



School of International Arbitration

IACL
International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law**

*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Award Name and Date: EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic (ICSID Case No. ARB/14/14) – Award – 18 August 2017

Case Report by: Oisín Challoner**, Editor Ignacio Torterola***

Summary: Claimants brought an action for relief against the Slovak Republic pursuant to the US-Slovakia and Canada-Slovakia BITs alleging that the Slovak Republic breached, *inter alia*, fair and equitable treatment, full protection and security, and expropriation protections in the BITs in relation to an investment in a talc deposit in the Košice region of the Slovak Republic. The Tribunal concluded that it lacked jurisdiction over the dispute in relation to either claimant due to the lack of continuity of the investment’s claim through an alleged *de facto* merger under Utah law and, ultimately, the date upon which the alleged claim had accrued under the BITs’ *ratione temporis*.

Main Issues: validity of a merger under domestic law for jurisdictional purposes under the BIT; estoppel of respondent state in relation to jurisdiction; dispute’s accrual for the purposes of the BITs jurisdiction *ratione temporis*.

Tribunal: Professor Pierre Mayer (President), Professor Emmanuel Gaillard (Arbitrator) and Professor Brigitte Stern (Arbitrator)

Claimant’s Counsel: Ms. Mona Lyman Burton, Ms. Maureen Witt (Holland & Hart LLP representing EuroGas Inc.); Dr. Hamid Gharavi, Mr. Emmanuel Foy (Derains & Gharavi representing Belmont Resources Inc.)

Respondent’s Counsel: JUDr. Ing. Andrea Holíková (Ministry of Finance of the Slovak Republic); Mr. Stephen P. Anway (Squire Patton Boggs (US) LLP); Mr. David Alexander (Squire Patton Boggs (US) LLP); Mr. Rostislav Pekař, Ms. Mária Poláková (Squire Patton Boggs s.r.o., advokátní kancelář); Mr. Raúl B. Mañón (Squire Patton Boggs (US) LLP); Ms. Eva Cibulková (Squire Patton Boggs s.r.o.)

* Directors can be reached by email at ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Oisín Challoner is a legal intern at the Association for International Arbitration. He holds an LLB degree in Pure Law European from University College Dublin and a Master in Investment Treaty Arbitration from Uppsala University. IACL’s case reports do not offer personal views but strictly reflect the content of the decision. However, in case of doubts, the views set forth herein are the personal views of the author and do not reflect those of ACICA or the IBA. Mr. Challoner can be contacted at oisin.challoner@ucdconnect.ie

*** Ignacio Torterola is co-Director of International Arbitration Case Law (IACL) and a partner in the International Arbitration and Litigation Practice at GST LLP.

Digest:

1. Relevant Facts

EuroGas Inc. ('EuroGas' or 'EuroGas II') is a company incorporated under the laws of the state of Utah, United States, and Belmont Resources Inc. ('Belmont') is a company incorporated under the laws of Canada (referred to collectively as 'Claimants'). Respondent is the Slovak Republic ('Slovakia' or 'Respondent') (¶¶ 3-6). The case concerned a dispute arising out of the Claimants' alleged interest in the Gemerská Poloma talc deposit ('GPS') located in the Košice region of the Slovak Republic (¶ 8). The Slovakian Government had sought private capital from foreign investors in order to develop the deposit (¶ 11). Rozmin s.r.o ('Rozmin') was a company incorporated under the laws of the Slovak Republic (¶ 17). Rozmin was issued a General Mining Authorization valid for an indefinite period and which authorized Rozmin to carry out mining activities on exclusive deposits in the Slovak Republic subject to its compliance with other statutory and regulatory requirements. The Mining Area was then transferred to Rozmin on 5 June 1997 (¶¶ 18-19) under the auspices of the 'Mining Act,' which stipulated that an organization's right to excavate an exclusive deposit arises when the District Mining Office assigns the excavation area to it (¶ 15).

On 16 March 1998, EuroGas became an indirect shareholder in Rozmin (¶ 25). Rozmin then secured numerous official approvals, permits and leases which allowed it to begin construction works (¶ 28). They also commissioned models and reports intended to verify the quality of the talc deposit (¶ 29).

The Slovak Parliament passed an amendment to the Mining Act which took effect on 1 January 2002 ('2002 Amendment'), introducing a new rule applicable to entities which are assigned an excavation area: if they do not begin the excavation within three years of the assignment, or if the excavation is interrupted for more than three years, the excavation area would be cancelled or reassigned (¶ 35).

