INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/21/51

BETWEEN:

DISCOVERY GLOBAL LLC

Claimant

-v-

THE SLOVAK REPUBLIC

Respondent

CLAIMANT'S REPLY

---

18 September 2023

Members of the Tribunal

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

Secretary of the Tribunal: Ms Jara Minguez Almeida

Assistant to the Tribunal: Dr Magnus Jesko Langer

TABLE OF CONTENTS

I. OVERVIEW 7

II. THE FACTS 15

A. General Themes 15

1. The domestic legislative framework for oil and gas exploration and extraction in Slovakia 15
2. AOG understood that it needed to acquire certain permits and consents in order to carry out exploration activities 17
3. AOG had an obligation to carry out the "*geological task*" under the Exploration Area Licences 18
4. Discovery engaged extensively with local communities throughout the project 20

B. AOG's Operations Prior to its Acquisition by Discovery in 2014 20

1. Aurelian/AOG informed local communities about its activities 21
2. Aurelian/AOG identified specific drilling locations in Slovakia 22
3. The drop in Aurelian's share price in 2011 was not attributable to the alleged failure to identify drilling locations in Slovakia 23

C. Discovery's Acquisition of AOG in 2014 25

1. Discovery's acquisition of AOG and the Overriding Royalty 25
2. In 2014, the MoE extended the Exploration Area Licences 27
3. The JOAs and AOG's role and strategy as the Operator 28

D. Smilno 32

1. The Road was publicly accessible and AOG understood this 32
   a. Contemporaneous documents 34
   b. Witness testimony 41
   c. Expert evidence on Slovak law 42
   d. Slovakia's arguments 42
2. Local residents were aware of AOG's plans at Smilno in 2015 46
3. AOG's first drilling attempt 47
4. The Interim Injunction 49
5. AOG's second drilling attempt 50
6. The Road signage scheme 54
7. The inconsistent positions adopted by the MoT and MoI 59
8. AOG's third drilling attempt 62

E. Krivá Ol'ka 63

1. AOG acquired the rights to drill an exploration well at Krivá O'lka 63
2. The MoA refused to approve the Amendment to the Lease 64
3. The MoE refused to grant a compulsory access order pursuant to an

application under Article 29 of the Geology Act 75
F. Ruská Poruba 84
G. EIA 86
1. The Amendment to the EIA Act and the EIA Directive 86
2. AOG's Press Release in April 2017 90
3. AOG's Applications for Preliminary EIA Clearance in 2017 93
a. An order for a Full EIA is only justified if the activities are likely to have significant adverse environmental effects 93
b. The EIA Decisions ordered AOG to perform a Full EIA on arbitrary, unfair and pretextual grounds 94
c. The EIA Decisions, taken with Slovakia's earlier conduct, destroyed the project's commercial viability 101
d. Slovakia has failed to disclose relevant documents relating to the EIA Decisions 103
4. AOG did not participate in the Full EIA process, and did not appeal, because it had no confidence that it would be treated fairly 105
H. JKX's Withdrawal from the Project in 2018 106
I. AOG Applies to Reduce the Exploration Licence Area in 2018 107
III. JURISDICTION AND ADMISSIBILITY 108
A. The Tribunal Has Jurisdiction under the BIT 108
1. Discovery is an eligible "*investor*" 108
a. Slovakia's argument is irreconcilable with the ordinary meaning of the terms used in the BIT 109
b. Slovakia's argument is unsupported by the consistent jurisprudence of numerous investment tribunals 111
c. Slovakia's argument ignores the true facts 113
2. Discovery made an eligible "*investment*" 115
3. Public order and essential security interests 116
4. Ownership of real property and hydrocarbons reservations 121
B. The Tribunal Has Jurisdiction under the ICSID Convention 124
1. The BIT's definition of "*investment*" automatically satisfies the requirement in Article 25(1) of the ICSID Convention 124
2. In any event, Discovery made an "*investment*" within the meaning of Article 25(1) of the ICSID Convention 125
C. Slovakia's Good Faith Jurisdictional Objection is Misconceived 128
D. Discovery Complied with Article VI(2) of the BIT 130
IV. ATTRIBUTION 133
V. LIABILITY 134

