INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

DISCOVERY GLOBAL LLC

(United States)

Claimant

– v –

THE SLOVAK REPUBLIC

Respondent

(ICSID Case No. ARB/21/51)

RESPONDENT'S COUNTER-MEMORIAL

31 March 2023

Professor Gabrielle Kaufmann-Kohler, President
Mr. Stephen L. Drymer, Arbitrator
Professor Philippe Sands, KC, Arbitrator

SQUIRE PATTON BOGGS

TABLE OF CONTENTS

I. INTRODUCTION

1. In its Memorial, Discovery Global LLC ("**Discovery**") twists the facts beyond recognition to paint the false picture that the Slovak Republic caused its project to fail. The reality is exactly the opposite: the Slovak Republic acted *precisely* according to Slovak and international law. What really caused Discovery's project to fail is that its subsidiary, Alpine Oil and Gas, s.r.o. ("**AOG**"), (*i*) never received all necessary property rights required for its geological works, (*ii*) did not properly understand the Slovak legal regulatory framework or did not want to follow it, (*iii*) never obtained a social license to operate during the critical period before it commenced activities, and (*iv*) never attracted the capital it needed. Each point alone is fatal to Discovery's claim.

2. *First*, AOG never received all of the property rights it needed to conduct its geological works. Mr. Michael Lewis—Discovery's President and CEO—testifies that AOG's lawyers advised that, so long as AOG had an exploration area license, no further permits or consents were needed to start exploratory drilling.[1] This advice was incorrect because the exploration area license (the "**Exploration Area License**"), which granted AOG the right to explore for oil and gas, is only one in a series of requirements needed to drill an exploration well.

3. Chief among the requirements to access potential drilling sites through property that belongs to third-parties is the need to obtain landowner consent. Article 29(3) of the Geology Act provides that "*[t]he geological works contractor is obliged to agree with the property owner on the scope, method of execution and duration of the geological works and to notify the property owner of the commencement of the geological works in writing at least 15 days in advance*."[2] The Ministry of Environment ("**MoE**") put AOG on express notice of this provision in 2010, when it extended the Exploration Area Licenses' terms and specifically told AOG it must comply with Article 29 "*when entering land plots*":[3]

---

1 Michael Lewis Witness Statement dated 30 September 2022, ¶ 79 ("**Lewis WS**").

2 Act No. 569/2007 Coll. on Geological Works, as amended ("**Geology Act**") (applicable from 15 June 2014 until 30 June 2016), Art. 29(3), **R-042**.

3 Decision about extension of the geological survey permit of 26 July 2010, Ref. No.: 44509/2010, File No.: 999/2010-9.3 (Snina), **C-7**; *see also* Decision about extension of the geological survey permit of 26 July 2010, Ref. No.: 44515/2010, File No.: 1000/2010-9.3 (Medzilaborce), **C-6**; Decision about

2. Conditions for the performance of the geologic work **The group of the holders of the survey:**
6. shall proceed according to § 29 Geology Act, when entering land lots

4. AOG, however, failed to do so. In late 2015, AOG failed to obtain consent of the forest land manager Urbariát and of the private owners of other land that AOG sought to use in Ruská Poruba. Instead of applying for a decision from the MoE on compulsory access under Article 29 of the Geology Act, AOG elected to turn to the Slovak courts. There, AOG derived its alleged access rights from its Exploration Area License. The consent requirement, however, cannot be achieved in that way.[4] The Exploration Area License on its own does not replace landowner consent.

5. In Smilno, AOG also failed to obtain landowner consent. Ms. Marianna Varjanová, one of the co-owners of the land with a field track that AOG attempted to use, explains that "*AOG started to perform the first visible activity in November and December 2015 […]. Later, excavators and heavy machinery started to arrive to Smilno and AOG brought cabins for workers. […] Despite the Land being privately-owned, nobody informed me and sought my permission to use it*."[5] Ms. Varjanová even left her phone number on the windshield of her car, blocking access to the site, and inviting AOG to call her. AOG, however, did not call. Instead, AOG lifted the car she parked there (below, the white van) using its own heavy machinery and installed concrete panels around it so she could not move it herself:[6]

extension of the geological survey permit of 26 July 2010, Ref. No.: 44505/2010, File No.: 998/2010-9.3 (Svidník), (emphasis added), **C-5**.

4 *See infra* ¶¶ 167-172.

5 Varjanová WS, ¶ 19.

6 Varjanová WS, ¶¶ 20-21.

6. This conduct is particularly troublesome because AOG contemporaneously recognized, in a meeting held on 21 January 2016, that (*i*) the field track that it sought to use was private property, and (*ii*) Ms. Varjanová had "*a legal right to park her car*" on it:[7]

Issues Redacted for legal privilege	Issue is a local who owns a nearby ski resort and spa, and "just doesn't like us there". She is one of 700 owners on the access road, and keeps chaining her car to the ground to block the access road. We have an alternative route for some of the work. But this situation will need to be permanently resolved before moving on the drilling rig. We are working with our attorney, security, construction company and the local police to repeatedly remove the vehicle. She has legal right to park her car on the road. [redacted] The vehicle is worth an estimated 400 Euros. We are recording the operations to prevent unreasonable damage claims. We know that this lady has had numerous meetings with the group funding the protests at the other locations. So, we're not sure of her legal capabilities or financial capacity, or if this situation will escalate to involvement of the protest group from Ruska Poruba (1.5 hours away). The mayor and the rest of the town are supportive.

7. Other contemporaneous events also show that AOG understood at the time that the field track it tried to use was private property, rather than a public special purpose road (as AOG now argues).[8] For instance, AOG sought to purchase a share in the plot, where the field track was located, so that it, too, would become a private owner of the field track. It did so, however, in breach of the preemption rights of other co-owners, to whom the sale of the share was required to be offered first.

8. Ms. Varjanová brought an action in the Slovak courts, arguing that the sale of the share was illegal on this basis. She also sought an interim injunction to prohibit AOG from

---

7 Report to Partners – Status Update dated 20 January 2016 (emphasis added), **C-120**.

8 Claimant's Memorial, ¶ 85.

accessing the property while the action was pending. The Slovak court granted the injunction, prohibiting AOG from accessing the land ("**Interim Injunction**"). AOG appealed, but never argued in the appellate proceedings (as it does today) that the road was a public special purpose road. Rather, AOG's position was predicated on the proposition that AOG had a right to use the track as its *private* co-owner. AOG adopted a "public special purpose road" theory only when its repeated efforts to establish ownership failed as a matter of Slovak law. In short, AOG was well aware that the field track was private property and, consequently, that it needed to obtain a right to use it.

9. *Second*, Discovery's project failed because AOG did not properly understand the Slovak legal regulatory framework.

(a) As discussed above, Article 29(3) of the Geology Act requires the geological contractor to obtain landowner consent to access potential drilling sites through lands owned by third-parties. It is essential to emphasize that Article 29 of the Geology Act places the elementary obligation to secure landowner consent exclusively on the geological works contractor. Where consent cannot be obtained, however, the Slovak Republic has a clear procedure to be used by a geological works contractor. Article 29(4) and (5) of the Geology Act provide a mechanism for the contractor to apply for authorization directly from the MoE to use the land by showing that the proposed access is in the public interest, even without the landowner's consent. AOG, however, never invoked this procedure with respect to the Smilno or Ruská Poruba sites. Instead, it elected to use a different legal strategy and engaged in numerous lawsuits with landowners. Having failed to use the proper procedure under Article 29 of the Geology Act, AOG cannot blame the State now for not having access to those sites.

(b) As explained above, in Smilno, AOG purchased a share in the land plot on which the field track was located in breach of preemption rights. This mistake, which led to the invalidity of the purchase agreement, allowed Ms. Varjanová to request and later obtain the Interim Injunction, which eventually prevented AOG from accessing the drilling site in its *second and third drilling attempts*.[9]

[9] *See infra* ¶¶ 95-112; 127-131.

It is that Interim Injunction—caused by AOG's own legal mistake—that is the basis for Discovery's supposed denial-of-justice claim.

(c) While the Interim Injunction was in force and prevented AOG from accessing the drilling site, AOG failed to timely raise and substantiate its "*public special purpose road*" argument (as it currently argues) in its appeal against the Interim Injunction. Again, Discovery cannot blame the Slovak Republic for outcomes that were driven by AOG's own legal mistakes.

(d) AOG also failed to timely request an extension of its lease agreement with the entity responsible for managing and administering State forests, Lesy Slovenskej republiky, štátny podnik ("**LSR**") for the Krivá Oľka site. Under the lease agreement, AOG was required to request an extension no later than one month prior to expiry of the lease agreement. AOG, however, failed to do so—missing the deadline and failing to fulfil other conditions under the lease agreement.[10] Discovery does not deny that AOG missed the deadline, but claims, oddly, that the Slovak Republic's unwillingness to *excuse* AOG's non-compliance is a breach of the US-Slovakia BIT.

(e) Finally, AOG made two attempts to access the site in Ruská Poruba. Contrary to Mr. Fraser's claims,[11] it failed to do so because of its own legal mistakes in the relation to a different court injunction.[12] As AOG's internal documents from February 2016 confirm, these legal mistakes were so serious that "*after further review*," AOG "*elected to drop the case, and terminate the attorney*,"[13] "*suspend further operations in Ruská Poruba*", and evaluate a plan to proceed under Article 29 of the Geology Act (which AOG never did):[14]

---

10 *See infra* ¶¶ 138-153.

11 Alexander Fraser Witness Statement dated 30 September 2022, ¶ 28 ("**Fraser WS**").

12 *See infra* ¶¶ 167-172.

13 AOG report to JKX and Romagaz dated 11 October 2016, p. 3, **C-148**.

14 Fraser WS, ¶ 28 (emphasis added).

3.2.	**Legal and PR**
3.2.1.	Because of the problems during last year's winter activities, the court process was started. However, after further review, we have elected to drop the case, and terminate the attorney. The chances of success did not justify the process and cost.
3.2.2.	We are evaluating changes in surface location, with the plan to begin the public interest of the investment option with Ministry help.
3.3.	Plan forward: Completing documents for the public interest option with Ministry help.

10. The list of AOG's legal mistakes is a long one. And they are dispositive. Even if Discovery's allegations in this proceeding were correct (they are not), its own legal mistakes severed any causal connection between the alleged breaches of the US-Slovakia BIT and the failure of the project.

11. *Third*, although the acts of the local community and activists are not attributable to the State, the Slovak Republic has decided to offer the testimony of two local inhabitants to explain their account of events. According to these witnesses, AOG avoided proper engagement with the community and landowners. AOG's failure to earn community and landowner support for more than three years predictably led to substantial community resistance and caused its later inability to secure landowner consent. In other words, AOG failed to obtain a social license to operate ("**SLO**"), the necessity of which is well known in the oil and gas industry, in the critical period before it commenced activities, and instead took a series of aggressive actions in relation to the proposed exploratory drilling.

12. The concept of an SLO is the idea that "*stakeholders have real power*" and "*communities have as much authority as governments in granting permissions or 'licenses'*."[15] An overall component of "*corporate social responsibility*",[16] the SLO is now commonplace in the extractive sector. It is an unwritten social contract that entities must earn and maintain.[17] A company earns its SLO "*when it has the ongoing*

---

15 M. Barnes, *The 'Social License to Operate': An Emerging Concept in the Practice of International Investment Tribunals*, in T. Schultz (ed.), *Journal of International Dispute Settlement* (2019), p. 331, **RL-037**.

16 H. G. Burnett, L. Bret, *Environmental and Social Disputes*, in Arbitration of International Mining Disputes: Law and Practice (2017), p. 121, **RL-038**.

17 M. Barnes, *The 'Social License to Operate': An Emerging Concept in the Practice of International Investment Tribunals*, in T. Schultz (ed.), *Journal of International Dispute Settlement* (2019), p. 332, **RL-037**.

acceptance or 'approval' of the local community and of other interested stakeholders."[18] Investment-treaty jurisprudence endorses this principle.[19]

13. While performing the seismic and other initial geological surveys in 2008-2010, neither Aurelian as original license holder nor AOG made meaningful efforts to inform local inhabitants about the planned activities. One of the local citizens, Mr. Ľuboš Leško, testifies that he started to become engaged in 2008, when AOG's first "*trucks and machineries arrived in [his] Chmeľová municipality*", which neighbors Smilno.[20] Given the lack of engagement by AOG, residents in the affected areas started to gather information on their own and connect with each other. Some people sought information from municipalities, some researched information on the internet and Mr. Leško recalls that "*many people were concerned about shale gas, fracking, and use of dangerous chemicals*."[21] Mr. Leško, as a member of a forest-protection organization VLK (in English: *Wolf*), reached out to his colleagues for help and support.

14. In the end, AOG's aggressive stance towards landowners and the local community caused a standstill. Rather than work with the local community to obtain an SLO, AOG did the opposite: it treated the local community as if it were, at best, irrelevant and, at worst, a nuisance to be swept away. AOG claimed without legal basis that, so long as it had the Exploration Area Licenses, no further permits or consents were needed to start exploratory drilling.[22] AOG therefore ran roughshod over the local community, demonstrating a stunning lack of transparency and communication with those most affected by its oil and gas project in protected agricultural and forest areas. It was precisely that brazen disregard for the local community that led to AOG's inability to secure access rights and led to the very protests about which Discovery so loudly complains.

---

18 M. Barnes, *The 'Social License to Operate': An Emerging Concept in the Practice of International Investment Tribunals*, in T. Schultz (ed.), *Journal of International Dispute Settlement* (2019), p. 333, **RL-037**.

19 *See, e.g., Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, § V.II.C.7, **CL-61**; *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 600, **RL-039**.

20 Leško WS, ¶ 7.

21 Leško WS, ¶ 20.

22 Lewis WS, ¶ 79.

15. After many months of hostility between them, however, AOG and the local community ultimately came to an agreement in April 2017. This point is critical, because it means that the Tribunal can cut through the morass of facts in this case—the protests, the alleged acts of the State, and the other factual allegations—and simply go to the document reflecting that agreement: **C-171**, which is an AOG press release dated 5 April 2017. That press release reflects an agreement between AOG and the local community on the conditions under which AOG would pursue the project without further public protests and physical interference. The local community approved this press release.[23]

16. The timing of this agreement is important. It was voluntarily entered into by AOG *after* all of the protests, *after* the alleged acts of the prosecutor or the police, and *after* the alleged acts of the various Slovak ministries. It therefore is crucially important on the issue of causation.

17. In the press release, AOG finally committed to "*observe certain key principles [...] in order to promote trust and confidence amongst local communities*"[24]—finally reflecting the SLO that AOG had previously not even attempted to obtain—and promised to undertake a preliminary (screening) environmental impact assessment (a "**Preliminary EIA**"). In exchange, the local community agreed to cease its protests—and, indeed, the local community kept that promise.

18. The press release was, in effect, a fresh start.

19. Thus, whatever occurred *before* this community agreement and press release—which constitutes virtually all of the facts about which Discovery complains—is largely irrelevant to what later caused the project to fail. In other words, for the vast majority of issues in this case, the agreement between AOG and the local community severs any causal connection between the alleged breaches of the US-Slovakia BIT and the ultimate failure of the project.

---

23 Leško WS, ¶ 26.

24 Press Release in relation to AOG's commitment to local communities in North-East Slovakia dated 5 April 2017, **C-171**.

20. The only relevant events that occurred *after* AOG's 2017 press release were three administrative proceedings on Preliminary EIAs in which AOG voluntarily participated pursuant to the terms of its community agreement. As a result of the Preliminary EIA proceedings, AOG was instructed to complete a so-called "full" EIA ("**Full EIA**") for each of its planned wells.[25] This two-phased approach was entirely consistent with the EU environmental directive which Slovakia was legally required to respect.

21. *Fourth*, the question, then, is what happened *after* this agreement between AOG and the local community that caused the project to fail? The answer is that Discovery was starved of capital; Discovery and AOG still could not attract investors to put any capital into this supposed 'once-in-a-lifetime' opportunity.

22. The drilling of exploration wells is an expensive process. According to Discovery's own expense budgets, the cost of drilling a single exploration well was around EUR 1.9 million.[26] Shortly after Discovery acquired its 100% stake in AOG in April 2014, it began to search for the capital necessary to drill exploration wells. Outside advisors were hired to assist in the capital raising exercise. But those efforts were plagued from the outset by dramatically declining oil prices from June 2014 onwards, falling from a peak of USD 100 per barrel to a low of USD 45 per barrel. To make matters worse, there were no existing production wells in the areas that AOG sought to develop. In this bleak and speculative environment—and despite years of trying—Discovery never obtained any capital investment to help fund the project.

23. It is not surprising, since oil and gas production in the Slovak Republic was almost non-existent (around 98% of oil and gas is imported);[27] according to the Slovak Republic's geological and petroleum engineering expert SLR, irrespective of the Slovak Republic's actions, any development of AOG's hydrocarbons was unlikely to be economically viable and there were no proven "Reserves"[28] but rather only

---

25 The other post-2017 allegation is Discovery's argument that the MoE imposed in the 2018 Exploration Area License (as defined below) the condition that AOG's new exploration drills shall be subject to the Preliminary EIA. As explained in § V.B.2d below, this allegation is likewise meritless as that condition merely restated the obligation directly applicable under the EIA Act.

26 JOA Budget dated 2 February 2015, **C-68**.

27 Energy Policy of the Slovak Republic dated October 2014, p. 23, **C-63**.

28 As explained further below, Reserves are "those quantities of petroleum anticipated to be commercially recoverable by application of development projects to known accumulations from a given date forward under defined conditions." See Petroleum Resources Management System dated June 2018, p. 3,

"prospective resources" in the exploration areas; and Discovery's principal place of business remained a private home in the State of Texas:[29]

24. Discovery's project did not fail because of anything that the Slovak Republic did or did not do; it failed because AOG did not understand, or ignored, available legal procedures to execute geological works; it refused for over three years to engage with the local community and landowners on a timely basis to earn their trust; and it never attracted investors to commit capital to the project.

25. Despite AOG's consistent missteps, the Slovak Republic went out of its way to *help* AOG and conducted itself in accordance with Slovak and international law. Indeed, the MoE always granted AOG's requests for changes and extensions to the Exploration Area Licenses and supported AOG along the way. In fact, the former Minister of Environment, Mr. Sólymos, tried to resolve the standstill between AOG and the local community, offering a compromise solution by proposing a voluntary Preliminary EIA in 2016, which Discovery initially rejected. Months later, however, Discovery privately met with community representatives. Those meetings occurred without notice to, or involvement of, the MoE.

26. The Slovak police acted with appropriate neutrality. Similarly, the state prosecutor JUDr. Slosarčíková acted in accordance with her duties, independently of all parties

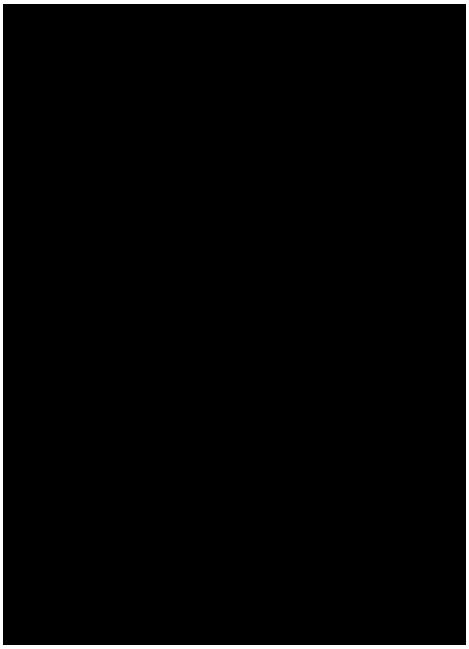
---

AA-037. In short, a Reserves classification means that an entity has successfully shown that its hydrocarbon discoveries can be extracted in a commercially viable manner.

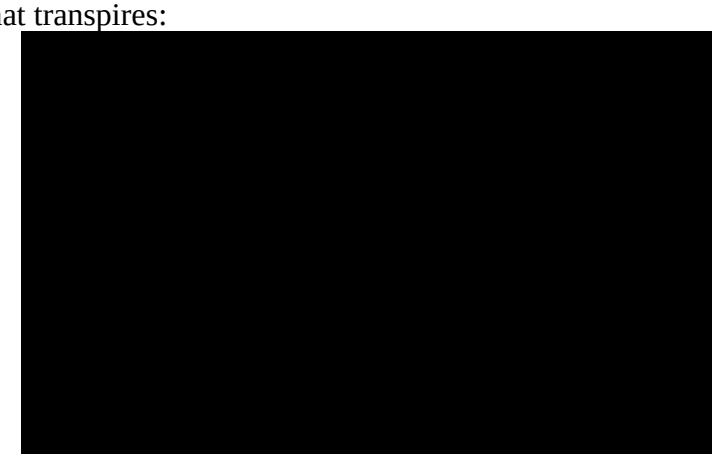
29 Texas Assumed Name Certificate dated 8 August 2016, **R-005**. Line 6 of this document lists 323 Kings Court, Forney, Texas as Discovery's principal office address. The image portrayed above was taken from an address search via Google.

concerned and according to applicable law. The Ministry of Agriculture ("**MoA**") likewise treated AOG fairly, even though it missed an important deadline. And finally, as explained by Prof. Fogaš, the Slovak Republic's Slovak law expert, the Slovak courts acted lawfully when dealing with Ms. Varjanová's Interim Injunction. In short, the Slovak Republic treated AOG appropriately, and like any other private entity operating within its borders.

27. The Slovak Republic raises two final, preliminary points about *credibility* ***and good faith***. *First*, we invite the Tribunal to compare this picture, **C-112**, which depicts Mr. Ron Crow of AOG in a cast because, he says, one of the activists injured him with a car…



28. …and to compare it against this video, **R-037**, of the incident (which Discovery apparently did not know existed). We invite the Tribunal to click on the below picture and watch what transpires:



29. This video should tell the Tribunal everything it needs to know about Discovery's credibility before this Tribunal.

30. *Second*, since 2014, when Discovery purchased AOG and acquired a share in the Exploration Area Licenses for EUR 153,054.50, AOG did not perform *any* substantial geological works, apart from the cheap, ineffective "MT" surveys, which even Discovery's own experts dismissed in their quantum model. As a result, AOG failed to perform any works that would plausibly justify its requested return on investment ("**ROI**") of some ***371,140%***. That AOG seeks such a patently absurd amount of damages, relative to the alleged "investment" made, says more about the credibility of its claim in this arbitration than all of the Parties' submissions taken together.

* * *

31. The reasons set forth above are the *real* cause for AOG's failure. As shown below, the Slovak Republic's actions were not only reasonable, but they also comported with the highest international standards of governance. The Slovak Republic will show in this Counter-Memorial that Discovery's claim fails for numerous, independent reasons. When it does, the Tribunal should have no hesitation in dismissing Discovery's claims in their entirety and awarding the full costs of this arbitration to the Slovak Republic.

32. The Slovak Republic's Counter-Memorial is accompanied by:

(a) The witness statement of **Ms. Marianna Varjanová** ("**Varjanová WS**") a life-long resident of Smilno, who testifies about her experiences with AOG and its activities in the Slovak Republic;

(b) The witness statement of **Mr. Ľuboš Leško** ("**Leško WS**"), a member of the forest-protection organization VLK (in English: *Wolf*), who testifies about his experiences with AOG and the eventual agreement that the local community and AOG concluded regarding AOG's planned activities;

(c) The witness statement of **JUDr. Vladislava Slosarčíková** ("**Slosarčíková WS**"), a Slovak state prosecutor, who testifies about her role as a state prosecutor and her personal experiences with AOG in Smilno;

(d) The witness statement of **Mr. László Sólymos** ("**Sólymos WS**"), the former Minister of Environment of the Slovak Republic, who testifies about the history of amendments made to the Slovak Republic's EIA Act and his own interactions with AOG;

(e) The expert report of **Doc. JUDr. Ľubomír Fogaš, CSc.** ("**Fogaš ER**"), retired law professor from Comenius University Faculty of Law and expert in Slovak civil procedural law, who opines on the various legal proceedings in which AOG found itself and the legality of the Slovak courts' actions;

(f) The expert report of **Dr. Chris Longman** from SLR Consulting (the "**SLR Report**"), who testifies about the geological and petroleum engineering analyses underpinning Discovery's damages case;

(g) The expert report of **Dr. Tiago Duarte-Silva** and **Richard Acklam** from Charles River Associates ("**CRA**" and the "**CRA Report**"), who opine on valuation matters of Discovery's hydrocarbons project;

(h) Factual Exhibits **R-013** to **R-106**; and

(i) Legal Authorities **RL-037** to **RL-109**.

II. THE FACTS

33. Before addressing the facts of this dispute, it is necessary to lay some groundwork. The EU and Slovak legal systems require various permits and consents before oil and gas exploration and exploitation can be undertaken. To ensure that the Tribunal can follow along as we describe the facts, we set forth below a table of the main process:

No.	Permit / notification / consent	Stage of process
(a)	**Geological Authorization**: Interested party must apply for and obtain from MoE a general authorization to perform geological works, similar to a trade license.[30]	**Oil and gas exploration**
(b)	**Exploration area licenses**: Interested party must apply for and obtain from MoE a decision on determination of exploration area (similar to a zoning permit in that it defines the territory).[31]	
(c)	**Commission of geological project design**: Exploration area license holder commissions a geological project design from an entity hired to perform geological works for the interested party that stipulates *inter alia* which geological works need to be performed and an approach towards their implementation.[32] The geological project design is submitted to MoE within 3 months of the determination of the exploration area and any later amendments within 30 days from approval by the exploration area license holder.[33] The technical part of the geological project design also needs to be submitted to the relevant nature protection authority for its comments.[34]	
(d)	**Obtain right to explore land**: Interested party must obtain consent from all landowners or apply to MoE under Article 29 of the Geology Act to replace such consent by a decision for geological works in the public interest.[35]	
(e)	**Notification of initiation to the Slovak Geological Institute**: Interested party must notify the Slovak Geological Institute of the commencement of exploration no later than on the day of such activity.[36]	
(f)	**Notification of initiation to the District Mining Office**: Interested party must notify the District Mining Office of the commencement of exploration 8 days prior to initiation of such activity.[37]	

30 Geology Act, Arts. 4-6, **R-042**.

31 Geology Act, Arts. 22-24, **R-042**.

32 Geology Act, Art. 12, **R-042**.

33 Geology Act, Art. 25(8), **R-042**.

34 Act No. 543/2002 Coll on Nature and Landscape Protection, as amended, Art. 9(1)(n), **R-043**.

35 Geology Act, Art. 29, **R-042**.

36 Geology Act, Art. 13(1), **R-042**.

37 Geology Act, Art. 13(4), **R-042**; Act No. 51/1988 Coll. on Mining Activities, as amended ("**Act on Mining Activities**"), Arts. 2 and 5a, **R-044**.

(g)	**Preliminary EIA / Full EIA**: Interested party submits a "project intent" plan to the District Office, which then performs Preliminary EIA if and when drilling deeper than 600m is involved. If District Office concludes there is a significant effect to the environment, then a Full EIA must be performed.[38]	
(h)	**Further permits for specific types of geological works**: Interested party must apply for permits for specific types of geological works, such as permits for blasting works.[39] In addition, in case specific types of geological works are to be performed in protected areas, permits from relevant nature protection authorities must be applied for and obtained.[40]	
(i)	**Notifications for specific geological works (drilling)**: Interested party must provide notifications to the District Mining Office of drilling activities 8 days prior to initiation of such activity.[41]	
(j)	**Approval of the final report summarizing results and the calculation of found resources**: Interested party submits to MoE a final report summarizing works performed and the results of the exploration, including calculation of reserves for approval.[42]	
(k)	**Certificate of reserved mineral deposit**: Based on the approval of the final report and the calculation of found resources, MoE issues a certificate on a reserved mineral deposit.[43]	
(l)	**Decision on protective deposit territory**: Interested party applies to the District Mining Office for a decision on protective deposit territory, which prevents third-parties from interfering with the area; District Mining Office issues decision on protective deposit territory.[44]	
(m)	**Mining authorization**: Interested party must apply for and obtain from the District Mining Office a general authorization to perform mining works, similar to a trade license.[45]	**Oil and gas exploitation**
(n)	**Rights to the affected land plots**: Interested party must obtain consent from all land owners (*e.g.*, by purchase or lease) or apply to the District Mining Office to expropriate if in the public interest (Article 29 of Geology Act not an option).[46]	

38 Act No. 24/2006 Coll. on Environmental Impact Assessment, as amended ("**EIA Act**") (applicable as of 1 January 2017), Art. 29, Annex 8, **R-045**.

39 Act No. 58/2014 Coll. on Explosives, as amended ("**Act on Explosives**"), Art. 47, **R-046**.

40 *See, e.g.*, Act No. 543/2002 Coll. on nature and landscape protection, as amended, Arts. 13(2)(f), 14(2)(f), **R-043**.

41 The Regulation of the Slovak Mining Agency No. 89/1988 Coll. on rational utilization of exclusive deposit and on permission and reporting the mining activity and on reporting the activity carried out by mining manner, as amended, Art. 12, **R-047**.

42 Geology Act, Arts. 17-18, **R-042**.

43 Act No. 44/1988 on Protection and Use of the Natural Resources, as amended ("**Mining Act**"), Art. 6, **R-048**.

44 Mining Act, Arts. 16-17, **R-048**.

45 Act on Mining Activities, Art. 4a, **R-044**.

46 Mining Act, Art. 31(3), **R-048**.

(o)	**Preliminary EIA / Full EIA**: Interested party submits a "project intent" plan to the District Office for planned exploitation. Provided the planned exploitation does not exceed 500t of oil per day or 500 000 m^3 of gas per day, the District Office performs the Preliminary EIA. If District Office concludes there is a significant effect to the environment, then a Full EIA must be performed.[47] Full EIA must be performed directly, if the planned exploitation exceeds 500t of oil per day or 500 000 m^3 of gas per day.[48]	
(p)	**Mining area license**: Interested party applies to District Mining Office for a decision determining the exploitation area (smaller than the exploration area, because the interested party now knows where the deposit is) that serves as a zoning permit in that it defines the territory.[49]	
(q)	**Mining permit**: Interested party must apply for and obtain from the District Mining Office a permit for performance of mining activities, which permits preparation, opening and excavation/exploitation of the deposit, similar to a building permit.[50]	
(r)	**Notifications of initiation of exploitation**: Interested party must notify the District Mining Office of the initiation of exploitation activity 8 days prior to initiation of such activity.[51]	
(s)	**Further permits and notifications**: Interested party must obtain additional permits and provide additional notifications for performance of specific types of work, such as permits for performance of blasting works[52] or permits to perform mining works within specific protected areas.[53]	

34. Against that backdrop, we turn to the facts of this case.

A. In 2006, Aurelian Oil & Gas plc commences its activities in the Slovak Republic

35. The story of this case began in July 2006, when the UK company Aurelian Oil & Gas plc ("**Aurelian**") acquired Exploration Area Licenses from the MoE ("**2006 Licenses**")[54] for the three exploration areas: Svidník, Snina, and Medzilaborce (the

47 EIA Act, Annex 8, point 1(4)-(5), **R-045**.

48 EIA Act, Annex 8, point 1(4)-(5), **R-045**.

49 Mining Act, Art. 24, **R-048**.

50 Act on Mining Activities, Arts. 17-18, **R-044**.

51 Act on Mining Activities, Art. 5a, **R-044**.

52 Act on Explosives, Art. 47, **R-046**.

53 *See, e.g.*, Act No. 543/2002 Coll. on nature and landscape protection, as amended, Arts. 13(2)(f), 28(4), **R-043**.

54 Decision on determination of exploration area Svidník dated 18 July 2006, **R-014**; Decision on determination of exploration area Snina dated 18 July 2006, **R-031**; Decision on determination of exploration area Medzilaborce dated 17 July 2006, **R-030**. The 2006 Licenses and all subsequent extensions of their terms are collectively referred to as "**Exploration Area Licenses**".

"**Exploration Areas**") with the total area of over 2,400 km^2. The 2006 Licenses set out the territory for the relevant geological works and identified further permits, notifications, and conditions that were required.

36. Several months after the 2006 Licenses, Aurelian, along with the company AOG Nominees Limited, signed a memorandum of association, under which they established their Slovak subsidiary, AOG.[55] On 25 November 2006, AOG was registered as a limited liability company.[56]

37. AOG thereafter established three Slovak subsidiaries, namely Radusa Oil & Gas s.r.o., Magura Oil & Gas s.r.o., and Dukla Oil & Gas s.r.o. ("**AOG's Subsidiaries**") and transferred the Exploration Area Licenses to these new subsidiaries.[57] In 2008 and 2009, the branches of operating companies affiliated with JKX Oil and gas plc. ("**JKX**") and the branch of Societatea Nationala de Gaze Naturale "ROMGAZ" S.A. ("**Romgaz**") each acquired a 25% share in the Exploration Area Licenses from AOG's Subsidiaries under separate Farm-In Agreements.[58] Consequently, JKX and Romgaz became Aurelian's joint venture partners in its Slovak operations (the "**JV Partners**").[59]

B. AOG's operations prior to its acquisition by Discovery

1. In the first four years, AOG performed limited geological works

38. During the early years, Aurelian primarily reviewed documents recording historical exploration works and prepared partial summary reports.[60] Later, at some point

55 AOG Full Extract from the Commercial Register dated 17 February 2023, **R-049**.

56 AOG Full Extract from the Commercial Register dated 17 February 2023, **R-049**.

57 AOG's Slovak subsidiaries held the Exploration License Areas until February 2010, when three subsidiaries transferred their share in these Exploration License Areas back to AOG.

58 [redacted]

59 Claimant's Memorial, ¶ 39.

60 Annual Report for 2007, pp. 3-4, **R-050**.

between 2008 and 2010, Aurelian performed limited 2D seismological exploration, cumulatively covering 417 km across all three Exploration Areas.[61]

39. As required under the 2006 Licenses,[62] Aurelian summarized the scope of exploration works in its annual summary reports submitted to the MoE.[63] Despite all of these efforts, however, Aurelian was unable to identify any specific drilling location within the initial term of the 2006 Licenses.

2. AOG's disinterest in communities affected by its operations created friction

40. At the outset, although the acts of the local community and activists are not attributable to the State, the Slovak Republic has decided to offer the testimony of two local citizens, Ms.Marianna Varjanová and Mr. Ľuboš Leško, to explain their account of events.

41. These witnesses testify that while performing these surveys and activities in 2008-2010, neither Aurelian nor AOG made meaningful efforts to inform local inhabitants about the planned activities. Mr. Leško, confirms that he "*first learned about AOG sometime in around 2008 through [his] involvement in [the forest-protection organization] VLK which was active in matters concerning the protection of environment for years*."[64] At the time, Mr. Leško had limited knowledge about AOG's plans. That changed in 2008, when AOG's first "*trucks and machineries arrived in Chmeľová municipality*"[65], which is a neighboring municipality to Smilno, where he lives. As these activities were uncommon, he had many "*unanswered questions about what was going to happen, where it would happen and how*."[66]

---

61 In 2009 and 2010, Aurelian performed additional 2D seismic measurements spanning 128 and 159 km respectively. Additional seismic measurement spanning 300 km was done in 2011. *See* Lewis WS, ¶ 24; Annual Report for 2009, **R-051**; Annual Report for 2010, **R-052**.

62 Decision on determination of exploration area Svidník dated 18 July 2006, p. 5, **R-014**; Decision on determination of exploration area Snina dated 18 July 2006, p. 5, **R-031**; Decision on determination of exploration area Medzilaborce dated 17 July 2006, p. 5, **R-030**.

63 *See, e.g.*, Aurelian Oil & Gas Slovakia s.r.o - Smilno Annual Report to the Ministry of Environment dated January 2011, **C-36**.

64 Leško WS, ¶ 7.

65 Leško WS, ¶ 7.

66 Leško WS, ¶ 8.

42. Given the lack of engagement by AOG, residents in surrounding areas started to gather information on their own. Some people went to "*visit the Mayors and sought information there*."[67] Mr. Leško, as a member of VLK, reached out to his colleagues within his organization to obtain information and help. He did so because "*VLK was active in environmental matters for years and people at VLK knew what to do in such cases*."[68]

43. Residents were also concerned about how AOG planned to exploit these areas. Mr. Leško recalls that "*many people were concerned about shale gas, fracking, and use of dangerous chemicals*."[69] Internet publications at the time connected Aurelian with controversial shale gas and fracking operations. An article from March 2010 published in Investors' Chronicle stated that "*Aurelian Oil & Gas has […] a series of high-impact exploration wells across the Carpathian region of Poland, Slovakia and Romania*."[70] The same article reported that Aurelian had successfully used the "*multi-fracced horizontal drilling technology that has revolutionised the natural gas market in the US and could do the same in Europe*."[71] Another article from March 2011 connected Aurelian with "*unconventional prospects in Poland*".[72]

44. Concern grew within the local community. AOG, however, did nothing to provide assurances to, let alone engage with, the local residents.

3. In 2010, the MoE extended the term of AOG's Exploration Area Licenses

45. By 2010, the initial terms for the three 2006 Licenses were nearing expiry, with no commercial discoveries having been made. AOG therefore applied to the MoE for an extension to the three 2006 Licenses. On 26 July 2010, the MoE granted AOG's

---

67 Leško WS, ¶ 20.

68 Leško WS, ¶ 10.

69 Leško WS, ¶ 20.

70 Investors' Chronicle, *Seven oil shares that could rocket*, 11 March 2011, **R-053**.

71 Investors' Chronicle, *Seven oil shares that could rocket*, 11 March 2011, **R-053**.

72 Hart Energy, *Aurelian O&G Sees Encouraging Signs From Its Polish Shale Prospects*, 25 March 2011, **R-054**.

requests and extended the 2006 Licenses for an additional four years (*i.e.* until 1 August 2014).[73]

46. In granting the extensions, the MoE reiterated several conditions originally included in the 2006 Licenses. It also noted additional conditions that had since been codified into the Geology Act when it replaced the old act.[74] In particular, the MoE stated that AOG was obliged to proceed under Article 29 of the Geology Act when seeking to access land owned by third-parties.[75]

4. During the first extension period (2010-2014), Aurelian again failed to identify any drilling locations, which caused a massive drop of its share price

47. After receiving the extensions in 2010, Aurelian generated estimated timelines for each Exploration Area License. These timelines were summarized in a plan called the "*Slovakia Blocks–Introduction*", which was dated May 2011. The project envisioned that, following 2D seismic measurements spanning 440 km, Aurelian would identify drilling locations in the Svidník and Medzilaborce Exploration Areas and then proceed to drilling in years 2012 and 2013. JKX was not as optimistic and expected that first drills in Slovakia could occur in late 2013 or 2014.[76]

48. Because the results of the 2008-2010 seismologic measurements were insufficient to locate any specific drilling sites, starting from June 2011, Aurelian obtained further seismic measurements spanning an additional 300 km.[77] By the end of 2011, however, Aurelian still was nowhere near identifying any drilling locations.

49. These disappointing results contributed to poor financial results. According to an article published in the Financial Times in February 2012, "*[s]hares in Aurelian Oil &*

---

73 Decision about extension of the geological survey permit of 26 July 2010, Ref. No.: 44505/2010, File No.: 998/2010-9.3 (Svidník), **C-5**; Decision about extension of the geological survey permit of 26 July 2010, Ref. No.: 44515/2010, File No.: 1000/2010-9.3 (Medzilaborce), **C-6**; Decision about extension of the geological survey permit of 26 July 2010, Ref. No.: 44509/2010, File No.: 999/2010-9.3 (Snina), **C-7**.

74 Decision about extension of the geological survey permit of 26 July 2010, Ref. No.: 44505/2010, File No.: 998/2010-9.3 (Svidník), pp. 8-9, **C-5**.

75 Decision about extension of the geological survey permit of 26 July 2010, Ref. No.: 44505/2010, File No.: 998/2010-9.3 (Svidník), p. 8, **C-5**.

76 JKX Oil & Gas plc Annual Report 2012, p. 63, **C-42**.

77 *See supra* ¶¶ 38-39.

Gas have failed to budge since the company effectively put itself up for sale at the beginning of the month amid disappointment over progress of its exploration for gas in Poland, Slovakia and other central and eastern European fields."[78] The "*disappointment*" among investors was so significant that Aurelian's shares dropped between September 2011 and February 2012 from 50p to 16p, "*of which 11p can be accounted for by cash reserves of €63m*."[79]

50. In view of these poor exploration results, Aurelian decided to "*put itself up for sale*" in early 2012.[80] These efforts culminated in early 2013, when San Leon Energy, an Irish company, acquired Aurelian.[81] This transaction involved the acquisition of Aurelian in its entirety, not just its Slovak assets.

51. Aurelian continued performing additional exploration works in Slovakia. Still, none of those activities identified any specific drilling locations.

52. Aurelian's own documents began to reflect growing pessimism that commercially viable oil or gas deposits would be discovered. In its Project Update from February 2013, Aurelian recognized that the reservoirs in the Slovak Republic were uncertain.[82] At the same time, Aurelian described the seismic quality as "*difficult*" and proposed to relinquish parts of the Exploration Area Licenses to "*reduce rental costs*".[83] In other words, no later than 2013, Aurelian was under mounting pressure to offset its growing costs—including exploration and rental fees—with a commercially-viable discovery.

53. As the end of the extended 2006 Licenses drew to a close, Aurelian was faced with the reality that, despite performing more 2D seismic measurements than planned, it had still failed to locate any locations for exploratory drilling. Its plan, which had been to start drilling by the end of 2013, was looking increasingly unrealistic, with the latest

---

78 Financial Times, *Aurelian's sale plan fails to lift shares*, 10 February 2012, **R-055**.

79 Financial Times, *Aurelian's sale plan fails to lift shares*, 10 February 2012, **R-055**.

80 Financial Times, *Aurelian's sale plan fails to lift shares*, 10 February 2012, **R-055**.

81 Claimant's Memorial, ¶ 46.

82 Slovakia Project Update on exploration activities and geological fieldwork: Svidnik, Medzilaborce & Snina Blocks dated February 2013, p. 32, **C-45**.

83 Slovakia Project Update on exploration activities and geological fieldwork: Svidnik, Medzilaborce & Snina Blocks dated February 2013, p. 32, **C-45**.

round of seismic measurements revealing no drilling prospects. Meanwhile, concern and scrutiny from local residents continued to grow.

54. It was against this backdrop that Discovery stepped into the project.

C. In 2014, Discovery entered the Slovak Republic

1. On 5 April 2014, Discovery allegedly invested in AOG

55. On 24 March 2014, Discovery executed a Share Purchase Agreement with Aurelian, under which, on 5 April 2014, Discovery acquired AOG[84]—and thus, a 50% share of the Exploration Area Licenses. The purchase price was EUR 153,054 and the grant of an overriding royalty to Aurelian of 3.5% from all petroleum produced, saved, and sold from all wells situated on the Exploration Areas.[85] A few months later, in January 2015, Aurelian sold the overriding royalty to Alpha Exploration, LLC for GBP 120,000.[86] According to Discovery, Alpha Exploration, LLC was a company "*affiliated with Discovery*".[87] Only months later, Alpha Exploration, LLC then transferred this royalty to Discovery for a nominal consideration of USD 10.[88]

56. The overall consideration Discovery paid—EUR 153,054—was a fraction of the EUR 10 million that Aurelian/AOG claims it spent for exploration activities between 2006 and 2013.[89] Further works would be required to demonstrate if any areas within the Exploration Areas were commercially viable—an outcome that was not assured and, indeed, looked increasingly unlikely after years of unsuccessful exploration.

2. In July 2014, the MoE again extended the terms of AOG's Exploration Area Licenses

57. Shortly after Discovery's acquisition of AOG, on 24 April 2014, AOG requested the MoE to extend the terms of the Exploration Area Licenses for two additional years and to reduce the area of the Snina Exploration Area. The MoE promptly reviewed AOG's

---

84 AOG Full Extract from the Commercial Register dated 17 February 2023, **R-049**.

85 Participation Interest Purchase and Sale Agreement dated 24 March 2014, Art. 1.2.1, **C-56**.

86 Agreement for Purchase of Overriding Royalty Interest dated 30 January 2015, **C-67**.

87 Lewis WS, fn. 5.

88 Assignment of Overriding Royalty Interest dated 3 November 2015, **C-84**.

89 Claimant's Memorial, ¶ 61(5).

requests and, in July 2014, again extended the term of AOG's Exploration Area Licenses—this time until 1 August 2016.[90] As requested by AOG, the MoE reduced the area of the Snina Exploration Area from 538,65 to 248,40 km^2.[91]

58. Notably, the MoE issued these extension decisions *after* Discovery acquired AOG. Discovery's witness, Mr. Michael Lewis, states that these extension "*decisions gave me (ie Discovery) the confidence to invest in Slovakia*."[92] That cannot be correct. Decisions issued after making the investment cannot give confidence in the investor to make the investment in the first place.

3. In mid-2014, AOG finally identified three drilling locations

59. After Discovery acquired AOG, AOG and Discovery proceeded to review and rework the old exploration data.[93] Mr. Lewis recalls that he was "*excited with the number of prospects [he saw] even from an initial review of the data*."[94] Discovery's JV Partner, JKX, did not share that excitement. During the JV Partners' operation committee meeting held on 11 September 2014,[95] Mr. [redacted] (JKX) noted that he "*was disappointed in the seismic*" because JKX "*was looking for deeper targets and the seismic was not sufficiently clear for such purposes*."[96]

60. In response to these concerns,[97] Mr. Lewis informed the JV Partners that "*the phase 1 acquisition of the MT surveys was completed*" and that "*the interpretation of the data acquired was approximately thirty percent (30%) finished for the shallow targets*."[98] Despite "*this small percentage of completion, certain prospects stood out that were*

---

90 Decision about exploration area term extension of 10 July 2014, Record Number: 33590/2014, File Number: 5670/2014-7.3 (Svidník), **C-8**; Decision about exploration area term extension of 9 July 2014, Record Number: 33409/2014, File Number: 5670/2014-7.3 (Medzilaborce), **C-9**; Decision about exploration area modification and extension of exploration area term of 15 July 2014, Record Number: 34186/2014, File Number: 5668/2014-7.3 (Snina), **C-10**.

91 Decision about exploration area modification and extension of exploration area term of 15 July 2014, Record Number: 34186/2014, File Number: 5668/2014-7.3 (Snina), **C-10**.

92 Lewis WS, ¶ 19.

93 Claimant's Memorial, ¶ 57.

94 Lewis WS, ¶ 45.

95 Opcom minutes dated 11 September 2014, p. 2, **C-61**.

96 Opcom minutes dated 11 September 2014, p. 3, **C-61**.

97 Opcom minutes dated 11 September 2014, p. 3, **C-61**.

98 Opcom minutes dated 11 September 2014, p. 2, **C-61**.

very interesting."[99] This caused the JV Partners to finally commence discussions about the potential drilling locations in Smilno, Miková, Radvaň nad Laborcom, and Soľník.

61. At the end of the meeting, Mr. Lewis emphasized that "*it was time to make a decision on the drill site locations*."[100] The JV Partners thus agreed "*to drill two wells on Medzilaborce […] in calendar year 2014 and one firm well on Svidnik in calendar year 2015 (Smilno)*" and "*[a] decision on the 3D survey would be made later contingent on the results of the drilling activities*."[101] In other words, Discovery and its JV Partners expected in September 2014 that AOG would proceed to its first exploration drillings in 2014.

62. The JV Partners, however, soon faced problems. The minutes from the operation committee meeting held on 28 November 2014 reveal that AOG was already plagued with financial problems caused by its inability to secure funds from the JV Partners. Mr. Lewis noted that the JV approval process "*has taken much longer*" than anticipated.[102] The delays were caused by JKX, whose Finance Director and CEO "*had been sitting on*" two authorizations for expenditure and refused to approve them.[103] Nevertheless, the JV Partners continued discussions about the budget, and in that context, whether the 3D surveys were necessary.[104]

63. The JV Partners suggested, as late as November 2014, that two wells would still be drilled in 2014.[105] Of critical importance, any commercial viability of the project was rapidly diminishing as the price of crude oil plummeted. As Discovery's CFO, Alexander Fraser, testifies, the ongoing efforts to raise needed capital were "*made considerably more challenging due to the fact that the oil price went into a prolonged period of weakness from June 2014 onwards*."[106]

---

99 Opcom minutes dated 11 September 2014, p. 2, **C-61**.

100 Opcom minutes dated 11 September 2014, p. 5, **C-61**.

101 Opcom minutes dated 11 September 2014, p. 5, **C-61**.

102 Opcom minutes dated 28 November 2014, p. 1, **C-66**.

103 Opcom minutes dated 28 November 2014, p. 1, **C-66**.

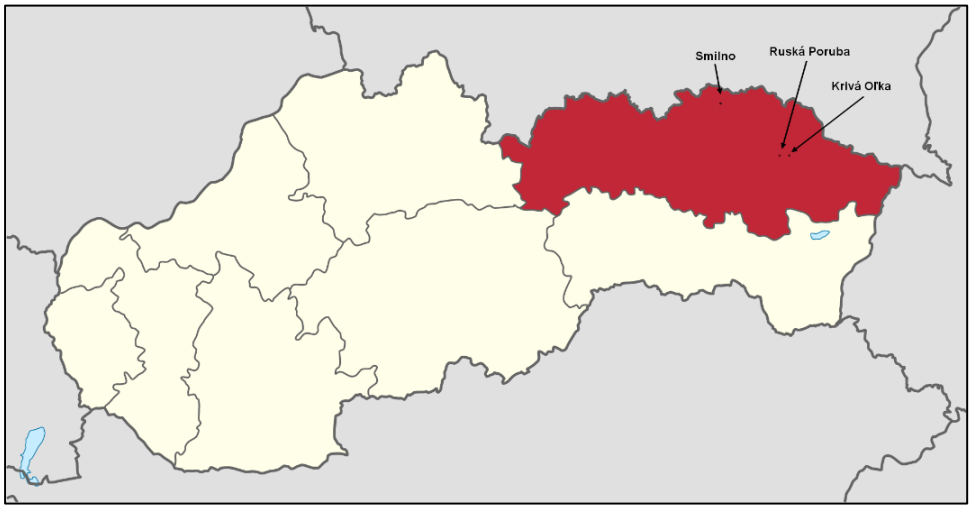
104 Opcom minutes dated 28 November 2014, p. 2, **C-66**.