On 5 September 2002, Rozmin applied for an extension of their mining authorization, which was then granted on 13 November 2006 (¶ 39). A closure of this procedure, however, in the intervening period had resulted in the authorization's lapse from 1 October 2001 and 18 November 2004, a period of more than three years (¶ 43). On 21 April 2005, a tender procedure took place for the assignment of the Mining Area which was awarded to another Slovak company (¶¶ 42-44); this company was later absorbed by VSK Mining s.r.o. ('VSK Mining') (¶¶ 46).

Having learned of this reassignment, Rozmin initiated local proceedings in the Slovakian courts, which culminated in a Supreme Court finding that the 2002 Amendment did not have retroactive effect, that the decision to revoke Rozmin's rights was "premature, unclear and insufficiently reasoned," and that the assignment to VSK Mining was unlawful and further proceedings should be taken by the District Mining Office ('DMO') (¶ 53).

On 31 October 2011, EuroGas sent a notification of their claim based on the US-Slovakia BIT alleging that Respondent had failed to comply with the Slovakian Supreme Court's judgment when, on 30 March 2012, the DMO reassigned exclusive rights over the Mining Area to VSK

Mining (¶ 54-55). On 23 December 2013, Claimants sent final notice of their dispute under the US-Slovak Republic and Canada-Slovak Republic BITs, alleging Slovakia had breached the protection standards of the relevant BITs, including, *inter alia*, those relating to expropriation, fair and equitable treatment and full protection and security (¶¶ 61 & 69).

It is also relevant to note that, according to the Claimants, EuroGas is a continuation of a company named EuroGas Inc. ('EuroGas I') (¶ 4). In 2001, EuroGas I had been administratively dissolved under Utah law (¶ 62). On 28 October 2016, the trustee of EuroGas I's estate succeeded in having an agreement approved by the Bankruptcy Court to the effect that the estate would "abandon *nunc pro tunc*" whatever interest the estate had in Rozmin and EuroGas GmbH (¶ 66).

2. Procedural History

Claimants filed a Request for Arbitration with ICSID on 27 June 2014, which was registered by ICSID on 10 July 2014 (¶¶ 73-75). The Tribunal was constituted on 20 January 2015 (¶ 83). Claimants submitted an Application for Provisional Measures on 8 July 2014 (¶ 84) which resulted in an exchange of submissions, including a letter from the Claimants to the President of the European Commission (¶ 87) and an Opposition to Claimants' Application for Provisional Measures submitted by the Respondent on 10 September 2014 (¶ 89).

The first session and hearing on provisional measures was held on 17 March 2015 at the ICC in Paris (¶ 101). On 24 March 2015, the Tribunal informed the Parties of its decision not to bifurcate the proceedings between jurisdiction and merits, but instead to hear jurisdiction and merits in a single phase, which would be followed if necessary by a phase on quantum (¶ 112). On 1 April 2015, the Tribunal issued Procedural Order No. 1 which designated the applicable Arbitration Rules as those in effect from 10 April 2006, that the procedural language would be English and that the place of proceeding would be Paris, France (¶ 113). On 16 April 2015, the Tribunal issued Procedural Order No. 2 addressing public access to hearings and documents, decided pursuant to Annex B of the Canada-Slovakia BIT (¶ 114). On 25 June 2015, the Tribunal issued its Decision on the Parties' Requests for Provisional Measures (Procedural Order No. 3), in which it denied both applications for provisional measures (¶ 102).

Claimants submitted their Memorial on 31 March 2015 along with related materials (¶ 116). Respondent submitted their Counter-Memorial on 30 June 2015 along with related materials (¶ 117). On 29 June 2015, Claimants wrote to Respondent requesting that the latter's expert Ms. Annette W. Jarvis step down on the basis that she lacked independence (¶ 118); when this request was not complied with (¶ 120), Claimants submitted on 19 August 2015 a letter to the Tribunal requesting that Ms. Jarvis' opinion be considered a Party Submission and not an independent expert report (¶ 121). On 28 August 2015, the Tribunal informed the Parties that Ms. Jarvis' report would remain an expert report, but that "[t]he Tribunal [would] assess its probative value, taking in consideration all relevant circumstances, which may include those which the Parties have debated in their recent letters" (¶ 122). On 26 August 2015, the Tribunal issued Procedural Order No. 4 which decided on the Parties' document requests (¶ 124). On 16 September 2015— at the Claimants request— the Tribunal extended the deadline for the submission of the Rejoinder to 29 December 2015 (¶ 124). Claimants filed their Reply on 29 September 2015 along with related materials (¶ 125). Respondent filed its Rejoinder on 29 December 2015 (¶ 127). EuroGas, Belmont and Respondent each filed a Statement of Costs on 14 November 2016 (¶ 198).

