

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

EuroGas Inc. and Belmont Resources Inc.

v.

Slovak Republic

(ICSID Case No. ARB/14/14)

PROCEDURAL ORDER NO. 2

Members of the Tribunal

Professor Pierre Mayer, President of the Tribunal

Professor Emmanuel Gaillard, Arbitrator

Professor Brigitte Stern, Arbitrator

Secretary of the Tribunal

Ms. Lindsay Gastrell

16th April 2015

1. Commenting upon the draft Procedural Order n° 1 sent to it by the Secretary of the Arbitral Tribunal, Respondent proposed to insert the following provision:

Respondent requests the insertion of the following section, to which Claimants object: Public Access to Hearings and Documents

25.1 In accordance with Annex B of the Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments signed on 20 July 2010, the following provisions shall apply in respect of the public access to hearings and documents.

25.2 Hearings held shall be open to the public. To the extent necessary to ensure the protection of confidential information, the Tribunal may hold portions of hearings in camera.

25.3 The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the parties.

25.4 All documents submitted to, or issued by, the Tribunal shall be publicly available, unless the parties otherwise agree, subject to the redaction of confidential information.

25.5 Notwithstanding § 24.4 (sic) and in conformity with § 23.1 (sic), any Tribunal award shall be publicly available, subject to the redaction of confidential information.

25.6 A party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents.

25.7 The Slovak Republic may share with officials of its sub-national government all relevant unredacted documents in the course of dispute settlement under this Agreement, but shall ensure that those persons protect any confidential information in such documents.

25.8 The Tribunal shall not require the Slovak Republic to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Slovak Republic's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security.

25.9 *To the extent that a Tribunal's confidentiality order designates information as confidential and the Slovak Republic's law on access to information requires public access to that information, the Slovak Republic's law on access to information shall prevail. However, the Slovak Republic should endeavour to apply its law on access to information so as to protect information designated confidential by the Tribunal.*

2. Annex B to the Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments is annexed to the present Procedural Order.
3. In their letter of 6 March 2015, Claimants made the following objections.

First, the Canada-Slovak Republic Treaty is not applicable to EuroGas.

Second, with respect to Belmont, Article XIII of the Canada-Slovak Republic Treaty provides:

When a matter is covered both by the provisions of this Agreement and any other international agreement to which both Contracting Parties are bound, subject to paragraph 8 of Article IX (General Exceptions), nothing in this Agreement shall prevent an investor of one Contracting Party that has investments in the territory of the other Contracting Party from benefiting from the most favourable regime.

According to Claimants, ICSID Arbitration Rule 32(2), which applies by virtue of Article 44 of the ICSID Convention, sets a regime more favourable to the investor than Section I of Annex B to the Canada-Slovak Republic Treaty, in that it provides that hearings will not be open to the public if either party objects to it.

Article 32(2) of ICSID Arbitration Rules reads:

Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

4. In its letter of 6 March 2015, Respondent mentions that no agreement could be reached on certain items of draft Procedural Order n° 1, among which “*the Slovak Republic's request that the proceedings comply with the Canada BIT, including its confidentiality and publicity provisions*”. Respondent maintains its position:

unusually but in line with the evolution of the terms of investment treaty instruments, the Canada BIT contains express provisions on the public access to hearings and documents in the event of an investment treaty dispute, in particular at Annex B. These provisions are binding. Claimants have chosen to bring the proceedings under both the USA and the Canada BIT, and the provisions of the Canada BIT therefore apply. It is simply not possible for the terms of the agreement between Slovakia and Canada to be amended in these proceedings, by the Parties to this arbitration or otherwise, as only the common agreement of Slovakia and Canada could do so. If Eurogas did not wish to be impacted by the Canada BIT, then it should not have filed this arbitration with Belmont jointly as claimants. That was Eurogas' decision, and it is bound by the consequences that flow from it.

5. As to EuroGas, the Arbitral Tribunal is convinced by Respondent's arguments that "*if Eurogas did not wish to be impacted by the Canada BIT, then it should not have filed this arbitration with Belmont jointly as claimants*".
6. As to Belmont, the Arbitral Tribunal is not convinced by Claimants' arguments. The basis for the Tribunal's jurisdiction over the dispute between Belmont and the Slovak Republic lies in the Treaty between Canada and the Slovak Republic. The Treaty's provisions addressing the exercise of such jurisdiction therefore bind the Tribunal. The possibility offered by the Treaty to investors to bring their claims against one of the Parties before an ICSID Tribunal cannot be understood as having the effect of setting aside, whenever such a choice is made by claimants, its own express provisions regarding publicity. In addition, the possibility under the ICSID Arbitration Rules for either party to object to public access to hearings does not constitute *per se* a regime more favourable to the investor than one in which public access is imposed. It can even result in the State objecting to public access, where the investor would want public access to be imposed.
7. In consequence, the following provisions will apply to the proceedings in the present arbitration:
 1. *In accordance with Annex B of the Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments signed on 20 July 2010, the following provisions shall apply in respect of the public access to hearings and documents.*
 2. *Hearings held shall be open to the public. To the extent necessary to ensure the protection of confidential information, the Tribunal may hold portions of hearings in camera.*
 3. *The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the parties.*

4. *All documents submitted to, or issued by, the Tribunal shall be publicly available, unless the parties otherwise agree, subject to the redaction of confidential information.*

5. *Notwithstanding § 4 and in conformity with § 24.1 of Procedural Order n° 1, any Tribunal award shall be publicly available, subject to the redaction of confidential information.*

6. *A party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents.*

7. *The Slovak Republic may share with officials of its sub-national government all relevant unredacted documents in the course of dispute settlement under this Agreement, but shall ensure that those persons protect any confidential information in such documents.*

8. *The Tribunal shall not require the Slovak Republic to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Slovak Republic's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security.*

9. *To the extent that a Tribunal's confidentiality order designates information as confidential and the Slovak Republic's law on access to information requires public access to that information, the Slovak Republic's law on access to information shall prevail. However, the Slovak Republic should endeavour to apply its law on access to information so as to protect information designated confidential by the Tribunal.*

For and on behalf of the Tribunal:

[Signed]

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Pierre Mayer

President of the Tribunal

Date: 16 April 2015