105 Opcom minutes dated 28 November 2014, p. 3, **C-66**.

106 Fraser WS, ¶ 12.

64. Moreover, the alleged expectations for drilling in 2014 were unrealistic for other reasons as well. Most importantly, AOG had no rights to third-party lands for drilling sites, no feasible budget, and no prepared drilling sites.

65. In the end, it took AOG *eight years* simply to identify exploratory drilling locations. It ultimately identified three: (*i*) Smilno, located in the Svidník Exploration Area;[107] (*ii*) Ruská Poruba, located in the Snina Exploration Area,[108] and (*iii*) Krivá Oľka, located in the Medzilaborce Exploration Area.[109] Their locations are shown on the map below:



66. AOG's identification of these drilling locations marked the first step in the process that would lead to actual exploratory drillings. In the events that followed, however, AOG made a series of legal mistakes and poor business decisions (*e.g.*, refusal to engage with the local community) that ultimately proved fatal to its project. The Slovak Republic describes them in the context of each of the three exploratory sites below.

107 Decision on determination of exploration area Svidník dated 18 July 2006, **R-014**.

108 Decision on determination of exploration area Snina dated 18 July 2006, **R-031**.

109 Decision on determination of exploration area Medzilaborce dated 17 July 2006, **R-030**.

D. Smilno

1. In the summer of 2015, AOG sought to acquire rights for the use of land in Smilno

67. The drilling site in Smilno was located on a land plot owned by Mrs. [redacted] and Mr. [redacted] ("**Smilno Site**"). AOG signed a lease agreement with [redacted] and [redacted] on 1 June 2015 and 15 June 2015, respectively.[110]

68. As shown on the map below, the drilling location was situated in the middle of a field used for agricultural purposes behind the municipality:

69. The drilling site was accessible via the land plot No. 2721/780 ("**Access Land**"), which was co-owned by approximately 160 co-owners, including Ms.Marianna Varjanová.[111] The Access Land, together with the surrounding land plots, are registered as arable land and were leased to the agricultural cooperative Biodružstvo Smilno

---

110 Lease for Smilno well site dated 1 June 2015, **C-74**; Lease of land for Smilno well site dated 15 June 2015, **C-76**.

111 Contrary to Discovery's assertion, the Access Land registered in "E" land registry is not fully identical with the plot No. 945 registered in "C" land registry. *See* Claimant's Memorial, ¶ 83; Cadastral Map of Land Plots 945 and 2721/780, **R-056**.

("**Cooperative**").[112] For years, the Access Land has been mainly used to access the surrounding agricultural land for agricultural use.[113] In fact, that is most likely how the Access Land originated—it had been created by the owners of the surrounding agricultural plots in order to allow them to access their agricultural plots for the agricultural use.

70. As can be seen in the pictures below—taken in August 2014 and December 2015, and thus *before* AOG's illegal "upgrade"[114]—the track on the Access Land was grassy land. When the track became muddy, it was unstable and moved from time to time depending on the weather.[115]

112 Varjanová WS, ¶ 18.

113 Varjanová WS, ¶ 17; Statement of Smilno municipality regarding the classification of the Road 6 June 2016, **C-18**.

114 *See infra* ¶ 102.

115 Well site locations visit note dated 20 August 2014, **C-60**.

71. AOG's contemporaneous internal documents and actions confirmed that it, too, believed the Access Land was private property. For example, at a meeting held on 21 January 2016, AOG recognized that (*i*) the Access Land it sought to use was private property, and (*ii*) Ms. Varjanová had "*a legal right to park her car*" on it.[116] Moreover, as discussed below, AOG later purchased a share of the Access Land.[117] When this attempt failed due to the Interim Injunction preventing AOG from using the Access Land discussed below,[118] AOG sought to secure a right to use the Access Land by establishing its subsidiary which in turn would acquire a right to the Access Land to circumvent the Interim Injunction.[119] Throughout these various efforts, AOG never

116 Report to Partners – Status Update dated 20 January 2016, **C-120**.

117 *See infra* ¶¶ 87-89.

118 *See infra* ¶¶ 95-96; Letter from Law Office Slamka to Mrs. Varjanová dated 30 December 2015, **R-036**.

119 *See infra* ¶¶ 97-100.

argued that the field track was a public special purpose road—not even in its initial court appearances. All of these facts show that AOG contemporaneously understood that the Access Land was private property that could (*i*) be used with landowners' consent or (*ii*) by following Slovak law and applying for compulsory access under Article 29 of the Geology Act.

72. Discovery now argues that the field track on the Access Land is "*a public special purpose road*" because it is "*used by vehicles and pedestrians in order to access other plots of land (and is not in an enclosed area)*."[120] However, as explained below, apart from this vague statement, AOG has failed to substantiate this assertion and thus, meet its burden of proof.

73. The Act No. 135/1961 Coll. on Roads, as amended (the "**Road Act**") defines four categories of surface communications:

(a) State highways;

(b) State roads;

(c) Municipal roads;

(d) Special purpose roads, either public or private.[121]

74. Under Article 1(3), to qualify as a surface communication under the Road Act—and thus fall under one of the above four categories under the Road Act and its regime—a surface communication must have a "*road body*".[122] A "*road body*" must fulfil specific technical criteria under applicable Slovak technical norms.[123] This is only logical because according to Article 2(1) of the Act No. 8/2009 Coll. on Road Traffic, as amended ("**Road Traffic Act**"), the road traffic takes place only on surface communications. Therefore, not all tracks or paths automatically qualify as a surface communication.

120 Claimant's Memorial, ¶ 85.

121 Road Act, Art. 1(2), **R-057**.

122 Road Act, Art. 1(3), **R-057**.

123 STN 73 6100 Terminology of Surface Communications, **R-058**.

75. Tellingly, Discovery offers no evidence to substantiate its conclusion that the field track on the Access Land is a special public purpose road.

76. Neither the pictures from 2014/2015 shown above, nor the pictures taken in March 2023 below show any signs of a suitable technical condition for road traffic. The second picture below was taken right above the drilling location and thus, it shows the state of the field track before its illegal upgrade by AOG.

77. Even if the track were a public special purpose road, pursuant to Article 19(1) of the Road Act, AOG still needed landowners' consent to "upgrade" it:

> For major constructions, mining works or landscaping that require a building permit or other permit according to special regulations, ***a surface communication is to be used, the construction and technical equipment of which does not correspond to the required traffic on this road, the necessary adjustments must be made to it after agreement with its owner or manager***.[124]

78. Consequently, if AOG required any upgrade of the field track, it needed landowners' consent.[125] And indeed, AOG needed such an upgrade: AOG's contemporaneous internal documents prove that the field track on the Access Land would have to be upgraded before it could be used by drilling rigs and machinery. The minutes from an AOG operating committee meeting on 3 December 2015 state that "*[t]he access road will need to be upgraded and in one place relocated slightly, by agreement with the mayor*."[126]

79. AOG's detailed drilling program for Smilno also states that an access road for the Smilno Site must be built, referring to the need to "*[b]uild[] the access road to the drilling site according to the requirements of the drilling company […]*."[127] Also, Mr. Fraser confirms that AOG "*planned to spend some money improving the access road, by levelling and draining certain sections of it*."[128]

80. In fact, even the Regional Court in Prešov in a case initiated by AOG found:

> If [AOG] refers to the Access Field Road as a public-purpose communication, ***it is necessary to point out that the Road Act sets forth certain restrictions on the use of communications. When using communications, the user must adapt to their structural and traffic-technical condition, which does not appear to be fulfilled in this case according to the Court of Appeals, given the condition of the field road (it is just a relatively narrow road in the middle of arable land covered with macadam) and the weight and size of the machines and motor vehicles used for the implementation of geological deposit exploration***. Moreover, the use of a communication the structural and technical equipment of which does not meet the required traffic can be sanctioned

---

124 Road Act, Art. 19(1) (emphasis added), **R-057**.

125 Given that the field track is privately owned, it does not have ant road manager. *See* Road Act, Art. 3d(5)(d)-(e), **R-057**.

126 Opcom Minutes dated 3 December 2015, **C-100**.

127 Detailed Drilling Programme Smilno dated December 2015, p. 22, **C-95**.

128 Fraser WS, ¶ 34.

> with a fine, which implies that it is an unlawful conduct that the Court would essentially approve by ordering an interim injunction.[129]

81. Moreover, under Act No. 50/1976 Coll. on spatial planning and construction order, as amended ("**Construction Act**"), a structure can be used only for the purpose so delineated in the relevant occupancy or the building permit.[130] If, however:

> [t]he documents (particularly the verified documentation) from which it should be possible to determine the purpose for which a structure was permitted, have not been preserved, ***the structure should be presumed to be intended for the purpose for which it has been equipped with its technical characteristics***. ***If the structure's equipment indicates several purposes, it shall be assumed that the structure is intended for the purpose for which it is used without any defects***.[131]

82. In other words, if no documentation to determine the purpose of a structure is preserved—*e.g.*, if no technical design documentation, no building permit, and/or no occupancy permit is available, such as in this case[132]—the intended purpose of the structure shall be assessed based on its technical characteristics. As explained above, the field track could not be used for the purpose of moving the drilling equipment.

83. In sum, Discovery failed to substantiate its assertion that the field track is a special purpose road open to the public without landowners' consent. In fact, even AOG contemporaneously understood that landowner consent was required for the use of the Access Land. But even if the Access Land were a public special purpose road, it was not suitable for the use by drilling rigs and heavy machinery "as is", and it could not have been upgraded without landowner consent. In either case, AOG was not entitled to use and improve the Access Land.[133]

---

129 Resolution of the District Court Prešov, File No. 20Co/14/2017-256 dated 16 February 2017, p. 4 (emphasis added), **R-059**.

130 Construction Act, Art. 85(1), **R-060**.

131 Construction Act, Art. 104(1) (emphasis added), **R-060**.

132 Letter from Smilno Municipality dated 3 November 2016, **R-061**.

133 Resolution of the District Court Prešov, File No. 20Co/14/2017-256 dated 16 February 2017, **R-059**.

2. AOG attempted to access the Smilno Site without required rights in late 2015

84. In late 2015, AOG's trucks and machinery started to arrive in Smilno. Ms. Varjanová recalls that—despite being one of the co-owners of the Access Land—"*nobody informed [her] and sought [her] permission to use it*."[134] She did not consider AOG's conduct to be legal and thus used "*plastic poles and a string with signaling flags*" from her ski resort, "*and implanted them in the ground*" and left her phone number.[135] Ms. Varjanová wanted to let AOG know that she was one of the co-owners so its representatives could contact her. She did so to ensure that she "*do everything to let those who use this land without [her] knowledge understand that the land plot has its owners and that they can be contacted easily*."[136] Nobody from AOG, however, contacted her at the time.[137] Instead, the plastic poles and signage were simply removed.

85. Having been ignored in her first attempt to contact AOG, Ms. Varjanová next parked her vehicle—with a phone number visible on a sign on the vehicle's window—on the Access Land. Again, however, she "*received no phone calls from AOG or anyone else at the time*."[138] Instead, when Ms. Varjanová arrived at the Access Land, she found that the vehicle was moved and placed on adjacent land.[139]

86. Nevertheless, Ms. Varjanová's efforts—as a result of AOG's failure to obtain owner consent—prevented AOG from its initial efforts to use the Access Land.

3. On 17 December 2015 AOG purchased a share on the Smilno Access Land

87. Although Ms. Varjanová repeatedly left her phone number hoping that AOG would contact her, AOG, rather than simply asking for her consent or otherwise engaging with

---

134 Varjanová WS, ¶ 19.

135 Varjanová WS, ¶ 19.

136 Varjanová WS, ¶ 20.

137 As Ms. Varjanová explains that she met with Mr. Benada and his colleagues to speak about AOG's plans or use of the Access Land. That discussion, however, happened only after AOG repeatedly towed the vehicle from the Access Land and the vehicle was even barricaded with concrete panels during that discussion, and thus, she did not consider this discussion as serious from AOG's perspective. *See* Varjanová WS, ¶ 24.

138 Varjanová WS, ¶ 20.

139 Varjanová WS, ¶ 20.

her, tried to buy its own private right to access the field track. On 17 December 2015—just two days after AOG's unsuccessful attempt to access the Smilno Site—AOG purchased a co-ownership share on the Access Land from one of its co-owners, Mr. [redacted] ("**Smilno Share**"). AOG's purchase of this share again confirms that it believed that the Access Land was private property.

88. After this transaction, AOG's attorney sent a letter to Ms. Varjanová, requesting that she "*remove the white vehicle*" placed on the Access Land because AOG now allegedly owned a share of the property. This was the first time Ms. Varjanová learned that AOG had purchased a share on the Access Land.[140] The attempted purchase was, however, voidable. The Slovak Civil Code provides that "*[i]f a co-ownership share is to be transferred, the co-owners shall have the right of pre-emption […]*."[141] Thus, the seller was obliged to offer the Smilno Share to other co-owners before selling it to AOG. No such offer was made.

89. The Civil Code grants the omitted co-owners the right to void the transfer that breached their pre-emption rights.[142] Therefore, on 19 January 2016, Ms. Varjanová filed a claim against AOG and Mr. [redacted] in the District Court in Bardejov. Ms. Varjanová sought to invalidate the purchase agreement between AOG and Mr. [redacted] and also sought the Interim Injunction preventing AOG from using the land and removing her assets from it until the court decided on the merits of her claim.[143]

4. AOG returned to Smilno in January 2016

90. While Ms. Varjanová's request for the Interim Injunction was pending, AOG came back to Smilno. Discovery states that this was "*AOG's first drilling attempt*".[144] The Smilno Site, however, was not remotely close to being ready for actual drilling. Discovery's January 2016 internal status update shows that AOG had only leveled the

---

140 Varjanová WS, ¶ 26; *see also* Letter from Law Office Slamka to Mrs. Varjanová dated 30 December 2015, **R-036**.

141 Act No. 40/1964 Coll. the Civil Code, as amended ("**Civil Code**"), Art. 140, **R-062**.

142 Civil Code, Art. 40a ("*If a legal act is invalid under the provisions of Section 49a, Section 140, Section 145 Subsection 1, Section 479, Section 589 and Section 701 Subsection 1, the legal act shall be deemed valid if the person affected by the legal act does not claim invalidity of the legal act Invalidity may not be claimed by the person who caused the invalidity*."), **R-062**.

143 Decision of District Court of Bardejov dated 18 February 2016, p. 1, **C-125**.

144 Claimant's Memorial, p. 45.

location and was preparing "*to install plastic liner, then will gravel location*."[145] Once the location would be graveled, AOG planned to prepare a concrete pad for the drilling rig. Finally, after all these works were done, AOG planned to "*temporarily suspend operations until a second location is ready*", because AOG could not "*justify the mob/demob of the drilling rig for just one well*."[146]

91. In short, AOG was not even close to actual drilling in January 2016.

92. As AOG carried out these preliminary works, it continued to do so without any right to the Access Land. Witnessing these ongoing activities on her privately co-owned land, Ms. Varjanová again left her vehicle parked on the Access Land—this time making sure that the vehicle blocked the passage entirely.[147] In response, AOG's contractors again towed the vehicle away.[148]

93. Having failed in her first two attempts to block access on property she co-owned, Ms. Varjanová then attempted a new approach: to chain the vehicle to the ground. She did so "*again [hoping] that AOG or its contractors would contact [her] if the vehicle could not be moved*."[149] Even this, however, did not work. When she returned to the property, she "*was shocked to see that the chain was cut off from the vehicle and the vehicle was again moved from the Land. That was not all, however. AOG's contractors barricaded the vehicle with heavy concrete panels.*"[150]

94. Despite AOG barricading Ms. Varjanová's car, its contemporaneous, internal documents show that AOG—upon consultation with its attorney—concluded that Ms. Varjanová "*has legal right to park her car on the road*."[151] This conduct exemplifies

---

145 Report to Partners – Status Update dated 20 January 2016, p. 2, **C-120**.

146 Report to Partners – Status Update dated 20 January 2016, p. 2, **C-120**.

147 Varjanová WS, ¶ 21.

148 Varjanová WS, ¶ 21.

149 Varjanová WS, ¶ 21; *see also* Photograph of car bolted into the public road dated 23 January 2016, **C-122**.

150 Varjanová WS, ¶ 21.

151 Report to Partners – Status Update dated 20 January 2016, p. 2, **C-120**. The Slovak Republic notes that various documents, like this exhibit, have been redacted on the purported basis that they contain privileged materials. The full, unredacted versions of these documents will be sought in document production.

the dismissive and hostile attitude AOG showed towards the local inhabitants—something Mr. Leško confirms in his own testimony:

> ***AOG and its representatives acted very arrogantly towards local inhabitants. My perception is that they did not consider local inhabitants as partners or even affected parties who have a compelling interest in activities being performed behind their houses and on their lands. They acted as if the decisions they possessed were a blank check to do anything in the region****. The fact that they just came and tried to use privately-owned land despite knowing the co-owner's disagreement or that they towed someone else's car from private land is a perfect example of such treatment. Naturally, this was something that people were very sensitive about.*[152]

5. On 18 February 2016, the District Court in Bardejov issued the Interim Injunction

95. On 18 February 2016, the District Court in Bardejov granted Ms. Varjanová's requested injunction and ordered AOG to "*refrain from using the [Access Land] and to refrain from removing things placed by [Ms. Varjanová] on the [Access Land] […] until the final determination of the proceedings conducted by the local court under file no. 1C/29/2016*."[153]

96. AOG later appealed this decision to the Regional Court in Prešov, although not on the basis that the track was a public special purpose road (as it now claims). Rather, it raised arguments concerning AOG's co-ownership right to the Access Land to attack the Interim Injunction. The Regional Court in Prešov upheld the lower court's decision and kept the Interim Injunction in place.[154] The Slovak Republic's expert on civil procedural law, Prof. Ľubomír Fogaš, confirms that both the Interim Injunction and the appellate court's decision were appropriate and consistent with Slovak law.[155]

---

152 Leško WS, ¶ 15 (emphasis added).

153 Decision of District Court of Bardejov dated 18 February 2016, **C-125**.

154 Decision of Regional Court in Prešov dated 14 April 2016, **R-063**.

155 Fogaš ER, § 3.1.

6. To circumvent the Interim Injunction and access the Smilno Site, AOG established Smilno Roads

97. AOG could have used Article 29 of the Geology Act, which permits a geological works contractor to seek permission from the MoE to access private property where the landowners do not consent. As explained earlier, the MoE put AOG on express notice of this provision when it extended the Exploration Area Licenses in 2010, stating that AOG needed to comply with Article 29 "*when entering land plots*".[156]

98. Rather than use the options available under the law, however, AOG attempted to *circumvent* the Interim Injunction by securing a right to the Access Land through a new entity, which would co-own the Access Land. On 12 April 2016, AOG and its local representative, Mr. Stanislav Benada, established a new company called Cesty Smilno s.r.o. (in English: "*Roads Smilno*") ("**Smilno Roads**"). AOG identified one co-owner of the Access Land, Mr. [redacted], who was willing to transfer his share to Smilno Roads. Accordingly, on 22 April 2016, Mr. Stanislav Benada transferred his business interest in the Smilno Roads entity to Mr. [redacted], who, in turn, contributed his share of 1/315 in the Access Land as a non-monetary contribution to Smilno Roads.[157]

99. Smilno Roads/AOG then proceeded to obtain consents from certain co-owners of the Access Land. By May 2016, Smilno Roads had approached several co-owners of the Access Land and informed them that AOG decided to "*use company Smilno Roads*" to "*transport of material and to repair the road*."[158] Several co-owners granted their consent to Smilno Roads, while others did not.

100. In trying to circumvent the Interim Injunction, AOG's maneuver was yet another example of its failure to respect the actual owners of the land and the Slovak court decisions. It is also contemporaneous evidence that AOG did not believe that the

---

156 Decision about extension of the geological survey permit of 26 July 2010, Ref. No.: 44505/2010, File No.: 998/2010-9.3 (Svidník), **C-5**; Decision about extension of the geological survey permit of 26 July 2010, Ref. No.: 44515/2010, File No.: 1000/2010-9.3 (Medzilaborce), **C-6**; Decision about extension of the geological survey permit of 26 July 2010, Ref. No.: 44509/2010, File No.: 999/2010-9.3 (Snina), **C-7**.

157 This transfer was also performed in breach of Ms. Varjanová's preemption right, and thus constituted another bad-faith attempt from AOG's side.

158 Consent from [redacted] dated 23 May 2016, **R-064**.

Access Land was a public special purpose road (as it now claims). If AOG had believed it was a public road, it would not have established Smilno Roads (to circumvent the Interim Injunction); and it would not have tried to acquire a share on the Access Land in violation of the real owners' pre-emption rights.

7. AOG again attempted to access the Smilno Site in the summer of 2016

101. AOG again returned to Smilno in the summer of 2016. At the time, the Interim Injunction was still in place, and AOG therefore was not entitled to use the Access Land. AOG's Smilno Site was still not ready for actual drilling. Nevertheless, AOG attempted to circumvent the Interim Injunction by using the Access Land through its entity, Smilno Roads, established solely for that purpose.[159]

102. As explained above, AOG itself recognized that the track was not in a condition for use by drilling rigs and heavy machinery.[160] Thus, in June 2016, AOG attempted to illegally upgrade the track by placing gravel on it, in breach of the Interim Injunction and without a majority of owners' authorization to do so.[161]

159 Slamka Partners - Smilno report by JUDr. Pavol Vargaestok of the events on 17-18 June 2016 dated 14 December 2016, p. 1, **C-161**.

160 *See supra* ¶¶ 78-79.

161 Civil Code, Art. 139(2), **R-062**.

103. Having laid the gravel, AOG then attempted to access the Smilno Site. Ms. Varjanová recalls that "*AOG was able to transfer some machinery to the drilling site*."[162] They used a track located on a different land plot leading from the Cooperative towards the Smilno Site. That way, AOG was able to bypass the section of the Access Land where Ms. Varjanová parked the car and move toward the illegally upgraded track and the drilling site. When Ms. Varjanová and her fellow activists noticed this attempt, however, they approached the drilling site. Ms. Varjanová recalls that two black SUVs blocked one of their cars leading to the drilling site.[163] AOG's representative—Mr. Crow—then stepped out of one SUV, stood in front of the activists' car, and prevented them from moving forward. Other AOG personnel stood behind the activists' car, so they were unable to move forward or backward. Ms. Varjanová recalls that "*Mr. Crow suddenly bent over and grabbed his leg, imitating that the activists drove the car into him and injured his leg*"[164] and "*[w]hile doing so, he even waved his hand*,"[165] suggesting that activists should move their car at him. Mr. Crow was smiling the entire time. This incident was recorded by a video camera.[166]

104. Mr. Fraser offers testimony that Ms. Varjanová's "*boyfriend drove his car into [Discovery's] Chief Operating Officer, Ron Crow, from behind, causing him to fall over and suffer bruising and some cuts*."[167] Discovery even submitted a picture showing Mr. Crow's bandaged leg.[168] As Ms. Varjanová confirms, however, "*the video from this incident refutes Mr. Fraser's description*."[169] The absence of a witness statement from Mr. Crow is telling.

105. On the same day of Mr. Crow's supposed "*leg injury*", the activists tried to prevent further drilling works by sitting next to the drilling machine (but not the actual drilling rig), as shown below:

---

162 Varjanová WS, ¶ 30.

163 Varjanová WS, ¶ 31.

164 Varjanová WS, ¶ 32.

165 Varjanová WS, ¶ 32.

166 Videorecording of Mr. Crow's Incident, **R-065**.

167 Fraser WS, ¶ 55.

168 Photograph of Ron Crow dated June 2016, **C-112**.

169 Varjanová WS, ¶ 33.

106. Protests continued on 18 June 2016, when local inhabitants and activists again gathered on the field and created a human chain, thereby preventing AOG from accessing the site. As Ms. Varjanová describes, "*numerous protesters and the Police were present. AOG also had its attorney present*."[170] It was on this day that the state prosecutor, Dr. Vladislava Slosarčíková, was called to the site.

8. The state prosecutor, who visited the Smilno Site on 18 June 2016, did not prevent AOG from accessing the site

107. In its Memorial, Discovery makes much of the fact that the state prosecutor, Dr. Slosarčíková, came out to the site on Saturday, 18 June 2016, and that she did not disband the protesters. In fact, it was AOG that caused her to visit the site. AOG did so by calling the police, and the Police in turn contacted the prosecutors' office.[171] Dr. Slosarčíková explains that the "*police officers were concerned that crime could occur, and that the situation could escalate*."[172] Therefore, Dr. Slosarčíková went to the site.

108. Although Discovery now says that it "*could not understand*" why Dr. Slosarčíková arrived at Smilno Site on a Saturday,[173] there is nothing surprising about it (in the end, it was AOG who called the police). As Dr. Slosarčíková explains, "*given the nature of*

170 Varjanová WS, ¶ 36.

171 Slosarčíková WS, ¶ 12.

172 Slosarčíková WS, ¶ 12.

173 Claimant's Memorial, ¶ 108.

their work, prosecutors must be prepared for an immediate performance of their duties."[174] Naturally, "*if a crime was committed, or if there is a threat that a period for filing a request for custody of an accused will lapse for example on Saturday, the prosecutor cannot wait until his regular service duty hours start on Monday morning*."[175] Thus, "*so-called emergency service duty is ordered to prosecutors, when they must be prepared for an immediate performance of prosecutor's duties even outside their schedule of daily service duty hours*."[176] Dr. Slosarčíková was on emergency service duty on 18 June 2016 when she arrived to Smilno.[177]

109. After arriving at the site, Dr. Slosarčíková "*witnessed around 30-50 activists who had created a human chain near the drilling site. SUVs with Polish license plates tried to pass through this human chain, but protesters kept preventing them from crossing*."[178] She, however, "*did not see any signs of criminal activity taking place*."[179] Rather, what she witnessed, and from what she gathered at the scene, it appeared to be a "*civil dispute between protesters, including owners of the lands that AOG wanted to cross, and AOG itself*."[180]

110. AOG's attorney, Mr. Pavol Vargaeštok, approached Dr. Slosarčíková and showed her various legal documents, including the Interim Injunction. Although Discovery argues that Dr. Slosarčíková "*referred*" Mr. Vargaeštok to the Interim Injunction,[181] she explains that this was the first time she learned about the Interim Injunction, and that AOG's attorney was the one who informed her of it and showed her a copy.[182] She recalls that Mr. Vargaeštok argued that the Interim Injunction did not apply to the Smilno Roads entity.

---

174 Slosarčíková WS, ¶ 9.

175 Slosarčíková WS, ¶ 9.

176 Slosarčíková WS, ¶ 9.

177 Slosarčíková WS, ¶ 12.

178 Slosarčíková WS, ¶ 13.

179 Slosarčíková WS, ¶ 14.

180 Slosarčíková WS, ¶ 14.

181 Claimant's Memorial, ¶ 106; Slamka Partners - Smilno report by JUDr. Pavol Vargaestok of the events on 17-18 June 2016 dated 14 December 2016, **C-161**.

182 Slosarčíková WS, ¶ 16.

111. Nevertheless, as prosecutors do not have authority to act in civil disputes, she did not intervene.[183] Dr. Slosarčíková then briefly discussed the situation with the Police, did not issue any instructions in her prosecutor capacity, and left.[184] Given the fact that state prosecutors do not have authority to act in these types of civil disputes, Discovery's assertion that Dr. Slosarčíková "*told the police to stop*" is incorrect.[185] In fact, the Police—whose wider responsibilities include protection of the public order[186]—stayed there until AOG decided to leave.

112. Like Mr. Crow, neither Mr. Benada nor Mr. Vargaeštok are witnesses in this arbitration.

9. In October 2016, the Police refused to place a road sign in Smilno

113. Having failed to circumvent the Interim Injunction, AOG concocted yet another new plan. This time, AOG requested the Smilno municipality to erect a road sign at the entrance to the Access Land that would indicate that those accessing the municipal road from the field track must give way to those on the municipal road. According to Discovery, such a sign would allow it to use the Access Land as a public special purpose road.[187] Discovery asserts that "*AOG was then led to believe that the signage scheme would be approved by the Police*"[188] and that the road signs would be erected.

114. At the time, the Smilno municipality was working on a wider project related to correcting several road signs in Smilno.[189] AOG used this opportunity and worked with Smilno municipality to include road signs P1 (*yield*) and P8 (*main road*) on an intersection of the Access Land and the adjacent municipal road.[190] The Smilno municipality included these road signs in the proposed road signage project.[191] Given

---

183 Slosarčíková WS, ¶ 16.

184 Slosarčíková WS, ¶ 16; *see also* Letter from District Prosecutor's Office on FOIA response dated 4 July 2016, **R-066**.

185 Claimant's Memorial, ¶ 107. Notably, Slovak law prescribes various remedies available in case anyone disagrees with the prosecutor's actions. AOG did not use any of these.

186 Act No. 171/1993 Coll. on Police Forces, as amended ("**Police Act**"), Art. 2(1), **R-067**.

187 Claimant's Memorial, ¶ 117.

188 Claimant's Memorial, ¶ 118.

189 Letter sent by the Police to the Smilno municipality dated 11 October 2016, p. 1, **C-153**.

190 Decree No. 9/2008 implementing the Road Traffic Act dated 20 December 2008, Annex II, Arts. 2(1),(7), **R-068**.

191 Letter sent by the Police to the Smilno municipality dated 11 October 2016, **C-153**.

that the municipality, as a road administration body, may determine the use of road signs only subject to the consent of the traffic inspectorate,[192] the Smilno municipality submitted its proposal—which included roads signs at the Access Land—to the District Traffic Inspectorate, for comments.[193]

115. The District Traffic Inspectorate responded to the Smilno municipality on 11 October 2016 and refused to place the road signs on the Access Land "*because it is not a crossroads but merely a conjunction of a [field track]*."[194] As a result, the Smilno municipality refused to erect the road signs at the intersection of the municipal road with the Access Land.

116. There is no obligation to place a road sign on any road. Rather, under Article 61(1) of the Road Act, "*[t]raffic signs and traffic devices may only be used to the extent and in such a way as inevitably required for safety and fluency of a road traffic*."[195] Therefore, it is up to the authorities' assessment of whether the signage is inevitably required or not.

117. Nevertheless, although Discovery repeatedly asserts that AOG was "*led to believe*" that the road signs would be erected[196] or that the project would be approved,[197] Discovery is unable to cite any contemporaneous documents showing that any Slovak authority promised to approve the road signs. Rather, even Discovery's own internal documents confirm that the project of a road sign erection is subject to "*final approval*" by the Police.[198]

118. After the District Traffic Inspectorate denied the road sign request, AOG submitted a request for interpretation of Article 22 of the Road Act concerning special purpose roads to the Ministry of Transportation (the "**MoT**") in November 2016. The MoT responded on 29 November 2016, advising AOG that generally (*i.e.*, not specific to the

192 Road Act, Art. 3(7), **R-057**.

193 Letter sent by the Police to the Smilno municipality dated 11 October 2016, **C-153**.

194 Letter sent by the Police to the Smilno municipality dated 11 October 2016, **C-153**.

195 Road Traffic Act, Art. 61(1), **R-069**.

196 Claimant's Memorial, ¶ 118.

197 Claimant's Memorial, ¶ 120.

198 AOG report to JKX and Romagaz dated 11 October 2016, p. 1, **C-148**.

Access Land in Smilno) "*special purpose roads serve for the connection of manufacturing plants or individual structures and real properties to other roads, or for communication purposes within closed sites*."[199] The MoT further explained that "*special purpose roads are divided into public and non-public special purpose roads*", and the "*regime of a special purpose road is prescribed by its owner*."[200] Therefore, the MoT concluded that "*the answer to the question whether a special purpose road is a public or non-public special purpose road depends on the relevant Building Permit and/or use permit relating to a particular special purpose road*."[201]

119. AOG then requested an additional interpretation of Article 22 of the Road Act. On 9 December 2016, the MoT responded—without specific reference to the Access Land in Smilno—that "*[s]pecial purpose roads are in particular [field tracks] and forest paths, access roads to manufacturing plants, construction sites, quarries, mines, sand pits and other sites, and roads within enclosed sites and structures*."[202] The MoT explained that "*a track for which no building permit or decision approving its use has existed, and that has been registered in the Land Register, can be deemed a special purpose road, taking into account its traffic-related importance, designation and technical condition*."[203]

120. Discovery characterizes these general statements, which were not specific to the Access Land in Smilno, as "*confirm[ation] that field tracks are indeed special purpose roads. In a subsequent clarification issued on 9 December 2016, the Ministry of Transport confirmed that if a field track was recorded on the land registry of the Slovak Republic, then it is classified as a public special purpose road*."[204] Discovery mischaracterizes what the MoT said.

---

199 Statement of the Ministry of Transport regarding the classification of the Road dated 29 November 2016, **C-21**.

200 Statement of the Ministry of Transport regarding the classification of the Road dated 29 November 2016, **C-21**.

201 Statement of the Ministry of Transport regarding the classification of the Road dated 29 November 2016, **C-21**.

202 Statement of the Ministry of Transport regarding the classification of the Road dated 9 December 2016, **C-22**.

203 Statement of the Ministry of Transport regarding the classification of the Road dated 9 December 2016, **C-22**.

204 Claimant's Memorial, ¶ 122.

121. Nowhere in its response of 29 November 2016 did the MoT state that all field tracks are special purpose roads; indeed, that communication does not even mention field tracks. Nor does the MoT's response of 9 December 2016 state that "*if a field track was recorded on the land registry of the Slovak Republic, then it is classified as a public special purpose road*", as Discovery suggests. Rather, the letter states that a field track "*can be deemed*" a special purpose road. It goes without saying that "*can be*" (in Slovak: *môže*) is not the same as "*is*" (in Slovak: *je*). As such, while a field track recorded in the land registry of the Slovak Republic *can* be a special purpose road, it need not be. In fact, as the MoT correctly noted, it depends on its "*traffic-related importance, designation and technical condition*."[205]

122. Discovery further points to the letter from the Ministry of Interior ("**MoI**") dated 19 December 2016, which—unlike the two general opinions from the MoT—specifically addressed the Access Land in Smilno. There, the MoI—referring to information from the Smilno municipality—stated that "*[a]ccording to the information we have procured, the plot of land in question is private land with several co-owners and, according to the Judgement delivered by the District Court in Bardejov, [AOG] is not a co-owner of that land as the above Court also delivered Judgement No. IC/29/2016-268 annulling the purchase agreement of 17.12.2015 concluded between [AoG] and* [redacted] *(one of co-owners).*"[206]

123. Contrary to AOG's assertions, there is no contradiction between the positions adopted by the MoT and the MoI. The former provided only a general opinion, recognizing that a field track can be (but need not be) a special purpose road, whereas the latter specifically opined that the track in Smilno was a private property. Their positions are compatible.

124. Finally, Discovery refers to the letter of the MoI dated 19 December 2016 as an "*instruction to the Police*" not to treat the track on the Access Land as "*a public special purpose road*."[207] This letter was, however, only a guidance on matters falling within

---

205 Statement of the Ministry of Transport regarding the classification of the Road dated 9 December 2016, **C-22**.

206 Statement of the Ministry of Interior regarding the classification of the Road dated 19 December 2016, p. 2, **C-23**.

207 Claimant's Memorial, ¶ 123.

the competence of the MoI while exercising its statutory authority.[208] This is important because Discovery ultimately points to the letter from the MoI dated 30 December 2016, which responded to an inquiry from AOG's counsel seeking an interpretation of the Road Traffic Act. In that letter, the MoI stated that the "*Ministry, given the scope of its authority, is not authorised to give generally binding interpretation of laws and of other generally binding legal regulations, or opinions having the nature of legal interpretation*" and thus cannot provide a general, legally binding interpretation of the Road Traffic Act.[209] In response to Discovery's questions about a field track, the MoI referred AOG's attorney to the MoT.

125. Based on this letter, Discovery argues that "*the Ministry of the Interior, by its own admission, had no competence to issue its instruction to the Police*" in its letter dated 19 December 2016.[210] Discovery's argument misses the point. Unlike the 19 December 2016 letter, the MoI's letter dated 30 December 2016 was a response to a request submitted by AOG's attorney. The MoI was thus right to advise that it is not authorized "*to give generally binding interpretation of laws and of other generally binding legal regulations, or opinions having the nature of legal interpretation*" to third parties.[211] On the other hand, the MoI is authorized to apply the law within its competence, which is precisely what it did in its letter dated 19 December 2016.[212]

* * *

126. In short, there is no obligation to place road signs on any surface communications.

10. AOG again attempted to access the Smilno Site in late 2016

127. AOG attempted to access the Smilno Site again in late 2016, while the Interim Injunction still applied. But as already explained, the Interim Injunction arose from

---

208 Police Act, Art. 6, **R-067**; Act No. 575/2001 Coll. Organization of Government Activities and Organization of Central Government, as amended, Arts. 11(c), 38, **R-071**.

209 Statement of the Ministry of Interior regarding the classification of the Road dated 30 December 2016, **C-24**.

210 Claimant's Memorial, ¶ 124.

211 Statement of the Ministry of Interior regarding the classification of the Road dated 30 December 2016, **C-24**.

212 Police Act, Art. 6, **R-067**; Act No. 575/2001 Coll. on Organization of Government Activities and Organization of Central Government, as amended, Arts. 11(c), 38, **R-071**.

AOG's legal mistakes (*e.g.* breach of owner pre-emption rights). AOG was thus unable to access the drilling site due to its own legal mistake yet again.

128. Instead of trying to ignore or circumvent the Interim Injunction, AOG had two different options available under Slovak law: (*i*) obtain a majority of the co-owners' consent; or (*ii*) invoke procedures under Article 29 of the Geology Act.

129. These two options were what AOG was supposed to do *from the very beginning*: Ms. Varjanová repeatedly left her phone number on the car parked on the Access Land so that AOG could reach her and discuss AOG's plans, and AOG was repeatedly put on notice about the procedures under Article 29 of the Geology Act that allow for compulsory access. Yet AOG did not undertake either option.

130. Discovery's witness, Mr. Fraser now tries to justify AOG's failure to use the procedure under Article 29 by stating that it was unnecessary for three reasons:

(a) the field track was a public special purpose road;

(b) "*[T]hrough Cesty Smilno, AOG also became a legal co-owner of the Road*" and thus AOG's "*understanding was that [Article 29] applications are for when the party applying has a dispute with the owner of the land in question (so effectively, how could we have a dispute with ourselves?)*"; and

(c) "*[T]here were almost 170 co-owners of the Road*" which "*would have added a significant level of complexity to the process*."[213]

131. None of these excuses is credible or legally sufficient. *First*, as explained above, AOG failed to substantiate that the field track on the Access Land was a public special purpose road. In fact, AOG contemporaneously treated it as private property.[214] As noted above, this view was initially held by AOG itself, and the "public special purpose road" theory emerged only after it had failed in its initial attempts to circumvent the required landowner's consent. *Second*, Smilno Roads was not the only co-owner of the Access Land; there were 170 other co-owners, and a majority's approval is required for

213 Fraser WS, ¶ 77.

214 *See supra* ¶ 71.

a decision regarding the property's use and upgrade.[215] Thus, while AOG would not have a dispute with Smilno Roads, it did have a dispute with other owners, including Ms. Varjanová. *Third*, the fact that the proceedings under Article 29 would take time is irrelevant; AOG cannot bypass this procedure simply because it may take time. Importantly, this requirement existed under Slovak law many years before Discovery ever made its alleged investment.

11. After the Interim Injunction ceased to apply, AOG never returned to Smilno Site

132. As explained above, AOG's apparent ignorance of the applicable law left no choice but for Ms. Varjanová to file her claim before the District Court in Bardejov and obtain the Interim Injunction. In June 2016, both AOG and Mr. [redacted], as defendants, admitted Ms. Varjanová's claim. As such, they admitted that AOG breached her pre-emption right.[216] On 5 October 2016, the District Court in Bardejov declared the purchase agreement between AOG and Mr. [redacted] invalid.[217]

133. Under Slovak law, an interim injunction ceases to exist once a decision on the merits becomes final, and a decision becomes final when appeals are exhausted. On 23 November 2016, Ms. Varjanová filed an appeal against the decision on the merits and as a result, the Interim Injunction remained in place.[218]

134. Although Discovery now complains that Ms. Varjanová was not entitled to appeal and that her appeal was "*an abuse of the court's processes*",[219] these arguments have no legal significance here. Ms. Varjanová is a private citizen and her actions are not attributable to the State. The Slovak Republic cannot prohibit Ms. Varjanová from exercising her procedural rights. It is up to the appellate court to decide whether a litigant has a right to submit such a request and whether the appeal is admissible. In

---

215 If no agreement can be reached, co-owners may seek court assistance to resolve their dispute; *see* Civil Code, Arts. 139(2)-(3), **R-062**.

216 Claimant's Memorial, ¶ 113.

217 The order of the Bardejov District Court (Slovak, with English translation) dated 5 October 2016, **C-147**.

218 Fogaš ER, ¶ 84.

219 Claimant's Memorial, ¶ 115.

any event, Prof. Fogaš explains that this was a proper legal procedure under Slovak law.[220]

135. Regardless of whether Ms. Varjanová had a right to appeal that judgment, the District Court in Bardejov and Regional Court in Prešov were obligated to address her appeal. Both courts lawfully processed Ms. Varjanová's appeal and the Regional Court in Prešov ultimately dismissed it as inadmissible on 4 April 2017. In his expert report, Prof. Fogaš explains that the appellate procedure was appropriate and lawful.[221]

136. After the court resolution dismissing the appeal was delivered to the parties, AOG never returned to Smilno.

* * *

137. To sum up, AOG was unable to access the Smilno Site because it ignored local citizens and landowners. Along the way, AOG also made critical legal mistakes, which only exacerbated AOG's self-created obstacles. As explained immediately below, AOG took a similar, error-ridden path for its planned works at Krivá Oľka.

E. Krivá Oľka

1. AOG sought to acquire rights to use land from LSR

138. The second drilling site that AOG identified was located in Krivá Oľka. The site is located on a forest land (highlighted in orange below) ("**Oľka Land**"):

220 Fogaš ER, § 3.3.

221 Fogaš ER, § 3.3.

139. To have the right to do exploratory drilling on forest lands, three conditions must be satisfied:

- The company must have an ***Exploration Area License***, granted by the MoE, that covers that area.

- The company must have a ***Forest Exemption***, granted by the District Office, because under the Act No. 326/2005 Coll. on forests (the "**Act on Forests**"), forest land can be used only for so-called "forest" purposes. To use forest land for any other purposes—such as exploration drilling—the District Office must grant a temporary exemption.[222]

- The company must have a ***Property Right***, granted by the landowner, in the form of a lease or purchase agreement.

140. *First*, AOG acquired a two-year extension of the Exploration Area License on 9 July 2014, meaning that its Exploration Area License would expire on 1 August 2016.

141. *Second*, AOG intended to use the Oľka Land for non-forest purposes. Therefore, on 19 December 2014, AOG requested the District Office in Humenné to grant a forest exemption for the Oľka Land. The District Office in Humenné promptly granted AOG's request and exempted the Oľka Land for the period of one year, *i.e.*, until 15 January 2016.[223]

142. *Third*, AOG proceeded to obtain a Property Right by seeking a lease from LSR, because the Oľka Land is owned by the Slovak Republic and managed by LSR.[224] On 4 May 2015, LSR signed a lease agreement with AOG (the "**Lease Agreement**") "*for a definite period of time, starting from the date of its entry into force until 15 January*

222 Act on Forests, Art. 5(1), **R-070**.

223 Decision of District Office Humenné dated 13 January 2015, **R-097**.

224 LSR is a State-owned, independent entity with discretion to decide whether to lease any of the forest land to third parties for a non-forest use. Rather, as an independent, state-owned entity, LSR "*conduct[s] its business independently*" and "*on its own account*", *see* Act No. 111/1990 Coll. on the State Enterprise, as amended, Art. 2(1), **R-072**; The main object of LSR "*is to manage forest and other property in the ownership of the Slovak Republic*", *see* Lesy SR website, *Forests of the Slovak Republic: About us*, https://www.lesy.sk/forest/about-us/ (last accessed 20 February 2023), **R-073**.

2016."[225] The Lease Agreement, which covers State property, must be approved by the MoA, which occurred in October 2015.

143. Thereafter:

- The Exploration Area License expired on 1 August 2016;
- The Forest Exemption expired on 15 January 2016; and
- The Lease Agreement also expired on 15 January 2016.

144. If *any* of these licenses, exemptions, or rights expired (without a valid extension), then AOG could not progress with its drilling preparations. As explained below, however, AOG missed a required deadline for extension due to its own errors.

2. AOG failed to extend the Lease Agreement on time

145. AOG's key mistake involved the Property Right (*i.e.*, the Lease Agreement), which was set to expire on 15 January 2016.[226] The Lease Agreement contained an extension mechanism, under which the "*lease relationship shall be extended in the form of amendment hereto at least by one year, even repeatedly*", if AOG delivered a request for the extension of the lease no later than one month before the termination of the Lease Agreement.[227] Thus, if AOG were to extend the lease, it was contractually obliged to submit its request to LSR no later than on *15 December 2015*.

146. 15 December 2015 came and went, and AOG did not seek an extension. It therefore missed this deadline.

147. More than a week later, on 23 December 2015 (and despite being dated 16 December 2015), AOG delivered to LSR its untimely request to extend the Lease Agreement:[228]

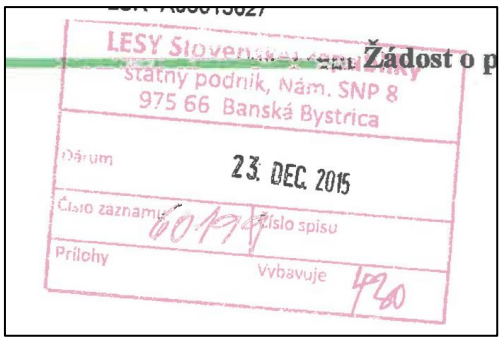
---

225 Lease Agreement between AOG and State Forestry dated 4 May 2015, Art. III(1), **C-73**.

226 Decision of District Office Humenné dated 13 January 2015, **R-097**.

227 Lease Agreement between AOG and State Forestry dated 4 May 2015, Art. III(2), **C-73**. Contrary to Discovery's assertion, this provision does not make the extension conditional on any additional approval from the MoA.

228 Letter from AOG to the LSR dated 16 December 2015, **R-074**.



LESY Slovenskej Republiky
State enterprise, Nám. SNP 8
975 66 Banská Bystrica
Date: **23 December 2015**
Record No. 60199 File No.
Annexes Provided by - signature

148. This was not AOG's only error. The Lease Agreement stated that, if AOG requested an extension by the deadline, the "*lease relationship shall be extended in the form of amendment hereto at least by one year, even repeatedly*."[229] But because AOG failed to request an additional extension for its Exploration Area License (which were set to expire on 1 August 2016), AOG could not extend the Lease Agreement by another year, because the Lease Agreement would then extend beyond the Exploration Area License's terms. Consequently, the only extension of the Lease Agreement that AOG could have received would be until 1 August 2016,[230] *i.e.*, for the remaining term of AOG's Exploration Area License.[231]

3. LSR agreed to amend the Lease Agreement, but the MoA disagrees

149. Despite these problems with AOG's request to extend the Lease Agreement, LSR agreed to amend it on 14 January 2016 (the "**Amendment**").[232] The Parties also agreed that additional consent from the MoA was necessary.[233] LSR requested this consent from the MoA on 14 January 2016.[234]

150. On 17 January 2016, AOG approached the Managing Director of the Forestry and Timber Processing Section of the MoA, Mr. Ctibor Hatar, for prior approval of the

229 Lease Agreement between AOG and State Forestry dated 4 May 2015, Art. III(2), **C-73**.

230 Addendum No. 1 extending the Lease Agreement dated 14 January 2016, Art. 1, **C-116**.

231 Decision about exploration area term extension of 10 July 2014, Record Number: 33590/2014, File Number: 5670/2014-7.3 (Svidník), **C-8**; Decision about exploration area term extension of 9 July 2014, Record Number: 33409/2014, File Number: 5670/2014-7.3 (Medzilaborce), **C-9**; Decision about exploration area modification and extension of exploration area term of 15 July 2014, Record Number: 34186/2014, File Number: 5668/2014-7.3 (Snina), **C-10**.