3. Positions of the Parties

3.1 Respondent's Position on the Tribunal's jurisdiction

Respondent submitted that the Tribunal lacked jurisdiction over EuroGas' claims because (a) EuroGas did not own the alleged investment in the Slovak Republic and therefore had no standing to bring its claims and (b) the Respondent had validly denied the benefits of the US-Slovakia BIT to EuroGas, a company without substantial business activities in the United States which was controlled by a German national.

Respondent also submitted that jurisdiction was lacking for Belmont's claim as (a) Belmont had sold its ownership in the alleged investment to EuroGas I in 2001 and thus did not own it and (b) the Canada-Slovak BIT only covered disputes arising after 14 March 2009, and all of the breaches of the treaty alleged by the Claimants occurred prior to that date (¶¶ 200-201).

3.1.1 EuroGas did not in fact own the alleged investment in the Slovak Republic, and thus had no standing to bring its claims.

Respondent alleged that Claimants had misrepresented EuroGas' identity in this regard; investigation of EuroGas' standing as a company incorporated in Utah revealed that the entity in the instant case, which was incorporated in 2005, was unsubstantiated: this resulted in a "EuroGas I/EuroGas II" system of reference between the two entities (¶ 203-204). They alleged that, as a result of this finding, EuroGas had since presented "one false explanation after another" in regards their standing as claimant (¶ 205).

3.1.2 EuroGas did not emerge from bankruptcy with the alleged investment under U.S. Bankruptcy Law

Respondent argued that neither EuroGas II nor McCallan Oil & Gas ('McCallan')— a U.K. company through which Claimants alleged EuroGas II had acquired their interest in Rozmin— could ever have acquired interest in the investment, as EuroGas I did not retain its interest in the investment following the bankruptcy (¶ 206). Respondent relied on the specificities of the relevant U.S. Bankruptcy Law provisions, including the distinction between Chapter 7 and Chapter 11 proceedings (¶ 207) as well as Section 554 of the Bankruptcy Code (¶ 208). Their application of this legal framework lead to the conclusion that EuroGas I's interest in Rozmin remained with the bankruptcy estate (¶ 211). Respondent also alleged that Claimants' arguments were wrong as a matter of fact as "[n]ot only is there no evidence that the EuroGas Trustee knew of EuroGas I's interest in Rozmin, but there is evidence to suggest that EuroGas I affirmatively concealed it" (¶ 213).

3.1.3 Even had EuroGas I retained interest in Rozmin, the Tribunal would still lack jurisdiction

Respondent submitted that, even had EuroGas I retained its interest in Rozmin, the Tribunal would lack jurisdiction nevertheless, as EuroGas II could never have come to possess the alleged investment (¶ 216). They deny that EuroGas II could have "stepped into the shoes" of EuroGas I, as Claimants' reliance on the Joint Unanimous Consent Resolution entered into on 31 July 2008 was a "sham document" which was invalid under Utah law and U.S. Bankruptcy law (¶ 217).

3.1.4 Respondent rejects Claimants' theory of a common law "de facto" merger

Respondent argued that EuroGas II could not have merged with EuroGas I or assumed the alleged investment (¶ 224). Respondent argued this point on two grounds.

Firstly, that the doctrine was only applicable in successor liability cases as a remedy to protect creditors of an entity that sells substantially all of its assets to another entity but retains its liabilities (¶ 220). Therefore, it could not operate to merge two entities engaged in an asset acquisition as EuroGas I and II had been.

Secondly, that EuroGas I did not have the capacity to merge with EuroGas II under Utah law as, under Utah law, dissolved corporations could not merge (¶ 221). They supplemented this argument by relying on the Utah Code, which stated that a dissolved corporation "may not carry on any business except that appropriate to wind up and liquidate its business and affairs," while also claiming that a dissolved corporation that had failed to seek reinstatement within the two-year period "ha[d] no legal capacity" and could not carry out any activities (¶¶ 222-223).

