 2005.

8. Indeed, the factual problems with EuroGas II's standing were sufficient to cause the U.S. Bankruptcy Court in Utah, on 17 December 2015, to order the reopening of EuroGas I's bankruptcy. The U.S. Bankruptcy Court ordered the reopening of the bankruptcy "*for the specific purpose of determining the bankruptcy estate's interest in the asset identified in the Motion to Reopen*."[9] The Motion to Reopen identified the asset as the "'*Rozmin and Eurogas GmbH talc mines in Slovakia' which were omitted from the Debtor's bankruptcy disclosures*."[10]

9. The U.S. Bankruptcy Court's ruling was based on a Motion to Reopen filed by the U.S. Trustee, which operates under the authority of the U.S. Department of Justice. The U.S. Trustee stated that he filed his Motion to Reopen in response to a letter he had received from the primary creditor of EuroGas I requesting the reopening. The primary creditor is an affiliate of EuroGas II, known as Texas EuroGas Corp. ("**Texas EuroGas**").[11]

10. In a 2009 financial statement, EuroGas II described Texas EuroGas as a "*friendly party*"[12] and stated that EuroGas II and Texas EuroGas planned to combine their efforts against the Slovak Republic:

> "***[EuroGas] and [Texas EuroGas] intend to*** enter into a Non-Execution Agreement and to combine its [sic] efforts ***to start legal proceedings against the Government of the Slovak Republic*** and certain Slovak individuals and

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9 Order Granting Motion to Reopen, 21 December 2015, p. 2, **R-0242**.

10 U.S. Trustee's Motion to Reopen, 18 September 2015, ¶ 3, **R-0248**.

11 U.S. Trustee's Motion to Reopen, 18 September 2015, ¶ 3, **R-0248**; Letter from Texas EuroGas' counsel to U.S. Trustee requesting reopening of the bankruptcy, 8 September 2015, **R-0261**.

12 EuroGas Form 10-Q filed with the SEC, Quarterly Period ended 31 March 2009, 7 August 2009, p. 2, **R-0262**; EuroGas, Inc.'s 2010 Schedule 14-C filed with the SEC, 21 July 2010, p. 9, **R-0263**.

> enterprises in connection with the illegal termination of the Company's mining interest in the Slovak Republic."[13]

11. Despite the "*friendly*" history between these two companies, Claimants alleged that it was the Slovak Republic that "*induced*"[14] and "*convinced*"[15] Texas EuroGas to seek reopening. This allegation is yet another in a series of allegations made without any serious inquiry—let alone evidence.

12. As the Slovak Republic confirmed in its letter to the Tribunal on 2 October 2015, the Slovak Republic had nothing to do with Texas EuroGas or the U.S. Trustee filing the Motion to Reopen. The first time that the Slovak Republic heard anything about the Motion to Reopen was when it read Claimants' Reply. That Claimants would make the false allegation that the Slovak Republic "*induced*"[16] and "*convinced*"[17] Texas EuroGas to seek reopening—without even checking whether it was true—is deeply troubling.

13. Following the U.S. Bankruptcy Court's order to reopen the bankruptcy, the U.S. Trustee appointed a new Chapter 7 trustee, Elizabeth Rose Loveridge ("**Trustee Loveridge**"),[18] to determine the bankruptcy estate's interest in the "'*Rozmin and Eurogas GmbH talc mines in Slovakia' which were omitted from the Debtor's bankruptcy disclosures*."[19] The Slovak Republic believes, based on dispositive law in the Tenth Circuit Court of Appeals (which is the appellate court overseeing the Utah Bankruptcy Court), that Trustee Loveridge will conclude that the interest at issue for the EuroGas I bankruptcy estate includes both the indirect interest in Rozmin and any claims that may be attached thereto under the BIT—and thus that EuroGas II does not own its purported "investment."

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13 EuroGas 10-Q Filing, Quarterly Period ended 31 March 2009, 7 August 2009, p. 2, (emphasis added), **R-0262**.

14 Claimants' Reply, ¶ 7.

15 Claimants' Reply, ¶ 9.

16 Claimants' Reply, ¶ 7.

17 Claimants' Reply, ¶ 9.

18 Notice of Appointment of Interim Trustee, 22 December 2015, **R-0264**.

19 U.S. Trustee's Motion to Reopen, 18 September 2015, ¶ 3, **R-0248**.

14. But even if the bankruptcy impediments to the Rozmin and EuroGas GmbH investment claims could be solved in the reopened Chapter 7 bankruptcy case, there are a myriad of other jurisdictional problems that EuroGas II still faces:

(a) EuroGas I, as an administratively dissolved corporation, did not have capacity to merge with EuroGas II for the purpose of continuing the business;

(b) The U.S.-Slovak BIT ceased to apply with respect to EuroGas I's ownership of Rozmin when EuroGas I sold its interest in EuroGas GmbH (and thus Rozmin) to McCallan on 13 July 2007 (because the only U.S. owner of Rozmin, EuroGas I, exited the ownership of the "investment" with that sale);

(c) EuroGas I and EuroGas II did not merge under Utah law and thus EuroGas II never acquired this ICSID claim (the doctrine of "*de facto merger*," which is only a theory of *liability*, not a theory of actually *effectuating a merger*, is entirely inapplicable here);

(d) Claimants have not satisfied their burden to even establish *if* or *when* EuroGas II ever acquired McCallan (and thus indirectly Rozmin);

(e) Acquisition of a troubled asset embroiled in domestic court litigation to achieve ICSID jurisdiction is not a protected "investment" under *Phoenix Action Ltd. v. The Czech Republic*;[20]

(f) The Tribunal has no jurisdiction *ratione temporis* to consider alleged breaches of the U.S.-Slovak BIT that occurred before EuroGas II's alleged acquisition of McCallan (because prior to that time EuroGas II did not own the interest); and

(g) The Slovak Republic validly denied EuroGas II the benefits of the U.S.-Slovak BIT.

15. As the Tribunal can see, Claimants' ever-changing theories have made a complete mess of their jurisdictional case.

[20] *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, **RL-0107**.

16. Belmont's claim suffers from similar jurisdictional problems. Belmont initially told the Tribunal that it owned a 57% interest in the Slovak talc mine when the Excavation Area was reassigned in 2005. But the Slovak Republic discovered through research of the public record a Sale and Purchase Agreement dated effective 27 March 2001 (the "**SPA**") by which Belmont sold that 57% interest to EuroGas I (meaning that the 57% interest is part of the EuroGas I bankruptcy estate as well).[21]

17. In this regard, the Slovak Republic offered the expert testimony of Mr. John Anderson, a partner at the international law firm of Stikeman Elliott LLP in Vancouver, Canada. Mr. Anderson is an expert in British Columbia corporate law, which is the law that governs the SPA. In his expert report, Mr. Anderson opined that a British Columbia court, applying British Columbia law, would conclude that Belmont transferred the 57% interest in 2001, while retaining a security interest in the shares.

18. Apparently unable to find any qualified expert that would disagree with Mr. Anderson, Claimants offered no response from an expert qualified in British Columbia law. Instead, it is only Claimants' lawyers in this arbitration—none of whom are qualified to give opinions on British Columbia law—who purport to dispute Mr. Anderson's position in their Reply. They argue that, although Belmont received significant consideration from EuroGas I for the transfer of the 57% interest (*i.e.*, more than 12 million EuroGas I shares), the SPA did not transfer the 57% interest in Rozmin. Mr. Anderson hereby issues a second expert opinion explaining why the arguments from Claimants' counsel are wrong under British Columbia law.

19. Moreover, the Slovak Republic researched the public domain and discovered numerous public statements from Belmont declaring that the 57% interest was, in fact, transferred in 2001. These declarations were not just ordinary statements. They were declarations (*i*) made under oath (such as the one that Belmont's president made to the Slovak police in 2009);[22] (*ii*) made subject to justification and verification (such as audited financial

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21 Share Purchase Agreement between EuroGas Inc. and Belmont Resources Inc., 27 March 2011, **R-0015**.

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

statements);[23] and (*iii*) made subject to liability for misrepresentation (such as documents comprising a public company's continuous disclosure record, including press releases, material change reports, financial statements, and information circulars).[24] Belmont's statements were echoed in a joint letter-agreement with EuroGas I three years after the SPA[25] and by similar public statements from EuroGas I and II,[26] which even offered to sell the 57% interest to a third party in 2004[27] (and, as discussed below, which *did* purport to sell the 57% interest in 2012).[28]

20. Indeed, testifying under penalty of perjury, the president of Belmont, Mr. Agyagos, told the Slovak police in 2009: "*Based on the fact that Belmont Vancouver sold its shares probably in 2002 to EuroGas, [Belmont] did not suffer any direct damage*" from the alleged acts by the Slovak Republic in this arbitration.[29]

21. It is important to pause here and remember that Claimants bear the burden of establishing the facts necessary for the Tribunal's jurisdiction.[30] Claimants cannot seriously argue that, despite their previous statements to the police and to the investing public that they do *not* own the asset, an international tribunal should exercise jurisdiction because they

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23 Belmont Audited Consolidated Financial Statements for the Years ended January 31, 2002 and 2001, note 2, p. 8, **R-0114**; Belmont Resources Inc. Consolidated Financial Statements for Years Ended 31 January 2005 and 2004, p. 14, **R-0042**.

24 Belmont Annual Information Form, 30 September 2002, **R-0116**; *see* John Anderson Rebuttal Expert Report, ¶ 16.

25 Letter from EuroGas Inc. to Belmont Resources Inc., 24 September 2004, **C-0297** ("*EuroGas, Inc.'s 57% interest in Rozmin*.").

26 EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, p. 4, **R-0075** ("*By virtue of its ownership of Rozmin, and the talc deposit, Eurogas bears the* ***full responsibility*** *to fund the development costs necessary to bring the deposit to commercial production*"), (emphasis added).

27 Letter from Mr. Wolfgang Rauball to Mr. Arne Przybilla, of Protec Industries Ltd., 12 January 2004, **R-0118** (where EuroGas confirms that it owned "*a 57% interest [in Rozmin] while our wholly owned Austrian subsidiary EuroGas GmbH owns the balance of 47%*").

28 EuroGas AG_Statement about participation (German original: DGAP-News EuroGas AG:Klarstellung zur Unternehmens- Beteiligung), (with extended translation), **R-0265**.

29 Witness Statement of Mr. Vojtech Agyagos provided with respect to criminal proceedings No. PPZ155/ BPK-S-2008, 16 March 2009, (with extended translation), p. 5, **R-0115**.

30 *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶ 171, **RL-0106**; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 58 *et seq.*, **RL-0107**.

now (when it suits their interests) say they *do* own the asset? Elementary principles of estoppel and good faith require that a party, having disavowed the alleged "investment" to the police and to the investing public, not be permitted to claim ownership of the alleged "investment" for purposes of achieving ICSID jurisdiction.

22. But to put this matter to rest, once and for all, the Slovak Republic has recently learned that EuroGas II has now purportedly sold the 57% interest to an affiliated company. On 25 February 2012, EuroGas' Swiss affiliate informed the German stock market that "*EuroGas Inc. confirmed transfer of rightful ownership of 57% shares in Rozmin s.r.o. to the EuroGas GmbH*."[31] To state the obvious, if EuroGas II sold the 57% interest, it is not credible for Claimants to argue that Belmont still owns it.

23. Moreover, the Tribunal does not have jurisdiction over Belmont for the additional reason that the Canada-Slovak BIT only covers disputes "*that ha[ve] arisen not more than three years prior to its entry into force*"—*i.e.*, after 14 March 2009. Claimants' colorable allegations, however, occurred prior to that date. Indeed, Belmont threatened the Slovak Republic with international arbitration as early as November 2005, proving that its claim arose well before March 2009.[32] The Tribunal therefore has no jurisdiction *ratione temporis* over Belmont's claims.

24. Claimants' case on the merits is equally flawed. In its Counter-Memorial, the Slovak Republic showed that Claimants' merits case collapses under the weight of three simple, incontestable facts:

- The 2002 Amendment provided that, if a mining company did not commence Excavation within three years, then the local mining authority "shall" cancel or reassign the Excavation Area;

- Rozmin did not commence Excavation within three years; and

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31 EuroGas AG_Statement about participation (German original: DGAP-News EuroGas AG:Klarstellung zur Unternehmens- Beteiligung), (with extended translation), **R-0265**.

32 Letter from Rozmin and Belmont to the Minister of Economy, 3 November 2005, **R-0162**.

- By the end of the three-year period, Rozmin was *not even close* to being able to commence Excavation.

25. In response to these three points, Claimants decided not to submit a single rebuttal witness statement with their Reply.

26. As the tribunal recently stated in *Quiborax,* these facts are fatal to a claim that cancellation of the license constitutes a taking by the State:

> "***If a State cancels a license or a concession because the investor has not fulfilled the necessary legal requirements to maintain that license or concession***, or has breached the relevant laws and regulations that are sanctioned by the loss of those rights, ***such cancellation cannot be considered to be a taking by the State***."[33]

27. Nor was the Slovak Republic's reassignment discriminatory. As the Slovak Republic showed in its Counter-Memorial, Rozmin was only one of approximately 30 entities whose excavation areas were reassigned on the basis of the 2002 Amendment in 2005.[34] And, yet again, Claimants offered no rebuttal.

28. Unwilling to accept their responsibility for Rozmin's failure to commence Excavation, Claimants instead attempt to shift the blame to the Slovak Republic. That effort is hopeless. As shown below, Rozmin's failure to commence Excavation was the result of (*i*) its repeated failure to file complete permit applications, and (*ii*) its lack of financing from Claimants themselves.

29. With regard to Claimants' failure to file complete applications, the Slovak Republic shows below in Section IV.C that Rozmin repeatedly failed to submit the required documentation and filing fees with its permit applications. As a result, the DMO had to stay the relevant proceedings until Rozmin provided them—which often took several months. And that, in turn, significantly delayed the project. The following table shows just how many times Rozmin submitted incomplete documentation or failed to submit the filing fee:

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[33] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplan v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶ 206, (emphasis added), **RL-0158**.

[34] Peter Kúkelčík First Witness Statement, ¶ 15.

Request	Date of Request	Deficiencies of Request	Removal of Deficiencies
Request for temporal removal of selected land plots from the "forest land fund"	11 June 1998	**Incomplete documentation**	26 October 1998
Request for issuance of zoning permit	2 July 1998	**Incomplete documentation**	12 October 1998
Request for construction permit with respect to water management buildings	13 November 1998	**Incomplete documentation**	23 February 1999
Request for construction permit with respect to special buildings	9 December 1998	**Incomplete documentation**	23 February 1999
Request for construction permit with respect to standard surface buildings	25 January 1999	**Incomplete documentation**	22 March 1999
Request for change of construction permit with respect to standard surface buildings	11 October 2001	**Incomplete documentation and Non-payment of administrative fee**	25 September 2002
Request for extension of Authorization of Mining Activities	5 September 2002	**Incomplete documentation and Non-payment of administrative fee**	-
Request for extension of deadline for construction of water management buildings	2 October 2003	**Incomplete documentation**	15 April 2004
Request for extension of Authorization of Mining Activities	8 January 2004	**Incomplete documentation and Non-payment of administrative fee**	10 March 2004

30. With regard to Claimants' lack of financing, the Slovak Republic demonstrates below in Section IV.B that Rozmin did not have the necessary financing from Claimants to

commence Excavation. In this regard, the Slovak Republic has retained Mr. Abdul Sirshar Qureshi, a partner at PriceWaterhouseCoopers, to conduct an independent review of the financial information available for Rozmin, EuroGas I, and each of the two Claimants. In a report submitted with this Rejoinder, Mr. Qureshi concludes that, according to filings made with U.S. regulators, audited financial statements, and other public disclosures, neither EuroGas I nor Belmont was financially capable of financing the development of the Gemerská Poloma project with internal or external funds.[35]

31. These were the real reasons why Rozmin did not commence Excavation within the three-year period set forth in the 2002 Amendment.

32. Nor was the application of the 2002 Amendment a surprise to Rozmin, despite Claimants' earlier statements that they were "*shocked*"[36] and "*kept in the dark*"[37] about it. After Claimants made these allegations in their Memorial, the Slovak Republic (yet again) researched the public records and found that Rozmin had stated to the media in 2003 that Rozmin was well aware of the 2002 Amendment and its potential application to Rozmin.[38] The Slovak Republic also discovered that Belmont's president, Mr. Agyagos, publicly admitted under oath that the Slovak authorities had *specifically warned* Rozmin about the 2002 Amendment and its application to Rozmin well before the end of 2004.[39] Having been caught in yet another misrepresentation, Claimants in their Reply abandoned their earlier assertion that the 2002 Amendment took them by surprise.

33. Forced to abandon these (and other) positions advanced in their Memorial, Claimants argue that the Slovak Republic pre-decided to reassign the Excavation Area before the end of the three year period. In support of this false accusation, Claimants point to two arguments. ***First***, Claimants argue that, on 30 December 2004—two days before the end

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35 PwC Report, ¶¶ 15 *et seq*.

36 Claimants' Memorial, ¶ 275.

37 Claimants' Memorial, ¶ 277.

38 Hospodárske noviny, *The Talc Saint Barbora Has Been Waiting for Extraction for Years*, 18 November 2003, **R-0181**.

39 Witness Statement of Mr. Vojtech Agyagos provided with respect to criminal proceedings No. PPZ155/ BPK-S-2008, 16 March 2009, (with extended translation), **R-0115**.

of the three-year period—the Slovak authorities published the Notice of the Initiation of the Tender Procedure for the Assinment of the Excavation Area. The reason that the DMO did so, however, was merely because it had previously interpreted the three-year period to have commenced on 1 October 2001—the day when Rozmin announced it was suspending works on at the site—which caused the DMO to believe the three-year period ended on 15 October 2004.[40] Thus, from the DMO's good-faith understanding of the new law, the publication on 30 December 2014 was after the expiry of the three-year period.

34. The Supreme Court later held that the 2002 Amendment could not apply retroactively and, therefore, could only start to apply on 1 January 2002 (meaning that the three-year period expired 1 January 2005).[41] Nevertheless, the DMO's good-faith miscalculation had no consequences for Rozmin, *because Rozmin had not commenced Excavation in that time period either*. The DMO's good-faith miscalculation thus explains the reason why the DMO published the notice two days before the end of the correct three-year period.

35. In any event, the selection procedure to assign the Excavation Area commenced only upon the first act of the DMO towards Rozmin—*i.e.*, when the notification on assignment of the Excavation Area dated 3 January 2005 was delivered to Rozmin.[42] The administrative proceeding thus started only *after* the expiry of the statutory three-year period.

36. In any event, are Claimants seriously arguing that posting notice of a tender *two days* early—when any reasonable observer already knew that the tender would happen because Rozmin was not even remotely close to being able to commence Excavation—violates *international law*? That is an absurd proposition. And it is the substance of Claimants' case.

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

41 Judgment of the Supreme Court of the Slovak Republic, Case No.2Sžo/132/, 18 May 2011, p. 38, **R-0061**.

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

37. ***Second***, Claimants argue that the Slovak Republic engaged in "*negotiations*" with interested third parties regarding the re-assignment of the Excavation Area before the lapse of the three-year period.[43] To dramatize this false allegation, Claimants accuse the Slovak Republic of intentionally withholding documents[44] that supposedly show that, before the expiry of the three-year period, the Slovak Republic "*had already resolved to reassign the deposit to another entity*."[45] This allegation is based on a false premise, is incorrect in any event, and is professionally disappointing.

38. To be clear, the State did not "negotiate" anything. The documents to which Claimants refer[46] merely show that an interested foreign investor, Mondo (represented by Mr. Keller), had an interest in cooperating with Mr. Čorej if there was to be an upcoming tender, that they requested a meeting with the Ministry of Economy (the Minister in charge of mining), and the Minister agreed to have the meeting. As Mr. Čorej explains in his second witness statement, "*[i]t is not uncommon for investors to want to meet with the relevant minister to discuss the relevant ministry's policies and plans for the future before making significant investments*."[47]

39. Contrary to Claimants' allegations, the meeting was not at the talc deposit site and the Minister of Economy never met with Mr. Keller or anyone else from Mondo at the site.[48] Rather, the meeting took place in Košice (the second largest city in Slovakia, some 75 kilometers away from the deposit), and the Minister made clear at the meeting that "*any[one] interested in the deposit would have to participate in an open tender selection procedure, and no one would be given preferential treatment*."[49] Thus, there is no evidence that the Minister promised anything to anyone. And Mondo ultimately did *not*

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43 Claimants' Reply, ¶ 456.

44 Claimants' Letter to the Slovak Republic, 30 October 2015, p. 1, **R-0266** ("….*documents which Respondent has chosen to conceal*….").

45 Claimants' Reply, ¶ 10.

46 Email message from Mr. Wulf-Dietrich Keller to Mr. Peter Čorej, 1 December 2004, **C-0356**; Email message from Mr. Wulf-Dietrich Keller to Mr. Dusan Cellar, 13 December 2004, **C-0357**; Email message from Mr. Peter Čorej to Mr. Wulf-Dietrich Keller, 16 February 2005, **C-0358**.

47 Peter Čorej Second Witness Statement ¶ 30.

48 Claimants' Reply, ¶ 462.

49 Peter Čorej Second Witness Statement, ¶ 33.

win the tender, so it is unclear what Claimants are even trying to prove with these documents.

40. As noted above, it was public knowledge that the proceedings on cancellation or re-assignment of the Excavation Area would be initiated upon lapse of the three-year period because Rozmin was not even remotely close to being able to commence Excavation. Given how much work would have to be done to be able to start Excavation, it was impossible for Rozmin to start Excavation any time soon. Naturally, other industry actors began inquiring about the Excavation Area.

41. Finally, Claimants' allegation that the Slovak Republic "*chose to conceal*"[50] these documents is without factual basis. Even assuming that the documents would have been responsive to the production ordered by the Tribunal, those documents were not in the Slovak Republic's possession, custody, or control. The correspondence is more than a decade old; it appears to have been received by individuals who, to our knowledge, no longer hold any State position; and there is no legal requirement for the State to have retained them. Since the Slovak Republic did not have possession, custody, or control of these documents, it could not produce them and was under no obligation to do so.

42. Thus, after the wave of Claimants' accusations recedes, the three key facts remain standing:

- The 2002 Amendment provided that, if a mining company did not commence Excavation within three years, then the local mining authority "*shall*" cancel or reassign the Excavation Area;
- Rozmin did not commence Excavation within three years; and
- By the end of the three-year period, Rozmin *was not even close* to being able to commence Excavation.

[50] Claimants' Letter to the Slovak Republic, 30 October 2015, **R-0266**.

43. Claimants have had a fair opportunity to establish the Tribunal's jurisdiction and to show that the Slovak Republic breached its obligations under the BITs. The record is now overwhelmingly clear that Claimants have failed on both accounts. The Tribunal should have no hesitation to dismiss Claimants' claim and to award the Slovak Republic the full costs of these proceedings.

II. THE TRIBUNAL HAS NO JURISDICTION OVER EUROGAS II

44. As the Tribunal will recall, the Slovak Republic demonstrated in its Counter-Memorial that (*i*) EuroGas II does not own the alleged investment made by EuroGas I and has no standing to bring its claim; and (*ii*) the Slovak Republic validly denied the benefits of the U.S.-Slovak BIT to EuroGas II. The Slovak Republic addresses Claimants' response to each proposition below.

A. EuroGas II Does Not Own the Alleged "Investment" and Has No Standing

45. It is (or should be) common ground that Claimants bear the burden to prove that EuroGas II qualifies as a protected "investor" and that it held a qualifying "investment" at the time of the alleged breaches of the U.S.-Slovak BIT.[51] Despite bearing the burden to establish these jurisdictional elements, Claimants have offered no less than *four* different stories for how EuroGas II owns the alleged "investment."

46. Claimants' first story, articulated in their Request for Arbitration, was that EuroGas I was the claimant and owned the "investment" through its Austrian subsidiary, EuroGas GmbH.[52] The Slovak Republic, however, discovered that EuroGas I had been dissolved years before and had been put into an involuntary bankruptcy in 2004.[53] Claimants' therefore scrapped that theory and come up with a second one.

47. Claimants' second story, articulated in its Memorial, was that EuroGas II (not EuroGas I) was the claimant and had "*assumed all of the assets*" of EuroGas I through a Type-F reorganization in 2008.[54] The Slovak Republic demonstrated that this could not be correct either, because Section 368(a)(1)(F) of the U.S. Internal Revenue Code ("**IRC**")—the basis for Claimants' "Type-F reorganization" argument—is a *tax* statute,

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51 *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶ 171, **RL-0106**; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 58 *et seq.*, **RL-0107**.

52 Claimants' Request for Arbitration, ¶¶ 7-8.

53 Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures, ¶¶ 12 *et seq*.

54 Claimants' Memorial, ¶ 21.

which cannot effectuate a merger.[55] Claimants' therefore went back to the drawing board again and came up with a third story.

48. Claimants' third story, articulated in its Reply, is that EuroGas I and EuroGas II merged not through a "Type-F reorganization" (as Claimants argued in their Memorial), but, rather, through a "*de facto merger*."[56]

49. Claimants' fourth theory, also articulated in its Reply, is the following:

> "64. On July 13, 2007, the 1985 Company sold its interest in EuroGas GmbH to a third party company, namely McCallan Oil & Gas (UK) (hereafter "McCallan"). EuroGas thereafter acquired the entirety of McCallan's issued shares, and ultimately, on June 4, 2012, caused McCallan to transfer its interest in EuroGas GmbH, and thus Rozmin, to its new Swiss subsidiary, EuroGas AG."
>
> 65. Further, in order to complete the winding up process, and at the same time maintain the interest of its shareholders, the 1985 Company validly merged with EuroGas on July 31, 2008, as set out below."[57]

50. This most recent theory appears to be that EuroGas I transferred its interest in EuroGas GmbH—and thus Rozmin—to a UK entity known as McCallan in 2007 (the sale price was only EUR 10,000[58]), and then EuroGas II acquired the shares of McCallan at an unspecified date in the future for unspecified consideration.

51. These are brand new annexes to Claimants' wobbly jurisdictional edifice. *None* of this was in Claimants' earlier filings. Indeed, we invite the Tribunal to search Claimants' first six written submissions for any mention of the name "McCallan." That search will be in vain. It was not until Claimants' *seventh* written submission—its Reply, filed almost a year-and-a-half after this proceeding began—that Claimants mentioned any of this. And, according to Claimants, the Tribunal's jurisdiction now depends on it.

52. Three immediate points bear mention. ***First***, Claimants do not specify *when* EuroGas II supposedly acquired the McCallan shares (and indirectly EuroGas GmbH, which in turn

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55 Respondent's Counter-Memorial, ¶¶ 59-61.

56 Claimants' Reply, ¶¶ 90-91.

57 Claimants' Reply, ¶¶ 64-65.

58 Notariatsakt, (n. Dr. Gerhard Knechtel, LL.M.), 13 July 2007, **C-0330**.

allegedly owns Rozmin). This omission is remarkable. As noted above, Claimants bear the burden of establishing the facts necessary for the Tribunal's jurisdiction. By failing to even *allege*—much less *prove*—when EuroGas II acquired EuroGas GmbH (and thus when it made its purported "investment"), Claimants have not come close to carrying their burden to establish the facts necessary for the Tribunal's jurisdiction.

53. ***Second***, Claimants present no direct evidence that (*i*) EuroGas II ever acquired the McCallan shares, or (*ii*) EuroGas II caused McCallan to transfer its interest in EuroGas GmbH (and thus Rozmin) to EuroGas II's Swiss subsidiary, EuroGas AG, on 4 June 2012.[59] This dearth of direct evidentiary support is also fatal to Claimants' jurisdictional argument.

54. ***Third***, Claimants' newest theory, if correct, would mean that, as of the moment when EuroGas I sold its interest in EuroGas GmbH to McCallan in 2007, EuroGas I's ICSID claim relating to the 2005 reassignment of the Excavation Area (the "**Reassignment Claim**") became *separated* from its shareholding in EuroGas GmbH (the "**GmbH Shareholding**"). This is because, according to Claimants' new theory, EuroGas I sold the GmbH Shareholding to McCallan on 13 July 2007, but that sale did not entail the Reassignment Claim because that claim was an asset of EuroGas I, not of EuroGas GmbH (EuroGas GmbH is not even protected under the U.S.-Slovak BIT). Thus, under Claimants' newest theory, the Reassignment Claim stayed with EuroGas I, whereas the GmbH Shareholding was transferred to McCallan.

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[59] As to (i), Claimants only put into the record exhibit **C-0334**, which is a Form 8-K dated 1 May 2008 and which reports that EuroGas, Inc. signed a Share Purchase Agreement with Regent Ventures Ltd. to acquire Regent's 45% interest in McCallan Oil & Gas (UK) Ltd. Claimants' expert apparently was provided with no evidence regarding the transaction either.

> "Further, ***I have been instructed by Counsel for the Claimants*** that EuroGas thereafter acquired 100% of the outstanding equity interests in McCallan, and on or about June 4, 2012, caused McCallan to transfer its entire interest in EuroGas GmbH to EuroGas AG, Swiss subsidiary of EuroGas. As of the date of this Report, EuroGas continues to hold an indirect interest in EuroGas GmbH through EuroGas AG, and, therefore, continues to hold an indirect interest in Rozmin and the Talc Deposit." SW Law Final Report, ¶101 (emphasis added).

Even as to McCallan's alleged acquisition of the shares in EuroGas GmbH on 13 July 2007, Claimants only put into the record exhibit **C-0330**, which is Notariatsakt, (n. Dr. Gerhard Knechtel, LL.M.), 13 July 2007.

55. As the Tribunal can see (and as will be clearer below), Claimants' newest theory makes a complete mess of their jurisdictional case. If—as Claimants say—EuroGas I emerged from the bankruptcy with its alleged "investment," then the Tribunal must trace each asset (the Reassignment Claim and the GmbH Shareholding) to see (*i*) which entity owns which asset at each relevant point in time, and (*ii*) what it means for the Tribunal's jurisdiction.

56. Fortunately, however, this entire issue can be (and should be) avoided. It is a moot issue if EuroGas I did not emerge from the bankruptcy with the alleged "investment." In that case, none of Claimants' new allegations matter because, if EuroGas I did not emerge from the bankruptcy with the "investment," then neither McCallan nor EuroGas II could have later come into possession of it—whether by merger, acquisition, or otherwise.

57. The following section therefore deals first with that threshold issue: *whether EuroGas I emerged from the bankruptcy with the alleged "investment."* If it did not, then the Tribunal can stop there: it has no jurisdiction, and it need not consider any further arguments relating to EuroGas.

1. EuroGas I did not emerge from the bankruptcy with its alleged investment

58. In its Counter-Memorial, the Slovak Republic explained that EuroGas I refused to file schedules of its assets and liabilities in the bankruptcy—and thus did not schedule the alleged "investment"—in violation of the U.S. Bankruptcy Court's order. As an unscheduled asset, the alleged "investment" remained property of the EuroGas I bankruptcy estate. This position was fully supported by the expert report of Ms. Annette Jarvis, a prominent member of the Utah bankruptcy bar and partner at the international law firm Dorsey & Whitney LLP.

59. In their Reply, Claimants contest both arguments and rely chiefly on the opinion of Messrs. David E. Leta and Brad W. Merrill, both of Snell & Wilmer, L.L.P. (the "**Snell Report**"). The Slovak Republic has asked Ms. Jarvis and Mr. Samuel P. Gardiner, an expert in Utah corporate merger and acquisition law, Utah corporate securities law, and Utah corporate dissolution law, to respond to the Snell Report (the "**Dorsey Report**").

As the Dorsey Report explains, Messrs. Leta and Merrill misstate the law, rely on wholly inapplicable cases, and ignore dispositive facts.

60. As a preliminary matter, Mr. Leta agrees that the abandonment of property of the bankruptcy estate is governed by Section 554 of the Bankruptcy Code.[60] That section provides:

> "(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
>
> (b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
>
> (c) Unless the court orders otherwise, any property ***scheduled*** under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.
>
> (d) Unless the court orders otherwise, ***property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate***."[61]

61. Mr. Leta also agrees that abandonment can take place in one of two ways: either by order of the court under Sections 554(a)-(b) or by operation of law under Section 554(c).[62] Claimants allege that the abandonment of EuroGas I's "investment" took place by operation of law—that is, under Section 554(c).[63]

62. A simple reading of Section 554(c) proves Mr. Leta wrong. That section explicitly provides for abandonment of "*any property **scheduled** under section 521(a)(1)*."[64] It is undisputed that EuroGas I's indirect interest in Rozmin was never scheduled. As a result, Section 554(c) never came into play, and EuroGas I's indirect interest in Rozmin was not abandoned.

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60 Claimants' Reply, ¶ 31; Snell Report, ¶¶ 72-73.

61 11 U.S.C. § 554(a) (emphasis added), **RL-0069**.

62 Claimants' Reply, ¶ 31; Snell Report, ¶¶ 72.

63 Snell Report, ¶ 72 ("*Here, the estate's interest in EuroGas GmbH, a wholly-owned Austrian subsidiary of [EuroGas I] . . . was abandoned by operation of law . . .*").

64 11 U.S.C. § 554(a) (emphasis added), **RL-0069**.

63. The U.S. Court of Appeals for the Tenth Circuit[65] and the United States Bankruptcy Appellate Panel for the Tenth Circuit[66]—federal courts that set precedent in Utah—have recently confirmed this position in the so-called *Brumfiel* cases.

a. The *Brumfiel* Cases

64. The *Brumfiel* cases arose out of a common set of facts. A bankruptcy debtor, Ms. Brumfiel, failed to schedule in her bankruptcy potential causes of action relating to her ownership interest in a piece of real property, which causes of action she later sought to assert against third parties. When she subsequently tried to assert those causes of action, the trial court held that because "*she failed to disclose those claims as assets in her bankruptcy schedules . . . her claims, as will all unscheduled assets, remain property of the bankruptcy estate and she has lost any right to enforce them*."[67]

65. Ms. Brumfiel then appealed that decision to the U.S. Court of Appeals for the Tenth Circuit. The Tenth Circuit rendered its decision on 24 July 2015 (after the Slovak Republic's Counter-Memorial but before Claimants' Reply), confirming the lower court's ruling and stating:

> "***Because Ms. Brumfiel did not list the claims in her asset schedules***, the trustee neither administered them nor abandoned them at the close of the bankruptcy case, and ***they remained the property of the bankruptcy estate***."[68]

66. This is not only the law in Utah. Other U.S. appeals courts are in accord. The First,[69] Fifth,[70] Sixth,[71] Eighth,[72] Ninth,[73] and Eleventh[74] U.S. Circuit Courts of Appeals have

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65 *Brumfiel v. U.S. Bank*, Case No. 14-1421, 2015 U.S. App. LEXIS 12812, (10 Cir., July 24, 2015), **RL-0137**.

66 *Brumfiel v. Lewis*, BAP Case No. CO-15-014, 2015 Bankr. LEXIS 3477 (BAP 10th Cir., Oct. 8, 2015), **RL-0136**.

67 *Brumfiel v. U.S. Bank*, Case No. 12-cv-02716, 2013 U.S. Dist. LEXIS 142649, *11 (U.S. Dist. Col. Oct. 2, 2013), **RL-0139**.

68 *Brumfiel v. U.S. Bank*, Case No. 14-1421, 2015 U.S. App. LEXIS 12812, *9 (10 Cir., July 24, 2015), (emphasis added),), **RL-0137**.

69 *Jeffrey v. Desmond (In re Jeffrey)*, 70 F.3d 183, 186 (1st Cir. 1995), **RL-0047** ("*by operation of 11 U.S.C. § 554(c) and (d), **any asset not properly scheduled remains property of the bankrupt estate**, and the debtor loses all rights to enforce it in his own name*"), (emphasis added).

70 *U.S. ex rel. Spicer v. Westbrook*, 751 F.3d 354, 364, fn. 13 (5th Cir. 2014), **RL-0159** ("***a trustee does not abandon a claim that the debtor has failed to disclose***"), (emphasis added).

similarly held that unscheduled assets cannot be abandoned under Section 554(c) of the U.S. Bankruptcy Code.[75] Numerous other lower federal courts are of the same opinion.[76]

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[71] *Tyler v. DH Capital Mgmt., Inc.*, 736 F.3d 455, 465 (6th Cir. 2013), **RL-0160** ("*Failure to schedule an asset does have an effect, however, on whether the trustee can be deemed to have abandoned it . . . if the property was never scheduled, it remains property of the estate. Here, [the debtor] did not originally schedule his FDCPA and usury claims, and he also failed to amend his filings after the case was closed. Under these circumstances,* ***the trustee cannot be considered to have abandoned the claims, and retains exclusive authority to pursue them***."), (emphasis added) (citing Fedotov v. Peter T. Roach & Assoc., 354 F. Supp. 2d 471, 475-76 (S.D.N.Y. 2005), **RL-0161** (holding that because debtor scheduled his FDCPA claim, he could pursue it after close of the bankruptcy)).

[72] *Vreugdenhill v. Navistar Internat'l Trans. Corp.*, 950 F .2d 524, 526 (8th Cir. 1991), **RL-0074**.

[73] *Dunmore v. United States*, 358 F.3d 1107, 1112 (9th Cir. 2004), **RL-0162** ("*Dunmore, as a debtor seeking bankruptcy relief, had a duty to carefully schedule his assets, including his tax refund claims, on his bankruptcy petition. Dunmore, however, breached this duty when he chose not to schedule his claims against the IRS on his Chapter 7 petition.* ***By operation of statute, assets that Dunmore failed to schedule remained the bankruptcy estate's property, even after the court discharged his debt***."), (emphasis added); *Pace v. Battley*, 146 B.R. 562, 566 (B.A.P. 9th Cir. 1992), **CL-0211**. ("*If the property is not properly scheduled, it is not sufficient that the trustee knew of the property's existence at the time that the case was closed.*").

[74] *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268, 1272 (11th Cir. 2004), **RL-0163** ("***Failure to list an interest on a bankruptcy schedule leaves that interest in the bankruptcy estate***."), (emphasis added).

[75] The Tenth Circuit cited and relied on some of these cases in *Brumfiel v. U.S. Bank*, Case No. 12-cv-02716, 2013 U.S. Dist. LEXIS 142649, *10 (U.S. Dist. Col. Oct. 2, 2013), **RL-0139** (citing *U.S. ex rel. Spicer v. Westbrook*, 751 F.3d 354, 364, fn. 13 (5th Cir. 2014), **RL-0159**; *Tyler v. DH Capital Mgmt., Inc.*, 736 F.3d 455, 465 (6th Cir. 2013), **RL-0160**; *Vreugdenhill v. Navistar Internat'l Trans. Corp.*, 950 F .2d 524, 526 (8th Cir. 1991), **RL-0074**; *Dunmore v. United States*, 358 F.3d 1107, 1112 (9th Cir. 2004), **RL-0162**; *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268, 1272 (11th Cir. 2004), **RL-0163**).

[76] *Mobility Sys. & Equip. Co. v. United States*, 51 Fed. Cl. 233, 234 (Fed. Cl. 2001), **RL-0164** ("*Courts have made it clear that the bankruptcy estate trustee* ***cannot abandon property*** *to the debtor at the close of the bankruptcy case* ***if that property or interest was never listed on a bankruptcy schedule***. ***Failure to list the interest on a bankruptcy schedule leaves that interest in the bankruptcy estate***."), (emphasis added); *Tyler House Apartments, Ltd. v. United States*, 38 Fed. Cl. 1, 6 (Fed. Cl. 1997), **RL-0165** ("*Unscheduled claims, however, such as those at issue here, remain the property of the estate, i.e., under the trustee's control*."); *In re Capozzi*, 229 B.R. 250, 521 (Bankr. S.D. Fla. 1999), **RL-0166** ("*The law is clear that property cannot be abandoned by operation of the above provision unless the debtor formally lists the property in his schedules.* ***Actual knowledge of the asset by the Trustee is irrelevant if the asset is not scheduled before the close of the case***."), (emphasis added); *In re Winburn*, 167 B.R. 673, 676 (Bankr. N.D. Fla. 1993), **RL-0167** ("*Cases which have interpreted the statute also follow the black letter approach. These cases hold that if an asset is not listed on the schedule of assets and liabilities, it is not 'scheduled' according to 11 U.S.C. § 521(1) and cannot be abandoned by operation of law*."); *Stanley v. Sherwin-Williams Co.*, 156 B.R. 25, 27 (W.D. Va. 1993), **RL-0168** ("*In order for property to be abandoned by operation of law pursuant to section 554(c), the debtor must formally schedule the property before the close of the case.* ***It is not enough that the trustee learns of the property through other means; the property must be scheduled*** *pursuant to section 521(1)*."), (emphasis added); *In re Fuller*, 146 B.R. 633, 639 (Bankr. S.D.N.Y. 1992), **RL-0169** ("*Under the Bankruptcy Code as it is applied today, property is not deemed abandoned by operation of law merely because the trustee failed to administer it,* ***unless the property was formally scheduled before the case was closed***."), (emphasis added); *Darrah v. Franklin Credit*, 337 B.R. 313, 316 (Bankr. N.D. Ohio 2005), **RL-0170** ("*[P]roperty not properly scheduled remains property of the estate in perpetuity*.").

67. On 8 October 2015, the Bankruptcy Appellate Panel for the Tenth Circuit followed the Tenth Circuit's holding in *Brumfiel*.[77] There, the court decided Ms. Brumfiel's objections to a Settlement Agreement entered by the trustee with the creditor who was the target of her litigation of her unscheduled claims. The court, following the Tenth Circuit's earlier opinion that unscheduled claims and assets remained property of the bankruptcy estate (and not the debtor, Ms. Brumfiel), explained:

> "When a bankruptcy case is closed, § 554(c) provides that property scheduled under § 521(a)(1), but not administered, is abandoned to the debtor. ***But because Debtor failed to disclose her alleged claims against Creditor in her bankruptcy filings, they were not abandoned to Debtor when her case was closed. Instead, the claims remained property of the estate pursuant to § 554(d)***, and upon reopening of the case and reappointment of Trustee, Trustee became the proper representative of the estate with the capacity to sue and be sued on its behalf pursuant to § 323."[78]

68. The holdings in the two *Brumfiel* cases are dispositive of the issue here and conclusively settle who owns EuroGas I's unscheduled interest in Rozmin. The property remained with the bankruptcy estate, and therefore EuroGas I did not emerge from the bankruptcy with the alleged "investment."

b. Mr. Leta's Response

69. Cognizant that the law on this issue is settled,[79] Mr. Leta haplessly argues that the Slovak Republic does not have standing to argue this point before this Tribunal (which is obviously wrong[80]) and attempts to carve out an exception to this well-settled rule. He

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77 *Brumfiel v. Lewis*, BAP Case No. CO-15-014, 2015 Bankr. LEXIS 3477 (BAP 10th Cir., Oct. 8, 2015), **RL-0136**.

78 *Brumfiel v. Lewis*, BAP Case No. CO-15-014, 2015 Bankr. LEXIS 3477, *13 (BAP 10th Cir., Oct. 8, 2015), (emphasis added), **RL-0136**.

79 Snell Report, ¶ 73 ("*Some bankruptcy courts have held that if an asset is not properly scheduled, then it is not abandoned under § 554(c).*") (citing *Vreugdenhill v. Navistar Internat'l Trans. Corp.*, 950 F .2d 524, 526 (8th Cir. 1991), **RL-0074**, a case included in Annette Jarvis First Expert Report and that holds: ("[*I]n order for property to be abandoned by operation of law pursuant to section 554(c), the debtor must formally schedule the property before the close of the case. It is not enough that the trustee learns of the property through other means; the property must be scheduled pursuant to section 521(1)*.") (citations omitted).