232 Addendum No. 1 extending the Lease Agreement dated 14 January 2016, **C-116**.

233 Addendum No. 1 extending the Lease Agreement dated 14 January 2016, Art. 2(3), **C-116**.

234 Letter from Ministry of Agriculture to AOG dated 22 January 2016, **C-121**.

Amendment from the MoA and "*renegotiation of the original contract*".[235] On 22 January 2016, Mr. Hatar responded by informing AOG that LSR had already delivered the request for approval to the MoA.[236] At the same time, Mr. Hatar explained that the Forestry and Timber Processing Section of the MoA already processed the request and sent it to the Head of the Service Office of the MoA, which is the competent office to decide on the consent.[237]

151. On 21 January 2016, AOG purported to report on these events to its JV Partners. There, AOG informed the JV Partners that "*the Ministry of Agriculture (Forestry) terminated*" the Lease Agreement "*on 15 January due to a misunderstanding of the terminology*."[238] According to AOG's description, the term of the Lease Agreement was "*roughly '15 January, or so long as Alpine holds valid licenses'*" and the Ministry "*took the position of the shorter term*."[239]

152. That is a stunning misrepresentation of what the Lease Agreement stated.

153. We invite the Tribunal to compare the actual words of the Lease Agreement with what AOG told its JV Partners.[240] Nowhere does the Lease Agreement state that its term is 15 January 2015 or "*so long as [AOG] holds valid [Exploration Area Licenses]*." Instead of admitting to the JV Partners that AOG missed the deadline, AOG blamed the MoA.

4. On 23 June 2016, the Minister of Agriculture denied AOG's request for an extension of the Lease Agreement

154. On 7 June 2016, the Minister of Agriculture, Mrs. Gabriela Matečná, announced she would not approve the retroactive "extension" of the Lease Agreement. By that time, the Lease Agreement had been terminated for almost *six months*.

---

235 Application for Ministry of Agriculture consent dated 17 January 2016, **C-118**.

236 Letter from Ministry of Agriculture to AOG dated 22 January 2016, **C-121**.

237 Letter from Ministry of Agriculture to AOG dated 22 January 2016, **C-121**.

238 Report to Partners – Status Update dated 20 January 2016, p. 3, **C-120**.

239 Report to Partners – Status Update dated 20 January 2016, p. 3, **C-120**.

240 Lease Agreement between AOG and State Forestry dated 4 May 2015, Art. III(2), **C-73**.

155. In rendering this decision, Minister Matečná explained that the Lease Agreement "*has terminated as a result of the fulfilment and/or nonfulfillment of conditions set out in its Article III dealing with the lease term*."[241] Minister Matečná explained:

> [A]s a result of the expiry of the lease term pursuant to its Article III (1), as well as non-fulfilment of the conditions of its extension pursuant to Article III (2) of the lease agreement; namely, the time limit for applying for a renewal was not complied with, and the length of time for which a renewal was requested was not in conformance with the above contractual provision.[242]

156. Mr. Fraser testifies that Discovery "*did not understand*" why the Minister responded that the Lease Agreement expired, as "*Stanislav Benada had personally delivered the lease amendment to the Ministry of Agriculture by hand*."[243] The problem, however, was not with AOG's delivery of the request for approval to the MoA, *but with AOG's belated request to LSR for an extension*.

157. Similarly, Discovery's allegation that "*Minister Matečná did not explain (i) what the alleged requirements were or (ii) why they were allegedly not fulfilled (or by whom)*" is contradicted by the Minister's letter. The above-cited portion of the Minister's letter refers to the *specific* provision of the Lease Agreement, under which the Lessee—here AOG—had to request an extension no later than one month before the expiry of the Lease Agreement.[244]

158. As the Amendment was signed in breach of the express contractual terms of the Lease Agreement, the Minister concluded she was not able to approve it. Whether the Amendment was already signed is irrelevant, as "*CEOs of a State-owned enterprises may sign similar documents only after having obtained the prior consent to such lease*

---

241 Response from the Ministry of Agriculture regarding the Krivá Oľka well and the lease approval dated 23 June 2016, **C-19**.

242 Response from the Ministry of Agriculture regarding the Krivá Oľka well and the lease approval dated 23 June 2016, **C-19**.

243 Fraser WS, ¶ 85.

244 Response from the Ministry of Agriculture regarding the Krivá Oľka well and the lease approval dated 23 June 2016, **C-19**.

from the Ministry; otherwise such an act is invalid and the document is not legally binding."[245]

159. To assist AOG, after its failure to request an extension on time, the Minister recommended to AOG that it proceed under Article 29 of the Geology Act,[246] which (as discussed above) would allow AOG to seek compulsory access from the MoE to use private property for exploratory drilling.

5. On 30 June 2016, AOG applied for compulsory access for the Krivá Oľka site under Article 29 of the Geology Act

160. Following the Minister's suggestion, AOG applied to the MoE for compulsory access under Article 29 of the Geology Act.[247] The MoE reviewed AOG's request and, on 20 September 2016, requested from AOG proof of "*whether the Ministry of Agriculture and Rural Development of the Slovak Republic has been contacted and asked to issue a preliminary consent for the conclusion of a lease agreement with the administrator of the property of interest*."[248] The MoE's request was understandable, as it can only grant compulsory access if the applicant proves that it was unable to secure the right by agreement. Therefore, the MoE inquired whether AOG sought to secure a new lease for the site in Krivá Oľka after the MoA refused to approve the Amendment.

161. The MoE also asked LSR to submit its comments and observations within the procedure. LSR responded on 25 October 2016, describing the history of AOG's Lease Agreement and its extension and explained that it was not within its competence to assess whether the public interest in forest protection is of greater significance than oil

---

245 Response from the Ministry of Agriculture regarding the Krivá Oľka well and the lease approval dated 23 June 2016, **C-19**.

246 Response from the Ministry of Agriculture regarding the Krivá Oľka well and the lease approval dated 23 June 2016, **C-19**.

247 Ministry of Environment response to AOG Application under s.29 of the Geology Act dated 20 September 2016, p. 1, **C-144**.

248 Ministry of Environment response to AOG Application under s.29 of the Geology Act dated 20 September 2016, p. 2, **C-144**.

and gas exploration.[249] Therefore, LSR concluded that AOG's application should be "*decided pursuant to the applicable law*."[250]

162. The MoE then approached the MoA for comments. On 23 November 2016, the MoA responded, stating that it was not a "*party to the proceedings*" as LSR manages the Oľka Land.[251] Contrary to Discovery's assertion, there is nothing "*confusing*" about the MoA's response. The mere fact that the MoA grants consent to a forest lease does not make it a party to the proceedings. Rather, the parties to the proceedings are owners of the affected property.[252]

163. On 6 March 2017, the MoE denied AOG's request for compulsory access to the Oľka Site.[253] AOG appealed the MoE's decision. The appeal was heard by the than Minister of Environment, Mr. Sólymos, who decided in favor of AOG and quashed the decision denying AOG's request for compulsory access.[254] Minister Sólymos noted that the MoE insufficiently ascertained the facts required for its decision. In essence, Minister Sólymos explained that, while the MoE considered lack of approval from the MoA in its decision-making, it did not deal with the question of whether AOG attempted to obtain new lease agreement with LSR. Therefore, Minister Sólymos "*return[ed] the matter to the Ministry of the Environment of the Slovak Republic, Department of State Geological Administration for a new discussion and decision*."[255]

---

249 Section 29 – various communications between the Ministry of Environment, State Forestry and Ministry of Agriculture dated 25 November 2016, p. 5, **C-156**.

250 Section 29 – various communications between the Ministry of Environment, State Forestry and Ministry of Agriculture dated 25 November 2016, p. 5, **C-156**.

251 Section 29 – various communications between the Ministry of Environment, State Forestry and Ministry of Agriculture dated 25 November 2016, p. 1, **C-156**.

252 Act on Forests, Art. 50(7), **R-070**.

253 On 10 March 2017, AOG stated that "*[t]he legal department indicated to us that they had been preparing to issue an order in our favor when they received an instruction from "above" to refuse the order, instead*.", AOG's report to Partners dated 10 March 2017, **C-169**. Discovery, however, does not say who at the MoE gave this supposed instruction or to whom it was given. This AOG's allegation about the instruction from "above" is implausible on its face. When AOG appealed the MoE's decision denying the compulsory access from 24 March 2017, Minister Sólymos—the highest representative of the MoE—decided in favor of AOG and on 13 June 2017, quashed the decision denying AOG's request for compulsory access.

254 Decision of Minister of Environment dated 13 June 2017, **C-174**.

255 Decision of Minister of Environment dated 13 June 2017, p. 1, **C-174**.

164. With AOG having prevailed on appeal, the matter was therefore remanded. On 27 June 2017, the MoE, on remand, requested AOG to provide additional documents necessary for the decision.[256] This is the typical procedure when the administrative authority does not have sufficient documents or information to decide on a particular matter.[257] Indeed, the MoE did the same to NAFTA, a company that Discovery uses as a comparator to AOG.[258] The MoE, therefore, suspended the proceedings until AOG submitted all required documents.[259] But then, AOG ceased participating in the procedure until they abandoned the Exploration Area License.

165. Mr. Fraser now tries to justify AOG's abandonment, stating:

> Following our previous experiences with the Slovak court system in dealing with the injunction at the Smilno well, together with the ongoing issues surrounding the preliminary EIA applications […], the Ministry of Environment's treatment of us in hearing our application the second time round gave us the overwhelming impression that they were not prepared to act with us in good faith, and consider our application fairly.[260]

166. Yet the factual record belies Mr. Fraser's testimony. Apart from AOG's request under Article 29, the MoE had granted all of AOG's requests. In fact, AOG was able to continue in the proceedings under Article 29 of the Geology Act *precisely because the Minister of Environment decided in AOG's favor*. Ultimately, the MoE terminated the proceedings because AOG abandoned its Exploration Area License.[261] As such, it was AOG's own legal mistakes, together with its decision to abandon the Exploration Area License, that led to its inability to access the Krivá Oľka site.

F. Ruská Poruba

167. The third and final exploratory drilling site was in Ruská Poruba, which was located on landplots co-owned by several individuals ("**Poruba Land**"). The Poruba Land was

---

256 Decision of the Ministry of Environment dated 27 June 2017, **R-075**.

257 Act No. 71/1967 Coll. on Administrative Procedure (Administrative Procedure Code), as amended, Art. 32(1), **R-076**.

258 *See infra* ¶ 388.

259 Decision of the Ministry of Environment dated 27 June 2017, **R-075**.

260 Fraser WS, ¶ 88.

261 *See infra* ¶ 219.

accessible via a forest road located on privately-owned land plots. Some of these land plots form part of a joint property (in Slovak: *spoločná nehnuteľnosť*), managed by a forest landowners' community called Urbárska spoločnosť-Pozemkové spoločenstvo Ruská Poruba ("**Urbariát**").[262]

168. Given that Urbariát managed forest land in the area, AOG sought its consent to access the land. Urbariát refused. But instead of using recognized and available procedures under Article 29 of the Geology Act, on 29 October 2015, AOG filed a claim in the District Court in Humenné against Urbariát, seeking an order that Urbariát refrain from blocking access to the Poruba Land.[263]

169. On 27 November 2015, the District Court in Humenné granted AOG's request and ordered Urbariát to "*allow the passage on foot and the passage of [AOG's] motor and freight vehicles and those vehicles of persons authorized by [AOG] across the part of the forest road*"[264] (the "**Poruba Injunction**"). Under the then valid Slovak law, the interim injunction became effective upon its delivery to the party against whom it was granted, *i.e.*, Urbariát.[265]

170. In particular, AOG started rolling its heavy machinery into Ruská Poruba on 22 December 2015—just days before Christmas. Residents immediately noticed and gathered on site to express their disagreement.[266] It was not, however, the local residents' opposition that stopped AOG on that day. Rather, AOG's attempt failed because of yet another of its own legal mistakes. Specifically, despite AOG could have foreseen Urbariát's opposition, it attempted to access the drilling site with machinery being able to demonstrate effectiveness of the Poruba Injunction.[267]

171. AOG returned to Ruská Poruba in January 2016. At the time, the Poruba Injunction was effective in AOG's favor. The problem, however, was that AOG intended to use

---

262 A landowners' community is a legal entity comprising community of owners of woodlands, pastures, or other common real estate.

263 Resolution of the District Court Humenné, File No. 5C/564/2015 dated 27 November 2015, pp. 1-2, **R-077**.

264 Resolution of the District Court Humenné, File No. 5C/564/2015 dated 27 November 2015, p. 1, **R-077**.

265 Act No. 99/1963 Coll. the Code of Civil Procedure, as amended, Art. 171, **R-078**.

266 Report to Partners – Status Update dated 20 January 2016, pp. 4-5, **C-120**.

267 Resolution of the District Prosecutor's Office Humenné dated 12 April 2016, **R-079**.

land plot No. 513, which was owned by private citizens, and was not managed by Urbariát. AOG had obtained the Poruba Injunction against Urbariát only, but not the owners of land plot No. 513.[268] The Poruba Injunction was not binding on owners of land plot No. 513. This was yet another AOG legal mistake.

172. AOG's internal status report from 11 October 2016 reveals that these mistakes were so significant that "*after further review*," AOG "*elected to drop the case, and terminate the attorney*."[269] The same internal report reveals that AOG's plan forward was to obtain compulsory access under Article 29 of the Geology Act—the process it should have undertaken from the beginning.[270] And while AOG's internal reports stated this was the plan, AOG never followed through with it. AOG did not return to Ruská Poruba after January 2016 and did no further work there until it was allegedly prevented from drilling its exploration well by a Full EIA more than one year later.[271]

* * *

173. As shown above, although AOG tried to access *three* different drilling sites, all of its attempts were riddled by a series of legal mistakes at *each one* of them:

(a) AOG failed to secure rights to the Access Land in Smilno;

(b) When AOG purchased a share on the Access Land, it did so in breach of Ms. Varjanová's statutory pre-emption right, which allowed her to obtain the Interim Injunction against AOG, which prevented AOG's second and third "drilling" attempts;

(c) AOG failed to timely request an extension of the Lease Agreement for the Oľka Site, and abandoned the Article 29 proceedings with the MoE; and

(d) AOG's two attempts to access the Poruba Land were stymied by AOG's own legal mistakes relating to the Poruba Injunction.

---

268 Resolution of the District Directorate of Police Forces dated 28 July 2016, p. 2, **R-080**.

269 AOG report to JKX and Romagaz dated 11 October 2016, p. 3, **C-148**.

270 AOG report to JKX and Romagaz dated 11 October 2016, p. 3, **C-148**.

271 Claimant's Memorial, ¶ 238.

174. These mistakes, together with AOG's unwillingness to engage on a timely basis with the local population, inevitably let to its failures at each site.

G. In June 2016, the MoE extended AOG's Exploration Area Licenses

175. As the term of the Exploration Area Licenses was again nearing its end, AOG requested another extension from the MoE. The MoE granted AOG's request and—as it had in 2010, 2012 and 2014—extended the validity of AOG's Exploration Area Licenses until 1 August 2021 (the "**2016 Licenses**").[272] The MoE generously extended the validity of the Exploration Area Licenses by an additional *five* years.[273] The 2016 Licenses were yet another example of repeated decisions by MoE in AOG's favor.

176. In the 2016 Licenses, the MoE summarized AOG's request and arguments for additional extension and, among other things, acknowledged that "*geological activities performed by the holder of exploration area are beneficial from the aspect gathering knowledge about the degree of geological exploration of the territory of the Slovak Republic*."[274] At the same time, however, the MoE reiterated that conditions for performing the exploration works—including the obligation to obtain the rights for third-party land—set in its previous decisions, continue to apply.[275]

177. Discovery notes that the acknowledgments in the 2016 Licenses "*are all the more significant because the protests (described further below) are also mentioned in the very same [2016 Licenses]*."[276] However, the MoE mentioned the protesters—as Discovery calls them—in the context of their requests to become a party to the

---

272 Decision modifying the size of the area, and extending the validity term for the exploration area of 14June 2016, Record No.: 33507/2016, Dossier No.: 5021/2016-7.3, p. 3, **C-12**; Decision modifying the size of the area, and extending the validity term for the exploration area of 7 June 2016, Record No.: 32017/2016, Dossier No.: 5020/2016-7.3, p. 3, **C-13**; Decision modifying the size of the area, and extending the validity term for the exploration area of 7 June 2016, Record No.: 32020/2016, Dossier No.: 5019/2016-7.3 (Snina), p. 2, **C-14**.

273 However, that does not confirm that the MoE found the exploration area prospective.

274 Decision modifying the size of the area, and extending the validity term for the exploration area of 14 June 2016, Record No.: 33507/2016, Dossier No.: 5021/2016-7.3 (Svidník), p. 19, **C-12**.

275 Decision modifying the size of the area, and extending the validity term for the exploration area of 14 June 2016, Record No.: 33507/2016, Dossier No.: 5021/2016-7.3 (Svidník), p. 15, **C-12**.

276 Claimant's Memorial, ¶ 77.

administrative proceedings to contest the extension requests.[277] There is no relation between any of the "*acknowledgments*" and activists in those decisions.

H. Resolution of the Prešov Self-Governing Region

178. Events taking place in Smilno and the surrounding municipalities resonated among people and within the region. On 24 June 2016, the parliament of the Prešov Self-Governing Region issued a resolution stating that it "*fully supports the citizens and councils of villages/municipalities in North-Eastern Slovakia that do not agree with exploration works in the exploration area for the extraction and production of oil and natural combustible gas associated with the activities of the company Alpine Oil and Gas s.r.o.*"[278] and stated that it would apply its "*best efforts*" to exclude the affected municipalities from the Exploration Area Licenses.

179. Although Discovery attempts to describe the resolution as a "*public, official condemnation of Discovery/AOG's proposed activities in the region*," that allegedly had a "*substantial negative impact on AOG's reputation and standing in the eyes of the local population, including members of the local Police*,"[279] this non-binding resolution was nothing more than an expression of support to local citizens by an authority that had no power to affect any permits or required consents.[280]

I. On 21 October 2016, the Slovak Parliament adopted the EIA Amendment to the EIA Act

180. In 2013, the European Commission initiated infringement proceedings against the Slovak Republic, arguing that it was not stringent enough in requiring EIAs in compliance with EU law.[281] During the infringement proceedings, among other items,

---

277 Decision modifying the size of the area, and extending the validity term for the exploration area of 14 June 2016, Record No.: 33507/2016, Dossier No.: 5021/2016-7.3 (Svidník), p. 19, **C-12**.

278 Resolution of the Parliament of Presov dated 24 June 2016, **C-20**.

279 Claimant's Memorial, ¶ 110.

280 As explained in ¶ 33 above, none of the permits required to perform drilling is issued by the Prešov Self-Governing Region.

281 Sólymos WS, ¶ 8; [redacted]

the European Commission challenged the Slovak Republic's incorrect implementation of the EIA Directive to so called "*deep drills*".[282]

181. The Slovak EIA Act required a Preliminary EIA only for "*mining drills*".[283] The European Commission argued that this implementation of EU law was inconsistent with the EIA Directive, which used the term "*deep drillings*".[284] According to the Commission, the term "*deep drilling*" is broader than "*mining drills*" and includes *exploration* drills. The European Commission therefore requested that the Slovak Republic extends the obligation to the exploration drills by the end of 2016.[285] The Slovak Republic did so by an amendment to the EIA Act adopted on 21 October 2016 ("**EIA Amendment**"). Minister. Sólymos confirms that the EIA Amendment—which extended the Preliminary EIA obligation to exploration drills—was prompted by the European Commission as part of the infringement proceedings.[286]

182. In its Memorial, Discovery claims that the EIA Amendment "*did not apply to AOG's exploration activities because (i) those activities had been authorised by the MoE since 2006 when the Licences were first granted and successively extended (as recently as June 2016) and (ii) the amended EIA Act could not apply retroactively to those already-authorised activities*."[287] Discovery also argues that Minister Sólymos confirmed that the EIA Amendment did not apply to AOG. These are incorrect allegations.

183. Contrary to Discovery's position, under Slovak law, the determination of an exploration area is not what triggers an EIA screening. This is because it is impossible to assess the potential environmental impact on areas spanning hundreds of kilometers—like the Exploration Areas that initially spanned from 721,1[288] to 960[289] km^2—without knowing precise drilling locations. Naturally, such a large area may include national parks,

---

282 [redacted]

283 EIA Act (applicable until 31 December 2016), Annex 8, **R-082**.

284 EIA Directive, Annex II, **R-083**.

285 [redacted]

286 Sólymos WS, ¶ 8.

287 Claimant's Memorial, ¶ 160.

288 Decision on determination of exploration area Medzilaborce dated 17 July 2006, **R-030**.

289 Decision on determination of exploration area Snina dated 18 July 2006, **R-031**.

nature preservation reserves, industrial areas, historical towns, archaeological sites, protected water sources, and other protected areas. Without knowing the specific drilling location, it is simply impossible to assess what impact a possible drilling operation would have on the environment.

184. The European Commission agrees, explaining that "*[e]ven a small-scale project (e.g. exploration or drilling in the range of only several meters) can have significant effects on the environment if it is in a location where the environmental factors, such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration*."[290] It is therefore impossible to assess environmental impacts of drills without knowing their precise location.

185. Even AOG's internal documents confirm the understanding that an EIA on such a large area is not possible. On 10 March 2017, AOG prepared a status update for its JV Partners to inform them about the progress of AOG's activities in the Slovak Republic. AOG stated that environmental activists insisted "*that they wanted to see a preliminary EIA conducted over an entire structure, as opposed to over a planned well location, before any wells were drilled*,"[291] but that the "*Ministry of Environment has since indicated that this is not possible*."[292]

186. In sum, the fact that AOG had its Exploration Areas determined in 2006 (and later extended) had no impact on its obligation to undergo the Preliminary EIA under the EIA Amendment once the specific locations of the deep drillings were identified at a later stage of exploratory activity. This is what the MoE and Minister Sólymos consistently explained in their public statements.[293]

J. In April 2017, AOG agreed with the activists to file Preliminary EIA applications

187. By early 2017, AOG realized that it could no longer resist engaging with the local community. In Mr. Fraser's words, AOG realized that it was "*effectively impossible to*

290 European Commission, Interpretation of definitions of project categories of annex I and II of the EIA Directive, 2015, p. 43, **R-084**.

291 AOG's report to Partners dated 10 March 2017, **C-169**.

292 AOG's report to Partners dated 10 March 2017, **C-169**.

293 Press releases and statements issued by the MoE consistently connected the EIA preliminary assessment with actual exploration drills. *See* Sólymos WS, ¶¶ 7-11.

proceed without establishing some sort of dialogue with the activists opposed to our operations, in order to hear their concerns (even though we considered them misplaced) and attempt to find some common ground."[294] Accordingly, over a series of meetings during February and March, AOG met with the activists to find a way forward.

188. At these meetings, the local community asked AOG to submit a Preliminary EIA application for each of its planned wells.[295] According to Mr. Leško, the Preliminary EIA application was important because "*[t]he dialogue between [license holders], local inhabitants, and the public at large in respect of environmental impact of various activities is done within the EIA proceedings and the parties' conflicting views should be decided by the relevant state authority*."[296] Thus, the activists asked AOG to submit Preliminary EIA applications because they "*wanted [their] objections to be heard and a proceeding where [they] could officially raise […] concerns*."[297] Even Mr. Fraser understood that, at its core, the activists' requests for the Preliminary EIA application were about "*promoting trust*".[298]

189. The dialogue was successful. AOG and the local community agreed on a way forward where AOG would submit Preliminary EIAs for each of its planned wells and, in return, the local community would cease all protesting.[299] To memorialize this agreement, AOG published a press release (after the activists approved the language), which, in the words of Mr. Lewis, captured AOG's commitment "*to advancing the exploration of Slovakia's oil and gas resources in a safe and transparent fashion, while developing a productive working relationship with the local communities where it works*."[300]

---

294 Fraser WS, ¶ 15.

295 Leško WS, ¶ 24.

296 Leško WS, ¶ 25.

297 Leško WS, ¶ 25.

298 Fraser WS, ¶ 94.

299 Leško WS, ¶ 26; TERAZ.SK, *Alpine Oil and Gas shall have an assessment of impacts of wells carried out*, 2 April 2017, **R-085**.

300 Press Release in relation to AOG's commitment to local communities in North-East Slovakia, 5 April 2017, p. 1, **C-171**.

190. That community agreement and corollary press release (**Exhibit C-171**) also explained to the public AOG's eight "*key principles*" by which it would abide in exchange for the local community to stop protesting:

(a) AOG would "*voluntarily prepare and submit an application under the preliminary environmental procedure described in law no. 24/2006 Coll. on Environmental Impact Assessments*"[301] (*i.e.*, the EIA Act). AOG would make drafts of each application available to the public before submission. [302]

(b) AOG agreed to "*make the design for each well available to members of the local community*", which would "*include details of any substances to be pumped into the ground*" to assuage concerns about harmful chemicals being used in its work.[303]

(c) AOG committed to allowing members of the community "*to visit the well location at agreed times, and to put questions about the conduct of operations to the person in charge*."[304]

(d) AOG agreed that if it made any discovery of oil or gas, and sought a "production licence", then "*a full environmental impact assessment will be conducted as part of that process*."[305] As explained above, a Full EIA is a statutory requirement for an entity wishing to exploit any oil or gas discovered if specified thresholds are met.[306]

---

301 Press Release in relation to AOG's commitment to local communities in North-East Slovakia, 5 April 2017, p. 1, **C-171**.

302 Press Release in relation to AOG's commitment to local communities in North-East Slovakia, 5 April 2017, p. 1, **C-171**.

303 Press Release in relation to AOG's commitment to local communities in North-East Slovakia, 5 April 2017, p. 1, **C-171**.

304 Press Release in relation to AOG's commitment to local communities in North-East Slovakia, 5 April 2017, p. 1, **C-171**.

305 Press Release in relation to AOG's commitment to local communities in North-East Slovakia, 5 April 2017, p. 1, **C-171**.

306 *See supra* ¶ 33.

(e) AOG agreed that, once a well or partial well location was no longer needed, it would be "*reinstated to its previous condition*."[307]

(f) AOG agreed that, when planning its development program, it would "*minimise the surface impact by drilling more than one well from each location*"[308] and it would "*consult, on a confidential basis, with representatives of the local community regarding options for locating appraisal and/or development wells*."[309]

(g) AOG committed to supporting the local economy by hiring local staff or engaging local contractors to the extent possible.[310]

(h) Finally, AOG agreed to "*develop an active community engagement policy involving support for the local projects and causes, in consultation with members of local communities*."[311]

191. After AOG issued this press release, and with these commitments made, not a single protest ever occurred thereafter. The local activists kept their word, and AOG prepared its Preliminary EIA applications for each well.

192. This was a restart. It was the "*compromise*" to which the local community agreed[312] and a way for both Parties to move forward in a productive way. The past was no longer the focus. Rather, in the words of AOG, what mattered was a future with "*trust and confidence amongst the local communities*."[313]

---

307 Press Release in relation to AOG's commitment to local communities in North-East Slovakia, 5 April 2017, p. 2, **C-171**.

308 Press Release in relation to AOG's commitment to local communities in North-East Slovakia, 5 April 2017, p. 2, **C-171**.

309 Press Release in relation to AOG's commitment to local communities in North-East Slovakia, 5 April 2017, p. 2, **C-171**.

310 Press Release in relation to AOG's commitment to local communities in North-East Slovakia, 5 April 2017, p. 2, **C-171**.

311 Press Release in relation to AOG's commitment to local communities in North-East Slovakia, 5 April 2017, p. 2, **C-171**.

312 Leško WS, ¶ 25.

313 Press Release in relation to AOG's commitment to local communities in North-East Slovakia, 5 April 2017, p. 2, **C-171**.

K. AOG's Preliminary EIA proceedings for its three exploration drills

1. Summary

193. When AOG submitted its Preliminary EIA applications, numerous agencies, citizen groups, and local municipalities filed (as permitted by law) objections to the proposed drillings in Krivá Oľka, Ruská Poruba and Smilno. The District Offices issued their decisions based in part on those objections and comments, and ultimately ordered a Full EIA for each location. For instance, citing the wetlands, risk of landslides, and protection of water sources, the District Office in Medzilaborce found that further environmental study was warranted and required a Full EIA.[314]

194. This conclusion was consistent with the European Directive 2014/52/EU, Article 28 of which concluded that Member States must take into account criteria to determine which projects are to be subject to environmental impact assessments on the basis of their significant effects on the environment. The EU Directive specifically referenced projects proposed for environmentally-sensitive locations.

195. Point 28 of EU Directive 2014/52/EU states:

> The selection criteria laid down in Annex III to Directive 2011/92/EU which are to be taken into account by the Member states in order to determine which projects are to be subject to environmental impact assessment on the basis of their significant effects on the environment, should be adapted and clarified. For instance, experience has shown that projects using or affecting valuable resources, projects proposed for environmentally sensitive locations, or projects with potentially hazardous or irreversible effects are often likely to have significant effects on the environment.[315]

196. It is important to stress that the District Office decisions ordering Full EIAs for each location did not stop Discovery's project. The decisions ordered further fulsome assessment. AOG had every right to proceed further. AOG, however, chose not to do

---

314 Medzilaborce District Office Decision (Slovak, with English translation) dated 8 March 2018, **C-186**.

315 Directive No. 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, ¶ 28, **R-086**.

so—despite initially telling potential investors that it would proceed with the Full EIAs[316]—because it could not raise sufficient funds to proceed.

197. In other words, AOG agreed to submit Preliminary EIA applications, and then walked away from the project when those applications required further study. As explained below, AOG made this decision because it did not have the necessary capital to continue, and Discovery's CEO, Mr. Lewis, did not want to invest more of his own funds.

198. Against this background, the Slovak Republic explains the individual EIA proceedings in more detail below.

2. Preliminary EIA proceedings for AOG's exploration drills resulted in a Full EIA for each location

199. Consistent with the agreement between protesters and AOG, AOG applied to have its three exploration drills reviewed in the Preliminary EIAs.[317] In its applications, AOG expressly stated that the proposed drills "*are subject to the screening procedures under [the EIA Act]*" and the request with a description of intended activity will be submitted "*to the competent authority*", *i.e.*, the district offices.[318]

200. As explained, when AOG filed its Preliminary EIA applications, many activists and organizations submitted comments to oppose AOG's plans. This community participation in the Preliminary EIA is the very purpose of the EIA Act.

201. On 2 August 2017, the District Office in Bardejov ordered a Full EIA on AOG's planned drill in Smilno ("**Smilno EIA Decision**");[319] on 7 September 2017, the District Office in Humenné ordered a Full EIA for Ruská Poruba drill ("**Ruská Poruba EIA**

316 Discovery Global, LLC: Exploration and appraisal in Slovakia, Investor introduction, October 2017, Slide 11, **C-180**.

317 Preliminary EIA submission of Smilno-1 dated May 2017, **R-087**; Preliminary EIA submission of Poruba-1 dated June 2017, **R-088**; Preliminary EIA submission of Krivá Oľka-1 dated July 2017, **R-089**.

318 *See, e.g.*, Preliminary EIA submission of Smilno-1 dated May 2017, ¶ 4.13, **R-087**. In addition, the EIA Act allows anyone to submit a motion to relevant authority under Article 19 of the EIA Act. Once filed, the relevant authority is obliged to screen —and impose a Full EIA, if necessary—even for projects that do not fall under any category under the EIA Act. *See* EIA Act, Art. 19, **R-045**.

319 Decision re. Smilno Environmental Impact Assessment (Slovak, with English translation) dated 2 August 2017, **C-176**.

Decision");[320] and on 8 March 2018, the District Office in Medzilaborce likewise ordered a Full EIA for AOG's drill in Krivá Oľka ("**Krivá Oľka EIA Decision**").[321]

202. Discovery states that these decisions ordering Full EIAs "*contradicted the clear and repeated specific statements by the MoE and Minister Sólymos in late 2016 and early 2017 (described above) […] that the amended EIA Act did not apply to AOG's exploration wells*."[322] Discovery also asserts that these decisions were "*inconsistent with both the express acknowledgement that none of the 8,000 wells drilled to date had had any adverse impact on the environment*."[323] Neither assertion is correct.

203. AOG agreed to undergo the Preliminary EIA voluntarily.[324] If the result of such a proceeding had been that a Full EIA was not necessary, AOG would surely have expected the activists to respect it. Yet because the result of such a proceeding was an order to proceed with a Full EIA, AOG appears to believe that it should have been immunized from that result. By submitting to the procedure, the applicant cannot selectively pick which decision it will or will not respect. This is particularly the case where, as here, AOG agreed to undergo this procedure to satisfy the calls from local activists to "*secure their consent*".[325]

3. AOG had remedies against the decisions ordering Full EIA, but did not exercise them

204. As noted, on 7 September 2017, the District Office in Humenné ordered a Full EIA for the Ruská Poruba drill.[326] Regarding this, Mr. Fraser testifies that Mr. Harakaľ from the District Office in Humenné unofficially told AOG "*that the outcome of the process had already been decided by his superiors in Bratislava*."[327] Putting aside the fact that no "*superiors in Bratislava*" are entitled to act within the administrative proceedings done at the District Office in Humenné, Mr. Fraser's testimony is belied by the fact

320 Humenne District Office Decision (Slovak, with English translation) dated 7 September 2017, **C-179**.

321 Medzilaborce District Office Decision (Slovak, with English translation) dated 8 March 2018, **C-186**.

322 Claimant's Memorial, ¶ 184(2).

323 Claimant's Memorial, ¶ 184(1).

324 Claimant's Memorial, ¶ 237(1).

325 Fraser WS, ¶ 95.

326 Humenne District Office Decision (Slovak, with English translation) dated 7 September 2017, **C-179**.

327 Fraser WS, ¶ 99.

that, after AOG appealed the Ruská Poruba EIA Decision,[328] the District Office in Prešov quashed this decision.[329]

205. Both the District Office in Humenné and the District Office in Prešov fall under the MoI—and, consequently, have the same "superiors" in Bratislava. In other words, on Discovery's case, "*superiors in Bratislava*" decided to order a Full EIA in first instance but then reverse that decision on appeal. That does not make sense.

206. More to the point, after the District Office in Prešov decided in AOG's favor, AOG chose not to continue. Mr. Fraser says that AOG did so because they "*were left at this stage with no choice but to mitigate our losses and try and focus our attention on the Svidník Licence*."[330] In other words, AOG decided not to continue in the EIA proceedings for Ruská Poruba because it wished to focus on drilling in the Svidník Exploration Area instead.

207. Discovery also chose not to pursue any remedies for the Smilno EIA Decision. Mr. Fraser states that AOG "*could have filed an appeal against this decision, but our sense was that there was no chance that an appeal would get a hearing that was any fairer than that for the original application*."[331] Interestingly, the appellate authority for the Smilno EIA Decision was the District Office in Prešov—the same one as in Ruská Poruba where Discovery's appeal was successful. Consequently, Discovery's attempted rationale to justify AOG's failure to appeal against the Smilno EIA Decision is irreconcilable with AOG's successful appeal to the same District Office in Prešov against the Ruská Poruba EIA Decision. Discovery does not explain why the same authority—after deciding in AOG's favor—would suddenly change its mind and, for no reason, treat AOG unfairly.

208. Also, Mr. Fraser cannot seriously claim that AOG decided not to appeal the Smilno EIA Decision—*i.e.*, the one in Svidník Exploration Area—and at the same time argue

---

328 Environmental Impact Assessment appeal against the Humenne district office decision (Slovak, with English translation) dated 6 October 2017, **C-181**.

329 District Authority Presov: Environment Impact Assessment Decision on the appeal Ruská Poruba (Slovak, with English translation) dated 11 January 2018, **C-184**.

330 Fraser WS, ¶ 101.

331 Fraser WS, ¶ 98.

that AOG decided to drop Ruská Poruba because they wanted to focus on the Svidník Exploration Area. Discovery cannot have it both ways.

209. Finally, AOG made the same decision for the Krivá Oľka EIA Decision as it did for the Smilno EIA Decision. It chose not to appeal it.

* * *

210. In sum, Discovery chose to submit its Preliminary EIA applications and it also chose to abandon the process. It not only had remedies against the decisions ordering Full EIA, but it was actually successful in one of these. It was Discovery's choice to halt its participation in the EIA procedures, even though it had agreed to undertake this very process.

L. In March 2018, JKX announced its withdrawal from the project

211. While AOG was dealing with the EIA procedures, Discovery's JV Partner, JKX, was facing another problem. On 21 December 2017, the UK High Court issued a freezing order for assets worth USD 2.5 billion owned by Ukrainian oligarch, Mr. Igor Kolomoisky.[332] These assets included his stake in JKX.[333]

212. Just a few weeks later, on 19 February 2018, JKX informed its other JV Partners about its plans to withdraw from its Slovak operations. Specifically, Mr. [redacted] wrote that he had "*received an instruction from the JKX Board that I should attempt to sell or withdraw from/assign the JKX interests in Slovaki*a."[334] Thus, regardless of his personal thoughts about this decision, he was "*obliged to follow the Board's instruction*."[335] Mr. [redacted] also informed the JV Partners that "*JKX Hungary assets are also up for sale*."[336]

332 London Evening Standard, *JKX oligarch's assets frozen over bank spat*, 21 December 2017, **R-090**.

333 London Evening Standard, *JKX oligarch's assets frozen over bank spat*, 21 December 2017, **R-090**.

334 Email from Romgaz re JKX departure dated 22 February 2018, **C-185**.

335 Email from Romgaz re JKX departure dated 22 February 2018, **C-185**.

336 Email from Romgaz re JKX departure dated 22 February 2018, **C-185**.

213. A few weeks later, Mr. [redacted] sent formal notices of relinquishment to the JV Partners.[337]

214. Discovery now tries to allege that JKX's decision to withdraw from Slovakia was made "*against the background of the Slovak Republic's conduct including the decision to order a full EIA*."[338] However, neither email from Mr. [redacted] suggests that JKX's decision to withdraw or sell its assets in the Slovak Republic was caused by the *State's* treatment of AOG. Nor could it. As noted, AOG voluntarily submitted to the EIA procedures after agreeing with the local activists to do so.

215. In any event, as explained above, JKX was hesitant about the project as early as 2014, when it repeatedly delayed approving the budget and expressed its disappointment on the progress of exploration works.

M. In April 2018, AOG applied to reduce the Exploration Area Licenses

216. Following JKX's withdrawal from the project, AOG and Romgaz decided to relinquish the Medzilaborce and Snina Exploration Areas Licenses.[339] At the same time, they applied to reduce the area of the Svidník Exploration Area and to remove JKX as an Exploration Area Licenses holder. The MoE granted AOG's request on 8 June 2018 ("**2018 License**").[340] As it had in the previous decisions, the MoE reiterated that the conditions imposed under its previous decisions continued to apply.[341]

217. The MoE also included a reference in the 2018 Decision to the recent EIA Amendment of the EIA Act, effective 1 January 2017, which required Preliminary EIAs for exploratory wells. The 2018 Decision's reference to this statutory obligation was consistent with its approach since at least the 2006 Licenses to restate certain conditions even though they apply *ex lege*. Thus, Discovery's argument that "*as a matter of Slovak law, any decision to amend the area of an exploration licence should only consist of the*

337 Email from JKX re. withdrawal dated 16 March 2018, **C-187**.

338 Claimant's Memorial, ¶ 188.

339 Claimant's Memorial, ¶ 191.

340 Decision Modifying an Exploration Area of 8 June 2018, Record No.: 31581/2018, Dossier No.: 6109/2018-5.3 (Svidnik), **C-15**.

341 Decision Modifying an Exploration Area of 8 June 2018, Record No.: 31581/2018, Dossier No.: 6109/2018-5.3 (Svidnik), **C-15**.

delimitation of the exploration area itself and should not seek to impose additional conditions which are not relevant or requested as part of the application"[342] is belied by the years-long approach of the MoE.

218. Equally important, the MoE included the same condition in an extension application for NAFTA which—just like AOG's Exploration Areas—was assigned before 1 January 2017.[343]

219. Nevertheless, AOG ultimately chose to relinquish this last Svidník Exploration Area License.

* * *

220. As the above makes clear, when Discovery and AOG left the Slovak Republic, they left behind a path riddled with countless legal mistakes and poor business decisions. As explained below, assuming this Tribunal has jurisdiction, nothing in the above triggers the Slovak Republic's liability under the US-Slovakia BIT.

342 Claimant's Memorial, ¶ 194.

343 Decision of MoE on extension of NAFTA a.s. exploration area licence dated 19 March 2018, **R-091**.

III. NO JURISDICTION

221. As is unsurprising for a penny stock acquired for nominal consideration, Discovery's so-called investment does not qualify as such under the US-Slovakia BIT **(A)** or under the ICSID Convention **(B)**. But even if Discovery met the formal requirements in the BIT and the ICSID Convention, it cannot establish its good faith in the making of an investment **(C)**. As such, this Tribunal lacks jurisdiction over it and its claims. In any event, even if this Tribunal has jurisdiction *ex hypothesi*, Discovery's claims are inadmissible **(D)**.

* * *

222. As a preliminary matter, Discovery must meet the double-barrel test, alternatively referred to as the double-keyhole or two-fold test. One recent ICSID tribunal thus opined: "*For jurisdiction to be established, the claim must pass both through the institutional jurisdictional keyhole set forth in Article 25 [of the ICSID Convention] as well as the specific jurisdictional keyhole defined in the BIT*."[344] The requirements of the BIT and the Convention are considered in turn.

A. No jurisdiction under BIT

1. No eligible "*investor*"

a. No contribution or act of investing <u>by</u> Discovery

223. Investment tribunals have determined that, in order to establish an eligible "*investment*", claimants, like Discovery, must prove some contribution or act of investing. Thus, for instance, the *Romak v. Uzbekistan* tribunal, in finding that this requirement was not met with respect to a contract to supply wheat, defined the requisite contribution—without which an asset would not qualify as an "*investment*" or a company as an "*investor*"—as a "*dedication of resources that has economic value, whether in the form of financial obligations, services, technology, patents, or technical assistance*."[345]

---

344 *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶ 242, **RL-040**.

345 *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award, 26 November 2009, ¶ 214, **RL-041**.

224. Similarly, investment tribunals frequently opine that BITs "*require[] an investment made by, not simply held by, an investor*."[346]

225. In other words, passive shareholding of an asset, in circumstances where the active control or contributions reside with third parties, do not suffice—and do not qualify an entity or company as an "*investor*". Further, the question is not whether contributions have been made, but whether they have been made by the entity which purports to be the investor—here, Discovery.

226. The facts are clear that no such contribution or act of investment has been made, at least not *by Discovery*. Its Memorial refers to JKX and Romgaz, which held 50% of the Exploration Area Licenses, as AOG's "*investors*"; AOG's activities were apparently financed "*through external investment from Akard*", a third party.[347] In the circumstances, it appears that whatever contribution was made to AOG's activities under the Exploration Area Licenses, those contributions were made by third parties—and not by Discovery. As such, Discovery's naked shareholding, absent any eligible contribution *by* Discovery, is insufficient.

227. Nor does it rescue Discovery to lean on the purchase price of the shares (which were paid to a third party outside the Slovak Republic and thus do not constitute an investment themselves). Investment tribunals have opined that acquisition of shares for no consideration,[348] or for nominal consideration,[349] does not constitute a sufficient contribution, and therefore results in lack of jurisdiction *ratione materiae*. As the *Caratube* tribunal explained: "*payment of only a nominal price and lack of any other contribution by the purported investor must be seen as an indication that the investment*

---

346 *Standard Chartered Bank v. United Republic of Tanzania I*, ICSID Case No. ARB/10/12, Award, 2 November 2012, ¶ 257, **RL-042**.

347 *See, e.g.*, Claimant's Memorial, ¶¶ 298, 324.

348 *Komaksavia Airport Invest Ltd v. Republic of Moldova*, SCC Emergency Arbitration No. EA (2020/130) & SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 175 ("*[I]n the absence of any evidence of a contribution having been paid, the Tribunal finds that Komaksavia has no qualifying investment within the particular terms of Article 1(1) of the BIT*."), **RL-043**.

349 *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012, ¶ 435, **RL-044**.

was not an economic arrangement, is not covered by the term 'investment' as used in the BIT, and thus is an arrangement not protected by the BIT."[350]

228. In fact, the *Caratube* tribunal dismissed as irrelevant and ineligible a purported investment in an oil concession that was dwarfed both by (*i*) prior expenditures made in exploration and (*ii*) the claimed damages:

> [T]he purchase price for the 92 % share in CIOC was the nominal price of USD 6,500-equivalent in the local currency, namely 920,000 tenge. The total charter capital of CIOC is 1,000,000 tenge. CIOC claims USD 1.145 billion plus interest in damages in this arbitration in connection with its main economic activity – performance of the Contract. When Devincci Hourani allegedly purchased his share in CIOC, CIOC was already a holder of the Contract for which it paid approximately USD 9.4 million. These facts necessarily raise doubts as to Devincci Hourani's investment in CIOC and require the Tribunal to analyse the circumstances of the transactions. A putative transaction to pay USD 6,500 for 92 % for an enterprise into which over USD 10 million have been invested and for which later a relief of over USD 1 billion is sought calls for explanation and justification.[351]

229. The *Caratube* tribunal, in denying the existence of a contribution in payment of such an aberrantly low purchase price (relative to the claimed damages), noted that the would-be investor refused to substantiate valuations and models made at the time of the would-be investment. Namely: "*No documentation was provided concerning the valuation of CIOC's share for the purpose of its purchase by Devincci Hourani. Devincci Hourani did not answer questions concerning such valuations*."[352]

230. Here, Discovery purports to have acquired AOG's shares for consideration of EUR 153,054.50 in 2014.[353] Less than a year later, Discovery was then gifted the royalty it originally granted to Aurelian as part of the AOG purchase. As noted above, Alpha Exploration, a company "*affiliated with Discovery*" assigned the royalty to Discovery

---

350 *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012, ¶ 435, **RL-044**.

351 *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012, ¶ 437 (internal citations omitted), **RL-044**.

352 *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012, ¶ 437, **RL-044**.

353 Claimant's Memorial, ¶ 54. At prevailing EUR-USD exchange rates of approximately 1.37:1 in March of 2014, that sum would represent approximately USD 209,685.

for a nominal USD 10.[354] Up to around that point, it is claimed that AOG expended some €18m on exploration.[355] Discovery now claims damages of USD 568.2 million. This represents a ROI of some ***371,140%***. Any such claimed return, which exceeds all commercial plausibility, must be carefully scrutinized—including on jurisdiction.

231. As the *Caratube* tribunal emphasized, the yawning discrepancy between the paltry sums spent by Discovery to acquire the AOG shares, and the sums now claimed as alleged compensation, "*calls for explanation and justification*"—including (but not limited to) "*valuation [...] for the purpose of its purchase*" by Discovery. These were matters that impacted not just the plausibility of the damages claimed by the claimant, but also went directly to the antecedent question of whether a *bona fide* investment had actually been made.

b. Discovery is a mailbox company that lacks its own activities and assets

232. The reason that there are no material contributions *by* Discovery are because it is a passive and inactive shareholder. Even if Discovery is able to prove that some entities, prior to its entry into AOG's shareholding, spent money on development activities, such expenses do not relate to Discovery's would-be "*investment*" and do not make Discovery an "*investor*".

233. Investment tribunals frequently explain that BITs "*require[] an investment made by, not simply held by, an investor*"—in other words, that the putative investor "*must have contributed actively to the investment*."[356]

234. Discovery has submitted no proof that it has any material purpose or activities other than holding the shares in AOG. Contributions made by third parties to this arbitration, if any, do not transform Discovery from a passive asset-holder into an active "*investor*" to which the BIT exceptionally grants international legal rights. The *quid pro quo* motivating such a grant—the influx of foreign direct investment—is absent, at least *vis-à-vis* Discovery specifically. In these circumstances, Discovery has not "*contributed*

354 Assignment of Overriding Royalty Interest, 3 November 2015, **C-84**.

355 Claimant's Memorial, ¶ 139.

356 *Standard Chartered Bank v. United Republic of Tanzania I*, ICSID Case No. ARB/10/12, Award, 2 November 2012, ¶ 257, **RL-042**.

actively" to the investment and thus does not qualify as an "*investor*", whatever the role or activities of third parties involved in AOG's affairs.

2. No eligible "*investment*"

235. The BIT requires that, per Art. I(1)(a), an otherwise-eligible "*investment*" be "*owned or controlled directly or indirectly by nationals or companies of the other Party*."[357] In other words, whatever eligible investment is invoked by Discovery, that asset must be "*owned or controlled*" by American investors. Thus, if the asset is ultimately controlled or owned by third-state nationals, or by Slovak nationals, it does not constitute an "*investment*" to which the BIT applies.

236. Discovery alleges two investments: its shareholding in AOG and "*its economic interest in […] the Licenses*."[358] The latter, however, does not qualify under Art. I(1)(a) of the BIT, as it is not "*owned or controlled*" by Discovery (or, for that matter, any other American investor).

237. Discovery admits that "*from 2008 onwards, Aurelian held a 50% interest in the Licences; JKX and Romgaz held the remaining 50% interest in equal shares*."[359] Further, when Discovery purportedly acquired its shareholding in 2014, it only "*held a 50% interest in the Licences. The remaining 50% interest in the Licences was held by JKX and Romgaz in equal shares*."[360] The Memorial describes JKX and Romgaz as AOG's "*investors*" as of December 2016.[361] JKX only withdrew in 2018,[362] and Romgaz in 2020.[363]

238. Given these facts, the BIT's requirement that the investment in question—here, the Exploration Area Licenses—be "*owned or controlled*" by an American investor is not

---

357 Treaty Between the Czech And Slovak Federal Republic And The United States Of America Concerning The Reciprocal Encouragement And Protection Of Investments, 22 October 1991, Art. I(1)(a) ("**BIT**"), **C-1**.