3.1.5 EuroGas I's purported merger would be ineffective due to non-compliance with provisions of Utah law

Respondent submitted that, even assuming EuroGas I had the legal capacity to merge under Utah law, the purported merger would still be ineffective as it was not registered with the Utah Division of Corporations as required by Utah law (¶ 225). Under U.S. Bankruptcy law, the Respondent argued that EuroGas I also lacked the capacity to merge pursuant to Section 727(a)(1) of the Bankruptcy Code, which prohibits a court from discharging a corporate debtor's debt in a Chapter 7 proceeding (¶ 226).

3.1.6 The Joint Unanimous Consent Resolution lacked retroactive effect

Respondent submitted that Utah corporate law expressly prohibited mergers from being effective retroactively; when the bankruptcy petition against EuroGas I was filed on 18 May 2004, an "automatic stay" came into effect under Section 362 of the Bankruptcy Code preventing "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." As such, as the Joint Unanimous Consent Resolution purported to make the merger effective as of 15 November 2005 (when this stay was in effect), it would be "void and without effect" (¶ 227).

3.1.7 Claimants' theory as to McCallan's acquisition of EuroGas GmbH raised additional jurisdictional issues for EuroGas

Respondent submitted that this theory attempted to claim that EuroGas I sold its shares in EuroGas GmbH but retained its ICSID claim relating to the reassignment of the Mining Area. This would mean that the ICSID claim became alienated from the shareholding in EuroGas GmbH (¶ 228). Therefore, the Tribunal would need to trace each of these assets at each point in time and analyse the consequences for jurisdiction, *viz.* before EuroGas II acquired the shareholding from McCallan; after EuroGas II acquired the shareholding from McCallan; the period from 13 July 2007 to 4 June 2012; and from 4 June 2012, when EuroGas II caused McCallan to transfer its interest in EuroGas GmbH to a Swiss subsidiary (¶ 228). The analysis

of these temporal elements would result in the finding, according to Respondent, that the Tribunal lacked jurisdiction *ratione temporis*

3.2 The BIT's Denial of Benefits clause operates to deny jurisdiction to EuroGas in the present case

Respondent submitted that the denial of benefits clause covered all “advantages of this Treaty” and could therefore be applied to the procedural benefits of the BIT, including the right to initiate arbitration (¶ 257). They claimed that, as EuroGas was controlled by a national of a third country and had no substantial business activities in the U.S., the requirements of the Article I.2 denial of benefits clause were satisfied (¶ 258).

Respondent relied upon the fact that they had denied the right of arbitration to EuroGas prospectively by letter one year prior to the Request for Arbitration (¶ 268).

3.3 The Tribunal lacks jurisdiction ratione temporis in relation to Belmont under the Canada-Slovakia BIT

Respondent submitted that the Tribunal’s jurisdiction *ratione temporis* has its basis in Article 15(6) of the Canada-Slovakia BIT, which limits the treaty’s application “to any dispute that has arisen not more than three years prior to its entry into force.”: therefore, any dispute arising before 14 March 2009 (the date the treaty entered into force) was not covered by the BIT (¶ 284). They argued that the correct date for determination of the dispute is the objective date when the dispute itself accrued, and not when the complaint was articulated as a claim (¶ 290).

On the Claimants’ “Denial-of-Justice Claim,” the Respondent argued that the reassignment of Rozmin’s Excavation Area in 2005 was the “one and only source of this dispute,” and the court decisions and subsequent conduct that followed in the period 3 February 2010 – 1 August 2012 did not constitute the correct dates in determining the claim’s validity *ratione temporis* (¶ 297).

On the issue of estoppel due to the lateness of the Respondent’s objections to jurisdiction, the Respondent submitted that the requirements for estoppel based on the statements made in a letter dated 2 May 2012 had not been met, as there was no clear statement of fact, the statements made were not unconditional and there had been no good faith reliance by the Claimants (¶ 298). They also submitted that Belmont had had access to the previous BIT between Canada and Slovakia, and had not been prevented from initiating proceedings under the previous BIT either in parallel with or in lieu of Rozmin’s domestic proceedings (¶ 299). Finally, they argued that Belmont had had more than seven years to seek recourse, and, in waiting, had accepted the risk that their claim may become time-barred (¶ 300).