80 Mr. Leta's argument that the Slovak Republic lacks standing has no merit under public international law or U.S. bankruptcy law. Under public international law, Claimants have a duty to affirmatively establish their standing to bring this claim. They can only do that by demonstrating that they own the "*investment*" (EuroGas I's indirect interest in Rozmin) for which they seek to be compensated. The issue—whether that

indirect interest in Rozmin was legally abandoned and thereafter acquired by EuroGas II or whether it remains property of the bankruptcy estate—is directly at the heart of that determination. By raising the issue of abandonment before this Tribunal, the Slovak Republic is not asking the Tribunal to award the indirect interest in Rozmin to any particular entity (which is the domain of the U.S. bankruptcy). Rather, the Slovak Republic is merely seeking a determination, as it is entitled under public international law and specifically the U.S.-Slovak BIT, that EuroGas II is not the owner of the indirect interest in Rozmin and therefore has no standing to pursue this claim for compensation.

Indeed, Claimants' "reverse" standing argument would, if accepted, have sweeping implications under public international law that would turn long-standing investment jurisprudence on its head. For example, such a principle would allow claimants to bring claims that they do not own (protected by the principle that the respondent State does not have standing to contest that ownership), thereby conferring an unjust enrichment on claimants that are not the real owners of the claim. It also has the potential of generating additional claims against respondent States: claims by entities that do not own the claim (but which, under Claimants' theory, the respondent States have no standing to challenge) and claims by entities that actually do own the claim.

Claimants are also wrong as a matter of U.S. bankruptcy law. U.S. courts, including the Tenth Circuit in *Brumfiel*, consistently entertain standing challenges raised by third parties in post-bankruptcy proceedings. Dorsey Report, ¶ 9. In *Brumfiel*, the bank that was sued post-bankruptcy successfully defeated the debtor's complaint on the same grounds here raised by the Slovak Republic: that unscheduled assets are property of the estate, not property of the post-bankruptcy debtor. *Brumfiel v. Lewis*, BAP Case No. CO-15-014, 2015 Bankr. LEXIS 3477, *3 (BAP 10th Cir., Oct. 8, 2015), **RL-0136** (debtor's claims against creditor bank were dismissed because those claims, which were unscheduled, "*belonged to the bankruptcy estate*" and debtor lacked standing to pursue those claims as she "*was not the real party in interest*"). This holding from *Brumfiel* is dispositive of this issue and none of the cases cited by Mr. Leta for the opposite proposition come from the Tenth Circuit.

Moreover, the non-Tenth Circuit cases cited by Mr. Leta are easily distinguishable. He first cites *Morlan v. Universal Guar. Life Ins. Co*., 298 F.3d 609 (7th Cir. 2002), **CL-0222**. There, the court found that the trustee took active, outward steps to abandon the property back to the debtor, who then had standing to bring his claim. *Morlan v. Universal Guar. Life Ins. Co.*, 298 F. 3d 609, 617-18 (7th Cir. 2002), **CL-0222** (the court noted that the trustee send a letter to the debtor's "*lawyer stating that the* ***trustee had decided to 'abandon*** *any claim the bankruptcy estate might have to any future proceeds arising from that claim" and "the bankruptcy judge's order approving '****the Trustee's statement of abandonment*** *and report of no distribution*"), (emphasis added). That plainly is not the case here.

Mr. Leta next cites *Wilsey v. Jewett Bros. & Co.*, 122 Iowa 315 (Iowa 1904), **CL-0220**, where the court rendered its decision under the bankruptcy statute in effect in 1904. As explained above, that century-old statute "*was silent about a general right to abandon, [and] made no provision as to what constituted abandonment and what the trustee was required to do to disclaim property*." *Stanley v. Sherwin-Williams Co.*, 156 B.R. 25, 27 (W.D. Va. 1993), **RL-0168** (quoting 4 Collier on Bankruptcy, Lawrence P. King *et al*. eds., 15th ed. 1993, ¶ 554.01). Needless to say, a 111-year old decision, rendered under a statute repealed since 1978, by a court with no binding authority on the Tenth Circuit, has absolutely no value. The same is true of *Steevens v. Earles*, 25 Mich. 40 (Mich. 1872), *Steevens v. Earles*, 25 Mich. 40 (Mich. 1872), **CL-0221**, a case decided by a state court more than 143 years ago.

Mr. Leta's next authority, *Middleton-Coulibaly v. Danco, Inc*, 919 N.Y.S.2d 305 (N.Y. Civ. Ct. 2011) **CL-0223**. (The copy of this case filed by Claimants is incomplete. A full copy of the opinion is submitted as **RL-0171**.) This is another state court case and actually *confirms* the Slovak Republic's position in this arbitration. The debtor in that case included the subject asset on her schedule but described it incorrectly. The court found that, while incorrectly described, the inclusion of the asset on the debtor's schedule met the disclosure requirements of the Bankruptcy Code. The court then noted that "*there is a substantial difference between failing to list a cause of action altogether and informing the trustee of its existence, on the one hand, and mislabeling the cause of action in the schedule of assets and further informing the trustee of the case, on the other*." *Middleton-Coulibaly v. Danco, Inc.*, 919 N.Y.S.2d 305, 309 (N.Y. Civ. Ct. 2011), **RL-0171**. The debtor in that case was at fault only of the latter situation; mislabeling an asset.

claims that at least three bankruptcy courts have ruled that "*where a Chapter 7 trustee is aware of an unscheduled asset and elects not to administer that asset, then the asset is deemed abandoned by operation of law under § 554(c) and (d)*."[81] Mr. Leta is wrong, and none of the cases he cites support his position.

70. Mr. Leta first cites to *In re DeGroot*, 484 B.R. 311 (BAP, 6th Cir. 2012) as allegedly holding that unscheduled assets are deemed abandoned under Sections 554(c)-(d) of the Bankruptcy Code.[82] The court in *DeGroot*, however, recognized that Section 554(c) should be applied as written and that unscheduled assets remain property of the estate "*[u]nless the court orders otherwise*." The court stated:

> "***[T]echnical abandonment of an asset pursuant to § 554(c) ordinarily cannot occur if the Debtor failed to list the asset on his schedules. This is true even if the trustee had knowledge of the asset***. A debtor has an affirmative duty under 11 U.S.C. § 521(a)(1) to list all his assets and liabilities on his bankruptcy schedules. When a debtor fails to list an asset on her schedules, it remains unadministered because the trustee has not been placed on notice of the existence of the asset.[83]
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> The prefatory language of § 554(c), 'unless the court orders otherwise,' indicates that courts have discretion to affect or prevent technical abandonment simply by ordering otherwise. Because the same phrase appears in subsection (d) of § 554,

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EuroGas I, however, failed altogether to submit schedules and did not identify any property as a result of which "*at the time the bankruptcy case is to close, interested parties do not have the requisite knowledge to oppose the closing on the grounds of insufficient administration of the estate, **and the cause of action remains part of the bankruptcy estate***." *Middleton-Coulibaly v. Danco, Inc.*, 919 N.Y.S.2d 305, 309 (N.Y. Civ. Ct. 2011), (emphasis added), **RL-0171** (citing Federal Rules of Bankruptcy Procedure Rule 5009; *Vreugdenhill v. Navistar Internat'l Trans. Corp.*, 950 F.2d 524, 526 (8th Cir. 1991), **RL-0074**).

Deitz v. Univ. of Denver, 2011 U.S. Dist. LEXIS 22728 (D. Colo. Feb. 22, 2011)—a copy of the opinion is submitted as **RL-0172** —is also of no use to Claimants. There, the court found that the debtor did include the asset in dispute on her bankruptcy schedules and denied the third party's standing objection because the debtor had ownership over that abandoned asset. *Deitz v. Univ. of Denver*, 2011 U.S. Dist. LEXIS 22728, *14, (D. Colo. Feb. 22, 2011), **RL-0172** ("*By examining [debtor's] disclosures, her creditors would have been made aware that Johnson was a creditor of Deitz and Thoms, and that they in turn may have had a malpractice claim against Johnson . . . Given this history, Brake's objection is overruled **as the trustee properly abandoned the account receivable to [debtor]** and she was the proper party to attempt to collect her attorney's charging lien.*"), (emphasis added). Again, that is not the case here where the indirect interest in Rozmin belongs to the bankruptcy estate.

81 Snell Report, ¶ 73.

82 Snell Report, ¶ 73.

83 *In re DeGroot*, 484 B.R. 311, *320 (BAP, 6th Cir., Dec. 27, 2012) (emphasis added) (citations omitted), **CL-0212**.

> the court's discretion to affect or prevent abandonment of estate property would be the same. If the claim is not abandoned under § 554(a), (b) or (c), ***and unless the bankruptcy court orders otherwise, the claim remains property of the estate***."[84]

71. *DeGroot* thus does not support Mr. Leta's position. Instead, the court recognized that unscheduled assets are not abandoned and premised its holding on the bankruptcy court's discretion under Section 554(c) "*to modify or revise any technical abandonment simply by ordering otherwise*."[85] As the Dorsey Report explains, the court's decision thus was based not on the debtor's earlier failure to schedule the assets (as Mr. Leta would have this Tribunal believe) but, rather, on the bankruptcy court's subsequent decision to order the assets abandoned.[86]

72. Mr. Leta next cites to *In re Vanhook*, 468 B.R. 694 (Bankr., D.N.J. 2012) for allegedly the same proposition.[87] Again he is wrong. In that case, like in *DeGroot*, abandonment was specifically ordered by the bankruptcy court and did not occur "*automatically . . . upon closure of the case*,"[88] as Claimants and Mr. Leta have represented to this Tribunal.[89] In fact, the court's order in that case deeming the property abandoned was entered with the trustee's explicit approval.[90]

73. Mr. Leta's attempt to rely on the New Jersey state case of *Starrett v. Starret*, 541 A.2d 1119 (N.J. App. Div. 1988) is equally misplaced. That case does not deal with an unscheduled asset at all. Instead, the court explicitly recognized that the trustee purposefully abandoned an asset that *had* been scheduled. The court found:

> "***There is no dispute that the judgment was scheduled as an asset of the estate for the benefit of creditors pursuant to 11 U.S.C. § 521(1). Thus, the trustee, creditors and representatives of the estate were put on notice of its existence***

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84 *In re DeGroot*, 484 B.R. 311, *320 (BAP, 6th Cir., Dec. 27, 2012) (emphasis added) (citations omitted), **CL-0212**.

85 *In re Shelton*, 201 B.R. 147, 155 (Bankr. E.D. Va. 1996), **RL-0173**.

86 Dorsey Report, ¶ 35.

87 Snell Report, ¶ 73.

88 Dorsey Report, fn. 31.

89 Snell Report, ¶ 73, Claimant's Reply, ¶ 31.

90 *In re Vanhook*, 468 B.R. 694, 701 (Bankr., D.N.J. 2012), **CL-0213**.

> ***and the fact it was a claim in favor of the estate*** . . . Here, the trustee had more than just inquiry knowledge. He, in fact, indicated to the lower court that he made attempts to collect on the judgment and decided to abandon pursuit of the judgment in the Bankruptcy Court. Therefore, we conclude the trustee had knowledge of the asset and clearly intended to abandon the asset prior to the close of the bankruptcy estate."[91]

74. *DeGroot*, *Vanhook*, and *Starrett* thus *undermine*, rather than *support*, Claimants' position. Unlike in those cases, the U.S. Bankruptcy Court here never ordered EuroGas I's unscheduled indirect interest in Rozmin be abandoned, and the bankruptcy trustee never requested it—a fact recently confirmed when the Utah Bankruptcy Court ordered the reopening of EuroGas I's bankruptcy.

75. Mr. Leta also seeks solace in a 1953 law review article,[92] written some 25 years prior to the enactment of the current U.S. Bankruptcy Code. As a seasoned bankruptcy attorney, Mr. Leta knows that the statute that was in effect in 1953—known as the "*Nelson Act*"—was generally silent on the right to abandon assets and did not contain a provision similar to Section 554 of the Bankruptcy Code. As U.S. courts have explained:

> "***Because the former statute was silent about a general right to abandon, it made no provision as to what constituted abandonment and what the trustee was required to do to disclaim property***. Many courts held that a formal act was not absolutely essential and that any clear manifestation of the trustee's intent to disclaim would suffice. But whether a manifestation of intent was clear enough frequently raised difficult questions of fact, particularly where the manifestation consisted of inaction rather that action."[93]

76. Ignoring the clear language of Section 554 and the overwhelming authority on the subject, Mr. Leta seems to be advocating a return to that archaic and long-repealed system—which is something that courts have explicitly refused to do. As U.S. courts have explained, "*[i]t would be neither desirable nor consistent with § 554 to resolve abandonment questions by returning to the uncertain practice of attempting to determine*

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91 *Starrett v. Starret*, 541 A.2d 1119, 1123 (N.J. App. Div. 1988), (emphasis added), **CL-0214**.

92 Snell Report, fn. 111.

93 *Stanley v. Sherwin-Williams Co.*, 156 B.R. 25, 27 (W.D. Va. 1993) (quoting 4 Collier on Bankruptcy, Lawrence P. King *et al*. eds., 15th ed. 1993, ¶ 554.01) (emphasis added), **RL-0168**.

the trustee's intentions."[94] Other courts have explained that "*[t]he law is interested in finality*" and, as a result, courts will not:

> "read into the Bankruptcy Code a provision which goes against the clear language of the code. ***The Bankruptcy Court will not do a case by case analysis of what the Trustee's knowledge was and whether that knowledge was enough to result in the abandonment of an unscheduled asset***. The clear language of the statute required the Debtor to schedule the cause of action on the statement of assets and liabilities in order for it to be abandoned by operation of law. ***Thus, because the Debtor did not properly schedule the cause of action it was not abandoned by operation of law pursuant to § 554(c)***."[95]

77. In sum, Mr. Leta asks this Tribunal to engage in the very exercise that U.S. courts have rejected: a subjective analysis of what the EuroGas I Trustee knew and when and whether that knowledge was sufficient to result in the abandonment of unscheduled assets. As Ms. Jarvis explained in her first expert report[96] and as the Dorsey Report confirms: "*the actual or even imputed knowledge of the Trustee is not relevant to abandonment by operation of law under Sections §§ 554 (c) and (d) of the Bankruptcy Code.*"[97] This has been the unanimous holding of virtually every court that has ruled on the issue:

> "Despite appellants' persistent claims, we agree with the district court that the alleged discussion with the Trustee, even if true, has no bearing on the outcome of this appeal. ***The law is abundantly clear that the burden is on the debtors to list the asset and/or amend their schedules, and that in order for property to be abandoned by operation of law pursuant to 11 U.S.C. § 554(c), the debtor must formally schedule the property*** . . . ."[98]
>
> * * *
>
> [I]n order for property to be abandoned by operation of law pursuant to section 554(c), the debtor must formally schedule the property before the close of the case. ***It is not enough that the trustee learns of the property through other means; the property must be scheduled pursuant to section 521(1)***."[99]

78. Claimants and Mr. Leta have not identified a single case holding otherwise.

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94 *Stanley v. Sherwin-Williams Co.*, 156 B.R. 25, 27 (W.D. Va. 1993), **RL-0168**.

95 *In re Winburn*, 167 B.R. 673, 676 (Bankr. N.D. Fla. 1993), (emphasis added), **RL-0167**.

96 Annette Jarvis First Expert Report, ¶¶ 73 *et seq*.

97 Dorsey Report, ¶ 32.

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

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

79. In any event, Claimants' and Mr. Leta's argument regarding what the trustee knew is wrong. In its Counter-Memorial, the Slovak Republic already analyzed in detail the record evidence regarding what the EuroGas I Trustee knew, including all of the documents referenced in Claimants' Reply and the Snell Report.[100] That analysis showed not only that there is no evidence that the EuroGas I trustee knew of EuroGas I's interest in Rozmin, but that there is evidence that *EuroGas I affirmatively concealed it*.

80. In particular, the Slovak Republic pointed to the cross-examination of EuroGas' CFO, Mr. Blankenstein, who testified before the U.S. Bankruptcy Court that EuroGas I held no interest in the Slovak talc deposit.[101] It was in part based on that false testimony that the McKenzie Trustee, who was cross-examining Mr. Blankenstein, explained to the U.S. Bankruptcy Court that "*the assets have been dissipated, that there is really nothing left.*"[102] Like everyone else, the McKenzie Trustee was led to believe that no asset existed.[103]

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100 Respondent's Counter-Memorial, ¶¶ 82 *et seq*.

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

> "Question: Okay. And that is the property that is referred to as the Gemerska, G-E-M-E-R-S-K-A, Talc Deposit; is that right?
>
> Answer: Yes.
>
> Question: Correct?
>
> Answer: Correct.
>
> Question: ***Now, isn't it true that Eurogas does not even own this talc project?***
>
> Answer: ***That's correct.***"

102 A public U.S. bankruptcy filing that contains as an exhibit the testimony of Eurogas, Inc.'s Chief Financial Officer, Hank Blankenstein, before the U.S. Bankruptcy Court, 3 August 2004, p. 3, lines 20-21, **R-0081**.

103 A cursory review of the documentary evidence that existed during the bankruptcy, including the very same evidence relied upon by Claimants and Mr. Leta, confirms this. Contrary to Mr. Leta's assertion, EuroGas I's 2006 tax return, prepared by PwC at the trustee's instruction, did not mention the unscheduled indirect interest in Rozmin. Instead, the tax return clarified:

> "Complete information regarding the history of the Company is not available. *No accounting information was provided by the Debtor. We have been unable to reconstruct the activity of the Debtor during this period due to the lack of business records available*.
>
> . . .
>
> The beginning balances on Schedule F consist *only of the assets, liabilities, and changes thereto* ***known to the trustee as reported on the 2001 returns prepared by the Debtor***.

81. Finally, Mr. Leta attempts to plead the equities of the case. U.S. law is clear, however, that no consideration should be given to whether adherence to the U.S. Bankruptcy Code would result in alleged inequities to EuroGas I and EuroGas II. As U.S. courts have held, *[a] debtor who fails to schedule assets as required cannot now be heard to reap the windfall of his oversight under principles of equity*."[104]

82. If anything, the equities compel the *opposite* conclusion. Claimants' theory, if correct, would allow a debtor to shield assets from being liquidated in bankruptcy by electing not to schedule those assets and then "emerge" from bankruptcy with the concealed assets as if the bankruptcy never took place. This proposition would incentivize debtors to hide assets and engage in other misfeasance. As the Dorsey Report puts it:

> "Under this logic, the less debtors comply with the affirmative duty imposed by the Bankruptcy Code to schedule assets, the better off they will be. Such a result is inconsistent with the purpose, the specific statutory provisions of the Bankruptcy Code, and controlling case law."[105]

> The ending balances on Schedule F have been eliminated due to either the sale or disposition of the asset as reported on the final return of EuroGas, Inc."

The 1985 Company 2006 Tax Return, p. 11; item 1, (emphasis added), **C-0329**.

To dispel any ambiguity on the issue, the 2006 tax return further states that "*[a]ssets **known** to the Trustee were sold at auction on March 28, 2006. All remaining assets on Schedule L were unknown to the Trustee and have been written off on this final return*." The 1985 Company 2006 Tax Return, p. 11; item 1, (emphasis added), **C-0329**. As Ms. Jarvis explains, the only assets sold by the trustee at the 28 March 2006 auction consisted of EuroGas Polska, Sp.zo.o; Pol-Tex Methan, Sp.zo.o; GlobeGas, B.V.; and Mckenzie Methane Jastrzebie, Sp.zo.o. Dorsey Report, ¶ 30—none of which pertained to the unscheduled indirect interest in Rozmin, which therefore was unknown to the Trustee.

Mr. Leta's other claim that EuroGas I did not have to schedule its indirect interest in Rozmin because it was "*at best, a contingent, equitable legal claim*," Snell Report, ¶ 87, is also contrary to settled law in the Tenth Circuit. In *Brumfiel*, the Tenth Circuit confirmed, as Ms. Jarvis has opined all along, that under Section 541(a) of the Bankruptcy Code a debtor must schedule "*all types of property, legal and equitable, tangible or intangible*," including "*[e]very conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative*" such as "*[l]egal claims and causes of action, pending or potential*." *Brumfiel v. Lewis*, BAP Case No. CO-15-014, 2015 Bankr. LEXIS 3477, *11-12 (BAP 10th Cir., Oct. 8, 2015), **RL-0136** *("When Debtor filed her Chapter 7 petition, she was obligated under § 521 to disclose all of her assets, including contingent and unliquidated claims.")*. To be clear, this is not new law in the Tenth Circuit, which decided this as early back as 2007. *Eastman v. Union Pac. R.R.* Co., 493 F.3d 1151, 1159 (10th Cir. 2007), **RL-0140** ("*The bankruptcy code imposes a duty upon a debtor to disclose all assets, including contingent and unliquidated claims. That duty encompasses disclosure of all legal claims and causes of action, pending or potential, which a debtor might have.*" (internal citations omitted)). Thus, there is no excuse for Mr. Leta to advance a clearly erroneous position in his report.

104 *In re Winburn*, 167 B.R. 673, 676 (Bankr. N.D. Fla. 1993), (emphasis added), **RL-0167**.

105 Dorsey Report, ¶ 29.

83. The bare, incontestable fact is that EuroGas I failed to schedule its indirect interest in Rozmin as it was explicitly ordered to do by the U.S. Bankruptcy Court. Under the explicit terms of Section 544 of the Bankruptcy Code and the recent *Brumfiel* cases, the interest was never abandoned and remained property of the bankruptcy estate.

* * *

84. The foregoing shows that EuroGas I did not emerge from the bankruptcy with its alleged investment. As a result, neither McCallan nor EuroGas II could have ever come into possession of the alleged "investment" at a later date. That can and should be the end of the matter: The Tribunal has no jurisdiction over EuroGas II, and EuroGas II has no standing to bring its claim.

2. Even if EuroGas I did emerge from the bankruptcy with its alleged "investment," Claimants' new allegations do not establish the Tribunal's jurisdiction over EuroGas II

85. But even assuming, *arguendo*, that EuroGas I emerged from the bankruptcy with the alleged "investment," the Tribunal would still not have jurisdiction over EuroGas II. As explained above, Claimants' newest theory—now their *fourth*—is that, after the bankruptcy, EuroGas I transferred its interest in EuroGas GmbH (and thus Rozmin) to McCallan on 13 July 2007, and then EuroGas II acquired the shares of McCallan at an unspecified date in the future.

86. If believed, this theory would mean that EuroGas I's Reassignment Claim became *alienated* from the GmbH Shareholding. As noted above, this is because, according to Claimants' new theory, EuroGas I sold the GmbH Shareholding to McCallan on 13 July 2007, but that sale did not transfer the Reassignment Claim because that was an asset of EuroGas I, not of EuroGas GmbH. Thus, under Claimants' new theory, the Reassignment Claim stayed with EuroGas I, whereas the GmbH Shareholding was transferred to McCallan.

87. Under this scenario, the Tribunal is now tracing two assets—the Reassignment Claim and the GmbH Shareholding. The following sections trace these assets to determine (*i*) which

entity owns each asset at each point in time, and (*ii*) what it means for this Tribunal's jurisdiction.

a. Prior to 13 July 2007

88. Assuming that EuroGas I emerged from the bankruptcy with the alleged "investment" (which is denied for the reasons set forth above), EuroGas I would have possessed both assets—the Reassignment Claim and the GmbH Shareholding—prior to 13 July 2007.

b. From 13 July 2007 until some unspecified time

89. Claimants now allege that "*[o]n July 13, 2007, the 1985 Company sold its interest in EuroGas GmbH to a third party company, namely McCallan . . . .*"[106] If believed, then as of this date the GmbH Shareholding was transferred to McCallan. At that point in time, the Slovak Republic no longer owes any obligations under the U.S.-Slovak BIT to EuroGas I, because EuroGas I has—under this scenario—sold the GmbH Shareholding (and thus its indirect interest in Rozmin) to McCallan, which is a UK entity not protected by the U.S.-Slovak BIT.

90. Therefore, the Tribunal's jurisdiction *ratione temporis* over any alleged breaches of the U.S.-BIT ceases on 13 July 2007. The U.S.-Slovak BIT did not apply as between the Slovak Republic and EuroGas I after that date because EuroGas I sold its indirect interest in Rozmin to McCallan. This lack of jurisdiction *ratione temporis* under the U.S.-Slovak BIT is fatal to EuroGas II's purported claims regarding the Slovak court proceedings and the repeated reassignment decisions, because they all occurred after 13 July 2007.

91. The Reassignment Claim, however, remained with EuroGas I because it was never an asset of EuroGas GmbH (which, by this point, was a legally dead company).

c. Some unspecified time between 13 July 2007 and 4 June 2012

92. Claimants next allege that, at some unspecified time between 13 July 2007 and 4 June 2012, EuroGas II "*acquired the entirety of McCallan's issued shares . . . .*" Claimants do

[106] Claimants' Reply, ¶ 64.

not even mention, much less establish, the date of this alleged transaction. Assuming this acquisition occurred (and there is no direct evidence that it did), EuroGas II indirectly acquired shares in a dead Rozmin company, which shareholding enjoyed no protection under the U.S.-Slovak BIT (since McCallan is a UK company), and with notice of all events that occurred prior to that unspecific time.

93. Accordingly, the Tribunal has no jurisdiction *ratione temporis* over EuroGas II's claims relating to any event before this acquisition (whenever the acquisition occurred) because EuroGas II had no "investment" prior to this acquisition. It is a fundamental principle of public international law that an investment tribunal only has jurisdiction with respect to alleged breaches occurring after the claimant came within the scope of the applicable investment treaty—*i.e.*, when the claimant became an "investor" and acquired a protected "investment" within the meaning of the treaty.[107] If EuroGas II acquired an indirect shareholding in Rozmin via McCallan at some unspecified time, it only came within the scope of the U.S.-Slovak BIT at that time and as a result of that acquisition.

94. The tribunal in *Société Générale v. Dominican Republic* confirmed this principle. In that case, a French claimant acquired an investment from the previous owner, a U.S. company, after the measure-in-question had occurred. The tribunal held it had no jurisdiction under the France-Dominican Republic BIT over claims relating to acts and omissions having occurred before the French claimant acquired the investment from the U.S. owner:

> "[T]he fact that Article 7 extends jurisdiction to any dispute concerning the investment does not mean that it could cover investments that are not eligible in terms of nationality. That article specifically refers to disputes between a "Contracting Party and a national or company of the other Contracting Party". As with most investment treaties, the meaning of this provision is that ***the investment might have been made before or after the date of the Treaty, but that the treaty violation falling under the Tribunal's jurisdiction must have occurred after the entry into force of the Treaty and the investor became its beneficiary as an eligible national of the relevant Contracting Party***. One

[107] *See, e.g., Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic*, UNCITRAL, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶¶ 105-107, **RL-0174**; *Gami Inv., Inc. v. The Government of the United Mexican States*, UNCITRAL-NAFTA, Final Award, November 15, 2004, ¶ 93, **CL-0079**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 71, **RL-0107**.

> would expect any derogation of this principle to be express and not implied. ***The Treaty could thus not apply to any acts or omissions that occurred before that date because the investor's nationality was different from that required by the treaty and did not permit it to qualify as a protected investor under the Treaty***.
>
> […] All of these terms lead inevitably to the conclusion that the Treaty was designed to protect only the nationals and companies of the Contracting Parties, in this case France. The investment of AES, a company incorporated in the United States, is not protected by the terms of this Treaty. ***Thus, the investment could not be protected by this Treaty until both this Treaty entered into force and Claimant, as a French company, acquired the investment and it became a French investment.*****"**
>
> […] ***Accordingly, the Tribunal lacks jurisdiction over acts and events that took place before the Claimant acquired the investment***, that is on November 12, 2004, at which time the investment became protected under the Treaty to the benefit of French nationals and companies only. It follows that the Tribunal will only have jurisdiction over acts and omissions that took place after November 12, 2004, at which time both the Treaty had entered into force and the investor had become a qualifying French national."[108]

95. Applying these principles, EuroGas II can only bring claims relating to alleged violations of the U.S.-Slovak BIT *after* the acquisition of the shareholding in McCallan—whenever that was (which we do not know).

96. In addition, EuroGas II's indirect acquisition of the Rozmin interest from McCallan mirrors the situation in *Phoenix Action Ltd. v. The Czech Republic*.[109] In that case, a foreign entity bought the shares of Czech companies that had already allegedly suffered damage from the measures later complained of in an investment treaty arbitration. The only State measures that were ongoing at the time of the acquisition were judicial procedures in the Czech Republic in which the Czech companies were seeking to reverse the alleged damage. The tribunal concluded that this acquisition of a troubled asset to gain ICSID jurisdiction was not a protected "investment" under the applicable BIT.[110]

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108 *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic*, UNCITRAL, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶¶ 105-107, (emphasis added), **RL-0174**.

109 *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 136, **RL-0107**.

110 *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 142-144, **RL-0107**.

97. Similarly, EuroGas II alleges that it indirectly acquired the shares of a Slovak company (Rozmin) that had already allegedly suffered damage caused by the State acts at issue in this arbitration. The only State measures that were ongoing at the time of the alleged acquisition were the judicial procedures in the Slovak Republic in which the Slovak company was seeking to reverse the alleged damage. As in *Phoenix Action*, EuroGas II allegedly acquired a troubled asset embroiled in national court litigation seeking to remedy the very act that is the subject of this investment treaty claim. Following the reasoning of the tribunal in *Phoenix Action*, EuroGas II's acquisition of McCallan (and indirectly Rozmin) is not a protected "investment."

d. After 4 June 2012

98. Finally, Claimants allege that "*on June 4, 2012, [EuroGas II] caused McCallan to transfer its interest in EuroGas GmbH, and thus Rozmin, to its new Swiss subsidiary, EuroGas AG*."[111] Because of the total lack of information and evidence provided by Claimants about this transaction, neither the Slovak Republic nor the Tribunal has any way of knowing what impact it has on the Tribunal's jurisdiction.

99. The Slovak Republic does not know, for example, EuroGas II's percentage of ownership in McCallan[112] or in EuroGas AG. If EuroGas II owned a greater ownership percentage in EuroGas AG than it did in McCallan, then this transaction—by which the GmbH Shareholding (and thus the Rozmin interest) was transferred from McCallan to EuroGas AG—would have *increased* EuroGas II's indirect interest in Rozmin. And this increased "investment" would be subject to the same *Phoenix Action* objection outlined above, because it would represent the additional acquisition of a troubled asset to gain greater ICSID jurisdiction.

111 Claimants' Reply, ¶ 64.

112 The only evidence in the record is *indirect* evidence—namely, Form 8-K dated May 1, 2008, **C-0334**, which reports that EuroGas signed a Share Purchase Agreement with Regent Ventures Ltd. to acquire Regent's 45% interest in McCallan Oil & Gas (UK) Ltd.

100. Again, however, Claimants provide no information or evidence about this transaction. Therefore, the Slovak Republic has no way of knowing what impact it has on the Tribunal's jurisdiction.

e. Conclusions from Claimants' New Allegations

101. A synthesis of the foregoing considerations leads to the following conclusions (which assume that EuroGas I emerged from bankruptcy with the "investment," had capacity to transfer the investment, and that Claimants' allegations are true—all of which is denied):

- The U.S.-Slovak BIT ceased to apply as to EuroGas I when it allegedly sold the GmbH Shareholding to McCallan on 13 July 2007;
- EuroGas II's "investment" was not made until some unspecified time between 2007 and 2012, when it allegedly acquired the GmbH Shareholding.
- EuroGas II never acquired the Reassignment Claim;
- The Tribunal has no jurisdiction *ratione temporis* before EuroGas II's made its alleged "investment" by acquiring McCallan (and we do not know when that occurred);
- Therefore, EuroGas II cannot complain of any actions that pre-dated that point in time, including the 2005 reassignment of the Excavation Area and the Slovak court proceedings and repeated administrative proceedings;
- EuroGas II cannot complain about the Slovak court actions that post-dated its "investment" either because the "investment" is not protected under the *Phoenix Action* doctrine.

102. The question, then, is whether Claimants' prior theory that EuroGas II "*stepped into the shoes*" of EuroGas I in 2008 changes any of this. And unfortunately, that theory, too, has now changed.

3. Claimants' new "*de facto merger*" theory is inapposite

103. In their Memorial, Claimants argued that, on 23 July 2008, EuroGas II had "*assumed*"[113] EuroGas I's assets and liabilities through a "*type-F reorganization*" under Section 368(a)(1)(f) of the IRC, effectuated through a Joint Resolution purportedly executed by the directors of EuroGas I and EuroGas II.[114] In its Counter-Memorial, the Slovak Republic showed that cannot possibly be correct, because Section 368(a)(1)(f) is a *tax* statute that does not effectuate corporate mergers.

104. Faced with the Slovak Republic's arguments, Claimants were forced to admit in their Reply that indeed Section 368(a)(1)(f) of the IRC "*could not, in and of itself, serve to realize the merger*."[115] So Claimants changed this theory too.

105. Claimants' new theory is no longer based on a type-F reorganization (even though the 2008 Joint Resolution repeatedly refers to it as a type-F reorganization),[116] but instead is

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113 Claimants' Memorial, ¶ 21.

114 Joint Director's Resolution for the Performance of a Type-F Reorganization under Sixtion 368(a)(1)(F) of the Internal Revenue Code of 1986, 31 July 2008, **C-0057**. Originally, there was no mention of the word "merger" as Claimants actively misrepresented who owned the alleged investment and did not disclose the existence of EuroGas I or of its dissolution in Utah and subsequent bankruptcy.

115 Claimants' Reply, ¶ 89. *See also id*. at ¶ 90 ("*The reference in the Resolution to Section 368(a)(1)(F) of the U.S. Internal Revenue Code only reflected the parties' intention to treat the merger as a tax-free transaction.* ***It did not however constitute the legal basis pursuant to which the merger would be operated*** *and become effective*."), (emphasis added); Snell Report, ¶ 142 ("***Ms. Jarvis is correct that 26 U.S.C. § 368(a)(1)(F), a federal tax law commonly referred to as authorizing a "class 'F' reorganization," does not authorize a merger under state law***. *Nevertheless, the merger between the 1995 Company and EuroGas still would be recognized under Utah law as a de facto merger.*") (emphasis added).

116 A simple reading of that document shows that Claimants were referring to a "*type-F reorganization*" as a misnomer for a merger. The Joint Director's Resolution for the Performance of a Type-F Reorganization under Sixtion 368(a)(1)(F) of the Internal Revenue Code of 1986, 31 July 2008, (emphasis added), **C-0057**, stated in this respect:

> "WHEREAS, *the "winding up" of a dissolved corporation's affairs would seem NOT to exclude the engaging or participating in a Class "F" reorganization* under the Internal Revenue Code, as amended, particularly when nothing in the law appears to require that a Class F reorganization *requires filing and recording Articles of Merger with the Division[.]*
>
> . . .
>
> RESOLVED: that the Corporation ***proceed to carry on the business and affairs for which it was incorporated, namely, to continue and carry on the business and affairs of the Predecessor Corporation***; and, in addition, that the Corporation hereby complete the so-called ***Class "F" reorganization with its Predecessor, namely, carrying out that which is necessary to make the Corporation assume and inherit the shareholders' list***

based on "*the common law doctrine of de facto merger*."[117] Claimants argue that, if this new "*de facto merger*" theory is correct—and assuming that EuroGas I emerged from bankruptcy with the alleged investment, that EuroGas I had capacity to enter into the alleged transactions, and that all of Claimants' allegations were true (all of which is denied)—then EuroGas II would have acquired the Reassignment Claim when it supposedly merged with EuroGas I.[118]

106. As explained below, however, Claimants' "*de facto merger*" argument is not correct for two reasons. First, the "*de facto merger*" doctrine only applies in so-called "successor-liability" cases (where a new company is being sued for the liabilities of a predecessor company with which it did *not* merge, and the theory operates to protect the creditors of the first company); it does not work to actually merge or consolidate two separate entities. Second, EuroGas I, as a dissolved Utah corporation, did not have capacity to enter into a merger in any event. The Slovak Republic address each below in turn.

> ***and other assets and liabilities of the Predecessor Corporation, including the recognition of the Predecessor Corporation's issued and outstanding shares, shareholder base and issued and outstanding stock certificates****[.]*"[116]

This language is clear. The directors of EuroGas I and EuroGas II sought to effectuate a merger and reproduce all of its effects—including stating that there would be no change in shareholders or issuance of new stock—but cognizant that EuroGas I was precluded from merging because it was a dissolved corporation, they euphemistically called the transaction a "type-F reorganization." Continuing with the mantra, Claimants alleged in their Memorial (¶ 21) (emphasis added):

> "When the Chapter 7 proceedings were closed, the interest in Rozmin had therefore not been administered and hence remained with the 1985 Company. On July 23, 2008, EuroGas' corporate documents were amended to mirror those of the 1985 Company, and in order to wind up and liquidate its business and affairs, in accordance with Utah State law, the 1985 Company entered into a joint resolution with EuroGas and ***performed a type-F reorganization, whereby EuroGas assumed all of the assets, liabilities and issued stock certificates of the 1985 Company***."[116]

After the Slovak Republic explained in its Counter-Memorial that the phantom merger could not proceed as a "*type-F reorganization*"—which is a tax denomination under the IRC—Claimants changed course. Claimants now seek to disavow that earlier position and advance an entirely new theory in their Reply.

[117] Claimants' Reply, ¶ 85 ("*there can be no doubt that the merger of the 1985 Company with and into EuroGas was valid and effective pursuant to the de facto merger doctrine*"); ¶ 91 ("*it is pursuant to the common law doctrine of de facto merger that the 1985 Company validly merged with and into EuroGas*").

[118] In theory, EuroGas II could have also acquired other claims that accrued to EuroGas I before 13 July 2007 when EuroGas I transferred the GmbH Shareholding to McCallan and thus ceased to hold an "investment." EuroGas II, however, has not asserted any such claims in this arbitration. In any event, this merger would not transfer the GmbH Shareholding to EuroGas II, since EuroGas I had purportedly already transferred that to McCallan on 13 July 2007.

a. The "*de facto merger*" doctrine only applies in successor liability cases

107. Under U.S. law, a successor corporation is generally liable for the debts and liabilities of its predecessor where there is a merger or consolidation of the two entities. This is referred to as "*successor's liability*." In contrast, where an entity simply acquires of all or substantially all of the assets of another entity, but does not merge or consolidate with that other entity, the acquiring entity generally does not by operation of law assume the liabilities of the seller.

108. The *de facto* merger doctrine applies in the latter situation: where there has been an asset purchase and not a merger or consolidation. As the Dorsey Report explains, "*the de facto merger concept is a theory of liability that provides for the attachment of liability to a corporation that purchased assets from another corporation*."[119] It is an equitable remedy created in common law to protect the creditors of an entity that sells all or substantially all of its assets to other entity but retains its liabilities/debt.[120] The Dorsey Report explains that the remedy "*is employed as a sword against corporations that seek to avoid the obligations created by a merger, including successor liability and dissenting shareholder rights, by engaging in an asset acquisition*."[121]

109. Indeed, the principal case upon which Claimants themselves rely explains that "*[w]here one company sells or otherwise transfers all its assets to another company, the latter is not responsible for the debts and liabilities of the transferor. But, four well-settled exceptions qualify that rule*."[122] One of those exceptions is the "*de facto merger*" doctrine, "*which considers whether the business operations and management continued and requires that the buyer paid for the asset purchase with its own stock*."[123] As another U.S. court explained:

> "[T]he rationale for the ***merger exception*** to the general rule that the purchaser of corporate assets does not succeed to the seller's tort liabilities . . . is the concept

119 Dorsey Report, ¶¶ 66 *et seq*.

120 Dorsey Report, ¶ 15.

121 Dorsey Report, ¶ 72.

122 *Decius v. Action Collection Serv., Inc*., 2004 UT App 484, 23 December 2004, **CL-0230**.

123 *Decius v. Action Collection Serv., Inc*., 2004 UT App 484, 23 December 2004, **CL-0230**.

> that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities in order to ensure that a source remains to pay for the victim's injuries[.]"[124]

110. The *de facto* merger doctrine, however, has no effect on the "*legal existence of the corporations before the state [here Utah] in terms of their corporate identity*."[125] In other words, the *de facto* merger doctrine does not work to merge or consolidate two entities engaged in an asset acquisition. It acts only to protect the creditors of the selling entity.

111. None of the cases relied upon by Claimants and their corporate law expert, Mr. Merrill, provide otherwise. As Mr. Merrill himself admits,[126] those cases all considered the *de facto* merger doctrine exclusively in the context of holding the acquiring entity responsible for the liabilities of the seller—a fact confirmed by the Dorsey Report.[127] These cases all discuss the *de facto* merger doctrine exclusively in the context of an asset acquisition.[128] *None* of these cases mentions anything about the *de facto* merger successor liability doctrine being a vehicle to merge or consolidate two separate entities.

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124 *City of New York v. Charles Pfizer & Co.*, 688 N.Y.S.2d 23, 24 (NY App. 1st Dep't 1999), (emphasis added), **RL-0175**.

125 Dorsey Report, ¶ 72.

126 Snell Report, ¶ 110 (". . . *Utah courts have often discussed the de facto merger doctrine in connection with assessing possible successor liability*").

127 Dorsey Report, ¶ 72 ("*None of the decisions referring to the de facto merger doctrine cited in the Snell Report concludes that the subject corporations were validly merged under the law; instead, they conclude, where the de facto merger doctrine was satisfied, the acquiring corporation may be responsible for liabilities of the selling corporation*.").

128 A brief overview of the cases relied upon by Mr. Merrill proves this:

- In *Macris & Assocs. v. Neways, Inc.*, plaintiff sought to hold defendant liable for a judgment rendered against another entity from which the defendant had acquired some, but not all, assets. *Macris & Assocs. v. Neways, Inc.*, 986 P. 2d 748 (Utah Ct. App. 1999), **CL-0227**. The court identified the issue before it as one of "*successor liability.*"
- In *Florom v. Elliot*, plaintiff claimed defendant was liable for the tortious acts of its predecessor entity from which the defendant had purchased assets in a "*court supervised sale*." The court's holding was explicitly premised on "*the theory of* the *corporate successor's assumption of liability*." *Florom v. Elliott*, 867 F.2d 570, 580 (10th Cir. 1989), **CL-0228**.
- In *Nettis v. Levitt*, plaintiff claimed defendant entered into an "*Asset Purchase Agreement*" for the "*wholesale acquisition and continuation of*" its business by another entity, and that the transaction subjected the acquiring entity to successor liability. *Nettis v. Levitt*, 241 F.3d 186 (2nd Cir. 2001), **CL-0229**. The court explained that the issue before it was one of "*purchaser's liability*" and that a

112. Mr. Merrill's reliance on the general commentary to Section 1101 of the Utah Business Corporation Act also fails. As the Dorsey Report explains, that commentary actually "*makes clear that the de facto merger doctrine serves as a theory of liability*,"[129] and nothing in it "*suggests that it could be used as a positive tool to effect a merger outside of the statutory requirements*."[130] Tellingly, Mr. Merrill conveniently omits the following language from the commentary:

> "Faced with these transactions [*i.e.*, transactions cast as a non-statutory transaction but whose economic effect is that of a merger, such as the acquisition of substantially all of a company's assets], a few courts have developed or accepted the "*de facto* merger" concept which, to some uncertain extent, ***grants***

"*corporate successor can no longer avoid liability by simply structuring a cash-for-assets sale*."). *Nettis v. Levitt*, 241 F.3d 186, 194 (2nd Cir. 2001), **CL-0229**.