358 Claimant's Memorial, ¶ 202.

359 Claimant's Memorial, ¶ 41.

360 Claimant's Memorial, ¶ 55.

361 Claimant's Memorial, ¶ 170.

362 Claimant's Memorial, ¶ 188.

363 Claimant's Memorial, ¶ 195.

met until, at the earliest, 2020. Any disputes arising before that date fall outside this Tribunal's temporal jurisdiction.

3. Article X(1) of the BIT, on "*public order*"

239. Even if, *par hasard*, Discovery could establish that it is a *bona fide* "*investor*" which has made an eligible "*investment*", it cannot square its legal claims with another provision of the BIT. Namely, Article X(1) of the BIT provides that "*[t]his Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order […] or the protection of its own essential security interests*."[364] This provision, and another discussed immediately below, are particular to the BIT, and do not arise under the separate jurisdiction requirements of the ICSID Convention (which are also discussed below).

240. Article X(1) therefore limits the scope of the BIT's substantive obligations, which do not extend to such measures—and which therefore cannot breach the BIT. As summarized by the *Deutsche Telekom v. India* tribunal in interpreting a similarly-worded provision in Article 12 of the Germany-India BIT:

> Article 12 entitles a Contracting Party to take measures "to the extent necessary" for the protection of its essential security interests without incurring responsibility under the substantive provisions of the BIT otherwise providing protection to investors. As held by the *ad hoc* committee in *CMS v. Argentina* in relation to the similarly worded Article XI of the U.S.- Argentina BIT, "***if [the essential security interests clause] applies, the substantive obligations under the Treaty do not apply***".[365]

241. The *Deutsche Telekom* tribunal went on to distinguish, as other tribunals have done, between a BIT's public order (or essentials security interest) provisions, on the one hand, and the customary international law defense of state of necessity.[366] This meant, per the *Deutsche Telekom* tribunal, that supposed "*stricter*" requirements relating to emergencies, existing under customary international law, did not apply to such BIT

364 BIT, Art. X(1), **C-1**.

365 *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, ¶ 227 (emphasis added), **RL-045**.

366 *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, ¶ 228, **RL-045**.

clauses.[367] Indeed: "*the possibility exists 'that a state could meet the requirements of a treaty exception clause and therefore be exempt from liability under an investment treaty without satisfying the state of emergency requirements […]'*."[368]

242. Therefore, what matters, as always, is the language of the treaty at hand. Here, Article X(1) of the US-Slovakia BIT excludes from its substantive protections any and all "*measures necessary for the maintenance of public order […] or the protection of [the Slovak Republic's] own essential security interests*."[369]

243. *First*, measures may be required to maintain public order, without impacting the Slovak Republic's "*essential security interests*", and *vice versa*. The safety and security of a region renowned as a pristine habitat for both natural life and for humans is clearly part of the concept of "*public order*", as is unrest generated by individuals or companies which threaten to damage or destroy that environment. Similarly, protection of the Slovak Republic's environment and drinking water, including respecting the right of affected residents to advocate for such protection, clearly qualify as part of the Slovak Republic's "*essential security interests*". Clean drinking water and air, and a vibrant political society, are rightly recognized as essential to the health and longevity of a state's citizens and residents.

244. *Second*, the concept of necessity, as multiple investment tribunals have affirmed, does not require perfect hindsight or absolute conviction that the measure adopted was the only one available to the state. Instead, as the *Deutsche Telekom* tribunal observed, a "*margin of deference*" is owed to the host state:

> [T]he Tribunal will undoubtedly recognize ***a margin of deference to the host state's determination of necessity***, given the state's proximity to the situation, expertise and competence. Thus, ***the Tribunal would not review de novo the state's determination nor adopt a standard of necessity requiring the state to prove that the measure was the "only way" to achieve the stated purpose***. On the other hand, the deference owed to the state cannot be unlimited, as

367 *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, ¶ 229, **RL-045**.

368 *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, ¶ 229, **RL-045**.

369 BIT, Art. X(1), **C-1**.

> otherwise unreasonable invocations of Article 12 would render the substantive protections contained in the Treaty wholly nugatory.[370]

245. Claims here arise out of measures taken to assure "*maintenance of public order*" *vis-à-vis* community activists or, put otherwise, the Slovak Republic's own security interests in preventing civil unrest. Lest there be no doubt: in all cases, the root cause lies in Discovery's, and its predecessors', failure to operate with a social license.

4. Annex I of the BIT: carve-outs for "*ownership of real property*" & "*Hydrocarbons*"

246. Annex I(3) of the BIT states that "*the Czech and Slovak Federal Republic reserves the right to make or maintain limited exceptions to national treatment in the sectors or matters it has indicated below: ownership of real property […]*."[371] An amendment to that Annex added "*[h]ydrocarbons*" to that list as of 2003, and also includes it as an exception to MFN treatment (not just national treatment).[372]

247. Discovery raises claims under both national treatment and MFN provisions of the BIT, alleging "*discriminatory treatment*" as well as failure "*to treat Discovery as favourably as a domestic investor (NAFTA)*."[373]

248. The Slovak Republic vigorously contests these allegations on the merits, below in paragraphs 374-400. Nevertheless, as an antecedent matter, those questions have been carved out from the BIT pursuant to the reservations for "*[h]ydrocarbons*" and "*ownership of real property*". The only possible conclusion to draw from the clear words of these reservations is that Discovery's claims of discriminatory treatment, which Slovakia contests, are as a threshold matter inadmissible or otherwise outside this Tribunal's jurisdiction.

---

370 *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, ¶ 238 (emphasis added), **RL-045**.

371 BIT, Annex I(3), **C-1**.

372 BIT, Additional Protocol Between the Slovak Republic and the United States of America to the Treaty Between the Czech and Slovak Federal Republic and the United States of America Concerning the Reciprocal Encouragement and Protection of Investment of 22 October 1991, Art. IV, **C-1**.

373 Claimant's Memorial, § IV(B), on "*Arbitrary and Discriminatory Treatment*".

B. No jurisdiction under ICSID Convention

249. Assuming that Discovery can thread its claims through the BIT's jurisdiction and admissibility requirements, set forth above, it still must satisfy the ICSID Convention's separate jurisdictional requirements.

250. In its Memorial, Discovery suggests that, once it meets the BIT's definition of eligible "*investment*", then that requirement under Article 25 of the ICSID Convention is also satisfied.[374] Nevertheless, it appears to accept the relevance of the so-called *Salini* test under Article 25: "*Discovery's investment also fulfils the alternative 'Salini test' of contribution, duration and risk (as interpreted in subsequent authorities)*."[375]

251. Discovery's primary position—that the BIT's definition of "*investment*" automatically satisfies the ICSID Convention's Article 25—is erroneous. It ignores the ample jurisprudence requiring claimants to meet the double-barrel or double-keyhole test. Thus, its "*alternative*" argument, under *Salini,* is its only tenable argument under the Convention. Indeed, the *Salini* criteria constitute generally recognized principles by numerous arbitral tribunals,[376] and serve a vital purpose in ensuring that Article 25 (and thus the Centre's jurisdiction) is properly exercised.

252. Discovery does not meet the *Salini* criteria. It suggests that it itself "*contributed money*" to the underlying Exploration Area Licenses: "*Discovery contributed money by acquiring AOG, by paying substantial licence fees to the Slovak Republic and by funding AOG's exploration activities from 2014 onwards*."[377]

253. Other parts of the Memorial, however, suggest that the funding for AOG's activities came from other sources, such as third parties like Akard.[378] Indeed, Discovery's

---

374 Claimant's Memorial, ¶ 208(2).

375 Claimant's Memorial, ¶ 208(2).

376 *See, e.g., 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 ("*The Tribunal concurs with ICSID precedents which, subject to minor variations, have relied on the so-called 'Salini test'.*"), **RL-046**; *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, ¶ 633 ("*The Tribunal finds it appropriate to take into account the four elements set forth by the tribunal in the Salini v. Morocco case in order to identify an investment protected by the ICSID Convention*"), **RL-047**.

377 Claimant's Memorial, ¶ 208(2).

378 Claimant's Memorial, ¶¶ 324-325.

damages case asks this Tribunal to award damages *net* of sums still owed to Akard.[379] In these circumstances, there is no proof that Discovery itself meets the *Salini* test.

C. Breach of good faith

254. Investment tribunals routinely scrutinize whether or not a would-be investor's entry into the investment complied with good faith. One routine manifestation of that principle is that a corporate restructuring is inconsistent with good faith where done to 'internationalize' an already-foreseeable dispute.[380] Corporate acquisitions and other restructurings that do not comply with good faith can amount to an abuse of process, which in turn renders the claim jurisdictionally unsound (or inadmissible) even if it otherwise meets the formal criteria.

255. The Slovak Republic invokes this underlying principle, namely, that an investor's use of corporate forms is subject to an overriding good faith obligation—and that abuse of those forms can constitute an abuse of process.

256. That underlying principle, which flows from international legal good faith principles, requires scrutiny of Discovery's use of corporate forms. In this arbitration, of course, Discovery holds itself out as a legitimate company with independent legal personality and operations. U.S. tax documents, however, reveal that its owner and principal, Mr. Michael Lewis, appears to be using Discovery as a "*pass-through*" entity.[381] U.S. legal scholars observe: "*[t]he way pass-through entities work, the income and losses incurred by a partnership or an LLC appear on the individual tax returns of the owners and investors in the business*."[382] As a result, individual taxpayers, like Mr. Lewis, can in principle "*deduct tax losses*" incurred by the pass-through entity (here, Discovery) against their own personal income tax liability, with the result that the individual in

379 Claimant's Memorial, ¶¶ 325-327.

380 *See, e.g.*, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, ¶ 185 ("*[A] restructuring carried out with the intention to invoke the treaty's protections at a time when the dispute is foreseeable may constitute an abuse of process depending on the circumstances*."), **RL-048**.

381 Discovery Global Tax Returns, 2017-2020, **R-002**. As explained in the Security for Costs briefing, Discovery's headquarters appears to be Mr. Lewis' personal residence.

382 The University of Chicago Law Review Online, *The Troubling Case of the Unlimited Pass-Through Deduction: Section 2304 of the CARES Act*, 29 June 2020, **R-092**.

question "*reduce[s] or even totally zero[s] out their income tax liability, including retroactively*."[383]

257. The use of pass-through entities to reduce an individual's income tax burden is not itself illegal or contrary to good faith. In this instance, Discovery cannot be a "*pass-through*" entity lacking its own economic structure and independence to reduce Mr. Lewis' personal income tax liability, and also hold itself out as an independent entity that is an active investor with its own assets and activities. This is the proverbial having and eating of the same cake. The abuse of process is not attempts to reduce income tax liability, but rather the fact that Discovery is portrayed in two diametrically-opposed manners before U.S. tax authorities and this international tribunal, where it suits Mr. Lewis' strategic interest. It is that opposition and tension that constitutes the international abuse of process. It is the characterization of Discovery as an entity without freestanding legal personality or assets (to lower Mr. Lewis' tax burden), while simultaneously claiming that Discovery is an independent economic operator (to establish jurisdiction before this tribunal). It is clear that, in reality, Discovery is not an "investor" for the reasons stated above—and inconsistent representations before various legal bodies or institutions creates the international abuse. And, while it is true that Mr. Lewis appears to be a U.S. national, by proceeding in Discovery's shoes, he has insulated himself and his assets from this arbitration procedure, including document production.

D. Failure to comply with procedural preconditions to arbitration

258. Finally, Discovery—even if it meets all of the other preconditions set forth above under the BIT and the ICSID Convention—cannot espouse an admissible claim. Art. VI(2) of the BIT states that "*the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation*".

259. Discovery failed to comply with this provision. Its Notice of Dispute is based on conclusory allegations that fail to provide any material legal or factual substantiation. Slovakia sought to engage with Discovery, stating repeatedly that "*we need more*

383 The University of Chicago Law Review Online, *The Troubling Case of the Unlimited Pass-Through Deduction: Section 2304 of the CARES Act*, 29 June 2020, **R-092**.

information provided from you and/or your client" to evaluate the alleged claim.[384] No such clarification or engagement was forthcoming.

260. In *Murphy v. Ecuador*, the ICSID tribunal rejected the claimant's argument that the six-month "cooling-off" period provided for in the BIT was a mere procedural formality. It held that the "cooling-off" period was "a fundamental requirement" of the BIT. Namely:

> This Tribunal finds the requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six-month period does not constitute, as Claimant and some arbitral tribunals have stated, "a procedural rule" or a "directory and procedural" rule which can or cannot be satisfied by the concerned party. To the contrary, ***it constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules***.[385]

261. The *Murphy* tribunal opined that this was an "*essential mechanism enshrined in many bilateral investment treaties, which compels the parties to make a* ***genuine effort to engage in good faith negotiations before resorting to arbitration***."[386] On the facts before it, the claimant had failed to adequately engage with its sovereign counterpart, and, because of that "*noncompliance*", the tribunal "*lack[ed] competence to hear this case*".[387]

262. The same result must follow here, too. Discovery had set its mind on initiating arbitration and ignored entreaties from the Slovak Republic to seek out amicable settlement (as both Parties are required to do under the BIT). As a result, as in *Murphy*, the Slovak Republic's consent to arbitration has not been satisfied, and there is no open or unconditional offer to arbitrate that Discovery could accept.

---

384 *See, e.g.*, Email from Slovak Republic to Discovery dated 9 February 2021, **R-093**.

385 *Murphy Exploration and Production Company International v. Republic of Ecuador I*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, ¶ 149 (emphasis added), **RL-049**.

386 *Murphy Exploration and Production Company International v. Republic of Ecuador I*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, ¶ 154 (emphasis added), **RL-049**.

387 *Murphy Exploration and Production Company International v. Republic of Ecuador I*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, ¶ 157, **RL-049**.

IV. NO ATTRIBUTION

A. Activists' conduct is not attributable to the Slovak Republic under the ILC Articles

263. The focus of Discovery's claim is on the actions of private activists, and the allegedly deficient response of state actors to those private actions. It is clear, however, that the private actions themselves are not attributable to the Slovak Republic and thus do not themselves breach any of its international legal obligations thereunder.

264. The private activists' conduct would be attributable to the Slovak Republic only if the ILC Articles applied in this arbitration (*quod non*) and if, at the same time, the private activists:

(a) acted as an organ of the Slovak Republic (Article 4 of the ILC Articles); or

(b) were empowered by Slovak law to exercise elements of the governmental authority *and* had acted in that capacity when engaging in the allegedly wrongful conduct (Article 5 of the ILC Articles); or

(c) had acted on the instructions of, or under the direction or control of, the Slovak Republic in carrying out the allegedly wrongful conduct (Article 8 of the ILC Articles).

265. At the outset, it should not be controversial that activists did not act as an organ of the Slovak Republic and were not empowered by any elements of the governmental authority, thus foreclosing attribution theories (a) and (b) above. That leaves attribution theory (c), regarding Article 8 of the ILC Articles. This provision, however, is also inapplicable: the private activists did not act on the instructions of, or under the direction or control of, the Slovak Republic in carrying out the allegedly wrongful conduct. As such, their conduct is not attributable to the state. This matters, because the focus of Discovery's claims—properly understood—is the State's response to private action or alleged interference, not that alleged interference itself. That, in turn, matters for the assessment of liability, among other considerations.

266. Article 8 of the ILC Articles attributes to a State any conduct carried out on the instructions or under the directions or control of that State. Article 8 reads:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State ***in carrying out the conduct***.[388]

267. The Commentary on the ILC Articles clarifies that the instruction, direction or control must relate to the *specific* conduct which is to be attributed under Article 8:

> In the text of article 8, the three terms "instructions", "direction" and "control" are disjunctive; ***it is sufficient to establish any one of them***. At the same time it is made clear that the instructions, direction or control ***must relate to the conduct which is said to have amounted to an internationally wrongful act***.[389]

268. Under the ICJ's case law, attribution of conduct carried out under the direction or control of a State requires the State to exercise "*effective control*" over the entity carrying out the conduct. For the control to be effective, the State must have (*i*) general control over the entity; and (*ii*) specific control over the conduct, which is said to have amounted to an internationally wrongful act.[390]

269. The "*effective control*" test is also routinely applied by investment tribunals. For instance, the tribunal in *Gavrilovic v. Croatia* determined that "*[a]n 'effective control' test has emerged in international jurisprudence, which requires both a general control of the State over the person or entity and a specific control of the State over the act of attribution which is at stake*."[391] The *Saint Gobain v. Venezuela* tribunal opined, with respect to private labor unrest:

> It is uncontested by Claimant that the plant takeover was not directly carried out by organs of the State in their official capacity but rather "by union members and sympathizers." At the same time, ***it is a well-established principle under international law that, in general, the conduct of private persons or entities is not attributable to the***

388 ILC Articles on State Responsibility, Art. 8 (emphasis added), **CL-54**.

389 ILC Articles on State Responsibility, p. 48 (emphasis added), **CL-54**.

390 *See e.g.*, Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Judgment, 27 June 1986, 1986 ICJ Rep. 14, ¶¶ 113, 115, **RL-050**.

391 *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, ¶ 828, **RL-051**.

> ***State.*** This general principle is clearly reflected, inter alia, in Article 8 of the ILC Draft Articles […].[392]

270. Investment tribunals routinely deny jurisdiction over claims arising out of non-sovereign conduct, even by state-owned companies. For example, in *Jan de Nul v, Egypt*, the ICSID tribunal rejected any possibility of attribution of conduct of the state-owned company, SCA, to the State of Egypt under Article 8 of the ILC Articles because there was no evidence that Egypt would have controlled, instructed or directed the specific acts and omissions of the SCA.[393]

271. None of the activists' conduct of which Discovery complains is attributable to the Slovak Republic under Article 8 of the ILC Articles. Nor did the Slovak Republic direct or instruct activists to any wrongful conduct. As such, none of the private activists' conduct is attributable to the Slovak Republic, nor does it breach, in the primary instance, the Slovak Republic's international legal obligations. The question is whether the Slovak Republic was required to respond to the private activists' conduct in a certain way and, if so, whether its actual response fell short of what the BIT required. As established in the sections that follow, there can be no doubt that, even if jurisdiction is established, then the Slovak Republic has complied with its international legal obligations.

---

392 *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, ¶ 448 (emphasis added), **RL-052**.

393 *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, ¶ 173, **RL-053**.

V. NO BREACH

A. The Slovak Republic did not fail to accord fair and equitable treatment to Discovery's investment

1. Contrary to Discovery's submissions, the BIT imposes the minimum standard of protection of investors and investments

272. Discovery focuses its merits submissions on the so-called fair and equitable treatment standard, found in Article II(2)(a) of the US-Slovakia BIT. Under this provision, investments "*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 which conforms to principles of international law*" ("**FET Standard**").[394]

273. As a threshold matter, Discovery misstates the scope of Article II(2)(a) of the BIT, thereby misconstruing both the international legal right that it invokes as well as the correlative international legal obligation incumbent on the Slovak Republic.

274. The starting point for interpretation of any treaty is the ordinary meaning of its words. In flagrant disregard for the normal rules of treaty interpretation, Discovery dismisses the ordinary meaning as "*of limited assistance*"[395] when interpreting the content of Article II(2)(a) of the US-Slovakia BIT. Quite how the ordinary words are of "*limited assistance*" is never articulated, but is an admission that Discovery's allegations about the scope and substance of the FET Standard are not found in the BIT's express terms, but instead find their source somewhere else.

275. Instead of analyzing the BIT's ordinary and express terms, Discovery deviates from the ordinary method of treaty interpretation by focusing on what it asserts is the context of the entire treaty. The context, however, is vague, and again finds no justification in the customary international law of treaty interpretation (as codified in the VCLT). Indeed, Discovery's outcome-driven, teleological method of interpretation effectively allows it to take vague aspirational statements, like protection of investment, and endow them with whatever content it desires. Unsurprisingly, the result of this misguided interpretative exercise is equally unreliable.

394 Claimant's Memorial, ¶¶ 109-211.

395 Claimant's Memorial, ¶ 210.

276. One example: Discovery states that the purpose of the US-Slovakia BIT is "*to provide a stable environment for investment*."[396] Indeed, this observation is as uncontroversial as it is irrelevant. It is true for all BITs and represents their very *raison d'être*. To accept that proposition, however, does not mean that the encouragement of investments would be best served by imposing a broad standard of protection—be it under the FET Standard or another provision. This Tribunal must interpret and apply the BIT's legal standards. Reasoning from a predetermined, self-serving outcome, to thereby define the rights and obligations of the treaty, has it backward. And in any event, Discovery's alleged context does not necessarily result in additional investor protections or rights. As the tribunal in *Saluka v. the Czech Republic* held, an exaggerated FET standard of protection would dissuade host States from admitting foreign investments and would thus undermine the purpose of BITs.[397] Therefore, the aspirational statements that Discovery relies upon, like stability, do not necessarily inform the content of the BIT's rights and obligations.[398]

277. Through this teleological, outcome-driven interpretative process—one at odds with the VCLT—Discovery ultimately arrives at four distinct standards that, it says, form part of Article II(2)(a)'s FET Standard.[399] Rather, the ordinary meaning of Article 2(2)(a) of the BIT leads to the inexorable conclusion that the FET Standard is no more, and no less, than the minimum standard of treatment in customary international law.

278. It is true that, at certain points in the past two decades, certain tribunals have endorsed a 'maximalist' interpretation of "*fair and equitable treatment*" that goes far beyond the text of the treaties before them—and indeed far beyond the customary minimum standard of investment protection. But Discovery is wrong to suggest that these recent awards should bind this Tribunal or inform the interpretation of the US-Slovakia BIT. That BIT was entered into force in 1992, and thus those awards—which post-date the BIT—cannot be assumed to be part of the context of its entry-into-force or, indeed, part

396 Claimant's Memorial, ¶ 211(2).

397 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 300, **CL-017**.

398 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 300, **CL-017**.

399 Claimant's Memorial, ¶ 213.

of customary international law. Indeed, the practice under the NAFTA—whereby certain early tribunals misconstrued the FET standard in Chapter 11 of thereof, only to be rebuked in a joint statement of the three contracting parties to NAFTA—is more indicative of the prevailing practice at the time.[400] The U.S., of course, is party both to the Slovak Republic BIT and to NAFTA, as it then was. And, in any event, awards only bind the parties to them, and further constitute a subsidiary source of law (as confirmed by Article 38 of the ICJ Statute). As such, Discovery's reliance on some investment awards endorsing a 'maximalist' FET conception can be disregarded.

279. Article II(2)(a) of the BIT, therefore, imposes the customary minimum standard. The same conclusion was reached by the tribunal in *El Paso v. Argentina*, which had before it another U.S. treaty—and whose FET obligation was similarly-worded to the US-Slovakia BIT.

280. Namely, Article II(2)(a) of the United States-Argentina BIT states that "*[i]nvestment 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*."[401] As is unsurprising given the U.S.'s use of model BITs, the only difference on this point between the United States-Argentina BIT and the US-Slovakia BIT is that, while the former refers to "*treatment less than that required by international law*", the latter refers to "*treatment less than that which conforms to principles of international law*." While worded differently, their meaning is the same: both these expressions refer to the customary international law minimum standard of treatment. In fact, even Discovery shares the same understanding.[402]

281. Interpreting that provision of the US-Argentina BIT, the *El Paso v. Argentina* tribunal held:

> [T]he position according to which FET is equivalent to the international minimum standard is more in line with the evolution of investment law and international law and with the identical role

400 *See, e.g.*, North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions NAFTA Free Trade Commission, 31 July 2001, **RL-054**.

401 *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 326, **CL-025**.

402 Claimant's Memorial, ¶ 211(1).

> assigned to FET and to the international minimum standard. The Tribunal wishes to emphasize what is, in its view, the specific role played by both the general international minimum standard and the FET standard as found in BITs. The role of these similar standards is to ensure that the treatment of foreign investments, which are protected by the national treatment and the most-favoured investors' clauses, do not fall below a certain minimum, in case the two mentioned standards do not live up to that minimum.[403]

282. The same conclusion can, and should, be reached with respect to the US-Slovakia BIT, namely: "*FET is equivalent to the international minimum standard*."

283. This conclusion is buttressed by Article 31(3)(c) of the VCLT, pursuant to which the interpretation of a treaty should take into account the relevant rules of international law applicable to the relations between the parties.[404] The current minimum standard of treatment is part of customary international law, and therefore constitutes such a rule (and a maximalist interpretation of FET found in some relatively recent investment awards is not). Thus, only the former—the long-standing customary international law principle of minimum standard of treatment—should guide the interpretation of the "*fair and equitable treatment*" language in the BIT.

284. Lest there be any doubt, the *El Paso* tribunal is far from alone in its conclusion that "*FET is equivalent to the international minimum standard*." Many other distinguished arbitral tribunals have likewise found that the treaty-styled FET standard, under numerous BITs, is materially identical to the minimum standard of treatment in customary international law—essentially, a treaty codification of the customary international legal doctrine. This was, for instance, the view articulated in *Biwater Gauff v. Tanzania*.[405] The *Biwater Gauff* tribunal referred approvingly to the holdings of the NAFTA tribunals in *S.D. Meyers v. Canada*, *Mondev v. Mexico*, *ADF v. United States*, *Loewen v. United States*, *Waste Management v. Mexico II*, and *Thunderbird v. Mexico*, endorsing that last tribunal's finding:

---

403 *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 336, **CL-025**.

404 Vienna Convention on the Law of Treaties ("**VCLT**"), Article 31(3)(c), **CL-014**.

405 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 597, **CL-023**.

> Notwithstanding the evolution of customary law since decisions such as the Neer claim in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent jurisprudence [citing Genin and Waste Management] … For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.

285. As gloss on the *Thunderbird* tribunal's analysis above, the *Biwater Gauff* tribunal (which was not constituted under the NAFTA) added the following observation:

> These were, of course, statements made in the context of Article 1105(1) of NAFTA, which contains slightly different wording to the BIT here, and has also been the subject of a binding interpretation by the NAFTA Free Trade Commission (FTC). ***However, notwithstanding these factors, the Arbitral Tribunal considers that the description of the general threshold for violations of this standard is appropriate in the context of Article 2(2) of the BIT***.[406]
>
> [T]he Arbitral Tribunal has also taken into account the submissions of the Petitioners, as summarised earlier, which emphasise countervailing factors such as the responsibility of foreign investors, both in terms of prior due diligence as well as subsequent conduct; the limit to legitimate expectations in circumstances where an investor itself takes on risks in entering a particular investment environment.[407]

286. Thus, the correct (and prevailing) view today is that "*fair and equitable treatment*" is the same as the customary minimum standard. This proposition has, of course, received the endorsement of the three contracting states to the NAFTA, which include the U.S. (party also to the BIT invoked here by Discovery). But, as the *Biwater Gauff* tribunal convincingly demonstrated, that proposition—that "*fair and equitable treatment*" represents the international minimum standard—is "*appropriate*" for BITs too.

287. Another observation of the *Biwater Gauff* tribunal bears emphasis at this juncture, in defining the scope of the US-Slovakia BIT's "*fair and equitable treatment*" proviso in

---

406 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 598-599 (emphasis added), **CL-023**.

407 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award 24 July 2008, ¶ 601, **CL-023**.

Article II(2)(a). In pushing back against the claimant-investor's maximalist 'FET' conception in favor of customary international law, the *Biwater Gauff* tribunal emphasized certain "*countervailing factors*"—which unsurprisingly receive short shrift in Discovery's submissions.

288. As the *Biwater Gauff* tribunal determined, the FET Standard, for instance, does not serve as an insurance policy against bad business judgments or failure to investigate the host State's law. This conclusion was confirmed by the tribunal in *Total v. Argentina*, which held:

> Besides such an objective comparison of the competing interests in context, the conduct of the investor in relation to any undertaking of stability is also, so to speak "subjectively", relevant. Tribunals have evaluated the investor's conduct in this respect, highlighting that BITs "are not insurance policies against bad business judgments" and that the investor has its own duty to investigate the host State's applicable law.[408]

289. As a corollary of the proposition that BITs are not insurance policies against bad business judgment, countless tribunals have found that "*fair and equitable treatment*" does not exempt an investor from educating itself on the host State's laws, regulations, and administrative practices. Thus, for instance, the *Unglaube v. Costa Rica* held that it is the investor's duty to become familiar with the host State's laws:

> But with regard to the other Claimants' properties (*i.e*. the remainder of Phase II and Phase I Lots 19 - 23), the Tribunal does not find convincing evidence of a violation of the fair and equitable treatment standard. As intelligent and experienced investors, Claimants were, of course, required, as part of their due diligence, to become familiar with Costa Rican law and procedure. The Tribunal understands that the workings of the courts and administrative agencies of Costa Rica surely involve noticeable differences from those with which Claimants may be more familiar. But, because governments are accorded a considerable degree of deference regarding the regulation/administration of matters within their borders, such differences are not significant, insofar as this Tribunal is concerned, unless they involve or condone arbitrariness, discriminatory behavior, lack of due process or other characteristics that shock the conscience, are clearly "*improper or discreditable*" or which otherwise blatantly defy logic or elemental fairness. The

408 *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, ¶ 124, **RL-055**.

> Tribunal finds no evidence, here, that these boundaries have been approached, much less surpassed.[409]

290. Nor, as Discovery's submissions imply, does "*fair and equitable treatment*" lead to *de novo* review of a State's actions, with perfect hindsight. Instead, as the *Unglaube* tribunal determined, "*governments are accorded a considerable degree of deference regarding the regulation/administration of matters within their borders*". Such "*deference*" is not novel but is built into the substantive standard itself—and, in particular, the high bar required to establish a breach of the minimum standard (*e.g.*, to again quote *Unglaube*, "*characteristics that shock the conscience, are clearly "improper or discreditable" or which otherwise blatantly defy logic or elemental fairness*").

291. Indeed, other tribunals agree with the *Unglaube* tribunal that the application of the FET Standard, howsoever construed, requires a "*margin of appreciation*". While this doctrine has been applied routinely in the E.U. and E.C.H.R. context, it is no less familiar to customary international law—and thus to Article 2(2)(a) of the BIT. As propounded by the *Philip Morris v. Uruguay* tribunal, and endorsed by other investment panels:

> The Tribunal agrees with the Respondent that the "margin of appreciation" is not limited to the context of the ECHR but "applies equally to claims arising under BITs," at least in contexts such as public health. ***The responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health***. In such cases respect is due to the "discretionary exercise of sovereign power, not made irrationally and not exercised in bad faith … involving many complex factors." As held by another investment tribunal, "***[t]he sole inquiry for the Tribunal… is whether or not there was a manifest lack of reasons for the legislation***."
>
> […]
>
> In the Tribunal's view, the present case concerns a legislative policy decision taken against the background of a strong scientific consensus as to the lethal effects of tobacco. ***Substantial deference is due in that regard to national authorities' decisions as to the measures which should be taken to address an acknowledged and***

409 *Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, ¶ 258, **RL-056**.

> ***major public health problem. The fair and equitable treatment standard is not a justiciable standard of good government, and the tribunal is not a court of appeal.*** Article 3(2) does not dictate, for example, that a 50% health warning requirement is fair whereas an 80% requirement is not. In one sense an 80% requirement is arbitrary in that it could have been 60% or 75% or for that matter 85% or 90%. Some limit had to be set, and the balance to be struck between conflicting considerations was very largely a matter for the government.[410]

292. Synthesizing these sources: ultimately, the FET Standard is subject to a high threshold and requires a balanced analysis of the State's conduct and that of the investor, including the level of the investor's due diligence and its assessment of risk associated with entering a particular business environment. At the same time, it does not protect the investor from ignoring the host State's national laws or administrative procedures, as prudent investors are required, within their due diligence, to become familiar with the environment in which they voluntarily invested. Discovery's fair and equitable treatment claims must be assessed against that backdrop.

* * *

293. Discovery asserts that the FET Standard encompasses several related but distinct legal standards, namely: (*i*) protection of investor's legitimate expectations; (*ii*) an obligation to act consistently; (*iii*) denial of justice; (*iv*) the host state must act transparently, in good faith, and the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process.[411] The Slovak Republic elaborates on each of these in turn below.

---

410 *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶¶ 399, 418 (emphasis added), **RL-057**; *see also RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, ¶ 468 ("*First, the Tribunal is of the opinion that the Respondent enjoys a margin of appreciation in conducting its economic policy; therefore, it will not subsitute its own views either on the appropriateness of the measures at stake or on the characterization of the situation which prompted them; in particular, the Tribunal will abstain to take any position on the issue of the existence of other or more appropriate possible measures to face this situation*"), **RL-058**.

411 Claimant's Memorial, ¶ 213.

2. The Slovak Republic has not frustrated Discovery's legitimate expectations

294. Here again, Discovery overstates the scope of the obligations incumbent on the Slovak Republic, and thus the alleged right to which it is entitled. Namely, while it is widely accepted that the protection of an investor's legitimate expectations forms, to a certain extent, part of the FET Standard, it is uncontroversial that investment law does not protect *any and all* expectations of the foreign investor.

295. Rather, international investment law only protects expectations that are based on (*i*) specific assurances, (*ii*) given by the host State (*iii*) *at the time the investment was made* and (*iv*) *relied on by the investor* in making that investment. The tribunal in *Duke v. Ecuador* formulated these principles as follows:

> The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. ***In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest***.[412]

296. The tribunals in *Azurix v. Argentina*,[413] *Tecmed v. Mexico*,[414] *LG&E v. Argentina*,[415] *Waste Management v. Mexico*,[416] and *AES v. Hungary*,[417] among others, endorsed these principles, too.

297. Moreover, to ground an investor's legitimate expectation, the assurances given by the State need to be *specific*. The tribunal in *Walter Bau v. Thailand* found that the question of breach turned on the specificity of the assurances:

---

412 *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 340 (emphasis added), **RL-059**.

413 *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 318, **RL-060**.

414 *Técnicas Medioambientales Tecmed S.A, v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 154, **CL-021**.

415 *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 127, **RL-061**.

416 *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98, **CL-020**.

417 *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶¶ 9.3.8-9.3.9, **RL-062**.

> The legitimate expectations doctrine has been applied to protect the substantive expectations of investors where *particular promises* have been made—*Eureko v Poland* (cit supra) and *CMS v Argentina*. As was noted in an article by Steven Fietta, '[…] ***The question of whether or not there has been a violation of the standard will turn on what legitimate expectations the investor had in light of the specific assurances given by the relevant state authorities against the background of the domestic legal framework that was to govern the investment***'.[418]

298. As explained by the tribunal in *Crystallex v. Venezuela*, the decisive factors, in assessing the specificity of assurances and resulting investor expectations, are the contents of the assurance and the specificity as to the future conduct to which the host State committed:

> However, protection of legitimate expectations under the FET standard occurs under well-defined limits. A legitimate expectation may arise in cases where the Administration has made a promise or representation to an investor as to a substantive benefit, on which the investor has relied in making its investment, and which later was frustrated by the conduct of the Administration. To be able to give rise to such legitimate expectations, such promise or representation – addressed to the individual investor – must be sufficiently specific, i.e. it must be precise as to its content and clear as to its form.[419]

299. Therefore, it is immaterial to establish that Discovery had certain expectations at the outset, even if it is able to marshal testimony in support of those allegations. What matters, by contrast, is the reasonableness of those alleged expectations, in view of the diligence that Discovery was expected to undertake and the assurances, if any, given by the State. As the above jurisprudence demonstrates, international investment law only protects legitimate expectations of an investor as to a *certain specific future conduct* of the host State, and only provided that these expectations are based on *specific assurances* from the host State that it will (or will not) adopt this specific conduct, they are reasonable in light of the due diligence that the investor did or should

---

418 *Walter Bau AG (in liquidation) v. The Kingdom of Thailand*, UNCITRAL, Award, 1 July 2009, ¶ 11.11 (emphasis added), **RL-063**.

419 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 547, **CL-026**.

have done, and further that the investor actually relied on these assurances at the time of making its investment.[420]

300. The tribunal in *Muszynianka v. the Slovak Republic*, constituted under the Slovak Republic's BIT with Poland, endorsed these propositions, citing to earlier jurisprudence from the *Antaris v. Czech Republic* tribunal:

> To qualify as legitimate, the investor's expectations must be based on assurances (i) given by the State in order to encourage the making of the investment; (ii) addressed specifically to the investor; and (iii) that are sufficiently specific in content. In addition, an investor must establish that it placed reliance upon the assurance.[421]

301. It bears emphasizing that, as the *Muszynianka* tribunal found, the requisite specificity required to establish a ***legitimate*** expectation turns not just on the content of the assurance, but also its recipient. Namely, the second requirement endorsed by the *Muszynianka* tribunal was an "*assurance[] […] addressed specifically to the investor*". This is particularly important: Discovery has not identified ***any*** assurances "*addressed specifically*" to it at the requisite time, *i.e.*, when it made its investments. And if it did receive any assurances, they were not from the Slovak Republic, but from its commercial counter-party (the seller of AOG's shares) in an arms' length commercial negotiation.

302. Finally, the legitimacy and reasonableness of an investor's expectations must necessarily be informed by the "*political, social, cultural, and economic conditions*" in which the investment is made. As the tribunal in *South American Silver v. Bolivia* observed:

> [t]he Tribunal should assess the legitimacy and reasonableness of the investor's expectations, taking account of all the circumstances of the case and the investor's conduct. In this case, the Claimant knew, or should have known, that CMMK operated in an area inhabited by indigenous communities, under specific political, social, cultural, and economic conditions. CMMK's own advisors,

---

420 *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 262, **CL-059**; *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, ¶¶ 241-243, **RL-064**.

421 *Spoldzielnia Pracy Muszynianka v. Slovak Republic*, UNCITRAL, PCA Case No. 2017-08, Award, 7 October 2020, ¶ 462, **RL-065**.

> as the Tribunal has already mentioned, warned of this situation and recommended that certain measures be taken for the development of the Project. On the one hand, this implies that SAS, through CMMK, should develop the Project based on the special characteristics of the place where it operated. On the other hand, this supposes that Bolivia had a heightened duty of protection and oversight regarding the communities that inhabit the Project area.[422]

303. The *South American Silver* findings immediately above are particularly salient for Discovery's alleged expectations. The *South American Silver* tribunal found that the local subsidiary "*operated in an area inhabited by indigenous communities, under specific political, social, cultural, and economic conditions*". These conditions meant that the *South American Silver* claimant knew, or should have known, of certain risks—and that it could not rely on a "*fair and equitable treatment*" clause for its knowing assumption of such risks.

304. The legitimacy of Discovery's expectations, therefore, must encompass a concept known among energy and mining companies as a "*social license to operate*". In other words, taking into account the local community in which it invested, as well as recommended practices for extractive industries like its own, Discovery knew, or should have known, that it should obtain a "*social license to operate*" prior to commencing operations.

305. It should be uncontroversial that a prudent investor in an extractive industry, like the mining industry, knows or should know of the make-or-break significance of this social license. For instance, Deloitte in its report "*Tracking the trends 2019 Top 10 issues transforming the future of mining*" confirms that a "*social license to operate is becoming a pivotal strategic issue that will either differentiate mining companies or derail them*."[423] EY in its report "*Top 10 business risks facing mining and metals in 2019-20*" places the license to operate as risk No. 1 for mining companies.[424]

306. The importance of a social license to operate is not limited to mining companies but applies equally to extractive industries like Discovery's proposed operations. Indeed,

---

422 *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, ¶ 655, **RL-066**.

423 Deloitte, *Tracking the Trends 2019: Top 10 Issues Transforming the Future of Mining, 2019*, p. 5, **R-094**.

424 EY, *License to Operate: Top 10 Business Risks Facing Mining and Metals In 2019-20*, p. 5, **R-095**.

Discovery's would-be principal, Mr. Lewis, would have been aware of the need for a "*social license to operate*", based on his self-reported expertise in the energy industry. The areas near his home, in Texas, are well-known for lawsuits by homeowners to prevent disruptive exploration techniques, like fracking.[425] Ultimately, based both on international best practices and the experience in Mr. Lewis' own home jurisdiction, Discovery either knew, or should have known, that it would require a "*social license to operate*". Failure to obtain such a license thus implicates the jurisprudence precluding the use of BITs as insurance policies against bad business judgment, or risks that an investor knowingly assumed absent any specific guarantees to the contrary from a state (*e.g.* stabilization clause in concession agreements).

307. As explained below, Discovery's alleged expectations fall short of the required standard, and are thus not legitimate. Illegitimate expectations are not protected by Article 2(2)(a) of the BIT.

a. Discovery ignored specific conditions in the Exploration Area Licenses

308. Discovery bases its alleged legitimate expectations on the Exploration Area Licenses, which, on its case, allegedly "*contained representations to the licence holder that it would be permitted to carry out geological deposit exploration in respect of oil and gas in the blocks*".[426] There are, however, numerous problems with Discovery's reliance on these decisions. Its asserted expectations are not legitimate under the jurisprudence cited immediately above.

309. At the outset, Discovery cannot base its legitimate expectations on decisions post-dating its investment in 2014. This is a routine application of the principle that the only eligible expectations are those that, among other things, were made to, and relied upon by, an investor ***at the time of making its investment***.[427] Thus, for instance, Discovery cannot base its expectations on the 2016 Licenses. Discovery's statement that the 2016 Licenses acknowledged that AOG was permitted to "*drill[] exploration wells of*

425 Reuters, *Texas judge upholds $3 million fracking verdict*, 15 July 2014, **R-096**.

426 Claimant's Memorial, ¶ 224.

427 *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 340, **RL-059**.

between 1200m and 1500m in depth, pumping tests and geophysical surveys"[428] cannot serve as a basis for Discovery's expectations: they were not made to it (but to AOG), were not made at the time of making of the investment, and were insufficiently specific to generate the unfettered international right to drill that Discovery espouses in this arbitration. But even if they could (*quod non*) overcome these hurdles, the above-cited passage from the 2016 Licenses was merely a restatement of AOG's application submitted to the MoE and thus, was not any acknowledgment or assurance by the MoE. Discovery, moreover, would know that this was not an assurance ***by*** the Slovak Republic, given its professed involvement in AOG's management, but instead a restatement or summary of what its own subsidiary put to regulators.

310. What Discovery does not mention, moreover, is that all these decisions contain numerous specific conditions which the Exploration Area License holder must fulfill before commencing any exploration activities. Its expectation, to the extent it ignores these conditions, is not legitimate. These conditions include the obligation to secure all rights required to access and use third-party land, or to undergo EIA.[429] Thus, to the extent that the FET Standard protects Discovery's legitimate expectations, and assuming *ex hypothesi* that these Exploration Area Licenses qualify to generate such expectations, breach of the FET Standard must consider whether or not these conditions or obligations—incumbent on Discovery—were satisfied. If they were not, Discovery's professed expectation of the underlying right to drill, absent satisfaction of those conditions and obligations, is illegitimate and unreasonable.

311. Indeed, as explained above, the Exploration Area Licenses are not a blank check that allow its holder to drill anywhere within these areas. This only stands to reason: the Exploration Area Licenses span large land masses and cover hundreds of different villages and cities, thousands of acres of private land, gardens, private backyards, protected areas, and other forms of land. As such, the Exploration Area License holder is required to secure permission to conduct exploration activity from any affected third-party property owners before commencing any exploration activities.[430] To the extent

428 Claimant's Memorial, ¶ 226(1).

429 *See supra* ¶ 33.

430 *See supra* ¶ 33.

such an area holder does not, explorers proceed at their own legal peril. Should they do so, they obviously risk scrutiny from third-party property owners—and justifiably so. Any legal due diligence by Discovery would have revealed these requirements of Slovak law and their express inclusion in the 2010 License. For that reason, the suggestion advanced in the Memorial, *i.e.* that Discovery had a legitimate expectation that it could enter a land owner's land plot, begin construction of a drilling pad and commence drilling ***without*** express permission of that landowner, is baseless.

b. The Slovak Republic did not prevent AOG from drilling

i. Smilno

312. Discovery next argues that numerous Slovak authorities allegedly frustrated its legitimate expectations by preventing AOG from "*carrying out all of the exploration activities which it was expressly permitted to undertake*".[431]

313. This argument, like the one summarized in the preceding section, also flies in the face of the fact that AOG was obliged to secure rights required to use the access lands and any other affected plots for its exploration activities. To give one example: as explained above, regardless of whether the field track was a special public purpose road or a private property, AOG needed landowners' consent for its contemplated use.[432] Further, as explained above, AOG did not have a proverbial 'blank check' to all exploration activities. The determination of an exploration area was only the first prerequisite for performance of exploration activities, but it was not the only one. Apart from the obligation to secure private property owners' consents (a matter of both legal obligation and commercial prudence), there were numerous other state authorities' consents, drilling notifications, explosives permissions, and other prerequisites for the specific exploratory works. Thus, even assuming Discovery can establish a legitimate expectation for AOG to carry out "*exploration activities which it was expressly permitted to undertake*", then it must carry those out in accordance with the terms of that express permission—with all the incumbent additional steps and permissions required under the Slovak legal order.

---

431 Claimant's Memorial, ¶ 227.

432 *See supra* ¶¶ 77-82.

314. The illegitimacy of Discovery's professed expectations in this arbitration is confirmed by AOG's actions and documents generated at the time. These unambiguously confirm that AOG consistently understood that the Access Land was private property. By way of example, two days after AOG's first unsuccessful attempt to access the Smilno Site, AOG purchased the co-ownership share in the Access Land.[433] Later, in April 2016, AOG established Smilno Roads and attempted to secure the rights to the Access Land via this company.[434] Naturally, AOG would not undergo these hurdles had it thought that the Access Land was a public special purpose road. Rather, AOG did so because it understood that the Access Land was private property. Even AOG's internal report concludes that Ms. Varjanová "*has legal right to park her car on the road*."[435] AOG only changed its mind and invented the argument about the Access Land being a public special purpose road in around mid-2016; it uses this argument *ex-post* in this arbitration. But a professed expectation that a claimant or its local representative did not even share at the time cannot be a legitimate one; nor is it one that was relied upon by the would-be investor at the time it made its investment in 2014.

315. Simply put, no representation in the Exploration Area Licenses authorized AOG to use private property without securing required rights in the first place. Quite to the contrary, Article 29(12) of the Geology Act expressly provides that "*[w]ithout the landowners' consent and without the decision of the Ministry [on compulsory access], the contractor of geological works can restrict the ownership right only in case of urgent public interest, namely in the prevention or liquidation of an imminent natural disaster and in the prevention and removal of accidents according to a special regulation, and only for the inevitably required time period*."[436] In other words, in the absence of emergency, the geological works contractor may access a private land only with landowner consent or MoE's compulsory access decision.

316. This fact alone suffices to dispel the entirety of Discovery's legitimate expectations claim based on AOG's inability to access the Smilno Site.

---

433 *See supra*, ¶¶ 87-89.

434 *See supra*, ¶¶ 97-100.

435 Report to Partners – Status Update dated 20 January 2016, p. 2, **C-120**.

436 Geology Act, Art. 29(12), **R-042**.

317. In any event, neither of the regulatory or state authorities identified by Discovery acted in contravention with Slovak law or, for that matter, the BIT.

318. *First*, Discovery's argument that the Police were obliged to remove Ms. Varjanová's vehicle placed on the Access Land property rests on the proposition that the field track was a public special purpose road, and her vehicle blocked traffic. Therefore, to sustain its allegation that the Police were obliged to remove Ms. Varjanová's vehicle, Discovery would have to prove that the field track was a public special purpose road. This is because pursuant to Article 2 of the Road Act, "*road traffic means the use of motorways, roads, local roads and special purpose roads […] by drivers of vehicles and pedestrians*."[437] As explained above, Discovery failed to substantiate this assertion.[438]

319. But, even if there were no traffic blockage, AOG was not entitled to use the Access Land and any track thereon for its purported use by a heavy drilling machinery.[439]

320. Finally, the Police were neither obliged nor entitled to disperse Ms. Varjanová and other activists because the Police are not entitled to intervene in a civil-law dispute between private parties. Their sole role at the Smilno Site was to supervise the situation and discourage any acts which would disturb public order or qualify as crimes or misdemeanors.[440] At the same time, the Interim Injunction preventing AOG from using the Access Land was still in force during AOG's alleged second and third drilling attempt.

321. *Second*, Discovery's claim that the Police frustrated its legitimate expectations by refusing to place a road sign on the Access Land is likewise flawed. As explained above, regardless of the status of the field track on the Access Land, the Police were not obliged to place any road sign on the Access Land and Discovery failed to provide any credible evidence that Slovak authorities made any promises to AOG.[441] Therefore,

---

437 Act No 8.2009 (the Road Traffic Act) (2015) (Slovak, with English translation) dated 2015, Art. 2, **C-214**.

438 *See supra* ¶¶ 72-83.

439 *See supra* ¶ 82.

440 Police Act, Art. 2(1), **R-067**.

441 *See supra* ¶¶ 113-125.

Discovery could not have had any legitimate expectations that the signs would be erected. Nor could this expectation have induced Discovery to invest in the project in 2014.