3.4 Belmont may not bring a claim in respect of an alleged investment which it does not own

Respondent submitted that Belmont no longer owned any shares in Rozmin, and therefore had no basis in jurisdiction *ratione materiae* to bring its claims (¶ 320). Belmont had, according to the Respondent, sold its 57% interest in Rozmin to EuroGas I on 27 March 2001 (¶ 321). They also argued that it was “legally irrelevant” that Belmont was registered as a shareholder of Rozmin in light of the Slovak Commercial Code in effect when the Share Purchase Agreement was executed (¶ 328). Respondent submitted that, even if Belmont held the shares in Rozmin only as collateral, this would amount to a mere security interest in Rozmin, which would make Belmont a creditor and not the investor itself (¶ 329). Finally, they asserted that, at a minimum,

EuroGas had become a beneficial owner of the 57% interest in Rozmin, and thus Belmont as mere nominal owners did not amount to investors with good standing under the general principle of law that “the beneficial ... owner of the property is the real Party-in-interest before an international court” (¶ 330).

4. Claimants’ position on the Tribunal’s jurisdiction

4.1 Claimants submitted that they made no misrepresentation in the arbitration, and that their position was that EuroGas “took on the surviving corporate existence, business, and affairs” of the entity named EuroGas, Inc. that was incorporated in 1985 (the ‘1985 Company’) (¶ 230).

In response to Respondent’s jurisdictional objections, the Claimants submitted that: (a) the Tribunal should “refrain from even entertaining” the objection because it would be “to the detriment of every interested party and benefit only the Respondent” who, according to Claimants, would not have standing under U.S. law to raise arguments it advances in this arbitration; and (b) that EuroGas is the rightful owner of the investment.

4.1.2 If the challenge to EuroGas’ ownership interest in Rozmin were accepted, the Slovak Republic would literally be the only one to benefit from this decision

Claimants submitted that, were the challenge accepted “despite the fact that Respondent does not have standing under U.S. law to raise this challenge and that it would in fact be prevented in a U.S. court from doing so,” the Slovak Republic would be “literally the only one to benefit from this decision” (¶ 232).

This would result in the following:

- (a) EuroGas’ interest in Rozmin would remain with the bankruptcy estate and never be administered. This would make no business sense, as the estate would not have the financial means to bring the claim; a trustee would not take on the burden of the claim; and selling the interest in Rozmin at auction would not generate a worthwhile return. The asset would be of minimal value to any entity other than the 1985 Company or a company which had “genuinely stepped into the shoes of the 1985 Company before there was even any prospect of arbitration” because no other entity could be considered as a genuine investor (¶ 233).
- (b) The shareholders of the 1985 Company would own shares in a defunct company rather than shares in EuroGas, a company “in good standing.”
- (c) The creditors of the 1985 Company would remain creditors of a defunct company.
- (d) The Respondent would never be held accountable for its breaches of international law.

For these reasons, Claimants asserted that EuroGas was the only party capable of successfully holding the Slovak Republic liable for its breaches (¶ 234).

4.2 The Respondent’s objection fails on its merits

According to Claimants, the 1985 Company emerged from the bankruptcy with the interest in Rozmin; was not prevented from winding up its affairs; and validly merged with EuroGas as the rightful owner of the investment (¶ 235).

4.2.1 The 1985 Company could have emerged from the bankruptcy with its interest in Rozmin intact

Claimants argued that the Respondent's interpretation relies on the strictest interpretation of the U.S. Bankruptcy Code, inconsistent with the practice of the U.S. courts themselves and which disregarded the peculiar circumstances of the instant case. This interpretation would not be consistent with the good faith interpretation required under international law and the principle of "form over substance" (§ 236).

They continued in saying that, in spite of the fact that some U.S. courts have ruled that property cannot be abandoned by a trustee unless it is formally scheduled in the Bankruptcy proceedings, other courts have found that when a trustee is aware of the asset and chooses not to administer it, the asset is deemed to be abandoned (§ 237).

They submitted that the trustee was aware, factually or constructively, of the Rozmin interest as the interest was reported in EuroGas' public SEC filings, was included in data and tax documents which had been reviewed by the trustee and their accountant, and Rozmin's challenge to the Government's decisions were available in online news articles from September 2005 which were easily discoverable by the trustee (§ 240).

Therefore, according to Claimants, as a result of the trustee's decision not to actively administer EuroGas' interest in Rozmin, the interest was abandoned back to EuroGas (§ 242).

4.2.2 The 1985 Company had the capacity to undertake any act necessary to wind up its affairs, including the merger with EuroGas

Claimants contended that dissolved corporations did, under Utah law, had legal existence. They argued that the jurisprudence relied upon by Respondent had been repealed in 1992, and that this new law allowed a corporation to undertake any act necessary to wind up its affairs, and contained no two-year limitation on legal actions (§ 244).