A. Slovakia Violated the FET Standard 134
1. The FET Standard in the BIT is not limited to the MST 135
2. The Tribunal must have regard to the individual and/or the cumulative effect of Slovakia's measures..139
3. Slovakia violated Discovery's legitimate expectations....................140
a. Legal standard... 140
b. The Exploration Area Licences gave rise to legitimate expectations which were protected under the FET Standard.. 149
c. Slovakia violated Discovery's legitimate expectations by its conduct at Smilno 151
d. Slovakia violated Discovery's legitimate expectations by its conduct at Krivá Ol'ka.. 153
e. Slovakia violated Discovery's legitimate expectations by reason of the EIA Decisions and the EIA Condition 155
4. Slovakia acted inconsistently 160
5. Slovakia acted arbitrarily 164
6. The conduct of the Slovak Judiciary violated the FET Standard......172
a. Legal standard... 172
b. Application to the facts 175
B. Slovakia Treated Discovery Arbitrarily and Discriminatorily 178
1. Legal standard 179
2. Application to the facts 180
a. NAFTA is an appropriate comparator 180
b. Slovakia treated NAFTA more favourably than AOG without any reasonable or objective justification 182
C. Slovakia Failed to Provide Effective Means to Enable AOG to Assert Claims and Enforce its Rights 186
D. Slovakia Expropriated Discovery's Investment 187
1. Legal standard 187
2. Application to the facts 189
VI. CAUSATION.. 191
A. Legal Standard 191
1. Causation 191
2. Contributory fault...192
B. Discovery Did Not Lack the Necessary Funding 194
C. Discovery Did Not Fail to Obtain a Social Licence to Operate 198
D. Damages Should Not Be Reduced Based On Contributory Fault 200
VII. QUANTUM... 201

A. Discovery Primary Case: The Tribunal Should Adopt an Income-Based Valuation Methodology using Rockflow's DCF Model 201
1. Investment awards support the use of an income-based valuation methodology using a DCF model, even for early-stage investments201
2. Rockflow's expert evidence supports the use of a DCF model as a matter of principle 205
3. Slovakia's criticisms of Rockflow's DCF model are misconceived.207
4. The additional Akard Sum 211
B. Discovery's Alternative Case: Slovakia Must Compensate Discovery for its Lost Opportunity to Earn Profits 211
1. Legal principles 212
2. Application to the facts 216
C. Discovery's Further Alternative Case: Adopting a Market-Based Valuation Methodology 221
1. Comparable companies 222
2. Comparable transactions 224
D. Discovery's Final Alternative Case: Slovakia Must Compensate Discovery for Wasted Expenses 227
1. Legal principles 228
2. Application to the facts 228
E. Discovery is Entitled to Compound Interest 228
VIII. REQUEST FOR RELIEF 231
ANNEX 1: EVIDENCE OF AOG COMMUNITY ENGAGEMENT 234
A. Meetings with Local Mayors 234
B. Town Hall Meetings 235
C. Meetings with Businesses and Church Leaders 237
D. Press Conferences and Interviews with Local Media 238
E. Coach Trips to Czech Republic 242
F. Letters to the Local Community 243
G. Support for Local Businesses 243
H. Licence Fees Allocated to Municipalities 244
I. Sponsorship and Co-operation 245
ANNEX 2: DISCOVERY'S RESPONSE TO SLOVAKIA'S DETAILED CRITICISMS OF ROCKFLOW'S DCF MODEL 246
A. Slovakia's Nine Key Criticisms of the Inputs to the DCF Model are Misconceived 246
1. Slovakia is wrong to contest Mr Atkinson's opinion that the Licence areas are "*on trend*" with Polish oil fields 246