322. *Finally,* Discovery's argument that the conduct of Slovak authorities in Smilno were "*exacerbated*" by other Slovak authorities is flawed as well. *First*, Dr. Slosarčíková did not intervene and direct the Police to stop their policing.[442] *Second,* contrary to Discovery's assertions, the MoI was entitled to issue the guidance regarding the track on the Access Land.[443] At the same time, the statements of the MoI were consistent with the statements of the MoT.[444] *Third*, the resolution of the Prešov Self-Governing Region was a non-binding expression of support to local activists. The parliament of the Prešov Self-Governing Region had no authority to change any legal rights or obligations or to exercise any rights to exclude affected locations from the Exploration Area Licenses.[445] *Finally*, as Prof. Fogaš explains, there were no undue delays in the decision-making of the Slovak courts; they were fully entitled to issue the Interim Injunction.[446] As such, none of the scattershot allegations against the Slovak authorities concerning Smilno withstands scrutiny.

ii. Krivá Oľka

323. Nor do Discovery's allegations concerning Krivá Oľka fare any better. With respect to this area, Discovery argues that, "*having been granted the relevant Licence and then the Lease in respect of the land owned by the State Forestry, Discovery/AOG had a legitimate expectation that the MoA would not actively prevent them from doing what both the MoE (as the relevant Ministry) and the MoA (who had granted its consent to enter into the Lease) had previously approved: namely, exploratory drilling*."[447] Again, Discovery wrongly characterizes the rights that AOG possessed under Slovak law.

---

442 *See supra* ¶¶ 107-112.

443 *See supra* ¶ 124.

444 *See supra* ¶¶118-123.

445 *See supra* ¶¶ 178-179.

446 *See infra* ¶¶ 369-373.

447 Claimant's Memorial, ¶ 232.

324. *First*, the fact that the MoA approved the Lease Agreement between LSR and AOG does not mean that the MoA approved AOG's exploratory drillings (as Discovery suggests).[448] This is because it was not within the MoA's competence to approve any such drilling—something that Discovery either knew or should have known through the exercise of reasonable investor diligence. Rather, the MoA—as the competent body for forests protection—approved specific terms and conditions of the Lease Agreement for the forest land as required by then-applicable law.[449] Nothing more. Discovery is attempting to mischaracterize the scope of the MoA's authority to give credence to its theory that it had an unfettered right to drill. But that assertion is untenable once the MoA's authority and powers under Slovak law are properly understood.

325. Discovery's assertion that the MoA should somehow give substantial weight to the existence of AOG's Exploration Area Licenses in its decision-making is also flawed. The MoA is a central administrative body for forestry,[450] whose aim is "*conservation, development and protection of forests as a component of the environment and natural heritage to fulfill their irreplaceable functions*."[451] Therefore, whether or not the MoE had extended the term of Exploration Area Licenses is a different question than was faced by the MoA. The MoA is not required to approve a lease simply because AOG held the Exploration Area Licenses. And, indeed, that is *precisely* why the MoA referred AOG to Article 29 of the Geology Act (and was squarely within its authority under Slovak law to do so).

326. *Second*, as the Slovak Republic explained above, the MoA did not "*actively prevent*" Discovery or AOG from exploration. Rather, LSR and AOG negotiated specific terms for extension in the Lease Agreement. The sole reason for the MoA's refusal to approve the Amendment was AOG's own failure to comply with the provisions of the Lease Agreement.[452] Neither AOG nor Discovery can legitimately expect that the Lease Agreement would be extended if AOG itself failed to comply with these conditions.

---

448 Claimant's Memorial, ¶ 232.

449 *See supra* ¶ 142.

450 Act No. 575/2001 Coll. on Organization of Government Activities and Organization of Central Government, as amended, Art. 9, **R-071**.

451 Act on Forests, Art. 1(2)(a), **R-070**.

452 *See supra* ¶¶ 145-159.

Indeed, the contrary expectation would be the only reasonable one. And there was nothing unfair or non-transparent in such conduct.

327. *Third*, Discovery is wrong that the MoA frustrated AOG's or Discovery's legitimate expectation that the MoA would approve the Amendment because it initially approved the Lease Agreement. The MoA approved the Lease Agreement because AOG complied with all requirements incumbent on that part of the process. On the other hand, at a later juncture, it declined to approve the Amendment because AOG failed to comply with the Lease Agreement. Neither AOG nor Discovery can legitimately expect that the MoA would approve the Amendment just because it approved the Lease Agreement in the first place—still more when faced with AOG's non-compliance with that Lease Agreement.

328. *Finally*, Discovery argues that had AOG "*known that [refusal to approve the Amendment] was going to be the MoA's position prior to June 2016, it could have made the §29 application much sooner*."[453] That, too, is not credible. AOG knew in December 2015 that it failed to timely seek an extension of the Lease Agreement.

329. It follows from the foregoing that (*i*) the main reason for refusing to approve the extension of the Lease Agreement was AOG's own failure to request the extension in compliance with the terms of the Lease Agreement; (*ii*) the Minister of Agriculture duly explained the rationale for her decision;[454] and (*iii*) the Minister of Agriculture informed AOG of other statutory means to secure a right for the Oľka Land.

---

453 Claimant's Memorial, ¶ 141(2).

454 Instead of admitting that AOG missed the deadline and did not prove fulfillment of the other conditions for renewal, Discovery argues that the MoA refused to grant its consent because the Head of the Service Office of the MoA, Mr. Jaroslav Regec, allegedly refused to sign it. Discovery bases its allegation that Mr. Regec refused to sign the approval on a single email communication between AOG and their advisor, Mr. Wolf. In the same communication, Mr. Wolf informed AOG that they are "*trying to get the addendum signed by his predecessor*." Naturally, asking a person that "*no longer has any responsibility*" to sign a document would be illegal. Despite that, AOG's advisor came with such solution as "*supposedly, it is legally possible*" —so much for the credibility of AOG's advisor. No wonder that AOG apparently replaced him for another advisor shortly after. AOG was using another communication agency—SNOWBALL COMMUNICATION—already in 2016, *see* Email from Cveckova to Fraser in relation to Smilno updates dated18 June 2016, **C-137**; Email from K Wolf to AOG dated 13 May 2016, **C-130**.

iii. The Slovak authorities did not frustrate any legitimate expectations in relation to the EIA

330. Discovery next claims that the Slovak Republic created Discovery's legitimate expectations that AOG would not have to undergo the EIA for its exploration drilling, such that the request for an EIA was contrary to the FET Standard. As a preliminary matter, of course, Discovery can point to no assurances made to it, at the time it invested, that future environmental assessments would never be required in any circumstance. But, even if such an expectation were legitimate (and it is not), Discovery's theories fail for several additional reasons.

331. *First*, the Slovak Republic had the right to adopt the EIA Amendment under the police powers doctrine. The tribunal in *Saluka v. Czech Republic* recognized the police powers doctrine as a rule of international law:

> It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.[455]

332. The *Saluka* tribunal concluded 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 international law today*."[456]

333. Other tribunals are in accord. The tribunal in *Lauder v. Czech Republic* observed that "*[p]arties to the Treaty are not liable for economic injury that is the consequence of bona fide regulation within the accepted police powers of the State*."[457] Similarly, the tribunal in *El Paso Energy International Company v. Argentina* recognized that "*in principle, general non-discriminatory regulatory measures, adopted in accordance*

---

455 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶¶ 254-255, **CL-017**.

456 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 262, **CL-017**.

457 *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶ 198, **CL-043**.

with the rules of good faith and due process, do not entail a duty of compensation."[458]

The tribunal in *Methanex v. United States* echoed the same principle:

> [A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.[459]

334. In *Chemtura Corporation v. Canada*, the tribunal applied the police powers doctrine to a State measure that was motivated by a concern for human health and the environment. The *Chemtura* tribunal stated that "*[i]rrespective 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.*" The tribunal went on to hold that the State "*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*."[460]

335. Of course, the right to regulate under police powers doctrine is not absolute. As the foregoing cases demonstrate, the state regulation must be reasonable and non-discriminatory.[461] The tribunal in *Rusoro v. Venezuela* explained the relevant analytical framework:

---

458 *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 240, **CL-025**.

459 *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, ¶ 7, **RL-067**.

460 *Chemtura Corporation v. Canada*, NAFTA/UNCITRAL, Award, 2 August 2010, ¶ 266, **RL-068**.

461 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 262, **CL-017**; *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶ 198, **CL-043**; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 240, **CL-025**; *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, ¶ 7, **RL-067**; *Técnicas Medioambientales Tecmed S.A, v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 119, **CL-021**; *Emmanuel Too v. Greater Modesto Insurance Associates and United States of America*, IRAN-US Claims Tribunal, Award, 29 December 1989, ¶ 26, **RL-069**; *Invesmart B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009, ¶ 498, **RL-070**; *Chemtura Corporation v. Canada*, NAFTA/UNCITRAL, Award, 2 August 2010, ¶ 266, **RL-068**; *Suez, Sociedad*

> In evaluating the State's conduct, the Tribunal must balance the investor's right to be protected against improper State conduct, with other legally relevant interests and countervailing factors. First among these factors is the principle that legislation and regulation are dynamic, and that States enjoy a sovereign right to amend legislation and to adopt new regulation in the furtherance of public interest. The right to regulate, however, does not authorize States to act in an arbitrary or discriminatory manner, or to disguise measures targeted against a protected investor under the cloak of general legislation. Other countervailing factors affect the investor: it is the investor's duty to perform an appropriate pre-investment due diligence review and to show a proper conduct both before and during the investment.[462]

336. As is evident from the jurisprudence, in assessing measures undertaken by a State, tribunals afford great deference to the State's right to regulate. The tribunal in *Tza Yap Shum v. Peru* explained that there is a presumption that the legislation is legitimate: "*the exercise of the State's regulatory and administrative power comes with a presumption of legitimacy*".[463]

337. In reviewing a State's exercise of its sovereign power when enacting a change in law, investment tribunals only assess whether the measure at issue bears a reasonable relationship to some rational policy. It is commonly accepted that tribunals should not, with the benefit of hindsight, assess the merit of the policy—much less substitute their views for those of a sovereign legislature.[464]

338. The above-cited jurisprudence thus unequivocally confirms that a State has a right to adopt a *bona fide*, reasonable and non-discriminatory general regulation, that bears a reasonable relationship to some rational policy or public interest.

339. In addition to legislation or other public measures motivated by the public interests, investment tribunals accept that state measures implementing EU legal obligations do not lead to liability under an investment treaty. This matters because, as a putative

---

General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶ 139, **RL-071**.

462 *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 525, **RL-072**.

463 *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, ¶ 95 (Original: "*Como ha indicado la Demandada, el ejercicio del poder regulatorio y administrativo del Estado lleva aparejada una presunción de legitimidad*."), **RL-073**.

464 *Invesmart B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009, ¶¶ 454, 460, **RL-070**.

investor in the Slovak Republic, Discovery accepted to be bound by EU law, which is part of Slovak law as well as international law. Thus, to the extent that the impugned measures in this arbitration are actually measures that are required by, or reasonably relate to the implementation of, EU law, they cannot lead to liability under the BIT. The tribunal in *Electrabel v. Hungary* explained that a State cannot be held liable when it implements legally binding obligations stemming from its membership in the European Union:

> Where Hungary is required to act in compliance with a legally binding decision of an EU institution, recognized as such under the ECT, it cannot (by itself) entail international responsibility for Hungary. Under international law, Hungary can be responsible only for its own wrongful acts. The Tribunal considers that it would be absurd if Hungary could be liable under the ECT for doing precisely that which it was ordered to do by a supranational authority whose decisions the ECT itself recognises as legally binding on Hungary.[465]

340. This applies with equal force here: the Slovak Republic cannot be held liable for implementing the regulation that it is obliged to implement under the EU law, namely, the EIA Directive.

341. The EIA procedures under the EIA Directive bear a reasonable relationship with a legitimate public purpose: protection of the environment. The EIA Amendment is also non-discriminatory as it applies to Slovak and non-Slovak companies alike; and it has not been applied inconsistently. Finally, the Slovak Republic was obliged to adopt it due to its membership in the European Union and was under an obligation to implement these under the then pending infringement proceeding.[466]

342. *Second*, neither the MoE nor Minister Sólymos ever represented to AOG or Discovery that Slovak authorities would not order a Full EIA on AOG when AOG agreed to undergo a Preliminary EIA voluntarily. In any event, AOG does not dispute that it agreed to undergo a Preliminary EIA voluntarily. Discovery cannot seriously contend that AOG's voluntary action somehow immunized it from a Full EIA if, as here, the results of a Preliminary EIA screening led to the conclusion that further study of

---

465 *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 6.72, **RL-074**.

466 *See supra* ¶¶ 180-182.

environmental risks was warranted. Moreover, neither the MoE nor Minister Sólymos would be authorized to give such a promise, as the decision on whether the exploratory well in a specific location would or would not have potential impact on its environment is done by the respective authority whose role is to screen such activity under the EIA Act (and is location specific).

343. *Third*, neither the MoE nor Minister Sólymos ever represented to AOG/Discovery that AOG's future drills would not be covered by the EIA Amendment and thus, subject to a preliminary EIA. Rather, the statements of the MoE and Minister Sólymos made clear that the EIA Amendment applied to all new drills.[467] For that reason, the Slovak Republic applied it consistently to all new drills after 1 January 2017.

344. *Finally*, whether or not the MoE included a condition to undergo a preliminary EIA in the 2018 Decision is irrelevant. As explained above, the MoE routinely included conditions that applied automatically under the applicable law, regardless of whether they were included in the decisions (or not).[468] The same holds true for the condition about a Preliminary EIA: it applied directly under the EIA Amendment. In any event, AOG agreed in its press release that it would undergo the EIA screening for "*each exploration well, including those where operations have already started*,"[469] even for future drills.

3. The Slovak Republic did not breach the FET Standard through allegedly inconsistent action

345. Discovery further argues that the FET Standard includes the State's obligation to act consistently.[470] That proposition, as a matter of general legal principle, is uncontroversial. Discovery's claim that the Slovak Republic acted inconsistently, so as to breach the FET Standard, is however meritless.

346. *First*, Discovery relies on *MTD Equity v. Chile*, where the tribunal concluded that "*an investor with whom Chile's foreign investment commission had signed an investment*

---

467 Sólymos WS, ¶¶ 7-11.

468 *See supra* ¶¶ 216-218.

469 Press Release in relation to AOG's commitment to local communities in North-East Slovakia, 5 April 2017, **C-171**.

470 Claimant's Memorial, ¶ 213(2).

contract for the construction of an urban development was denied the necessary permits pursuant to applicable zoning regulations."[471] In *MTD Equity v. Chile*, Chile's foreign investment commission (FIC) had signed an investment contract for the construction of an urban development, which was, however, contrary to the urban policy of the Chilean government. As a result, other Chilean authorities refused to grant required permits for the project. The *MTD* tribunal thus found that, "*based on the evidence presented to it, that approval of an investment by the FIC for a project that is against the urban policy of the Government is a breach of the obligation to treat an investor fairly and equitably*."[472]

347. The factual scenario here is, however, entirely different. Unlike in the *MTD* matter, no umbrella grant of entry or authorization was purportedly given by a "foreign investment committee" or similar organization responsible for the encouragement of foreign direct investment. By contrast, no such institution exists in the Slovak Republic, and all others with which Discovery interacted had clearly-demarcated competencies and spheres of authority under Slovak law. Nor did any organization or authority purport to grant AOG *carte blanche* authority to undertake all of the exploration activities that Discovery wished to do, without need to carry out any environmental or community impact analyses or obtain further authorizations or permits. Discovery was, or should have been, aware of each institution's or agency's area of authority. This is not a case of two institutions reaching a different outcome on the same legal issue or question posed to them, as was the case in *MTD*.

348. *Second*, Discovery's reliance on *Garanti Koza v. Turkmenistan* is likewise inapposite. There, the *Garanti Koza* tribunal found inconsistency because one governmental agency required different payment procedures than those agreed between Garanti Koza and another Turkmen agency:

> The Tribunal concludes that Turkmenistan's insistence that Garanti Koza's progress payment invoices conform to Smeta was a breach of Turkmenistan's obligation to treat Garanti Koza's investment in Turkmenistan fairly and equitably. The inconsistency of behavior between one agency of the Turkmenistan Government, which had

---

471 Claimant's Memorial, ¶ 217.

472 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 166, **CL-016**.

> agreed to a system of payment based on the percentage of work completed, and other arms of the same Government that insisted that payment could only be made against invoices built up from costs, plus a limited profit margin, as required to conform to Smeta, would alone have been sufficient to call into question whether the Claimant had been treated fairly and equitably.[473]

349. Thus, the *Garanti Koza* tribunal again found inconsistency between what was agreed in the contract with the investor and what other authorities subsequently requested from that investor. There is no such inconsistency in the present case.

350. *Finally,* Discovery's reliance on *Glencore v. Colombia* does not assist its case. In that matter, the *Glencore* tribunal noted that the inconsistency between the acts of the government agencies can breach investor's legitimate expectations if these agencies act within the "*same sphere of powers*":

> [A]n investor may legitimately hold the expectation that different branches of government will not take inconsistent actions affecting the investment: a government agency should not make a decision that contradicts a prior decision made by the same or another agency, ***acting within the same sphere of powers***, on which the investor has relied, causing harm to the investor. This is part of the core meaning of the FET standard.[474]

351. Here, there simply is no such inconsistencies in acts of the Slovak authorities, nor any overlapping "*sphere[s] of powers*" so as to create a possible inconsistency.

352. *First,* Discovery's argument that the MoA "*acted inconsistently*" with the conduct of the MoE, which assigned and extended the Exploration Area Licenses to AOG is incorrect: the competences of the MoE and the MoA differ.[475] These two ministries thus do not act "*within the same sphere of powers*", within the meaning of the *Glencore* award. As such, the fact that the MoE assigned the Exploration Area Licenses to AOG does not mean that any other authority is prevented from independently exercising its own authority in its respective field of its competence, as specified in Slovak law.

---

473 *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, ¶ 382, **CL-028**.

474 *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 1419 (emphasis added), **CL-037**.

475 Act No. 575/2001 Coll. on Organization of Government Activities and Organization of Central Government, as amended, Arts. 9, 16, **R-071**.

353. *Second*, the fact that the MoA refused to approve the Amendment does not mean that it "*acted inconsistently*" with its own conduct because it approved the Lease Agreement in October 2015. The MoA approved the Lease Agreement because AOG complied with all requirements. On the other hand, it refused to approve the Amendment because AOG failed to comply with the Lease Agreement.[476]

354. *Third*, Discovery's argument that the MoE failed to act consistently because it rejected AOG's request under Article 29 of the Geology Act is incorrect. It is essential to emphasize that Article 29 of the Geology Act places the elementary obligation to secure the landowner consent exclusively on the geological works contractor, here, AOG. To comply with the law, the geological works contractor should reach agreement with landowners. If such agreement cannot be reached, the geological works contractor may apply for compulsory access rights under the Article 29 procedure, provided that it proves, in the particular case, that the public interest in exploration will prevail over the particular landowner's interest. This is only logical because imposition of such compulsory access directly interferes with private ownership rights protected by the Constitution of the Slovak Republic.[477] Therefore, in any administrative proceeding aiming at restricting such rights, careful consideration must be given to prevailing public interest, as well as the least invasive restriction of the ownership right. As such, AOG cannot legitimately expect that it would have unrestricted right to drill anywhere within the entire Exploration Areas.

355. Nevertheless, the MoE processed AOG's request under Article 29 of the Geology Act. Although it initially refused AOG's application, Minister Sólymos decided in AOG's favor on appeal, quashed the first instance decision, and ordered the MoE to proceed further with AOG's request. Despite this, however, AOG ceased participating in the procedure and ultimately abandoned the Exploration Area Licenses.[478]

476 *See supra* ¶¶ 145-159.

477 Constitution of the Slovak Republic, Art. 20, **R-018**.

478 *See supra* ¶¶ 160-166.

4. No denial of justice

a. Legal standard

356. The international delict of denial of justice is subject to a particularly high threshold. It only sanctions a *systemic and flagrant* failure of the host State's judiciary to grant due process to the investor and is only available where the investor has exhausted all available local remedies.[479]

357. In other words, it is uncontroversial that international law accords a high level of deference to domestic administration of justice.[480] This leading rule translates into a presumption of correctness for domestic judiciary decisions, as commentators like Paulsson confirm.[481]

358. Traditionally, denial of justice focused on procedural misconduct of national courts. For instance, according to Paulsson, "*[d]enial of justice is always procedural," as its objective is to ensure that foreigners are afforded "procedural fairness" as measured by an international standard*.[482] Similarly the tribunal in *Loewen v. USA* defined denial of justice as a "*[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety*."[483]

359. Notably, Discovery is unable to point to any procedural misconduct of Slovak courts that would amount to a denial of justice. Hence, Discovery is left with the argument that a denial of justice covers also "*substantive denial of justice*", *i.e.*, decisions on the merits of domestic claims. [484]

---

479 *See, e.g.*, *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, **CL-038**; *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, ¶ 225, **RL-075**; *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016, ¶ 254, **RL-076**.

480 J. Paulsson, *Denial of Justice in International Law* (4th ed., 2007), p. 87, **RL-077**.

481 J. Paulsson, *Denial of Justice in International Law* (4th ed., 2007), p. 87, **RL-077**.

482 J. Paulsson, *Denial of Justice in International Law* (4th ed., 2007), pp. 4, 62, **RL-077**.

483 *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶ 132, **CL-039**.

484 Claimant's Memorial, ¶¶ 222 *et seq*.

360. This view, however, contravenes the general principle of international law that the standards of lawfulness under international law and domestic law are different and independent.[485] Violations of international law standards, including the FET standard, must be assessed independently from breaches of domestic law, and BIT tribunals are not courts of appeal.

361. Numerous authors and international tribunals confirm this principle. For example, De Visscher observed that wrongful application of domestic law by national courts is *never* a sufficient ground for the host States' international liability:

> The mere violation of internal law may never justify an international claim based on denial of justice. It may be that the defectiveness of internal law, the refusal to apply it, or its wrongful application by judges, constitute elements of proof of a denial of justice, in the international understanding of the expression; but in and of themselves they never constitute this denial.[486]

362. The tribunal in *Pantechniki v. Albania* explained this principle as follows:

> The general rule is that "mere error in interpretation of the national law does not per se involve responsibility." Wrongful application of the law may nonetheless provide "elements of proof of a denial of justice." But that requires an extreme test: the error must be of a kind which no "competent judge could reasonably have made." Such a finding would mean that the state had not provided even minimally adequate justice system.[487]

363. Similarly, the tribunal in *Iberdrola v. Guatemala* agreed that "*denial of justice is not a mere error in interpretation of local law, but an error that no merely competent judge could have committed and that shows that a minimally adequate system of justice has not been provided*."[488]

---

485 International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Art. 3, **CL-054**.

486 J. Paulsson, *Denial of Justice in International Law* (4th ed., 2007), p. 73, **RL-077**.

487 *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, ¶ 94 (citing Gerald Fitzmaurice, "*The Meaning of the Term 'Denial of Justice'*", 1932 *BYIL* 93 at 111, n.1 and Charles de Vischer, "*Le déni de justice en droit international*", (1935) 34 *Recueil des cours* 370 at 376), **RL-078**.

488 *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012, ¶ 432, **RL-079**.

364. Finally, the *Jan de Nul* tribunal observed that, absent proof of discrimination or severe impropriety, an international tribunal cannot review the scope of jurisdiction of domestic court or their application of national law:

> [T]he Tribunal does not review the scope of the jurisdiction of the national authorities or the application of the law. This may be different if the result were to show discrimination or severe impropriety situation that does not arise here. Hence, the Tribunal can see no element of denial of justice in this allegation.[489]

365. Therefore, Discovery's reliance on the substantive denial of justice on the basis of mere misapplication of domestic law is not admissible; the BIT does not encompass this concept, which is distinct from procedural denial of justice. The only possibly admissible claim is that the substantive application of Slovak law was so aberrant that it "*shows that a minimally adequate system of justice has not been provided*" (to quote *Iberdrola*). Thus, absent *concurrent and manifest* procedural irregularities, a substantive outcome of judicial proceeding, no matter how incorrect, cannot constitute a breach of international law.

366. Nevertheless, even if the Tribunal is minded to agree with Discovery's proposition that "*substantive denial[s] of justice*" are actionable, its claim still fails. According to the former President of the ICJ, Eduardo Jiménez de Aréchaga, the "*exceptional finding*" that the national courts' misapplication of domestic law engages State's international responsibility is justified only where the following requirements are cumulatively satisfied:

(i) the decision must constitute a *flagrant and inexcusable* violation of municipal law;

(ii) it must be a decision of a Court of last resort, *all remedies available having been exhausted*; and

489 *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, ¶ 206, **CL-029**.

(iii) a subjective factor of *bad faith* and *discriminatory intention* on the part of the courts must have been present.[490]

367. Aréchaga further suggests that in certain exceptional circumstances, an alien can make a successful claim without furnishing proof of bad faith. This is because Aréchaga believes that "*proof of bad faith [may] be found in res ipsa*", but only "*where the breach of municipal law is exceptionally outrageous or monstrously grave*."[491] This is because in such instances, "*one can no longer explain the sentence rendered by any factual considerations or by any valid legal reason*."[492]

368. Discovery's claim does not satisfy any of these cumulative, and *highly demanding*, requirements for a finding of substantive denial of justice expounded by Aréchaga and confirmed in investment jurisprudence cited above. At the very least, Discovery would need to furnish evidence that the decision of the District Court Bardejov or Regional Court Prešov rests on "*exceptionally outrageous or monstrously grave*" misapplication of Slovak law that cannot be explained by "*any valid legal reason*". They cannot show either, as the following sections demonstrate.

b. The Slovak courts did not deny justice to AOG/Discovery

369. Contrary to Discovery's assertions, neither the District Court Bardejov nor the Regional Court Prešov denied Discovery/AOG justice.

370. *First*, as Prof. Fogaš explains in his expert report, the statutory conditions for granting the Interim Injunction were fulfilled. This is because Ms. Varjanová stated and described in detail all prerequisites decisive for granting the Interim Injunction within this civil co-ownership dispute, including the justification of a threat of imminent harm.[493] Therefore, contrary to Discovery's assertion that the application for granting the Interim Injunction "*did not meet the basic criteria*,"[494] Prof. Fogaš concludes that,

---

490 E. J. Aréchaga, *International Law in the Past Third of a Century (Volume 159)* in Collected Courses of the Hague Academy of International Law (1978), p. 281, **RL-080**.

491 E. J. Aréchaga, *International Law in the Past Third of a Century (Volume 159)* in Collected Courses of the Hague Academy of International Law (1978), p. 282, **RL-080**.

492 E. J. Aréchaga, *International Responsibility of States for Acts of the Judiciary* in Transnational Law in Changing Society (1972), p. 185, **RL-081**.

493 Fogaš ER, § 3.1.3.

494 Claimant's Memorial, ¶ 228(1).

"*it was justified to grant preliminary protection to the applicant in the form of the Interim Injunction for the period until the decision on the merits becomes effective*."[495]

371. *Second*, contrary to Discovery's assertion, neither the District Court Bardejov nor the Regional Court Prešov were obliged to deal with the status of the field track on the Access Land. This is because District Court Bardejov was bound by the content of Ms. Varjanová's action and her request for granting the Interim Injection and was required to decide on the basis of the factual status described therein. Ms. Varjanová complained of a breach of statutory preemptive right and thus, the dispute concerned the private-law dispute between co-owners of the Access Land. Interestingly, not even AOG invoked any right to use the Access Land as a special public purpose road within its appeal against the Interim Injunction. Prof. Fogaš therefore concludes that District Court Bardejov did not err when it did not take into consideration within its decision-making process the manner of use of the Access Land as a field track and Regional Court Prešov did not err either when it affirmed the appealed decision on the Interim Injunction.[496]

372. *Finally*, Discovery provides no support for its assertions that Ms. Varjanová's "*unlawful conduct would have disentitled any applicant from obtaining an interim injunction*"[497] or that "*the Interim Injunction was not aimed at protecting the applicant's alleged interest – that interest was in the loss of the pre-emption right over a 1/700 share in the [Access Land]*."[498] In any event, AOG contemporaneously understood that Ms. Varjanová had a right to park the vehicle on the Access Land. At the same time, as Prof. Fogaš explains, "*AOG as a co-owner sought to exercise its right to use the [Access Land] and repeatedly removed the motor vehicle leased by the plaintiff from the [Access Land]*.[499] Evidence submitted by Ms. Varjanová also showed that Ms. Varjanová submitted even "*a criminal complaint about the damage to the vehicle that was caused by its unlawful removal from the Land Plot*" and this led to "*commencement of criminal investigation of the minor offence of damage to property*

495 Fogaš ER, ¶ 15.

496 Fogaš ER, §§ 3.1.2; 3.2.

497 Claimant's Memorial, ¶ 228(3).

498 Claimant's Memorial, ¶ 228(1).

499 Fogaš ER, ¶ 61.

belonging to another."[500] Therefore, Ms. Varjanová had evidenced the facts, *i.e.*, the entitlement to and urgency of temporary regulation of relationships between the parties.[501] Ms. Varjanová as a co-owner was entitled of this protraction regardless of the size of her co-ownership share. In the end, AOG even admitted Ms. Varjanová's claim.

373. To conclude, both District Court Bardejov and Regional Court Prešov acted lawfully. Discovery failed to prove that these proceedings were sufficiently biased, arbitrary, unjust or idiosyncratic that "*they should compel the Tribunal to conclude that the decisions could not have been reached by an impartial body worth of its name*."[502]

B. The Slovak Republic did not treat Discovery arbitrarily and discriminatorily

1. Legal standard

374. Discovery further alleges arbitrary and discriminatory treatment. While doing so, Discovery invokes two separate standards under the US-Slovakia BIT.[503] Subject to the jurisdictional and admissibility considerations set out above, in paragraphs 246-248, Discovery has not come close to making out any case of discriminatory or arbitrary treatment.

375. *First*, Discovery invokes Article II(1) of the US-Slovakia BIT. Discovery represents that the provision states as follows: "*[e]ach Party shall permit and treat investment, and activities associated therewith, on a basis no less favourable that that accorded in like situations to investment […] of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favourable*."[504] This, however, is not what Article II(1) of the US-Slovakia BIT actually provides. Rather, the actual treaty provision in its entirety reads as follows:

> Each Party shall permit and treat investment, and activities associated therewith, on a nondiscriminatory basis, subject to the right of each Party to make or maintain exceptions falling within one

500 Fogaš ER, ¶ 61.

501 Fogaš ER, § 3.1.3.

502 Claimant's Memorial, ¶ 229.

503 Claimant's Memorial, ¶¶ 239, 242.

504 Claimant's Memorial, ¶ 239.

> of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Annex, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, except as stated otherwise in the Annex, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.[505]

376. As is clear from the full text of that provision, it is subject to numerous exceptions and nuances that Discovery's partial excerpting fails to reveal or to engage with.

377. *Second*, Article II(2)(b) of the United States-Slovakia BIT then provides that "*[n]either Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments*."[506] Thus, while the former provision incorporates what is generally known as a national treatment and the most-favored national standards ("**MFN**"), the latter incorporates a non-impairment standard. Since Discovery does not invoke the MFN standard, the Slovak Republic will only address the national treatment and non-impairment standards.

378. At the outset, there is a high bar for proving breach of national treatment. The jurisprudence on national treatment establishes a rigorous test for determining violations of this obligation, which requires a fact-specific inquiry showing nationality-based discrimination,[507] establishing that the treatment accorded to the foreign investor was in fact "*less favorable*" than that accorded to the domestic comparator, and that the two comparators were in "*like circumstances*".[508] Even in such circumstances, no

---

505 BIT, **C-1**.

506 BIT, **C-1**.

507 *Festorino Invest Limited and others v. Poland*, SCC Case No. V2018/098, Award, 30 June 2021, ¶ 747, **RL-082**.

508 *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, ¶ 710, **RL-066**; *Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya*, ICC Case No. 21537/ZF/AYZ, Award, 7 November 2018, ¶ 525, **RL-083**.

liability will be found if there are public policy justifications for the differential treatment.

379. As the tribunal in *UPS v. Canada* explained, the burden of proof falls on an investor to prove the individual elements of a discrimination claim:

> Failure by the investor to establish one of those three elements [treatment, that is less favorable, like circumstances] will be fatal to its case. This is a legal burden that rests squarely with the Claimant. That burden never shifts to the Party, here Canada. For example, it is not for Canada to prove an absence of like circumstances between UPS Canada and Canada Post regarding article 1102.[509]

380. Further, and with particular salience to matters in dispute before this Tribunal, the tribunal in *Festorino v. Poland* explained that the discrimination cannot be found solely based on limited summaries of oil and gas licenses held or sought by certain entities:

> To find that these facts demonstrate actionable discrimination, the Tribunal would have to be in possession of significantly more evidence proving (i) that the Claimants and PGNiG were afforded noticeably different treatment in proceedings similar enough to be compared; and (ii) that such a discrepancy was nationality-based and not the result of some other confounding variable unrelated to nationality.[510]
>
> […]
>
> If discrimination could be found merely based on limited summaries of oil and gas licenses held, sought, etc. by certain entities, States would be put in a virtually impossible situation to maintain levels of potentially-superficial equality to avoid treaty claims. Considering the complexity in this sector and the numerous variables that go into such license proceedings, such a result would surely have obstructive implications and, more importantly, would impose such requirements absent support in international law.[511]

381. In other words, it is not sufficient to merely assert that one entity obtained a permit, license, agreement, and the other did not, to find discrimination.

---

509 *United Parcel Service of America Inc. v. The Government of Canada,* ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007, ¶ 84, **RL-084**.

510 *Festorino Invest Limited and others v. Poland*, SCC Case No. V2018/098, Award, 30 June 2021, ¶ 747, **RL-082**.

511 *Festorino Invest Limited and others v. Poland*, SCC Case No. V2018/098, Award, 30 June 2021, ¶ 751, **RL-082**.

382. Similarly, establishing unlawful arbitrariness requires, as the tribunal in *Mobil v. Argentina* explained, "*a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*."[512]

383. The tribunal in *Casinos Austria v. Argentina* gave certain examples of unlawful arbitrariness, including "*a manifest lack of competence of the host State's authority for taking the measure in question, bad faith applications of domestic law, or decisions that appear so manifestly incorrect that they must be deemed to constitute an abuse of power*."[513]

384. As explained below, all of Discovery's alleged claims of arbitrary and discriminatory treatment fall short of these standards. The Slovak Republic addresses individual alleged breaches in turn below.

2. Discovery's individual claims of discrimination and arbitrary treatment must fail

a. NAFTA is not an appropriate comparator for AOG

385. As explained above, to prove the breach of the national treatment standard, Discovery must prove nationality-based discrimination. As such, Discovery must identify an appropriate comparator, which is a host-State national that is similarly situated to it—but was treated differently despite being a comparator. Discovery purports to rely on NAFTA.

386. NAFTA—like AOG—is a company registered in the Slovak Republic and thus, both entities are nationals of the Slovak Republic.[514] At the same time, NAFTA is controlled by a foreign national, Mr. Daniel Křetinský,[515] just like AOG is purportedly controlled by Mr. Michael Lewis. Thus, Discovery's discrimination claim under Article II(1) of the US-Slovakia BIT fails already on the first step of the analysis because both NAFTA

---

512 *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, ¶ 873, **RL-085**.

513 *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, 5 November 2021, ¶ 348, **RL-086**.

514 Extract from the Register of Public Sector Partners of Nafta a.s. dated 16 February 2023, **R-098**.

515 Extract from the Register of Public Sector Partners of Nafta a.s. dated 16 February 2023, **R-098**.

and AOG are Slovak entities with foreign ownership. Discovery's specific examples of alleged discrimination do not hold water.

b. AOG's application for compulsory access under Article 29 of the Geology Act

387. Discovery first argues that the Slovak Republic treated AOG less favorably than NAFTA. Namely, Discovery claims the MoE granted NAFTA's application for compulsory access for its Bažantica exploration area,[516] yet it refused AOG's application.[517] Notably, this is where Discovery's analysis ends. Such an incomplete analysis does not suffice under the legal standards set out above. As explained above, this superficial comparison is precisely the sort of non-substantive analysis rejected by the tribunal in *Festorino v. Poland*.[518] It is not surprising, however, that a closer look at the NAFTA example demonstrates the frailty of Discovery's allegations.

388. On 12 May 2010, NAFTA requested compulsory access because the owner of the property, the Forest Society Záhorská Ves, refused to agree with NAFTA on conditions for access.[519] Within this procedure, the MoE repeatedly requested NAFTA to supplement its submission and provide its comments or additional explanations.[520] The MoE ultimately granted NAFTA's request on 13 April 2012, *i.e.*, almost two years after NAFTA's initial request.[521] The Forest Society Záhorská Ves then appealed the decision. On 21 August 2012, the Minister of Environment *ex officio* quashed the decision granting NAFTA compulsory access, assessing that the scope of access rights granted to NAFTA excessively impacted the owner's rights. Thus, after over two years of the proceedings, NAFTA found itself at the very beginning of the procedural process.

389. AOG's complaint is similar: "*over nine months after it had initially made an application, […] [AOG] was exactly where it had started*."[522] The MoE then repeatedly assessed NAFTA's request and issued new decisions granting NAFTA the compulsory

516 NAFTA a.s. section 29 applications dated 2010, **C-32**.

517 Claimant's Memorial, ¶ 249.

518 *See supra* ¶ 380.

519 NAFTA a.s. section 29 applications dated 2010, pp. 1-2, **C-32**.

520 *See, e.g.*, NAFTA a.s. section 29 applications dated 2010, pp. 6, 17, **C-32**.

521 Decision of the Minister of Environment dated 17 May 2013, p. 2, **R-099**.

522 Claimant's Memorial, ¶ 154.

access on 1 March 2013.[523] Following the dismissal of the owner's appeal, the decision granting the compulsory access to NAFTA became effective on 21 May 2013, *i.e.*,[524] three years after NAFTA's initial application.

390. Naturally, as the decision under Article 29 of the Geology Act restricts private ownership rights and requires the public interest proportionality test, the procedures leading to such decision can be lengthy and complex. In fact, NAFTA's case is a prime example of such proceeding—it took NAFTA over three years to obtain compulsory access. During this procedure, the MoE repeatedly asked NAFTA to supplement its request—just as the MoE asked AOG for supplemental information [525]—and the MoE even quashed the decision issued in NAFTA's favor. This is in stark contrast with AOG's case, where MoE was unable to decide because AOG ultimately abandoned its Exploration Area License after the Minister of Environment granted AOG's appeal.

391. Thus, there was no "*discretion, prejudice or personal preference*"[526] or arbitrariness[527] in AOG's case as Discovery asserts. Rather, the only reason why NAFTA obtained the compulsory access under Article 29 of the Geology Act is that NAFTA continued in the proceedings.

c. AOG's Lease Agreement with LSR

392. The second example of allegedly preferential treatment provided to NAFTA relates to the Lease Agreement with LSR. This claim also lacks merit.

393. At the outset, Discovery failed to identify any specific lease agreement concluded between LSR and NAFTA. Without the specifics of the purported comparative instrument, it is impossible to assess whether the treatment given to NAFTA was different from the treatment received by AOG.

---

523 Decision of the Minister of Environment dated 17 May 2013, p.3, **R-099**.

524 Decision of the Minister of Environment dated 17 May 2013, **R-099**.

525 Claimant's Memorial, ¶ 150; Ministry of Environment Response re. Application under s.29 of the Geology Act dated 9 February 2017, **C-165**; AOG response to Ministry of Environment re. s.29 of the Geology Act 15 February 2017, **C-167**.

526 Claimant's Memorial, ¶ 250.

527 Claimant's Memorial, ¶ 254.

394. In any event, AOG concluded the Lease Agreement with LSR, and the MoA gave its consent to the initial lease. This is the same treatment as Discovery suggests in its unsubstantiated comparison. But the purported comparison fails because there is no evidence that preferential treatment was granted.[528] Rather, the reason was AOG's own failure to comply with the Lease Agreement.[529] AOG's own failure to comply with the Lease Agreement is the "*rational purpose*"[530] which sustains the MoA's refusal to approve the Amendment.

395. Finally, Discovery's argument that the MoE and the MoA failed to act expeditiously because they failed to "*resolve these entirely straight-forward applications within less than 5 and 6 months respectively*"[531] is manifestly wrong, as well. *First*, Discovery does not even attempt to explain what it considers proper time to resolve these requests. *Second*, the duration of the procedure under Article 29 of the Geology Act was caused primarily by AOG's insufficient request and the need for supplementary information.[532] *Third*, the MoA's approval was not a decision issued in an administrative procedure where the applicant would be a participant and where procedural time periods would apply. Nevertheless, AOG must have known that (*i*) it requested the lease extension belatedly and (*ii*) failed to fulfil the agreed terms.[533] Therefore, the timing of MoA's response has no bearing on AOG's/Discovery's position.

d. EIA

396. Finally, Discovery asserts that AOG suffered discriminatory and arbitrary treatment by being required by the district offices (i) "*to carry out a full EIA in respect of the Smilno well, the Ruská Poruba well and the Krivá Oľka well*", and by the MoE (ii) "*to carry out a preliminary EIA prior to drilling any future exploration wells*"[534] Again, Discovery's claims must fail.

528 Claimant's Memorial, ¶ 253.

529 *See supra* ¶¶ 145-159.

530 Claimant's Memorial, ¶ 252.

531 Claimant's Memorial, ¶ 265.

532 *See supra* ¶ 161.

533 *See supra* ¶¶ 145-159.

534 Claimant's Memorial, ¶ 257.

397. *First*, Discovery bases its discrimination claim on a statement of Minister Sólymos, who said in January 2017 that 8,000 exploration wells had been drilled in Slovakia and that the MoE was "*not aware of any environmental problem arising from these 8,000 exploratory wells*."[535] Thus, just like in the previous examples, Discovery was unable to identify any comparator to assess whether there was any discrimination. Instead of advancing a specific claim, Discovery "*reserves the right to contend that the Slovak Republic also treated Discovery less favourably than other (domestic or foreign) investors*."[536] That is telling.

398. Be that as it may, as explained above, exploration drills performed before 1 January 2017 were not subject to any EIA requirement and thus, any reference to 8,000 exploration wells historically done in Slovakia is misplaced. At the same time, each exploration drill, being a deep drill, is unique and can negatively affect its specific environment. In fact, as the European Commission recognized - "*[e]ven a small-scale project (e.g. exploration or drilling in the range of only several meters) can have significant effects on the environment if it is in a location where the environmental factors, such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration*."[537] Thus, any discrimination claim that an authority imposed a Full EIA on specific deep drills requires specific assessment of the environmental conditions of the specific location for each compared drill. Without it, Discovery's discrimination and arbitrariness claims must fail.

399. *Second*, Discovery's claim that the "*District Offices ordered AOG to carry out a full EIA, without any rational justification and for no legitimate purpose other than to thwart AOG's exploration activities*" is likewise flawed.[538] To find arbitrariness or discrimination in specific decisions would likewise require Discovery to specifically assess the merits of each decision. By way of example, the District Office in Medzilaborce found that the drilling site is "*located in the protection zone of III. degree of the water source Ondava - Kučín, an unnamed small watercourse runs through the*

535 Claimant's Memorial, ¶ 257(1).

536 Claimant's Memorial, ¶ 257(1).

537 European Commission, Interpretation of definitions of project categories of annex I and II of the EIA Directive, 2015, **R-084**.

538 Claimant's Memorial, ¶ 257(1).

site, in close proximity an unnamed watercourse from the local part of Krivá Oľka […] which is an important water body in terms of water management. A wetland is identified at the site."[539] Discovery would have to show that authorities ignored the same environmental concerns in other cases. Without it, any discrimination and arbitrariness claims must fail.

400. *Third*, as explained above, shortly after the EIA Amendment became effective, the MoE included language in the Exploration Area Licenses noting the obligation to comply with applicable law for preliminary review under the EIA Act. Notably, the MoE utilized the same approach in NAFTA decisions as well as others.[540] Again, no discrimination has been or will be shown.

C. The Slovak Republic provided Discovery effective means of asserting its claims

401. Discovery further invokes the standard of effective means under Article II(6) of the United States-Slovakia BIT, which requires the Slovak Republic to "*provide effective means of asserting claims and enforcing rights with respect to investments and authorizations relating thereto and investment agreements*."[541]

402. The "*effective means*" standard is not absolute. Rather—using words of the *Chevron* tribunal—"*the threshold of 'effectiveness' stipulated by the provision requires that a measure of deference be afforded to the domestic justice system; the Tribunal is not empowered by this provision to act as a court of appeal reviewing every individual alleged failure of the local judicial system de novo*."[542]

403. Importantly, the tribunal in *Apotex* held that the standard of effective means does not apply in non-adjudicatory administrative decision-making:

> The Tribunal determines that the plain meaning of Article II(6) of Jamaica-USA BIT, interpreted under international law (as codified in Article 31 of the Vienna Convention on the Law of Treaties) does

---

539 Medzilaborce District Office Decision (Slovak, with English translation) dated 8 March 2018, pp. 123-124, **C-186**.

540 Decision of MoE on extension of NAFTA a.s. exploration area licence dated 19 March 2018, **R-091**; Decision of MoE on extension of Ochtiná exploration area license dated 17 July 2018, **R-100**.

541 BIT, Art. II(6), **C-1**.

542 *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador I*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, ¶ 247, **CL-046**.

> not apply to non-adjudicatory proceedings, such as the administrative decision of the FDA as a regulator on the Import Alert of 28 August 2009. The wording "asserting claims and enforcing rights" is the language of adjudicatory proceedings. It is not the language of non-adjudicatory administrative decision-making, such as the FDA's decision regarding the Import Alert; and if it had been intended by the BIT's Contracting Parties to bear this broader meaning, it would have been necessary to add further unambiguous wording.[543]

404. Both of Discovery's claims about an alleged breach of the effective means standard relate to alleged delays of Slovak administrative authorities and courts in AOG's cases. However, not every delay automatically causes a breach of this standard. The tribunal in *Chevron v. Ecuador* explained:

> For any "means" of asserting claims or enforcing rights to be effective, it must not be subject to indefinite or undue delay. ***Undue delay in effect amounts to a denial of access to those means***. […] The Ecuadorian legal system must thus, according to Article II(7), provide foreign investors with means of enforcing legitimate rights within a reasonable amount of time.[544]

405. In other words, the *Chevron v. Ecuador* tribunal held that under this standard, national law must provide means of asserting rights within a reasonable amount of time. Having said that, the *Chevron* tribunal went on to explain "*reasonableness*":

> The limit of reasonableness is dependent on the circumstances of the case. As with denial of justice under customary international law, some of the factors that may be considered are the complexity of the case, the behavior of the litigants involved, the significance of the interests at stake in the case, and the behavior of the courts themselves. The Tribunal must thus come to a conclusion about if and when the delay exceeded the allowable threshold under Article II(7) in light of all such circumstances.[545]

406. As explained below, Discovery's claim falls far short of the required standard.

---

543 *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, ¶ 9.70, **RL-087**.

544 *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador I*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, ¶ 250 (emphasis added), **CL-046**.

545 *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador I*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, ¶ 250, **CL-046**.

407. *First*, the behavior of the litigants is a factor in assessing breach of international law. As Prof. Fogaš explains, the courts must examine the appeal and allow other parties to submit their comments and observations. This involves numerous procedural steps, including distributing the appeal to other participants, imposing time limits to submit their observations, and subsequently, submitting the file to the appellate court. The appellate court will only then proceed to assess whether the appeal is legal and founded. Thus, Prof. Fogaš concludes that the court acted lawfully and without any undue delay.[546] This duration of a few months is in stark contrast with the 13 year delay in the *Chevron* case, which—per the *Chevron* tribunal—does not *per se* amount to a breach.[547]

408. *Second*, unreasonable delay in the administrative procedure falls outside of effective means. Nevertheless, the duration of the proceedings in AOG's case under Article 29 of the Geology Act was caused primarily by AOG's failure to submit a complete application with all required documents. As such, the MoE repeatedly sought further documentary information from AOG.

D. The Slovak Republic did not expropriate Discovery's alleged investment

409. Discovery further alleges that the Slovak Republic violated the expropriation provision in Article III(1) of the United States-Slovakia BIT, which provides:

> Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation') except for a public purpose; in accordance with due process of law; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation and in accordance with the general principles of treatment provided for in Article II(2).[548]

410. Problems with Discovery's claim, however, materialize immediately at the very beginning of the expropriation analysis: what assets were taken? The tribunal in *Generation v. Ukraine* observed, "*[s]ince expropriation concerns interference in rights in property, it is important to be meticulous in identifying the rights duly held by the*

---

546 Fogaš ER, §§ 3.3; 3.4.

547 *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador I*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, ¶ 253, **CL-046**.

548 BIT, **C-1**.

Claimant at the particular moment when allegedly expropriatory acts occurred."[549] In the words of the tribunal in *Bayindir v. Pakistan*:

> ***The first step in assessing the existence of an expropriation is to identify the assets allegedly expropriated***. In the present case, the assets identified by the Claimant, namely its contractual rights, plant and equipment, and the Mobilisation Advance Guarantees, are within the scope of Article III(1) of the Treaty, and may potentially be subject to an interference amounting to expropriation.[550]

411. The need to identify the allegedly expropriated property rights applies to both direct and indirect expropriation claims. As the tribunal in *Waste Management v. Mexico* observed, "*indirect expropriation is still a taking of property*."[551] Surprisingly, Discovery does not identify *any* assets that were allegedly expropriated.