4.2.3 EuroGas was not prevented from winding up its affairs by U.S. Bankruptcy Law

Claimants submitted that Bankruptcy Proceedings could not prevent EuroGas from winding up its affairs as bankruptcies cannot cause the dissolution of a company because they are governed by U.S. federal law, whereas the creation and dissolution of corporate entities is governed by state law; the *travaux préparatoires* of the law contemplated the survival of the debtor; and the relevant U.S. case law confirmed that Chapter 7 proceedings do not dissolve a corporation (§ 245).

4.2.4 The Joint Unanimous Consent Resolution facilitated a type-F reorganization

Claimants then argued that the Joint Unanimous Consent Resolution allowed a type-F reorganization, whereby EuroGas assumed all of the assets, liabilities and issued stock certificates of the 1985 Company (§ 247).

4.2.5 The two EuroGas companies merged pursuant to the common law doctrine of de facto merger

Claimants submitted that nothing in the Utah Revised Business Corporation Act prevents a dissolved corporation from merging with another corporation (§ 249). They also submitted that the requirement to register mergers is only mandatory in the case of statutory mergers, and therefore their alleged *de facto* merger did not have this requirement (§ 250). They relied upon the *travaux préparatoires* of Utah's corporate statute and Utah court decisions in support of this position.

Claimants submitted that the merger satisfied a four-factor test: continuity of management; continuity of shareholders; cessation of ordinary business by the predecessor; and the assumption of successor liability (§ 251). Claimants also submitted that Utah courts would affirm such a merger, “especially given that ‘all parties with an interest in the 1985 Company, EuroGas, or the merger between the two, have benefitted from said merger’” (§ 252).

4.2.6 The Joint Unanimous Consent Resolution does not preclude the merger's validity by virtue of its retroactive effect

Claimants argued that the Joint Resolution could not have had retroactive effect as it was entered into in July 2008, in excess of one year after the stay had been lifted in March 2007; therefore, it could not have interfered with the automatic stay (§ 253).

4.2.7 The BIT's Denial of Benefits clause does not operate to deny jurisdiction to EuroGas in the present case

Claimants submitted that Respondent had failed to meet its burden of proving that EuroGas had no substantial business activities in the U.S (§ 272). They argued that Respondent had not attempted to discharge its burden of proof in good time, as, pursuant ICSID Arbitration Rule 41, jurisdictional objections are to be raised in *limine litis* in order to be admissible (§ 274).

Even were the objection admissible, the Respondent's claim would fail on its merits, as (a) EuroGas did not fall into the narrow category of claimants intended to be covered by the clause, which they characterized as “free rider” investors engaged in “sham compan[ies]” against whom the benefits of the treaty may be legitimately denied (§ 277); (b) the Respondent had failed to substantiate a lack of business activities on the part of EuroGas in light of its status as a junior mining company (§ 280); and (c) the Respondent had failed to identify at which point in time a company must lack substantial business activities in order to fall within Article I.2 of the BIT, and therefore if a company engages in the requisite “substantial business activities” at any time during the life of the investment, such engagement would demonstrate adequate high-level commitment to the country's economy (§ 281).

*4.2.8 The Tribunal has jurisdiction *ratione temporis* in relation to Belmont under the Canada-Slovakia BIT*

Claimants submitted that: (a) the Respondent should be estopped from raising this objection as it had represented in the 2 May 2012 letter that the instant dispute was not yet ripe and (b) although important events took place prior to the date, the critical date for the purposes of the dispute took place after 14 March 2009 (§ 301).

Notwithstanding the issue of estoppel, the Claimants asserted that the events leading up to the dispute's accrual should not be confused with the date of accrual of the claim itself (¶ 307); that the dispute crystallized when the conflict alleged was opposed by the Respondent (¶ 311); that the dispute did not arise when Rozmin asserted its domestic claim as the parties and rights relied upon differed (¶ 314-316); that the dispute did in fact arise on 1 August 2012, when the DMO's reassignment of the Mining Area was confirmed (¶ 318); and that the arbitration was initiated in a timely manner given the Claimants' duty to exhaust local remedies (¶ 319).

4.2.9 Belmont remains the owner of a 57% interest in Rozmin as conditions for the transfer of the shares in Rozmin were not satisfied

Claimants submitted that conditions precedent to the transfer of the shares in Rozmin from Belmont to EuroGas were not fulfilled, as: a non-refundable royalty was not paid in full (¶ 333); a 2% royalty on all talc sold over the life of the deposit was not paid, as the deposit never went into commercial production (¶ 335); and a payment of 125% of the value of its initial investment had not been recouped in full (¶ 336). They also submitted that, as EuroGas had been dissolved in 2001, and as under Utah law "a dissolved company may enter into agreements after its dissolution only for purposes of winding up and liquidating its business and affairs, and that does not include acquiring new assets or issuing new shares" (¶ 337).