2. Slovakia has exaggerated the impact of Dr Moy's calculation error in relation to oil leads 249
3. Slovakia's criticisms of Mr Atkinson's probabilistic estimates for PIIP are baseless 250
4. Slovakia is wrong to contend that Mr Atkinson's estimates of GCOS are "*inflated*" 251
5. Mr Atkinson's calculations of oil prospects are not "*overstated by a factor of 30*" 253
6. Dr Moy's material balance calculations are not "*overstated by a factor of 20*" in comparison with Polish oil fields 254
7. Mr Howard's optimal well count analysis is not "*15 times higher*" than the best recorded Polish wells 255
8. Well counts for the same leads are consistent as between Dr Moy's report and Mr Howard's report 256
9. Mr Howard's ECOS calculations for each well are not greater than the GCOS for each well 257

B. Slovakia's Seven Subsidiary Criticisms of the DCF Model are Misconceived 257

1. Rockflow's analyses are not contradicted by Discovery's contemporaneous documents 257
2. Slovakia's criticisms of Rockflow's resource classification are unfounded 259
3. Dr Moy has presented a revised development plan, taking into account Dr Longman's comments 261
4. Slovakia's criticisms of Discovery's anticipated costs are unfounded 261
5. It is reasonable to assume that Discovery would have been able to finance the project 262
6. It is reasonable to assume that AOG would have reacquired Licence areas which were reduced or relinquished 265
7. It is reasonable to assume that Discovery would have been granted all additional permits and approvals by Slovakia 267

ANNEX 3: GLOSSARY OF DEFINED TERMS 271
ANNEX 4: DRAMATIS PERSONAE 279

I. OVERVIEW

1. This Reply is submitted by the Claimant, Discovery Global LLC ("**Discovery**"), pursuant to the procedural timetable set out in Annex B of Procedural Order No. 1 (as amended), in response to the Counter-Memorial dated 31 March 2023 submitted by the Respondent, the Slovak Republic ("**Slovakia**").

2. In its Counter-Memorial, Slovakia seeks to pin the blame for the failure of the project entirely on Discovery. The opposite is true. The reason why the project failed was because of Slovakia's persistent conduct, in breach of the BIT, which prevented Discovery's subsidiary (AOG) from drilling any oil and gas wells in Slovakia and completely wiped out the value of Discovery's investment.

3. Throughout the project, Discovery was subjected to torrent of regulatory inconsistency, arbitrary decision-making, and discriminatory treatment at the hands of multiple Slovak State organs, as well as measures which violated Discovery's legitimate expectations and which indirectly expropriated Discovery's investment. The measures imposed by Slovakia—as explained in the Memorial and elaborated in this Reply—fall into three categories and may be summarised as follows:

    (1) With respect to Slovakia's conduct in relation to the Smilno drilling site:

        (a) The Slovak Police refused to acknowledge that the Road was publicly accessible despite the fact that official maps published by Slovakia and statements issued by the Smilno Municipality confirmed that the Road was publicly accessible. The Police's conduct prevented AOG from using the Road to access the drilling site. The Police also refused to remove vehicles and activists who persistently and illegally blocked the Road and prevented AOG from accessing the drilling site during multiple drilling attempts. Finally, the Police refused to approve road signs which would have acknowledged that the Road was publicly accessible, despite having initially promised to approve the scheme.

        (b) The Slovak Judiciary granted (and then upheld on appeal) an Interim Injunction which prevented AOG from using the publicly accessible

Road to access the drilling site at Smilno. These decisions were inexplicable, not least because (*i*) the conditions for granting an interim injunction were not even made out and (*ii*) by their decisions, the Slovak Judiciary prevented AOG from using a publicly accessible Road. The consequence was that AOG was prevented from accessing the Smilno site via the Road to drill its exploration well.

(c) What is more, a State Prosecutor abused her authority by intervening in a civil dispute between AOG and Mrs Varjanová and instructing the Slovak Police to cancel their policing operation at Smilno. As a result, the activists and their vehicles continued to block the Road and AOG was prevented from accessing the drilling site and from completing its exploration activities at Smilno.

(2) With respect to Slovakia's conduct relating to the <u>Krivá Ol'ka</u> drilling site:

(a) Despite having previously approved a Lease over State-owned forestry land between AOG and State Forestry—which AOG needed to use to carry out exploratory drilling—the MoA refused to approve an extension of the Lease. The reasons given by the Minister of Agriculture for refusing to grant approval were a pretext for the real reason, namely the personal prejudice held by the Head of the Service Office of the MoA (Mr Regec) against AOG and his attempts to score political "*points*" by preventing AOG from carrying out exploration. The MoA's decision—which was taken after 6 months of delay—prevented AOG from drilling an exploration well at Krivá Ol'ka.