- In *Decius v. Action Collection Serv. Inc.*, plaintiff sought to hold defendant liable for the debt of another entity from which defendant had acquired significant assets. The court decided the issue as one of "*successor liability*." *Decius v. Action Collection Serv., Inc.*, 2004 UT App 484, **CL-0236**.
- In *Shannon v. Samuel Langston Co.*, plaintiff sought to impose liability on an entity that had acquired all of the assets of the original debtor entity. The court analyzed the case as one of successor's liability and framed the issue before it as "*whether the acquisition of the [assets of the seller] by [the acquiring entity] falls into one of the stated exceptions to the general rule which would insulate the latter from liability*." *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797, 800 (W.D. Mich. 1974), **CL-0231**.
- *In Ekotek Site PRP Comm. v. Self*, plaintiff sought to hold one of the defendants liable for environmental liabilities incurred by another defendant from which it had purchased assets. The court identified the issues before it as one pertaining to the "*doctrine of corporate successor liability*." *Ekotek Site PRP Comm. v. Self*, 948 F. Supp. 994, 1001 (D. Utah 1996), **CL-0232**.
- In *Oklahoma ex rel. Doak v. Acrisure Business Outsourcing Services, LLC*, plaintiff sought to recover from the defendant employee related liabilities incurred by the company from which the defendant had acquired considerable assets. The court considered the issue before it as one of "*predecessor's liabilities*." *Oklahoma ex rel. Doak v. Acrisure Business Outsourcing Services, LLC*, 529 Fed.Appx. 886, 893 (10th Cir. 2013), **CL-0233**.
- In *Dayton v. Peck, Stow and Wilcox Co (Pexto)*, defendant sold its assets to another entity, which then sold it to a third entity. Plaintiff sought to hold the third entity liable for defendant's tortious act on the basis of, as the court described it, "*successor liability*." *Dayton v. Peck, Stow and Wilcox Co (Pexto)*, 739 F.2d 690, 693 (1st Cir. 1984), **CL-0234**.
- In *Polius v. Clark Equipment Co.*, plaintiff sought to hold defendant liable for the tortious acts of an entity from which defendant had purchased an entire line of business. The court identified the issue before it as one of "*corporate successor responsibility*." *Polius v. Clark Equipment Co.*, 802 F.2d 75, 85 (3rd Cir. 1986), **CL-0235** (stating that with regard to the *de facto* merger doctrine, the "*continuity of shareholders*" factor involves the shareholders of the one corporation becoming a "*constituent part*" of the other corporation).

129 Dorsey Report, ¶ 70.

130 Dorsey Report, ¶ 70.

> ***to dissenting shareholders the rights they would have had if the transaction had been structured as a statutory merger***."[131]

113. As the Dorsey Report points out, the above language makes clear that the commentary refers to the "*de facto merger doctrine as a tool to punish corporations that attempt to avoid compliance with the law*. *This characterization is consistent with the doctrine's actual application in Utah courts, and courts throughout the United States, as a theory of liability*."[132]

114. The fact is that there is but one way for entities to merge under Utah law: by following the specific statutory procedures set forth in Utah's Business Corporation Act. Ms. Jarvis discussed those procedures in her original expert report.[133] Those procedures require the filing of articles of merger with the Utah Division of Corporation,[134] which Claimants and Mr. Merrill acknowledge never took place.[135] As Mr. Merrill himself acknowledges,[136]

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131 UTAH DEP'T OF COMMERCE DIV. OF CORP. & COMMERCIAL CODE, UTAH CORPORATION AND BUSINESS LAWS, at 185-86 (1992) (emphasis added where text was omitted in the Snell Report), **RL-0154**. (citing Folk, "*De Facto Mergers in Delaware: Hariton v. Arco Electronics, Inc.*," 49 Va. L. Rev. 1261 (1963) (emphasis added)).

132 Dorsey Report, ¶ 70. Moreover, to settle any misunderstanding, the commentary's above-quoted language is immediately followed by this clarifying statement: "***[t]hese problems should not occur under the Revised Act*** *since the procedural requirements for authorization and consequences of various types of transactions are largely standardized*." UTAH DEP'T OF COMMERCE DIV. OF CORP. & COMMERCIAL CODE, UTAH CORPORATION AND BUSINESS LAWS, at 185-86 (1992) (emphasis added), **RL-0154**. In other words, as Ms. Jarvis explains, "*because the law standardizes 'procedural requirements' for corporate transactions, common law doctrines like the de facto merger should not be necessary. Even as a theory of liability, the de facto merger doctrine has limited application given the procedures required by the statute to effect corporate transactions.*" Dorsey Report, ¶¶ 70-71.

However, even if this commentary could somehow be read to mean what Mr. Merrill implies (it cannot), the commentary provides no support to Mr. Merrill's position. Contrary to his assertion, that commentary is not "*official*." It was in fact a paper put together by the Committee of the Utah State Bar, which the Utah Division Corporations no longer publishes. Dorsey Report fn. 84 ("*the Division ceased publishing the commentary in 2014, suggesting its lack of relevance to interpreting the Current Act*"). Therefore, not only is the commentary *not* "*official*," it is not even persuasive authority, it is not part of Utah law, and it is not binding on any court. Accordingly, "*no Utah court could rely on the commentary to employ an interpretation of Section 1105 of the Current Act that would allow the de facto merger doctrine to be used to effect a merger*." Dorsey Report, ¶ 71. Mr. Merrill's attempt to rely on a blatant mischaracterization of the commentary clearly fails.

133 Annette Jarvis First Expert Report, ¶¶ 57 *et seq*.

134 Utah Code Ann. § 16-10a-1105, **RL-0093** ("*After a plan of merger or share exchange is approved by the shareholders, or adopted by the board of directors if shareholder approval is not required, the surviving or acquiring corporation* ***shall deliver to the division for filing articles of merger or share exchange*** *. . . A merger or share exchange* ***takes effect upon the effective date of the articles of merger or share exchange, which may not be prior to the date of filing***."), (emphasis added).

135 Claimants' Reply, ¶ 71; Snell Report, ¶¶ 113-114.

the Utah Supreme Court has "*long held that where a conflict arises between the common law and a statute or constitutional law, the common law must yield, because the common law cannot be an authority in opposition to our positive enactments*."[137]

115. Consequently, the "*de facto merger*" doctrine applies only in successor liability cases (for the protection of creditors). It does not apply here to effectuate a merger between EuroGas I and EuroGas II (where the only beneficiary would be EuroGas II itself).[138]

b. Dissolved corporations cannot merge under Utah law

116. But even if the "*de facto merger*" doctrine did apply (it does not), EuroGas I—as a dissolved Utah corporation—did not have capacity to merge with EuroGas II. Claimants and Mr. Merrill allege that, no matter how long EuroGas I had been dissolved, it was entitled to merge as part of its winding up and liquidation activities under Utah's Business Corporation Act. In support of this position, Mr. Merrill engages in a convoluted and unnecessary analysis between the prior Utah business corporation statute (the "**Repealed Act**") and the current version now in effect (the "**Current Act**").

117. This distinction is a red herring. *Both* acts contain similar provisions regarding what limited activities a dissolved entity can undertake. And under *both* acts, dissolved entities continue their corporate existence exclusively for the purpose of winding up and

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136 Snell Report, fn. 22.

137 *Gottling v. P.R., Inc.*, 61 P.3d 989, 991 (Utah 2002), (internal citations and quotations omitted), **CL-0198**.

138 Because this is not a case of successor's liability and there was no asset acquisition, it is unnecessary to address the four factors considered by U.S. courts in applying the de facto merger doctrine. Those factors are whether (*i*) there is continuity of the selling corporation's enterprise, including management and employees, (*ii*) there is "*continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock*," (*iii*) the selling "*corporation ceases its ordinary business operations*," and (*iv*) whether the purchasing corporation has assumed liabilities of the selling corporation ordinarily necessary for continuing the selling corporation's business. *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797 (W.D. Mich. 1974), **CL-0231**. A cursory review of the Joint Resolution, **C-0057**, demonstrates nonetheless that these factors are not met. As it pertains to the second factor, the Joint Resolution makes clear that EuroGas II "*is and shall NOT be issuing any new securities of its own*." Thus, even if EuroGas II did acquire EuroGas I's assets (it did not), it did not pay for those assets with shares of its own and the second factor is therefore not present. Similarly, as it pertains to the third factor, EuroGas recognizes in the Joint Resolution that it "*is in fact a continuation of the Predecessor Corporation [EuroGas I]*." Claimants' own document, therefore, acknowledges that EuroGas I did not cease to exist and the third factor never materialized.

liquidating their business.[139] They cannot engage in any other activity. The question before this Tribunal, therefore, is whether a merger is an activity consistent with the winding up and liquidation of an entity. As explained below, the answer is clearly "no."

118. The Current Act is explicit: "*[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***."[140] The Current Act then provides five specific categories of activities—listed as "(a)" through "(e)"—that are consistent with the winding up and liquidation of an entity's business and affairs.[141] Mr. Merrill alleges that a merger falls under category "(e),"[142] which states: "*doing every other act necessary to wind up and liquidate its business and affairs*."[143]

119. Mr. Merrill is wrong. As the Dorsey Report explains, letter "(e)" is a "*general catch-all provision [that] . . . must be interpreted in light of the specific examples enumerated by the Current Act.*"[144] This is mandated by the doctrine of *ejusdem generis*, which the Utah Supreme Court has recognized as requiring that a general, catch-all phrase at the end of a list of specific categories be "*understood as restricted to include things of the same kind, class, character, or nature as those specifically enumerated, unless there is something to show a contrary intent*."[145]

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139 The Repealed Act provided in this respect: "*the corporate existence of such corporation [a dissolved corporation] shall nevertheless continue for **the purpose of winding up its affairs***[.]" *Terry v. Wilkinson Farm Service Co.*, 173 P.3d 204, (Utah App. 2007), **CL-0199** (emphasis added) (quoting Repealed Act). The Current Act similarly provides: "*[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***." Utah Code. Ann. § 16-10a-1405, **R-0019**.

140 Utah Code Ann. § 16-10a-1405 (emphasis added), **R-0019**.

141 These are: "*(a) collecting its assets; (b) disposing of its properties that will not be distributed in kind to its shareholders; (c) discharging or making provision for discharging its liabilities; (d) distributing its remaining property among its shareholders according to their interests; and (e) doing every other act necessary to wind up and liquidate its business and affairs*." Utah Code Ann. § 16-10a-1405(1), **R-0019**.

142 Snell Report, ¶ 56.

143 Utah Code Ann. § 16-10a-1405(1)(e), (emphasis added), **R-0019**.

144 Dorsey Report, ¶ 55.

145 *State ex rel. A.T.*, 34 P.3d 228, 232 (Utah 2001), **RL-0153** ("*The doctrine of ejusdem generis applies in instances where an inexhaustive enumeration of particular or specific terms is followed by a general term or terms that suggest a class. The doctrine declares that in order to give meaning to the general term, the*

120. In that context, the catch-all provision under letter "(e)" is limited to the same kind of activities listed in letters "(a)" through "(d)"—none of which contemplate a merger or any activity directed at continuing the existence of the dissolved entity. The Dorsey Report explains:

> "In that context, "***every other act necessary [to wind up and liquidate its business and affairs]***" would be limited to those actions of the same kind as collecting and disposing of the dissolved corporation's assets and using the proceeds to first satisfy creditors and then make distributions to shareholders from any remaining proceeds. ***While it may be necessary for a dissolved corporation to enter into various agreements or other transactions to accomplish such activities, any transaction entered into should, therefore, be directed at "collecting its assets," "disposing of its properties," "discharging its liabilities," and "distributing its remaining property" to shareholders***."[146]

121. Simply stated, merger is not one of the activities contemplated under the statute as consistent with a dissolved entity's winding up and dissolution. Mr. Merrill's argument to the contrary would "*undermine the Current Act's clear purpose to prevent dissolved corporations from carrying on their regular business*"[147] as it would allow "*a dissolved corporation to simply declare its continuation as an entity with the same name and governing documents*."[148]

122. Mr. Merrill's position is also unsupported. Outside of the two non-binding orders entered in non-adversarial proceedings discussed below, Mr. Merrill has not cited a single case where a Utah court has held that a merger is an act "*necessary to wind up and liquidate*" an entity's business and affairs. Instead, he relies on cases that stand for the more general proposition that dissolved entities are not prohibited from entering into contracts. That general proposition, however, is not in dispute. As the Dorsey Report explains, "*[i]n order to dispose of its assets, as required by the Current Act, a dissolved corporation must necessarily enter into agreements and other contracts*."[149] But the limitations

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general term is understood as restricted to include things of the same kind, class, character, or nature as those specifically enumerated, unless there is something to show a contrary intent.").

146 Dorsey Report, ¶ 55 (emphasis added).

147 Dorsey Report, ¶ 59.

148 Dorsey Report, ¶ 59.

149 Dorsey Report, ¶ 57.

imposed under the statute remain. "*[T]he nature of such contracts and agreements must be directed at winding up and liquidating the dissolved corporation, not [at] perpetuating its existence*"[150]—as the Joint Resolution explicitly purported to do.

123. Mr. Merrill also cites to *In the Matter of Bio-Trust* ("***Bio-Trust***")[151] and *In the Matter of Syntetix Group, Inc.* ("***Syntetix***").[152] In both cases, however, the Utah courts entered an order at the request of a petitioning party recognizing a specific corporate transaction as a merger. It is undisputed that that did not occur here. To date, neither EuroGas I nor EuroGas II has petitioned a Utah court for an order recognizing a merger between them. Because the purported merger between EuroGas I and EuroGas II is a matter governed exclusively by Utah law, Claimants must seek any such determination from a Utah court and not from this Tribunal.

124. Moreover, as the Dorsey Report explains, *Bio-Trust* and *Syntetix* do not hold, as Mr. Merrill wrongly asserts, "*that a dissolved corporation may merge with a corporation in good standing as part of a wind up*."[153] Their holdings are much narrower and "*provide only that, in the specific non-adversarial situations at issue [in those cases], the courts, without analysis or explanation, deemed that a merger had taken place pursuant to the "Class F" Reorganization sought by the petitioning corporation*."[154] Not only are those holdings much narrower than the position advanced by Mr. Merrill, but they are also premised on a theory that all Parties in this arbitration agree is legally invalid.

125. In both cases, the court held that the subject entities were deemed merged by virtue of having performed a "*Class F reorganization*" under Section 368(a)(1)(f) of the IRC.[155]

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150 Dorsey Report, ¶ 57.

151 *In the Matter of Bio Thrust*, Case No. 040908769 (3rd Dist. Utah, July 1, 2004), **RL-0034**.

152 *In the Matter of Synetix Group Inc*., Case No. 080500140 (3rd Dist. Utah, Mar. 21, 2008), **RL-0035**.

153 Dorsey Report, ¶ 60.

154 Dorsey Report, ¶ 60.

155 *In the Matter of Synetix Group Inc.*, Case No. 080500140, ¶ 1 (3rd Dist. Utah, Mar. 21, 2008), **RL-0035** ("*Such reorganization [Class F Reorganization under Section 368(a)(1)(f) of the IRC] is hereby considered or treated as a 'winding-up' of the affairs of Synetix's dissolved predecessor corporation as contemplated in Utah Code Ann. § 16-10a-1405 titled Effect of dissolution . . . Accordingly, Synetix's dissolved predecessor corporation is hereby deemed to have merged or reorganized with and into Synetix Group,*

As explained above, Claimants and their legal experts now agree that a "Class F reorganization" cannot effect a merger. As a result, Claimants and their legal experts must logically agree that the holdings in *Bio-Trust* and *Syntetix* are clearly wrong.

126. Given the highly-specific facts of these cases and that the courts did not advance any authority for their rulings, the Dorsey Report concludes that "*it is unlikely that any other Utah court would find the conclusions of such [cases] persuasive*"[156]—a fact Mr. Merrill appears to agree with since he felt compelled to caution the reader that "*neither of these cases constitutes binding precedent*."[157]

127. In contrast to these unreasoned cases, the Utah Department of Commerce, Division of Securities—the agency responsible for regulating securities in Utah—held in *In re Flavor Brands, Inc.*[158] that a dissolved corporation cannot merge with a corporation in good standing because, among other things, a "*[m]erger is not consistent with liquidating or winding up and is not authorized by statute*."[159] The Division of Securities reasoned that no merger can take place because "*[t]he shares of a dissolved corporation are invalid*" and, therefore, a dissolved corporation has "*no shares to offer, sell or swap*."[160]

128. Mr. Merrill recognizes *Flavor Brands* is directly on point but argues that its holding is not authoritative because it is a decision rendered by the Division of Securities, not the Division of Corporations.[161] That argument has no merit. In Utah, the validity of securities, such as stock, and their transfer are governed by the Utah Uniform Securities Act, which is enforced by the Division of Securities not the Division of Corporations. As

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Inc."); *In the Matter of Bio-Thrust*, Case No. 040908769, ¶ 1 (3rd Dist. Utah, July 1, 2004) (same), **RL-0034**.

156 Dorsey Report, ¶ 60.

157 Snell Report, ¶ 106.

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

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

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

161 Snell Report, ¶ 132.

a result, decisions from the Division of Securities are persuasive authority on the matter.[162]

129. The Division of Securities' holding in *Flavor Brands* is entirely consistent with the language of the Current Act, which does not preclude a dissolved corporation from transferring its shares or securities. That language must be read in the context of the Current Act's limitations on what a dissolved corporation can do—*i.e.*, activities consistent with its winding up and liquidation. As such, while it is true that a dissolved corporation is not precluded under the Current Act from transferring its securities, any such transfer is limited to activities consistent with the entity's winding up and liquidation and merger is not one such activity.

130. In a merger, the non-surviving corporation does not issue stock and does not transfer its stock to the surviving corporation.[163] Rather, in a merger, the "*shares of the non-surviving corporation are themselves extinguished and deemed no longer issued and outstanding as a result of a merger process*."[164] Accordingly, the provisions of the Current Act that allow a dissolved corporation to transfer its shares is not implicated in a merger and the Division of Securities' holding in *Flavor Brands* makes perfect sense and is authoritative on the subject.

131. Still another case on point is *Hillcrest Invest v. Sandy City*.[165] There, the court recognized that the Current Act severely restricts the activities that a dissolved entity can undertake and held that a corporation could not assign a contract more than eleven years after its dissolution without first seeking reinstatement.[166] Forced to admit that the decision is on point, Mr. Merrill limits himself to arguing that the court was simply wrong and that the decision is not *stare decisis* because it was rendered by a Utah court of first instance.[167] Whatever Mr. Merrill's opinion, the fact remains that a Utah court has already decided on

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162 Dorsey Report, ¶ 62.

163 Dorsey Report, ¶ 65.

164 Dorsey Report, ¶ 65.

165 *Hillcrest v. Sandy City*, 2009 WL 7347353 (Utah Dist. Ct. Jan. 27, 2009), **RL-0027**.

166 Annette Jarvis First Expert Report, ¶ 41.

167 Snell Report, ¶ 130.

the precise issue submitted to this Tribunal: whether a dissolved corporation can validly engage in business activities not connected with its winding up and liquidation. The answer is "no."

132. Accordingly, EuroGas II's new theory that it *de facto* merged with EuroGas I fails both because the "*de facto merger*" doctrine only applies to successor-liability cases and because EuroGas I, as a dissolved corporation, had no authority to enter into a merger.

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133. As now should be clear, for EuroGas II to be successful on its newest jurisdictional arguments, the Tribunal would have to make so many factual assumptions (none of which Claimants have established with evidence) and undertake so many legal gymnastics (which would require disregarding well-settled U.S. and Utah legal precedent) that the exercise is—quite literally—dizzying. For all of the reasons set forth above and in the Slovak Republic's Counter-Memorial, EuroGas II does not own the alleged "investment" and has no standing to bring its claim.

B. The Slovak Republic Validly Denied EuroGas II the Benefits of the U.S.-Slovak BIT

134. The second, independent reason why the Tribunal lacks jurisdiction over EuroGas II is that the Slovak Republic denied it the benefits of the U.S.-Slovak BIT—including the right to arbitration—on 21 December 2012. As a result, the Tribunal has no jurisdiction *ratione voluntatis* over EuroGas' claims.

135. In their Reply, Claimants do not dispute that the denial-of-benefits can apply retroactively; they do not dispute that the denial-of-benefits clause in the U.S.-Slovak BIT covers the right to arbitration; and they do not dispute that EuroGas II is controlled by Mr. Rauball, a national of Germany (which is a third country within the meaning of Article I. 2 of the U.S.-Slovak BIT).[168]

136. Instead, Claimants argue that (*i*) the Slovak Republic's jurisdictional objection on this issue is untimely because the Slovak Republic did not attempt to "*discharge its burden of*

[168] Wolfgang Rauball Witness Statement, ¶ 1.

proof" on the issue until its Counter-Memorial, (*ii*) the denial-of-benefits provision should be interpreted in overly-restrictive manner, and (*iii*) the Slovak Republic has not carried its burden to show that EuroGas has no "*substantial business activities*" in the U.S.[169] The Slovak Republic addresses each below.

1. Claimants' argument that the Slovak Republic "*discharge[d] its burden of proof*" too late is baseless

137. Claimants' raise a new argument in their Reply that "*it is only in its Counter-Memorial that Respondent attempted for the first time to discharge its burden of proof with respect to the second cumulative condition for a valid denial of benefits under the U.S.-Slovak BIT, namely that EuroGas does not have substantial business activities in the U.S.*"[170] We do not understand this argument. When and under what rule was the Slovak Republic required to discharge its burden of proof before its Counter-Memorial?

138. Article 41 of the ICSID Convention makes it clear that an objection to jurisdiction or admissibility may be raised in the Counter-Memorial. The Slovak Republic fully discharged any burden it had in its Counter-Memorial. Claimants' complaint that the Slovak Republic fully argued the denial-of-benefits objection "*only in its Counter-Memorial*" thus falls.

2. Claimants' argument for an overly-restrictive interpretation of the denial-of-benefits clause should be rejected

139. Claimants next offer a host of arguments that the denial-of-benefits clauses should be read in an overly-restrictive manner. First, Claimants argue that "*the only entities that such denial of benefits clauses are intended to exclude from the benefit of the treaty are "shell" and/or "sham compan[ies]" that are only formally incorporated in one of the Contracting States for the sole purpose of benefitting from procedural and substantive advantages*."[171] This argument runs counter to the plain language of the U.S.-Slovak

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169 Claimants' Reply, ¶¶ 101 *et seq.*

170 Claimants' Reply, ¶ 97.

171 Claimants' Reply, ¶ 105.

BIT, which provides that the Slovak Republic may deny the benefits if the company "*has no substantial business activities in the territory of the other Party [...]*."[172]

140. There is nothing in this provision that would limit it to particular *types* of companies. Rather, by its terms, the BIT allows for a denial-of-benefits if, for example, the company is active in one country (and thus not a "*shell*" or "*sham*" company), but nonetheless not active in the country that signed the BIT with the host State.

141. In any event, the evidence offered by the Slovak Republic shows that the main asset of EuroGas II is a prospect of a favorable award in this arbitration. Thus, EuroGas II indeed is no more than a sham company with no demonstrable business activities. Thus, the Slovak Republic was justified in denying the benefits to of the U.S.-Slovak BIT to EuroGas II even under the Claimants' own tailor-made test.

142. Claimants next argue that the word "*substantial*" in the phrase "*substantial business activities*" should, in effect, be read out of the provision altogether. Under Article 31 (1) of the Vienna Convention on the Law of Treaties, however, "*a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*."

143. Thus, the starting point for interpretation of the term "*substantial"* must be its ordinary meaning. Black's Law Dictionary defines *substantial* as "*significant or large and having substance*."[173] Similarly, Oxford dictionary defines *substantial* as "*of considerable importance, size, or worth*."[174]

144. The term "*substantial*" thus includes a requirement of quality—*i.e.*, materiality, as well as quantity (magnitude). The tribunal in *Amto v. Ukraine* focused on more quality—rather than quantity—when interpreting the phrase "*substantial business activities*":

> "The ECT does not contain a definition of 'substantial', nor does the Final Act of the European Energy Charter Conference that would serve as guidance for

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

173 Definition of "substantial" in online Black's Law Dictionary, **R-0267**.

174 Definition of "substantial" in online Oxford Dictionary, **R-0268**.

> interpretation. As stated above, the purpose of Article 17(1) is to exclude from ECT protection investors which have adopted a nationality of convenience. ***Accordingly, 'substantial' in this context means 'of substance, and not merely of form'. It does not mean 'large', and the materiality not the magnitude of the business activity is the decisive question. In the present case, the Tribunal is satisfied that the Claimant has substantial business activity in Latvia, on the basis of its investment related activities conducted from premises in Latvia, and involving the employment of a small but permanent staff***."[175]

145. Thus, the ordinary meaning of the term "*substantial"* is "*real and material*." This requires an assessment of the nature of the business of the company at stake and review the quality of its activities. This interpretation is confirmed by the commentary to the denial-of-benefits clause in NAFTA, authored by Meg Kinnear and Andrea Bjorklund:

> "The second purpose is to permit a NAFTA Party to deny benefits to an enterprise if it is merely a "sham company" having no "substantial business activities" in the NAFTA country in which it is established. The U.S. Statement of Administration Action ***specifies that a shell or sham company does not include "firms that maintain their central administration or principal place of business in the territory of, or have a real and continuous link with, the country where they are established***."[176]

146. The foregoing analysis applies with equal force to the U.S.-Slovak BIT. The denial-of-benefits provision in the U.S.-Slovak BIT, like the one in NAFTA, enables States to deny benefits to an enterprise if that investor has no substantial activities in the country under the law of which it is constituted or organized.[177]

147. Claimants additionally argue that it is enough for a U.S. investor to carry out substantive business activities at *any* time during the life of the investment—not only when the rights

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175 *Limited Liability Company Amto v. Ukraine*, Arbitration No. 080/2005, Final Award, 26 March 2008, ¶ 69 (emphasis added), **RL-0126**.

176 *See* Article 1113 - Denial of Benefits in Meg N. Kinnear, Andrea K. Bjorklund , et al.: *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, Supplement No. Main work, June 2006(© Kluwer Law International; Kluwer Law International 2006) pp. 1113-1 - 1113-13 (emphasis added), **RL-0176**.

177 *See* Article 1113 - Denial of Benefits in Meg N. Kinnear, Andrea K. Bjorklund , et al.: *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, Supplement No. Main work, June 2006(© Kluwer Law International; Kluwer Law International 2006) pp. 1113-1 - 1113-13 (emphasis added), **RL-0176**: Subject to prior notification and consultation in accordance with Articles 1803 (Notification and Provision of Information) and 2006 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an *enterprise of such Party* and to investments of such investors if investors of a non-Party own or control the enterprise and *the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized*.

under the applicable treaty are exercised.[178] Claimants offer no authority in support of this novel proposition. Indeed, there is none.

148. On the contrary, the tribunal in *Ulysseas v. Ecuador* expressly held that the time period relevant for the fulfillment of the requirements for a valid denial of benefits was the moment of the notice of arbitration because that was when the claimant claimed the benefits of the investment treaty:

> "***[T]he date on which the conditions for a valid and effective denial of advantages are to be met in the instant case is the date of the Notice of Arbitration****, i.e.* 8 May 2009, this being the date on which Claimant has claimed the BIT's advantages that Respondent intends to deny."[179]

149. Thus, the reasoning of the *Ulysseas* tribunal is fatal to Claimants' argument that it is enough for a U.S. investor to carry out substantive business activities at *any* time during the life of the investment.

150. Applying that test, the Slovak Republic showed that EuroGas II had no substantial business activities in the United States since its creation in 2005 until today.[180] The lack of substantial business activities thus existed both at the time of EuroGas II's notice of arbitration on 25 June 2014 as well as at all the prior relevant dates, including on the date of EuroGas II's notice of dispute on 31 October 2011 and the date of the Slovak Republic's denial of benefits on 21 December 2012.[181] Thus, there can be no question that the requirements for a denial-of-benefits were satisfied at all relevant times.

3. Claimants' argument that the Slovak Republic has not shown a lack of substantial business activities is without merit

151. Finally, Claimants argue that the Slovak Republic has not satisfied its burden of proof to show that EuroGas has no substantial business activities in the U.S. Putting aside the question of who bears the burden of proof on this issue (discussed below), the Slovak Republic has offered voluminous evidence showing that EuroGas II (and its purported

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178 Claimants' Reply, ¶ 122.

179 *Ulysseas, Inc. v. Ecuador*, Interim Award, 28 September 2010, ¶ 174, (emphasis added), **RL-0103**.

180 Respondents' Counter-Memorial, ¶¶ 99, 106.

181 Respondents' Counter-Memorial, ¶¶ 99 *et seq*.

predecessor EuroGas I) had no real business activity in the U.S. during the relevant time. The Slovak Republic showed that:

(a) EuroGas II has not conducted any material operations in the U.S. from its creation in 2005 to the present;

(b) EuroGas II has been managed from outside the U.S.—in Canada, Western and Central Europe[182] and more recently in Austria and Switzerland;[183]

(c) EuroGas II has been inactive since at least 2 December 2010;[184]

(d) EuroGas II maintains no physical office. Its purported principal office in New York is a mere mail drop address.[185] The Dun & Bradstreet report clearly shows that EuroGas was inactive at the address at which it is registered and listed in the Request for Arbitration, as of 18 June 2012;[186]

(e) EuroGas II had repeatedly failed to meet its statutory requirement to file audited financial statements for the periods ended 31 December 2007, 2008, and 2009;[187]

(f) EuroGas II was de-registered by the SEC on 30 March 2011 for non-compliance with U.S. securities laws;[188]

(g) EuroGas I[189] has had no direct operating U.S. subsidiaries since its bankruptcy;[190] and

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

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

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

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

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

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

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

(h) EuroGas I by its own admission lacked the ability to pay its auditors as far back as for the period ended 31 December 2003, which coincided with EuroGas I's administrative dissolution.[191]

152. Moreover, the Slovak Republic disproved Claimants' allegations in its Counter-Memorial that EuroGas II was involved in substantial business activities in the U.S. For example, the Slovak Republic explained that the lawsuit brought *against* EuroGas II by the company TEC is not proof of any activity of EuroGas II.[192] To the contrary, it demonstrates that EuroGas II has no proper activity to speak of—the lawsuit itself resulted from EuroGas II's inability to provide the promised financing to TEC (which, ironically, Claimants had earlier advertised alleged proof of EuroGas II's "*substantial business activities*").[193]

153. Similarly, the Slovak Republic showed that EuroGas II's shareholding in TEC is no proof of business activity.[194] TEC is a Canadian company with no operating revenues, with substantial operating losses, and a negative balance sheet.[195] As the tribunal in *Pac Rim*

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189 The Slovak Republic demonstrated above that EuroGas II, established in 2005, was not a successor to EuroGas I, itself legally defunct in 2007. EuroGas II thus cannot credibly claim that it is a "genuine and long-standing U.S. Company" by virtue of its succession to EuroGas I. To the extent it is, than this fact is relevant.

190 EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, p. 3, **R-0075** (identifying subsidiaries as EuroGas GmbH Austria, EuroGas Polska Sp. zo.o., and Energy Global A.G., and the subsidiaries of each of these subsidiaries, including GlobeGas B.V., Pol-Tex Methane, Sp. zo.o., McKenzie Methane Jastrzebie Sp. zo.o.). Subsequent to the bankruptcy, EuroGas no longer had any subsidiaries; EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2007, p. 1, **R-0063**.

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

192 Respondent's Counter-Memorial, ¶ 106.

193 Claimants' Rejoinder on Provisional Measures, ¶ 71; Respondent's Counter-Memorial, ¶ 106.

194 Respondent's Counter-Memorial, ¶ 106.

195 Tombstone Exploration Corporation Form 20-F for Fiscal Year Ended 31 December 2013, p. 19, **R-0153**; Print-out from Nevada Secretary of State status page for Tombstone Exploration Corporation, **R-0152**.

v. El Salvador confirmed, the mere shareholding in another entity (in this case, a non-US one) is not enough to give rise to substantial business activities in the U.S.[196]

154. With equal force, the Slovak Republic demonstrated that EuroGas' purported shareholding[197] in EuroGas Silver & Gold Inc. Nevada[198]—which is only an *indirect* shareholding—is irrelevant for the business activities of EuroGas II. EuroGas Silver & Gold Inc. has by itself no proven operational activities, and Claimants have offered no evidence of any operations of this indirect subsidiary of EuroGas—other than nebulous and unsubstantiated business plans on the exploitation of the historic Banner Silver Mine.[199]

155. Finally, the Slovak Republic noted that there was no evidence showing that EuroGas indeed owns 86 porphyry copper mining rights in the Tombstone Mining District of Arizona or that EuroGas II indeed exercises these purported rights.[200] In their Reply, Claimants *again* refused to provide any evidence.

156. One can hardly expect the Slovak Republic to do more. Any possible evidence of substantial business activities would be in Claimants' hands. Perhaps for that reason, the Tribunal recognized in Procedural Order No. 4 that it is not the Slovak Republic that bears the burden of proof on this issue. In its Request No. 24, the Slovak Republic requested "*documents showing any business activities of EuroGas I or EuroGas II in the U.S. since 1998*".[201] The Tribunal denied that request in Procedural Order No. 4, stating that "*Claimants have the burden of proof*."[202]

157. Claimants have had every chance to produce evidence showing EuroGas II's substantial business activities in the U.S. They have failed to do so.

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

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

198 Wolfgang Raubal Witness Statement, ¶ 10.

199 Respondent's Counter-Memorial, ¶ 112.

200 Respondent's Counter-Memorial ¶ 109.

201 Respondent's First Request for Production of Documents, 31 July 2015, Request No. 24.

202 Annex No. 2 to Procedural Order No. 4, 17 August 2015, Decision on Request No. 24.

4. Claimants are wrong that they do not need to show substantial business activities in the U.S. because EuroGas is a "junior mining company"

158. Finally, Claimants argue that they do not need to show substantial business activities in the U.S. because EuroGas is a "*junior mining company*." Yet again, this argument has no basis in law.

159. Claimants themselves acknowledge that the activities of junior mining companies consist of "*raising capital on stock markets in order to search for and explore deposits, conduct estimations, confirm reserves, secure mining rights, and prepare mines for their commercial development*."[203] But Claimants have not shown that EuroGas II has explored any specific deposits in the U.S., secured any specific mining rights in the U.S., or prepared any specific mines for their commercial development in the U.S.

160. Further, it is clear that EuroGas II has not been raising capital on the stock markets—as Claimants say a typical junior mining company would do—in the U.S. since at least 30 March 2011, when the SEC deregistered EuroGas II for non-compliance with U.S. securities laws.[204] And Claimants have offered no evidence to show that EuroGas II has attempted to attract capital from private investors in the U.S.

161. Claimants also acknowledge that, although junior mining companies "*do[] not need to be heavily staffed, to have a permanent office or directly own equipment*" until it is able to monetize the investment,[205] they "*carry out the exploration works through subsidiaries incorporated locally in the country where the deposit is located . . .*." Yet again, however, Claimants nowhere state that EuroGas II uses any staff in the U.S. or that it has made any arrangements to use any equipment in the U.S. Nor do Claimants assert that EuroGas II would itself carry out any specific exploration activities in the U.S. through any its local subsidiaries.

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203 Claimants' Reply, ¶ 111.

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

205 Claimants' Reply, ¶ 112.

162. In the end, EuroGas II does not seriously dispute that it has very few assets other than shareholdings in mining projects *outside* the U.S.[206] EuroGas II's management and staff are located outside of the U.S.;[207] it has had no operational revenues generated in the U.S.; and it has no projects in the U.S. By any standard, EuroGas II has no substantial business activities in the U.S., and the Slovak Republic validly denied EuroGas II the benefits of the U.S.-Slovak BIT—including the right to arbitration itself. Accordingly, the Tribunal has no jurisdiction over EuroGas II's arbitration claim.

* * *

163. In sum, Claimants' Reply further confirms that this Tribunal lacks jurisdiction of EuroGas II because (*i*) EuroGas II does not own the alleged "investment" and does not have standing to bring the claim, and (*ii*) the Slovak Republic validly denied the benefits of the U.S.-Slovak BIT—and in particular the right to arbitration—before EuroGas exercised its right to arbitration.

206 Claimants' Reply, ¶ 114.

207 Claimants' Reply, ¶ 114.

III. THE TRIBUNAL HAS NO JURISDICTION OVER BELMONT

164. Unable to refute that the Tribunal has no jurisdiction over EuroGas II, Claimants argue that the Tribunal has jurisdiction over Belmont. As the Slovak Republic showed in its Counter-Memorial, however, the Tribunal has no jurisdiction over Belmont either—and for two independent reasons: (*i*) Belmont sold its 57% ownership interest in Rozmin to EuroGas I in 2001, and therefore Belmont does not own its alleged "investment"; and (*ii*) in any case, Claimants' colorable allegations occurred prior to 14 March 2009, the date when the Canada-Slovak BIT came into effect.[208]

A. Belmont Does Not Own the Alleged "Investment" and Has No Standing

165. As the Slovak Republic explained in its Counter-Memorial, Belmont sold its 57% Rozmin interest to EuroGas I under the SPA dated 27 March 2001.[209] In general terms, the SPA provided that Belmont would transfer its 57% interest to EuroGas I, and in exchange EuroGas I would pay Belmont with 12 million EuroGas I shares and other consideration.

166. The SPA is governed by British Columbia law.[210] The Slovak Republic's expert on British Columbia law, Mr. John Anderson, explained in his First Expert Report, that under the SPA, Belmont "*transferred to EuroGas [I] ownership over Belmont's 57% interests in Rozmin*" and "*retained a security interest in the 57% interest, to secure EuroGas [I's] compliance with its covenants under sections 4.1(c) and 4.1(d) of the*" SPA.[211]

167. Although Claimants dispute that Belmont transferred its 57% interest, they have offered no expert testimony to rebut Mr. Anderson. Therefore, Claimants have no one who is qualified in British Columbia law that agrees with their position. Their arguments come only from their advocates in this arbitration—who are not independent experts and who

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208 Respondent's Counter-Memorial, ¶¶ 44 *et seq*.

209 Share Purchase Agreement between EuroGas I and Belmont (executed version), 27 March 2001, **R-0107**.

210 Share Purchase Agreement between EuroGas I and Belmont (executed version), 27 March 2001, Section 7.5, **R-0107**.

211 John Anderson First Expert Report, ¶ 5.

are not qualified in British Columbia law. Mr. Anderson hereby issues a Second Expert Report, explaining why Claimants' advocates have, under the law of British Columbia, reached the wrong conclusion.

168. As explained below, the Slovak Republic also discovered numerous public statements from Belmont, EuroGas I, and EuroGas II declaring—under oath and to the investing public—that Belmont had, in fact, transferred the 57% interest to EuroGas I and that Belmont retained the shares in the 57% interest merely as "*collateral*."

169. But it is not just the parties' *words*, but their *actions*, that confirm that the transfer took place. After receiving the EuroGas I shares as consideration for the 57% transfer, Belmont sold the EuroGas I shares to a third party.[212] Similarly, EuroGas I, upon receiving that 57% interest, granted an irrevocable option on the 57% interest to an alleged third-party purchaser Protec Industries, Inc.[213] and subsequently purported to dispose of the 57% interest by transferring it to EuroGas GmbH.[214] Thus, both Belmont and EuroGas exercised control over the consideration that they paid to each other under the SPA.

170. In the following sections, the Slovak Republic (*i*) summarizes Mr. Anderson's analysis of the SPA, (*ii*) reviews the public statements from Belmont, EuroGas I, and EuroGas II confirming that the transfer occurred, (*iii*) analyzes the actions by the parties that confirm the transfer occurred, (*iv*) refutes Claimants' arguments to the contrary, and (*v*) argues that, even if EuroGas I did not acquire legal title to the 57% interest (and it did), at a minimum it was the beneficial owner of the interest.

171. Throughout this analysis, it should always be recalled that Claimants—not the Slovak Republic—bear the burden of proof to establish the facts necessary for the Tribunal's jurisdiction.

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212 Belmont Resources Inc.'s Audited Consolidated Financial Statements for the Years ended 31 January 2004 and 2003, note 3, **R-0043**.

213 Letter from Mr. Wolfgang Rauball to Mr. Arne Przybilla, of Protec Industries Ltd., 12 January 2004, **R-0118**.

214 EuroGas AG_Statement about participation (German original: DGAP-News EuroGas AG:Klarstellung zur Unternehmens-Beteiligung), (with extended translation), 25 February 2012, p. 1, **R-0265**.

1. Mr. Anderson's analysis of the SPA under British Columbia law confirms that Belmont transferred the 57% interest

172. As was typical with agreements between Belmont and EuroGas, the SPA is a short, poorly-drafted contract. It is hardly a model of clarity. Nevertheless, Mr. Anderson has provided expert testimony on how a British Columbia court, analyzing the SPA under British Columbia law, would analyze it.

173. The most important provisions of the SPA are Sections 2.1, 4.1, and 6.1. Section 2.1 provides the consideration that EuroGas I was required to pay to Belmont for the 57% interest in Rozmin:

> "**ARTICLE 2**
> **Purchase And Sale**
>
> 2.1 Purchased Shares. Relying upon the representations and warranties herein contained, and on and subject to the terms and conditions hereof, the Vendor will sell to the Purchaser and the Purchaser will accept and acquire from the Vendor the Shares in consideration of:
>
> (a) the Purchase Price Shares [*i.e.*, defined as 12 million EuroGas I shares];
>
> (b) the Purchaser hereby undertaking to register and qualify, at its expense, the Purchase Price Shares under the Securities Act of 1933 (United States), which registration and qualification shall be carried out by making the necessary filings with the Securities and Exchange Commission ("S.E.C") within 30 days from the date this Agreement is approved by the Canadian Venture Exchange;
>
> (c) the Purchaser hereby granting the right to the Vendor to require the Purchaser to register and qualify, at the expense of the Purchaser, the Purchase Price Shares under the Securities Act of 1933 (United States) at any time;
>
> (d) Rozmin s.r.o. hereby granting a royalty to the Vendor of 2% calculated on the gross sale revenue of any talc sold with such royalty to be paid on March 31, June 30, September 30 and December 31 of each year of the mining life of the Deposit;
>
> (e) the payment by the Purchaser to the Vendor of a US$100,000 non-refundable advance royalty (the "USS100,000 NRAR") within 30 days of the execution of this Agreement by all parties."[215]

[215] Share Purchase Agreement between EuroGas I and Belmont (executed version), 27 March 2001, Article 2, **R-0107**.

174. Claimants argue that these items are conditions precedent to the transfer of Belmont's 57% interest in Rozmin. The Slovak Republic agrees. As demonstrated below, all of these provisions were satisfied.

175. Two of these items—Subsections (a) and (e)—require the actual transfer of shares or money. With respect to (a), it is undisputed that EuroGas I paid to Belmont the 12 million EuroGas shares. In its financial statements for the years ended 2003 and 2004, Belmont declared that it had disposed of all 12 million shares received from EuroGas I.[216] In this arbitration Belmont has confirmed that it sold those EuroGas I shares to a third party.[217]

176. With respect to (e), EuroGas also paid to Belmont the USD 100,000 non-refundable advance royalty ("**NRAR**"). Claimants agree that at least USD 74,000 was paid.[218] In fact, the audited financial statements of Belmont show that, in fact, effectively the entire amount was paid.

177. In particular, the 2001/2002 Belmont Audited Financial Statements disclose that the proceeds from the disposition of the 57% ownership interest in Rozmin included "*[a]dvance royalty payments of US96,774 or C$150,000*" and confirm that the sale of the 57% ownership interest included consideration of "*[p]ayment by Eurogas of $100,000 U.S. as advance royalties (subsequently net recovery to Belmont of $96,744)*."[219] Belmont never mentioned or demanded from EuroGas I any shortfall in the payment of the NRAR (although it did allege *other* breaches of the SPA, discussed below).