412. Instead, Discovery makes the vague statement that the Slovak Republic "*deprived AOG of the access to the benefit and economic use of its property*."[552] This is insufficient because it is well settled that "*the loss of benefits or expectations is not a sufficient criterion for an expropriation, even if it is a necessary one*."[553] Indeed, numerous investment tribunals have emphasized that a mere reduction of profitability does not amount to expropriation. Judge Higgins observed that, absent taking of the rights, a diminution in value is not compensable:

> International tribunals have in the main preferred to look and see whether various government interferences have left these essential rights intact at the end of the day, rather than to see whether they have occasioned a diminution in value. ***The tendency is for a diminution in value to remain uncompensated, so long as rights of use, exclusion and alienation remain***.[554]

---

549 *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶ 6.2, **RL-088**.

550 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶ 442 (emphasis added), **RL-089**.

551 *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 143, **CL-20**.

552 Claimant's Memorial, ¶ 269.

553 *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 159, **CL-20**.

554 R. Higgins, *The Taking of Property by the State. Recent Developments in International Law*, in Académie de Droit International, 176 Recueil des Cours. Collected Courses of the Hague Academy of International Law, 1982-III (1983) 259, p. 271 (emphasis added), **RL-090**.

413. Similarly, Prof. Douglas has explained that indirect expropriation is not established by proof of reduction of *value* of investment, but requires taking of the investor's *right* to manage, use, or control its investment:

> A de facto expropriation may occur if the measures deprive an owner of the management, use, or control of its property and this may be evidenced by the fact that the property has been rendered worthless; but a de facto expropriation is not established by proof that the value has been significantly diminished.[555]

414. Other tribunals agree. In *ECE v. Czech Republic*, the tribunal rejected the investors' claim that the non-implementation of their business plan to build a shopping center due to delays in the issuance of the necessary permits by the Czech Republic amounted to an unlawful expropriation. The tribunal explained that the non-realization of the investors' expectation of future benefits from prospective commercial operations does not amount to an expropriation in a situation where the investors retained all their assets—*i.e.*, shareholding in the local companies and land plots:

> [T]he Claimants' business model was to sell on projects of this kind to investors at a point prior to the start of construction work, and enter into a long-term agreement with the investors to manage the centre on their behalf. ***The expropriation claim therefore mistakenly conflates the Claimants' rights constituting their investment, which they hoped to exploit, and the expectation of future benefit or future profits, if that exploitation had proved commercially viable***. The position might have been different had the Galerie project in fact been completed, and had the Claimants now been complaining against some measure interfering in a *substantial* way with their continuing right to its profitable exploitation. However, that is not the situation with which the Tribunal is faced; the Claimants' investment was at most for the most part executory, and ***the anticipated value to the Claimants of the project if it had in fact been completed cannot constitute something which was prospectively taken***.[556]

---

555 Z. Douglas, *Property, Investment and the Scope of Investment Protection Obligations*, in The Foundations of International Investment Law: Bringing Theory Into Practice (2014), p. 376, **RL-091**.

556 *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.815 (emphasis added), **RL-092**.

415. The tribunals in *Feldman v. Mexico*,[557] *Mamidoil v. Albania*,[558] and *Nykomb Synergetics*[559] all reached the same conclusion. So, too, did the tribunal in *Pope & Talbot v. Canada*, where the tribunal held that, even if the investor demonstrates diminished profits, there can be no expropriation if the investor is able to fully control, use, enjoy, or dispose of the affected property.[560]

416. The *Pope* tribunal's conclusion was endorsed in *CMS v. Argentina*, where, despite the near-total deprivation of *value* of investment, the tribunal determined that no expropriation took place because the investor was not deprived of the control of its investment:

> Substantial deprivation was addressed in detail by the tribunal in the Pope & Talbot case. The Government of Argentina has convincingly argued that the list of issues to be taken into account for reaching a determination on substantial deprivation, as discussed in that case, is not present in the instant dispute. In fact, the Respondent has explained, the investor is in control of the investment; the Government does not manage the day-to-day operations of the company; and the investor has full ownership and control of the investment.[561]

417. This is important because Discovery still owns AOG's shares. AOG even retained all its Exploration Area Licenses until it *voluntarily* relinquished them. Notably, Discovery did so despite the Exploration Area Licenses remaining whole, and thus not reduced or impaired by any measure adopted by the Slovak Republic: AOG/Discovery had the same rights as they had since its purported investment. This is in stark contrast with the *Middle East Cement v. Egypt* case that Discovery relies on, where an investor received a long-term license for the importation and storage of cement. Egypt subsequently issued a decree prohibiting the importation of certain types of cement, which paralyzed the investor's operations. The investor argued that, although the

---

557 *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶¶ 103, 112, **RL-093**.

558 *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶ 570, **RL-094**.

559 *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Award, 16 December 2003, p. 33, **RL-095**.

560 *Pope & Talbot Inc. v. Canada*, UNCITRAL/NAFTA, Interim Award, 26 June 2000, ¶ 102, **CLA-49**.

561 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 263, **RL-096**.

license technically remained in effect after the decree, the latter destroyed the economic benefit of the investment. This case thus involved a taking—which was undisputed by Egypt—of existing rights under a license. Similarly in *Olympic Entertainment Group v. Ukraine*—another case cited by Discovery—Ukraine revoked gambling licenses issued to the investor. That was "*a textbook example of indirect expropriation*."[562]

418. Nothing of this kind happened here: AOG obtained rights to exploration activities subject to the conditions set in the Exploration Area Licenses. None of the Slovak Republic's alleged breaches in any way impacted this right. Indeed, AOG retained all rights under these decisions until AOG *voluntarily* relinquished these decisions.

419. Thus, Discovery's expropriation claim fails as a matter of law. The individual measures of Slovak authorities Discovery cites fare no better.

420. *First*, Discovery's argument that "*the conduct of the Police at Smilno […] deprived AOG of the access to the benefit and economic use of its property, i.e. the state-granted Licence to explore for oil and gas, and the rights to do so it derived under the lease it entered into with the owner of the Smilno well site*"[563] presupposes that the Exploration Area Licenses gave AOG any right to use the Access Land to the Smilno Site. As explained above, that was not the case.[564] The Exploration Area Licenses allowed AOG to perform exploration activities, provided that AOG obtained the necessary rights to access land owned by third-parties. AOG did not do this. And in any event, the Police's conduct in Smilno was entirely lawful.

421. *Second*, neither the conduct of the MoE nor the conduct of the MoA deprive AOG of any economic benefits under the Exploration Area Licenses. Rather, as explained above, the MoA refused to approve the Amendment because AOG failed to comply with the Lease Agreement. At the same time, the MoE was unable to finalize the procedure under Article 29 because AOG relinquished the Exploration Area Licenses.

---

562 *Olympic Entertainment Group AS v. Republic of Ukraine*, PCA Case No. 2019-18, Award, 15 April 2021, ¶ 106, **CL-50**.

563 Claimant's Memorial, ¶ 269(1).

564 *See supra* ¶ 33.

422. *Third*, Discovery's argument that the imposition of a Preliminary EIA requirement "*substantially depriv[ed] AOG of the value, use or enjoyment*" of all Exploration Area Licenses[565] simply ignores the fact that a Preliminary EIA on similar deep drills applies across the entire EU. Despite that, exploration drills are routinely done in the EU and exploration areas still retain their value. If that is not enough, AOG itself committed in its SLO that all its future drill would undergo a Preliminary EIA.[566]

423. Finally, it is worth noting that the tribunal in *Muszynianka v. the Slovak Republic* held that there is no permanent deprivation of the investment if the investor still can proceed with its plan, even "*at significantly higher costs than it contemplated originally*":

> It is also clear that, if Muszynianka were to decide to nevertheless exploit the Legnava Sources, it would have to do so in conformity with the Constitutional Amendment at significantly higher costs than it contemplated originally. However, these findings show no substantial permanent deprivation of the investment. The ownership of an asset does not per se confer the right to use that asset in the most profitable manner or any other particular way.[567]

424. This is exactly what happened in this case. AOG was still able to perform its exploration activities. Whether these procedures would impose additional costs or take more time for Discovery/AOG is irrelevant.

* * *

425. For the reasons set forth above, Discovery's claims must fail.

---

565 Claimant's Memorial, ¶ 269(3).

566 Press Release in relation to AOG's commitment to local communities in North-East Slovakia dated 5 April 2017, **C-171**.

567 *Spoldzielnia Pracy Muszynianka v. Slovak Republic*, UNCITRAL, PCA Case No. 2017-08, Award, 7 October 2020, ¶ 640, **RL-065**.

VI. CAUSATION

426. Even if the Tribunal has jurisdiction (it does not) and the Slovak Republic breached the US-Slovakia BIT (it did not), Discovery's claims still fail because there is no causal link between the Slovak Republic's alleged breaches and Discovery's damages. It is axiomatic that "*[a]ny determination of damages under principles of international law require a sufficiently clear direct link between the wrongful act and the alleged injury*."[568] It is Discovery's burden to establish causation.[569]

427. As explained below, Discovery has failed to meet that burden. Specifically, Discovery's project failed because it could not attract any investors and thus did not have the funds to continue **(A)**. A second, independent reason why Discovery's project failed was Discovery's inability—and initial refusal—to obtain an SLO **(B)**. And even if neither of these was the overriding reason for Discovery's alleged harm, any damages this Tribunal awards should be reduced because of these (and additional) contributory actions **(C)**.

A. Discovery's project failed because it ran out of money

428. Discovery's project failed because it lacked necessary capital funding. In fact, Discovery failed to attract needed investors both at the outset of the project and throughout the period of its activities until Discovery walked away. This is fatal to Discovery's claim because its damages claim, in the words of its own expert, is "*contingent on demonstrating that adequate financing would be available*."[570] While Discovery's case requires this Tribunal to assume that this financing was available, all of the record evidence shows this to be an unjustifiable assumption. As explained below, Discovery openly admits that it left the Slovak Republic because it lacked the funds to continue.

429. On Discovery's own case, it failed at least three times to secure funding. According to Mr. Fraser, one of Discovery's first attempts was with a company called Gulf Shores

---

568 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, ¶ 282, **RL-097**.

569 *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Application for Annulment, 1 September 2009, ¶ 297(h), **RL-098**.

570 Howard ER, ¶ 271.

Resources Ltd. Discovery entered a letter of intent with Gulf Shores, which then morphed into a full Farm-In Agreement dated 19 March 2015.[571]

430. Though not submitted to the record, this agreement allegedly committed Gulf Shores to investing USD 12.3 million dollars, but it was conditional upon Gulf Shores "*obtaining approval of its terms by the TSX-V exchange within 45 days of signature (which would be issued* ***following execution of a fund raising****)*."[572] According to Mr. Fraser, however, "*a combination of the weak oil price environment and the issues with local activists that were already at that time beginning to emerge in Slovakia (ie in Oľka) resulted in Gulf Shores being unable to complete its fund-raising, and it subsequently withdrew*."[573]

431. Discovery supports none of these allegations with contemporaneous evidence. It has not submitted (*i*) the letter of intent with Gulf Shores, (*ii*) the Farm In Agreement with Gulf Shores, (*iii*) or any correspondence whatsoever with Gulf Shores. Furthermore, apart from Mr. Fraser's and Mr. Lewis's testimony that Gulf Shores could not fundraise because of issues with local activists,[574] there is no documentary evidence for this, either. In fact, Discovery's operating committee minutes discussing this Oľka location do not mention Gulf Shores or activists affecting those fundraising abilities. The operating committee minutes do, however, explain that the crash of oil prices negatively affected the project.[575]

432. Even entertaining Discovery's argument that Gulf Shores was "*unable to complete fund raising*" in part because of activists, this is not somehow the Slovak Republic's responsibility. And, these alleged issues with activists in March 2015 pre-date any of the Slovak Republic's actions which allegedly give rise to BIT breaches.[576]

---

571 Fraser WS, ¶ 15.

572 Fraser WS, ¶ 14 (emphasis added).

573 Fraser WS, ¶ 14.

574 Fraser WS, ¶ 14; Lewis WS, ¶ 35.

575 *See, e.g.*, Opcom Minutes dated 16 September 2015, p. 1, **C-81**; Opcom Presentation dated 16 September 2015, Slide 4, **C-80**.

576 None of the Slovak Republic's alleged breaches relate to the Slovak Republic's actions in March 2015 concerning this location and activists.

433. Finally, in any event, Gulf Shores was obviously not an investor, ready to commit its own funds. It is clear from Mr. Fraser's testimony that Gulf Shores was some fundraising entity that would seek investors itself to meet its USD 12.3 million maximum farm-in. That failure could have arisen for a variety of reasons. But it does not change the fact that, even at an early stage in the project, Discovery could not successfully attract outside investors that it needed.

434. A second attempt at outside investment came through an "*initial investment agreement*" that Discovery allegedly concluded in October 2015 with a company called Akard—a consortium of high-net worth individuals from Texas.[577] This agreement would "*finance Discovery's share of the cost of drilling the first three wells*",[578] even though Mr. Lewis could allegedly cover these costs himself.[579] But according to Mr. Fraser, the "*delays experienced with the drilling program*" resulted in Akard "*default[ing] on its obligations*", leading to the investment agreement's termination.[580]

435. Again, Discovery cites to no documentary evidence for these allegations. The agreement with Akard is not on the record, communications with Akard are absent, and the same operating committee minutes noted above are silent on these alleged financing issues related to delays. Discovery does not even provide general time frames for Akard's default. Akard's failure to provide needed funds for the exploration stage is even more consequential because Discovery's counsel has instructed Mr. Howard to assume that the Akard agreement "*would have remained in place (or been replaced by a deal on equivalent terms)*."[581] In other words, whatever personal contributions Mr. Lewis could bring to the project would not be enough. Outside investment would be needed for the exploration phase.

436. Discovery failed a third time to secure financing—this time in October 2017, towards the end of the project. Mr. Fraser explains that Discovery "*held discussions with a number of potential investors from the oil and gas sector in the second half of 2017 and*

577 Fraser WS, ¶ 15.

578 Fraser WS, ¶ 15.

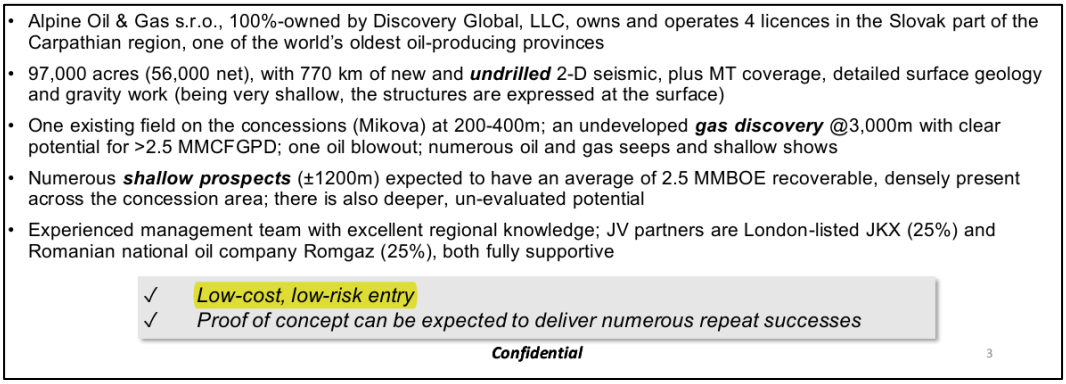
579 Lewis WS, ¶ 34.

580 Fraser WS, ¶ 15.

581 Howard ER, ¶ 268.

early 2018."[582] According to Mr. Fraser, these nameless investors "*easily understood the untapped potential of the Carpathian region*", but that the "*local issues […] involving a track record of activist opposition and an obstructive attitude from the authorities were a major disincentive*."[583]

437. The investment presentation used by Discovery in this time period paints a different picture than the one Discovery now attempts to create throughout its Memorial. On the third slide of the presentation, Discovery explains that the project was "*Low cost, low-risk entry*":[584]


- Alpine Oil & Gas s.r.o., 100%-owned by Discovery Global, LLC, owns and operates 4 licences in the Slovak part of the Carpathian region, one of the world's oldest oil-producing provinces
- 97,000 acres (56,000 net), with 770 km of new and ***undrilled*** 2-D seismic, plus MT coverage, detailed surface geology and gravity work (being very shallow, the structures are expressed at the surface)
- One existing field on the concessions (Mikova) at 200-400m; an undeveloped ***gas discovery*** @3,000m with clear potential for >2.5 MMCFGPD; one oil blowout; numerous oil and gas seeps and shallow shows
- Numerous ***shallow prospects*** (±1200m) expected to have an average of 2.5 MMBOE recoverable, densely present across the concession area; there is also deeper, un-evaluated potential
- Experienced management team with excellent regional knowledge; JV partners are London-listed JKX (25%) and Romanian national oil company Romgaz (25%), both fully supportive

✓ *Low-cost, low-risk entry*
✓ *Proof of concept can be expected to deliver numerous repeat successes*

Confidential

3

438. Discovery's presentation then walks through some of the 2D seismic imaging from the exploration areas and some of Mr. Lewis' MT scans to conclude that with this "*low cost*" opportunity, the investors can expect a return on equity of **1,517%**.[585] And yet this apparent 'once-in-a-lifetime' opportunity could not attract any investors to a project Discovery now claims—on the basis of the *very data it presented* in this investor presentation—is worth over **USD 2.2 billion**.[586]

439. Ultimately, Discovery admits that the outcome of the three Preliminary EIAs requiring more fulsome environmental assessment increased costs and risks to a level that persuaded Discovery that the Project was not commercially viable. As Mr. Fraser testifies "*[b]y the end of 2017, and against the background of the decisions ordering*

582 Fraser WS, ¶ 105.

583 Fraser WS, ¶ 105.

584 Discovery Global, LLC: Exploration and appraisal in Slovakia, Investor Introduction, October 2017, Slide 3 (emphasis added), **C-180**.

585 Discovery Global, LLC: Exploration and appraisal in Slovakia, Investor Introduction, October 2017, Slide 30, **C-180**.

586 Howard ER, ¶ 269.

full EIAs, it was beginning to prove economically unviable to continue, particularly if we were required to undergo a full EIA procedure for every exploration well."[587] As noted above, submitting to a Preliminary EIA can lead to a Full EIA. That is the process spelled out in the relevant EU directives and, accordingly, in Slovak law.

440. By late 2017, Mr. Lewis acknowledged the "*additional internal investment in Discovery that we needed by that stage*" and how Discovery ultimately failed to secure it.[588] It was Discovery's inability to fund its projects that prevented work from moving forward—not acts or omissions by the Slovak Republic.

441. As a final testament to how this overall project (with an alleged ROE of 1,517%) was viewed by industry investors, JKX tried—but failed—to sell its interest in the project after it left. On 19 February 2018, JKX informed Discovery and Romgaz that its board of directors instructed it to "*sell or withdraw from/assign the JKX interests in Slovakia*."[589] It therefore prepared a "*sale flier*" that it would present to "*the industry*":[590]

> As a result the London team is putting together a "sale flier" and will be contacting the industry later this week. Before this goes out I will send a copy of the proposed material to you. Your approval time may not fit with our timetable – I am sure there will be further communications along this line.
>
> For your information, the JKX Hungary assets are also up for sale. It will form the majority of the technical material in the sale flier.
>
> If you have any immediate questions please contact me on +44 7789 926472.
>
> regards
> ritchie

442. JKX simply relinquished its interests on 16 March 2018 without having attracted any buyers for its 25% stake in the project.[591]

* * *

443. In sum, at every stage of the project, Discovery failed to secure the necessary funds for its project. It failed at the outset of the project, before any alleged breaches of the BIT,

---

587 Fraser WS, ¶ 104.

588 Lewis WS, ¶ 86.

589 Email from Romgaz re JKX departure dated 22 February 2018, **C-185**.

590 Email from Romgaz re JKX departure dated 22 February 2018 (emphasis added), **C-185**.

591 Email from JKX re. withdrawal dated 16 March 2018, **C-187**.

and it failed at the end. It is obvious that no investors saw Discovery's project as economically viable, which is unsurprising given the complete absence of other current commercially viable oil and gas production from this part of the Slovak Republic.

B. Discovery failed to obtain a social license to operate

444. Discovery failed to obtain a social license to operate, which ultimately led to the project's failure. As noted at the outset of this Counter-Memorial, a social license to operate is the idea that "*stakeholders have real power*" and "*communities have as much authority as governments in granting permissions or 'licenses'*".[592] An overall component of "*corporate social responsibility*",[593] the social license to operate is now commonplace in the extractive sector. Indeed, the Minerals Counsel of Australia has explained that the social license to operate is an unwritten social contract that entities must earn and maintain:

> [The social license is] an unwritten social contract. Unless a company earns that license and maintains it on the basis of *good performance on the ground and community trust*, there will undoubtedly be negative implications. Communities may seek to block project developments; employees may choose to work for a company that is a better corporate citizen; and projects may be subject to ongoing legal challenges, even after regulatory permits have been obtained, potentially halting project development.[594]

445. A company earns its social license to operate "*when it has the ongoing acceptance or 'approval' of the local community and of other interested stakeholders*."[595]

446. Investment-treaty arbitration is no stranger to the concept. For instance, in *Tethyan Copper*, one of Discovery's cases, the tribunal made a positive finding that Tethyan Copper's mining project accounted for the need to maintain a "*social license*" to operate

---

592 M. Barnes, *The 'Social License to Operate': An Emerging Concept in the Practice of International Investment Tribunals*, in T. Schultz (ed.), *Journal of International Dispute Settlement* (2019), p. 331, **RL-037**.

593 H. G. Burnett, L. Bret, *Environmental and Social Disputes*, in Arbitration of International Mining Disputes: Law and Practice (2017), p. 121, **RL-038**.

594 M. Barnes, *The 'Social License to Operate': An Emerging Concept in the Practice of International Investment Tribunals*, in T. Schultz (ed.), *Journal of International Dispute Settlement* (2019), p. 332, **RL-037**.

595 M. Barnes, *The 'Social License to Operate': An Emerging Concept in the Practice of International Investment Tribunals*, in T. Schultz (ed.), *Journal of International Dispute Settlement* (2019), p. 333, **RL-037**.

in the community.[596] In *Bear Creek v. Peru*, the tribunal dismissed the claimant's discounted cash flow analysis not only because it was too speculative and uncertain, but also because "*there was little prospect for the Project to obtain the necessary social license to allow it to proceed to operation, even assuming that it had received all the necessary environmental and other permits*."[597]

447. While the tribunal agreed on this point unanimously for damages, it disagreed on how much of Bear Creek's sunk costs Peru should bear. While the majority awarded all amounts invested, the dissenting arbitrator would have reduced that amount by half[598] because of the investor's actions—namely, its inability to obtain a social license:

> [T]he Project collapsed because of the investor's inability to obtain a "*social license*", the necessary understanding between the Project's proponents and those living in the communities most likely to be affected by it, whether directly or indirectly. It is blindingly obvious that the viability and success of a project such as this, located in the community of the Aymara peoples, a group of interconnected communities, was necessarily dependent on local support.[599]

448. Oil and gas companies in the Slovak Republic, specifically NAFTA, understand the importance of this community engagement. NAFTA's strategy is one of transparency and open communication with the public about its commercial activities. To that end, NAFTA created the website www.dobryvrt.sk (in English: *www.gooddrill.sk*), where the public can find information on gas exploration and exploitation. For instance, NAFTA explains how its drills operate, what happens if gas is discovered, how it transports gas from its drilling locations, what happens after the exploitation phase is terminated, and what impact the exploitation phase might have on the local community.

449. NAFTA also invests in communities where it operates. For instance, in 2020 NAFTA (*i*) financed the renovation of municipal buildings, cultural landmarks and schools; (*ii*)

---

596 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, § VII.C.7, **CL-61**.

597 *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 600. **RL-039**.

598 *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands QC, 30 November 2017, ¶ 39, **RL-099**.

599 *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands QC, 30 November 2017, ¶ 6, **RL-099**.

supported educational programs and school supplies; (*iii*) built and revitalized children's playgrounds and sports fields; and (*iv*) supported sporting events and running initiatives.[600] Even then, and as already explained, NAFTA sometimes encounters problems with local communities that cause delays with respect to its permitting procedures.[601]

450. Reduced to its core, an SLO represents community engagement. After all, it is the local citizens—their land, their homes—that are most affected by extractive projects. Here, instead of engaging with the local communities in a productive manner, Discovery was combative from the outset and demonstrated total disregard for the local community.

(a) *First*, instead of calling Ms. Varjanová, Discovery physically moved her car, which was on her property, numerous times and even barricaded it with concrete panels.[602]

(b) *Second*, Discovery tried to circumvent the Interim Injunction, which was issued against AOG in a procedure regarding breach of Ms. Varjanová's preemption rights.[603]

(c) *Third*, Discovery increased tensions with the activists through behavior like blocking their cars and then mocking them through feigned injury,[604] like Ms. Varjanová's video of Mr. Crow shows.[605]

451. With this "introduction" to the community, it is obvious why Discovery could not progress with its planned works. The issues about which Discovery now complains (*e.g.* the activists, the status of the field track, the Interim Injunction, the prosecutor, etc.) all flow from Discovery's refusal to engage with the local community from the

600 Nafta website, *We support*, https://www.nafta.sk/en/corporate-responsibility/we-support (last accessed 1 March 2023), **R-101**. A list of Nafta's supporting activities can be found in its annual reports, *see, e.g.*, Nafta a.s. 2015 Annual Report dated 31 December 2015, p. 33, **R-102**; or Nafta a.s. 2017 Annual Report dated 31 December 2017, p. 35, **R-103**.

601 *See supra* ¶ 388.

602 *See supra* ¶¶ 85, 93.

603 *See supra* ¶ 98.

604 *See supra* ¶ 103.

605 Videorecording of Mr. Crow's Incident, **R-065**.

outset. Had it sought compromise and communicated with landowners, Discovery's experience would have been different. And the record already shows this to be true.

452. Discovery finally recognized at a very late date that (*i*) the activists were the main obstacle to its project moving forward and therefore (*ii*) it needed to earn their trust—*i.e.* a social license to operate—for its project to advance. As Mr. Fraser explains, Discovery realized its plans were impossible without finding "*common ground*" with the activists:[606]

> we sensed that this was unlikely to change. We were coming to the conclusion that it was effectively impossible to proceed without establishing some sort of dialogue with the activists opposed to our operations, in order to hear their concerns (even though we considered them misplaced) and attempt to find some common ground. One of our staff based in the region happened to know some of the activists, and he had been informed by one of them that they were open to meeting with us. We felt we had nothing to lose, and therefore a meeting was arranged.

453. Once Discovery finally engaged with the community, that common ground was promptly reached. As already explained, Discovery agreed with the local community that it would undergo Preliminary EIAs for all of its exploratory wells. In exchange, the activists stopped their public protests. As Mr. Fraser even acknowledges, this was the "*most important element in* ***promoting trust***" with the activists.[607] The local community kept its word. Discovery submitted its Preliminary EIAs and the protests stopped.

454. Stepping back, this means that, even after all of the issues between the local communities and AOG, the community was still willing to sit down and seek compromise. As explained above, however, once Discovery was ordered to conduct Full EIAs, it remained unable to raise the needed capital and could no longer continue its operations in the Slovak Republic.

455. Unwilling to accept the consequences of its own actions, Discovery tries to shift the blame on the Slovak Republic. But nearly every obstacle that Discovery faced before

606 Fraser WS, ¶ 92 (emphasis added).

607 Fraser WS, ¶ 94 (emphasis added).

it reached agreement with the community in April 2017 was a direct consequence of its failure to obtain an SLO with the local community.

C. In any event, any damages awarded to Discovery should be reduced for its own actions

456. Even if Discovery's inability to fund its project, or its inability to obtain an SLO, were only part of the reason why Discovery's project failed, the Tribunal should nonetheless reduce any damages it may award. Whether characterized as contributory fault or simply as a matter of causation, a claimant's actions that lead to its own damages should be reduced. Indeed, this approach comports with Article 39 of the ILC Articles, which states that, "*[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought*."[608]

457. As already explained above, this is what the dissenting arbitrator in *Bear Creek v. Peru* proposed. Other tribunals agree with this approach. In *MTD v. Chile*, the tribunal reduced the claimants' damages by 50% because the claimants' investment decisions increased their overall risk.[609] Similarly, in *Copper Mesa Mining Corporation v. Ecuador*, the claimant met local resistance to its mining project. Its combative relationship with the local population led the tribunal to reduce the claimant's damages by 30%:

> By December 2006, by the acts of its agents in Ecuador, the Claimant had substantially reduced its chances of turning its Junín concessions into a commercial success. In short, a foreign investor, by its local agents, whatever the illegal provocations by local residents in the form of road-blocks, violence, arson and other impediments, should not resort to recruiting and using armed men, firing guns and spraying mace at civilians, not as an accidental or isolated incident but as part of premeditated, disguised and well-

608 ILC Articles on State Responsibility, Art. 39, **CL-54**.

609 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 242 ("*The Tribunal decided earlier that the Claimants incurred costs that were related to their business judgment irrespective of the breach of fair and equitable treatment under the BIT. As already noted, the Claimants, at the time of their contract with Mr. Fontaine, had made decisions that increased their risks in the transaction and for which they bear responsibility, regardless of the treatment given by Chile to the Claimants. They accepted to pay a price for the land with the Project without appropriate legal protection. A wise investor would not have paid full price up-front for land valued on the assumption of the realization of the Project; he would at least have staged future payments to project progress, including the issuance of the required development permits*."), **CL-016**.

> funded plans to take the law into its own hands. Yet, this is what happened. The Claimant's decisions to do so from mid-July to December 2006 remain both unexplained and inexplicable to the Tribunal, save as a sustained act of folly. ***It was bound to fail and to make the situation far worse for the Claimant; and it did***.[610]

458. Here, if Discovery is awarded anything at all, those damages should be significantly reduced not only because of Discovery's inability to fund the project and its clashes with the local community, but also:

(a) Discovery tried to bypass Article 29 of the Geology Act when it sought the Poruba Injunction against Urbariát, which the Regional Court in Prešov condemned;[611]

(b) Discovery filed its requested lease extension for the Krivá Oľka site late, thus missing the applicable deadline, and leading to the request's denial; and[612]

(c) Discovery chose not to avail itself of Article 29 of the Geology Act for its Ruská Poruba and Smilno sites where it could not obtain landowner consent, which would have been an alternative way to obtain access to these lands and instead, engaged in litigation which by its own legal mistakes, prevented it from accessing its drilling sites.[613]

459. Issues with the local community and funding aside, these actions contributed to Discovery's ultimate failure.

---

610 *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016, ¶¶ 6.99, 6.102 (emphasis added), **RL-100**.

611 *See supra* ¶¶ 168-169.

612 *See supra* ¶¶ 145-147.

613 *See supra* ¶¶ 128-131, 172.

VII. QUANTUM

460. Even assuming jurisdiction, breach, and causation, Discovery's claims fail for another reason: its damages case is built on layers of speculation, assumption, and errors; it must be rejected. Although Discovery recognizes that market- and asset-based valuations are legitimate fair market value analyses, it alleges that the most appropriate way to effectuate "*full reparation*" in this case is through a discounted cash flow analysis ("**DCF**").[614]

461. Indeed, Discovery contends that a DCF is appropriate "*regardless of whether or not there is any record of past production or profitability*."[615] Discovery relies on a few cases to bolster its assertion that "*[v]aluers also agree that the absence of historical track record does not render the DCF method inappropriate*."[616] Yet past arbitral decisions—including the cases on which Discovery relies—shows that using a DCF on pre-operational projects is the rare exception, not the rule **(A)** and **(B)**. That exception only applies in limited circumstances, which are far from being met in this case **(C)**. Therefore, even if the Slovak Republic breached the BIT, Discovery's damages must be rejected. A market comparables valuation shows that Discovery's damages are a fraction of what it claims **(D)**.

A. A DCF analysis for non-going concerns is the exception, not the rule

462. Full reparation is not without its limits. Damages that are too indirect, remote, uncertain, or speculative would "*run afoul*" of any notion of "*full reparation*".[617] The inherent speculation in a DCF has generated a long line of cases reaffirming that a DCF is most appropriately used for a "*going concern*" (*i.e.* an operation with a historical record of profitability).[618]

---

614 Claimant's Memorial, ¶ 281.

615 Claimant's Memorial, ¶ 283.

616 Claimant's Memorial, ¶ 289.

617 *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, 24 December 2007, ¶ 428, **RL-101**.

618 *See, e.g., Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶¶ 120-123, **CL-035**; *Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Case No. UNCT/07/1, ICSID Administrated, Award, 31 March 2010, ¶ 264, **RL-102**; *Deutsche Telekom v. India*, PCA Case No. 2014-10, Final Award, 27 May 2020, ¶¶ 200, 209, **RL-103**; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 355, **RL-104**; *Quiborax S.A.*

463. In the recent case of *Bahgat v. Egypt*, the tribunal refused to apply a DCF analysis to a mining project stopped at the early exploration phase.[619] The tribunal discussed the contours of DCF analyses and reaffirmed this longstanding approach: the DCF analysis is used to value going concerns. Nevertheless, it can be used "*under narrowly defined conditions to investments that are not going concerns*":

> The Tribunal summarizes the jurisprudence as follows. Although the DCF method has been used to value going concerns, this methodology has also been applied under *certain narrowly defined conditions* to investments that are not going concerns. However, the DCF method has been used *only if factors were proven that permitted the reliable estimation of the investment's future profits. These include the existence of* ***detailed business plans***, ***substantiated information on the price and quantity of the products and services***, *on the* ***availability of financing***, *and on the existence of a* ***stable regulatory environment***.[620]

464. As the tribunal explained, even in cases involving commodities and predictable prices for the underlying commodity, "*tribunals have assured themselves of the availability of* ***reserves***, ***financing***, ***appropriate methods of exploration***, ***and the possibility of the product begin sold***."[621] What is common in all of these cases—*i.e.* a DCF being used for a non-going concern—"*is that there were other factors that allowed a positive assessment of the hypothetical profitability of the companies concerned*."[622]

465. For instance, in *Al-Bahloul v. Tajikistan*, the tribunal explained that a DCF could be justified for a hydrocarbons project with no record of profitability upon the showing of the following: (*i*) the claimant was able to finance the exploration for hydrocarbons, (*ii*) the exploration would have been successful, *i.e.* the claimant would have found oil and gas reserves which would be exploited, (*iii*) the claimant would have been able to

---

and Non Metallic Minerals S.A. v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶ 344, **RL-105**.

619 *Mohamed Abdel Raouf Bahgat v. Egypt*, PCA Case No. 2012-07, Award, 23 December 2019, ¶ 433, **RL-106**.

620 *Mohamed Abdel Raouf Bahgat v. Egypt*, PCA Case No. 2012-07, Award, 23 December 2019, ¶ 438 (emphasis added), **RL-106**.

621 *Mohamed Abdel Raouf Bahgat v. Egypt*, PCA Case No. 2012-07, Award, 23 December 2019, ¶ 438 (emphasis added), **RL-106**.

622 *Mohamed Abdel Raouf Bahgat v. Egypt*, PCA Case No. 2012-07, Award, 23 December 2019, ¶ 434, **RL-106**.

finance and perform the exploitation of any hydrocarbon reserves found, and (*iv*) it would have been possible to sell hydrocarbons produced.[623]

466. Ultimately, the tribunal rejected the DCF proposed in *Al-Bahloul v. Tajikistan* because it entailed "*too many unsubstantiated assumptions to justify the application of the DCF-method*":

> In summary, Claimant asks the Tribunal to accept the assumption that he *would have been able* to acquire financing for the exploration (but he had no definite offer of financing, just expressions of interest), that upon exploration he *would have* found hydrocarbons (although the probabilities were low and there is no evidence that any other company seems to have found hydrocarbons so far) and that he *would have* been able to exploit and sell the oil (although he had no proven experience in this field).[624]
>
> In the Tribunal's view, this entails too many unsubstantiated assumptions to justify the application of the DCF-method.[625]

467. Similarly, the tribunal in *Rusoro Mining v. Venezuela* discussed how a DCF "*cannot be applied to all types of circumstances*."[626] According to that tribunal, a DCF could be considered if all—or at least a significant part—of the following are met:

(a) The enterprise has an established historical record of financial performance;

(b) There are reliable projections of its future cash flow, ideally in the form of a detailed business plan adopted *in tempore insuspecto*, prepared by the company's officers and *verified by an impartial expert*;

(c) The price at which the enterprise will be able to sell its products or services can be determined with reasonable certainty;

---

623 *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Award, 8 June 2010, ¶ 77, **RL-107**.

624 *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Award, 8 June 2010, ¶ 95 (emphasis in the original), **RL-107**.

625 *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Award, 8 June 2010, ¶¶ 95-96 (emphasis in the original), **RL-107**.

626 *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 759, **RL-072**.

(d) The business plan can be financed with self-generated cash, or, if additional cash is required, there must be *no uncertainty regarding the availability of financing*;

(e) It is possible to calculate a meaningful WACC, including a reasonable country risk premium, which fairly represents the political risk in the host country; and

(f) The enterprise is active in a sector with low regulatory pressure, or, if the regulatory pressure is high, its scope and effects must be predictable: it should be possible to establish the impact of regulation on future cash flows with a minimum of certainty.[627]

468. And yet even in circumstances where some of these factors are met, DCF valuations must be "*subjected to a '**sanity check**' against other valuation methodologies*"[628] given their inherent speculation.

469. In sum, valuing loss for a non-going concern with a DCF remains an exception to the general approach. As discussed immediately below, the four cases on which Discovery relies (one being irrelevant) represent the small minority of cases whose facts were so exceptional that tribunals accepted using a DCF analysis (or some form thereof) even though the asset was non-operational.

B. Discovery's arbitral jurisprudence confirms that a DCF for non-operational assets requires exceptional facts

470. Discovery relies on four cases where forward looking, income-based valuations were used by arbitral tribunals, even though the underlying asset was a non-going concern. All are distinguishable from this case, and all confirm why this Tribunal should reject the DCF that Discovery's experts, Rockflow Resources ("**Rockflow**"), propose (explained in section VI.C *et seq* below).

627 *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 759 (emphasis added), **RL-072**.

628 *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 760 (emphasis added), **RL-072**.

471. Discovery's first case is *Crystallex v. Venezuela*.[629] In *Crystallex*, the tribunal accepted an income-based valuation for a gold mine because of "*the nature of the investment*" and "*the development stage of the project*."[630] *First*, the tribunal explained that the mine in question—the Las Cristinas—was one of the most important mines in all Latin America, relying on statements made by Venezuelan authorities about the size, value, and importance of the mine.[631]

472. *Second*, the tribunal noted that Crystallex "*had completed exploration (drilling and testing) activities and the feasibility studies produced by the Claimant (and approved by the Ministry of Mines) show that that nature of the Las Cristinas deposit was well known*."[632] The feasibility study—contemporaneously prepared by the reputable mine engineering and geology consulting company MDA—showed that the project was geologically, technically, and financially sound.[633] The study underwent close review by Venezuela and was updated following input from Venezuelan authorities.[634]

473. *Third*, another report MDA prepared—a 2007 Technical Report—confirmed that the Las Cristinas deposit contained "***proven and probable reserves** estimated at 16.86 million ounces of gold in situ, and measured and indicated resources of 20.76 million ounces and inferred resources of 6.28 million ounces*."[635] The tribunal found "*no reason*" to doubt these reports because they were prepared by "*well-known consultants*" and prepared "*contemporaneously for the Claimant throughout the years*."[636] Indeed, in line with the *ADC v. Hungary* tribunal, the Crystallex tribunal explained that a

---

629 Claimant's Memorial, ¶ 284.

630 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 878, **CL-026**.

631 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 878, fn. 1257, **CL-026**.

632 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 878, fn. 1257, **CL-026**.

633 Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 21(b), **CL-026**.

634 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 23-32, **CL-026**.

635 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 878 (emphasis added), **CL-026**.

636 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 878, **CL-026**.

contemporaneous business plan "*constitutes the best evidence before the Tribunal of the expectations of the parties at the time of expropriation for the expected stream of cash flows*."[637]

474. *Fourth*, the tribunal explained that "*gold, unlike most consumer products or even other commodities, is less subject to ordinary supply-demand dynamics or market fluctuations, and, especially in the case of open pit mining as in Las Cristinas, is an asset whose costs and future profits can be estimated with greater certainty*."[638] Thus, the tribunal "*accept[ed] that predicting future income from ascertained reserves to be extracted […] can be done with a significant degree of certainty, even without a record of past production*."[639]

475. *Fifth*, while not relied upon expressly by the tribunal, Crystallex submitted evidence showing that "*at every stage, [it] always succeeded in raising funds to go to the next stage in development*", even after its permit to mine was denied.[640]

476. In light of the above, the tribunal concluded that Crystallex "*established the fact of future profitability, as it had completed the exploration phase, the size of the deposits had been established, the value can be determined based on market prices, and the costs are well known in the industry and can be estimated with a sufficient degree of certainty*."[641]

477. Discovery next relies on *Gold Reserve v. Venezuela*, another gold mining case.[642] There, the tribunal accepted a DCF analysis for many of the same reasons the *Crystallex* tribunal felt comfortable doing the same.

---

637 *ADC Affiliate Limited, et al. v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 507, **RL-108**.

638 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 878, **CL-026**.

639 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 878, **CL-026**.

640 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 202, **CL-026**.

641 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 880, **CL-026**.

642 Claimant's Memorial, ¶ 285.

(a) *First*, both parties' experts *agreed* that a DCF analysis was the proper valuation method for Gold Reserve's asset.[643]

(b) *Second*, Gold Reserve had several detailed feasibility studies conducted on its project[644] as well as "*detailed mining cashflow analysis previously performed*."[645]

(c) *Third*, both parties' experts agreed that a substantial amount of reserves (as that term is understood in the mining industry) existed.[646] Indeed, Gold Reserve had even reported some of these in its 2008 NI 43-1010 Technical Report filed with the Toronto Stock Exchange—meaning that a "*qualified*" person "*independently reported reserves to the public*."[647] Importantly, the tribunal did *not* award any damages to resources that were classified as "*additional resources*" (and not reserves) because "*additional resources [are] too speculative to include in the present valuation*."[648]

(d) *Fourth*, financing had been successfully arranged for the project, which the tribunal found "*indicated that a convincing business case had been made to obtain the debt*."[649]

478. In short, and like in *Crystallex*, the project in Gold Reserve was not simply an unprofitable, nonoperational project. Rather, it met the exceptional criteria to justify

---

643 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1820, Award, 22 September 2014, ¶ 830, **CL-55**.

644 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1820, Award, 22 September 2014, ¶¶ 14, 18, 833, **CL-55**.

645 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1820, Award, 22 September 2014, ¶ 830, **CL-55**.

646 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1820, Award, 22 September 2014, ¶¶ 774-782, **CL-55**.

647 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1820, Award, 22 September 2014, ¶ 820, **CL-55**.

648 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1820, Award, 22 September 2014, ¶ 780, **CL-55**.

649 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1820, Award, 22 September 2014, ¶ 820, **CL-55**.

the use of a DCF such that even Venezuela's expert conceded that a DCF was appropriate in the circumstances.

479. The third case Discovery cites is *East Mediterranean Gas S.A.E. v. Egyptian General Petroleum Corporation*.[650] This case is inapposite. The claimant, EMG, had a series of long-term agreements with the respondents for the purchase and sale of gas on a take-or-pay basis.[651] For its damages case, EMG proposed a DCF analysis showing its future cash flows under the contracts, had the respondents complied with their contractual obligations to supply gas to EMG.[652] The respondents' expert contested the DCF because it claimed that EMG "*lacks a proven record of profitability*."[653]

480. It was in this context that the tribunal accepted a DCF and explained that it was appropriate because of the "*15 year-long gas supply deal, secured by an interlocking mesh of contracts*."[654] The full paragraph, which Discovery only partially quoted in its Memorial, shows the tribunal's entire reasoning:

> JWC has, additionally, raised an objection as to the accuracy of a DCF model, given the lack of record of EMG's profitability. The Tribunal sees no reason for concern. The important fact is not whether EMG can prove its profitability in the past, but rather whether it is reasonable to presume that, were it not for EGAS' wrongdoing, it would have obtained a foreseeable stream of income in the future. ***In the case of a 15 year -long gas supply deal, secured by an interlocking mesh of contracts (the MoU, the GSPA, the Tripartite Agreement and the On -Sale Agreement) the Tribunal***

650 Claimant's Memorial, ¶ 286.

651 *East Mediterranean Gas S.A.E. v. Egyptian General Petroleum Corporation, Egyptian Natural Gas Holding Company and Israel Electric Corporation Ltd*, ICC Case No. 18215/GZ/MHM, Award, 4 December 2015, ¶ 13, **CL-60**.

652 *East Mediterranean Gas S.A.E. v. Egyptian General Petroleum Corporation, Egyptian Natural Gas Holding Company and Israel Electric Corporation Ltd*, ICC Case No. 18215/GZ/MHM, Award, 4 December 2015, ¶¶ 1327-1328, **CL-60**.

653 *East Mediterranean Gas S.A.E. v. Egyptian General Petroleum Corporation, Egyptian Natural Gas Holding Company and Israel Electric Corporation Ltd*, ICC Case No. 18215/GZ/MHM, Award, 4 December 2015, ¶ 1329, **CL-60**.

654 *East Mediterranean Gas S.A.E. v. Egyptian General Petroleum Corporation, Egyptian Natural Gas Holding Company and Israel Electric Corporation Ltd*, ICC Case No. 18215/GZ/MHM, Award, 4 December 2015, ¶ 1344, **CL-60**.

> ***entirely satisfied [sic] of the reasonableness of such presumption***.[655]

481. Thus, *East Mediterranean Gas S.A.E. v. Egyptian General Petroleum Corporation* was not a case where an investor tried to establish a cash-flowing investment and was thwarted. Rather, the claimant had contracts for a certain amount of gas it was certain—or nearly certain—to receive over 15 years and the respondents breached that obligation.

482. Discovery's final case to support its use of a DCF is a general citation to *Tethyan Copper v. Pakistan* to allege that this was a "*further example where the tribunal decided to apply the DCF method, and award[] significant profits notwithstanding that there was no past history of production*."[656] This oversimplifies *Tethyan Copper* beyond recognition.

483. *First*, the tribunal in *Tethyan Copper* explained that "*whether a DCF method (or similar income-based valuation methodology) can be applied to value a project which has not yet become operational depends strongly on the circumstances of the individual case*."[657] Indeed, the tribunal explained that it (*i*) must be convinced that in the absence of a respondent's breach, the claimant's project would have become operational and profitable and (*ii*) must be convinced that it can, "*with reasonable confidence, determine the amount of these profits based on the inputs provided by the Parties' experts*."[658]

484. If there are "*fundamental uncertainties*" regarding either of these questions, a DCF may not be appropriate:

> If the Tribunal reaches the conclusion that there are "*fundamental uncertainties*" due to which it is not convinced that the project would have reached the operational stage and would have been able to generate profits, ***it cannot apply*** *the DCF method*. If it reaches the

---

655 *East Mediterranean Gas S.A.E. v. Egyptian General Petroleum Corporation, Egyptian Natural Gas Holding Company and Israel Electric Corporation Ltd*, ICC Case No. 18215/GZ/MHM, Award, 4 December 2015, ¶ 1344 (emphasis added), **CL-60**.

656 Claimant's Memorial, ¶ 287.

657 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 330, **CL-61**.

658 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 330, **CL-61**.

> conclusion that no such "*fundamental uncertainties*" preclude reliance on the DCF method but is not convinced by the inputs provided by the Parties' experts, *it may conclude that it cannot apply the DCF method or it may conclude that certain deductions have to be made to account for additional risks or uncertainties faced by the project*.[659]

485. On that basis, the tribunal undertook an extensive, detailed analysis of the underlying facts and competing expert analyses to conclude that a DCF was appropriate. It concluded that Tethyan Copper, whose project was at the "*advanced stage exploration*" phase,[660] met its burden of proof and demonstrated "*the feasibility and financeability of the project*."[661] Specifically the Tribunal made dispositive findings on the following points:

(a) **Mineral Agreement and fiscal terms**: the tribunal determined that Tethyan Copper would have reached an agreement with the government regarding exploitation of the project.[662] It made this finding based on contemporaneous documentary evidence, witness testimony, expert testimony, and because concluding the Mineral Agreement would have been in Pakistan's favor.[663]

(b) **Estimation and classification of mineral resources**: Tethyan Copper had already established the estimation and classification of its mineral resources in its "Feasibility Study", which formed the basis of its quantum valuation.[664] The Feasibility Study "*comprised **21 volumes**, **235 appendices**, and almost **18,000***

659 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 330 (emphasis added), **CL-61**.

660 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 349, **CL-61**.

661 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1421, **CL-61**.

662 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1421(1), **CL-61**.

663 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶¶ 402-403, 408, 410-412, 416, **CL-61**.

664 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1421(2), **CL-61**.