4.2.9.1 Belmont's security/collateral interest in the 57% stake in Rozmin qualifies as an investment under the Canada-Slovakia BIT

Claimants submitted that a security/collateral interest in the Rozmin shares falls within the Article I(d)(ii) definition of "investment" contained in the Canada-Slovakia BIT, which includes "shares of stock or other interests in a company or interests in the assets thereof" (¶ 346).

5. Tribunal's Decisions on Jurisdictional Objections

5.1 Whether EuroGas II validly qualifies as an investor under the US-Slovakia BIT

The Tribunal first established that EuroGas II needed to demonstrate two factual circumstances: (a) that when the Bankruptcy Proceedings closed, EuroGas I owned the shares in EuroHas GmbH and thereby owned the claim relating to the 2005 reassignment of the Mining Area; and (b) that EuroGas I validly transferred the Talc/Reassignment to EuroGas II (¶ 374).

5.1.1 Did EuroGas I emerge from the Bankruptcy Proceedings owning the Talc/Reassignment Claims?

Following an analysis of the factual circumstances and the law applicable to the bankruptcy, the Tribunal determined that, as from 18 May 2004, the Talc/Reassignment Claims were property of EuroGas I. This was because the claims had either been validly abandoned by the trustee—and thus reverted to EuroGas I—or they had not been abandoned, remained property of the estate and reverted to EuroGas I (¶ 384).

5.1.2 Did EuroGas I validly merge with EuroGas II?

The Tribunal assessed the effect of the Joint Resolution through the lens of the Claimants' alleged "*de facto* merger" theory (¶ 388). They addressed two of Respondent's points, *viz.* that EuroGas I, as a dissolved company, could not enter into contracts other than for the purpose of winding up its activities (¶ 390); and that the Joint Resolution could not possibly effectuate a merger as certain legal provisions had not been followed (¶ 391).

On the first, the Tribunal concluded that EuroGas I was not prevented by its dissolution under Utah law from merging with EuroGas II (¶ 401). They emphasized, however, that this was distinct from the question of whether a merger did *in fact* occur in the present case (¶ 402).

On the second—the most crucial issue—the Tribunal first stated that it was uncontested that the alleged merger did not comply with the statutory requirements for merger under Utah law (¶ 404). The question then was whether there was "any possibility for the Joint Resolution to effectuate a merger without complying with the Utah law statutory requirements" (¶ 405). They concluded that EuroGas II had failed to establish any basis under Utah law, either statutory or common, by which the Joint Resolution could have resulted in a valid merger (¶ 420). This finding was based on the fact that the Joint Resolution fell short of an actual transfer of rights and liabilities from EuroGas I to EuroGas II and was merely a record of the directors' agreement to proceed with the transfer (¶ 418).

5.2 Whether Belmont validly qualifies as an investor under the Canada-Slovakia BIT

The Tribunal stated that Article 15(6) of the Canada-Slovakia BIT provided that the treaty would only "apply to any dispute which has arisen not more than three years prior to its entry into force." As the BIT had entered into force on 14 March 2012, the dispute would need to have arisen on or after 14 March 2009 in order to be captured by the BIT (¶ 427).

5.2.1 Is the Respondent "estopped" from relying on Article 15(6) of the Canada-Slovakia BIT?

The Tribunal stated that the position presented by the Claimants—to the effect that the Respondent had estopped itself by asserting on 2 May 2012 that it was premature to trigger the dispute resolution process—was "excessive and unsupported" (¶¶ 429-430). This was because the letter in question contained an express reservation to this effect (¶ 430); the "prematurity" referred to was the instigation of *negotiations* while the local dispute was still pending and not the *dispute* itself in the treaty's context (¶ 431); and the applicability *ratione temporis* of the BIT depended only on the intentions of the Parties to the Treaty (¶ 432).

5.3 Is the Treaty dispute distinguishable from the dispute submitted to the Domestic Court?

The Tribunal then considered Belmont's argument that the dispute must be distinguished from the events leading to the dispute (¶ 435). The Tribunal agreed with this statement in the sense that the relevant date is the date when the dispute arose (¶ 436). Relying on the PCIJ *Mavrommatis* case, they quoted the Court's articulation of a dispute as "[a] disagreement on a point of law or fact, a conflict of legal views or of interests between two persons," adding further that a "conflict of legal views does not require the expression of all possible legal arguments and grounds in support of one's position" (¶ 437).