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216 Belmont Resources Inc.'s Audited Consolidated Financial Statements for the Years ended 31 January 2004 and 2003, note 3, confirms that the Purchase Price Shares were received by Belmont and subsequently disposed by it for proceeds of approximately $1,379,700, **R-0043** ("*In 2001 the Company entered into an agreement to sell its 57% interest in its then subsidiary, Rozmin S.R.0 (Rozmin), to EuroGas Inc. (EuroGas), a publicly traded company that held the remaining 43% interest in Rozmin. Rozmin holds a 100% interest in an industrial talc mineral project in Slovakia.* ***As proceeds for this disposition Belmont received 12,000,000 shares of EuroGas*** *. . . As at year end,* ***all of the original 12,000,000 shares received from EuroGas Inc. had been disposed of*** *for proceeds of approximately $1,379,700*.") (emphasis added).

217 Vojtech Agyagos Witness Statement, ¶ 26 ("By January 31, 2006, ***Belmont had disposed of all of the 15,830,000 EuroGas shares, but for only approximately USD 1,505,400.19***")

218 Claimants' Reply, ¶ 139, fn 109 ("*The 1985 Company indeed made eleven payments to Belmont by check, for a total amount of only CND 114,000 (approximately USD 74,000).*").

219 Belmont Resources Inc.'s Audited Consolidated Financial Statements for the Years Ended 31 January 2002 and 2001, notes 2 and 3, **R-0114**.

178. Thus, the conditions precedent in Subsections (a) and (e) were satisfied. That leaves subsections (b), (c), and (d).

179. Subsections (b), (c), and (d) each begin with the language "*hereby*," showing that they are rights being conferred as of the signing of the SPA. Thus, they are conditions precedent in the sense that the *rights* must be conferred before the 57% interest transfers. When the parties signed the SPA, however, these conditions precedent were satisfied because the rights were conferred upon signing.

180. To be clear, it cannot be the case—as argued by Claimants—that the obligations in Subsections (b), (c), and (d) *must have actually been performed* before the 57% interest transfers. Nothing in the SPA suggests that. To the contrary (and as discussed below), Section 6.1 of the SPA specifies the conditions for closing the transaction and only refers to two obligations in Section 2.1—those in Subsections 2.1(a) and (e). It does not refer to the obligations in Sections 2.1(b), (c), or (d). If those obligations were conditions precedent, they would have been mentioned in Section 6.1 specifying the events that had to occur prior to closing.

181. Moreover, the nature of EuroGas I's obligations under Subsections (b), (c), or (d) confirms that they need only be *undertaken*, not actually be *performed*, before the 57% interest transfers. Subsection 2.1(d) grants to Belmont a 2% royalty on "*the gross sale revenue of any talc sold*," with payments to be made in increments over "*the mining life of the deposit*." This language obviously only imposes as a condition precedent the *granting* of a 2% royalty, not the *payment* of that royalty.

182. Logically, the payment could only take place post-closing as a matter of performance under the SPA (indeed, these payments were to take place for many years and would never be triggered if there are no gross sale revenues from the mining operations). As Mr. Anderson explains, "*I am not aware of any method of granting a royalty in the mining industry other than by the signing of a document that evidences the grant of a royalty and outlines its terms. This was achieved in this case*."[220]

[220] John Anderson Rebuttal Expert Report, ¶ 12.

183. In sum, the provisions that can be fairly characterized as conditions precedent—(a) and (e)—were, in fact, satisfied. The other provisions—(b), (c), and (d)—were simply rights granted upon the signing of the SPA that, if not fulfilled, would give rise to a breach of contract action at a later date if performance was not forthcoming.

184. The next important section under the SPA is Section 4.1, which provides in relevant part:

> "**4.1 Covenants, Representations and Warranties. The Purchaser covenants, represents and warrants to the Vendor that now and at the Closing:**
>
> (a) it has the full authority to enter into this Agreement;
>
> (b) if the average weighted trading price of the shares of the Purchaser as quoted on the NASD OTC market is less than US$0.30 for any 10 trading day period within one year of the date of execution of this Agreement by all parties, then the Purchaser will issue to the Vendor that number of common shares equal to 1,000,000 multiplied by the following factor:
>
> (US$0.30 – (10 day ave. w. tr. price))/0.05
>
> (c) in the event the Vendor is unable from the sale of the Purchase Price Shares to recover 125% of its initial investment in the Deposit equal to CDN$3,000,000 (based on an initial investment of CDN$2,400,000) within one year of the date of execution of this Agreement by all parties due to depressed market conditions or a depressed trading price then the Purchaser shall within 10 business days of the written request by the Vendor issue such additional common shares to compensate for any shortfall from the CDN$3,000,000, with the deemed price of such shares to be the average weighted trading price for the 10 day period prior to the date of receipt of the written notice by the Purchaser[.]"

185. Thus, Subsections 4.1(b) and (c) provide that EuroGas I will issue additional shares to Belmont in certain circumstances following the closing. Subsection 4.1(b) applies, for example, where Belmont *retains* the EuroGas I shares and is compensated with additional EuroGas I shares according to the specified formula if the market price of the EuroGas I shares within the year following execution of the SPA falls below the specified level. Subsection 4.1(c) applies, for example, where Belmont *sells* the EuroGas I shares and is compensated with additional EuroGas I shares according to the specified formula if the proceeds from the sale fall below the specified level. According to the evidence available

to the Slovak Republic, it appears that EuroGas did issue 3,830,000 additional shares to Belmont under Subsection 4.1(b).[221]

186. Notably, neither of these provisions provides that Belmont will receive additional consideration in the form of *a certain amount of additional money*. Rather, they only provide for additional consideration in the form of *additional EuroGas I shares* (whose value varies over time).

187. The final important provision in the SPA is Section 6.1, which provides:

> "**Article 6**
> **Closing**
>
> 6.1 Within 30 days of the date of approval by the Canadian Venture Exchange of the transactions described in this Agreement the Vendor shall deliver In trust to the solicitor (the "Trust") for Rozmin s.r.o. any and all transfer documentation necessary for the transfer of the Shares to the Purchaser against payment of the Purchase Price Shares and the US$100,000 NRAR (if not already paid). The terms of the Trust are that:
>
> (a) the ownership of the Shares shall not pass to the Purchaser; and
>
> (b) no instructions to proceed with the share transfer in the Slovak Republic District Court will be given to the Rozmin s.r.o. Solicitor,
>
> unless and until the Vendor has received 125% of its initial investment equal to CDN $3,000,000 through the sale of the Purchase Price Shares."

188. Thus, the opening clause in Section 6.1 makes clear that there are two conditions precedent to closing: transfer of the 12 million EuroGas I shares, which was required by Subsection 2.1(a), and payment of the USD 100,000 NRAR, which was required by Subsection 2.1(e). As explained above, both of those conditions precedent were satisfied.

189. The remainder of Section 6.1 states that ownership of the 57% interest will not pass to EuroGas I "*unless and until the Vendor has received 125% of its initial investment equal to CDN $3,000,000 through the sale of the Purchase Price Shares*." This is the provision on which Claimants seize to argue that the 57% interest never transferred because, when

[221] Letter from Belmont to EuroGas, 10 October 2002, **R-0112**.

Belmont sold the 12 million EuroGas I shares, it did not immediately receive CAD 3 million.

190. As shown below, however, prior to this arbitration Claimants *themselves* did not interpret this provision in this way. Rather, before this arbitration Claimants took the same position that the Slovak Republic does now: this language was intended to transfer the 57% interest to EuroGas I, but to leave the shares to the 57% interest with Belmont as collateral to guarantee EuroGas I's obligations under the SPA.

191. That Claimants took this different view before this arbitration is not surprising. According to Mr. Anderson, "*it is clear that the words cannot be given their plain meaning, that is, that a pre-condition to EuroGas actually receiving ownership of the 57% interest is that Belmont previously receives CAD$3 million from the sale of the Purchase Price Shares*."[222] This is because, if Belmont sold its EuroGas shares for less than the specified threshold of CAD 3 million (as turned out to be the case[223]), then the condition would never be capable of being satisfied. The same situation arises if Belmont—after receiving all of EuroGas I's consideration—simply decides not to sell the EuroGas I shares at all.

192. Both scenarios would ultimately lead to a commercially absurd result: EuroGas I would have satisfied all its duties under SPA, delivered 12 million of its shares to Belmont, paid the USD 100,000 NRAR to Belmont, and given the covenants regarding other royalties and registration rights to Belmont, but—if Belmont simply decides not to sell the 12 million EuroGas I shares or sells them for less than CAD 3 million—EuroGas I would receive in return ***nothing***. And since Belmont would have already received all of that consideration, it had the power and every incentive not to sell the EuroGas I shares or to sell them for less than CAD 3 million and give EuroGas I nothing in return.

193. On any view, that is a commercially absurd result.

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222 John Anderson First Expert Report, ¶ 16.

223 Belmont Resources Inc.'s Audited Consolidated Financial Statements for the Years ended 31 January 2004 and 2003, note 3 ("*As at year end, all of the original 12,000,000 shares received from EuroGas Inc. had been disposed of for proceeds of approximately $1,379,700*."), **R-0043**.

194. Mr. Anderson explains that, under the laws of British Columbia, the literal words should not be given their literal meaning if they are ambiguous or would lead to a commercial absurdity:

> "[T]he normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. ***Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted***."[224]

195. The laws of British Columbia require that three rules be considered in determining the meaning of Section 6.1 of the SPA. ***First***, the interpretation must have reference to the SPA as a whole:

> "The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but ***should be considered in harmony with the rest of the contract and in light of its purposes and commercial context***."[225]

196. ***Second***, the interpretation must examine the factual circumstances that gave rise to the SPA:

> "While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of the agreement (*Hayes Forest Services*, at para 14; and Hall, at p. 30). ***The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual objective intentions of the parties as expressed in the words of the contract***."[226]

197. ***Third***, the interpretation must give commercial efficacy to the parties' agreement in business setting:

> "Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. ***Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial***

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224 *Consolidated-Bathurst v Mutual Boiler*, [1979] SCJ No. 133, [1980] 1 SCR 888, p. 12, (emphasis added), **RL-0084**.

225 *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, ¶ 64**,** (emphasis added), **RL-0085**.

226 *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, ¶ 57, (emphasis added), **RL-0086**.

> ***transaction in the first place should be discarded in favour of the interpretation of the policy which promotes a sensible commercial result***."[227]

198. Applying these principles, Mr. Anderson points out the disconnect between Article 6.1 and Article 4.1(b) and (c). That is, the SPA contains two clauses that relate to the value of the 12 million EuroGas I shares: section 4.1(b) and section 4.1(c). Each of these clauses in turn requires that EuroGas I issue additional EuroGas I shares to Belmont in certain circumstances following the closing. As explained above, however, neither of these clauses guarantees that Belmont will *actually receive* proceeds of CAD 3,000,000 (something that would be required in order to give effect to the literal meaning of section 6.1). Rather, they simply provide for the issuance of additional shares (which, at the time of issuance, may not be worth CAD 3 million with the 12 million shares).

199. According to Mr. Anderson, "*[t]his disconnect between the wording in section 6.1 and the remainder of the Share Purchase Agreement, in particular sections 4.1(b) and 4.1(c) to which section 6.1 is so obviously tied, require reconciliation*." He concludes:

> "It is for these reasons that I was and remain of the opinion that section 6.1 would *not* be interpreted as creating a new right in favour of Belmont (to actually receive CDN$3,000,000 in proceeds from the sale of the Purchase Price Shares) that is not supported by any covenants on its part to try to achieve these proceeds or any contractual ability on the part of Eurogas to make-up for any shortfall. ***Instead, I am of the opinion that section 6.1 was drafted, and would be interpreted, as securing the obligations of Eurogas to meet its post-closing obligations under sections 4.1(b) and 4.1(c) in relation to the issuance of additional common shares***."[228]

200. In other words, Mr. Anderson reconciles the disconnect between Section 6.1 and Subsections 4.1(b) and (c) by interpreting Section 6.1 as providing that the shares to the 57% interest remain with Belmont as collateral, which secures EuroGas I's obligation to issue additional shares under Subsections 4.1(b) and (c). In practical terms, this means that, if EuroGas I defaults on its obligation to issue additional shares after the closing under Subsections 4.1(b) or (c), then Belmont—holding the shares to the 57% interest in Rozmin as collateral—can foreclose and repossess legal title to the shares.

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227 *Scanlon v Castlepoint Development Corp.*, [1992] OJ No. 2692, 11 OR (3d) 744770, leave to appeal to SCC refused [1993] SCCA No. 62, ¶ 51, (emphasis added), **RL-0087**, quoting from *Consolidated-Bathurst v. Mutual Boiler*, [1979] SCJ No. 133, [1980] 1 SCR 888, **RL-0084**.

228 John Anderson Rebuttal Expert Report, ¶ 7, (emphasis added).

201. And that is *precisely* how Belmont and EuroGas interpreted the SPA before this arbitration.[229]

2. Claimants' public statements confirm that Belmont transferred the 57% interest

202. After the signing of the SPA, Belmont, EuroGas I, and EuroGas II repeatedly declared that Belmont sold the 57% interest to EuroGas I and only retained the shares of the 57% interest as collateral:

- Belmont declared to the investing public in its audited financial statements for 2001 and 2002 that it had "*sold its 57% interest in Rozmin, s.r.o. effective 27 March 2001*," that it held "*the shares as a collateral measure only*," and that "*EuroGas acquired effective control of Rozmin on March 27, 2001*."[230]

- Belmont publicly informed its shareholders and the market in its 2002 Annual Information form that it "*sold its 57% interest in Rozmin, s.r.o. ("Rozmin") effective March 27, 2001*."[231]

- EuroGas I publicly informed the market in its annual reports for 2002 through 2005 that "*[b]y virtue of its ownership of Rozmin and the talc deposit, Eurogas*

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229 The above also disposes of Claimants' related argument under Section 6.1 that "*as a result of [EuroGas I's] failure to pay the USD 100,000 [NRAR] . . . Belmont did not deliver in trust to Rozmin's solicitor the transfer documentation necessary for the transfer of its 57% interest in Rozmin*." Claimants' Reply, ¶ 142. As Mr. Anderson explains:

> This could be indicative of a variety of things, including being indicative of the parties viewing the delivery to Rozmin's solicitor as a clerical matter that could be completed after closing (either in order to put in place the mechanism to achieve the delayed transfer of the 57% ownership interest in Rozmin, as argued by the Claimants, or in order to implement the security arrangements which I believe to be the correct result in interpreting the Share Purchase Agreement). Given that the failure to deliver in trust to Rozmin's solicitor the transfer documentation necessary for the transfer of the 57% ownership interest in Rozmin is not inconsistent with either position, and is not indicative of one or the other, this is a neutral factor that should be set aside in any analysis of the Share Purchase Agreement. John Anderson Rebuttal Expert Report, ¶ 7(b)(i).

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

231 Belmont Annual Information Form, 30 September 2002, **R-0116**.

bears the full responsibility to fund the development costs necessary to bring the deposit to commercial production."[232]

- Belmont publicly disclosed in its audited financial statements for 2004 and 2005 that it held "*a collateral security interest [which] is not considered by management to be a controlling or significant interest in the shares or operations of Rozmin*."[233]

- EuroGas I represented to Protec Industries, Inc., an alleged potential third-party purchaser, that it owned "*a 57% interest [in Rozmin] while our wholly owned Austrian subsidiary EuroGas GmbH owns the balance of 47%*" and purportedly granted an irrevocable offer "*to purchase 49% of Rozmin s.r.o. for a purchase price of EUR 26,000,0000*."[234]

- Belmont thereafter threatened to "*repossess*"[235] the 57% interest that Belmont had previously described in its financial statements as a "*collateral security interest*."

- Belmont thereafter agreed not to "*foreclose*" on the 57% interest that Belmont had described in its financial statements as a "*collateral security interest*" because it "*would harm EuroGas Inc's 57% interest in Rozmin s.r.o., currently still standing in the name of Belmont*."[236]

- Mr. Agyagos testified under oath to the Slovak police that because "*Belmont Vancouver sold its business shares around 2002 to company EuroGas, we*

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232 EuroGas, Inc., Form 10-K for Fiscal Year Ended 31 December 2005, p. 4, **R-0075**.

233 Belmont Resources Inc. Consolidated Financial Statements for Years Ended 31 January 2005 and 2004, note 4, **R-0042**.

234 Letter from Mr. Wolfgang Rauball to Mr. Arne Przybilla, of Protec Industries Ltd., 12 January 2004, **R-0118**.

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

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

[Belmont] did not incur direct damage" from the alleged State measures at issue in this arbitration.[237]

- EuroGas AG publicly informed the German Stock Market (Xetra) that "*[a]nother 57% of the shares in Rozmin s.r.o. is held by EuroGas, Inc., which it has acquired by contract in March 2000 (sic)*."[238]

- EuroGas AG publicly informed the German Stock Market: "*EuroGas Inc. confirmed transfer of rightful ownership of 57% shares in Rozmin s.r.o. to the EuroGas GmbH*."[239]

203. Thus, Belmont, EuroGas I, and EuroGas II informed the investing public, securities regulators (in Canada, the U.S., and Germany), and Slovak criminal authorities that the sale had been consummated, that EuroGas I (and through the purported merger, EuroGas II) was the owner of the 57% interest, and that Belmont only held a "*collateral security interest*" in the stock. Having made these declarations to induce reliance by shareholders, investors, and the criminal authorities, Claimants are precluded by principles of estoppel and good faith from arguing the opposite in this arbitration to achieve ICSID jurisdiction.

3. Claimants' conduct confirms that Belmont transferred the 57% interest

204. Perhaps the most powerful evidence that the transaction was completed, however, is that both parties exercised control over the consideration that the other party gave them under the SPA. Belmont sold the 12 million EuroGas I shares. In its 2003/2004 audited financial statements, Belmont stated:

> "In 2001 the Company entered into an agreement to sell its 57% interest in its then subsidiary, Rozmin S.R.0 (Rozmin), to EuroGas Inc. (EuroGas), a publicly

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237 Witness Statement of Vojtech Agyagos provided with respect to criminal proceedings No. PPZ-155/BPK-S-2008, 16 March 2009, p. 13 (with extended translation), **R-0115**.

238 EuroGas AG_Statement about participation (German original: DGAP-News EuroGas AG:Klarstellung zur Unternehmens-Beteiligung), (with extended translation), 25 February 2012, p. 1, **R-0265**.

239 EuroGas AG_Statement about participation (German original: DGAP-News EuroGas AG:Klarstellung zur Unternehmens-Beteiligung), (with extended translation), 25 February 2012, p. 1, **R-0265**. The Slovak Republic takes this statement at face value for it has not received from Claimants documents relevant to this referenced transfer to EuroGas GmbH, which Claimants were instructed to produce by the Tribunal in response to the Slovak Republic's Request for Production No. 23.

> traded company that held the remaining 43% interest in Rozmin. Rozmin holds a 100% interest in an industrial talc mineral project in Slovakia. As proceeds for this disposition Belmont received 12,000,000 shares of EuroGas . . . ***As at year end, all of the original 12,000,000 shares received from EuroGas Inc. had been disposed of for proceeds of approximately $1,379,700***.").[240]

205. In addition, Mr. Agyagos admits in his witness statement that "*[b]y January 31, 2006, Belmont had disposed of all of the 15,830,000 EuroGas shares, but for only approximately USD 1,505,400.19*."[241]

206. For its part, EuroGas I granted an irrevocable option on the 57% interest in Rozmin to an alleged third-party purchaser Protec Industries, Inc. in 2004.[242] More recently, EuroGas II ***actually purported to resell*** the 57% interest to an affiliated company. This is evidenced by information that EuroGas provided on 25 February 2012 to the German stock market that "*EuroGas Inc. confirmed transfer of rightful ownership of 57% shares in Rozmin s.r.o. to the EuroGas GmbH*."[243]

4. Claimants offer no explanation for their prior statements and conduct confirming that Belmont transferred the 57% interest

207. Faced with this evidence, it is perhaps not surprising that Claimants have offered no expert on British Columbia law to disagree with Mr. Anderson's analysis of the SPA. Nor have they offered any explanation for their public statements quoted above or their conduct confirming that Belmont transferred the 57% interest. Instead, Claimants' offer several other arguments in defense—none of which are supported by a lawyer qualified in British Columbia law.

208. ***First***, Claimants argue that the conditions precedent to the transfer of the 57% interest were never discharged. The Slovak Republic has shown above, however, that all conditions precedent under the SPA were, in fact, satisfied.

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240 Belmont Resources Inc.'s Audited Consolidated Financial Statements for the Years ended 31 January 2004 and 2003, note 3, (emphasis added), **R-0043**.

241 Vojtech Agyagos Witness Statement, ¶ 26.

242 Letter from Mr. Wolfgang Rauball to Mr. Arne Przybilla, of Protec Industries Ltd., 12 January 2004, **R-0118**.

243 EuroGas AG_Statement about participation (German original: DGAP-News EuroGas AG:Klarstellung zur Unternehmens- Beteiligung), (with extended translation), 25 February 2012, **R-0265**.

209. ***Second***, Claimants argue that subsequent breaches by EuroGas I of its post-closing covenants under the SPA nullify the transaction. As Mr. Anderson explains, however, EuroGas I's alleged post-closing breaches of contractual obligations cannot, as a matter of law, nullify the SPA or undue the sale of the 57% interest.[244] They may be *breaches* of the SPA, but they do not *rescind* the SPA. This is all the more so where, as here, Belmont retained the benefit of the bargain under the SPA, including the USD $1,505,400 it received for the sale of the 12 million EuroGas I shares and subsequently the additional 3,830,000 EuroGas I shares.[245]

210. In this regard, Claimants argue that EuroGas I breached Subsection 4.1(d) of the SPA, which requires EuroGas to pay "*an advance royalty of US$10,000 per month for each month of delay in achieving commercial production*."[246] While EuroGas I may very well have been in breach of its obligation under Subsection 4.1(d), that obligation is not one of the conditions precedent set forth in Section 2.1 of the SPA.

211. Rather, this was an obligation that was "*to be performed **after** the Closing, after the time at which the legal transfer to EuroGas of the 57% ownership interest in Rozmin occurred*."[247] Thus, its breach would not "*impede[] the prior legal transfer to EuroGas of the 57% ownership interest in Rozmin*."[248] Belmont's remedy for this breach would have been "*a claim . . . against EuroGas for damages, but that is not the same as a claim to rescind the Share Purchase Agreement and recover the 57% ownership interest in Rozmin*."[249]

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244 John Anderson Rebuttal Expert Report, ¶ 13.

245 Vojtech Agyagos Witness Statement, ¶ 26 ("*By January 31, 2006, Belmont had disposed of all of the 15,830,000 EuroGas shares, but for only approximately USD 1,505,400.19 In other words, Belmont was never able to sell EuroGas' shares for the total amount of CAD 3,000,000, and therefore remained the owner of the 57% shareholding interest in Rozmin*.").

246 Share Purchase Agreement between Eurogas I and Belmont, (executed version), 27 March 2001, Subsection, 4.1(d), **R-0107**.

247 John Anderson Rebuttal Expert Report, ¶ 13.

248 John Anderson Rebuttal Expert Report, ¶ 13.

249 John Anderson Rebuttal Expert Report, ¶ 13.

212. Confirming this interpretation, Section 4.1(d) explicitly states that EuroGas I "***agrees*** *to arrange the necessary financing*" or that it "***will pay*** *[Belmont] an advance royalty of US$10,000 per month*." There is no doubt that EuroGas I met the first requirement—indeed, it *agreed* in the SPA to arrange for the necessary financing—the question then is what would be the consequence of its failure to keep that promise? And the answer is provided in the clause itself: it had to pay a penalty for every month of delay. The remedy for EuroGas I's breach, therefore, was specified in the SPA itself, and if EuroGas I refused to pay the penalty, then Belmont had an action on breach of contract against it; but not a right to unwind and nullify the entire transaction.

213. ***Third***, Claimants argue that Belmont and EuroGas made several statements suggesting that the 57% interest had not transferred. These statements, however, were self-serving assertions made in the midst of anticipated litigation. They should therefore be given little, if any, weight when compared with the consistent public, contemporaneous, and in some cases sworn statements quoted above.

214. If anything, these statements show that, whenever Belmont or EuroGas thought it was in their interest to say that Belmont owned the 57% interest, they would say it. And whenever Belmont or EuroGas thought it was in their interest to say that EuroGas owned 57% interest, they would say that too. This is hardly the conduct of a party (bearing the burden of proof, no less) that should be given the benefit of the doubt by this Tribunal.

215. ***Fourth***, Claimants' argue that subsequent negotiations and posturing with each other after disputes arose under the SPA should nullify the SPA. As Mr. Anderson explains, unlike the evidentiary weight to be given to contemporaneous and subsequent public disclosures, the documents exchanged privately between the parties in the course of subsequent negotiations should not be viewed as probative evidence of the prior intention of the parties. British Columbia courts have held:

> "***Parties involved in arm's length negotiations commonly conceal their true intentions.*** It is part of the negotiating process that positions are advanced that do not represent what a party truly expects or is prepared to agree to in the end. A party may well say it will pay no more than a stated amount, or agree on no more than a limited term, when in fact it would pay more or agree on a longer

> term in order to conclude a deal. ***Intentions are, in that sense, commonly "misrepresented" in the interests of achieving a better bargain in the end***."[250]

216. As Mr. Anderson explains, "*in the context of negotiations following a breach by Eurogas of its post-closing obligations under the [SPA] . . . one must view the statements contained in the documents representing those negotiations with suspicion as they could certainly consist of "negotiation positions" that could contain misrepresentations as to the real position and intentions of the parties*."[251] Indeed, a party such as EuroGas I—which was in breach of its obligations under the SPA—might well have accepted a position advanced by Belmont without complaint to obtain concessions regarding those breaches.

217. Nor can subsequent negotiations change the legal effect of a prior transaction under the law of British Columbia. The courts of British Columbia have held:

> "In breach of contract situations language such as the above, after formation of a contract, has many times been dealt with in reported cases. The principle is that once a definite offer has been made and accepted without qualification and it appears that all essential terms have been agreed between the parties, ***there exists a contract which cannot be affected by subsequent negotiations. Once there is a complete contract further negotiations between the parties cannot, without the consent of both, get rid of the contract already arrived at***."[252]

218. Therefore, any later agreement between Belmont and EuroGas could not have altered the legal effect of the prior agreement.

219. ***Fifth***, Claimants point to the appointment of Mr. Agyagos to the board of EuroGas I as evidence that the 57% interest never transferred. But this fact only undermines Claimants' position. The SPA called for EuroGas I to acquire Belmont's 57% interest in Rozmin in exchange for Belmont becoming a shareholder in EuroGas I. As a shareholder of EuroGas I, Belmont had the right under Section 7.1 of the SPA to appoint Mr.

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250 *Westcom TV Group Ltd. v. CanWest Global Broadcasting Inc.*, [1996] B.C.J. No. 1638 (emphasis added), **RL-0134**.

251 John Anderson Rebuttal Expert Report, ¶ 18.

252 *Ridgeway-Pacific Construction Ltd. v. United Contractors Ltd.*, [1978] B.C.J. No. 478, ¶ 42 (emphasis added), **RL-0135**.

Agyagos to the board of its new subsidiary, EuroGas I,[253] and to inject capital into the Gemerská Poloma project.

220. Belmont retained those rights through the duration of its shareholding in EuroGas I, which, according to Mr. Agyagos, lasted through 31 January 2006.[254] Consistent with this fact, the press release announcing Mr. Agyagos' appointment as a director of EuroGas I, which was contained in a statement filed with Canada's securities regulator, makes clear that the appointment is "***to oversee the transfers of ownership*** *and liaison with Slovakian partners*."[255]

221. Similarly, Belmont's injections of working capital into the Gemerská Poloma project are fully consistent with Belmont's new position as shareholder of EuroGas I. Belmont certainly had a vested interest—both as a shareholder of EuroGas I and as the beneficiary of a 2% gross revenue royalty under Subsection 2.1(d) of the SPA—in seeing that the project became operative. Nothing in the documents produced by Claimants in this arbitration suggests otherwise. Thus, contrary to Claimants' allegation, the fact that EuroGas I did not reimburse Belmont for these advances proves nothing.

222. In fact, Belmont and EuroGas I entered into a letter agreement on 24 September 2004, in which they recognized "*EuroGas, Inc.'s 57% interest in Rozmin s.r.o.*"[256] This letter-agreement was reached more than three years *after* the SPA, *after* the 2001 appointment of Mr. Agyagos as director of EuroGas I, and *after* Belmont's post-closing injections of working capital into the Gemerská Poloma project. Accordingly, this letter-agreement puts to rest Claimants' allegation[257] that these two post-closing activities—the 2001

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253 Share Purchase Agreement between Eurogas I and Belmont (executed version), 27 March 2001, Section, 7.1, **R-0107**, which states in this respect: "*Due to the Vendor [Belmont] by virtue of this Agreement receiving 12,000,000 common shares of the purchaser, as well as previously holding 2,500,000 warrants to purchase an additional 2,500,000 shares of the Purchaser [EuroGas I] at a price of US$0.40 per share; the Vendor [Belmont] shall have the right to appoint one director of the Vendor [Belmont] to the Purchasers [EuroGas] Board*."

254 Vojtech Agyagos Witness Statement, ¶ 26 ("*By January 31, 2006, Belmont had disposed of all of the 15,830,00 EuroGas shares . . .*").

255 News Release and Material Change Report issued by Belmont and filed on SEDAR, 16 May 2001, (emphasis added), **R-0111**.

256 Letter-Agreement from EuroGas Inc. to Belmont Resources Inc., 24 September 2004, **C-0297**.

257 Claimants' Reply, ¶¶ 157-59 and 171.

appointment of Mr. Agyagos and Belmont's advances of working capital—somehow show that EuroGas I never acted as the beneficial owner of Belmont's 57% in Rozmin. The parties to the SPA jointly declared *after* these two activities had taken place that it was "*EuroGas Inc.'s 57% interests in Rozmin*."[258]

223. ***Sixth***, Claimants allege that because EuroGas I was a dissolved entity under Utah law, it "*could not issue new shares or acquire new assets and could therefore not have acquired Belmont's interest in Rozmin*."[259] This argument ignores settled facts. As the Slovak Republic explained in its Counter-Memorial, the "*SPA was signed and took effect* ***before*** *EuroGas I was dissolved on 11 July 2001,* ***before*** *the two-year period for seeking reinstatement expired under Utah law, and* ***before*** *EuroGas I was put into involuntary bankruptcy in 2004*."[260] Consequently, the SPA was entered into and made effective while EuroGas I still had legal capacity to enter into the SPA to purchase Belmont's 57% interest in Rozmin.

224. ***Finally***, Claimants argue that, even if Belmont held the shares only as collateral, it would not affect its standing before this Tribunal.[261] That position, too, is baseless. If Belmont held only a collateral security interest, then it was a *creditor* of EuroGas I and not an owner of the 57% interest in Rozmin. The creditor of an investor has no standing to bring claims for losses suffered by the investor on its investment, even if the subject investment was offered by the investor to its creditor as collateral. In such a scenario, the creditor is nothing more than a third party who has extended credit to the investor but has no ownership interest in the investment.

225. In tribunal in *Burimi v. Albania* reached the same conclusion. In that case, two claimants—an Italian company Burimi and an Albanian company, Eagle Games—brought a case against Albania alleging an unlawful termination of Eagle Games'

258 Letter-Agreement from EuroGas Inc. to Belmont Resources Inc., 24 September 2004, **C-0297**.

259 Claimants' Reply, ¶¶ 174 *et seq*.

260 Slovak Republic Counter-Memorial, ¶ 130 (emphasis added).

261 Claimants' Reply, ¶¶ 180 *et seq*.

gambling license.[262] Burimi—itself not a shareholder of Eagle Games—asserted that it had made a protected investment into Eagle Games *inter alia* because it financed a loan to one of Eagle Games' co-owners Ms. Laka guaranteed by a pledge of Ms. Laka's shares in Eagle Games.[263] The tribunal rejected that assertion and held:

> "Claimants argue that the financing agreement and the share pledge agreement between Ms. Alma Leka and Burimi SRL together constitute an investment by Burimi SRL in Eagle Games. However, the financing agreement—by which Burimi SRL financed Ms. Alma Leka's share purchase in exchange for 90 percent of the profits she would receive—***does not represent ownership by Burimi SRL of Eagle Games. Rather, it represents a private, contractual loan agreement between Burimi SRL and Ms. Alma Leka, a private citizen, to finance investments belonging to her.***
>
> […] Moreover, ***the dispute at hand does not arise out of any government measure affecting Burimi SRL's agreement with Ms. Alma Leka***. The financing and pledge agreements are free-standing contracts between Ms. Alma Leka and Burimi SRL, and exist independently of Eagle Games' gambling business. Burimi SRL's claims in this dispute arise out of its agreement with Ms. Alma Leka and do not arise out of the investment in question, namely, the enterprise of Eagle Games."[264]

226. Similarly, Belmont has held at most a security interest in Rozmin. This security interest cannot be equated to shareholding in Rozmin. It is purely a result of the contractual relationship between EuroGas and Belmont, two private parties. Furthermore, Belmont nowhere alleges that the Slovak Republic's measures would have affected such a contractual relationship or any rights attaching to Belmont's security interest in Rozmin in any manner whatsoever. This means that Belmont's dispute in any event does not arise out of a protected investment as required by Article 25 (1) of the ICSID Convention.

227. Claimants' reliance on *Saluka v. Czech Republic* does not change this result. The issue in *Saluka* was whether the definition of investment in the U.S.-Czech BIT required more than the simple acquisition of stock in a Czech bank by the investor, Saluka, and imposed

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262 *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Award, 29 May 2013, ¶ 36, **RL-0177**.

263 *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Award, 29 May 2013, ¶¶ 16-17, **RL-0177**.

264 *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Award, 29 May 2013, ¶¶ 144 - 145, **RL-0177**.

additionally an infusion of capital (or other investment) by Saluka into the Czech bank.[265] The tribunal held that the acquisition of the stock was sufficient to qualify as an investment under the treaty.

228. The holding in *Saluka* is thus easily distinguishable. Unlike Belmont, Saluka was the *owner* of the shares acquired from Nomura, although it did not exercise all the rights relating to those shares. By virtue of its *ownership* of IPB's shares, Saluka thus held the qualifying investment in IPB. By contrast, Belmont has not owned the shares in Rozmin since their transfer to EuroGas I under the SPA. Nor does Belmont's security interest give rise to any legal rights capable of constituting a protected investment under the Canada-Slovak BIT. Indeed, Belmont itself decided not to foreclose on its security interest to acquire legal rights that could plausibly give rise to a protected investment in Rozmin.[266]

229. Thus, it is not that Belmont failed to invest in Rozmin or in the Slovak Republic; it is that Belmont *sold* its investment in Rozmin and the Slovak Republic to EuroGas I. Having sold that investment, it has no standing to seek compensation for losses allegedly suffered by the new owner of that investment, EuroGas I.

230. Additionally, Belmont's security interest in Rozmin also fails the definition of an "investment" under Article 25 of the ICSID Convention. As investment tribunals have held, a commercial operation must not only fulfill the definition of an "investment" under the relevant investment treaty (here, the Canada-Slovak BIT), but also the definition of an "investment" under Article 25 of the ICSID Convention.[267]

231. That definition requires the fulfillment of hallmarks commonly known as the *Salini* test, *i.e.*, (*i*) it must consist of a contribution having an economic value; (*ii*) it must be made for a certain duration; (*iii*) there must be the expectation of a return on the investment, subject to an element of risk; (*iv*) it should contribute to the development of the economy

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265 *Saluka Investment BV v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶¶ 207 *et seq.*, **CL-0151** (the respondent objected to the tribunal's jurisdiction on the ground that "*the purchase of IPB shares was not an investment since Nomura/Saluka had invested nothing in IPB*").

266 Belmont Resources Inc.'s Audited Consolidated Financial Statements for Years Ended 31 January 2005 and 2004, p. 14, **R-0042**.

of the host State.[268] The tribunal in *Ulysseas v. Ecuador* explained the *Salini test* as requiring "*an actual transfer of money or other economic value from a national […] of a foreign State to the host State through the assumption of some kind of commitment ensuring the effectiveness of the contribution and its duration over a period of time.*"[269]

232. Belmont's security interest in Rozmin fails the *Salini* test. It is merely collateral, the sole purpose of which was to guarantee the transfer of Belmont's shares in Rozmin to EuroGas I—an economic operation through which Belmont effectively *disposed* of its investment in Rozmin's shares. Belmont's collateral involves no transfer of economic value from Belmont to the Slovak Republic, no effective contribution over a period of time, and no contribution to the development of the Slovak Republic's economy. It thus cannot qualify as an "investment" under Article 25 of the ICSID Convention.

233. The tribunal in *Joy Mining v. Egypt* reached a similar conclusion. In that case, the claimant argued that its bank guarantee qualified as an "investment" based on a broad definition of the relevant treaty that included claims to money and pledges. The tribunal rejected that assertion and held that a bank guarantee as a contingent liability[270] did not fall within the definition of an "investment" under the ICSID Convention.

234. For the same reasons, Belmont—having held the 57% interest merely as collateral—has no "investment" within the meaning of the Canada-Slovak BIT or the ICSID Convention, and this Tribunal has no jurisdiction over Belmont's claim.

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267 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006. ¶¶ 91-92, **RL-0110**; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶ 122, **CL-0056**.

268 *See, e.g., Ulysseas, Inc. v. Ecuador*, UNCITRAL, Final Award, 12 June 2012, ¶ 251, **RL-0178**; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006. ¶ 91, **RL-0110**; *Noble Energy Inc. and MachalaPower Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008, ¶ 128, **RL-0179**.

269 *Ulysseas, Inc. v. Ecuador*, UNCITRAL, Final Award, 12 June 2012, ¶ 252, **RL-0178**.

270 *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, ¶¶ 44-45, **CL-0081**.

5. At a minimum, Belmont transferred beneficial ownership to the 57% interest

235. But even if, *arguendo*, EuroGas I did not acquire legal title to the 57% interest (and it did), at a minimum it was the beneficial owner of the 57% interest. This proposition is supported by the foregoing analysis of the SPA and reinforced by the repeated public statements and conduct by Belmont, EuroGas I, and EuroGas II set forth above.

236. In addition, in a 24 September 2004 letter-agreement executed by Messrs. Rauball and Agyagos, the parties recognized that "*EuroGas, Inc.'s 57% interest in Rozmin, s.r.o., [was]* ***currently still standing at the name of Belmont***."[271] This joint acknowledgement constitutes the most current authoritative statement from the parties to the SPA that EuroGas I was, at a minimum, the beneficial owner of the 57% interest in Rozmin and that Belmont remained the nominal owner only.

237. It is a general principle of public international law "*that the beneficial (and not the nominal) owner of property is the real party-in-interest before an international court*."[272] As the *ad hoc* committee recently held in *Occidental Petroleum Corp. et al v. the Republic of Ecuador*, "*[i]n cases where legal title is split between a nominee and a beneficial owner international law is uncontroversial . . . the dominant position in international law grants standing and relief to the owner of the beneficial interest – not to the nominee*."[273] As the committee explained, this principal is a corollary of the more general principle of international investment law under which "*claimants are only permitted to submit their own claims, held for their own benefit, not those held (be it as nominees, agents or otherwise) on behalf of third parties*."[274]

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271 Letter-Agreement from EuroGas Inc. to Belmont Resources Inc., 24 September 2004, (emphasis added), **C-0297**.

272 David J. Bederman, "*Beneficial Ownership of international Claims*," International and Comparative Law Quarterly, Vol. 38, 1989, p. 936, (emphasis added), **RL-0180**.

273 *Occidental Petroleum Corp. et al v. The Republic of Ecuador*, ICSID Case No. ARB 06/11, Decision on Annulment, 2 November 2015, ¶ 259, **RL-0181**.

274 *Occidental Petroleum Corp. et al v. The Republic of Ecuador*, ICSID Case No. ARB 06/11, Decision on Annulment, 2 November 2015, ¶ 262, **RL-0181**.

238. Thus, even if one were to assume, *arguendo*, that Belmont only transferred beneficial ownership to the 57% interest rather than legal title, the Tribunal still would have no jurisdiction over Belmont's claim.

* * *

239. In sum, the only analysis undertaken by an expert in British Columbia law has concluded that, under the SPA, Belmont transferred its 57% interest and retained the shares as collateral. The public statements and conduct by Claimants confirm this is *precisely* what happened. For these reasons, Belmont does not own the 57% interest, the Tribunal has no jurisdiction over Belmont, and Belmont has no standing.

B. Belmont's Claims Fall Outside the Canada-Slovak BIT *ratione temporis*

240. In any event, the Tribunal does not have jurisdiction over Belmont for the additional reason that Article 15.6 of the Canada-Slovak BIT states that the BIT only covers disputes "*that ha[ve] arisen not more than three years prior to its entry into force*"—*i.e.*, after 14 March 2009. As the Slovak Republic explained in its Counter-Memorial, Claimants' colorable allegations occurred prior to that date, and the Tribunal therefore has no jurisdiction *ratione temporis* over Belmont's claims.

241. In response to this jurisdictional objection, Claimants have argued that this dispute arose after 1 August 2012, when the local Slovak proceedings were concluded.[275] This is inconsistent with Claimants' new allegations concerning jurisdiction over EuroGas II (discussed above). In that context, Claimants focus on EuroGas I's "*de facto merger*" with EuroGas II and a "succession" theory of ownership of the assets of Eurogas I (which now includes McCallan). If the dispute had arisen only in 2012—as they say with respect to Belmont—then there would be no need to trace the ownership back to 2005 with regard to EuroGas II.

242. These conflicting positions show that Claimants' theories have become so twisted that they now contradict each other. Claimants cannot have it both ways. As explained below, Claimants' claim arose in 2005—and thus the Tribunal has no jurisdiction under the Canada-Slovak BIT, which took effect four years later.

1. Belmont's claims constitute the Reassignment Claim and the Denial-of-Justice Claim

243. The Slovak Republic showed in its Counter-Memorial that, in an effort to blur the chronology of facts, Claimants had argued that the acts of the Slovak authorities before and after the reassignment of the Excavation Area constitute a single, continuing "*creeping expropriation*."[276] The Slovak Republic demonstrated that, contrary to that portrayal, Claimants had instead raised two distinct claims.

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275 Claimants' Reply, ¶ 225.

276 Respondent's Counter-Memorial, ¶ 145.

244. The first claim is the Reassignment Claim—a claim based on the alleged outright expropriation of Rozmin's right to the Excavation Area. The dispute between Belmont and the Slovak Republic regarding the Reassignment Claim arose in 2005—*i.e.*, well before the cut-off date of 14 March 2009.

245. The second claim is a Denial-of-Justice claim—a claim based on the State's alleged conduct when the reassignment of the Excavation Area was submitted to the Slovak Republic's administrative and judicial authorities. Indeed, once the dispute over the reassignment of the Excavation Area was submitted to the Slovak Republic's administrative and judicial authorities, the treatment by these authorities may only give rise to a claim for denial of justice.

246. Faced with these arguments in the Slovak Republic's Counter-Memorial, Claimants now admit in their Reply that they do not assert a creeping expropriation claim.[277] Nor do they dispute the Slovak Republic's distinction between the Reassignment Claim and the Denial-of-Justice Claim. Rather, Claimants argue that these claims only arose after 14 March 2009. As shown below, however, the real cause of the dispute was the reassignment of the Excavation Area in 2005.

2. The "*real cause*" of the dispute is the reassignment of the Excavation Area

247. As the Slovak Republic has shown, the reassignment of Rozmin's Excavation Area in 2005 is the one and only source of this dispute. The subsequent conduct of the Slovak Republic's authorities in deciding Rozmin's complaints on the reassignment is inseparable from that original source.