***pages** in total*."[665] It was an economic, financial, and technical study on the base case mining project.[666]

Importantly, the tribunal acknowledged that the "*the estimation and classification [of resources] performed for the Feasibility Study **was not conducted for the purposes of a damages valuation in contentious proceedings** but rather for the purposes of determining whether the resources available could form the basis of successful mining operations*."[667] Indeed, an independent, third-party consultant conducted the resource estimation.[668]

Bearing that in mind, the tribunal analyzed the Feasibility Study against expert testimony, and concluded that "*the resource classification method […] in the Feasibility Study […] produced accurate results on which a willing buyer would have based its valuation of the [project]*."[669] Finally, both Barrick and Antofagasta (Tethyan Copper's shareholders)[670] had reported on these resource estimates in their own annual reports, and noted that each entity's own Competent Persons/Qualified Persons reviewed and approved the resource classification analysis.[671]

(c) **Metallurgical sampling and testing**: Tethyan Copper established that metallurgical sampling "*was adequate and in line with industry standards*",[672] and thus confirmed that minerals could be economically extracted. The tribunal

---

665 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, ¶ 482 (emphasis added), **RL-109**.

666 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, ¶ 482, **RL-109**.

667 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 480 (emphasis added), **CL-61**.

668 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 484, **CL-61**.

669 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 490, **CL-61**.

670 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 5, **CL-61**.

671 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶¶ 493-494, **CL-61**.

672 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1421(3), **CL-61**.

made this conclusion after extensive analysis of the various feasibility studies conducted on the project throughout the years. According to the tribunal, the metallurgical testing conducted on countless mineral samples—and the results of that extensive testing campaign—did not diminish the value a willing buyer would have paid for Tethyan's investment.[673]

(d) **Project execution**: the tribunal determined that Tethyan Copper's plans for executing the project—including its capital cost estimates—would have been accepted by a buyer at the relevant valuation date.[674] Indeed, the tribunal explained that "*Barrick and Antofagasta were significantly involved in the preparation of the Feasibility Study and had every interest to prepare a thorough Feasibility Study including plans on project execution and appropriate cost estimates accounting [sic] for the relevant risks affecting the project*."[675] Several chapters of the Feasibility Study were devoted entirely to the operations of the mine,[676] including a "*considerable number of highly detailed drawings and diagrams*."[677]

(e) **Water supply**: the tribunal found that certain water supply issues raised by Pakistan would not have affected the value of the project from a buyer's perspective.[678] Again, this exercise involved an extensive review of Tethyan Copper's contemporaneous feasibility and operational studies for the project.[679]

---

673 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶¶ 531-610, **CL-61**.

674 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1421(4), **CL-61**.

675 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 701, **CL-61**.

676 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 658, **CL-61**.

677 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 656, **CL-61**.

678 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1421(5), **CL-61**.

679 *See, e.g., Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶¶ 739 et seq., **CL-61**.

(f) **Security risks**: Tethyan Copper established adequate security plans for the project at its development stage—an issue raised by Pakistan—and Tethyan Copper would have been able to adapt its security plans as needed.[680]

(g) **Environmental and social impacts**: the tribunal found that Tethyan Copper "*adequately addressed the environmental and social impacts of the project*."[681] In particular, Tethyan adequately demonstrated its environmental protection plans for certain issues (*e.g.* environmental impacts on air quality and sea water quality, disposal of sludge, additional non-conformities regarding general environmental impacts, the environmental impact after the mine's closure) and the work it would undertake to maintain a "*social license*" to operate in the community, including hundreds of millions of dollars invested in the local communities through various programs.[682]

(h) **Permits and land rights**: The tribunal held that Tethyan Copper properly accounted for "*potential difficulties in obtaining relevant permits and/or land rights*" in its valuation.[683] In particular, Tethyan Copper had established that "*relevant permits and approvals had either already been obtained or that [Tethyan] had a reasonable plan and schedule to obtain them in time for the project to start construction and, subsequently, mining operations*."[684] Indeed, the tribunal noted that Pakistan was unable to identify a specific permit or approval which Tethyan Copper "*had not obtained but which a buyer would have expected to be already obtained at the valuation date*."[685] In any event, the tribunal found that, to the extent land acquisition and permitting issues

680 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1421(6), **CL-61**.

681 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1421(7), **CL-61**.

682 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶¶ 1017-1018, 1030, 1043, 1047-1048, 1054, 1066, 1080, 1087-1089, 1096, 1098-1102, 1114-1119, 1142, 1145-1151, 1158-1161, **CL-61**.

683 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1421(8), **CL-61**.

684 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1208, **CL-61**.

685 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1210, **CL-61**.

existed, these would have been considered "*insufficient by a buyer as of the valuation date*."[686]

(i) **Financing**: Tethyan Copper proved that it would have obtained the necessary financing for the project.[687] In particular, the tribunal found that previous investments by Tethyan Copper's shareholders for the exploration work—notably the Feasibility Study and Expansion Pre-Feasibility Study—and their "*close involvement*" in both of these studies were strong indications that they were committed to developing the project, funding included.[688] Moreover, the Feasibility Study "*expressly contemplated that [Tethyan Copper's owners] would contribute 60% equity*."[689] Furthermore, for the remaining 40% needed to finance the project, Tethyan Copper presented evidence that it had had talks with the Asian Development Bank, several Japanese and French banks, the China Development Bank, Citibank, Standard Charter, and several American banks,[690] all leading the tribunal to conclude that it was "*improbable that [Tethyan's owners] would not have been able to obtain third-party financing*."[691]

486. In sum, to state that Tethyan Copper stands for the proposition that a DCF can be used for non-operational assets overlooks the exceptional nature of that case and the overwhelming record evidence to justify a DCF.[692]

---

686 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶¶ 1244, 1266, 1278, **CL-61**.

687 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1421(9), **CL-61**.

688 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1366, **CL-61**.

689 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1369, **CL-61**.

690 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1412, **CL-61**.

691 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1413, **CL-61**.

692 To be clear, the tribunal in Tethyan Copper applied a so-called "modern DCF" analysis. This does not change the Slovak Republic's overall argument that any income-based approach should be rejected in this case.

* * *

487. Discovery's own cases thus confirm that only in narrow circumstances could a DCF be appropriate for non-operational assets. Discovery must show the existence of "*factors that allow[] a positive assessment of the hypothetical profitability*."[693] For instance, and in line with the above, it must show (*i*) contemporaneous and detailed business plans, including robust feasibility and technical studies undertaken by independent third parties (or, in the alternative, verified by impartial third parties), (*ii*) proper methods of exploration and exploitation, (*iii*) proper resource classification that is appropriate for a DCF analysis (*i.e.* reserves), (*iv*) substantiated information on the commodity pricing, and (*v*) availability of financing, to name a few.

488. As explained below, however, Discovery fails to prove almost every single one of these factual considerations. Rockflow's entire DCF is built upon layers of speculation, assumptions, and errors that render any byproduct uncertain and flawed.

C. Rockflow's DCF is built upon layers of speculation, assumption, and countless errors

489. Turning to Rockflow's DCF, it is important to recall that when Discovery left Slovakia, it was at the preliminary stages of the exploration phase of its project; Discovery had not drilled a single exploration well. This already puts Discovery's case in a different league than *Crystallex*, *Gold Reserve,* and *Tethyan Copper*. In each of those cases, the claimant had either completed, or was at the end stage of, the exploration phase of its project. Meanwhile, in *Mohamed Abdel Raouf Bahgat v. Egypt*, the project was stopped at the early stages of the exploration phase and the tribunal rejected a DCF in that case for that reason.

490. Here, the result should be the same. Because Discovery was at the very beginning of its project, Rockflow's DCF asks this Tribunal to undertake an entirely hypothetical, speculative exercise, much like the one rejected in *Al-Bahloul v. Tajikistan* mentioned

693 *Mohamed Abdel Raouf Bahgat v. Egypt*, PCA Case No. 2012-07, Award, 23 December 2019, ¶ 434, **RL-106**.

above.[694] Rockflow's DCF asks the Tribunal to assume, at a minimum, the following facts (taken directly from Discovery's Memorial):

(a) JKX and Romgaz *would not have* withdrawn from the project;

(b) Sufficient funding *would have been* in place for AOG to fund its proper share of the drilling program;

(c) Exploration activities, had funding been in place, *would have resulted* in a discovery of hydrocarbons;

(d) AOG, JKX, and Romgaz *would have obtained* Exploration Area Licenses for the Svidník, Medzilaborce, and Snina areas that were reduced/relinquished; and

(e) Assuming that hydrocarbons were discovered, AOG *would have been granted* Mining Area Licenses permitting it to extract discovered hydrocarbons.[695]

491. As explained below, there are even more hypotheticals and speculation embedded in each layer of Rockflow's DCF. While the Slovak Republic addresses each of these assumptions below, it begins with the most basic and pervasive of Discovery's flaws: every single hydrocarbon input in Rockflow's DCF was created for this arbitration.

1. All of the hydrocarbon inputs for Rockflow's DCF were artificially created for this arbitration

492. Rockflow's DCF does not provide economic valuation to an already-existing exploration plan that Discovery created. Nor does Rockflow rely on an independent feasibility study contemporaneously generated for its oil and gas project in Slovakia. Rather, it is Discovery's experts, **Mr. Atkinson**, **Dr. Moy**, and **Mr. Howard**, who (*i*) identify 40 oil and gas leads based on their own approach and interpretation of limited sets of data,[696] (*ii*) estimate the oil and gas contained in each lead based on a theoretical exercise,[697] (*iii*) estimate the chance that oil or gas is actually discovered and extracted

694 *See supra* ¶¶ 465-466.

695 Claimant's Memorial, ¶ 298.

696 Atkinson ER, ¶¶ 3.5.2-3.5.7.

697 Atkinson ER, ¶ 3.6.

from each of these leads, again operating on speculation,[698] (*iv*) create a fictitious, generic development plan for the "successful" oil and gas leads that is unrealistic,[699] (*v*) use these generic development plans to generate production profiles for the produced oil and gas,[700] and then (*vi*) use these production profiles to run an ex-post DCF to value Discovery's project.[701]

493. To show just how divorced from reality Rockflow's DCF is, two points deserve recalling.

494. *First*, Rockflow has identified 40 oil and gas leads scattered across the entirety of the geographic areas where Discovery was permitted to explore for oil and gas.[702] There is no evidence to suggest that Discovery identified these 40 leads or that Discovery was *going* to identify and target these. In fact, the opposite is true. Rockflow has determined that one of the three wells that Discovery planned to drill does not fall within a single, viable oil and gas lead. In other words, had Discovery drilled there, according to Rockflow, it would have found nothing:[703]

> 112. The AOG Ruska Poruba-1 well was planned to target the Claimant's 'Poruba' prospect. I do not consider there to be a prospect at the Poruba location: the feature identified by the claimant is not reflected in surface geology or gravity and so relies on seismic data to support it. I consider that the features within the seismic image that have been used to define the prospect are more likely to be out-of-plane reflections rather than indications of structural closure in the plane of the section. More robust prospects are found in the adjacent BE10, BE11, LU07C and LU07D prospects.

495. This would-be-failure is all the more important because, as explained below, Mr. Lewis explains that Discovery planned to finance its future work with revenues generated from its initial three wells, including this Poruba-1 well.[704]

---

698 Atkinson ER, ¶ 3.7.

699 Moy ER, §§ 10.1-10.2.

700 Moy ER, ¶¶ 8-9.

701 Howard ER, ¶ 9.

702 Atkinson ER, ¶ 107.

703 Atkinson ER, ¶ 112 (emphasis added).

704 Lewis WS, ¶ 34.

496. *Second*, Discovery explains the technical contributions it allegedly made after purchasing AOG. Specifically, Discovery claims that it brought additional value to this project through something called "*magneto-telluric surveys*".[705] According to Mr. Lewis, he had successfully used this technique and was "*confident that this technology could be used in conjunction with the 2D seismic, surface mapping and aerial gravity surveys […] already acquired across AOG's license areas.*"[706]

497. But again, Rockflow disagrees. Mr. Atkinson explains that not only was he "*unable to obtain a detailed description of the theory or application of the MT method*", but also, he is "*unaware*" of any peer reviewed study of this technique having ever been undertaken:[707]

> 208. I was unable to obtain a detailed description of the theory or application of the MT method used by DMT on the Claimant's licence areas. I am not aware that a peer reviewed study of depth accuracy and depth resolution of pay resulting from this technique has been undertaken.

498. In fact, Mr. Atkinson further explains that, given his unfamiliarity with this technique (which Discovery champions), he did not even rely on it to calculate the estimated volumes of oil and gas in each lead nor the estimated geological chance of success in extracting that oil and gas:[708]

> 211. I therefore concluded that, since there is a lack of peer reviewed evidence for this implementation of the MT technique, and I was not able to establish a strong empirical basis for its predictions of pay, I would not rely on it in my assessment of prospectivity and did not use MT data to help estimate PIIP or prospect GCOS. As set out at paragraph 75 above, however, I do not consider that this has impacted on my ability to define prospects or estimate PIIP and GCOS for prospects within the Claimant's licence areas.

499. Rockflow's decision *not* to use Discovery's MT data not only confirms how inconsequential it is, but also reflects the artificial nature of its DCF. Instead of building its models from real, concrete work that Discovery undertook during its operations in the Slovak Republic, Rockflow has done the opposite. Rockflow has run abstract

---

705 Lewis WS, ¶ 27.

706 Lewis WS, ¶ 27.

707 Atkinson ER, ¶ 208 (emphasis added).

708 Atkinson ER, ¶ 211 (emphasis added).

simulations that bear no connection to what Discovery was actually doing or planned to do.

500. With such little data, Rockflow had no choice but to construct its DCF—including the basic inputs. That alone is enough to invalidate the use of a DCF in this case. Yet even then, and as explained in the following section, the *way* Rockflow created the DCF inputs is fundamentally flawed.

2. Rockflow's geoscience and petroleum engineering analyses are flawed and therefore render its DCF inputs unreliable

501. Because Discovery had not drilled any exploratory wells and thus has no actual, verifiable data regarding its hydrocarbons, Rockflow constructed its DCF inputs through various statistical analyses and alleged "*analogue*" data. The SLR Report provides an extensive discussion and critique of these various analyses. For nearly every input generated, Rockflow has either made unwarranted assumptions that skew conclusions in Discovery's favor or has made material errors that compound the uncertainties in the already-speculative nature of Rockflow's construction. Below are a few examples of the critical errors that Rockflow makes when calculating various inputs for its DCF.

a. Discovery's exploration areas are not "*on trend*" with Polish fields

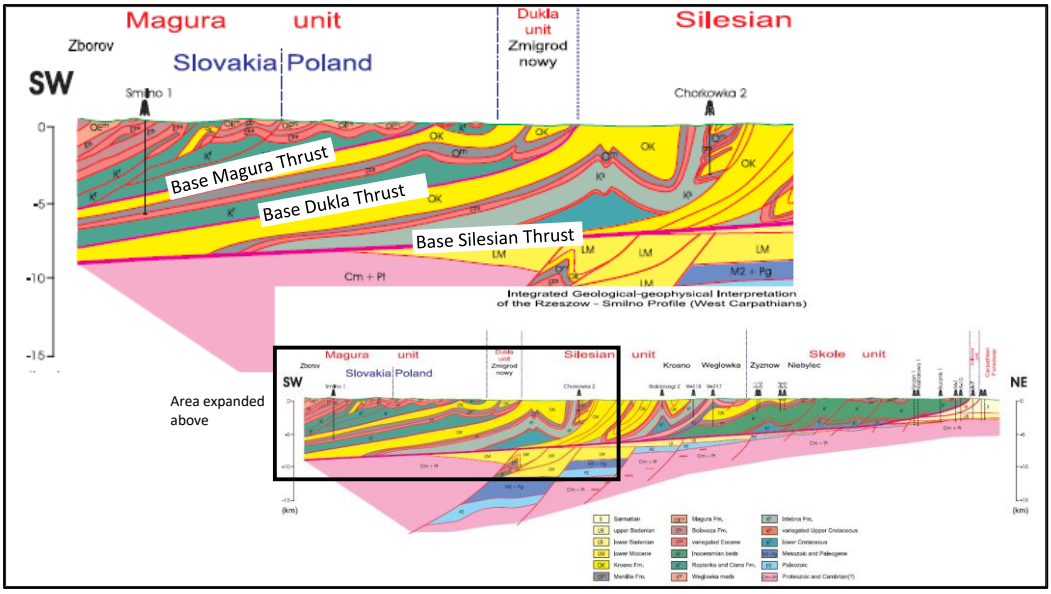
502. Discovery's lack of data for its own exploration areas requires Rockflow to use "*analogue*" data from Polish fields north of Slovakia, where oil and gas production has been much more successful. Rockflow supports using this data because it claims that these Polish fields are "*on trend*" in the geological sense as Discovery's own exploration areas.[709] This is wrong.

503. As the SLR Report explains, the majority of oil and gas found in this part of the world has been discovered and exploited from the Silesian nappe[710] whereas Discovery's exploration areas are dominated by the Magura and Dukla nappes:[711]

709 Atkinson ER, ¶ 31.

710 SLR Report, ¶ 13.

711 SLR Report, ¶¶ 12-13.



504. This Silesian nappe does not extend to Discovery's exploration areas.[712] The Magura nappe is a distinct structure—meaning that whatever production history has occurred in the Silesian nappe cannot be considered "*on trend*" with the Magura nappe.[713]

505. SLR has analyzed Rockflow's own data and compiled a list of oil and gas fields from the Magura nappe.[714] The results of that analysis show that historical production from the Magura nappe averages *less* than 0.5 MMstb per accumulation.[715] That is significant because, on Rockflow's own calculations (which are skewed high), the "*minimum economic value*" of each oil and gas lead in Discovery's exploration area is 0.5MMstb.[716] In other words, the historical production rates of oil and gas from the same geological structure where Discovery was exploring show that oil and gas prospectivity is below Discovery's own economic viability threshold.

506. More fundamentally, the erroneous conclusion that the Silesian Polish fields are "*on trend*" permeates the rest of Rockflow's geological and petroleum engineering analyses and, by extension, its DCF. By incorrectly relying on data from Polish fields—whose

712 SLR Report, ¶¶ 12-13, 18.

713 SLR Report, ¶ 13.

714 SLR Report, ¶¶ 13-14, 18, 23, 106.

715 SLR Report, ¶¶ 21-22.

716 SLR Report, ¶¶ 21-22; *see, e.g.*, Howard ER, ¶ 120.

oil and gas prospectivity is much higher than the area where Discovery was exploring—Rockflow has inflated all of its inferred oil and gas volumes.

507. Throughout the remaining critiques of the Rockflow reports, the Slovak Republic often relies on Rockflow's own Polish field data and compares Rockflow's conclusions to Polish benchmarks. The Slovak Republic does not do this because the Polish fields are analogues (which the SLR Report explains).[717] Rather, the Slovak Republic refers to this Polish data to show how irreconcilable Rockflow's conclusions are with these supposed "*analogues*".

b. Every single oil lead has been calculated incorrectly due to conversion errors

508. Moving beyond the initial error of using Polish field data, additional errors compound the already-inflated oil and gas estimates. Rockflow has made a calculation error for every oil lead. Specifically, when Rockflow calculated the Petroleum Initially in Place ("**PIIP**") (one of Mr. Atkinson's key calculations that Dr. Moy and Mr. Howard then rely upon), Rockflow incorrectly used metric units (*i.e.* m^3/m^3) when it should have used normal field units (*i.e.* scf/stb) for the Formation Volume Factor part of the PIIP equation.[718]

509. This is a material error. For example, when correcting this error for the oil lead identified as **LUC07C**, Rockflow's estimated oil volume for this lead drops **by 40%**.[719] In sum, every single oil lead that Rockflow calculates and ultimately values in its DCF is wrong. Again, this error permeates the rest of Rockflow's analyses because Dr. Moy and Mr. Howard use these results in their own analyses.

c. Rockflow's probabilistic calculations for Discovery's PIIP produce artificially high results

510. Compounding the oil lead error discussed immediately above, Rockflow has skewed its probabilistic model—which Rockflow's experts say is best—to produce artificially high results. Rockflow has calculated PIIP through a deterministic model and a

717 SLR Report, ¶¶ 9, 11, 18, 51, 85.

718 SLR Report, ¶ 95.

719 SLR Report, ¶ 95.

probabilistic model, with Rockflow relying more on the latter and it is evident why. For the probabilistic model, Rockflow has set the range for the majority of the lead areas to be:[720]

(a) Low case = **0.5 x the mid case**; and

(b) High case = **2 x the mid case**.

511. Although Rockflow claims this approach is to account for "*uncertainty in knowledge of area*"[721] for each lead, it is obvious that Rockflow has used this approach because it produces higher overall values of PIIP when compared to the deterministic model (which nonetheless produces flawed results itself):[722]

Leads taken through to DCF evaluation

	Lead	Reservoir	Depth m	Atkinson Deterministic Mid PIIP	Atkinson Probabilistic Mean PIIP	"Discovered" vs Deterministic PIIP
Oil MMb	LU07D	Inoceramian	2250	32.0	44.6	139%
	BE08	Zlin/Beloveza	400	17.6	15.5	88%
	BE11	Zlin/Beloveza	800	23.4	20.8	89%
		Sum		**73.0**	**80.9**	
Gas bcf	LU03A	Inoceramian	800	21.1	29.7	141%
	LU02A	Inoceramian	1700	10.0	13.7	137%
	LU05D	Inoceramian	375	14.0	19.5	139%
	LU05B	Inoceramian	450	1.6	2.2	138%
	BM03	Menilite	1150	21.6	45.9	213%
	BM07	Menilite	3725	21.9	32.7	149%
		Sum		**90.2**	**143.7**	

Table 7: Comparison between deterministic and probabilistic volumes

512. The table above shows the massive discrepancies between these two approaches when calculating PIIP. Combined with the oil lead error and the reliance on Polish field data, Rockflow's PIIP calculations are systemically flawed.

d. Rockflow's estimated Geological Chance of Success is inflated

513. Once Rockflow incorrectly calculates PIIP, it then seeks to calculate the chance of recovering these volumes—*i.e.* the Geological Chance of Success or **GCOS**. That

720 SLR Report, ¶¶ 95-96.

721 Atkinson ER, ¶ 155.

722 SLR Report, ¶ 97.

involves assigning certain percentage values of "risk" to various calculations which, taken together, produce the GCOS. Although Rockflow has not provided the underlying models (which will be sought in document production), the SLR Report explains the obvious errors already apparent in these risk calculations:

(a) **100% certainty for source effectiveness and migration/timing**: Source effectiveness measures the likelihood that source rocks are present and mature. Migration/timing measures the likelihood that hydrocarbons can move into a trap after it has been formed.[723] Rockflow has assumed 100% likelihood for both. As the SLR Report explains, this is not credible given minimal data on each lead and the low level of knowledge about each lead's geological characteristics.[724]

(b) **85% certainty for seal effectiveness/trap retention**: Seal effectiveness measures the likelihood that hydrocarbons can be sealed (retained) within a trap.[725] Rockflow's 85% assignment[726] for this risk element is, according to SLR, inflated. As the SLR Report explains, "*the poor structural definition of the leads, combined with the complex tectonic history and prevalence of seeps indicate a significant level of uncertainty of source effectiveness, migration and timing. These issues are even more acute in the case of seal (trap integrity) rendering the estimation of an 85% chance […] unsustainable*."[727]

(c) **100% certainty for effective reservoir presence**: Reservoir presence measures the likelihood that the anticipated reservoir facies will be present in a trap.[728] Rockflow assigns a 100% certainty for this risk element. As the SLR Report explains, the tectonic complexity alone in Discovery's exploration areas

723 Atkinson ER, ¶ 183.

724 SLR Report, ¶¶ 100-102.

725 Atkinson ER, ¶ 183.

726 Rockflow assigns 85% to all but two leads. SLR Report, ¶ 100(ii).

727 SLR Report, ¶ 102.

728 Atkinson ER, ¶ 183.

"*suggests that a 100% chance of reservoir presence is not a figure that can be justified*."[729]

(d) **No consideration for dependency**: Rockflow's GCOS analysis does not consider the issue of dependency. Rockflow has grouped its leads together but the overall GCOS for each group never changes, even if the first lead fails. This is incorrect. As the SLR Report explains, "*the overall GCOS for a group of similar leads is affected by initial failures. If the first lead drilled is not successful, then the GCOS for the remaining leads in that same group will reduce*."[730] Rockflow's failure to account for dependency skews the overall GCOS calculation to produce an unrealistic (and high) GCOS.[731]

514. In sum, the errors and unjustified assumptions underpinning Rockflow's GCOS calculations—apparent even without the underlying model—show that Rockflow's 19.3% GCOS is unreliable and too high.

e. Rockflow's calculated volumes of recoverable hydrocarbons are overstated by a factor of 30

515. Once Rockflow converts its calculated PIIP to estimated volumes of recoverable hydrocarbons, the results are irreconcilable with the alleged Polish "analogues". Rockflow's analyses show that the oil and gas leads in Discovery's exploration areas contain *30 times more oil and gas* than in discovered Polish fields—Polish fields that lie in *more* productive nappes.[732]

516. The SLR Report shows this through a log probability distribution chart. The blue dots represent discovered, small fields from Poland taken from Rockflow's own sources. The red dots show Rockflow's estimated volumes of recoverable hydrocarbons for Discovery:[733]

729 SLR Report, ¶ 102.

730 SLR Report, ¶ 103.

731 SLR Report, ¶ 103.

732 SLR Report, ¶¶ 106-109.

733 SLR Report, ¶ 109, Figure 9.

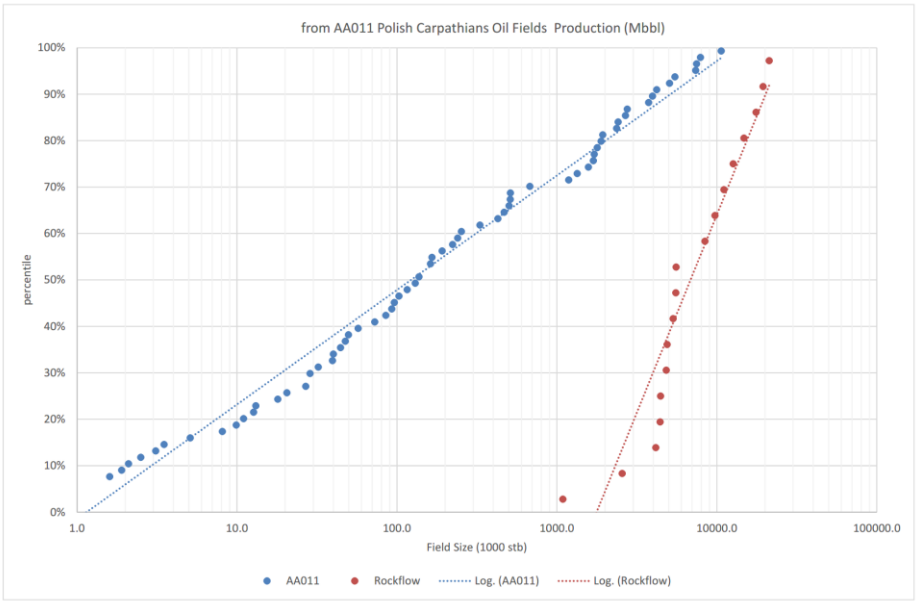


Figure 9: Comparison between Oil Field Distribution in Poland Carpathians and Claimant's Leads

517. It is unjustifiable that Rockflow's analysis produces results that outperform these Polish wells—from an area with a more robust and proven history of oil production—by a factor of 30. Indeed, as the SLR Report explains, "*[t]here is no credible way to reconcile this difference especially as the Claimant makes the case, incorrectly, that the Claimant's exploration area is "on trend" with the offset historical fields in Poland*."[734]

f. Rockflow's weighted average oil recovery per well is overstated by a factor of 20

518. The same irreconcilable differences appear when Rockflow calculates its weighted average oil recovery per well. On Rockflow's calculations, the weighted average oil recovery per well for its 40 leads is 400 Mbbl/well.[735] To put this in perspective, published data on Polish wells shows an average oil recovery per well of 20 to 30 Mbbl/well[736] Thus, Rockflow's results produce average recovery per well figures that are *20 times higher* than known, producing Polish wells.[737]

734 SLR Report, ¶ 109.

735 SLR Report, ¶ 114.

736 SLR Report, ¶ 114.

737 SLR Report, ¶ 114.

519. Benchmarking these data to Rockflow's own sources also confirms these figures to be unrealistic. Mr. Atkinson's exhibit AA-011 shows that Rockflow's results produce an average well quantity that is "*seven times greater than the typical best single well on the Polish fields*":[738]

> 115. Additional benchmarking reinforces drastic differences between Dr Moy's results and those Polish fields. Mr Atkinson provides a summary table of the best individual well per field in Poland. The low, mid, high range for this data is 11 Mbbl, 60 Mbbl, and 167 Mbbl respectively.[101] Taking the mid case, this means that Dr Moy's results show an average well quantity that is seven times greater than the typical best single well on the Polish fields. This would require that the Claimant's exploration areas were expected to have significantly better reservoir properties than the data for fields in Poland, when in fact the wells drilled to date in this part of Slovakia have been disappointing. The fact that the bulk of the Polish fields are located further North within the more productive Silesian nappe, whereas the

520. In sum, despite this region of Slovakia having historically poor oil and gas production, Rockflow's analyses produce results that dramatically outperform known, producing Polish wells.

g. Rockflow's optimal well count is 15 times higher than the best recorded Polish wells

521. Rockflow's analysis incorporates this weighted average oil recovery per well discussed immediately above to generate optimal well counts. As noted, however, the weighted average oil recovery per well results are unrealistically high. Accordingly, the optimal well counts analysis has "*no credible value*".[739] Indeed, while Rockflow's analysis shows per well ranges of 0.6 MMstb/well up to 10.00 MMstb/well, the best individual wells over the last 100 years of Polish oil and gas history produced 0.65 MMstb (a figure taken from Rockflow's own sources).[740]

522. In other words, Rockflow's analysis shows that the *minimum expected per-well recovery volumes* in these Slovak fields is on par with the *highest per-well recovery volumes* recorded on Polish wells. Similarly, Rockflow's analysis also reveals that its calculated 10.00 MMstb/well is *15 times greater* than the best recorded Polish wells.[741] Again, it is unrealistic that Rockflow's results so dramatically outperform these Polish

738 SLR Report, ¶ 115 (emphasis added).

739 SLR Report, ¶ 132.

740 SLR Report, ¶ 133.

741 SLR Report, ¶ 134.

benchmarks, given the more productive geological structures in Poland and its documented historical production.

h. Well counts for the same leads are inexplicably different between the Moy and Howard reports

523. After Rockflow defines leads and then calculates well counts, it uses those results to value the project in the DCF. The number of wells has a direct effect on CAPEX and OPEX as well as production amounts and timing of oil and gas production. The more wells producing from one lead, the faster one can generate revenues.

524. Inexplicable, divergent well counts for the same leads appear across the Moy and Howard reports:

(a) Lead **LU05D** is assigned 15 wells in Dr. Moy's report; however, Mr. Howard uses 25 wells in his DCF; [742]

(b) Lead **LU03A** is assigned 14 wells in Dr. Moy's report; however, Mr. Howard uses 18 wells in his DCF; [743] and

(c) Lead **BM07** is assigned 8 wells in Dr. Moy's report; however, Mr. Howard uses 5 wells in his DCF.[744]

525. There is no explanation for these material discrepancies.

i. Rockflow's calculated Economic Chance of Success for some wells is greater than those wells' Geological Chance of Success

526. One of the main calculations Rockflow undertakes, which encompasses the various analyses undertaken up to that point, is a determination of each well's Economic Chance of Success ("**ECOS**"). Logically, a well's ECOS cannot be greater than its GCOS. A well cannot have a greater chance at succeeding economically than it does geologically.

742 SLR Report, ¶ 145.

743 SLR Report, ¶ 145.

744 SLR Report, ¶ 145.

527. But this is exactly what Rockflow's analysis produces. The following table from the SLR Report demonstrates that, for some wells, Rockflow's ECOS is greater than that well's GCOS: [745]

Leads progressed to field development in DCF evaluation						
	Lead	Reservoir	Depth	Atkinson GCOS	Howard ECOS	Variation
Oil MMb	LU07D	Inoceramian	2250	13.2%	13.0%	-0.2%
	BE08	Zlin/Beloveza	400	23.0%	22.8%	-0.2%
	BE11	Zlin/Beloveza	800	15.3%	15.5%	0.2%
Gas bcf	LU03A	Inoceramian	800	32.7%	33.0%	0.3%
	LU02A	Inoceramian	1700	29.8%	29.0%	-0.8%
	LU05D	Inoceramian	375	23.8%	23.7%	-0.1%
	LU05B	Inoceramian	450	17.9%	11.6%	-6.3%
	BM03	Menilite	1150	23.8%	23.8%	0.0%
	BM07	Menilite	3725	8.7%	8.3%	-0.4%

Table 10: ECOS vs GCOS Comparison

528. These illogical outcomes are a product of Rockflow's inappropriate statistical analyses. As the SLR Report explains, the 40 leads generated by Rockflow "*have been subjected to a level of statistical analysis to generate input data for DCF modelling that is not warranted given the huge technical uncertainties, the errors and the optimistic per-well recoveries.*"[746]

* * *

529. In sum, Rockflow has created all of the geological inputs to its DCF on the flawed foundation that Discovery's exploration areas are "*on trend*" with Polish fields. The SLR Report demonstrates that to be wrong. Compounding that erroneous premise are the serious errors, flaws, and unjustified assumptions explained above. The irreconcilable conclusions Rockflow makes confirm the artificiality of Discovery's entire DCF.

745 SLR Report, ¶ 138.

746 SLR Report, ¶ 155.

3. Rockflow's geological and petroleum engineering analyses contradict Discovery's contemporaneous materials

530. Major discrepancies between what Discovery reported during its time in Slovakia and what Rockflow now concludes confirm that Discovery's damages case is entirely made-for-arbitration. SLR reviewed (*i*) various technical presentations that Discovery made throughout its years in Slovakia, (*ii*) an investor presentation Discovery gave in October 2017, and (*iii*) a geological study that Discovery commissioned at the end of its time in the Slovak Republic (the "**EGI Study**").[747] As the SLR Report explains, the EGI Study is the most comprehensive document from Discovery's project—and even then, it recognizes limited prospectivity for Discovery's exploration area.[748]

531. Rockflow's conclusions are completely at odds with these documents and presentations. For example, in Discovery's October 2017 investor presentation—no doubt an optimistic pitch to "sell" the project—Discovery explained that it identified seven leads and 170 MMboe. Meanwhile, Rockflow's analysis identifies 40 leads and 836 MMboe. Otherwise stated, the number of leads in Rockflow's analysis is almost *six times* higher and the overall estimated MMboe is *five times* greater according to Rockflow:[749]

Prospectivity Comparisons (2014 to 2022)					
Year	2014	2015	2017	2021	2022
Basis	Executive Technical Summary	Drilling Campaign	Investor Presentation	EGI	Rockflow
Prospects		3			
Leads	6		7	5	40
PIIP MMboe	102	60	170	No data	836

Table 5: Comparison of Prospectivity Summaries 2014 to 2022

532. It is important to note that Rockflow relies on the EGI report—a report that incorporates much of the 2D seismic and MT scans that Discovery itself was using while in the

747 SLR Report, ¶¶ 35-66.

748 SLR Report, ¶ 60.

749 SLR Report, ¶ 61 (emphasis added).

Slovak Republic.[750] In other words, apart from the filing of this arbitration, nothing has changed between 2021 and Rockflow's analysis.

533. In sum, Discovery's contemporaneous presentations (flawed themselves) confirm the artificial and unrealistic conclusions Rockflow reaches on general levels of prospectivity.

4. Rockflow's DCF requires this Tribunal to assume that Discovery's hydrocarbons are Reserves, which they are not

534. Regarding resource classification, Rockflow's DCF requires the Tribunal to assume that, but for the Slovak Republic's alleged breaches, (*i*) its exploration phase *would have* been successful, (*ii*) Discovery *would have found* hydrocarbons in commercial quantities, and thus Discovery's hydrocarbons *would have* been classified as Reserves at some point in the future. The only evidence that Discovery submits for this Reserves classification is the unsupported expert testimony of Dr. Moy.[751]

535. Resource classification in the extractives sector is extremely important—particularly for obtaining financing. Indeed, as industry guidelines explain, investors or financial institutions will often condition future financing on a Reserves classification.[752] This is because a Reserves classification (made by an independent third-party, *e.g.* Competent Person), is only made after an entity proves the existence of hydrocarbons in large enough quantities to justify their development. In other words, a Reserves classification generally signals economic viability of a project.

536. Even Mr. Lewis' testimony highlights this. He explains that his long-term plan may have included a future transaction with "*a larger, likely multinational partner, for the further development of the licenses, as a means of managing risk and accessing*

750 SLR Report, ¶¶ 55-57.

751 Moy ER, ¶¶ 224-225.

752 Petroleum Resources Management System, June 2018, ¶ 2.1.2.4 ("*While PRMS guidelines require financial appropriations evidence, they do not require that project financing be confirmed before classifying projects as Reserves. However, this may be another external reporting requirement.* ***In many cases, financing is conditional upon the same criteria as above***. *In general, if there is not a reasonable expectation that financing or other forms of commitment (e.g., farm-outs) can be arranged so that the development will be initiated within a reasonable time-frame, then the project should be classified as Contingent Resources. If financing is reasonably expected to be in place at the time of the final investment decision (FID), the project's resources may be classified as Reserves*.") (emphasis added), **AA-037**.

complementary skills."[753] But he explains that, in most instances, that type of transaction occurs only once hydrocarbons reach their highest classification: Reserves that are "Proved":[754]

> 33. Longer term, my thinking was that once almost all of the exploration wells had been drilled, and the scope of their surrounding fields was quantified, AOG could have been open to a transaction with a larger, likely multinational partner, for the further development of the licences, as a means of managing risk and accessing complementary skills. From my past experience, it is typical for this type of transaction to take place once virtually all the discoveries have been made and delineation wells drilled or being drilled, so that the oil and gas reserves can be valued under the classification of "Proved" rather than "Probable" or even "Possible". Our plans, however, were not dependent on such a transaction, and we were prepared to continue operations regardless of whether any sale took place.

537. Mr. Howard agrees. In discussing financing, he explains that development financing (as opposed to exploration financing) often requires an entity "*to obtain a Competent Person's Report (CPR) from a third-party entity which will independently audit and verify the discovered resources […] [t]he CPR can also be used in support of obtaining corporate finance or additional equity finance*."[755] In short, resource classification is a critical component for any extractives project—including oil and gas.

538. Resource classification is also important for damages and determining a DCF's suitability. The international arbitration community has developed a sophisticated understanding of these classification systems and their importance. Even the brief discussion of cases earlier shows the emphasis tribunals place on resource classification and reserves:

(a) In *Mohamed Abdel Raouf Bahgat v. Egypt*, the tribunal explained that, before applying a DCF to a non-going concern, tribunals should assure themselves "*of the availability of* ***reserves***."[756]

---

753 Lewis WS, ¶ 33.

754 Lewis WS, ¶ 33 (emphasis added).

755 Howard ER, ¶ 289.

756 *Mohamed Abdel Raouf Bahgat v. Egypt*, PCA Case No. 2012-07, Award, 23 December 2019, ¶ 438 (emphasis added), **RL-106**.

(b) In *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, Crystallex's third-party consultant, which had prepared independent technical reports on the future mine, confirmed that the Las Cristinas deposit contained "***proven and probable reserves*** *estimated at 16.86 million ounces of gold* in situ, *and measured and indicated resources of 20.76 million ounces and inferred resources of 6.28 million ounces*."[757]

(c) In *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, the tribunal took note that both parties' experts agreed that a substantial quantity of "*reserves*" existed. The tribunal also noted that reserves had been independently reported, in accordance with Canadian securities law. Importantly, and as described earlier, the tribunal in that case *did not* award any damages for resources that were classified as "*additional resources*" (and not reserves) because "*additional resources [are] too speculative to include in the present valuation*."[758]

(d) In *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, Tethyan Copper had hired a third-party consultant specifically to address resource classification for its Feasibility Study, and both of Tethyan Copper's shareholders had publicly reported that each entity's Competent Persons/Qualified Persons reviewed and approved the resource classification analysis, which determined the presence of Reserves.[759]

539. In Discovery's cases, where a tribunal employed a DCF on a non-operating project, the resource classification had already been determined—either through an independent third-party or some other technical/feasibility study. In other words, in those cases, the tribunal was not being asked to make a preliminary determination on the resource classification *and then* value the asset *based on that determination*. Rather, the tribunals already knew how the resources were classified through contemporaneous reporting.

---

757 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 878 (emphasis added), **CL-026**.

758 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1820, Award, 22 September 2014, ¶ 780, **CL-55**.

759 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶¶ 493-494, **CL-61**.

540. This case is different. Here, Discovery asks this Tribunal to determine first that, had it begun its exploration drilling, it *would have* ultimately met a Reserves classification. Discovery then asks the Tribunal to value its oil and gas projects on that basis—*i.e.* that its hydrocarbons *would have* met a Reserves classification at some point in the future.

541. As explained below, Discovery's resources were—at best—Prospective Resources. Both the CRA Report and the SLR Report explain that a DCF is inappropriate in this context.[760] Moreover, even if Discovery continued prospecting for gas, the Tribunal would be required to make too many unsubstantiated assumptions to determine that Discovery would have had Reserves. In any event, as the SLR Report ultimately explains, "*[b]ased upon the data Rockflow has presented, and the technical analyses carried out to date, [SLR] do not believe that the Claimant would have been in a position to meet the criteria for reserves to be classified if it had continued with its project*."[761]

a. The oil and gas sector has a well-defined approach to resource classification

542. For oil and gas, the most well-known and accepted unified classification system is the Society of Petroleum Engineers, Petroleum Resource Management System ("**PRMS**").[762] This classification system was created to support investor confidence for oil and gas projects. It gives a systematic approach to help markets (*i.e.* investors) determine value for any given project by measuring the level of uncertainty, and thus risk, associated with it.

543. The PRMS classifies resources into "*Discovered*" and "*Undiscovered*" categories. It then divides the "*Discovered*" and "*Undiscovered*" recoverable volumes across three categories, each representing a level of uncertainty *vis-à-vis* commerciality. In order from least to most certain in terms of commerciality, those categories are: Prospective Resources, Contingent Resources, and Reserves. The PRMS further measures risk within each of these categories through a 1, 2, 3 classification system.[763]

---

760 SLR Report, ¶ 129; CRA Report, § III.

761 SLR Report, ¶ 122.

762 Moy ER, ¶ 239.

763 Petroleum Resources Management System dated June 2018, ¶ 2.2.0.2, **AA-037**.

544. Graphically, this classification system looks like this:[764]

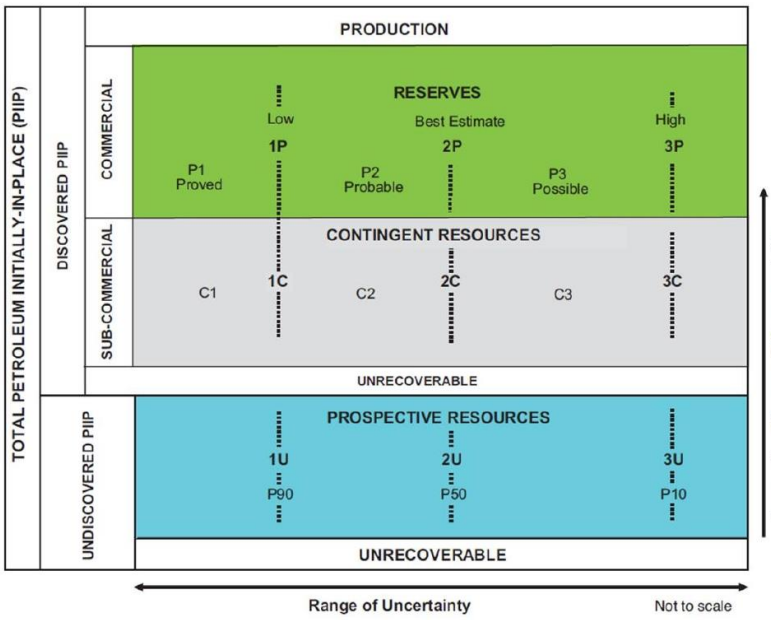


Figure 13-1 PRMS Resources Classification Framework (Source: PRMS 2018)

545. For example, in the "Prospective Resources" category, which is used for *Undiscovered* resources like Discovery's, **1U**, **2U**, and **3U** are used to denote the Low, Best, and High Estimates, respectively. At the opposite end of the spectrum are Reserves, where **1P** means Proved, **2P** means Probable, and **3P** means Possible.[765]

546. Moving up the classification system to Reserves requires one to demonstrate that certain criteria, which increases the likelihood of success (*i.e.* commerciality), have been met. For example, to move from Prospective Resources to Contingent Resources requires successful exploration wells—as Dr. Moy himself notes.[766] Attaining the status of Proved Reserves (the highest ranking) means that the hydrocarbons have met four criteria to be considered "*commercially recoverable*".[767]

764 Petroleum Resources Management System dated June 2018, p. 2, **AA-037**.

765 Petroleum Resources Management System dated June 2018, ¶ 2.2.0.2, **AA-037**; Moy ER, ¶¶ 245-246.

766 Moy ER, ¶ 243.

767 Petroleum Resources Management System dated June 2018, Table 1, p. 31, **AA-037**.

547. The hydrocarbons must be (*i*) discovered, (*ii*) recoverable, (*iii*) commercial, and (*iv*) remaining:[768]

> A. **1. Reserves** are those quantities of petroleum anticipated to be commercially recoverable by application of development projects to known accumulations from a given date forward under defined conditions. Reserves must satisfy four criteria: discovered, recoverable, commercial, and remaining (as of the evaluation's effective date) based on the development project(s) applied.

548. Sufficient detail and technical documentation must exist to provide a clear "*basis for the estimation, categorization, and classification of recoverable resources quantities and, if appropriate, associated commercial assessment*."[769]

> 1.2.0.12 The supporting data, analytical processes, and assumptions describing the technical and commercial basis used in an evaluation must be documented in sufficient detail to allow, as needed, a qualified reserves evaluator or qualified reserves auditor to clearly understand each project's basis for the estimation, categorization, and classification of recoverable resources quantities and, if appropriate, associated commercial assessment.

549. To show that hydrocarbons are "*Discovered*" and "*Recoverable*", an entity must generally have performed exploration wells that (*i*) confirm the presence of hydrocarbons and (*ii*) confirm that these hydrocarbons can be developed with existing technology or technology under development.[770]

550. For the commerciality requirement, an entity must show a "*firm intention to proceed with development*" and it must meet *all* of the following criteria:[771]

(a) Evidence of a technically mature, feasible development plan;

(b) Evidence of financial appropriations either being in place or having a high likelihood of being secure to implement the project;

(c) Evidence to support a reasonable time-frame for development;

---

768 Petroleum Resources Management System dated June 2018, ¶ 1.1.0.6(A) (emphasis added), **AA-037**.

769 Petroleum Resources Management System dated June 2018, ¶ 1.2.0.12 (emphasis added), **AA-037**.

770 Petroleum Resources Management System, June 2018, ¶¶ 2.1.1.1, 2.1.1.2 (In some circumstances, a finding of "Discovered" petroleum can be made without flow tests or sampling: "*In the absence of a flow test or sampling, the discovery determination requires confidence in the presence of hydrocarbons and evidence of producibility, which may be supported by suitable producing analogs*."), **AA-037**.

771 Petroleum Resources Management System dated June 2018, ¶ 2.1.2.1, **AA-037**.

(d) A reasonable assessment that development projects will have positive economics and meet defined investment and operating criteria;

(e) A reasonable expectation that there will be a market for forecast sales quantities of the production require to justify development;

(f) Evidence that the necessary production and transportation facilities are available or can be made available; and

(g) Evidence that legal, contractual, environmental, regulatory, and government approvals are in place or will be forthcoming, together with resolving any social and economic concerns.

551. Many of these criteria overlap with the same criteria (discussed above) that tribunals assess when asked to apply a DCF to a non-going concern; however, it is important not to mix the two analyses. The above criteria relate to resource classification alone—not the suitability of a DCF. In other words, even if Discovery could meet the resource classification of Reserves (which it cannot), that does not mean that a DCF would *ipso facto* be appropriate.

b. Discovery has failed to show that its resources should be classified as Reserves

552. Discovery's hydrocarbons throughout its entire time in the Slovak Republic would be considered Prospective Resources (at best). They are "*potentially recoverable from undiscovered accumulations by application of future development projects*."[772] Dr. Moy agrees:[773]

> **2.6 Classification**
>
> 53. Through the GCOS and its application via the decision tree analysis of Mr Howard, an estimate of the P50 discoverable in-place volumes resulting from the sequential exploration drilling of the prospects, has been made. Modelling these prospects, I have generated production profiles for each and determined the best, (or mid) case technically recoverable volumes which would, in an ex-ante case, be classified as prospective resources as defined by the SPE PRMS. According to the SPE PRMS these resources would be categorised as 2U.

772 Petroleum Resources Management System dated June 2018, p. 3, **AA-037**.

773 Moy ER, ¶ 53 (emphasis added).

553. But Dr. Moy assumes that, but for the Slovak Republic's alleged breaches, Discovery *would have found* hydrocarbons that *would be considered* "*Discovered*" and "*Recoverable*". Dr. Moy then assumes that Discovery *would have* met the seven commercial criteria for Discovery's hydrocarbons to be classified as Reserves:[774]

> 225. In my opinion, the risked 2U prospective resources resulting from Mr Howard's decision tree analysis would, in the 'But-For' case, be fully developed by Discovery Global and would therefore meet the seven commercial criteria required for them to move into the 2P reserve category. Mr Howard's economic analysis gives the 2P volumes for each of the successful prospects.