The Tribunal stated that all decisions by the Slovak authorities that had been mentioned in the arbitration were elements of the same dispute, characterized by the alleged taking of Belmont's investment (¶ 457). They concluded that, as no new State conduct had given rise to or recrystallized a dispute after 14 March 2009, the Tribunal had no mandate to accept jurisdiction over Belmont's claims (¶ 458). They stated that, to conclude alternatively would require the Tribunal to deprive Article 15(6) of the Canada-Slovakia BIT from any meaning and effect, and would necessitate the engineering of a "legalistic and artificial bypass" to the Treaty's limitations, essentially extending the Treaty's *ratione temporis* to a dispute dating in excess of three years prior to the entry into force of the Treaty (¶ 458). They stated that they could not accept an investor invoking the last event in a series in order to claim the benefit of the Treaty (¶ 460).

6. Costs

The Tribunal ordered, relying on Article 61(2) of the ICSID Convention, that the costs be apportioned 50% to each party. Belmont and EuroGas had each agreed to be liable for the Claimants' costs in proportion to their alleged shareholding in Rozmin: this was reflected in the order. The Tribunal stated that it was making its decision on costs on equitable grounds due to the complexity of the jurisdictional issues raised: this had resulted in a valid case to be tried which was not brought unreasonably by the Claimants (¶¶ 470-474).

7. Separate Opinion of Emmanuel Gaillard

Professor Emmanuel Gaillard disagreed with the Tribunal's conclusion that Belmont's claims fell outside of the ambit of the Tribunal's jurisdiction (¶ 1).

7.1 *The Majority erred in their interpretation of Article 15(6) of the Canada-Slovakia BIT*

Prof. Gaillard's opinion differed on the operation of the *ratione temporis* Article 15(6) of the Canada-Slovakia BIT, and thus that the Majority's assessment of the dispute presented was wrong (¶ 2). He described the Majority's interpretation of the *Mavrommatis* definition as "too reductive and inconsistent," (¶ 9) as they had reduced the dispute to its most abstract element in the "reassignment of Rosman's rights" (¶ 10). Prof. Gaillard was of the opinion that the acts of the Slovak authorities carried out following the critical date of March 14 2009 were sufficiently significant for jurisdictional purposes.

Moreover, Prof. Gaillard disagreed with the Majority's expression of the intention of the State Parties to the BIT in the context of Article 15(6) (¶ 12), as nothing in the Treaty conveyed the intention of the State Parties to define jurisdiction based on "facts" as opposed to a "dispute" (¶ 13); and, given that "follow-up actions" could produce new legal effects and transform the subject and scope of the initial disagreement, he could not see how such an intervening action could not give rise to a new dispute under the *Mavrommatis* definition (¶ 14).

7.2 *The Majority erred in determining its jurisdiction ratione temporis in terms of the dispute's scope & accrual*

Prof. Gaillard submitted that the dispute comprised claims based on the 2005 *de facto* revocation as well as claims that were substantially based on a spectrum of conduct extending from 2008 through 2012 (¶ 23). Therefore, the dispute concerned the legality under

international law of events which took place in 2005 as well as the conduct of the Slovak authorities from 2008 to 2012 (¶ 25).

Prof. Gaillard also stated that “a dispute cannot arise until all of its constituent elements have fully come into existence.” In the present case, according to Prof. Gaillard, the DMO’s 2012 act of reassignment of the mining rights was the final and essential constituent element of the dispute (¶ 26). He thus disagreed with the Majority’s conclusion that, after the critical date of 14 March 2009, there had been no new act by the Slovak authorities capable of giving rise to a dispute (¶ 27). He relied upon the Supreme Court’s order which “*quashed*” the act of reassignment, and therefore rendered the reassignment void and without legal effect (¶ 30). He drew a difference between certain measures which merely confirm a legal situation that came about in 2005 on the one hand, and certain annulled acts that were followed by another act which began to produce effects in 2012 on the other (¶ 35). As such, until the final act in 2012, the Respondent could have remedied a situation which potentially could have constituted a breach of the Treaty, and, in changing its course of conduct by reassigning the mining rights to VSK Mining in 2012, had created the dispute at that point in time which should rightfully have fallen within the Tribunal’s jurisdiction (¶ 38).