248. *Lucchetti v. Peru* confirms this principle. There, the tribunal held that it had no jurisdiction *ratione temporis* to hear a dispute with the same subject matter as the pre-treaty dispute. The original pre-treaty dispute related to the annulment of licenses held by the local company. The removal of licenses was then annulled by competent authorities, and the local company regained the licenses and continued to hold them for several years. Thereafter, when the Italy-Peru BIT was in force, Peru issued decrees

[277] Claimants' Reply, fn. 574.

revoking these licenses altogether. Claimants argued that a new dispute arose only when Peru issued the revocation decrees and that this new dispute was already covered by the Italy-Peru BIT. The tribunal held that, because the subject-matter and the purported new dispute was the same (*i.e.*, revocation of licenses), the purported new dispute was in fact a mere continuation of the old dispute and thus arose prior to the scope of coverage of the investment treaty.[278]

249. The *Luchetti* approach finds support in other investment decisions. In *Phosphates of Morocco*, the PCIJ similarly confirmed that a dispute may only arise out of its "*real causes*," as opposed to situations or factors that merely follow-up or confirm the real causes:

> "[I]t is necessary always to bear in mind the will of the State which only accepted the compulsory jurisdiction within specified limits, and consequently only intended to submit to that jurisdiction disputes having, actually arisen from situations or facts subsequent to its acceptance. ***But it would be impossible to admit the existence of such a relationship between a dispute and subsequent factors which either presume the existence or are merely the confirmation or development of earlier situations or facts constitute the real causes of the dispute***."[279]

250. Precisely for this reason, the PCIJ rejected Italy's attempt to bring the dispute within the purview of its jurisdiction by virtue of denial of justice claim which, as the PCIJ emphasized, was not a factor giving rise to the dispute before it.[280] The PCIJ also made it clear that the later failure of the State to remedy a previous allegedly unlawful act cannot create a new dispute because it "*merely results in allowing the unlawful act to subsist*" but "*exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it*."[281]

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

279 *Phosphates in Morocco (Italy v. France)*, PCIJ Reports, Ser. A/B No. 74, 1938, p. 24, (emphasis added), **CL-0033**.

280 *Phosphates in Morocco (Italy v. France)*, PCIJ Reports, Ser. A/B No. 74, 1938, pp. 28, 29, **CL-0033**.

281 *Phosphates in Morocco (Italy v. France)*, PCIJ Reports, Ser. A/B No. 74, 1938, p. 28, **CL-0033**. The PCIJ's ruling in *Phosphates of Morocco* is of general relevance irrespective of the fact that the jurisdictional clause in that case related to *disputes that may arise […] with regard to situations or facts*

251. Nor do Claimants find support in *Jan de Nul v. Egypt*—the only case on which they rely for the proposition that the judicial treatment of an earlier claim gives rise to a new investment dispute. As the Slovak Republic explained in detail in its Counter-Memorial, the dispute in *Jan de Nul* was fundamentally different from Belmont's dispute.[282] In their Reply, Claimants provided no response.

252. With no rebuttal by Claimants to address, the Slovak Republic can do no more than repeat why *Jan de Nul* is fundamentally different than this case. In *Jan de Nul*, the dispute arose only with the judgment rendered by the Egyptian court of Ismaïlia and cannot plausibly have arisen before this judgment. The reason is simple: the underlying dispute between the claimant and the Suez Canal Authority (the "**SCA**") was a pure contractual dispute, which could not have engaged international responsibility of Egypt because the conduct of the SCA was not attributable to Egypt. The Egyptian state only became involved later through its courts, which handled the claimants' lawsuits on the contractual dispute against the SCA. The investment dispute between the claimants and Egypt thus came into existence only after the State became involved:

> "It is clear, however, that the reasons, which may have motivated the alleged wrongdoings of the SCA at the time of the conclusion and/or performance of the Contract, do not coincide with those underlying the acts of the organs of the Egyptian State in the post-contract phase of the dispute. Since the Claimants also base their claim upon the decision of the Ismaïlia Court, the present dispute must be deemed a new dispute.
>
> […] ***The intervention of a new actor, the Ismaïlia Court, appears here as a decisive factor to determine whether the dispute is a new dispute***. As the Claimants' case is directly based on the alleged wrongdoing of the Ismaïlia Court, the Tribunal considers that the original dispute has (re)crystallized into a new dispute when the Ismaïlia Court rendered its decision."[283]

253. Here, by contrast, the conduct of the Slovak Republic was not a new intervening factor when the judicial and quasi-judicial authorities became involved. Rather, the Slovak administrative and judicial authorities merely pronounced themselves on the legality of

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subsequent to such ratification: it is impossible to create a new dispute based on events or factors which merely confirm or develop earlier situations of facts—which is precisely what Claimants seek to do here.

282 Respondent's Counter-Memorial, ¶¶ 180 and 181.

283 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, ¶¶ 127 - 128, (emphasis added), **RL-0110**.

the reassignment under Slovak law. Ultimately, these proceedings could have only *remedied*, rather than *worsened*, Belmont's position following the reassignment.

254. Despite not disagreeing with the Slovak Republic's analysis of *Jan de Nul*, Claimants argue that "*damages sustained by Belmont as a result of the revocation of Rozmin's mining rights were indeed compounded by the subsequent conduct of mining authorities, which disregarded the multiple rulings of the Supreme Court in favour of Rozmin*."[284] That is manifestly not the case. If the mining authorities refused to reinstate the license (as they ultimately did), they would have left Claimants no worse off that before the administrative and judicial proceedings started: Claimants would have had no rights to the Excavation Area.

255. Accordingly, Claimants are incorrect to argue that a series of new claims arose after 2005. The one and only source of this dispute—the "*real cause*"—was the 2005 reassignment of the Excavation Area.

3. The dispute arose upon the Reassignment of the Excavation Area

256. Although the real cause of the dispute occurred in 2005, Claimants argue that a "dispute" only arises when an investor articulates a complaint. As emphasized by numerous international tribunals, however, the notion of a "*dispute*" is an objective one, and it falls to the Tribunal (rather than the investor) to determine the moment when a dispute arises. This was recently stated by the tribunal in *Lao Holdings v. Lao People's Democratic Republic*:

> "The Parties agree ***that the test for determining the critical date is objective*** and that the relevant question is not whether the Lao Government subjectively believed the legal dispute to have arisen, or whether the Claimant subjectively believed it had not, ***the question is whether the facts, objectively analysed, establish the existence of a dispute and if so at what time did it arise***, and was it resolved (as the Lao Government argues) before the Treaty came into force as between the Lao Government and the Claimant?"[285]

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284 Claimants' Reply, ¶ 235.

285 *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014, ¶ 124, **CL-0049**.

257. More to the point, the tribunal in *African Holding Company v. Congo* made clear that the dispute arises as of the date of breach:

> "La question à laquelle le Tribunal doit répondre ***est celle de savoir si le différend concerne le règlement de factures restées impayées depuis le tout début ou si le différend n'est né qu'à un moment postérieur à la date critique lorsque la RDC aurait refusé de payer***.
>
> […]Le Tribunal conclut à cet égard que la nature du différend concerne le fait que des travaux ont été exécutés sous contrat et que leur coût n'a pas été réglé pendant une longue période de plus de quinze ans. Que la RDC ait officiellement refusé de payer ou ait gardé le silence, est sans importance pour la nature du différend. Le fait est que la RDC a manqué à ses obligations aux termes du contrat, ce qui se rattache donc à une situation d'inexécution envisagée à l'article 7.1.1 des Principes d'UNIDROIT. Aux termes de ce même article, l'inexécution comprend l'exécution défectueuse ou tardive. En outre, le fait que la RDC offrait de renégocier les créances et de ne payer qu'une fraction de leur valeur ne peut pas être assimilé à un refus officiel. Même si la RDC avait accepté de payer, et n'a en fait pas payé, la nature du différend serait toujours restée la même: avant comme après la date critique: le montant des travaux exécutés n'a pas été réglé."[286]

258. Thus, contrary to Claimants' assertion, the findings in *African Holding* were not based on the distinction between the events leading to the dispute and the dispute itself.

259. Indeed, the distinction between the events leading to a dispute and the dispute itself is typically relevant in diplomatic protection, where the State takes over the claim of its injured national and thus becomes aware of the events giving rise to the dispute only later. This certainly was not the case here: Belmont, the purported majority shareholder of Rozmin, was well aware of the reassignment of the Excavation Area when it occurred. Indeed, Belmont's CEO and President, Mr. Agyagos, was simultaneously Rozmin's executive and was actively involved in Rozmin's administrative and judicial complaints since the very beginning.[287] Thus, Belmont's dispute on the Reassignment Claim arose on the day of the reassignment, *i.e.*, 3 May 2005.

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286 *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République démocratique du Congo*, ICSID Case No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité, ¶¶ 120 - 121, (emphasis added), **RL-0022**.

287 Letter from Rozmin and Belmont to the Minister of Economy, 3 November 2005, **R-0162**. Mr. Agyagos signed this letter simultaneously as both Rozmin's executive and as the President and the CEO of Belmont.

4. Even if a dispute only arises when claimant articulates a complaint, Belmont articulated its complaint before the Canada-Slovak BIT became effective

260. But even if, *arguendo*, a dispute only arises when a claimant articulates a complaint, Belmont, its affiliates, and Rozmin all notified the Slovak Republic that dispute existed well before the Canada-Slovak BIT became effective. Belmont itself wrote to the then Slovak Minister of Economy in November 2005, complaining about the reassignment of Rozmin's Excavation Area, demanding that the Slovak Republic act in compliance with international investment law, and threatening international investment arbitration.[288] Thus, even under Claimants' own test, Belmont articulated a dispute as early as 2005.

261. Moreover, two months earlier, in September 2005, Rozmin had challenged the reassignment before the Regional Court of Košice.[289] In this regard, several investment tribunals that required an exchange of views stated that the dispute arises as soon as a party seeks its resolution by a third party. This was the finding of tribunal in *Pey Casado v. Chile*, referring to *Helnan v. Egypt*:

> "Ainsi que l'a souligné le tribunal arbitral dans l'affaire Helnan c. Egypte, « [The parties' disagreement] crystallizes as a 'dispute' ***as soon as one of the parties decides to have it solved, whether or not by a third party ».*** Ce n'est qu'avec l'expression et la confrontation des points de vue des parties que se cristallise le différend."[290]

262. In line with the findings in *Pey Casado* and *Helnan*, the dispute between Belmont and the Slovak Republic clearly arose when Rozmin referred the Reassignment Claim to Slovak courts. As the tribunal in *Luchetti* held, it does not matter whether the challenge was brought under an investment treaty.[291] Claimants have offered no authority to the contrary.

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

289 Claim of Rozmin s.r.o. to the Regional Court in Košice, 27 September 2005, **R-0195**.

290 *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶ 443, **RL-0182**.

291 *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, ¶¶ 58- 59; **RL-0021**.

263. Instead, Claimants attempt to distinguish *Luchetti* by noting that, unlike here, in *Luchetti* no pre-existing investment treaty was applicable. Claimants allege that the tribunal in *Luchetti* "*clearly explained the purpose of the ratione temporis reservation of Article 2 of the Peru-Chile BIT, namely that an investor may not invoke international law guarantees that simply did not exist when the dispute arose*."[292] But a fuller quote of the award—conveniently omitted by Claimants—shows that the tribunal's decision was not preconditioned on the non-existence of a previous investment treaty:

> "Lucchetti may therefore consider it a harsh result that its effort at obtaining an international remedy is brought to a halt before the merits of its contentions are even examined. Such a conclusion, however, would not be warranted in light of the fact that ***Lucchetti did not have an a priori entitlement to this international forum. It cannot say that it made its investment in reliance on the BIT, for the simple reason that the treaty did not exist until years after*** Lucchetti had acquired the site, built its factory, and was well into the second year of full production. It cannot conceivably contend that it invested in reliance on the existence of this international remedy.
>
> ***The only question entertained by this Tribunal is precisely whether the claim brought by Lucchetti falls within the scope of Peru's consent to international adjudication under the BIT. Lucchetti has not satisfied the Tribunal that this is the case, and thus finds itself in the same situation as it would have been if the BIT had not come into existence***. Its substantive contentions remain as they were, to be advanced, negotiated, or adjudicated in such a manner and before such instances as it may find available."[293]

264. Thus, the tribunal in *Luchetti* did not state that absence of the pre-existing treaty was relevant for the jurisdictional query of when a dispute arose. The existence or absence of a preceding investment treaty played no role in the analysis.

265. Claimants also attempt to distinguish *Luchetti* on the basis that the claimant was the same as the party in the local proceedings. That, however, is irrelevant for the question of *when the dispute arose*. Belmont cannot plausibly argue that that Rozmin's articulation of complaint relating to the reassignment before Slovak authorities is irrelevant for the

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[292] Claimants' Reply, ¶ 233.

[293] *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, ¶¶ 61-62(emphasis added), **RL-0021**.

dispute with the Slovak Republic when Rozmin and Belmont acted through the very same person, Mr. Agyagos.[294]

266. Further, on 22 September 2008—still well before the Canada-Slovak BIT became effective—Rozmin's shareholder, EuroGas GmbH, wrote to the Slovak Ministry of Economy with a complaint about the allegedly unlawful treatment of Rozmin's right to explore the Excavation Area. In this letter, EuroGas GmbH also threatened an international investment claim:

> "[T]he Ministry's mining offices have infringed upon the legal rights of Rozmin s .r.o . and its foreign shareholders and have opened the Slovak Republic to ***potentially class-action lawsuits with foreign investors which potentially will claim damages because of their investment in Rozmin s .r.o. and the loss of the mining concession as well as potential loss of profit from one of the largest talc*** mines in the world. […] We therefore would like to believe that the Slovak Republic as a full Member of the European Union ***is finally also protecting the rights of foreign investors***."[295]

267. If that were not enough, on 12 March 2009—two days before the Canada-Slovak BIT became effective—Rozmin filed an administrative lawsuit against the DMO's second reassignment before the Regional Court in Košice. Rozmin expressly stated that it is a "*company owned by foreign investors whose investments are covered by a specific legal regime under international agreements on protection of foreign investment.*"[296]

268. Even Claimants' notice of dispute, sent on 23 December 2013,[297] shows that Belmont had previously noticed a dispute:[298]

> "***The Republic of Slovakia has already been notified of the existence of the investment dispute.*** On October 31, 2011, indeed, EuroGas notified the Republic

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294 Letter from Rozmin and Belmont to the Minister of Economy, 3 November 2005, **R-0162**.

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

296 Appeal to the Regional Court in Košice, 12 March 2009, (Ref. 449-9109), p. 3, **C-0271**.

297 Claimants assert that "*the moment when the dispute arises or is "initiated" – corresponds to the moment one party articulates its claims, which triggers the parties' duty to engage in settlement negotiations*." *See* Claimants' Reply, ¶ 217.

298 Incidentally, this position conflicts with Claimants' other argument that this dispute did not arise until August 2012, when the local proceedings were concluded. Claimants' Reply ¶ 228; *see also id*. ¶ 225.

> of Slovakia of the existence of an investment dispute arising out of its investment in the Mine, under the US-Slovak Republic BIT.[…]"[299]

269. Belmont went on and stated that Belmont did not need to observe a new six-month waiting period because:

> "As far as Belmont is concerned, the same necessarily goes, by analogy, with respect to the six-month amicable settlement requirement under Article X(2) of the Canada-Slovak Republic BIT. ***Indeed, Belmont's claims are the very same as those of EuroGas.*** It would simply be futile, under these circumstances, to commence a new six-month amicable settlement period for Belmont's claims alone."[300]

270. Belmont's own words thus show that an investment dispute had *already arisen*. Thus, under Claimants' own test, Belmont articulated a dispute well before 14 March 2009.

5. Claimants' improperly conflate the words "*arise*" and "*initiate*" under the Canada-Slovak BIT.

271. Left grasping at straws, Claimants play a game of semantics by conflating the term "*arise*" in the *ratione temporis* provision of the Canada-Slovak BIT ("*Apart from any such dispute, this Agreement shall apply to any dispute which has* ***arisen*** *not more than three years prior to its entry into force*.") with the term "*initiate*" in the arbitration clause ("*If the dispute has not been settled amicably within a period of six months from the date on which the dispute was* ***initiated****, it may be submitted by the investor to arbitration*.").[301] Building on this false premise, Claimants assert that "*the moment when the dispute arises or is "initiated" – corresponds to the moment one party articulates its claims, which triggers the parties' duty to engage in settlement negotiations*."[302]

272. This game of semantics is fraught with an obvious fallacy: the ordinary meaning of the terms "*arise*" and "*initiate*" is clearly different. While the Oxford dictionary defines the

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299 Letter from EuroGas Inc. and Belmont Resources Inc. to the Government of the Slovak Republic, 23 December 2013, ¶ 32, **C-0042**.

300 Letter from EuroGas Inc. and Belmont Resources Inc. to the Government of the Slovak Republic, 23 December 2013, ¶ 35, **C-0042**.

301 Claimants' Reply, ¶ 217.

302 Claimants' Reply, ¶ 217.

term "*arise*" as "*emerge; become apparent, originate, come into being*,"[303] the term "*initiate*" on the other hand is defined as "*cause (a process or action) to begin*."[304] Thus, while the term "*arise*" clearly refers to an objective event of coming into existence, the term "*initiate*" requires *action* that starts a process or an event.

273. Claimants have offered no serious argument for why these two terms—different on their face—should be interpreted the same. Indeed there is none. To the contrary, logic (and the Vienna Convention requiring that terms be given their ordinary meaning) mandates the opposite interpretation: the Canada-Slovak BIT used two different words because it intended two different meanings.

6. The Slovak Republic is not estopped from raising the objection *ratione temporis* against Belmont's claims

274. In one last attempt to salvage Belmont's case, Claimants argue that the Slovak Republic's position is contradictory. They assert that, on the one hand, the Slovak Republic argues that Belmont's claim could have been brought before March 2009 while, on the other hand, it "*represented, as late as in May 2012, that the dispute was not yet ripe for the filing of the arbitration should therefore be delayed*."[305] On this basis, Claimants argue that the Slovak Republic is estopped from arguing that Belmont's dispute arose earlier. As discussed below, however, Claimants argument proceeds on a false premise: the Slovak Republic never represented to Belmont that the dispute was not ripe for arbitration.

275. The principle of estoppel under international law is subject to strict requirements. As the tribunal in *Pan American v. Argentina* explained:

> "Estoppel is a recognised general principle of law that has been applied by many international tribunals. Of the essence to the principle of estoppel is ***detrimental reliance by one party on statements of another party***, so that reversal of the

303 Definition of "arise" in online Oxford Dictionary, **R-0269**.

304 Definition of "initiate" in online Oxford Dictionary, **R-0270**.

305 Claimants' Reply, ¶ 187 and ¶¶ 189 *et seq.*

> position previously taken by the second party would cause serious injustice to the first party."[306]

276. The tribunal then referred to the requirements of estoppel articulated in the ICJ's case *Temple of Preah Vihear*:[307]

> "(i) a ***clear statement of fact by one party*** which (ii) is voluntary***, unconditional*** and authorised; and (iii) ***reliance in good faith by another party on that statement to that party's detriment*** or to the advantage of the first party."[308]

277. None of these three requirements is satisfied.

278. ***First***, there is no "*clear statement of fact by one party*" as Claimants allege. The Slovak Republic never told the Claimants that the dispute was not ripe for arbitration. Below is a full quote from the Slovak Republic's letter to EuroGas II dated 2 May 2012:

> "As already outlined in letters of my predecessor dated June 16, 2011 and February 09, 2012, the administrative procedure before the Slovak mining offices is still pending, therefore any discussions regarding the alleged claims ***of EuroGas Inc***, seems to me to be premature prior relevant decisions of local authorities are rendered. Therefore, ***as long as the above mentioned proceedings are ongoing, the Ministry of Finance of the Slovak Republic is of the view that this dispute could not be amicably settled at this stage.*** For avoidance of doubt, ***this letter is subject to the reservation that*** such conduct ***is in no way a confession that the claim*** articulated in your notification of claim against the Slovak Republic ***meets the jurisdictional*** or substantive ***requirements-of the Slovak-US Bilateral investment Treaty***. The Slovak Republic fully reserves all rights arising under that Treaty and all applicable laws."[309]

279. This letter makes clear that the Slovak Republic nowhere "*represented*" that "*the dispute was not ripe.*"[310] The Slovak Republic simply said that it could not engage in *settlement negotiations* with EuroGas II while EuroGas II's claims were still under the scrutiny of the Slovak Republic's competent judicial and administrative authorities. Belmont's

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306 *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, ¶ 159, (emphasis added), **CL-0060**.

307 *Temple of Preah Vihear (Cambodia v. Thailand)*, ICJ Reports 1962, p. 6, **RL-0183**.

308 *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, ¶ 151 in conjunction with ¶ 160, (emphasis added), **CL-0060**.

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

310 Claimants' Reply, ¶¶ 127, 186 and 187.

notice of dispute of 23 December 2013 shows that Claimants understood the Slovak Republic's letter in exactly this manner:

> "On the contrary, ***on May 2, 2012, Mr Kažimir***, 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***. The argument did not stand and would, in any event, now be inapposite given that no such procedure is currently pending."[311]

280. But even if, *arguendo*, the Slovak Republic's letter of 2 May 2012 had stated that the dispute was not ripe (it did not), that would only be a *legal* characterization—not a statement of *fact*. As a result, Claimants and their counsel would have had every opportunity to independently assess whether they agreed with that conclusion. It certainly is not a "*clear statement* ***of fact*** *by one party*,"[312] as required by the *Pan American* test. Thus, the first factor in the estoppel test is not satisfied.

281. ***Second***, the Slovak Republic's statement was not "*unconditional*." The Slovak Republic's letter includes an express reservation of rights that it should not be construed as an admission that the jurisdictional or the substantive requirements of the U.S.-Slovak BIT are met. The conditional letter of the Slovak Republic thus cannot create any estoppel to the Slovak Republic's jurisdictional objection. As a result, the second factor of estoppel is not satisfied either.

282. ***Third***, there was no "*reliance in good faith by another party on that statement to that party's detriment*." As the tribunal in *Pan American* explained, the essence of estoppel is detrimental reliance of *one party* on statements *made by another party*. The Slovak Republic's letter related only to EuroGas' claims brought under the U.S.-Slovak BIT. The Slovak Republic's letter had nothing to do with Belmont's claims under the Canada-Slovak BIT. Hence, Belmont cannot plausibly argue that it relied on the Slovak Republic's letter to its detriment.

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311 Letter from EuroGas Inc. and Belmont Resources Inc. to the Government of the Slovak Republic, 23 December 2013, ¶ 33, **C-0042**.

312 *Temple of Preah Vihear (Cambodia v. Thailand)*, ICJ Reports 1962, p. 6, **RL-0183** quoted in *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, ¶ 151 in conjunction with ¶ 160, (emphasis added), **CL-0060**.

283. The tribunal in *Pan American v. Argentina* reached the same conclusion. There, Argentina argued that Claimants' initial choice to bring a dispute relating to hydrocarbon concessions to Argentine court estopped Claimants from bringing claims before an international investment tribunal.[313] The tribunal rejected Argentina's estoppel argument because:

> "***Argentina, which was not a party to the local dispute***, cannot be said to ***have relied on the choice*** supposedly made by the Claimants under Article VII of the BIT and, ***even less, to have suffered a disadvantage from this supposed choice.***"[314]

284. This reasoning applies with equal force here. The Slovak Republic's letter of 2 May 2012 cannot stop the Slovak Republic from objecting to the Tribunal's jurisdiction over a party to whom the letter was not addressed.

285. Claimants' assertion that "*Belmont's claims are the very same as those of EuroGas*"[315] does not change this conclusion. Estoppel is based on *personal representations* and *detrimental reliance on those representations*, and thus cannot be extended to other parties to whom statements were not made in similar situation.

286. Finally, Claimants did not rely on the Slovak Republic's statements to its detriment. The letter to which Claimants point for the Slovak Republic's alleged representation is dated 2 May 2012. That letter did not and could not change (*i*) the facts giving rise to this dispute, or (*ii*) that the Canada-Slovak BIT only took effect on 14 March 2009. Thus, nothing that the Slovak Republic said on 2 May 2012 could have adversely impacted Belmont on this issue.

287. In sum, *none* of the requirements for estoppel are present here.

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313 *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, ¶ 140, **CL-0060**.

314 *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, ¶ 160, (emphasis added), **CL-0060**.

315 Claimants' Reply, ¶ 222.

7. Belmont could have, but did not, initiate an investment treaty claim under the Previous Canada-Slovak BIT

288. The Slovak Republic showed above that it never represented to Belmont that the dispute was not ripe for international arbitration and that Belmont could have initiated arbitration earlier than the conclusion of the domestic proceedings. In response, Claimants have argued that the dispute was not ripe for arbitration as long as there was "*a chance*"[316] of reinstatement of Rozmin's rights through local court proceedings and "*if the dispute were deemed to have arisen at the time of the taking of Rozmin's mining rights, this means that Claimants would have had to launch arbitration proceedings to claim compensation, but would inevitably have had to stay the proceedings*."[317]

289. That is not true. Article X(5) of the Canada-Slovak BIT states that, before it may submit a dispute to international arbitration, an investor must discontinue or waive domestic proceedings *only where it seeks money damages*. Here, Rozmin's application before the Slovak administrative and judicial authorities did not seek money damages. Therefore, the Slovak proceedings did not fall within the scope of Article X(5), and Belmont was not required to waive or stay them in order to bring its purported investment claims. In short, Rozmin's administrative and judicial challenges before Slovak authorities and its investment claim are totally independent.

290. It is a basic tenet of modern investment international law, confirmed in a plethora of investment cases, that the investor has a choice between domestic remedies and investment arbitration and that investment claims do not require exhaustion of local remedies as a jurisdictional threshold. Absent a contrary provision in the relevant investment treaty (such as the fork-in-the road provision) or unless otherwise agreed, the existence of parallel domestic proceedings does not affect the jurisdiction of an investment tribunal.[318]

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316 Claimants' Reply, ¶ 230.

317 Claimants' Reply, ¶ 230.

318 *See, e.g., British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18/BCB-BZ, Award, 19 December 2014, ¶ 187, **RL-0184**.

291. It is also a fundamental principle in international investment law that international tribunals are not bound by the determination of municipal courts. This principle was articulated and applied by numerous investment tribunals.[319] Thus, it is unavailing for Claimants to argue that this international arbitration would have to be stayed to await the outcome of the proceedings before the Slovak authorities. Indeed, very few investment tribunals have thus far stayed international arbitration to await outcome of domestic proceedings—and the context of such cases was fundamentally different.[320]

292. Belmont thus could have, but did not have to, initiate international arbitration immediately after the reassignment, in parallel or *in lieu* of Rozmin's domestic proceedings. Since Rozmin's domestic proceedings did not seek money damages, nothing in Article X(5) of the Canada-Slovak BIT restricted this choice.

293. In fact, Article X(5) is relevant for this dispute only because *it confirms that a BIT claim arises before the domestic proceedings have concluded*. If a BIT claim truly arose only after the domestic proceedings are over, then there would be no need to address the

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319 *See, e.g., Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic,* ICSID Case No ARB/07/26, Decision on Jurisdiction, 19 December 2012, ¶ 191, **RL-0185**; *Emilio Agustín Maffezini v Kingdom of Spain,* ICSID Case No ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000,¶ 29, **CL-0039**; *Robert Azinian, Kenneth Davitian & Ellen Baca v United Mexican States* (ICSID Case No ARB(AF)/97/2), Award, 1 November 1999, ¶ 86, **CL-0092**.

320 In those cases, the investment treaty arbitration related to a contract and the proceedings were stayed in favor of contractually agreed exclusive forum. *See, e.g. SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, ¶ 173-176, **RL-0186**. Recently, the tribunal in *British Caribbean Bank v. Belize* succinctly summarized the issue:

> "The Tribunal observes that, generally, treaty disputes are legally different from disputes in domestic courts as treaty disputes involve the provisions regarding investment protection contained in the treaty. The Tribunal further notes that it is not uncommon for proceedings pursuant to an investment treaty to be initiated at the same time that aspects underlying the dispute between the parties are being litigated in the municipal courts of the host State. ***In the absence of a treaty provision requiring a claimant to select one forum over the other for the pursuit of certain claims, the mere existence of parallel proceedings does not go to the jurisdiction of an arbitral tribunal***. The Tribunal accepts, however, that it has a measure of discretion with respect to the timing and conduct of the arbitration and that municipal judicial proceedings may sometimes need to be taken into account in the exercise of international comity. In the Tribunal's view, such discretion must be carefully exercised, and the Tribunal must not, in taking account of parallel proceedings, permit comity to frustrate a claimant's right to the arbitral forum and, potentially, to the relief offered by the bilateral investment treaty under which the arbitration proceedings were commenced." *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18/BCB-BZ, Award, 19 December 2014, ¶ 187, (emphasis added), **RL-0184**.

potential parallel pursuit of domestic remedies and international arbitration because there would be no BIT claim until the domestic proceedings are over. Similarly, it would be nonsensical to authorize the parallel conduct of domestic proceeding that do not seek money damages because, under Claimants' theory, the continuation of such proceedings would actually prevent the BIT claim from arising in the first place.

294. Lest there be any doubt, there *was* an investment treaty under which Belmont could have brought its claim in 2005 and the years thereafter. Belmont's purported investment in Rozmin was covered by the previous Canada-Slovak BIT (the "**Previous Canada-Slovak BIT**."). The Previous Canada-Slovak BIT was effective from 30 January 2001 until 14 March 2012[321]—during which the vast majority of events about which Belmont complains occurred.

295. Indeed, the very last decision of the MMO confirming on the reassignment of the Excavation Area to the Economy Agency was dated 1 August 2012—*i.e.*, a mere four months after the Previous Canada-Slovak BIT was replaced by the successive Canada-Slovak Republic BIT. Belmont thus had *seven years* under the Previous Canada-Slovak BIT to bring the dispute to arbitration. It did not do so.

296. By deferring its recourse to the arbitration option until 2014, Belmont took the risk that the BIT might change and make its claim time-barred. Belmont cannot complain now that the risk has materialized.

297. Analyzing a similar issue, the tribunal in *Ping v. Belgium* recently concluded that disputes already notified to the host State, but not yet submitted to arbitration when the successive treaty came into force, fell outside of the scope of coverage of either of the successive treaties and thus fell outside of the tribunal's jurisdiction *ratione temporis*:

> "***[I]n the view of the Tribunal there is nothing in the wording of the 2009 BIT to justify on the basis of its express language, or on the basis of an implication or inferences, that the more extensive remedies under the 2009 BIT would be available to pre-existing disputes that had been notified under the 1986 BIT but not yet subject to arbitral or judicial process.***

[321] *See http://investmentpolicyhub.unctad.org/IIA/country/35/treaty/800.*

> […] It would, of course, be regrettable, if the Claimants had valid claims (on which there is a sharp difference of view between the parties) for which they had no effective remedy. ***But the Tribunal has, for the reasons given, come to the conclusion that there is no legitimate method of interpretation, having regard to the requirements and the Vienna Convention and the rules reflected therein, which gives the Claimants the remedy which they seek in this arbitration under the 2009 BIT.***"[322]

298. In *Ping*, the new investment treaty stated that it would not "*apply to any dispute or any claim concerning an investment which was already under judicial or arbitral process before its entry into force*"—those disputes were to be settled under the previous treaty.[323] The Canada-Slovak BIT similarly states that the Previous Canada-Slovak BIT shall continue to apply to "*any dispute between either Contracting Party and an investor of the other Contracting Party that has been submitted to arbitration*" pursuant to the Previous Canada-Slovak BIT prior to 14 March 2012, when the new Canada-Slovak Republic BIT entered into force.[324]

299. Applying these principles, Belmont's claim falls outside the Tribunal's jurisdiction *ratione temporis*. Belmont had nearly *seven years* to bring a claim under the Previous Canada-Slovak BIT. It did not. Belmont's failure to use international investment protection available to it cannot now be used to create protection where none exists.

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322 *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium*, ICSID Case No. ARB/12/29, Award, 30 April 2015, ¶¶ 231-232, (emphasis added), **RL-0187**.

323 *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium*, ICSID Case No. ARB/12/29, Award, 30 April 2015, ¶ 49, **RL-0187**.

324 The Canada-Slovak BIT states that the Previous Canada-Slovak BIT would continue to apply where the investor has submitted its dispute to arbitration under the Previous Canada-Slovak BIT:

> "Upon the entry into force of this Agreement, the Agreement between the Government of Canada and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments, done at Prague on 15 of November 1990, ***shall be terminated except that its provisions shall continue to apply to any dispute between either Contracting Party and an investor of the other Contracting Party that has been submitted to arbitration pursuant to that Agreement*** by the investor prior to the date that this Agreement enters into force. ***Apart from any such dispute, this Agreement shall apply to any dispute which has arisen not more than three years prior to its entry into force.***" *See* Article XV, Canada-Slovak BIT, (emphasis added), **R-0006**.

IV. THE REAL REASON THAT ROZMIN LOST THE EXCAVATION AREA

300. Even if the Tribunal were to dismiss all of the above jurisdictional objections, Claimants *still* would not prevail because the Slovak Republic was fully entitled to re-assign the Excavation Area. It is undisputed that Rozmin had failed to commence Excavation within the statutory three-year period.

301. In their Reply, Claimants attempt to shift the blame for Rozmin's failure to commence Excavation to the Slovak Republic. Their primary argument is that the permitting process in the Slovak mining industry is part of an "*excessively bureaucratic administration inherited […] from the Soviet era.*"[325]

302. This, of course, is another fiction. As shown below, it was Rozmin's own failure to submit complete permit applications and its own financial difficulties that caused it to lose the Excavation Area. In any event, Claimants' theory fails as a matter of international investment law because investors cannot use BITs to force changes in pre-existing domestic legislation.

303. Before addressing these failures, however, it is first necessary to correct Claimants' false allegations that the Excavation Area was reassigned to another entity only after Claimants had invested considerable efforts in developing the deposit and had de-risked it.

A. Claimants Did Not De-risk the Deposit

304. Claimants allege that Rozmin's "*original shareholders*" lacked sufficient data about the Gemerská Poloma deposit and were unable to secure financing to develop the site[326] but that all changed with Claimants' involvement. Claimants claim that, beginning on 16 March 1998 with EuroGas I's investment in Rozmin and through 4 April 2000 with the issuance of the Kloibhofer Report,[327] they "*gathered*" additional data and commissioned

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325 Claimants' Reply, ¶ 316.

326 Claimants' Reply, ¶ 268 *("The fact that Dorfner and the other original shareholders of Rozmin were unable to secure the necessary financing to move forward with the project is directly attributable to the fact that the data available at the time, though promising, did not meet the level of confidence necessary for potential third-party investors to agree to commit significant funds to the project.")*.

327 Claimants' Reply, ¶¶ 298 *et seq.*; Kloibhofer Report, 4 April 2000, **C-0154**.

"*additional studies*,"[328] which "*wiped out*" "*any uncertainties regarding the commercial and financial viability of the reserves in the Extraction Area*."[329] Through these efforts, Claimants argue, "*the deposit had essentially been de-risked*."[330]

305. None of that is true. As the Slovak Republic already established, *all* of the contemporaneous technical studies show that, given the deposit's geographic characteristics, it could only be de-risked through closely-spaced underground drilling from within the deposit *after* it was opened.[331] And that never took place.

306. The limited activity that Claimants reference in their Reply as having taken place between 1998 and 2000—consisting of randomly-drilled additional *surface* boreholes and the commissioning of limited studies by Kloibhofer and ARP/ECV GesmbH ("**ARP**")—did not substitute the need for closely-spaced underground drilling. Moreover, from a de-risking point of view, they were technically irrelevant. This is explained below and in Mr. Sparks' rebuttal expert report submitted with this Reply.

307. Equally important, Mr. Stephan Dorfner, who was personally involved in Rozmin's activities at Gemerská Poloma at the time, explains that the deposit was not de-risked by 2000.[332] Moreover, Mr. Dorfner further explains that the uncertainties regarding the commercial and financial viability of the reserves in the Excavation Area could not be removed and the interest of investors could not be increased by simple gathering of additional data. Potential investors were discouraged by adverse risks such as uncertain situation on the talc market, uncertainty regarding the quality of Rozmin's talc, location of the deposit deep under the surface, and unfavorable geographic location of the deposit, which significantly increased shipping costs. Additional data that Claimants may have obtained from further surface drilling could not dispel these risks.[333]

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328 Claimants' Reply, ¶ 268.

329 Claimants' Reply, ¶ 314.

330 Claimants' Reply, ¶ 314.

331 Respondent's Counter-Memorial, ¶¶ 226 and 230.

332 Stephan Dorfner First Witness Statement, ¶ 15.

333 Stephan Dorfner Second Witness Statement, ¶¶ 3 – 9.

1. The Closely-Spaced Underground Drilling Required for De-Risking Never Took Place

308. As Slovak Republic already explained, de-risking of the Gemerská Poloma site could only be accomplished through closely-spaced underground drilling from within the deposit *after* its opening.[334] This is because the deposit's terrain has intense faulting and molding—a fact admitted by Claimants.[335] As a result, continuity of the talc veins underground could not have been determined confidently from surface drilling alone.[336] This was confirmed by contemporaneous studies commissioned by Rozmin[337] and by the individuals most knowledgeable of the deposit's characteristics.[338] Those individuals include the mine's current operator,[339] as well as Mr. Ernst Haidecker, who prepared the Feasibility Study on Gemerská Poloma and submitted an unrebutted witness statement in this arbitration.[340]

309. Despite what Claimants allege in this arbitration, Rozmin also shared this opinion at the time. In its 1998 Plan for the Opening, Preparation, Development, and Exploitation of the Gemerská Poloma Excavation Area (the "**1998–2002 POPE**") filed with the Slovak mining authorities, Rozmin acknowledged the highly fractured nature of the talc veins[341]

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334 Respondent's Counter-Memorial, ¶ 226 and 230.

335 Claimants' Reply, ¶ 303 (". . . *the assumption was that the structure of the Deposit could potentially not be contiguous, but folded and faulted* . . .").

336 Gregory Sparks First Expert Report, ¶¶ 43, 45 and 103.

337 Analysis and Evaluation of the Feasibility Study Talk Gemerská Poloma, Slovakia, January 1998, § 2.2, p. 9, **C-0137** ("*The variation in thickness from 2 m to 400 m of the talc mineralized rock suggest intense faulting in addition to folding. This was confirmed by the structure noticed in the core of the Dorfner /Thyssen borehole*.").

338 Gregory Sparks First Expert Report, ¶ 103 *("Mr. E. Haidecker and Mr. P. Corej formerly of Rozmin, have confirmed emphatically in conversation that: 1) folding and significant displacement faulting has occurred in the mineralized body, and 2) that more closely spaced underground drilling is essential to confirm continuity beyond what is generally accepted as an Inferred Resource.").*

339 Gregory Sparks First Expert Report, ¶ 103 *("Finally, Messrs. Grena and Smolarik, Mine Manager and Geologist respectively for VSK/Eurotalc have confirmed that the body is indeed intensely folded and faulted, hence continuity cannot be determined confidently from surface drilling alone.").*

340 Ernst Haidecker First Witness Statement, ¶ 9 *("As a result, de-risking required greater drilling density performed from below the surface, which was only possible after opening an access to the deposit.").*

341 Plan for the Opening, Preparation, Development, and Exploitation submitted by Rozmin s.r.o. on 15 January 1998, p. 10, **C-0168** *("The deposit body is disturbed by tectonic defects of various sizes. The most disturbed are rocks in the top wall as well as the floor wall granites. From tectonic zones, the faults of NE-SW, NW-SE, but also E-W and N-S directions are significant. The magnesite is rather compact without*

and confirmed that "*[f]urther geological exploration in **underground** mining works is planned because only research exploration stage was finished with surface boreholes. Further exploration will continue by drifting of winze*."[342]

310. Rozmin thus recognized that surface drilling could not secure sufficient data and that closely-spaced underground drilling from within the deposit was necessary. This view is consistent with Mr. Haidecker's witness statement (which is unrebutted), Mr. Sparks' expert opinion, and the contemporaneous studies commissioned by Rozmin.[343] Rozmin's original assessment and proposed course of action remained unchanged through November 2003 when it submitted a revised POPE.[344]

311. Importantly, Claimants do not dispute that Rozmin never performed this required closely-spaced underground drilling or that the deposit was never opened. In fact, only 7% of the opening decline was ever completed.[345] These two facts alone establish that the deposit was not de-risked, and Claimants' allegation that they had "*essentially*" de-risked the deposit by 2000 is simply not true.

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significant zones of crushing. The more apparent disturbance is in positions of talc. In some cases, the talc is strongly broken down to small fractions, in a few isolated cases it is mylonitised. It is caused also by its physical-mechanical attributes. Some positions of the talc become transformed to shale with a variable slope.").

342 Plan for the Opening, Preparation, Development, and Exploitation submitted by Rozmin s.r.o. on 15 January 1998, p. 22, (emphasis added), **C-0168**.

343 Analysis and Evaluation of the Feasibility Study Talk Gemerská Poloma, Slovakia, January 1998, § 2.2, p. 10, **C-0137** *("The complicated structure and the varying intersection length of the talc bearing formation and its limited lateral extent **requires underground exploration work before and during the mine development. It can not be done by drilling further surface boreholes**.")*, (emphasis added).

344 Plan for the Opening, Preparation, Development, and Exploitation approved on May 31, 2004, p. 6, **C-0230** *("The deposit body is broken by tectonic movements of varied intensity. The overlying rocks and underlying granites are broken most. There are significant fractures from tectonic zones in the NE-SW and NW-SE directions, but also EW and NS. Magnesite is quite compact without significant crushing zones. More significant fracturing is discernible in the talc locations. In some cases the talc is very fractured and occasionally, as a result or its physical and mechanical characteristics, mylonitized. Some talc locations are cleaved with variable inclines."); p. 10 ("The overall distribution of talc in the deposit is probably very irregular, without regularity of bearing. **It will require difficult excavation methods**.")* (emphasis added); p. 26 *("**Underground mining and drilling works precisely surveying the spatial path and distribution of talc layers** with a volume greater than 60% are planned."),* (emphasis added).

345 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, p. 25, **R-0058**.

2. Claimants' Limited Activity Between 1998-2000 Did Not De-Risk The Deposit

312. Nothing that Rozmin or Claimants could have done between 1998 and 2000, short of opening the deposit and drilling closely-spaced boreholes from within, could have de-risked the deposit. But even if the deposit could have been de-risked otherwise (it could not),[346] the limited activities described in Claimants' Reply as having taken place between 1998 and 2000 did nothing to technically advance the works at the deposit or to de-risk it. Instead, they appear to have been chiefly intended to create the *illusion* of activity at the site, presumably in an effort to drive Claimants' stock price. After all, de-risking required a significant investment,[347] which Rozmin and Claimants admittedly did not have.[348]

313. Claimants' claimed efforts between 1998 and 2000 consist of: (*i*) purchasing in early 1998 the 1997 Feasibility Study from Gebrüder Dorfner;[349] (*ii*) financing Rozmin's new drilling program in November 1998, which led to the drilling of additional surface boreholes;[350] (*iii*) Rozmin's commissioning of the 4 April 2000 Kloibhofer Report;[351] and (*iv*) Rozmin's commissioning in 1999 of a study by ARP regarding the quality of the talc at the deposit and the most efficient method for its processing.[352] Each is discussed in turn.

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346 Gregory Sparks Rebuttal Expert Report, ¶ 3.

347 Stephan Dorfner First Witness Statement, ¶ 10 ("*The works at the deposit were both technically and financially very demanding, and a strong investor was needed that would be willing to finance the works. Because of the high risk connected with financial profitability of the project, it was difficult to find such a partner*.").

348 Belmont Quarterly Report, 31 July 2001, p. 5 (SQ-3), **R-0217**; EuroGas I SEC 10-K 2004, p. 46, (SQ-6), (emphasis added), **R-0220**; Mr. Ellison's report, Exhibit 13, p. 7.