554. In turn, Mr. Howard therefore calculates his DCF assuming that the hydrocarbons are Reserves.[775] Yet turning to Dr. Moy's determination that Discovery would have met the seven commercial criteria shows no analysis at all. Dr. Moy concludes, with no record evidence, that these criteria would have been met.

555. But before turning to the seven commercial criteria, it is important to note that Dr. Moy's "analysis" is rooted in Section 4.1.1.1 of the PRMS, which explains the use of "Analogs":[776]

> **4.1.1 Analogs**
>
> 4.1.1.1 Analogs are widely used in resources estimation, particularly in the exploration and early development stages when direct measurement information is limited. The methodology is based on the assumption that the analogous reservoir is comparable to the subject reservoir in regard to reservoir description, fluid properties, and most likely recovery mechanism(s) applied to the project that control the ultimate recovery of petroleum. By selecting appropriate analogs, where performance data of comparable development plans are available, a similar production profile may be forecast. Analogs are frequently applied for aiding in the assessment of economic producibility, production decline characteristics, drainage area, and recovery factor (for primary, secondary, and tertiary methods).

556. As noted earlier, supposed Polish analogues are the foundation of Rockflow's geoscience and petroleum engineering analyses. As 4.1.1.1 makes clear, analogues can only be used if they are "*comparable to the subject reservoir in regard to reservoir description, fluid properties, and most likely recovery mechanism(s) applied to the*

774 Moy ER, ¶ 225 (emphasis added).

775 Moy ER, ¶ 225; Howard ER, ¶ 51 ("*However, given the points noted in the preceding paragraphs, and in the corresponding references to Dr Moy's report, in the 'But For' (ex-post) case, the P50 discoverable volumes can be considered as the basis for calculating Reserves, and I therefore use them as the basis for my valuation*").

776 Petroleum Resources Management System dated June 2018, ¶ 4.1.1.1 (emphasis added), **AA-037**.

project that control the ultimate recovery of petroleum."[777] Here, as the SLR Report explains, the use of Polish data to construct the DCF inputs is inappropriate because the vast majority of Polish fields are not analogues.

557. Thus, in reality, Dr. Moy seeks to make a Reserves classification based on data that is not analogous to the very resources Dr. Moy analyzes. All of his conclusions, therefore, derive from a flawed foundation. In any event, as shown below, Dr. Moy summarily (and incorrectly) concludes that each of the seven commercial criteria for a Reserves classification is met.

No evidence of a technically mature, feasible development plan

558. As explained in more detail below,[778] *Dr. Moy created Discovery's development plans*. Dr. Moy therefore refers to *his own* development plans and considers this criterion to be met: "*The proposed development plans outlined (Sec. 10.1 & 10.2) are conventional, standard and achievable. All components would be 'off the shelf' from conventional oil field suppliers and engineering companies. In addition, the fields would be developed in a region well served by good quality infrastructure and with easy access to oil-field service companies*."[779]

559. Discovery's development plans—constructed purely for this arbitration by Rockflow—cannot be considered "*evidence of a technically mature, feasible development plan*." Even assuming that Dr. Moy's development plan could even be considered for this criterion, it still is not a *technically mature,* feasible development program. As discussed below, it is merely a generic description of an "*off the shelf*" (Dr. Moy's words) development program. Thus, Discovery fails this first requirement.

No evidence of financial appropriations either being in place or having a high likelihood of being secure to implement the project

560. Dr. Moy provides no evidence of this. Instead, he declares that it is "*highly likely*" that Discovery would obtain funding: "*Considering the size of the gas and oil volumes that are discoverable within the Discovery Global license areas, as well as the value of the*

---

777 Petroleum Resources Management System dated June 2018, ¶ 4.1.1.1, **AA-037**.

778 *See infra* ¶¶ 576-580.

779 Moy ER ¶ 224.1.

oil and gas that would be produced, it is highly likely that funding would be available for the development of these assets."[780] But as described above, the exact opposite is true. As the SLR Report explains, "*the Claimant's exploration areas are so ill-defined, and the historical production from this area of Slovakia so poor, that even if the Claimant continued exploring, it would not have discovered oil and gas in such quantities to justify development*."[781] Therefore, on that basis alone, Dr. Moy's conclusion fails.

561. In the same vein, Discovery states that "*additional funding **would have been provided** by Akard (who **would not have withdrawn** from the project, as they did so only because of delays and opposition encountered) and/or an **alternative equivalent investor/funder***."[782] But as explained above, Discovery routinely failed to secure outside funding even for the exploration phase of the project. Here, Discovery cannot even state who would have provided funding. It was either Akard or some nameless, future investor. There is no evidence Discovery had sufficient funds to complete both the exploration phase and the future development phase. Discovery therefore fails this second requirement.

No evidence to support a reasonable time-frame for development

562. Dr. Moy provides no detailed dates of development. Rather, he postulates that oil and gas discoveries would have been made at some unknown time, and production would begin within 5 years of those unknown dates: "*Once discoveries had been made, even taking into account the required time for environmental impact studies […], detailed engineering and procurement, full field development to production would be achieved within the 5-year limit specified by the PRMS*."[783] None of these conclusions is based on a real, tangible development plan because none existed.

563. The SLR Report has analyzed Rockflow's development plans and explained how it would most likely take 11-12 years—at least—to progress from exploration to full

780 Moy ER, ¶ 224.2.

781 SLR Report, ¶ 122.

782 Claimant's Memorial, ¶ 298(3) (emphasis added).

783 Moy ER, ¶ 224.3.

production.[784] In any event, Dr. Moy gives no consideration to any number of roadblocks either stopping the project in its entirety or delaying development. Therefore, there is no "*evidence to support a reasonable time-frame for development*" and Discovery fails to meet this requirement.

No reasonable assessment that development projects will have positive economics and meet defined investment and operating criteria

564. Dr. Moy says that this factor is met because "*Mr. Howard's economic analysis confirms the positive net present value for both the gas and oil developments*."[785] This is unfounded and circular. As discussed above, Mr. Howard's DCF relies on wrongly calculated inputs.[786] None of Rockflow's manufactured geological data provides solid ground for Mr. Howard's DCF.[787]

565. Moreover, part of the reason why Mr. Howard's economic analysis shows a positive value is because Mr. Howard assumes that Discovery's hydrocarbons are Reserves.[788] Without that assumption, Discovery's hydrocarbons would be classified as Prospective Resources at best.[789] According to industry standards, a DCF run on Prospective Resources discounts the overall value of that output by an immediate 95% to account for the uncertainty of valuing undiscovered oil and gas.[790] Thus, one of the main reasons Mr. Howard's analyses show economic positivity is because it *assumes* economic viability. In any event, this assumption, combined with the fundamentally flawed, skewed, and hypothetical inputs, provide no reliable indication that the project shows positive economics.

No reasonable expectation that there will be a market for forecast sales quantities of the production required to justify development

566. Dr. Moy says "*[t]he expected development would be in a region where there is a high demand for gas and access to nearby refineries for oil. The volume of gas imports in*

784 SLR Report, ¶ 154.

785 Moy ER, ¶ 224.4.

786 *See supra* § VII.C.2.

787 *See supra* ¶ 529.

788 Howard ER, ¶ 51.

789 Moy ER, ¶ 225.

790 SLR Report, ¶¶ 126-129.

Slovakia […] indicates that there would be a ready market for a domestic source of gas."[791] The mere existence of a market is not the criterion. The criterion requires a showing that there is a market for "*the sales quantities of the production* ***required to justify development***."[792] Here, just like the point directly above, the only reason why Discovery believes it has substantial quantities of oil and gas is a result of flawed geological and petroleum engineering analyses.[793] Once those flaws are addressed, and as the SLR Report explains, "*it is extremely unlikely that any commercial accumulations of oil and/or gas would be made in the Claimant's exploration areas*."[794] Discovery therefore fails this requirement.

No evidence that the necessary production and transportation facilities are available or can be made available

567. Dr. Moy assumes this criterion to be met through oversimplification. He states: "*[t]he area is well served by existing transportation infrastructure and a gas distribution network. Moreover, the volumes of gas resulting from the development of the successful gas prospects […] would be exported via the high-capacity gas Poland-Slovakia interconnector*."[795]

568. Connecting into local distribution networks requires more than aspiration. Agreements must be concluded, funds must be set aside, and infrastructure must be built. On this point, Discovery refers to the fact that it had discussions with Slovakia's national gas distribution company about building a pipeline from a future well at the AOG Smilno 1 site.[796] That plan, which Discovery refers to as a "feasibility study", is an undated, 4-page document showing that Discovery would need to construct a 15km gas pipeline through "*complicated*" terrain:[797]

---

791 Moy ER, ¶ 224.5.

792 Petroleum Resources Management System dated June 2018, ¶ 2.1.2.1(E) (emphasis added), **AA-037**.

793 *See supra* VII.C.2.

794 *See, e.g.*, SLR Report, ¶¶ 22, 122.

795 Moy ER, ¶ 224.6.

796 *See, e.g.*, Lewis WS, ¶ 32.

797 Preliminary feasibility study of project Smilno (emphasis added), **C-235**.

> Distance of extraction network to gas pipeline (beeline) is cca **9 000 m**. Real terrain is complicated (hills, forest, brooks) - therefore proposed track of connection pipeline that shall build Applicant is led by south-eastern direction through valley. Real track and real point of connection to pipeline depends on possibilities to settlement crossing trough parcels. Track lead near villages when can by bigger problem crossing trough parcels.

569. Regarding the "*Poland-Slovakia interconnector*" that Dr. Moy assumes Discovery could exploit, Discovery would have to build a pipeline to that, too:[798]

> 52. For the full gas development of six successful prospects in the P50 case, expected total gas rates are higher and exceed capacity within the local network. I therefore show in my report that this gas could be transported to the Polish-Slovakian gas interconnector which will open in October 2022 and which crosses the Discovery Global licence areas. Feasibility study tenders were issued in 2012 and an environmental impact assessment was submitted in 2016, so, in my opinion, it is highly likely that the construction of this pipeline was known to Discovery Global. Although a viable export route, it would require an additional pipeline to be laid between the Discovery Global gas prospects and the interconnector. The cost of this linking pipeline is included in Mr Howard's economic analysis. In addition to this, there is a possible second export route option which would be to connect directly to the existing and well-established Polish gas network by building a cross-border pipeline directly.

570. The estimated length of this pipeline is assumed to be 75 kilometers.[799] To presume successful construction of this pipeline requires the Tribunal to assume that enough gas would be discovered to justify its development. It also requires the Tribunal to assume that Discovery would have obtained all of the necessary permits and approvals from the Slovak government and third-party landowners.

571. Dr. Moy gives no consideration to the hurdles someone like Discovery would face to construct these pipelines.[800] In short, the mere existence of an entity's desire to use infrastructure is not enough to meet this criterion.

No evidence that legal, contractual, environmental, regulatory, and government approvals are in place or will be forthcoming, together with resolving any social and economic concerns

572. Finally, Dr. Moy gives no consideration to this factor and simply states that Discovery is "*expected*" to overcome any and all hurdles it may face: "*[p]utting aside actions (or inactions) of the authorities, and over which this dispute has arisen; the nature of the*

---

798 Moy ER, ¶ 52 (emphasis added).

799 Moy ER, ¶ 207.

800 *See infra* ¶¶ 604-608.

proposed development is entirely conventional and ***it is to be expected*** *that all approvals would have a reasonable expectation of being obtained*."[801]

573. There is nothing tangible about Dr. Moy's conclusions. Moreover, the nature of the proposed development is the opposite of "entirely conventional". To recall, there are no oil and gas projects of this scale in the mountainous terrains that dominate Discovery exploration areas. Furthermore, Discovery was at the beginning stages of the exploration phase of its project. To move from exploration to successful development requires numerous regulatory and administrative processes. As already explained, Discovery would need permits of various types—including a Mining Area License for each well it planned to construct—and the idea that one can just assume it would receive all of the necessary approvals is untenable.

574. As for "*resolving any social and economic concerns*", the record already indicates that Discovery was not willing to do this. As explained throughout this Counter-Memorial, Discovery clashed with the local community from the outset. Once Discovery finally sought an SLO, and was required to undergo a Full EIA, it abandoned its projects. As explained above, for each Mining Area License that Discovery would have needed for exploitation, a Full EIA would be needed for each well. As part of that procedure, the public is allowed to voice any concerns it may have about the project. To suggest that Discovery would have successfully navigated any pushback and "*resolv[ed] any social and economic concerns*" is an untenable assumption.

* * *

575. In sum, Discovery has failed to show that its hydrocarbons could or should be considered Reserves. The sheer number of assumptions this Tribunal must accept to make that conclusion exemplifies the overall nature of Discovery's speculative DCF.

5. Discovery has no contemporaneous production plans and Rockflow's assumed production schedule is manifestly unreasonable

576. Like Discovery's hydrocarbon inputs, and as discussed above, Rockflow has invented production plans for the oil and gas leads that Rockflow (not Discovery) identified. Specifically, Dr. Moy devotes Sections 10.1 and 10.2 to a fictitious production plan to

801 Moy ER ¶ 224.7 (emphasis added).

extract oil and gas from the "*successful prospects*" that Mr. Howard's theoretical exercise produces.

577. Below is the nondescript production plan Dr. Moy created for Discovery's oil leads:[802]

> 198. In order to reduce the number of access roads and the surface footprint, groups of up to 6 wells will be drilled from a single pad with pads located evenly across each field.
>
> 199. Although it is likely that oil wells may produce naturally in the initial production phase the development concept has assumed that wells will require down-hole pumps in order to allow them to produce to a minimum bottom hole pressure, and these have been costed in Mr Howard's analysis.
>
> 200. Multi-phase production (oil, water and gas) will then go from the well head via flow lines to a production manifold at the well pad and from there it will go via a further flowline to central separation facilities located at a central point within the field. The facilities will contain separators, flare, power generators, storage tanks and metering.
>
> 201. After separation, the oil and water will be stored in separate tanks. The oil will be collected periodically by road-tanker for transportation to a regional refinery, while the water will be collected as required and trucked for appropriate disposal.
>
> 202. Associated gas will be dehydrated and any water fed back into the water storage. The dry gas can then be compressed on-site and fed into the local DN 200 PN40 SPP gas pipe distribution network (Figure 7-1 & ¶113) for domestic consumption.

578. Dr. Moy also created a generic gas production plan:[803]

> 205. As with the oil, in order to reduce the number of access roads and the surface footprint, groups of up to 6 wells will be drilled from a single pad with pads located evenly across each field.
>
> 206. Gas production will go via a flow line to a production manifold and then to centrally located separation facilities where the gas and water will be separated. Data from the historic Smilno-1 well indicates that the gas is extremely lean and it is not expected that any condensate will be produced. Produced water can be stored and can be trucked periodically offsite for appropriate disposal. Due to the over pressures and the consequent limited size of the aquifers (Sec. 8.6) it is expected that produced water volumes will be small.
>
> 207. A plot of total gas produced from the development of the six successful gas prospects is shown in Figure 10-4 and the summary spreadsheet[119]. The developed gas prospects are all located within an area roughly 14 by 8 km. The expected maximum plateau rate will be around 1.25 MMscm/d (44 MMscf/d) with a cumulative production of 3 bcm (106 bcf). Plateau gas rates will be too high to transport within the existing SPP domestic gas network, therefore produced gas will to fed into the new Poland-Slovakian interconnector (¶120) via a centrally located hub (somewhere

802 Moy ER, ¶¶ 198-202 (emphasis added).

803 Moy ER, ¶¶ 205-207 (emphasis added).

579. These are not *bona fide*, contemporaneous production plans created in the normal course of business. Indeed, Dr. Moy even acknowledges this. He explains that his production plans are "*off the shelf*":[804]

> 224.1. *A technically mature development plan*
>
> The proposed development plans outlined (Sec. 10.1 & 10.2) are conventional, standard and achievable. All components would be 'off the shelf' from conventional oil field suppliers and engineering companies. In addition, the fields would be developed in a region well served by good quality infrastructure and with easy access to oil-field service companies.

580. None of this is appropriate for a DCF analysis. Indeed, the cases discussed in section IV.B show that tribunals relied upon (and often required) detailed business and exploitation plans, generated contemporaneously, either by the company itself in the normal course of business or third-party consultants:

(a) *Rusoro Mining*: the tribunal explained that detailed business plans "*adopted in tempore insuspecto prepared by the company's officers and verified by an impartial expert*" are "*ideal[]*".[805]

(b) *Mohamed Abdel Raouf Bahgat v. Egypt*: the tribunal held that "*the existence of detailed business plans*" was one of the several factors that a claimant must show to justify using a DCF on a non-operating asset.[806]

(c) *Crystallex International Corporation v. Bolivarian Republic of Venezuela*: the tribunal relied upon third-party feasibility and technical reports, explaining that it had "*no reason*" to doubt the reports because, importantly, they were prepared by "*well-known consultants*" and prepared "***contemporaneously** for the Claimant throughout the years*."[807]

---

804 Moy ER, ¶ 224.1 (emphasis added).

805 *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 759, **RL-072**.

806 *Mohamed Abdel Raouf Bahgat v. Egypt*, PCA Case No. 2012-07, Award, 23 December 2019, ¶ 438, **RL-106**.

807 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 878 (emphasis added), **CL-026**.

(d) *Gold Reserve v. Venezuela*: the tribunal relied upon "*detailed mining cashflow analysis* ***previously*** *performed*."[808]

(e) *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*: the tribunal relied on Tethyan Copper's Feasibility Study (21 volumes, 235 appendices, and almost 18,000 pages), which it explained "***was not conducted for the purposes of a damages valuation in contentious proceedings*** *but rather for the purposes of determining whether the resources available could form the basis of successful mining operations*."[809]

581. Here, Discovery only has an "*off the shelf*", generic production plan created by Rockflow for the purposes of this arbitration.

582. Yet taking a closer look at Rockflow's production plans reveals that they are manifestly unrealistic. As explained in the SLR Report, Rockflow's DCF is run on a production plan that assumes the following:

(a) **40 wells drilled in 2017**: Rockflow's DCF assumes that Discovery drills 40 exploration wells for each of its leads. This equates to *one well drilled every nine days*.[810] A single well requires time to prepare the site, set-up the rig, drill the well, test the well, plug and abandon it, pack up all equipment, and move to the next site. These wells would range in depth from 389 meters to approximately 4,000 meters.[811] As the SLR Report explains, a 4,000 meter deep well, assuming nothing goes wrong, would take approximately one to three months to drill.[812] A 389 meter deep well would take about three to seven weeks.[813]

---

808 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1820, Award, 22 September 2014, ¶ 830 (emphasis added), **CL-55**.

809 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 480 (emphasis added), **CL-61**.

810 SLR Report, ¶ 147.

811 Moy ER, ¶ 180.

812 SLR Report, ¶ 147.

813 SLR Report, ¶ 147.

(b) **52 oil production wells drilled and put on production in 2018**: Rockflow's DCF assumes that Discovery makes three oil discoveries and six gas discoveries (in other words, 31 exploration wells are unsuccessful). These nine "successes" then lead Discovery to drill 52 oil production wells (and construct 10 well pads) *and* put every single one on production in 2018.[814] That translates to *one production well drilled, completed, and put onto production every single week.* 10 well pads are also presumed to be built in 2018. A well pad is made of concrete. It requires time to construct and access roads to build. This does not even consider the permits needed, the land purchases required, and any other regulatory approvals.[815] Most unrealistic of all about this schedule is that Rockflow's DCF calculation "*is simultaneously recording a production level for 2018 which is 90% of the 2019 production figure, by which time all oil production wells would have been drilled according to his model*."[816] In other words, Rockflow's DCF assumes that every oil well is (*i*) drilled and put on production in 2018 and at the same time (*ii*) every well achieves almost one full year's worth of production that same year.[817] That cannot possibly be correct. Most incredible of all, no operational delays or problems are assumed to take place during this entire campaign.[818]

(c) **74 gas production wells in 2023 with 14 well pads**: Rockflow's DCF assumes 14 well pads and 74 gas production wells constructed in 2023.[819] This equates to *one well drilled and put on production every five days*.[820] This ultimately means that between 2017 and 2023, a central production facility is built, gathering pipelines are installed to the six gas fields and a major pipeline, which Rockflow estimates at 75km, is constructed to the EUStream Interconnector.[821]

---

814 SLR Report, ¶ 148.

815 SLR Report, ¶ 148.

816 SLR Report, ¶ 151.

817 SLR Report, ¶ 155.

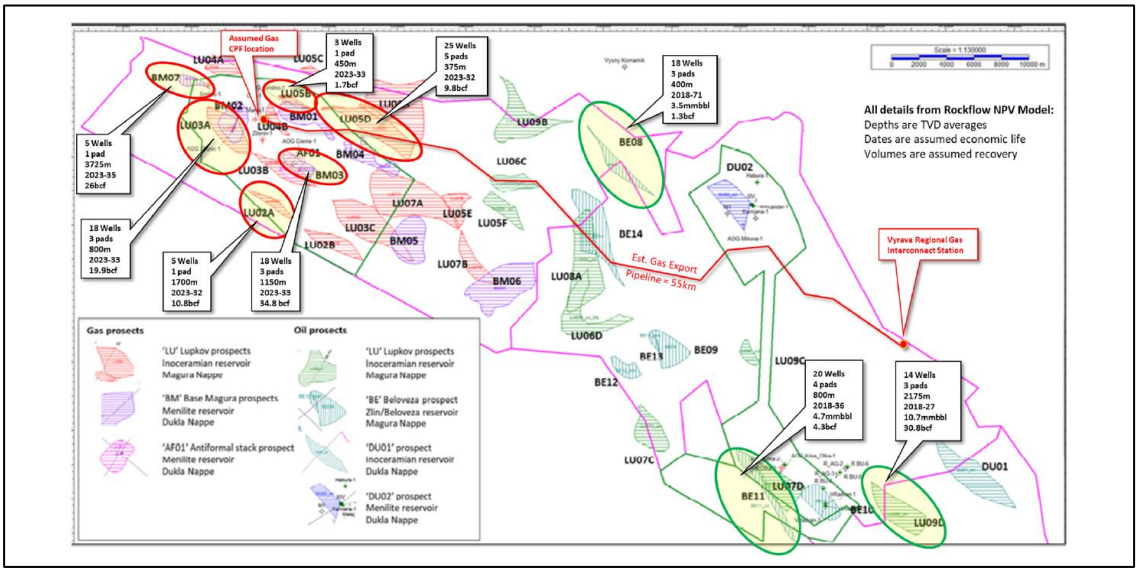
818 SLR Report, ¶ 148.

819 SLR Report, ¶¶ 141, 144(iii), 149.

820 SLR Report, ¶ 149.

821 Moy ER, ¶ 207.

583. The SLR Report has shown the basic outline of this production plan across the leads Rockflow has identified as "successes":[822]



584. This is not an "optimistic" production plan. Rather, it is unrealistic, divorced from reality, and created by Rockflow for the purposes of this arbitration to maximize its DCF output. As the SLR Report concludes, "*[f]or both of the exploration and production phases of the hypothetical development, the inputs to the model assume all of the wells are to be drilled on a greatly and unrealistically expedited timescale, which would not be feasible in any location let alone one such as Claimant's exploration area*."[823]

6. Discovery's anticipated costs were made for this arbitration

585. Similarly, Discovery's CAPEX, fixed OPEX, and variable OPEX, which Mr. Howard then uses as inputs for his DCF, were created for this arbitration at Rockflow's request. Mr. Lewis admits this in his witness statement:[824]

822 SLR Report, ¶ 143.

823 SLR Report, ¶ 161.

824 Lewis WS, ¶ 32 (emphasis added).

> pipeline may have fallen to AOG. **Exhibit C-213** is a spreadsheet of anticipated/potential costs which I have prepared with Ron Crow (AOG's head of operations with experience across the globe, most notably nearby in Hungary and Poland) at the request of the independent experts engaged by Discovery in this arbitration, in which Ron and I have provided our estimates for capital expenditure, fixed operational expenditure, and variable operational expenditure. This includes (under capital expenditure) our estimate for a 75km, 0.5m diameter pipeline linking to the interconnector.

586. **Exhibit C-213** is an undated, single page list of estimated/anticipated costs that provides by no background information, no substantiation, and no explanation from where these costs derive:[825]

	Estimate	Units	Currency $ or €	Real-Terms Ref Year
Per-Well (Oil)	12.00	per year	$k	2016
Per-Well (Gas)	12.00	per year	$k	2016
Per-Well-Pad	20.00	per year	$k	2016
Per-Field (Oil)	50.00	per year	$k	2016
Per-Field (Gas)	50.00	per year	$k	2016
Gas Central Processing Facilities	50.00	per year	$k	2016
In-Country Overhead - Oil Operations	484.00	per year	$k	2016
In-Country Overhead - Gas Operations (Additional)	632.00	per year	$k	2016
Allocated Head Office G&A (All Partners)	0.00	per year	$k	2016
Insurance	120.00	per year	$k	2016
Licence Rental: Exploration & Production Licences	436.80	per year	€k	n/a
Oil Processing	0.00	$ /bbl	$	
Oil Transport	4.00	$ /bbl	$	2016
Gas Processing	0.00	$/mmscf	$	
Per-Well Costs:				
Oil Well - Producer	1.12	millions	€	26/10/2016
Gas Well - Producer	1.07	millions	€	26/10/2016
Exploration Well	1.07	millions	€	26/10/2016
Exploration Site Prep	0.24	millions	€	26/10/2016
Exploration Well Testing	0.07	millions	€	26/10/2016
Well Completion	0.23	millions	€	14/08/2016
Well-Depth Adjustment Factors:				
0 to 500m	0.50	n/a	n/a	n/a
600m - 1000m	0.80			
1200m - 1550m	1.00			
1700m - 2600m	1.75			
3000m 4000m	3.50			
Well Pad Costs:				
Well Pad	0.35	millions	$	2016
Oil Field Surface Facilities				
Oil Field Surface Facilities : (Spend yr relative to first prod)	0.22	millions	$	2016
Gas Field Surface Facilities				
Gas Field Surface Facilities	0.25	millions	$	2016
Gas Field-CPF Export Pipelines	0.25	millions	$	2016
Gas Export Infrastructure				
Processing Hub Facilities	0.35	millions	$	2016
Gas Compression	5.00	millions	$	2014
Intangible drilling (percent of cost)	78.5%			

587. Generated purely for this arbitration by Discovery, and adopted without question by Mr. Howard,[826] Discovery's costs are another exercise in hypotheticals.

825 Cost Estimation Summary Spreadsheet, **C-213**.

826 *See, e.g.*, Howard ER, ¶¶ 191, 197, 199.

7. Discovery has failed to show that it could have financed the project

588. As noted, tribunals assess whether an entity can finance a project when considering a DCF's suitability for non-operational assets. Here, as shown in **Section V.1** above, one reason why Discovery's project failed was lack of funding. This is another reason Rockflow's DCF should be rejected. An additional financing point deserves attention, however. And it simply *confirms* that Discovery would not have succeeded in financing the project.

589. Discovery initially planned three wells and received internal authorizations for expenditure for only these three. According to Discovery, once it drilled these three wells, it would then use the revenues from them to help finance the additional exploratory works:

> As I mentioned above at paragraph 31, the plan from the start, and all along, was to drill three exploratory wells (although, as noted above, we were prepared to fund and drill several wells if needed) and then, based on those results, expand the drilling program. From a cost perspective, it would have been possible to expand the drilling program after three successful wells had been drilled as the success of those wells would have enabled further funding to be obtained or, if possible, the revenue generated from those wells could have been reinvested.[827]

590. At the outset, exploration wells do not generate revenue. Had Discovery found any oil or gas in commercial quantities (which is unlikely based on the SLR Report), it could not immediately sell it. Rather, Discovery would have needed further permits, including a Mining Authorization, a Preliminary or Full EIA, a Mining Area License and a Mining Permit to exploit any discovered oil or gas.[828] Notably, Mr. Lewis says nothing about how Discovery would have owed funds to the Slovak Republic from any hydrocarbons found and sold from these initial wells.[829]

---

827 Lewis WS, ¶ 49.

828 *See supra* ¶ 33.

829 *See, e.g.*, Government Decree No. 50/2002, Art. 3(1) ("*The remuneration for extracted minerals shall be calculated for each quarter of the calendar year as the product of the ratio of the costs of extracting minerals to the total costs of manufacturing products from extracted minerals, the revenue generated from the sale of products manufactured from extracted minerals and the rate of remuneration. The rate of remuneration for extracted minerals by type of mineral is set out in Annex 2.*"), **R-104**.

591. Mr. Howard nevertheless accepts Discovery's argument that it would have funded exploration wells with these revenues. Based on Mr. Atkinson 19.3% GCOS (which is inflated), Mr. Howard derives a calculation that shows the "*chance of complete failure*" and ultimately concludes that Discovery's plan to fund exploration with revenues from the initial wells would have succeeded.[830] He asserts this because Discovery would have drilled seven initial wells, and his calculation shows an overall success rate based on seven wells.[831] He expresses the calculation as follows:[832]

> 272. Mr Atkinson has presented his estimate of the GCoS for each of the prospects he identifies in the Claimant's licence areas.[117] The arithmetic mean for all the prospects as 19.3%.[118] The corresponding average chance of failure for a single prospect is therefore 100% - 19.3% = 80.69%
>
> 273. The chance of complete failure for a sequence of wells (no successes) is therefore 0.8069^n, where n is the number of wells. Therefore, by way of example, for five wells, the chance of total failure is 0.8069^5 = 34.2%, for seven wells 22.26%, and for 11 wells 9.44%.

592. Yet the record already demonstrates that this plan would more than likely have failed. As explained above, Discovery's Poruba-1 well, according to Rockflow, was not a viable lead.[833] Had Discovery drilled there, it would have found nothing. And while Mr. Howard asserts that Discovery could have financed seven initial wells,[834] he has misunderstood Mr. Lewis' testimony. Mr. Lewis states that he could fund three wells, and Discovery would use funds from Akard to cover the additional four.[835] But Akard defaulted on its funding obligations and ultimately pulled out of the project. In any event, Discovery only received authorization for expenditures for three wells: Smilno 1, Poruba 1, and Krivá Oľka 1.[836] Three wells should be the metric—not seven.

593. Adopting Mr. Howard's analysis above and calculating complete failure for a sequence of Discovery's three wells results in: **0.8069^3 = 52.5%**. In other words, even based

---

830 Howard ER, ¶¶ 272-277.

831 Howard ER, ¶¶ 272-277.

832 Howard ER, ¶¶ 272-273 (emphasis added).

833 Atkinson ER, ¶ 112.

834 Howard ER, ¶ 276.

835 Lewis WS, ¶ 35.

836 Atkinson ER, ¶¶ 109-112; AOG AFE Proposal Cover Letter dated 5 November 2015, **C-87**; Drilling Plan dated 3 December 2015, **C-99**.

on Mr. Atkinson's artificially high GCOS of 19.3%, Discovery had a **52.5%** chance of complete failure for the first three wells. Given that Poruba-1 would have failed, Discovery would then be reduced to two wells for which it had received authorization for funding. In that scenario, Discovery's total failure rate would be **0.8059^2** = **65.1%**.

594. Regarding the other wells, as explained above and throughout the SLR Report, "*it is extremely unlikely that any substantial accumulations of oil and/or gas would ever be discovered in the Claimant's exploration areas*."[837] Thus, even if the AOG Smilno 1 and AOG Krivá Oľka 1 wells contained any hydrocarbons, there is serious doubt as to the recovery of that oil and gas, too. Indeed, even on Mr. Atkinson's and Mr. Howard's skewed analyses, Discovery's chance of complete failure for these two wells was **65.1%**.

595. In sum, Discovery's plan to fund future exploratory works through these first three wells would have likely failed. Coupled with Discovery's inability to secure outside investment, this simply confirms that Discovery could not have financed its project.

8. Discovery's potential reacquisition of reduced or relinquished exploration areas is immaterial

596. Discovery next argues that "*AOG (together with JKX and Romgaz) would have applied for, and obtained, licenses for the Svidník, Medzilaborce and Snina areas that had been reduced/relinquished in 2016 and 2018, i.e. to restore the Licenses to the position they were in as at the time of Discovery's acquisition of AOG in March 2014*."[838] Discovery alleges this because, according to it, "*Slovak law provides a preferential right for a party to re-apply for an area previously relinquished*."[839]

597. It is unclear what Discovery means when referring to a "*preferential right for a party to re-apply for an area previously relinquished*."[840] Section 24(7) of the Geology Act—the cited provision—merely states that, if an applicant seeks an Exploration Area License for an area that shares a border with an exploration area already assigned to

837 SLR Report, ¶ 9.

838 Claimant's Memorial, ¶ 298(4).

839 Claimant's Memorial, ¶ 298(4).

840 Claimant's Memorial, ¶ 298(4).

that applicant, then certain processes for the issuance of such Exploration Area License do not apply. Namely, the MoE is not required to send a notice of filed application for issuance of the Exploration Area License inviting others to submit competitive applications to the Office for Official Publications of the European Communities as would normally be the case.[841]

598. This provision, however, does not mean that the applicant would obtain the Exploration Area License to the adjacent exploration area automatically or without a formal administrative proceeding being initiated. Instead, just like any other application for the Exploration Area License, the application would be properly assessed by the MoE. The applicant would be obliged to supplement its application with approvals from a number of affected authorities evaluating and considering various public interests, such as public health and safety, protection of flora and fauna, or underground water.

599. If the relevant authorities do not agree with issuance of the Exploration Area License, the MoE is obliged to dismiss the application.[842] Similarly, since 1 January 2019, the MoE has a discretion not to issue the Exploration Area License if its issuance would be contrary to public interest.[843]

600. It follows that AOG had no certainty that it would be able to "*restore the Licenses to the position they were in as at the time of Discovery's acquisition of AOG in March 2014*".

601. Even assuming that this was some "priority right" (and it is not), Discovery's potential reacquisition of land it relinquished does not mean that its project would have succeeded. The reality is that Discovery makes this argument because Rockflow has identified 40 leads that span the *entire* geographical area of Discovery's Exploration Area Licenses as of March 2014. In other words, Discovery is actually arguing that, had it never reduced or relinquished its Exploration Area Licenses, it would have (*i*) identified the 40 leads Rockflow now identifies, (*ii*) Discovery would have drilled an

841 Geology Act (applicable from 1 January 2019 until 31 August 2019), Art. 24(7), **R-105**.

842 Geology Act (applicable from 1 January 2019 until 31 August 2019), Art. 23(11)(b), **R-105**.

843 Geology Act (applicable from 1 January 2019 until 31 August 2019), Art. 23(11)(h), **R-105**.

exploration well at every location, and (*iii*) Discovery would have developed the nine oil and gas wells that Rockflow says would be successful.

602. This assumption is untenable on its face. And it is only made to maximize the DCF results. As the SLR Report notes, of the 40 leads Rockflow identifies, "*only thirteen are found within the Claimant's* ***post-2016*** *exploration area and a further six are only partially within this*."[844] Similarly, of the nine "successful leads" in Rockflow's DCF, "*only four lie fully within the* ***post-2016*** *exploration area and a further three are only partially-so*."[845] In other words, instead of reducing its Exploration Area Licenses to retain what Rockflow says are the most valuable and promising areas, Discovery did the *exact opposite*.

603. So, when Mr. Lewis explains how he chose "*the key areas where drilling would first take place*"[846] when he selected which areas to relinquish, it turns out that he relinquished *five* of the nine "successful wells" that Rockflow uses for its DCF. There is no better evidence of Discovery's prospecting abilities (or lack thereof) than this.

9. Discovery cannot show that it would have been granted all of the additional permits and approvals required

604. Finally, Discovery assumes that it would have been granted "Mining Area Licenses" for any hydrocarbons discovered because "*Slovak law confers a priority right to the holder of an exploration licence to apply for a Mining Area Licence […] and there would be no reason for the Mining Area License not to be granted in circumstances where the domestic production of oil and gas was a key part of Slovakia's 2014 Energy Policy […].*"[847] This is an unrealistic and incomplete assumption.

605. As explained above, for Discovery to move from exploration to exploitation, it would need to obtain several further permits, including a Mining Authorization, a Preliminary or Full EIA, a Mining Area License and a Mining Permit. It is true that Discovery would have a priority right to apply for the Mining Area License but that does not mean that the license would be automatically issued to it. As explained above, when issuing

844 SLR Report, ¶ 2.

845 SLR Report, ¶ 2.

846 Lewis WS, ¶ 63.

847 Claimant's Memorial, ¶ 298(5).

Exploration / Mining Area Licenses, the relevant authorities providing their views on the application evaluate and consider numerous public interests. There is no certainty that the public interest to explore / exploit natural resources will outbalance other public interests such as public health and safety, protection of flora and fauna, or underground water.

606. Moreover, the priority right to the Mining Area License does not equate to a priority right to obtain *all* necessary approvals thereafter. The Slovak Republic details below the additional authorizations and approvals needed for *just* the exploitation stage of the project (assuming Discovery would have made it there):[848]

(a) **Mining authorization**: Interested party must apply for and obtain from the District Mining Office a general authorization to perform mining works, similar to a trade license.[849]

(b) **Rights to the affected land plots**: Interested party must obtain consent from all land owners (*e.g.*, by purchase or lease) or apply to the District Mining Office to expropriate if in the public interest (Article 29 of Geology Act not an option).[850]

(c) **Preliminary EIA / Full EIA**: Interested party submits a "project intent" plan to the District Office for planned exploitation. Provided the planned exploitation does not exceed 500t of oil per day or 500 000 m^3 of gas per day, the District Office performs the Preliminary EIA. If District Office concludes there is a significant effect on the environment, then a Full EIA must be performed.[851]

Full EIA must be performed directly, if the planned exploitation exceeds 500t of oil per day or 500 000 m^3 of gas per day.[852]

848 *See supra* ¶ 33.

849 Act on Mining Activities, Art. 4a, **R-044**.

850 Mining Act, Art. 31(3), **R-048**.

851 EIA Act, Annex 8, point 1(4)-(5), **R-045**.

852 EIA Act, Annex 8, point 1(4)-(5), **R-045**.

(d) **Mining area license**: Interested party applies to District Mining Office for a decision determining the exploitation area (smaller than the exploration area, because the interested party now knows where the deposit is) that serves as a zoning permit in that it defines the territory.[853]

(e) **Mining permit**: Interested party must apply for and obtain from the District Mining Office a permit for performance of mining activities, which permits preparation, opening and excavation/exploitation of the deposit, similar to the building permit.[854]

(f) **Notifications of initiation of exploitation**: Interested party must notify the District Mining Office of the initiation of exploitation activity 8 days prior to initiation of such activity.[855]

(g) **Further permits and notifications**: Interested party must obtain additional permits and provide additional notifications for performance of specific types of work, such as permits for performance of blasting works[856] or permits to perform mining works within specific protected areas.[857]

607. Successfully obtaining each permit or approval is not guaranteed—especially in the face of potential issues with the local community whose voices are heard and considered at various steps. There is no certainty that the scales of public interest would not weigh *against* Discovery's many applications for required permits and approvals.

608. It follows that assuming success at this stage of the project is unreasonable and unwarranted.

* * *

853 Act No. 44/1988 Coll. on protection and use of the natural resources, as amended, Art. 24, **R-106**.

854 Act on Mining Activities, Arts. 17-18, **R-044**.

855 Act on Mining Activities, Art. 5a, **R-044**.

856 Act on Explosives, Art. 47, **R-046**.

857 *See, e.g.*, Act No. 543/2002 Coll on nature and landscape protection, as amended, Arts. 13(2)(f), 28(4), **R-043**.

609. Nothing in the above should instill any confidence in a DCF valuation. Rather, the speculation—compounded by significant errors—embedded at nearly every input or factual consideration reaffirms that this Tribunal should reject a DCF in this case.

D. A market valuation shows that Discovery's project is worth USD 1.2 million

610. A market valuation is an established valuation technique.[858] In general, a market valuation "*estimates the value of an asset or company by examining the market valuation of companies holding properties of similar characteristics. It derives a measure of value for the asset subject to valuation by inference from the value of peer companies*."[859]

611. As the Crystallex tribunal explained, the market valuation approach is "*widely used as a valuation method of businesses, and can thus be safely resorted to, provided it is correctly applied and, especially, if appropriate comparables are used*."[860] Discovery acknowledges the market valuation approach as valid.[861]

612. CRA has analyzed (*i*) past transactions on Discovery's project and (*ii*) comparable companies that Discovery itself has previously identified. To provide a robust, full picture, CRA further undertakes both an *ex-ante*[862] and *ex-post* analysis for Discovery's project. Using Discovery's preferred valuation approach—an ex-post, but for valuation—CRA shows that Discovery's project is worth **USD 1.2 million**.

1. A transaction on the project itself shows a valuation of USD 1.8 million

613. An arm's length transaction on Discovery's asset yields a USD 1.8 million valuation. Discovery purchased AOG in March 2014 for EUR 153,054.50.[863] Part of that

858 Claimant's Memorial, ¶ 279.

859 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 901, **CL-26**; *see also* CRA Report, ¶¶ 45-46.

860 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 901, **CL-26**.

861 Claimant's Memorial, ¶ 279.

862 The Slovak Republic has identified 7 June 2018 as the *ex-ante* valuation date. According to Discovery, on 8 June 2018 when the Ministry of Environment included a requirement for a preliminary EIA for future exploration wells, this constituted the "*final straw*" (Lewis WS, ¶ 93) that led to Discovery's decision to exit the Slovak Republic and, ultimately, gives rise to Discovery's expropriation claim Memorial, ¶ 269.

863 Lewis WS, ¶ 16.

transaction included Discovery granting a 3.5% royalty to Aurelian on all petroleum produced from the future project.[864] This royalty translated to "*7% net of AOG's 50% share of the petroleum produced*."[865] One year later, in January 2015, Aurelian sold that royalty to Alpha Exploration LLC—a company "*affiliated with Discovery*" for £120,000.[866] Based upon this transaction, the implied value of Discovery's 25% share[867] as of January 2015, is at most, **USD 1.29 million**.[868]

614. Importantly, after January 2015, Discovery added no value to the project that could have materially increased this USD 1.29 million figure. By January 2015, and according to Discovery's own materials, it had already completed its MT scans and had already reinterpreted Aurelian's 2D seismic data.[869] Moreover, as SLR explains, the prospectivity of oil and gas in the exploration areas is so low that even if Discovery continued exploring, it is extremely unlikely that any oil or gas would have been found in such quantities to justify development.[870] In other words, there was no material increase in economic value (save for changes in oil prices) since January 2015.

615. As the CRA report notes, this USD 1.3 million is even considered high "*because it is based on royalties, which are only based on the Project's revenues*."[871] In other words, this amount is "*not affected by all the costs, taxes, and other deductions that depress the Project's true value*."[872] Adjusted for the change in oil and gas indexes from

---

864 Lewis WS, ¶ 16.

865 Lewis WS, ¶ 16.

866 Agreement for Purchase of Overriding Royalty Interest dated 30 January 2015, ¶ 2, **C-67**.

867 While Discovery held a 50% interest in the project, its entire valuation assumes that its financing agreement with Akard remained in place, and thus Discovery's equity position was reduced 25%. The Slovak Republic therefore adopts this assumption for the purposes of this exercise. *See* Howard ER, ¶ 268.

868 CRA Report, ¶¶ 51-52. Unlike the ADX Energy and JKX Oil and Gas comparable analyses, this valuation does not depend upon any of Rockflow's geoscience and petroleum engineering flaws. Furthermore, as the CRA Report explains, in a "*but for*" world, and according to Discovery, Discovery and Akard would have created a new company that owned the project 50:50 once Akard provided USD 3.7 million in funding. In that scenario, Discovery's "but for" stake in the project is worth **USD 0**. *See* CRA Report, fn. 59. The Slovak Republic reserves the right to expand this point following document production.

869 Discovery Global, LLC: Exploration and appraisal in Slovakia, Investor Introduction, October 2017, Slide 10, **C-180**.

870 SLR Report, ¶¶ 22, 123.

871 CRA Report, ¶ 52.

872 CRA Report, ¶ 52.

January 2015 to the ex-ante valuation date—*i.e.* the day before Slovakia's alleged breach—the inferred (still high) value would be **USD 1.82 million**.[873]

2. A comparables analysis to companies deemed comparable by Discovery shows a valuation of less than USD 3 million

616. As the CRA Report explains, in December 2021, Discovery selected eight companies that it deemed comparable when calculating its cost of capital for the purposes of this arbitration.[874] Those comparable companies were: Ascent Resources, ADX Energy, Cadogan Petroleum, JKX Oil & Gas, Europa Oil & Gas, Cub Energy, Caspian Sunrise, and Serinus Energy.[875]

617. As the CRA Report notes, Mr. Howard does not disagree with this selection of companies.[876] In fact, he specifically mentions that Cub Energy is a "*good comparator*" because "*[Cub Energy] is the only company in the list holding prospective resources only*."[877] While Mr. Howard is incorrect about Cub Energy's hydrocarbons classification,[878] this is nevertheless important. As the CRA Report explains, because Mr. Howard's valuation is always on a but for, ex-post basis, his conclusion that Cub Energy is a "*good comparator*" is consistent with the SLR Report's findings that Discovery's project would not have Reserves even in a but-for scenario.[879]

618. Of the companies that Discovery identified as comparable, all but ADX Energy had 2P reserves and were producing.[880] Because ADX Energy had prospective resources—just like Discovery—it is a "*good comparator*" (Mr. Howard's words) and thus provides a valuation "*benchmark*."[881] On an ex-ante basis and based upon ADX

873 CRA Report, ¶ 55. As the CRA Report explains, footnote 289 would still apply in this instance and may reduce the overall valuation to **USD 0**. *See* CRA Report, fn. 59.

874 CRA Report, ¶ 62.

875 CRA Report, ¶ 62.

876 CRA Report, ¶ 63.

877 Howard ER, ¶ 92.

878 CRA Report, fns. 85, 89.

879 CRA Report, ¶ 63.

880 CRA Report, ¶ 68.

881 CRA Report, ¶ 68.

Energy's enterprise value and hydrocarbons resources, **USD 0.15 million** is the value of Discovery's share of its project.[882]

619. Moving to an ex-post analysis, CRA has taken Discovery's list of comparable companies, and identified JKX Oil and Gas as the one most suitable for a market valuation.[883] CRA identifies JKX Oil and Gas's Reserves, discounts them to "*5-10% of a boe of 2P reserves*"[884] in accordance with industry guidelines and applies this inferred valuation to Rockflow's estimated amount of oil and gas from Discovery's project. In an ex-post, but for world (Discovery's preferred approach), the value of Discovery's share of the project is **USD 1.2 million**.[885]

620. One final point deserves attention. CRA's valuation accounts for *none* of the flaws identified in Rockflow's geological and petroleum engineering calculations. In other words, CRA accepts Rockflow's estimated amounts of oil and gas—which SLR have already determined are wrong—in their entirety. This means that the **USD 1.2 million** figure is likely high. Following receipt and review of all underlying data supporting the Rockflow reports, the Slovak Republic and CRA will update this valuation to the extent needed.

* * *

621. Three different market valuations produce consistent results: **USD 1.8 million** (ex-ante), **USD 0.15 million** (ex-ante), and **USD 1.2 million** (ex-post). That level of consistency, over the life of the project, confirms CRA's valuations to be sound. It also explains why, at every stage of the project, Discovery could not attract any outside investors and why its project ultimately failed—it was worth almost nothing.

---

882 CRA Report, ¶ 68. Note, however, that this valuation is subject to CRA's explanation of the "but for" scenario involving the Discovery/Akard new company. In other words, the proper valuation for the project may be **USD 0**. *See* CRA Report, fn. 59.

883 CRA Report, ¶ 69.

884 CRA Report, ¶ 72.

885 CRA Report, ¶ 72. As explained in the SLR Report, when applying Reserve Adjustment Factors to prospective resources, the adjustment factor (or multiplier) is 1 to 10% with a mean of 5%. *See* SLR Report, ¶ 127. Accordingly, the Slovak Republic applies that mean of 5% here to arrive at a valuation of USD 1.2 million. Finally, and consistent with the above, this valuation is still subject to CRA's explanation of the "but for" scenario involving the Discovery / Akard new company. In other words, the proper valuation for the project may be **USD 0**. *See* CRA Report, fn. 59.

E. Interest

622. Discovery has failed to request any specific rate of interest. Instead, it requests "*post-award interest on all sums awarded from the date of the award to the date of payment, at a rate to be determined by the Tribunal*."[886] Given Discovery's failure to specify any rate of interest, and in the event that Discovery is awarded any damages, the Slovak Republic proposes simple interest at a rate equal to the yield on Slovak government 10-year bonds as of the date of the award. The Slovak Republic further proposes a six-month grace period from the date of the award before interest begins to accrue.

886 Claimant's Memorial, ¶ 332.

VIII. REQUEST FOR RELIEF

623. For the foregoing reasons, the Slovak Republic requests the following relief:

(a) a declaration dismissing Discovery's claims;

(b) an order that Discovery 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.

624. 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 the Slovak Republic,

[Signed]

31 March 2023
SQUIRE PATTON BOGGS
Counsel for the Slovak Republic