349 Claimants' Reply, ¶ 289.

350 Claimants' Reply, ¶ 293.

351 Claimants' Reply, ¶¶ 298 - 299; Kloibhofer Report, 4 April 2000, **C-0154**.

352 Claimants' Reply, ¶ 298. ARP's conclusions were issued in three separate reports: a 17 December 1999 Survey Report, a 5 May 2000 Interim Report on the use of flotation as a processing method, and a 29 May 2000 Final Report on the flotation processing method and overall cost of the optimal processing method. *See* Claimants' Reply, ¶ 306.

314. ***First***, the 1997 Feasibility Study[353] did not de-risk the deposit. The study's own author, Mr. Haidecker, made clear in his witness statement (submitted with the Slovak Republic's Counter-Memorial) that "*de-risking required greater drilling density performed from below the surface, which was only possible after opening an access to the deposit*."[354] That testimony is unrebutted.

315. As the Slovak Republic explained in its Counter-Memorial, the Feasibility Study was conceptual in nature because it contained numerous assumptions that were made with limited project specific information.[355] As Mr. Sparks described it, the Feasibility Study would likely be identified as a Class 5 or 4 (the lowest or second lowest level of certainty) under the international standards of the Association for the Advancement of Cost Engineering ("**AACE**").[356] Thus, Claimants' attempt to portray the 1997 Feasibility Study as a significant step toward de-risking fails.

316. ***Second***, the drilling of additional surface boreholes by Rozmin also failed to de-risk the deposit because, again, those boreholes did not confirm the continuity of talc layers underground, which all contemporaneous technical studies determined was required, and did not allow a reasonable understanding of actual mining conditions.[357] While Claimants place emphasis on these additional surface boreholes in their Reply, Mr. Sparks had already opined in his first expert report as to their relative unimportance from a de-risking perspective: "*[t]hough these holes were drilled several years apart they did not materially change the requirement for more closely spaced underground drilling, however they seemed to be focused on drilling known relatively high grade talc.*"[358] In other words, these surface boreholes were drilled in areas already known to contain high grade talc. Thus, they "proved" nothing more than what was already known. Critically, the continuity of the underground veins of talc remained otherwise unconfirmed.

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

354 Ernst Haidecker First Witness Statement, ¶ 9.

355 Respondent's Counter-Memorial, ¶ 215.

356 Gregory Sparks First Expert Report, ¶ 41.

357 Respondent's Counter-Memorial, ¶ 226; Gregory Sparks First Expert Report, ¶¶ 81 *et seq*.

358 Gregory Sparks First Expert Report, ¶ 97.

317. More specifically, Mr. Sparks explains in his rebuttal expert report that the additional boreholes were drilled over a "*wide range of azimuths and not in a straight lines or "fences"*"[359] as is the standard industry practice. As a result:

> "[The] additional holes only confirmed that at certain unsurveyed locations, high grade talc was intersected. However, due to this dearth of critical data, including a lack of survey information, ***there was no ability to determine the orientation and continuity of the talc intercepts***. That lack of data, juxtaposed on the known folding and faulting of the rock mass, meant that exploitation of the deposit was subject to considerable economic and technical risk without significantly greater exploration detail to mitigate that risk."[360]

318. Claimants' own image shows the random, non-linear location of these six additional boreholes.[361] As Mr. Sparks explains, not only were none of these boreholes "*located along a section line and with azimuths similarly oriented*," but "*Rozmin [also] failed to orient holes to take advantage of previously drilled holes to generate logical cross-sections*."[362] Therefore, the data obtained from these additional surface boreholes made it exceedingly difficult, if not at all impossible, "*to get any sense of continuity between [the additional] holes drilled by Rozmin*."[363]

319. Mr. Sparks also identifies a number of additional shortcomings with the data collected from these additional surface boreholes that made de-risking of the deposit impossible, including that: (*i*) no lithologic data appears to have been collected from the boreholes; (*ii*) no data regarding the boreholes' structure features, including faults and folds, appears to have been collected; (*iii*) no geophysical methods were employed to identify faults known to exist; (*iv*) no alteration intensity data appears to have been logged; (*v*) accessory mineral data in the drill cores appears to not have been tested; and (*vi*) no downhole survey information was recorded.[364] Thus, as Mr. Sparks concludes, Rozmin

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359 Gregory Sparks Rebuttal Expert Report, ¶ 7.

360 Gregory Sparks Rebuttal Expert Report, ¶ 10, (emphasis added).

361 Claimants' Reply, ¶ 296.

362 Gregory Sparks Rebuttal Expert Report, ¶ 12.

363 Gregory Sparks Rebuttal Expert Report, ¶ 13.

364 Gregory Sparks Rebuttal Expert Report, ¶ 11.

failed to "*materially de-risk the Gemerska Poloma Talc deposit, notwithstanding completion of an additional six drill holes*"[365] because:

> "[E]ven with the six holes it completed, [Rozmin failed] to demonstrate reasonable evidence of continuity between drillholes sufficient to rise to the level of resource classification to either Measured or Indicated Resources under international standards. This is largely due to data not collected for the six holes it drilled and through additional exploratory works."[366]

320. ***Third***, the 4 April 2000 Kloibhofer Report, which relied on the incomplete data that Rozmin had secured to date, similarly failed to de-risk the deposit. That report was a 3D model of the deposit, which, according to Claimants, took into consideration "*the data produced by the additional . . . drilling carried out by Rozmin since 1997*."[367] This was data that, as explained above, was incomplete and inconclusive on the issue of continuity of the talc lenses.

321. For this reason, Mr. Sparks expressed skepticism in his first expert report of the Kloibhofer Report's apparent conclusion that the high grade lenses of talc were continuous.[368] In his rebuttal expert report, Mr. Sparks confirms:

> "The Kloibhofer study, though transparent and presented in great detail, did not address this paramount issue. Instead, the study was based on cross-sections prepared by Rozmin, which also did not address the issue of continuity with supportable data. As a consequence of this, no mineralization could be deemed to be Reserves under CRIRSCO, nor under any regulatory body subscribing thereto."[369]

322. Claimants' Reply does nothing to undermine the validity of Mr. Sparks' opinion. Claimants instead rely on a contrite statement made by their expert witness, Mr. Alex Hill

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365 Gregory Sparks Rebuttal Expert Report, ¶ 3.

366 Gregory Sparks Rebuttal Expert Report, ¶ 27, (underlining in original).

367 Claimants' Reply, ¶ 305.

368 Gregory Sparks First Expert Report, ¶ 45 ("*The [Kloibhofer Report] seems to conclude that the high grade talc lenses are continuous. The undersigned does not believe there is sufficient evidence through drilling to support this assertion, as confirmed by all sources, beginning with the Slovenska geologia study, Haidecker Feasibility Study, and the Hansa GeoMin report. Though six additional holes were drilled in the interim, given the obvious folding and faulting, the holes still remained too widely spaced to draw this conclusion*.").

369 Gregory Sparks Rebuttal Expert Report, ¶ 27.

of Wardell Armstrong International, to the effect that he has "*not seen any evidence that would allow [him] to call into question the findings of the Kloibhofer 2000 Study.*"[370]

323. As Mr. Sparks explains, however, international reporting standards and standard industry practice required that Kloibhofer secure the additional data that Mr. Sparks has identified as missing before it could reach any conclusion regarding the continuity of the talc lenses throughout the deposit.[371] Kloibhofer, however, relied solely on the limited and incomplete data provided to it by Rozmin, which, as explained above, was insufficient to confirm the continuity of talc lenses throughout the deposit.[372] To further dispel any misunderstanding on the issue, Kloibhofer's unsubstantiated conclusion ultimately proved to be wrong as the deposit's current operator recently "*confirmed that the body is indeed intensely folded and faulted, hence continuity cannot be determined confidently from surface drilling alone*."[373]

324. None of this could have been lost on Mr. Hill, an associate director at an established mining consulting firm, which may explain why he "*appears to avoid the use of objective, industry specific descriptive terms*" and prefers the use of subjective terms that are "*not in conformance with CRIRSCO, JORC, or any other international standards for defining mineralization*."[374]

325. By way of example, Mr. Hill refers to "*Well Explored mineralized rock*" and "*measured reserve*," yet neither is an industry specific term recognized under international standards

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370 WAI Supplemental Expert Report, § 1.2.

371 Gregory Sparks Rebuttal Expert Report, ¶¶ 5-6 and 15.

372 Gregory Sparks Rebuttal Expert Report, ¶15 ("*Kloibhofer goes to great lengths to explain its estimating procedure, which appears to be a cross-sectional method of determination* ***relying exclusively on the cross-sectional interpretations provided by Rozmin***. *While cross-sectional estimates are a well-recognized method for estimating resources, the Kloibhofer estimate is limited to digitizing cross-sections and computing volumes and tonnages therefrom.* ***Kloibhofer, as does WAI, fails to address the fundamental question of continuity between drill holes, and ignores the contributory data described above***."), (emphasis added).

373 Gregory Sparks First Expert Report, ¶ 103 ("*Finally, Messrs. Grena and Smolarik, Mine Manager and Geologist respectively for VSK/Eurotalc have confirmed that the body is indeed intensely folded and faulted, hence continuity cannot be determined confidently from surface drilling alone*.").

374 Gregory Sparks Rebuttal Expert Report, ¶ 14.

for defining mineralization.[375] This appears to be an effort by Mr. Hill to avoid "*specific characterization of the level of confidence regarding mineralization*" at the deposit.[376]

326. In contrast, Mr. Sparks explains that "*notwithstanding completion of six additional drillholes, Rozmin failed to achieve anything more than Inferred Resources*," as that term is defined under "*CRIRSCO and all international resource reporting standards adhering thereto*."[377] In short, the deposit was not re-risked.

327. ***Finally***, for all of the above reasons, ARP's studies also failed to de-risk the deposit. ARP limited itself to studying the quality of talc samples extracted from the additional surface boreholes that were randomly drilled in areas already known to contain high grade talc.[378] These studies, therefore, contained none of the missing data needed to determine the continuity of the talc lenses underground and were entirely irrelevant for purposes of de-risking the deposit.

* * *

328. The foregoing puts to rest Claimants' fictional story that the Excavation Area was reassigned to another entity only after Claimants had invested considerable efforts in developing the deposit and had de-risked it. The record shows that there remained considerable exploratory works outstanding at the deposit. It is simply not serious for Claimants to allege that after 2000 "*[a]ll that remained was to open the deposit and start exploitation*."[379] Rozmin lost the Excavation Area not because the Slovak Republic sought to reap the benefit of Claimants' efforts but, rather, because for seven years Rozmin did no Excavation at the site. And it never came close.

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375 Gregory Sparks Rebuttal Expert Report, ¶ 14.

376 Gregory Sparks Rebuttal Expert Report, ¶ 14.

377 Gregory Sparks Rebuttal Expert Report, ¶ 19.

378 Claimants' Reply, ¶¶ 306 *et seq*.; ARP Final Report, 29 May 2000, p. 3, **C-0162** ("*A composite specimen derived from the most varied products of the processing tests performed earlier on the talc specimen using the AR pc specimen number 3062 (Rozmin borehole core V-DO 45 was manufactured as a flotation process task*.").

379 Claimants' Reply, ¶ 314.

B. Rozmin and Claimants Had No Internal or External Funds to Finance the Development of the Deposit

329. That Rozmin was unable to commence Excavation at the site should not come as a surprise, given the dire financial situation in which Rozmin and its two shareholders, EuroGas I and Belmont, found themselves at the time.

330. After studying all of the financial information available for EuroGas I and Belmont, Mr. Sirshar Qureshi from PwC concludes that neither company was "*able to finance the Project from internal resources*."[380] As it pertains to Belmont, Mr. Qureshi notes that it publicly acknowledged in 2001 that it "*was incurring difficulty in arranging this financing*" and that the consideration it received under the SPA—EuroGas I's 12 million shares—was its primary source of financing.[381] Mr. Qureshi's analysis of Belmont's financial information also shows that Belmont's "*poor financial condition and lack of financing*" continued after the execution of the SPA in 2001 and through 2005.[382]

331. EuroGas I's situation was equally dire. It explained in its 2004 financial statement that:

> "EuroGas has ***accumulated a deficit of $ 156,838,059*** through December 31, 2004. EuroGas has had ***no revenue, losses from operations and negative cash flows*** from operating activities during the years ended December 31, 2004 and 2003 and 2002. At December 31, 2004, the Company had a ***working capital deficiency of $ 21,636,889 and a capital deficiency of $ 10,893,149***. The Company has impaired most of its oil and gas properties. ***These conditions raise substantial doubt regarding the Company's ability to continue as a going concern***."[383]

332. Having analyzed EuroGas I's financial statements for 1997 through 2004, Mr. Qureshi concludes that, during that time period, EuroGas I had "*(a) no operational revenues; (b)*

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380 PwC Report, ¶ 15.

381 Belmont Quarterly Report, 31 July 2001, p. 5 (SQ-3), **R-0217**; PwC Report, ¶ 60.

382 PwC Report, ¶ 60(b); App. D.1 to PwC Report. Additionally, after the SPA was executed, EuroGas I became solely responsible for the financing of Rozmin and the Gemerská Poloma project. PwC Report, ¶ 60(d) (citing EuroGas I SEC 10-K 2001, page 61 (SQ-5), **R-0219** ("*By virtue of its 100% ownership of Rozmin s.r.o. and the talc deposit, EuroGas bears the full responsibility to fund the development costs necessary to bring the deposit to commercial production*.")

383 EuroGas I SEC 10-K 2004, p. 46, (SQ-6), (emphasis added), **R-0220**.

increasing accumulated losses; (c) experienced a sharp decrease in its share price; and (d) significant doubts as to its ability to continue as a going concern."[384]

333. Given that they each found themselves in a dire financial situation and that the project was not de-risked, it is no surprise that EuroGas I and Belmont were also unable to secure external financing for the Gemerská Poloma project.[385] Additionally, as Mr. Qureshi explains, EuroGas I, which was the entity responsible for raising capital for the project, could not have reasonably secured external financing as it was the debtor of a U.S. $113 million judgment that prompted its bankruptcy.[386]

334. Rozmin's financial situation was no better. Mr. Qureshi explains that Rozmin was also "*facing a lack of funding from an early stage of EuroGas I's involvement in the Project" and that the "[w]orking capital funds provided by the Claimants were clearly insufficient to finance the initial capital investment needs of EUR 19.2 million*."[387] In fact, Rozmin's acknowledged its financial woes in one of its first monthly management reports in November 1999—after EuroGas' involvement—which it described its financial situation as follows:

> "The shareholder Rima Muran [which at the time was 55% owned by EuroGas GmbH] was informed for *the third time* on November 10 by registered mail that its shareholder contribution for the 1st half of 1999 is still outstanding . . . Due to the outstanding contribution of Rima Muran in the amount of approx. SK 2 million (approx. DM 100,000) . . . ***the liquidity of ROZMIN s.r.o. is no longer guaranteed for January 2000***."[388]

335. In sum, neither EuroGas I nor Belmont had funds to finance the development of the project, and they lacked the ability to raise those funds from external sources.

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384 PwC Report, ¶ 62.

385 PwC Report, ¶¶ 18-19, § V; ¶ 113.

386 PwC Report, ¶¶ 90 *et seq.*

387 PwC Report, ¶ 22.

388 PwC Report, ¶ 138 (citing Mr. Ellison's report, Exhibit 13, p. 7), (emphasis added).

C. Rozmin's Own Failures to its Permitting Problems

336. Having established that Claimants never de-risked the deposit and that they simply did not have the funds to do so, the Slovak Republic now turns to Claimants next false allegation: that "*the reason Rozmin was not able to start mining activities before 2000 is . . . because the number of permits, authorizations, leases, and officials approvals which Rozmin had to request and obtain from various authorities was overwhelming, and the process of applying for, and securing, the same was extremely time consuming due to the excessively bureaucratic administration inherited by the Slovak Republic from the Soviet era*."[389] That assertion—that the Slovak Republic required too many permits—is an awfully thin reed on which to base an investment treaty claim, and speaks pointedly to the weakness of Claimants' case.

337. It is a standard procedure in every industry in every developed country in the world that an investor interested in launching a business needs to obtain a variety of permits. These include (*i*) ordinary permits, such as permits authorizing an entity to perform particular activity or construction permits; and (*ii*) special permits, which are typical for a particular field of industry and are conditional upon specifics of the particular investment.

338. Permitting procedures in the mining industry are no different. To put talc mine in Gemerská Poloma into operation, Rozmin had to apply for and obtain:

(a) the General Mining Permit;

(b) rights to the Excavation Area;

(c) rights to land plots at which Rozmin intended to perform its activities;

(d) permits allowing Rozmin to construct the mine and to excavate the talc, *i.e.* the Authorization of Mining Activities;

(e) construction permits allowing Rozmin to build Surface Construction; and

[389] Claimants' Reply, ¶ 316.

(f) special permits, which are necessary, for example, if the deposit is located in a protected area where water source is located and for particular types of activities.

339. None of this was a surprise to Rozmin. These permits had been required long before Rozmin became involved with the Gemerská Poloma talc mine. And Rozmin was not singled out. Every other entity in Rozmin's position was required to obtain these permits as well.

340. The following sections walk the Tribunal through the permitting process for the Gemerská Poloma talc site and, at each step along the way, show just how baseless it is for Claimants to allege that the Slovak Republic's permitting process was the reason Rozmin could not commence Excavation. Rather again Rozmin submitted incomplete permit applications that significantly delayed the process.

1. 1997–29 May 1998: The first round of Rozmin's permitting procedure—mining permits

341. In 1997, Rozmin initiated its first efforts to obtain the necessary permits. As a first step, on 9 May 1997, Rozmin submitted to the DMO its request for the issuance of the General Mining Permit.[390] Without undue delay, the DMO issued the General Mining Permit on 14 May 1997.[391] With this permit, Rozmin was entitled to perform mining activities within the Slovak Republic and was entitled to apply for rights to a particular excavation area.

342. On 11 June 1997, Rozmin acquired rights to the Excavation Area from Geologická služba SR.[392] Together with these rights Rozmin obtained also an obligation to initiate the Opening Works at the deposit by 31 July 1998.[393]

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390 Rozmin's request to the District Mining Office for a mining authorization, (RM/112/97 RNDr. Rozložník), 9 May 1997, **C-0122**.

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

392 Letter from the District Mining Office to Geological Survey, (Ref. 1432-465-V/97), 5 June 1997, **C-0123**; Agreement on the Transfer of the Gemerská Poloma Mining Area, 11 June 1997, **C-0023**; Certificate of Acquisition of Rights to a Mining Area, 24 June 1997, **C-0024**.

393 Agreement on the Transfer of the Gemerská Poloma Mining Area, 11 June 1997, Art. IV, Section 2, **C-0023**; Decision on the Assignment of the Gemerská Poloma Mining Area, 25 July 1996, p. 2, **C-0020**.

343. As a next step, Rozmin started preparation of the Plan for Opening, Preparation and Excavation of the deposit—the 1998-2002 POPE. The 1998-2002 POPE is a pre-condition for applying for the Authorization of Mining Activities, an authorization allowing Rozmin to undertake mining activities at the Excavation Area. Rozmin entrusted this task to Messrs. Ondrej Rozložník, Peter Čorej, and Ernst Haidecker.[394]

344. On 15 January 1998, the 1998–2002 POPE was finalized.[395] The next day, on 16 January 1998, Rozmin applied for the Authorization of Mining Activities.[396]

345. Rozmin's POPE only set forth Rozmin's plan for the mine development until 2002.[397] This was important because the time period covered for the POPE is the same time period covered by the Authorization of Mining Activities (the Authorization of Mining Activities cannot be issued for a longer period than the POPE).[398] As a result, on 29 May 1998, the DMO issued the Authorization of Mining Activities, which was valid until 31 December 2002.[399] As will be seen, this decision later meant that Rozmin had to apply for the Authorization of Mining Activities for a *second* time.

2. 29 May 1998–23 March 1999: First round of Rozmin's permitting procedure —construction permits

346. After the Authorization of Mining Activities became effective, Rozmin had the right to initiate Opening Works at the deposit.[400] To do so, however, Rozmin had to construct the supporting Surface Construction, which required that Rozmin obtain rights to land plots and construction permits (which required Rozmin to obtain a zoning permit).

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394 Plan for the Opening, Preparation, Development, and Exploitation submitted by Rozmin s.r.o. on 15 January 1998, **C-0168**.

395 Plan for the Opening, Preparation, Development, and Exploitation submitted by Rozmin s.r.o. on 15 January 1998, **C-0168**.

396 Request for Authorization of Mining Activities, 16 January 1998, **C-0169**.

397 Plan for the Opening, Preparation, Development, and Exploitation submitted by Rozmin s.r.o. on 15 January 1998, **C-0168**.

398 Thus, if the plan in a POPE describes the mine development for, say, a period of five years, then the Authorization of Mining Activities will be issued for a period of five years as well.

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

400 Peter Čorej Second Witness Statement, ¶ 8.

347. At this point of time—on 16 March 1998—EuroGas I entered the project by acquiring a 55% shareholding interest in RimaMuráň, a 43% shareholder of Rozmin, through its subsidiary EuroGas GmbH.[401] Almost one year had passed since the acquisition of the Excavation Area by Rozmin. It was anticipated that EuroGas I would provide financial support to the project and thereby accelerate the process of commencement of work.

348. The entry of EuroGas I, however, changed nothing.

349. On 11 June 1998, Rozmin sought to use certain land plots and, to do so, requested a temporary removal of selected land plots from the "forest land fund."[402] These land plots were needed for building the Surface Construction. Rozmin's request, however, lacked required documentation. As a result, the proceedings were suspended on 20 July 1998:

> "***Due to the fact that the request was not supplemented with all essentials***, ***the District Office in Rožňava*** could have not decided within the statutory period and ***suspends the proceedings*** for the period specified in the statement part of this decision."[403]

350. Meanwhile, on 2 July 1998, Rozmin applied for a zoning permit designating the territory on which the Surface Construction (which was necessary for the drilling of the exploration decline) would be performed.[404] Again, however, Rozmin did not provide sufficient documentation. The proceedings were therefore suspended on 10 July 1998:

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401 Contract on the Transfer of a Business Share in the Commercial Company Ríma Muráň sro between EuroGas GmbH and Mr. Viliam Komora, 16 March 1998, **C-0006**; Contract on the Transfer of a Business Share in the Commercial Company Ríma Muráň sro between Eurogas GmbH and Mr. Peter Čorej, 16 March 1998, **C-0007**; Contract on the Transfer of a Business Share in the Commercial Company Ríma Muráň sro between EuroGas GmbH and Mr. Pavol Krajec, 16 March 1998, **C-0008**; Contract on the Transfer of a Business Share in the Commercial Company Ríma Muráň sro between EuroGas GmbH and Mr. Ján Baláž, 16 March 1998, **C-0009**.

402 Letter from Rozmin s.r.o. to District Office in Rožňava, Department of Lands, Agriculture and Forestry, 11 June 1998, **R-0271**.

403 Decision of the District Office in Rožňava, Department of Lands, Agriculture and Forestry, 20 July 1998, p. 2, (emphasis added), **R-0272**.

404 Decision of the Department of Environment of the District Office of Rožňava, No SP 98/06072/003-OL, 23 October 1998, p. 1, **C-0171**.

> "The zoning procedure was initiated on the above mentioned date and ***cancelled on July 10, 1998 because the request did not contain sufficient material*** for a reliable impact assessment of the proposed construction."[405]

351. On 31 July 1998, the deadline for initiation of the Opening Works, which was set forth in the Decision on Assignment of the Excavation Area,[406] lapsed. In their Reply, Claimants state that "*the failure of Rozmin's initial shareholders to meet this alleged requirement would have nothing to do with Claimants*."[407] Already at this time, however, EuroGas GmbH owned a 55% shareholding in the largest shareholder of Rozmin—RimaMuráň—and thus was also responsible for Rozmin's performance.

352. On 12 October 1998—*three months after original request for issuance of the zoning permit*—Rozmin supplemented its request with the missing documents.[408] On 23 October 1998, the zoning permit for Surface Construction (which was necessary for drilling the exploration decline) in Gemerská Poloma was issued.[409] As is standard, the zoning permit contained a condition that Rozmin had to apply for issuance of a construction permit—a permit that allows actual construction of the Surface Construction—within two years; otherwise the zoning permit would cease to exist.[410]

353. The Surface Construction consisted of three different types of buildings: (*i*) standard surface buildings; (*ii*) water management buildings; and (*iii*) special buildings (such as construction of relocation of the forest road and construction of a bridge over the Dlhý potok stream). As a result, Rozmin had to apply for three construction permits.

354. On 26 October 1998—*i.e., four months after the submission of the original request*—Rozmin finally managed to submit all the required documentation for the temporary

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405 Decision of the Department of Environment of the District Office of Rožňava, No SP 98/06072/003-OL, 23 October 1998, p.1, (emphasis added), **C-0171**.

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

407 Claimants' Reply, ¶ 265.

408 Decision of the Department of Environment of the District Office of Rožňava, No SP 98/06072/003-OL, 23 October 1998, p.1, **C-0171**.

409 Decision of the Department of Environment of the District Office of Rožňava, No SP 98/06072/003-OL, 23 October 1998, **C-0171**.

410 Decision of the Department of Environment of the District Office of Rožňava, No SP 98/06072/003-OL, 23 October 1998, p. 4, **C-0171**.

removal of forest lands from the forest land fund.[411] On 27 October 1998, the Slovak authorities promptly granted the request and temporarily removed the specified forest lands from the forest land fund for a period of five years.[412]

355. On 13 November 1998, that Rozmin applied for the first construction permit relating to the Surface Construction—the water management buildings.[413] Yet again, however, Rozmin's request was incomplete, causing the proceedings to become suspended:

> "Based on the submitted documents, the water-management authority held oral hearings dealing with this case and based on the comments provided by proceedings participants and the state administration authorities concerned, ***the authority interrupted the proceedings dealing with the case until supplementation of the filed documents by missing documents***."[414]

356. This was the *third time* that the permitting proceedings concerning the Surface Constructions were suspended because of incomplete applications.

357. While Rozmin was obtaining documentation to supplement its request for the construction permit concerning the water management buildings, it decided to replace the originally planned mining water treatment facility with another water management building—a "sump."

358. As a result of this change, Rozmin had to apply for a change of the zoning permit that had been issued one month earlier. Rozmin's newest change again delayed the already-delayed permitting proceedings. The change was approved on 7 December 1998.[415]

359. On 9 December 1998, Rozmin applied for a construction permit with respect to a second group of buildings belonging to the Surface Construction—special buildings.[416] On 25

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411 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), 27 October 1998, p. 3, **C-0179**.

412 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), 27 October 1998, **C-0179**.

413 Decision of the Department of Environment of the District Office of Rožňava, (Ref. ŠVS - 98/ 09586-Kú), 23 February 1999, p. 1, **C-0187**.

414 Decision of the Department of Environment of the District Office of Rožňava, (Ref. ŠVS - 98/ 09586-Kú), 23 February 1999, p. 6, (emphasis added), **C-0187**.

415 Decision of the Department of Environment of the District Office of Rožňava, No. SP 98/09631/001-0L, 7 December 1998, **C-0172**.

January 1999, Rozmin applied for a construction permit with respect to a third group of buildings belonging to the Surface Construction—standard surface buildings.[417] Yet again, however, Rozmin did not provide the required information, and both proceedings were suspended:

> "After reviewing the application of the developer Rozmin, s.r.o., Šafariková 114, Rožňava, dated December 9, 1998, attached compulsory documentation ***and additional necessary documents delivered upon request of the Department on February 23, 1999,*** we can state that on the basis of this detailed documentation and previous negotiations we can refrain from the on-site examination."[418]
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> * * *
>
> "***Given the fact that the submitted application did not include sufficient documentation for reviewing the proposed structure, the procedure was suspended on February 2, 1999***."[419]

360. This was the *fourth and fifth* suspension of proceedings caused by Rozmin's failure to provide the requested documents.

361. Meanwhile, Rozmin concluded a lease agreement with respect to the removed land plots with Lesy SR.[420] Additionally, Rozmin asked for the removal of one additional land plot from the forest land fund, which had not been removed under the original request.[421]

362. By 22 March 1999, Rozmin supplemented all three requests for issuance of construction permits.[422] With all the necessary documentation filed, the Slovak authorities reacted promptly and issued all three construction permits.[423]

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416 Decision of the Department of Transport and Road Management of the District Office of Rožňava, (Ref. 99/01138-00005), 24 February 1999, p. 1, **C-0188**.

417 Decision of the Department of Environment of the District Office of Rožňava, (Ref. SP 99/01195/003-OL), 23 March 1999, p.1, **C-0186**.

418 Decision of the Department of Transport and Road Management of the District Office of Rožňava, (Ref. 99/01138-00005), 24 February 1999, p.1., (emphasis added), **C-0188**.

419 Decision of the Department of Environment of the District Office of Rožňava, (Ref. SP 99/01195/003-OL), 23 March 1999, (emphasis added), p.1, **C-0186**.

420 Lease Agreement with LESY Košice, 22 December 1998, **C-0181**.

421 Letter from Rozmin s.r.o. to District Office in Rožňava, Department of Lands, Agriculture and Forestry, 20 January 1999, **R-0273**.

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

363. As is standard, the construction permits provided deadlines by which the construction of the buildings must have been completed. In particular, the construction of standard surface buildings had to be completed by 30 June 2001[424] and the construction of water management structures had to be completed by 31 December 2001.[425]

364. In sum, after eight months of delay because of incomplete applications, Rozmin obtained permits necessary for construction of Surface Construction. This proves that it was not "*excessive bureaucracy*" that prevented Rozmin from initiating works in a timely matter; it was submission of incomplete requests and last-minute changes with respect to construction planning that led to the delay in initiating works at Gemerská Poloma deposit.

3. 23 March 1999–25 September 2000: Inactivity of Rozmin despite valid mining and construction permits

365. With valid construction permits in hands, and bearing in mind the obligation to initiate the Opening Works by 31 July 1998, it was anticipated that Rozmin would immediately start with the works at the Surface Construction in order to commence the actual Mining Works and the construction of the exploration decline.

366. Rozmin, however, did not do so.

367. For the next year-and-a-half, Rozmin did not perform any works at the deposit, despite the entry of new shareholder—Belmont—on 24 February 2000[426] and the fact that all

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(Ref. ŠVS - 98/ 09586-Kú), 23 February 1999, **C-0187**; Decision of the Department of Transport and Road Management of the District Office of Rožňava, (Ref. 99/01138-00005), 24 February 1999, **C-0188**.

423 Decision of the Department of Environment of the District Office of Rožňava, (Ref. SP 99/01195/003-OL), 23 March 1999, **C-0186**; Decision of the Department of Environment of the District Office of Rožňava, 23 February 1999 (Ref. ŠVS - 98/ 09586-Kú), **C-0187**; Decision of the Department of Transport and Road Management of the District Office of Rožňava, (Ref. 99/01138-00005), 24 February 1999, **C-0188**.

424 Decision of the Department of Environment of the District Office of Rožňava, (Ref. SP 99/01195/003-OL), 23 March 1999, p. 4, **C-0186**.

425 Decision of the Department of Environment of the District Office of Rožňava, 23 February 1999 (Ref. ŠVS - 98/ 09586-Kú), p. 3, **C-0187**.

426 Agreement on the Transfer of Business Shares in the Company Rozmin s.r.o. between Östu Industriemineral Consult GmbH and Belmont Resources Inc., 24 February 2000, **C-0016**; Agreement on the Assignment of Company Shares in the Rozmin s.r.o. Corp. between Gebrüder Dorfner GmbH & Co. Kaolin- und Kristallquarzsand- Werke KG and Belmont Resources Inc., 24 February 2000, **C-0017**.

necessary permits were issued. There were no legal obstructions preventing it from proceeding with works.

368. What is more, at a general meeting of Rozmin that took place on 29 March 2000,[427] the shareholders of Rozmin were discussing a change of the already-approved alternative of the Opening Works from a 1300 meter long decline to a shaft that belonged to one of the most technically difficult mining works.

369. Mr. Čorej disagreed with this change.[428] Concerned about further delays, he tried to persuade the shareholders to proceed with already-approved method because a change in the plan for the approved opening works would have required a modification to the previously issued permits and, would have resulted in further delay in the commencement of the works by approximately ten months.[429]

370. In their Reply, Claimants' attempt to portray Mr. Čorej as a reason for the postponement of works and as a person who refused the proposal to prepare the documents necessary to put the Opening Works to tender.[430] But no such proposal was on the table.[431] Indeed, Mr. Čorej prevented further postponement of works.

371. Two months later, Rozmin finally decided to proceed with the works and, on 17 June 2000, put out a request for tenders for a contractor.[432] The tender was won by RimaMuráň. The Contract for Construction of Surface Construction and Opening Works was concluded on 22 September 2000.[433]

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427 Minutes of Rozmin's shareholder meeting held on 29 March 2000, **C-0347**.

428 Peter Čorej Second Witness Statement, ¶ 12.

429 Peter Čorej Second Witness Statement, ¶ 12.

430 Claimants' Reply, ¶¶ 343 – 344.

431 Minutes of Rozmin's shareholder meeting held on 29 March 2000, **C-0347**.

432 Monthly Report for the Activities of Rozmin s.r.o. of August and September 2000, p. 2, **C-0217**.

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

4. 25 September 2000–October 2001: Works at the deposit performed by RimaMuráň

372. On 25 September 2000, Rozmin announced the commencement of works at the deposit to the DMO.[434]

373. Before initiating the Mining Works (which includes Opening Works, Preparatory Works and Excavation), RimaMuráň worked on the Surface Construction covering standard surface, water management, and special buildings.[435]

374. By the end of 2000, RimaMuráň had completed the construction of 90% of the Surface Construction.[436] It had not completed the mining water treatment plant construction, which was delayed because of weather conditions.

375. In December 2000, the construction slowed down because of lack of financial support from the shareholders of Rozmin: Belmont and EuroGas I. The situation deteriorated to the point that the miners—whose wages had not be paid—were threatening to strike.[437] The lack of financing with respect to works performed in 2000 was acknowledged by Rozmin in its annual report:

> "In December, as a result of the ***status of project financing*** by the shareholders of Rozmin s.r.o., the progress of the works was limited."[438]

376. This admission is important. It proves that, from the very beginning of works, the project was suffering and not progressing because of financial problems.

377. Thus, it is not true, as Claimants state, that the works were not progressing because of Rima Muráň's financial difficulties[439] and previous "*poor business decisions.*"[440] These allegations are unsupported by any evidence. Based on the Financing Agreement

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

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

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

437 Peter Čorej First Witness Statement, ¶ 39.

438 Rozmin's Annual Report on Activity for the Year 2000, 16 January 2001, p. 4, (emphasis added), **R-0168**.

439 Claimants' Reply, ¶ 340.

440 Claimants' Reply, ¶ 350.

between RimaMuráň and EuroGas GmbH, RimaMuráň had no obligation to provide financing with respect to the project. It was the obligation of EuroGas GmbH, which had undertaken an obligation to pay not only costs corresponding to its 55% shareholding in RimaMuráň, but all costs that RimaMuráň was obliged to pay as a 43% shareholder of Rozmin.[441] Moreover, even if RimaMuráň had financial difficulties, at that time, EuroGas GmbH was a majority shareholder of RimaMuráň and was thus supposed to be actively participating in solving the financial problems of the company RimaMuráň, but it did not.[442]

378. Therefore, any suggestion by Claimants that the works were suspended because of the unhealthy financial status of RimaMuráň is without basis. To the contrary, the problems with progress of works were caused solely by insufficient financing by Claimants.

379. In late December 2000, Rozmin paid some of the amounts that were outstanding, and works were reinitiated.[443]

380. In January 2001, RimaMuráň began building the exploration decline.[444] Thereafter, the first meters were drilled, and the Mining Works were thus initiated. By then, almost *three years* had passed since Rozmin had acquired the Authorization of Mining Activities—and thus *three years* had passed since Rozmin had been allowed to open the deposit, prepare it for Excavation, and excavate.

381. Although the Opening Works were progressing, the Surface Construction was still not completed and the deadlines for its completion contained in the construction permits were approaching. As a result, on 31 May 2001, Rozmin had to apply for an extension of the deadline for the construction of standard surface buildings, which was originally set for 30 June 2001.[445] In its request, Rozmin acknowledged that:

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441 Financing Agreement between EuroGas GmbH and Rima Muráň sro, Article V, 16 March 1998, **C-0136**.

442 Peter Čorej Second Witness Statement, ¶ 19.

443 Peter Čorej First Witness Statement, ¶ 39

444 Peter Čorej First Witness Statement, ¶ 40.

445 Decision of the Department of Environment of the District Office of Rožňava, (Ref. SP 99/01195/003-OL), 23 March 1999, p. 3, **C-0186**.

> "***Due to the delayed commencement (October 2000) and the circumstances accompanying construction launch, the deadline for structure completion cannot be complied with.*** Therefore we request extension of the building permit applicable to the entire structure until March 31, 2002."[446]

382. Consequently, it is clear that the reason that Rozmin had to apply for the postponement of the deadline was its inactivity. If Rozmin initiated the construction works immediately after the issuance of the construction permits, it would not have to ask for an extension.

383. Rozmin's lack of financing continued. On 20 April 2001, RimaMuráň and Rozmin amended the Construction Contract in order to postpone the deadlines for finalization of construction. In the amendment, Rozmin acknowledged its fault for delayed works, stating "*[t]he original contract should be amended due to deadlines for completion of individual construction phases. The deadlines provided in the original contract were not observed due to fault on the part of the customer who failed to fulfill its payment obligations vis-à-vis the contractor. The contractor therefore had to suspend works in line with the original contract*."[447]

384. On 21 June 2001, the DMO extended the deadline for construction of the standard surface buildings until 31 March 2002.[448]

385. However, instead of speeding up the works to finish them within the extended deadline, progress was again delayed because of a dispute between RimaMuráň and Rozmin that arose because of Rozmin's failure to pay for the works.

386. To rectify the situation, RimaMuráň sent to Rozmin several letters in which it asked Rozmin to make the required payments.[449] No payment, however, was forthcoming. As a result, RimaMuráň suspended the works at the deposit.

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446 Rozmin s.r.o.'s Request to the Department of Environment of the Rožňava District Office of Rožňava, 31 May 2001, (Ref. No. 2126), (emphasis added), **C-0235**.

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

448 Decision of the Department of Environment of the District Office of Rožňava, 21 June 2001 (Ref. SP 2001/02784 – O), **C-0236**.

387. On 11 October 2001 Rozmin applied for a change to the construction permit with respect to the standard surface buildings.[450] The reason for this change was the significant reduction in construction.[451]

388. Yet again, Rozmin submitted an incomplete request. It did not pay the required administrative fee and did not provide the required documentation. Because of these shortcomings, the proceedings on change of the construction permit were suspended:

> "The local construction office reviewed the request for the building permit pursuant to Section 58 and Section 59 of the Construction Act. ***Due to the fact that the request does not contain all necessary data and does not provide sufficient background for assessment of the proposed structure, it was necessary to suspend the building proceedings*** until the supplementation."[452]

389. On 15 October 2001, Rozmin informed DMO in writing that the works at the Excavation Area had been suspended effective as of 1 October 2001.[453]

390. Thus, between September 2000 and October 2001, Rozmin did not complete Surface Constitution[454] and drilled only 93.2 meters out of a total of 1300 meters of the exploration decline (only 7%).[455]

5. October 2001–Summer 2004: Second round of Rozmin's inactivity

391. On 1 January 2002, the 2002 Amendment entered into force and the three-year period started to run. Aware of that the Excavation Area would be reassigned if Rozmin failed

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449 Letter from RimaMuráň s.r.o to Rozmin s.r.o., 23 July 2001, **R-0127**; Letter from Rozmin s.r.o. to RimaMuráň s.r.o, 25 July 2001, **R-0169**; Letter from RimaMuráň s.r.o to Rozmin s.r.o., 30 July 2001, **R-0126**; Letter from RimaMuráň s.r.o. to Rozmin s.r.o., 15 August 2001, **R-0170**; Letter from Rima Muráň sro to Rozmin s.r.o., 28 September 2001, **C-0220;** Letter from Rozmin s.r.o. to RimaMuráň s.r.o., 2 October 2001, **R-0171**; Letter from Rima Muráň s.r.o to Rozmin s.r.o, 3 October 2001, **R-0172**; Letter from Rozmin s.r.o to Rima Muráň s.r.o, 4 October 2001, **R-0173**.

450 Letter from Rozmin s.r.o. to District Mining Office in Rožňava, 11 October 2001, **R-0274**.

451 Letter from Rozmin s.r.o. to District Mining Office in Rožňava, 11 October 2001, **R-0274**.

452 Call for Supplementation of the Request for Change of Construction, 15 October 2001, p. 2, (emphasis added), **R-0275**.

453 Letter from Rozmin s.r.o. to the District Mining Office, (Ref. No. 2274), 15 October 2001, **C-0221**.

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

455 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, p. 25, **R-0058**.

to initiate Excavation within three years, one would have expected Rozmin to run a new tender for a contractor to complete the works and to accelerate the works at the deposit.

392. Nothing, however, happened.

393. After RimaMuráň left the deposit, no further works were performed. This site sat idle until Siderit came to the deposit in summer 2004.

394. Meanwhile, the extended deadline for the initiation of the standard surface buildings lapsed. Therefore, on 10 April 2002, Rozmin asked for an extension of the construction permit for the following reason:

> "The entire the structure has been temporarily suspended and no works are carried out on the object of the structure. ***However, the shareholders of Rozmin want to continue in the works yet this year, after resolving all economic and technical problems which conditioned the suspension of the structure.***"[456]

395. As show from this request, Rozmin itself admitted that it was "*economic and technical issues that caused the cessation of the construction."*

396. On 23 April 2002, Rozmin asked for a change of the construction permit with respect to the water management buildings. Its stated reason was the simplification of the constructions.[457] Yet again, however, Rozmin did not submit all the required documentation:

> "Upon hearings and local inspection implemented at the construction site, ***the state water administration authority suspended the proceedings*** by the Decision dated May 31, 2002 to June 30, 2002, ***until the missing documents will be provided***, i.e. statements of the Slovak Forests s.p. Banska Bystrica, Branch of Rožňava, the statement of SWMC, s.e., Branch of the Hron River Basin Banska Bystrica and, in addition, asked by the letter dated May 31, 2002 the District Mining Office in Spišska Nova Ves to take a stand to the proposed change to the Work."[458]

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456 Letter from Rozmin s.r.o. to District Office in Rožňava, 10 April 2002, (emphasis added), **R-0276**.

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

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

397. This was *sixth time* that Rozmin's permitting procedure was suspended because of missing documents.

398. On 26 March 2002, RimaMuráň, suffering from a dire financial situation caused by failure of Rozmin fulfill its payment obligations, transferred its 43% shareholding in Rozmin to EuroGas GmbH, and thus EuroGas I and Belmont remained the sole shareholders of Rozmin.[459]

399. On 23 July 2002, Rozmin asked for a change of the construction permit with respect to special buildings.[460]

400. By 4 October 2002, all requests for change of the construction permits were granted. The new deadline for completion of standard surface buildings was 30 December 2002, and the new deadline for water management buildings was 31 December 2002.[461] In addition to the deadline, the construction permit for water management buildings provided a condition that the Mining Works may only be initiated after the Surface Construction was complete.[462]

401. Meanwhile, almost a year had passed since the works at the Excavation Area had been suspended. Despite having an option to continue with the works at the deposit, Rozmin decided not to do so.

402. At this point in time, the five-year long validity of the Authorization for Mining Activities was coming to an end. Rozmin thus had to ensure that it was extended. In

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

460 Letter from the Department of Transport and Road Administration of the District Office of Rožňava to Rozmin s.r.o., 24 July 2002, **R-0277**.

461 Decision of the Department of Environment of the District Office of Rožňava, (Ref. SP 2002/00325/001-0L), 4 October 2002, **C-0237**; Decision of the Department of Environment of the District Office of Rožňava, (Ref. ŠVS-2002/02214), 9 August 2002, **C-0239**; Decision of the Department of Transport and Road Administration of the District Office of Rožňava, 12 August 2002, **C-0246**.

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

fact, during these five years, Rozmin did not perform any substantial mining activities (except for 93.2 meters of Opening Works) authorized under this Authorization for Mining Activities. Moreover, it was Rozmin's decision to prepare the 1998–2002 POPE only until 31 December 2002, although it did not have to do so.

403. On 5 September 2002—only three months before expiration of its Authorization of Mining Activities—Rozmin submitted a request for its extension. The request contained the following explanation for why no works were performed at the deposit:

> "On 29 November 2001, the mining activity was suspended for a term longer than 30 days, about which you received a notice dated 31 November 2001. Currently, the works are still suspended.
>
> On 13 August 2002, the contractor of the structure, RimaMuráň s.r.o., terminated the contract on realization of the structure, which accepted by Rozmin, and in the course of September the structure will be handed over and accepted. ***Given the change of the shareholders of Rozmin s.r.o., as well as the termination of the contract by the contractor, it is estimated that the mining activity will be commenced in the first half of 2003***."[463]

404. After the first review of the request, the DMO found out that Rozmin—yet again—had not pay the administrative fee. The DMO asked Rozmin to pay the administrative fee.[464] Rozmin's failure to pay the nominal administrative fee upon filing the application was unusual because the law requires that the fee be paid at that time and the need for the DMO to issue a formal request unnecessarily delays the proceedings.[465]

405. After the fee was paid by Rozmin, the DMO conducted the second review of the request and found out that Rozmin had also failed to comply with other statutory requirements. For example, Rozmin failed to submit with its request (*i*) the names and addresses of the participants of the procedure; (*ii*) statements and confirmations to be issued by various entities such as the Municipality of Gemerská Poloma, Lesy SR, which were responsible for the management of the forest covering the excavation area and the authorities responsible for the protection of the nearby source of drinkable water for the district town

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463 Letter from Rozmin s.r.o. to the District Mining Office in Spišská Nová Ves, 5 September 2002, (emphasis added), **R-0251**.

464 Decision of the District Mining Office No. 46/2003, 16 January 2003, p. 2, **C-0225**.

465 Peter Kúkelčík Second Witness Statement, ¶ 8.

of Rožňava, (*iii*) the evaluation of previous works done at the deposit; and (*iv*) update of the submitted POPE for the evaluation of dangers and threats resulting from the proposed mining techniques and for the suggestion of relevant protective measures against these dangers and threats pursuant to the then applicable Act No. 330/1996 Coll. on Safety and Protection of Health at Work, as amended.

406. As a result, on 12 November 2002, the DMO wrote to Rozmin and granted it 45 days to cure these and other defects.[466]

407. Claimants argue that this request of the DMO to supplement the request for Authorization of Mining Activities "*came as a surprise to Rozmin, as all the required statements of approval had been submitted with Rozmin's initial application, and it did not expect that renewed statements of approval would have to be submitted in support of its application for an extension of its Authorization on Mining Activities at Gemerská Poloma.*"[467] This assertion, however, is baseless.

408. As Mr. Peter Kúkelčík, the Head of the Main Mining Office correctly points out in his second witness statement, none of these requirements should have been a surprise for Rozmin because (*i*) "*[a]ll relevant documentary requirements are laid down in the applicable laws and regulations*";[468] (*ii*) Rozmin already had practical experience with necessary documentation because it successfully applied for the Authorization of Mining Activities in 1998;[469] and (*iii*) Rozmin's "*original application related only to the time period ending on 31 December 2002, and it is legally relevant and necessary that the relevant authorities have an opportunity to express their opinion regarding the contemplated continuation or renewal of Rozmin's activities beyond that time period.*"[470]

409. As a result, Rozmin should have been aware of all the requirements that it needed to fulfill—as well as of the fact that applicable law did not allow for an extension of the

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

467 Claimants Reply, ¶ 374.

468 Peter Kúkelčík Second Witness Statement, ¶ 5.

469 Peter Kúkelčík Second Witness Statement, ¶ 10.

470 Peter Kúkelčík Second Witness Statement, ¶ 13.

already-issued Authorization of Mining Activities. Therefore, it was not the "*unpredictable nature of the DMO's decision-making process*"[471] that caused Rozmin's Authorization of Mining Activities to be terminated, but Rozmin's lack of diligence

410. Moreover, it is not true, as Claimants state, that "*no indication was … given in respect of the DMO's requirements for the evaluation of irrecoverable and irremovable danger*"[472] and that "*Rozmin was essentially shooting in the dark, each time doing its best to guess and meet the DMO's requirements*."[473] As Mr. Kúkelčík confirms, "*the applicants for the Authorization of Mining Activities may consult the DMO while they are preparing the application.*"[474] In addition, at least two oral hearings were held at the DMO during this process at which Rozmin's issues could have been discussed.[475]

411. Meanwhile, the deadline for the completion of the standard surface buildings was approaching, and Rozmin had to again apply for an extension on 25 November 2002.[476] In its request for an extension, Rozmin *again* acknowledged that it was its own internal reasons that were the obstacle for the completion of works:

> "***For internal reasons of the company Rozmin s.r.o., as a result of discontinuance of works on the structure by the then shareholder and at the same time the contractor of the works on the deposit opening, the company RimaMuráň terminated the contract on realization of the structure***. The structure was handed over by the stated company and accepted by Rozmin by handover protocol on 24 October 2002.
>
> Therefore, to continue with the structure, it is necessary to conclude, by a selection procedure, a new contract on completion of unfinished surface objects with a new contractor of works and subsequently after putting them into use, to continue in drilling the planned mining works."[477]

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471 Claimants` Reply, ¶ 374.

472 Claimants` Reply, ¶ 381.

473 Claimants` Reply, ¶ 382.

474 Peter Kúkelčík Second Witness Statement, ¶ 6.

475 Decision of the District Mining Office, (Ref. 1494/2003), p.3, 12 August 2003, **C-0227**; Minutes of Oral Hearing, 1 April 2004, **R-0259**.

476 Letter from Rozmin s.r.o. to District Mining Office in Rožňava, 25 November 2002, **R-0278**.

477 Letter from Rozmin s.r.o. to District Mining Office in Rožňava, 25 November 2002, (emphasis added), **R-0278**.

412. On 4 December 2002, Rozmin also asked for an extension of the construction permit for water management buildings.[478] Yet again, Rozmin admitted that the reasons for non-compliance with the deadline were of an internal nature:

> "***The builder asked for the change to the date because of the changed contactor of the Work***; it is necessary to select a contactor of the Work via selection proceedings, as the Contract of Work concluded with RIMA MURA spol. s.r.o. Rožňava was terminated as of October 24, 2002. The proposed date of completion of structures is October 30, 2003."[479]

413. By 19 December 2002, the Slovak authorities granted extensions to both deadlines until 31 October 2003.[480]

414. On 20 December 2002, Rozmin cured some of the defects in its request for an extension of the Authorization of Mining Activities. Rozmin acknowledged, however, that it was unable to submit all of the missing documents and that it would do so as soon as it obtained the approving opinions from the relevant authorities.[481] As a result of missing documents on 16 January 2003, the DMO rendered a decision terminating the proceedings.[482]

415. On 31 January 2003, Rozmin appealed that decision to the MMO[483], which on 15 May 2013 remanded the matter back to the DMO for further proceedings because of non-compliance with procedural rules.[484] Based on the hearing that took place on 30 June

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478 Decision of the Department of Environment of the District Office of Rožňava, (Ref. SVS-2002/02214-Kú), 19 December 2002, **C-0240**.

479 Decision of the Department of Environment of the District Office of Rožňava, (Ref. SVS-2002/02214-Kú), 19 December 2002, p.1, **C-0240**.

480 Decision of the Department of Environment of the District Office of Rožňava, (Ref. SP-2002/04990-002-Po), 17 December 2002, **C-0238**; Decision of the Department of Environment of the District Office of Rožňava, (Ref. SVS-2002/02214-Kú), 19 December 2002, **C-0240**.

481 Letter from Rozmin s.r.o. to District Mining Office, 20 December 2002, **C-0224**.

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

483 Letter from Rozmin s.r.o. to the Main Mining Office, 31 January 2003, **R-0252**.

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

2003, the DMO granted Rozmin 90 days to submit missing information and to cure certain defects of its application.[485]

416. By this time, the construction permits for the Surface Construction were still valid. Therefore, despite the fact that Rozmin was not allowed to perform Mining Works because of the missing the Authorization of Mining Activities, Rozmin still could have worked on the Surface Structures. But it did not. And the validity of permits was lapsing again.

417. Therefore, on 24 September 2003, Rozmin applied for an extension of the permit for temporal removal of land plots from the forest land fund.[486] On 2 October 2003, Rozmin applied for an extension of the deadline for construction of water management buildings until 30 September 2004.[487] The necessity to extend the permits was again not caused by the excessive administrative burden imposed by the Slovak Republic, but rather the financial problems of Rozmin that prevented Rozmin from meeting its deadlines:

> "***As a result of*** suspension of the mining activity on 30 November 2001, of termination of the contractual relationships with the contractor of the works – the firm RimaMuráň s.r.o. Rožňava, as well as of the change of the owners in the company Rozmin, and ***the related financial problems***, ***the deadline for completion of structures could have not been met."***[488]

418. What is more, even *this* request was not complete, and the proceedings on postponement of the deadline for the construction of the water management buildings had to be suspended.[489]

419. On 4 November 2003, Rozmin supplemented its request for Authorization of Mining Activities.[490] But it *still* did not provide all the necessary documents. This was

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

486 Letter from Rozmin s.r.o. to District Office in Rožňava, 24 September 2003, **R-0279**.

487 Letter from Rozmin s.r.o. to District Office in Rožňava, 2 October 2003, **R-0280**.

488 Letter from Rozmin s.r.o. to District Office in Rožňava, 2 October 2003, (emphasis added), **R-0280**.

489 Decision of the Department of Environment of the District Office of Environment in Rožňava, 17 May 2004 (Ref. ŠVS-2003/03792-Kú), **C-0241**.

490 Letter from Rozmin s.r.o. to District Mining Office in Spišská Nová Ves, 4 November 2003, **R-0281**.

particularly remarkable, since the DMO had already granted Rozmin 90 extra days to supplement the filing.[491]

420. As a result, on 27 November 2003, the DMO terminated the proceedings.[492] Meanwhile, almost one year passed since Rozmin started to work on prolongation of its Authorization of Mining Activities. Although Rozmin appealed against the decision on 15 December 2003[493], it withdrew its appeal on 8 January 2004[494] and submitted an entirely new application for the Authorization of Mining Activities.[495]

421. Surprisingly, Rozmin repeated the same mistake that it had made with respect to the first request for an extension of the Authorization of Mining Activities and *again* did not pay the administrative fee.[496] Nor did Rozmin submit the documents that were missing with its previous request.[497]

422. On 6 February 2004, DMO wrote to Rozmin, awarding it 90 days to cure the defects and to submit the missing supporting documentation.[498] This time, Rozmin complied with the DMO's request and, on 10 March 2004, provided all required documentation.[499] As a result, *after a-year-and-half*, on 31 May 2004, the DMO issued a new Authorization of Mining Activities.[500] The authorization was valid through the term of the Rozmin's lease agreement with Lesy SR, š.p. but, in any case, not longer than 13 November 2006.[501]

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

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

493 Letter from Rozmin s.r.o. to the Main Mining Office, 15 December 2003, **R-0254**.

494 Letter from Rozmin s.r.o. to District Mining Office in Spišská Nová Ves, 8 January 2004, **R-0255**.

495 Letter from Rozmin s.r.o. to District Mining Office in Spišská Nová Ves, 8 January 2004, **R-0256**.

496 Letter from the District Mining Office, 23 January 2004, **R-0257**.

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

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

499 Letter from Rozmin s.r.o. to the District Mining Office, 10 March 2004, **R-0258**.

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

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

423. The excessively long period of time necessary for issuance of the Authorization of Mining Activities was not a common practice in mining industry. For example, with respect to other excavation area "Gemerská Hôrka"—where the conditions were similar to those in Gemerská Poloma[502]—it took the applicant only five months to obtain the Authorization of Mining Activity.[503] Moreover, the issuance of the first Authorization of Mining Activities in 1998 took Rozmin only four months. As Mr. Kúkelčík confirms:

> "This shows that the reason for the unusual length of the proceedings for the new decision on Rozmin's Authorization of Mining Activities was Rozmin's own negligent and unqualified approach and lack of cooperation with the DMO rather than the alleged cumbersome nature of the permitting process."[504]

424. Meanwhile, on 17 May 2004, the deadline for completion of water management structures was postponed until 30 September 2004.[505] By this time, there had been no Mining Works at the Excavation Area since October 2001—*i.e.* for almost 31 months. The deposit was abandoned, devastated, and the decline was flooded.

6. Summer 2004–31 December 2004: Works at the deposit performed by Siderit

425. Finally, in summer 2004, Rozmin launched a tender for the performance of the Opening Works at the Excavation Area. Siderit won the tender. When Siderit came to the deposit, however, it was unable to continue in the Mining Works at the Excavation Area because the 93.2 meters of the decline (which RimaMuráň had built through October 2001) were flooded.[506] In addition, under the Decision of the Department of Environment of the

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502 The excavation area had not been mined before, the contemplated mining activities were similar to those in Gemerská Poloma, and the applicant had to file documentary evidence very similar to the documentation required from Rozmin. *See* Peter Kúkelčík Second Witness Statement, ¶ 22.

503 Peter Kúkelčík Second Witness Statement, ¶¶ 22 – 23; Decision of the District Mining Office, 11 October 2002, **R-0260**.

504 Peter Kúkelčík Second Witness Statement, ¶ 24.

505 Decision of the Department of Environment of the District Office of Rožňava, 28 July 2004 (Ref. ŠVS-2004/00172-Ku), **C-0244**.

506 Peter Čorej Witness Statement, ¶ 55; Construction Diary of Siderit, s.r.o. Nižná Slaná, p. 15 (Based on information included therein the water was depleted only in January 2005), **R-0141**.

District Office, the mining activities at the deposit could not have been re-initiated until all surface infrastructures were completed and put into operation.[507]

426. Therefore, in September 2004, Siderit started to work on Surface Construction, including the mining wastewater treatment plant,[508] the rainwater sewage system,[509] and the building that would house the mine's employee lounge and administrative offices.[510] The works at the deposit, however, were impeded because of missing source of electricity.[511]

427. Since the deadline for finalization of water management structures was approaching again, Rozmin had to again apply—for the *third* time—for an extension.[512] The stated reason for this request was as follows:

> "Reasons of the request to extend the deadline:
>
> There were changes in the shareholders of Rozmin s.r.o.- Rožňava (enclosed please find the current extract from the Commercial Register),
>
> A new POPE was prepared for the authorization of the mining activity which was approved by the District Mining Office - Spišská Nová Ves and the mining activity was authorized by a decision dated 31 May 2004, proceedings No. 1023/511/2004 (the decision was sent to you by the District Mining Office),
>
> There was a selection procedure for a new contractor for the opening of the deposit by an exploration decline."[513]

428. The deadline was prolonged on 26 October 2004 until 30 May 2005.[514]

429. On 5 November 2004, Rozmin concluded a Construction Contract with Siderit. On 8 November 2004, four days after concluding its agreement with Siderit, Rozmin informed

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

508 Individual Order for Works from Rozmin s.r.o. to Siderit, 14 September 2004, **C-0254**.

509 Individual Order for Works from Rozmin s.r.o. to Siderit, 27 September 2004, **C-0255**.

510 Individual Order for Works from Rozmin s.r.o. to Siderit, 6 October 2004, **C-0256**.

511 Letter from Rozmin s.r.o. to the District Office in Rožňava, 27 September 2004, **R-0282**.

512 Letter from Rozmin s.r.o. to the District Office in Rožňava, 27 September 2004, **R-0282**.

513 Letter from Rozmin s.r.o. to the District Office in Rožňava, 27 September 2004, **R-0282**.

514 Decision of the Department of Environment of the District Office of Rožňava, 26 October 2004 (Ref. No. ŠVS-2004/00685-Kú), **C-0245**.

the DMO that it intended to resume works at the Excavation Area by 18 November 2004.[515]

430. Nevertheless, Siderit never reinitiated the "*mining activities per* se"—despite Claimants' suggestion to the contrary.[516] Because the mine was flooded and had no permanent source of electricity, Rozmin worked in a limited capacity and only on the construction of the Surface Construction until the end of 2004. The Surface Construction ultimately was never completed.[517]

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431. In view of the foregoing, we invite the Tribunal to reflect on Claimants' representation that the reason Rozmin could not commence Excavation was the Slovak Republic's fault. Contrary to that representation, the above shows:

- Rozmin consistently failed to submit complete requests; and
- Rozmin repeatedly applied for extension of deadlines to complete construction projects because of its own internal problems.

432. In conclusion, Claimants' argument that Rozmin's failure was attributable to the Slovak Republic's "*excessive[] bureaucra[cy]*" is a fiction. The reason Rozmin failed was because of its own negligence and lack of financing.

D. Because of Rozmin's Own Failures, the DMO Was Required by Law to Reassign the Excavation Area

433. Having failed in its first argument that the Slovak Republic was the reason that Rozmin could not commence Excavations, Claimants offer a second argument: that regardless of Rozmin's efforts, the Slovak Republic had pre-determined before the expiration of the

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515 Letter from Rozmin s.r.o. to the District Mining Office, 8 November 2004, **C-0267**.

516 Claimants' Reply, ¶ 439.

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

three-year period to revoke Rozmin's rights to the Excavation Area.[518] This argument is as baseless as the first. The reality is that, by late 2004, there was no question that Rozmin was not going to be able to commence Excavation within the three-year time period.

434. Upon expiry of the three-year period, there was no discretionary competence left for the Slovak Republic. The DMO was statutorily required to *"assign the excavation area to [an]other organization.*"[519] That reassignment was the mandatory result of Rozmin's failures over a multi-year period, which left the site nowhere near the possibility of Excavation by the end of 2004.

435. Claimants advance two arguments to support their allegation that the Slovak Republic pre-decided to revoke Rozmin's mining rights. ***First***, Claimants complain that the DMO published the Notification of the Initiation of the Tender Procedure for the Assignment of the Excavation Area in the Commercial Journal on 30 December 2004—two days before the end of the three-year period.[520]

436. The reason that the DMO did so was because it had previously interpreted the 2002 Amendment to apply retroactively and thus believed that the three-year period had already started to run on 1 October 2001—the day when Rozmin suspended works at the Excavation Area according to its letter to the DMO dated 15 October 2001 (which caused the DMO to believe the three-year period ended on 15 October 2004).[521]

437. The DMO's genuine error was later remedied by the Supreme Court, which held, in its decision of 18 May 2011, that the 2002 Amendment could not have retroactive effects and could only start applying on 1 January 2002. The three-year statutory period to start

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518 Claimants' Reply, ¶ 452.

519 Section 27 (12) of the Act No. 44/1988 Coll., on Protection and Exploitation of Mineral Resources (Mining Act), as amended by the Act No. 558/2001 Coll., that amends and supplements the Act No. 44/1988 Coll. on Protection and Exploitation of Mineral Resources (Mining Act), as amended by the Act of Slovak National Council No. 498/1991 Coll), **R-0062**.

520 Claimants' Reply, ¶ 455.

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

Excavation thus expired on 1 January 2005.[522] The DMO's miscalculation had no consequences for Rozmin, however, which had not commenced Excavation before that time either. But the DMO's miscalculation explains why the DMO published the notice two days before the end of the three-year period.[523]

438. Nor did this publication impact the commencement of the selection procedure. As an administrative proceeding, the selection procedure to assign the Excavation Area commenced only upon the first act of the DMO towards Rozmin—*i.e.*, when the notification on assignment of the Excavation Area dated 3 January 2005 was delivered to Rozmin.[524] The administrative proceeding thus started only *after* the expiry of the statutory three-year period. Therefore, Claimants' first argument shows no unlawful conduct by the Slovak Republic.

439. ***Second***, Claimants argue that the Slovak Republic engaged in "*negotiations*" with interested third parties regarding the re-assignment of the Excavation Area before the lapse of the three-year period.[525] This is another fiction. There was no "*negotiation.*" The re-assignment of the Excavation Area was only possible through a selection procedure. And that is precisely how it was done.

440. In particular, Claimants point to a company, Mondo Minerals, represented by Mr. Keller, which expressed interest in the Excavation Area and started to develop activities aiming at obtaining rights to the Excavation Area. The interest of Mr. Keller in the Excavation Area in late 2004 was not unexpected. Mr. Keller had expressed potential interest in the

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522 Judgment of the Supreme Court of the Slovak Republic, Case No.2Sžo/132/, 18 May 2011, p. 38, **R-0061**.

523 Nor is there any inconsistency between this fact and the fact that Mr. Baffi inspected the site on 8 December 2004. As the Slovak Republic has explained, the inspection was a routine check, which is required whenever works authorized in an Authorization of Mining Activities are started. It is undisputed that Rozmin's contractor Siderit had been performing such works since October. Further, Rozmin still held a valid Assignment of the Excavation Area at that time. Regardless of whether Mr. Baffi thought that the mandatory reassignment had been triggered in October due to retroactive application, Rozmin would lose its Excavation Area only upon the DMO's decision to re-assign the Excavation Area to another company. Until the reassignment, Rozmin was the lawful holder of the Excavation Area and was to be treated accordingly.

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

525 Claimants' Reply, ¶ 456.

project years before—after the initial discovery of the deposit—but ultimately did not invest in the deposit.[526]

441. Later, when Rozmin was established, Mr. Keller made intermittent inquiries about the project and even discussed financial cooperation with Rozmin.[527] In September 2001, representatives of companies belonging to the OMYA Group, including Mr. Keller, made a visit to the Excavation Area during which they received the project documentation relating to the deposit.[528] Although, Mr. Keller stated during the visit that he hoped to join the project by the end of October 2001,[529] OMYA Group came to the conclusion that the project was too risky and declined to join.[530]

442. Thus, it comes as no surprise that, when Mr. Keller learned about the long-term stagnation of works at the Excavation Area, he inquired about possibilities to obtain the Excavation Area and sought Mr. Čorej's cooperation.

443. In 2004, Mr. Keller approached Mr. Čorej, then one of the shareholders of RimaMuráň, with an offer to cooperate in the development of the Excavation Area if Rozmin lost the Excavation Area due to inactivity.[531] It is thus misleading and incorrect for Claimants to call Mr. Čorej an intermediary[532] or representative[533] of the Slovak Republic in the discussions with Mondo Minerals. In reality, Mr. Čorej was acting on his own behalf and in his own interest.[534]

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526 Peter Čorej Second Witness Statement, ¶ 26.

527 Minutes from 4th meeting of shareholders of Rozmin, (SQ-10); **R-0224**; The minutes of the general meeting of the company Rozmin s.r.o., 7 June 2000, p. 2, **R-0245**.

528 Report on visit to the Excavation Area, 26 September 2001, **R-0246**.

529 Report on visit to the Excavation Area, 26 September 2001, **R-0246**.

530 Peter Čorej Second Witness Statement, ¶ 27.

531 Peter Čorej Second Witness Statement, ¶ 28.

532 Claimants' Reply, ¶ 459.

533 Claimants' Reply, ¶ 463.

534 Peter Čorej Second Witness Statement, ¶¶ 21-37.

444. Upon Mr. Keller's request,[535] Mr. Čorej wrote a letter to the then Minister of Economy of the Slovak Republic, Mr. Pavol Rusko, on 24 November 2004, requesting a meeting with the Minister.[536] Mr. Čorej understood that Mr. Keller wanted to meet with the Minister of Economy (which was in charge of the mining sector) before proceeding to participate in the tender because, if successful, it would have meant a significant investment in the country. As Mr. Čorej explains, "*[i]t is not uncommon for investors to want to meet with the relevant minister to discuss the relevant ministry's policies and plans for the future before making significant investments*."[537]

445. One day before the meeting with the Minister took place, on 11 December 2004, Mr. Čorej met in Košice with Mr. Keller and with Mr. Dušan Čellár, the then chairman of the District Mining Office in Košice (not a representative of MMO, as incorrectly stated by Claimants[538]), who was invited to the meeting by Mr. Keller.[539] Mr. Čorej and Mr. Keller tentatively agreed that, if there will be a selection procedure on re-assignment of the Excavation Area, Mr. Čorej would prepare the bid for the project with his company RimaMuráň and Mr. Keller would provide the necessary financing for the bid.[540]

446. The next day, Mr. Keller met with the Minister Rusko as planned. At the meeting, Minister Rusko stated that if Rozmin did not start with the Excavation within the statutory three-year period, "*any interested in the deposit would have to participate in an open tender selection procedure, and no one would be given preferential treatment*"[541] On 13 December 2004, Mr. Čorej took Mr. Keller for a visit of the Excavation Area.[542]

447. Despite initial agreement between Mr. Čorej and Mr. Keller to prepare a joint bid in the selection procedure, ultimately Mr. Keller decided to end his cooperation with Mr.

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535 Peter Čorej Second Witness Statement, ¶ 31.

536 Letter from Mr. Peter Čorej to Mr. Pavol Rusko, 24 November 2004, **R-0247**.

537 Peter Čorej Second Witness Statement, ¶ 30.

538 Claimants' Reply, ¶ 462.

539 Peter Čorej Second Witness Statement, ¶ 32.

540 Peter Čorej Second Witness Statement, ¶ 32.

541 Peter Čorej Second Witness Statement, ¶ 33.

542 Peter Čorej Second Witness Statement, ¶ 34.

Čorej.[543] Instead, a Slovak subsidiary of Mondo Minerals submitted a separate bid. In an email to Mr. Čorej, Mr. Keller expressed his opinion on Claimants' involvement in the project—which was hardly flattering:

> "Since Mondo is one of the world's leading talc producers and has access to an extensive sales network through its parent company Omya, it has best credentials to ensure the commercial success of this project ***unlike previous venture capitalists that have been associated with the project who appeared to be primarily interested in the speculative potential***."[544]

448. Following the decision of Mr. Keller to end cooperation, Mr. Čorej decided to submit his own bid through his spouse's company Economy Agency.

449. Thus, the State did not "*negotiate*" anything. The Minister merely met with Mondo Minerals, which had indicated potential interest in participating in the tender if the deposit was reassigned. Mondo Minerals then decided to end cooperation with Mr. Čorej and submitted its separate bid in the tender which they did not win. So it is unclear what relevance Claimants believe these meetings had in any event.

450. In the end, therefore, Claimants' entire argument hinges on a single meeting with the former Minister of Economy, Mr. Rusko, where there is no evidence that he promised anything to anybody. That does not come remotely close to showing "negotiations" by the State on assignment of the Excavation Area to other organization. Indeed, this meeting could not, and did not, result in the revocation of the Excavation Area from Rozmin, which occurred based on a selection procedure and entirely due to Rozmin's own failure.

451. The transparent and fully lawful nature of the selection procedure on re-assignment of the Excavation Area was confirmed by all committee members who provided their witness testimony on the course of the selection procedure before Slovak criminal authorities. They categorically denied any interventions into their decision-making during the

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543 Email message from Mr. Peter Čorej to Mr. Wulf-Dietrich Keller, 16 February 2005, **C-0358**.

544 Email message from Mr. Peter Čorej to Mr. Wulf-Dietrich Keller, 16 February 2005, (emphasis added), **C-0358**.

selection procedure[545] and re-assured that all bids were submitted in sealed envelopes and these were opened only by the committee members on the day of the selection procedure.[546] As one committee member, Mr. Ľubomír Nedeljak, testified:

> "Investigator's question: Please describe the course of the selection procedure, method of evaluation and evaluation criteria of the submitted bids?
>
> Answer: The course of the selection procedure was as follows. First, the chairman of the DMO SNV notified us of the obligations and rights of a member of the selection committee so that we signed a declaration that we are not biased in the case at issue and that we are obliged to maintain confidentiality regarding the course of the selection procedure. Then, from among the members, the chairman of the selection committee and the minutes clerk were elected. Subsequently, the chairman of the DMO SNV left the meeting room and the selection committee started its activity. ***First, the integrity of each envelope containing a bid was checked.*** Subsequently, the envelopes were opened and the bids were checked whether they meet the prescribed essentials for submission to the selection procedure. Then, the individual committee members got gradually familiarized with the bids. After the familiarization, each committee member scored the individual bids. Optional evaluation criteria were used for evaluation. As far as I remember, these criteria were not strict, evaluation was optional, at the discretion of the individual members, the entire bid as a whole was evaluated. During familiarization with the bids as well as during the entire selection procedure only the selection committee was present in the meeting room, there was nobody else there. The individual members cast their votes individually, they did not discuss regarding voting or anything similar. From the scores made by the individual members, the ranking was made showing the winner of the selection procedure. Subsequently, the chairman of the DMO SNV was invited to whom the chairman of the committee handed over the result of the selection procedure.
>
> […]
>
> Investigator's question: Prior to the beginning of the very selection procedure or during it, did anybody recommend you which of the bids submitted to the selection procedure you should prefer?
>
> Answer: No.
>
> Investigator's question: ***Did anybody influence your decision in any manner?***
>
> Answer: ***No.***

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545 Witness testimony of Mr. Juraj Mihálik, 25 May 2009, **R-0283**; Witness testimony of Mr. Ľubomír Nedeljak, 22 May 2009, **R-0284**; Witness testimony of Mr. Ján Chanas, 25 May 2009, **R-0285**; Witness testimony of Ms. Lýdia Šomšáková, 25 May 2009, **R-0286**; Witness testimony of Mr. Michal Kapusta, 25 May 2009, **R-0287**; Witness testimony of Mr. Karol Piovarczy, 26 May 2009, **R-0288**; Witness testimony of Ms. Tatiana Kúdelová, 25 May 2009, **R-0289**.

546 Witness testimony of Mr. Ľubomír Nedeljak, 22 May 2009, p. 4, **R-0284**.

> Investigator's question: Did anybody offer you a bribe or other benefit to prefer some specific bid submitted in the selection procedure?
>
> Answer: No." [547]

452. Nor could a pre-decided outcome, even if it had occurred (it did not), have impacted Claimants' investment in any event. The 2002 Amendment required that, upon the lapse of the three-year period with no Excavation, the Excavation Area must be cancelled or reassigned. By law, Rozmin was not permitted to participate in the tender and win the Excavation Area back; if it was to be reassigned, it had to be reassigned to a new party. Thus, it is irrelevant for this arbitration which new party won the tender or how they did so. Rozmin lost its investment under the 2002 Amendment and had no right to get it back. As a result, nothing that occurred in the selection process could have harmed Rozmin.

[547] Witness testimony of Mr. Ľubomír Nedeljak, 22 May 2009, p. 4, (emphasis added), **R-0284**.

V. NO SLOVAK JUDICIAL AUTHORITY EVER HELD THAT ROZMIN SHOULD REGAIN THE EXCAVATION AREA

453. As explained above, Rozmin failed to commence Excavation within the three-year period. Each and every administrative and judicial authority that later reviewed the matter reached that same conclusion. And Claimants do not dispute it in this arbitration. For that reason, nothing that happened after that three-year period could have caused any harm to Rozmin, since it had already failed to fulfill the conditions for retaining of the Excavation Area.

454. Nevertheless, Claimants complain about two administrative decisions in their Reply: the DMO's decision after the second Supreme Court decision of 18 May 2011,[548] and the DMO's decision of 12 August 2008 revoking the General Mining Permit.[549] The Slovak Republic addresses each in turn.

A. The DMO Followed Instructions of the Supreme Court and Issued a Lawful Decision on Assignment Of Excavation Area to VSK Mining

455. Claimants misinterpret the second decision of the Supreme Court handed down on 18 May 2011, which cancelled the earlier decision of DMO on assignment of mining rights to the Excavation Area to VSK Mining.[550] Claimants argue that the DMO did not follow binding instructions of the Supreme Court when it reassigned the Excavation Area to the same entity, VSK Mining.[551] This interpretation is highly misleading and does not reflect the real content of the third DMO decision.[552]

456. *To be clear*: the Supreme Court did not reach any conclusions about whether Rozmin complied with the requirement to commence Excavation within the statutory three-year

548 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, **R-0058**.

549 Decision on the Revocation of the Authorization for Mining, 12 August 2008 (Ref. 104-1620/2008) p. 3, **C-0035**.

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

551 Claimants' Reply, ¶ 481.

552 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, **R-0058**.

period.[553] Instead, the Supreme Court laid down conditions for assignment of an excavation area to other organization and remanded the matter to DMO for further proceedings:

> "According to the opinion of the court of appeal, considering the foregoing reasoning, procedure pursuant to Art. 27, par. 12, that is assigning the excavation area to other organization or its cancellation would be appropriate according to the Mining Act effective until 31 1 May 2007 in such a case, ***if after a thorough investigation conducted by the administrative body an information was discovered that the organization to which the excavation area is assigned does not perform any activities in this excavation area, it does not use this area, it does not without any reason perform activities leading to excavation of the deposit or it behaves speculatively.*** If an organization with assigned excavation area artificially delays the start of excavation of the deposit, then it is clearly more effective from the point of view of its use to assign it to other organization."[554]

457. The Supreme Court gave DMO the following instructions:

- to supplement the evidence in order to determine the actual state of affairs;
- to consider the proportionality of the protection of the public's legitimate aim and of the intensity of intervention into Rozmin's rights guaranteed by law; and
- to decide on the case and reason its decision appropriately.[555]

458. The DMO strictly followed all three instructions of the Supreme Court. ***First***, DMO performed a thorough investigation of Rozmin's activities at the site and concluded that Rozmin did not carry out any activities leading to Excavation:

> "Only technical works relating to the opening and preparation of exclusive deposit as laid down in the provision of Section 2(b) of Act No. 51/1988 can be considered as works relating to the excavation of the deposit. This provision details works clearly required to carry out or start the excavation of exclusive deposit, i.e. works relating to the tunneling of the opening mining work - mineshaft, 93.2 m in total length between March 2001 and July 2001 (preparatory works were not carried out at all). Those works were later

553 Respondent's Counter-Memorial, ¶ 328.

554 Judgment of the Supreme Court of the Slovak Republic, Case No. 2Sžo/132/2010, 18 May 2011, pp. 83-84, **R-0061**.

555 Judgment of the Supreme Court of the Slovak Republic, Case No. 2Sžo/132/2010, 18 May 2011, p. 86, (emphasis added), **R-0061**.

> interrupted and never resumed again, or, to put it in other words, ***in the decisive period, i.e. between 1st January 2002 and 1st January 2005, Rozmin, s.r.o. did not carry out any other works leading to the excavation of exclusive deposit***. Other technical works, except for the opening and preparation of deposit for the excavation, cannot be from any perspective considered works leading to the excavation of the exclusive deposit or excavation-related works."[556]

459. ***Second,*** the DMO looked into reasons why Rozmin did not start Excavation of the deposit and concluded:

> "The findings suggested that ***the start of the deposit excavation or actual mining of the talc had not been delayed due to geological or technical conditions in the mine but only due to the insolvency or unwillingness—reluctance of Rozmin, s.r.o. to pay the agreed funds to the organization*** having been implementing the project for the opening of the talc deposit and construction of surface objects and facilities of the future mining activity."[557]

460. ***Third***, the DMO applied the proportionality test. It also conducted a public-interest analysis and concluded that the public interest was in this particular case served by *"using exclusive deposits rationally, i.e. excavating them and not the other way round, i.e. not using = not excavating or blocking them.*"[558]

461. Based on these findings, DMO issued a 84-page decision, which was extremely detailed and thoroughly-reasoned. It reassigned the Excavation Area to VSK Mining. It is therefore not surprising that Rozmin chose not to challenge this final decision of DMO before Slovak courts, because it was issued in full compliance with the Supreme Court's instructions.

B. The Cancellation of Rozmin's General Mining Permit Was Lawful

462. Claimants also complain about the DMO's decision issued on 12 August 2008, cancelling Rozmin's General Mining Permit because (*i*) Rozmin had not appointed a responsible representative for several years and thus the conditions for obtaining the General Mining

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556 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, pp. 187-188, (emphasis added), **R-0058**.

557 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, p. 235, (emphasis added), **R-0058**.

558 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, p. 236, **R-0058**.

Permit were not met for more than three months (Section 4(b) Subsection 4(c) of Act No. 51/1988 Coll., on Mining Activity, Explosives and on the State Mining Administration[559] ("**Law 51**")),[560] and (*ii*) Rozmin did not perform any mining activities at any site in the Slovak Republic for a period longer than three years (Section 4(b) Subsection 4(d) of Law 51[561]).[562]

463. Claimants' complaint is twofold. ***First***, Claimants argue that before this decision was issued, *"Rozmin never suspended mining activities for a period exceeding three years."*[563] The analysis in Section IV above shows that this is incorrect. There is no doubt that Rozmin performed no mining activities as of 2002.

464. ***Second***, Claimants argue that the General Mining Permit's cancellation *"could not be grounded on the absence of mining activities following the re-assignment of the Mining Area to Economy Agency."*[564] That, too, is incorrect. The Regional Court in Košice that confirmed the DMO's decision explicitly stated that it assessed activities of Rozmin in the period from 1 January 2002 to 1 January 2005—*i.e.*, before the assignment of the Excavation Area to Economy Agency—and concluded that Rozmin conducted no mining activity during this period of time.[565]

465. For the same reason, Claimants are wrong to argue that *"Rozmin was unlawfully prevented from carrying out mining activities."*[566] As explained above, the decisive period for determining the failure of Rozmin was *before* any assignment of the Excavation Area occurred. In addition, as the Regional Court in Košice concluded, the

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559 Section 4(b) of the Act No. 51/1988 Coll., on Mining Activity, Explosives and on the State Mining Administration, **R-0290**.

560 Decision on the Revocation of the Authorization for Mining, 12 August 2008 (Ref. 104-1620/2008) p. 3, **C-0035**.

561 Section 4(b) of the Act No. 51/1988 Coll., on Mining Activity, Explosives and on the State Mining Administration, **R-0290**.

562 Decision on the Revocation of the Authorization for Mining, 12 August 2008 (Ref. 104-1620/2008) p. 3, **C-0035**.

563 Claimants' Reply, ¶ 486.

564 Claimants' Reply, ¶ 486.

565 Decision of the Regional Court in Košice, 26 September 2013 (Ref. 6S/28/2009-308), p. 13, **C-0276**.

566 Claimants' Reply, ¶ 486.

State had played no role in Rozmin's lack of activity; that inactivity was entirely based on Rozmin's internal problems.[567]

466. Finally Claimants argue that the failure to appoint a responsible representative as one of the two reasons for revocation of the General Mining Permit had never been raised by the Slovak Republic.[568] That is simply not true. This basis for cancellation was repeatedly mentioned in the DMO's decision of 12 August 2008.[569]

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467. For the foregoing reasons, Claimants' complaints about the Slovak administrative and judicial processes are baseless as well.

567 Decision of the Regional Court in Košice, 26 September 2013 (Ref. 6S/28/2009-308), p. 13, **C-0276**.

568 Claimants' Reply, ¶ 487.

569 Decision on the Revocation of the Authorization for Mining, 12 August 2008 (Ref. 104-1620/2008) pp. 1-3, **C-0035**.

VI. THE SLOVAK REPUBLIC DID NOT BREACH INTERNATIONAL LAW

468. As the Slovak Republic has shown, Rozmin was not a *bona fide* investor seriously interested in the actual exploitation of the Gemerská Poloma talc deposit. Rather, Rozmin was a speculative investor who had deliberately left the Excavation Area idle for years only to create the illusion of activity shortly before the three-year period. The 2002 Amendment was adopted *precisely* to address the situation where, as here, entities assigned to an excavation area sit idly on their rights and engage in speculative practices.

469. In reassigning the Excavation Area, the Slovak Republic thus exercised its sovereign regulatory authority to fulfill the public interest of effectively exploiting its mineral deposits. This is hardly an expropriatory taking or a violation of any other standard of protection under the US-Slovak BIT and the Canada-Slovak BIT. Rozmin's rights to exploit the Excavation Area were conditioned by the requirement to actually start Excavation within three years—and Rozmin, with full knowledge of that condition, forfeited its rights by failing to do so.

470. Claimants essentially complain that the DMO's implementation and interpretation of the 2002 Amendment was erroneous. This argument fails because (*i*) the reassignment was substantively correct—and no Slovak judicial authority ever stated otherwise; and (*ii*) Claimants obtained redress every time Rozmin appealed for each and every procedural error in the DMO's decisions to reassign the Excavation Area.

471. Indeed, while the second decision of the Supreme Court of 18 May 2011 criticized the DMO for insufficient fact-finding as to whether Rozmin indeed started Excavation and thus qualified for reassignment, the Supreme Court never held that the reassignment was substantively incorrect or that Rozmin's rights should be reinstated. And when the DMO faithfully followed the Supreme Court's instructions and, based on a thorough factual investigation, public interest and proportionality analysis, concluded that Rozmin's Excavation Area should be reassigned, Claimants did not bring this decision to courts.

472. On these facts, Claimants have not come close to establishing a violation of international law. And the case law supports that conclusion.

A. The Reassignment of the Excavation Area was a Legitimate Exercise of the State's Regulatory Powers

473. The reassignment of Rozmin's rights to the Excavation Area was a result of the implementation of the 2002 Amendment—a *bona fide* regulatory measure adopted with a clear public interest goal. The 2002 Amendment was enacted to implement a legitimate purpose of public policy: to address the widespread problem of entities assigned to an excavation area sitting idly on those sites and thus reducing the amount of potential revenue that the State could be achieving. This is no *ex post facto* justification; the goal was publicly advertised from the very start of the legislative process leading to the adoption of the 2002 Amendment.

474. The Slovak Republic showed in its Counter-Memorial that investment treaty obligations had to be interpreted against the backdrop of the doctrine of police powers under international law. It pointed to numerous investment tribunals, including *Saluka v. Czech Republic,* holding that *bona fide* regulation adopted within the State's police powers excludes a finding of expropriation with the result that the measure thus adopted is not compensable.[570]

475. In response, Claimants confuse the police powers doctrine with the notion of expropriation. Claimants argue that, even if an expropriation is implemented in public interest, it still requires compensation. Relying on *Azurix v. Argentina*, Claimants argue that "*the few cases in which tribunals have held that States cannot be required to indemnify against the adverse effects of reasonable governmental regulation have been criticized in subsequent awards*."[571]

476. Claimants have missed the point entirety. The point is that application of the police powers doctrine, by definition, *precludes a finding of expropriation*. In other words,

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570 *Saluka Investments B.V. v. The Czech Republic,* UNCITRAL, Partial Award, 17 March 2006 ¶¶ 254-255, 262, **RL-0113**. *See also Marvin Roy Feldman Karpa v. United Mexican States,* ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶103, **RL-0118**; *Total S.A. v. Argentine Republic,* ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, ¶123, **RL-0119**; *Glamis Gold, Ltd. v. The United States of America,* UNCITRAL, Final Award, 8 June 2009, ¶ 804, **RL-0120**; *Tza Yap Shum v. Republic of Peru,* ICSID Case No. ARB/07/6, Award, 7 July 2011, ¶ 95, **RL-0121**.

571 Claimants' Reply, ¶ 556.

precisely because a measure is a *bona fide* exercise of police powers, it cannot constitute a compensable expropriation or any other breach of an investment treaty.

477. This much was effectively confirmed by *Azurix v. Argentina*—the one and only case that Claimants rely on for the attempted assertion that *bona fide* regulation still requires compensation. Claimants argue that the *Azurix* tribunal "*rejected outright the S.D. Myers approach that "parties [to the Bilateral Treaty] are not liable for economic injury that is the consequence of bona fide regulation within the accepted police powers of the State*."[572] That is not true.

478. A fuller quote from *Azurix v. Argentina*—conveniently omitted by Claimants—shows that the tribunal *did* distinguish between non-compensable government regulation and compensable expropriation. The tribunal held that additional criteria—more than mere public interest—were needed to distinguish between non-compensable regulatory action and compensable expropriation and found that proportionality was to be one of such criteria:

> "***For the Tribunal, the issue is not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim.*** In the exercise of their public policy function, governments take all sorts of measures that may affect the economic value of investments without such measures giving rise to a need to compensate. The tribunal in S.D. Myers ***found the purpose of a regulatory measure*** a helpful criterion to distinguish measures for which a State would not be liable: "Parties [to the Bilateral Treaty] are not liable for economic injury that is the consequence of bona fide regulation within the accepted police powers of the State." ***This Tribunal finds the criterion insufficient*** and shares the concern expressed by Judge R. Higgins, who questioned whether the difference between expropriation and regulation ***based on public purpose*** was intellectually viable:
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> "Is not the State in both cases (that is, either by a taking for a public purpose, or by regulating) purporting to act in the common good? And in each case has the owner of the property not suffered loss? Under international law standards, a regulation that amounted (by virtue of its scope and effect) to a taking, would need to be 'for a public purpose' (in the sense of in general, rather than for a private interest). And just compensation would be due. At the same time, interferences with property for economic and financial regulatory purposes are tolerated to a significant extent."

572 Claimants' Reply, ¶ 556.

> The argument made by the S.D. Myers tribunal is somehow contradictory. According to it, the BIT would require that investments not be expropriated except ***for a public purpose*** and that there be compensation if such expropriation takes place and, at the same time, regulatory measures that may be tantamount to expropriation would not give rise to a claim for compensation ***if taken for a public purpose***. ***The public purpose criterion as an additional criterion to the effect of the measures under consideration needs to be complemented.*** The parties have referred in their exchanges to findings of the tribunal in Tecmed. That tribunal sought guidance in the case law of the European Court of Human Rights, in particular, in the case of James and Others. The Court held ***that "a measure depriving a person of his property [must] pursue, on the facts as well as in principle, a legitimate aim 'in the public interest'", and bear "a reasonable relationship of proportionality between the means employed and the aim sought to be realized***". This proportionality will not be found if the person concerned bears "an individual and excessive burden". The Court considered that such "a measure must be both appropriate for achieving its aim and not disproportionate thereto." The Court found relevant that non-nationals "will generally have played no part in the election or designation of its [of the measure] authors nor have been consulted on its adoption", and observed that "there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.
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> ***The Tribunal finds that these additional elements provide useful guidance for purposes of determining whether regulatory actions would be expropriatory and give rise to compensation***."[573]

479. Apart from *Azurix v. Argentina*, this principle has been widely recognized by a number of prominent investment tribunals. The tribunal in *Burlington v. Ecuador* explained this relationship between compensable expropriation and non-compensable exercise of police powers:

> "Accordingly, a ***State measure constitutes expropriation*** under the Treaty if (i) the measure deprives the investor of his investment; (ii) the deprivation is permanent; and (iii) ***the deprivation finds no justification under the police powers doctrine***. The Tribunal will examine these elements in reverse order."[574]

480. Several months ago, the tribunal in *Quiborax v. Bolivia* quoted the foregoing statement from the *Burlington* tribunal with approval:

> "The tribunal in Burlington which the Claimants cite, articulated the standard for a direct expropriation as follows: "a State measure constitutes expropriation

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573 *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award dated July 14, 2006, ¶¶ 310-312, (emphasis added), **CL-0152**.

574 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, ¶ 506, (emphasis added), **RL-0188**.

> under the Treaty if (i) the measure deprives the investor of its investment; (ii) the deprivation is permanent; and (iii) the deprivation finds no justification under the police powers doctrine." This Tribunal agrees with this enunciation of the relevant standard.
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> The Tribunal agrees with the Respondent that, ***if the Revocation Decree was the legitimate exercise of its sovereign right to sanction violations of the law in its territory, it would not qualify as a compensable taking. International law has generally understood that regulatory activity exercised under the so-called "police powers" of the State is not compensable.***"[575]

481. Claimants thus fundamentally confuse a taking, which requires compensation, with a legitimate exercise of sovereign regulatory power, which does not. This was explained by the Reporter's Note to the §712 of the American Law Institute's Restatement (Third) of the Foreign Relations Law quoted by the *Quiborax* tribunal:

> "It is often necessary to determine, ***in the light of all the circumstances, whether an action by a state constitutes a taking and requires compensation under international law,*** or ***is a police power regulation or tax that does not give rise to an obligation to compensate,*** even though a foreign national suffers loss as a consequence."[576]

482. This key principle was also upheld by tribunals in *Chemtura v. Canada*[577] and *Suez v. Argentina*,[578] previously quoted by the Slovak Republic.

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575 *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶¶ 200, 202 (emphasis added), **RL-0158**.

576 *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶ 203, (emphasis added), **RL-0158**, quoting the Restatement (Third) of The Foreign Relations Law (1986), § 712(g).

577 *The Chemtura* tribunal expressly held as follows:

> "Irrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. ***A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation***." *See Chemtura Corporation v. Canada*, NAFTA/UNCITRAL, Award, August 2, 2010, ¶ 266, (emphasis added), **RL-0115**.

578 In *Suez v. Argentina*, the tribunal referred to Saluka v. Czech Republic and stated:

> "As numerous cases have pointed out, in evaluating a claim of expropriation it is important to recognize a State's legitimate right to regulate and to exercise its police

483. Nor do Claimants find refuge in cases such as *Compañía del Desarrollo de Santa Elena v. Costa Rica, Rumeli v. Kazakhstan*, or *Feldman v. Mexico.* Claimants cite these cases for the proposition that compensation is due for an expropriation for public purpose. That, however, is irrelevant. The key is the distinction between a (compensable) expropriation and a (non-compensable) police power regulation—and the reassignment of Rozmin's Excavation Area was without any doubt a police power regulation.

484. The reassignment was an administrative implementation of the Section 27(12) of the 2002 Amendment. This provision was adopted with a clear purpose to promote efficient use of state-owned mineral deposits. It prescribed that an entity that has been assigned an excavation area must commence Excavation within three years from obtaining the excavation area, else it will lose it.[579] This was a clear regulatory delimitation of Rozmin's right to excavate. Claimants nowhere dispute that Rozmin never actually started Excavation of the site.

485. While Claimants disagree about whether actual commencement of Excavation was required, the interpretation of the 2002 Amendment by Slovak authorities was tested by Rozmin in several administrative and judicial proceedings and *none* of the Slovak judicial authorities ever determined that Rozmin's Excavation Area was not to be reassigned.

486. On the contrary, the Supreme Court held that the reassignment would be appropriate if the fact-finding confirms that the entity who has been assigned the excavation area "*does not without any reason perform activities leading to mining the deposit or it behaves*

> power in the interests of public welfare and not to confuse measures of that nature with expropriation.
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> ***
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> In the context of investment disputes, the doctrine of police powers has been referred to, for instance, in Methanex v. United States and Saluka v. the Czech Republic. In this latter decision, the tribunal noted that "the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary law today." *See Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶ 139, **RL-0116**.

579 Section 27(12) of the Act No. 44/1988 Coll., on Protection and Exploitation of Mineral Resources (Mining Act), as amended by the Act No. 558/2001 Coll., that amends and supplements the Act No. 44/1988 Coll., on Protection and Exploitation of Mineral Resources (Mining Act), as amended by the Act of Slovak National Council No. 498/1991 Coll.)," **R-0062**.

speculatively," or "*artificially delays the start of mining the deposit*".[580] The DMO subsequently performed this analysis and, after a thorough examination of any signs of activity that Rozmin performed on the site, concluded that Rozmin was precisely this type of speculative investor.[581]

487. Once the DMO's thorough analysis confirmed that Rozmin did not commence Excavation, it was *required* to reassign Rozmin's Excavation Area.[582] Rozmin did not challenge this decision before the Slovak courts.

488. The reassignment was also non-discriminatory. Rozmin was only one of approximately 30 entities whose excavation areas were tendered out for reassignment on the basis of the 2002 Amendment only in 2005.[583] As the Slovak Republic explains further below, the reassignment was also proportionate because Rozmin could-but failed to- start exploiting the Excavation Area in three years.[584]

489. Hence, the reassignment of the Excavation Area was the legitimate result of the Slovak Republic's police powers regulation. Accordingly, the Slovak Republic cannot be liable for expropriation or any other breach of the U.S.-Slovak BIT or Canada-Slovak BIT.

B. The Administrative and Judicial Processes Did Not Deny Claimants Justice

490. In its Counter-Memorial, the Slovak Republic showed that Claimants' claims on the Slovak Republic's subsequent failure to remedy the reassignment should be assessed against the standard of denial of justice. This is the only plausible standard for Claimants' claims, because they are based on the subsequent operation of Slovak administrative and judicial proceedings not remedying the alleged wrong reassignment of Rozmin's rights. Thus, the gravamen of Claimants' claims is that the application of

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580 Judgment of the Supreme Court of the Slovak Republic, Case No.2Sžo/132/, 18 May 2011, p. 23, **R-0061**.

581 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, p. 159, **R-0058**.

582 As explained above, the 2002 Amendment made it mandatory to reassign the Excavation Area in such a situation. *See* ¶ 432.

583 Respondent's Counter-Memorial, ¶ 312.

584 Respondent's Rejoinder, ¶¶ 519 *et seq*.

Slovak procedural and substantive law by Slovak Republic's authorities was incorrect to the point that it amounts to a breach of the U.S.-Slovak BIT and the Canada-Slovak BIT.

491. This is a textbook denial-of-justice claim.

492. Tellingly, Claimants nowhere expressly object to this characterization of their claims. Rather, they assert that the failure to remedy the reassignment in the subsequent judicial and administrative proceedings itself constitutes an expropriation. They state that "*irrespective of the revocation, per se, of Rozmin's mining rights, the Slovak Republic's disregard of the decisions of its own Supreme Court, when the DMO reassigned Rozmin's mining rights to VSK Mining, in itself constituted an expropriation of Claimants' rights.*"[585]

493. This assertion is incorrect. As emphasized by the tribunal in *Pey Casado v. Chile*, "*the same assets could not be expropriated twice.*"[586] The reassignment was an instantaneous act and the subsequent treatment of the reassignment decision by Slovak authorities should be assessed against the backdrop of denial of justice. As confirmed in *Amco v. Indonesia* and *Jan de Nul v. Egypt*,[587] this is the standard that specifically addresses the interplay between States' responsibility under international law and their decision-making in multi-level administrative or judicial proceedings. It thus constitutes a *lex specialis* for the assessment of the State liability in such matters.

494. As explained below, the Slovak Republic is not liable for a denial of justice for a variety of reasons—not the least of which because Claimants failed to exhaust local remedies.

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585 Claimants' Reply, ¶ 236.

586 *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award 8 May 2008, ¶ 622, **RL-0182**.

587 *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/8, Award, 5 June 1990, **RL-0124**; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, **RL-0125**.

1. Claimants did not exhaust local remedies

495. Denial of justice requires exhaustion of local remedies as a substantive, rather than a procedural, matter. This is because under public international law, a State must always be judged by its final product, and it will only be held liable if the overall process of its decision-making is erroneous.[588]

496. Claimants, however, failed to exhaust the local remedies when Rozmin abandoned the domestic proceedings by not challenging the decision of the DMO (confirmed by its superior authority, the MMO) on the reassignment of the Excavation Area on 1 August 2012. This is fatal to their claims.

497. Claimants find no solace in the academic writings on which they rely for their proposition that ineffective remedies need not be exhausted.[589] Claimants' attempts to use the Slovak judicial system were very effective. There is no better witness than Rozmin itself to just how effective the remedies were.

498. ***First***, Rozmin prevailed before the Slovak Republic's Supreme Court in February 2008. The First Supreme Court's Decision remedied the DMO's failure to conduct the reassignment in a formal administrative proceeding with Rozmin as participant.[590] The DMO subsequently conducted the reassignment following this procedure,[591] and Rozmin thus obtained full redress of DMO's initial procedural error.

499. ***Second***, Rozmin prevailed before the Slovak Republic's Supreme Court in May 2011. In this decision, the Supreme Court found the DMO's fact-finding investigation of Rozmin's activities on the site insufficient and thus remanded the case to it with

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588 Jan Paulsson, Denial of Justice in International Law, Cambridge University Press, 4th edition, 2007, pp. 108, 112, **RL-0123**. *See also* Jan Paulsson, Denial of Justice in International Law, Cambridge University Press, 4th edition, 2007, pp. 108, 112, **RL-0123**.

589 Claimants' Reply, ¶¶ 601 - 612.

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

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

instructions on further fact-finding and analysis of public interest of the reassignment.[592] The DMO again faithfully followed the Supreme Court's instructions and concluded that the reassignment of Rozmin's Excavation Area was in full compliance with the 2002 Amendment and the public interest.[593]

500. Claimants then appealed this decision with the MMO, which confirmed it on 1 August 2012. [594] Subsequently, however, Rozmin abandoned this case. It did not initiate any court proceedings to review the DMO's decision (and the MMO's decision confirming it). Instead, Claimants chose to pursue this international arbitration.

501. This means that each time Claimants challenged the DMO's decision, they were successful. The DMO itself fully remedied all the errors in its first and second reassignment decisions based on the instructions of the Supreme Court. It is thus wholly disingenuous for Claimants to assert that the Slovak Republic's remedies were ineffective.

502. Accordingly, Claimants have not satisfied the substantive requirement of exhaustion of local remedies. For this reason alone, Claimants' Denial-of-Justice claim fails, and the Tribunal need go no further.

2. Claimants' Denial of Justice Claim fails to meet the requisite threshold

503. But even putting aside that Claimants did not exhaust local remedies, Claimants have not satisfied the very high threshold for denial-of-justice claims. Claimants are required to show a systemic failure of the State's decision-making system as a whole,[595] rather than individual erroneous low-instance decisions.[596]

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

593 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, p. 164-165, **R-0058**.

594 Decision of the Main Mining Office, 1 August 2012 (Ref. 808- 1482/2012), **C-0273**.

595 *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic,* PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.764 (emphasis added), **RL-0111**.

596 *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* committee on annulment, 14 June 2010, ¶ 50 (emphasis added), **RL-0129**. *See also Jan de Nul N.V.*

504. There can hardly be a denial of justice where, as here, all the errors in the first and second reassignment decision of the DMO—a first-instance authority—were subsequently remedied based on successful challenges by Claimants. Nor can there be a denial of justice where, as here, Claimants suffered no due process violation and had a fair opportunity to present their case and assert administrative and judicial remedies—which they successfully did.

505. In reality, all Claimants' colorable claims—and the alleged systemic failure of the Slovak Republic—boils down to the complaint that Rozmin never gained its Excavation Area back.[597] And that claim rests entirely on the allegation that Rozmin performed genuine works leading to actual Excavation of the talc deposits at the Excavation Area.[598] This allegation, therefore, is a complaint on substantive misapplication of the 2002 Amendment, an allegation of *substantive* denial of justice.

506. That is not enough. As the Slovak Republic has shown, a denial of justice rarely arises as a result of a *substantive* misapplication of domestic law. Rather, it requires a major due process violation.[599] This is primarily because, as explained in *Generation Ukraine v. Ukraine*, international tribunals do not sit as appellate courts to domestic decision-making authorities, especially with regard to highly-complex or technical matters.[600] Yet that is precisely what Claimants' claim here is—a classic example of a highly-technical and fact-dependent inquiry that should not be decided by this Tribunal acting as a "court of appeals" over the Slovak administrative and judicial system.

507. In any event, the reassignment was substantively correct—and no Slovak authority ever held otherwise. This can be seen through the thorough analysis performed by the DMO in its last decision of March 2012, which Claimants themselves chose not to challenge

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and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award (November 6, 2008), ¶¶ 258-259, (footnotes omitted) (emphasis added), **RL-0125**.

597 Claimants' Reply, ¶ 612.

598 Claimants' Reply, ¶¶ 429, 523, 528.

599 *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, ¶ 279, **RL-0128**.

600 *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶ 20.33 (emphasis added), **RL-0005**.

before Slovak courts. Claimants' claims, assessed as they should be under the standard of denial of justice, thus inevitably fail.

C. The Reassignment Did Not Constitute an Unlawful Expropriation

508. Claimants' claims also fail under the remaining standards of the U.S.-Slovak BIT and Canada-Slovak BIT. The cornerstone of Claimants' case is the allegation that the Slovak Republic unlawfully expropriated Rozmin's right to the Excavation Area. This claim cannot succeed, however, because the reassignment of the Excavation Area did not constitute a taking.

1. The Reassignment Was Not a Taking

509. To establish an expropriation, one must first show a *taking*. Although Claimants rightly state that expropriation does not necessitate an outright taking[601] the tribunal in *ECE v. Czech Republic* clearly explained that a *taking* of some sort is an essential prerequisite for a finding of both direct and indirect expropriation:

> "The Tribunal agrees with the Respondent's submission that, to bring this [*expropriation*] provision into play, ***there must have been some 'taking' of an investment. That applies equally to a claim for indirect expropriation*** or, in the words of Article 4(2), "measures the effects of which would be tantamount to expropriation or nationalization."[602]

510. The reassignment did not constitute a *taking*. As the Slovak Republic explained in detail in its Counter-Memorial, the reassignment of the Excavation Area did not substantially affect Claimants' shareholding in Rozmin, the company through which Claimants purportedly hoped to carry out their business plan. Claimants' sole complaint in relation to their alleged investment in Rozmin is that the value of their shareholding decreased as a result of the reassignment of the Excavation Area.[603]

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601 Claimants' Reply, ¶ 507.

602 *See, e.g., ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic,* PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.811, **RL-0111.**

603 Slovak Republic's Counter-Memorial, ¶¶ 388 and 389.

511. Claimants' reliance on the expansive test for expropriation, advanced most famously by the *Metalclad* tribunal, is of no avail. Under the *Metalclad* test, a measure is expropriatory if it "*deprives the investor of the use or reasonably-to-be- expected economic benefit of property.*"[604] Leaving aside the fact that the *Metalclad* standard of expropriation has been openly criticized by numerous investment tribunals as overly broad,[605] the reassignment simply did not constitute an expropriation even under this expansive standard.

512. The investment decisions relied on by Claimants, where the tribunals found that the removal of license qualified as expropriatory taking, cannot be equated with Claimants' situation. None of the cases cited by Claimants involved a statute that required the license to be revoked if the license holder did not commence activity under the license:

- In *Tecmed v. Mexico*, the investor operated a landfill for two years based on a license, but its application for renewal of the authorization to operate the landfill was then rejected.[606]

- In *CME v. Czech Republic*, the investor operated a television channel based on a television license, but the license was removed by the Czech Broadcasting Authority.[607]

- In *Middle East Cement Shipping v. Egypt*, the investor imported and stored bulk cement based on a license issued for ten years, but the license was revoked shortly before the expiration of this ten-year period.[608]

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604 *Metalclad Corp v. United Mexican States*, ICSID Case No. ARB (AF)/97/1 Award dated August 30, 2000, ¶ 103, **CL-0143**.

605 *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic,* PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.812, **RL-0111**.

606 *See Técnicas Medioambientales Tecmed, S.A. v. United Mexican States,* ICSID Case No ARB(AF)/00/2), Award, dated May 29, 2003, ¶¶ 38-39, **CL-0137**.

607 *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic,* UNCITRAL, Partial Award, 13 September, 2001,¶¶ 8-23, 107, **CL-0140**.

608 *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶¶ 82-83, **CL-0142**.

- In *Starret Housing Corp. v. Iran*, the investor was building a residential housing project based on a contract with an Iranian development.[609]

- In *Metalclad v. Mexico*, the investor acquired a permit for operation of a landfill and started construction. More than two years later, when the construction was completed, the local municipality denied a construction permit on environmental grounds and the investor was thus prevented from operating the landfill.[610] The tribunal, however, found that the reasons given by the municipality for the denial had no basis in how the investor was actually running the landfill.[611]

513. By contrast, Rozmin's rights to the assigned Excavation Area were reassigned under the 2002 Amendment because Rozmin did not commence Excavation within the three-year period and never even came close. Rozmin therefore failed to fulfill the requirements, prescribed by the Slovak Republic's general regulation, to maintain its rights to the Excavation Area. As the tribunal in *Quiborax* recently held, cancellation of a license in such a case does not constitute a taking:

> "***If a State cancels a license or a concession because the investor has not fulfilled the necessary legal requirements to maintain that license or concession***, or has breached the relevant laws and regulations that are sanctioned by the loss of those rights, ***such cancellation cannot be considered to be a taking by the State***."[612]

514. Claimants' residual assertion that the "*Slovak Republic's subsequent disregard of the decisions of its own Supreme Court […] in and of itself constituted an expropriation of Claimants' rights*"[613] fares no better. The Supreme Court never ruled that Rozmin's

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609 Starrett Housing Corporation, Starrett Systems, Inc. and others v The Government of the Islamic Republic of Iran, Bank Omran and others, Interlocutory Award, IUSCT Case No. 24 (ITL 32-24-1), 19 December 1983 in Pieter Sanders (ed), Yearbook Commercial Arbitration 1985 - Volume X, Yearbook Commercial Arbitration, Volume 10 (© Kluwer Law International; Kluwer Law International 1985) p. 237, **RL-0189**.

610 *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶¶ 50, 92, **CL-0143**.

611 *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶¶ 92, 93, **CL-0143**.

612 *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplan v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶ 206, (emphasis added), **RL-0158**.

613 Claimants' Reply, ¶ 546.

rights should be reinstated, as Claimants have misleadingly claimed throughout their submissions. That is why DMO's decisions on the reassignment, implemented faithfully following the Supreme Court's instructions, do not come close to an expropriation.

515. The absence of a taking by itself defeats Claimants' expropriation claim.

2. Rozmin's Excavation Area was Reassigned in Public Interest

516. The reassignment of Rozmin's Excavation Area had a clear public purpose stemming from both the general purpose of the 2002 Amendment as well as its specific application to Rozmin. As the Slovak Republic explained, the 2002 Amendment was adopted with a legitimate purpose—articulated clearly in its Rationale Report—to foster effective use of Slovakia's mineral resources by preventing persons with assigned excavation areas from sitting on their rights indefinitely and engaging in speculative practices.[614]

517. Tellingly, Claimants nowhere dispute that this goal underlying the 2002 Amendment was legitimate. Rather, they rely exclusively on the second decision of the Slovak Supreme Court dated 18 May 2011, which cancelled the reassignment. But Claimants' reliance on the Supreme Court's decision in no way disproves the public interest in the reassignment.

518. On the contrary, the Supreme Court expressly stated that "*the public interest was undoubtedly the most possible effective use of the mining area "Gemerská Poloma*,"[615] but that the fulfillment of this public interest required the DMO to carry out a thorough factual investigation that Rozmin did not commence Excavation on the site. The DMO followed the Supreme Court's decision "to the letter" and performed a thorough review of Rozmin's purported activities on the site.[616] The DMO reasoned that, under the mining regulations in effect, the public interest was best served by the rational use of mineral deposits.[617] The DMO held that public interest in the usage of talc deposit such

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

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

616 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, **R-0058**.

617 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, p. 236, **R-0058**.

as Gemerská Poloma was best served by excavating the deposit and extracting the talc. Conversely, the opposite conduct—the failure to excavate the site or actively blocking Excavation—was *not* in the public interest.[618] The public interest analysis carried out by the DMO thus conclusively supported the reassignment of the Excavation Area to VSK Mining.[619]

3. The Authorization of Mining Activities was irrelevant for the reassignment

519. Claimants also seize on the fact that DMO granted to Rozmin an Authorization of Mining Activities in May 2004, under which Claimants could carry out specific mining activities at the site until November 2006. Claimants argue that, because Rozmin was previously granted this authorization, the 2002 Amendment could not have been a real cause for the subsequent reassignment and the reassignment thus could not have been in the public interest.[620] As the Slovak Republic previously explained, however, the Authorization of Mining Activities was only one of *three separate permits*—each governed by its own set of rules.[621] This was a decision specifying the technical conditions to carry out the mining activities and did not guarantee that Rozmin would continue to hold other required permit, *i.e.* the assigned Excavation Area.

520. The Authorization of Mining Activities provided was no assurance whatsoever that Rozmin has a right to carry out Mining Works at the Excavation Area. Rozmin thus could have lost its assigned Excavation Area even though it held a valid Authorization of Mining Activities. Claimants thus failed in their attempt to disprove the public purpose of the reassignment based on the previous issuance of the Authorization of Mining Activities.

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618 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, **R-0058**.

619 Decision of the District Mining Office on Assignment of Excavation Area "Gemerská Poloma" to other organization, 30 March 2012, p. 164-165, **R-0058**.

620 Claimants' Reply, ¶ 522.

621 Respondent's Counter-Memorial, ¶ 292.

4. The reassignment was proportionate

521. The reassignment was also an entirely proportionate consequence to Rozmin's failure to start Excavation for three years. As Claimants themselves point out, the requirement of proportionality requires that a measure be both appropriate for achieving its aim and not disproportionate to that aim.[622] The reassignment of Rozmin's Excavation Area was in full compliance with these requirements.

522. Once again, Claimants rely solely on the critique of the procedural errors in the reassignment as set forth in the Supreme Court's decision dated 18 May 2011, but they completely disregard the DMO's reassignment decision dated 30 March 2012 that fully implemented the Supreme Court's instruction. A simple review of the DMO's decision shows that the DMO faithfully followed the instruction of the Supreme Court and performed a detailed factual and legal analysis of the proportionality of the reassignment. The DMO found that the reassignment was well-founded and proportionate because Rozmin did not use its Excavation Area effectively between 1999 and 1 January 2005, did not make sufficient efforts to access and excavate the talc deposit, did not obtain sufficient financing, and all the works on the site were of superficial nature only.

523. Claimants' attempt to equate Rozmin's situation with the scenario in *Tecmed v. Mexico* is misplaced. In *Tecmed*, the tribunal condemned Mexican authorities' refusal to renew a permit to operate a landfill to Tecmed's local subsidiary Cytrar. The real reasons for the authorities' refusal to renew Cytrar's permit were unrelated to Cytrar's operation of the landfill. Rather, the refusal to renew the permit was a response to political pressures, including community opposition to the landfill's operation, despite Cytrar's willingness to relocate the landfill to a more convenient location.[623] The (incomplete) extract from

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622 *Azurix Corp. v. Argentina,* ICSID Case No. ARB/01/12, Final Award, dated July 14, 2006, ¶ 311, quoting James and others, **CL-0152**.

623 The tribunal stated:

> "The fact that the real problem was the site of the Landfill and not the manner in which the Landfill was operated by Cytrar is confirmed by the fact that the Mexican federal, state and municipal authorities, including INE, did not hesitate to entrust Cytrar with the construction and operation of a new hazardous waste landfill located outside Hermosillo, with characteristics, activities and a scope apparently wider and more ambitious than the operation in Las Víboras. If these authorities had considered that Cytrar was not a suitable company to operate the Landfill in a prudent and responsible manner, and under

the *Tecmed* award relied on by Claimants merely addresses the unsuitable reaction of Mexican authorities to the public opposition to the landfill which, according to the tribunal, simply did not reach the critical magnitude to justify the removal of Cytrar's permit.[624]

524. Nothing of the kind happened to Rozmin. Unlike in *Tecmed*, the reassignment of Rozmin's Excavation Area was a result of Rozmin's own self-inflicted inability to come even close to actually excavating its assigned Excavation Area in three years. In this situation, it cannot be seriously disputed that the reassignment was the proportionate and appropriate method to implement the public interest objective to exploit the talc reserves at the Excavation Area.

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technical conditions that ensured the protection of the environment, ecological balance and the health of the population, these authorities could not have agreed to —or even proposed— Cytrar's relocation, in good faith and without committing a breach of their obligations. That would entail the possible and almost certain risk that Cytrar's unscrupulous and careless action, allegedly lacking meticulousness in public relations management or in the relationship with the people, would lead to new expressions of condemnation in addition to the predictable damage to the environment and public health. ***This confirms that it was political pressure mainly revolving around the physical location of the site rather than a condemnation of major consequences expressed by the community or a situation originating a serious social emergency due to Cytrar's behavior that motivated the refusal to renew the Permit.***" *See Técnicas Medioambientales Tecmed, S.A. v. United Mexican States,* ICSID Case No ARB(AF)/00/2), Award, 29 May 2003, ¶ 145, (emphasis added), **CL-0137**.

624 The full quote of paragraph 147 partly cited by Claimants states as follows*:*

> "In this case, there are no similar or comparable circumstances of emergency, no serious social situation, nor any urgency related to such situations, in addition to the fact that the Mexican courts have not identified any crisis. The actions undertaken by the authorities to face these socio-political difficulties, where these difficulties do not have serious emergency or public hardship connotations, or wide-ranging and serious consequences, may not be considered from the standpoint of the Agreement or international law to be sufficient justification to deprive the foreign investor of its investment with no compensation, ***particularly if it has not been proved that Cytrar or Tecmed's behavior has been the determinant of the political pressure or the demonstrations that led to such deprivation, which underlie the Resolution and conclusively conditioned it. On the contrary, the commitment by such companies to relocate the Las Víboras operation to a different site, although immediately motivated in the deeply reasonable —though non-altruistic— concern of being able to continue with the commercial exploitation they were engaged in makes it clear that, objectively, such commitment was intended to make a positive contribution to mitigate the socio-political pressure and to continue providing Mexico with hazardous waste landfill services from a new site***. It should be underscored that, as argued in these arbitration proceedings, Mexico urgently needs these services due to a serious lack thereof." *See Técnicas Medioambientales Tecmed, S.A. v. United Mexican States,* ICSID Case No ARB(AF)/00/2), Award, 29 May 2003, (emphasis added), ¶ 147, **CL-0137**.

5. The Reassignment Fully Complied with Claimants' Due Process Rights

525. Claimants' assertion that the reassignment constituted a procedurally unlawful expropriation cannot be sustained either. The reassignment of Rozmin's Excavation Area fully complied with Claimants' due process rights. Claimants suffered from no due process violations and were at all times granted a fair opportunity to present their case.

526. Rozmin was actively using the available administrative and judicial remedies to challenge the reassignment of its Excavation Area from the very start. Rozmin successfully challenged procedural errors in two DMO's decisions and voluntarily abandoned the proceedings when the DMO issued—and the MMO confirmed—the final reassignment decision in full compliance with the Supreme Court's procedural and fact-finding instructions.

527. To be sure, the DMO mistakenly failed to conduct a formal administrative proceeding with Rozmin as a participant in the first reassignment. That error—entirely understandable given the DMO's lack of experience with the novel provision of Section 27 under the 2002 Amendment—was promptly remedied upon Rozmin's judicial challenge.[625]

528. In any event, the DMO's initial error cannot conceivably give rise to a due process violation under international investment law *precisely because* it was remedied. The DMO's initial failure to conduct the reassignment under the framework of administrative proceedings with Rozmin as a participant thus had no impact whatsoever on Rozmin's ability to defend itself against the reassignment. This alone suffices to dismiss any Claimants' due process argument.

529. Rozmin was not a *bona fide* investor taken aback by the sudden and unexpected decision to remove its legitimate rights, as Claimants feign. Rozmin sat on its Excavation Area for years without any activity leading to the actual Excavation of the talc deposit. Its executives were well aware of the 2002 Amendment and its consequences.[626] Only when

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

626 Respondent's Counter-Memorial, ¶¶ 295 – 301.

Rozmin realized that the three-year period to start Excavation was coming to an end did it frantically started to create an appearance of works at the site. Rozmin suffered no due process violation in the reassignment.

D. Slovak Republic Did Not Violate the Standard of Fair and Equitable Treatment

530. Nor did the Slovak Republic violate the fair and equitable treatment standard. Claimants offer no serious authority to rebut the clear requirement, articulated by a myriad of investment tribunals that legitimate expectations may only be based on specific assurances given by the host State at the time when the investor *makes the investment*.[627] Indeed, Claimants nowhere allege that they received any such assurance from the Slovak Republic.

531. Claimants rely solely on an extract from the commentary by *Schreuer and Kriebaum* for the proposition that an investment may be a complex operation rolling over in time and thus, even later assurances could create legitimate expectations as long as they were *relied on by the investor* and *relevant for its investment decisions*.[628] This interpretation is inapposite. As the commentary itself suggests, subsequent assurances could be indeed relevant in situations of complex investment operations where the *acquisition of the investment* has been stretched over into several operations spreading over in time. This occurred, for example, in *AES v. Hungary*, where the tribunal emphasized that the investor's legitimate expectations must necessarily be assessed anew each time the investor acquired additional shareholding—its protected investment—in the local electricity company.[629] Nothing of the sort occurred here.

532. But even accepting *pro tem* that subsequent assurances could give rise to legitimate expectations, Claimants' allegation on the breach of legitimate expectations fails as well. The Authorization of Mining Activities could not give rise to any legitimate expectations

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627 *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 340, **RL-0130**. *See* also *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award dated July 14, 2006, ¶ 318, **CL-0152**.

628 Claimants' Reply, ¶ 570.

629 *AES Summit Generation Limited and AES – Tisza Erömü Kft v. Republic of Hungary,* ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶¶ 9.3.12 – 9.3.18, **RL-0190**.

regarding Rozmin's right to hold its assigned Excavation Area. This is because the subject-matter of the Authorization of Mining Activities was unrelated to Rozmin's ability to hold the assigned Excavation Area.

533. On the contrary, Claimants should have been aware—and indeed were aware[630]—that Rozmin's right to use the assigned Excavation Area was predicated on commencement of actual Excavation in the period of three years. In the face of this mandatory statutory requirement, Claimants' attempt to seek assurances to the contrary in different permits and authorizations clearly fails.

534. Nor can Claimants assert that they had legitimate expectations based on the inspection carried out by Mr. Baffi in December 2004. Aside from the fact that this did not occur at the time Claimants made their alleged investment, the Slovak Republic has already explained that Mr. Baffi's inspection was not intended to verify whether Rozmin had commenced Excavation within the three-year period under the 2002 Amendment, in fact it had nothing to do with that enquiry. The only purpose of the inspection was to verify that Rozmin's contemporaneous on-site activities were in accordance with Slovak mining regulations—and Mr. Baffi's conclusion was they were.

535. Claimants' claim that the Slovak Republic acted non-transparently also rings hollow. ***First***, Claimants cannot derive any transparency violation from DMO's initial failure to conduct the reassignment in formal administrative proceedings with Rozmin as participant, because that initial error had no impact on Rozmin and was fully remedied upon Rozmin's judicial challenge. It is therefore disingenuous for Claimants to argue that Rozmin had no opportunity to present its case on the taking.[631] In any event, this initial mistake of the DMO has nothing to do with the requirement of transparency—even under Claimants' formulation of that standard requiring "*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.*"[632]

630 Respondent's Counter-Memorial, ¶¶ 295 – 301.

631 Claimants' Reply, ¶ 583.

632 Claimants' Reply, ¶ 580. *See also* Claimants' Memorial, ¶ 312.

536. ***Second***, Claimants' new theory that the reassignment was allegedly pre-decided is fabricated. As the Slovak Republic explained above, the DMO initially genuinely believed that the three-year statutory period to commence Excavation under the 2002 Amendment would expire on 1 October 2004. DMO had in no way pre-decided the reassignment.

537. ***Third***, the DMO transparently and correctly interpreted the term *Excavation* (*dobývanie*) under the 2002 Amendment and concluded that Rozmin's had not commenced Excavation within the meaning of that term.

E. The Slovak Republic Did Not Violate the Standard of Non-Impairment

538. Similarly, Claimants' allegation that the Slovak Republic violated the standard of non-impairment by unreasonable or arbitrary measures fails because it is based on the very same false predicaments as the rest of Claimants' claims. The reassignment was substantively correct. As the DMO investigation confirmed, Rozmin did not commence Excavation under the 2002 Amendment and did not even come close. Rozmin thus fell within the scope of the Section 27(12) of the 2002 Amendment justifying the reassignment of its Excavation Area. The reassignment was a reasoned and reasonable measure justified both under the wording and the underlying public interest of the 2002 Amendment to foster effective use of the mineral deposits owned by the Slovak Republic. Under Claimants' standard of reasonableness requiring "*a reasonable relationship to some rational policy*,"[633] the reassignment was reasonable.

539. Moreover, any and all errors in the Slovak Republic's administrative and judicial proceedings were remedied and had no impact on Rozmin. These errors thus do not come close to reaching the standard for arbitrariness formulated by the International Court of Justice in *E.L.S.I*[634]—and Claimants nowhere take issue with the high threshold for arbitrariness articulated in that case.

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633 Claimants' Memorial ¶ 362 quoting **CL-0151**, ¶ 460.

634 *Elettronica Sicula S.P.A. (ELSI)*, Judgment, 20 July 1989), I.C.J. Reports 1989, p. 76, ¶ 128, **RL-0132**.

F. The Slovak Republic Did Not Breach the Standard of Full Protection and Security

540. Nor did the Slovak Republic breach the standard of full protection and security. The Slovak Republic showed in its Counter-Memorial that the standard of full protection and security prescribes a minimum duty of due diligence in the event of threats or actual injury to aliens attributable to a third party.[635] Claimants, however, nowhere make such a claim. On the contrary, Claimants complain exclusively of actions of the Slovak Republic's authorities.

541. Relying on *Biwater Gauff v. Tanzania*[636] and a commentary by Christoph Schreuer,"[637] Claimants argue that the full protection and security standard extends to actions of State authorities. That view has been rejected in numerous investment cases. For example, the tribunal in *Eastern Sugar v. Czech Republic* stated in no ambiguous terms:

> "As the Arbitral Tribunal understands it, the criterion in Art. 3(2) of the BIT concerns the obligation ***of the host state to protect the investor from third parties,*** in the cases cited by the Parties, mobs, insurgents, rented thugs and others engaged in physical violence against the investor in violation of the state monopoly of physical force. ***Thus, where a host state fails to grant full protection and security, it fails to act to prevent actions by third parties that it is required to prevent***."[638]

542. The tribunal in *Ulysseas v. Ecuador* more recently held:

> "It is Claimant's view that "full protection and security" and "fair and equitable treatment can be considered together, "*as both treatments require the State to provide stability and predictability."*
>
> The Tribunal does not share this view. ***Full protection and security is a standard of treatment other than fair and equitable treatment, as made manifest by the separate reference made to the two standards by Article II (3)(a) of the BIT. This standard imposes an obligation of vigilance and care by the State under international law comprising a duty of due diligence for the prevention of***

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635 *El Paso Energy International Company v. The Argentine Republic*, Award, 31 October 2011, ¶¶ 522-523, **RL-0056**.

636 *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award, dated July 24, 2008, at ¶¶ 729 *et seq*., **CL-0031**.

637 Claimants' Reply, ¶ 623 quoting Christoph Schreuer, Full Protection & Security, Journal of International Dispute Settlement, (2010), p. 6, **CL-0256**.

638 *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, ¶ 203, (emphasis added), **RL-0191**.

> ***wrongful injuries inflicted by third parties to persons or property of aliens in its territory or, if not successful, for the repression and punishment of such injuries***."[639]

543. A similar conclusion was reached by the tribunal in *Electrabel v. Hungary*.[640]

544. The findings of the tribunals in *Ulysseas v. Ecuador* and *Electrabel v. Hungary* apply with equal force to Claimants' claims. Both the U.S.-Slovak BIT and the Canada-Slovak BIT articulate the standard of full protection and security separately from the standard of fair and equitable treatment.[641] That is why Claimants cannot obfuscate the two standards and make the very same claims under both standards.[642] As a result, the standard of full protection and security must be understood as a standard different from the standard of fair and equitable treatment which prescribes a duty of due care to prevent third party injury and is therefore wholly inapplicable to Claimants' claims.

545. But even if the Tribunal were to apply the expansive interpretation of the standard as in *Biwater Gauff v. Tanzania*, the Slovak Republic still did not breach that standard. As shown above, the reassignment of Rozmin's Excavation Area was substantively correct and in full compliance with the 2002 Amendment, a regulatory act adopted to pursue a

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639 *Ulysseas, Inc. v. Ecuador*, Final Award, 12 June 2012, ¶¶ 271-272 (emphasis added), **RL-0178**.

640 The tribunal in *Electrabel v. Hungary* stated: "In the Tribunal's view, ***given that there are two distinct standards under the ECT, they must have, by application of the legal principle of "effet utile",* a different scope and role**. The Tribunal ***generally concurs with the description given by the El Paso award of the scope of an FPS standard, as follows***: "(…) A well-established aspect of the international standard of treatment is that ***States must use "due diligence" to prevent wrongful injuries to the person or property of aliens caused by third parties within their territory, and, if they did not succeed, exercise at least "due diligence" to punish such injuries***." *See Electrabel S.A. v. Republic of Hungary,* ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 7.83, (emphasis added), **RL-0192**.

641 The standard of full protection and security is set out in Article II.2 (a) of the U.S.-Slovak BIT as follows: "***Investment shall at all times be accorded fair and equitable treatment***, ***shall enjoy full protection and security*** and shall in no case be accorded treatment less than that required by international law."

> Similarly, Article III. 1(a) of the Canada-Slovak BIT states: "Investments or returns of investors of either Contracting Party shall at all times be accorded treatment in accordance with the customary international law minimum standard of treatment of aliens, ***including fair and equitable treatment and full protection and security***."

642 Claimants' Memorial openly states that "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". *See* Claimants' Memorial, ¶ 371.

legitimate public policy interest where entities such as Rozmin fail to start actual Excavation at the Excavation Area. As explained in *AES v. Hungary* :

> "In the Tribunal's view, the duty to provide most constant protection and security to investments is a state's obligation to take reasonable steps to protect its investors (or to enable its investors to protect themselves) against harassment by third parties and/or state actors. But the standard is certainly not one of strict liability. ***And while it can, in appropriate circumstances, extend beyond a protection of physical security, it certainly does not protect against a state's right (as was the case here) to legislate or regulate in a manner which may negatively affect a claimant's investment, provided that the state acts reasonably in the circumstances and with a view to achieving objectively rational public policy goals***."[643]

546. The reassignment of the Excavation Area thus could not plausibly give rise to a violation of the full protection and security standard.

G. The Slovak Republic Did Not Breach the Umbrella Clause

547. Finally, Claimants' umbrella clause claim cannot be sustained. The Slovak Republic never undertook any commitment that Rozmin's Excavation Area would not be reassigned under the 2002 Amendment.

548. As set forth in the Slovak Republic's previous submissions, umbrella clauses cover only consensual legal obligations entered into with a foreign investor. This was famously articulated by the *ad hoc* committee in *CMV v. Argentina*:

> "In speaking of "any obligations it may have entered into with regard to investments", it seems clear that Article II(2)(c) is concerned with consensual obligations arising independently of the BIT itself (i.e. under the law of the host State or possibly under international law). Further they must be specific obligations concerning the investment. They do not cover general requirements imposed by the law of the host State."[644]

549. The Slovak Republic never entered into any such consensual legal obligation towards Claimants' investment. This alone defeats Claimants' umbrella clause claim.

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643 *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary,* ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶ 13.3.2, (emphasis added), **RL-0190**.

644 *CMS Gas Transmission Company v. Argentine Republic,* ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, ¶ 95, **RL-0193**.

VII. CONCLUSION

550. For the foregoing reasons, the Slovak Republic requests the following relief:

(a) a declaration dismissing Claimants' claims;

(b) an order that Claimants pay the costs of these arbitral proceedings, including the cost of the Arbitral Tribunal and the legal and other costs incurred by the Slovak Republic, on a full indemnity basis; and

(c) interest on any costs awarded to the Slovak Republic, in an amount to be determined by the Tribunal.

551. The Slovak Republic reserves the right to modify or supplement the claims and arguments in this submission as permitted by the Tribunal.

Submitted on behalf of Respondent

29 December 2015

[Signed]

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