(b) The MoA's decision left AOG with no other option but to apply to the MoE to obtain a compulsory access order over the same State-owned forestry land under Article 29 of the Geology Act. The MoE's legal department was finalising the wording of a decision granting an order in favour of AOG, but then at the very last moment the legal department received an instruction from higher up in the MoE to decide against AOG. AOG was therefore rebuffed by the MoE's refusal to grant such

an order. The MoE's decision—which was taken after a further 7 months of delay—prevented AOG from drilling an exploration well at Krivá Ol'ka. After the decision was subsequently quashed, the MoE unjustifiably suspended any further consideration of the application despite AOG's protests. AOG was thereby prevented from drilling an exploration well at Krivá Ol'ka.

(3) With respect to Slovakia's conduct relating to the EIA process:

(a) The District Offices ordered AOG to perform a Full EIA before AOG was permitted to drill any exploration wells on any Licences. The decisions by the District Offices to order a Full EIA were not based upon any rational evidential foundation, involved an arbitrary application of Slovak law and were inconsistent with numerous earlier statements attributable to Slovakia which had concluded that AOG's exploration activities were not likely to have any significant adverse effect on the environment. The purpose and effect of the decisions was to delay the project by many more years (by requiring a Full EIA) which—taken together with the delays caused by Slovakia's earlier conduct—rendered the project economically unviable.

(b) What is more, the MoE imposed a new condition on one of AOG's Licences which required AOG to perform a Preliminary EIA before drilling any exploration wells. Again, this decision was not based upon any rational evidential foundation, was inconsistent with numerous earlier statements attributable to Slovakia and involved an arbitrary application of Slovak law. Again, the purpose and effect of the decision was to delay the project by many more years (by requiring Preliminary EIAs and, inevitably, Full EIAs for each exploration well) which—taken together with the delays caused by Slovakia's earlier conduct—also rendered the project economically unviable.

4. Viewed individually and/or collectively, these measures breached Slovakia's obligations to Discovery under the BIT and completely wiped out the value of

Discovery's investment, as explained in Section V below. Indeed, the measures prevented AOG from performing its basic obligation to Slovakia under the Licences, namely to complete its geological exploration. But for Slovakia's conduct, AOG would have drilled multiple wells and those wells would have yielded substantial discoveries of oil and gas which AOG and Discovery would have exploited for large commercial gain.

5. The monetary gains Discovery stood to derive from the project were substantial, as modelled in the Rockflow expert reports. Significant gains would also have accrued to Slovakia by: (*i*) improving its energy security and reducing its near-total dependence on Russian imports of oil and gas;[1] (*ii*) boosting local employment; and (*iii*) earning significant royalties and taxes which would have been payable by AOG to Slovakia from the production of hydrocarbons. Indeed, based on the P50 development case in Rockflow's DCF model,[2] the Slovak State would have earned in excess of ***USD 677 million*** in royalties and taxes during the project.[3] The foregoing matters are relevant in two respects:

   (1) to illustrate the lost opportunity to Slovakia (and its citizens) as a direct result of Slovakia's conduct in thwarting Discovery's project; and

   (2) to show that it is inherently likely that Slovakia would have supported Discovery's project but for its conduct in breach of the BIT.

6. As explained in Section VII below, there are four alternative options available to the Tribunal to quantify the compensation due to Discovery as a result of Slovakia's breaches:

   (1) Discovery's primary case is that the Tribunal should award compensation using an income-based valuation methodology (*i.e.* Rockflow's DCF model). Slovakia and its quantum experts have raised a barrage of criticisms to the DCF model. These criticisms are unfounded. Indeed, Slovakia's quantum

---

1 Memorial at [6]-[11]; Fraser 2 at [27].

2 The P50 development case represents the most likely volumes of hydrocarbons which would have been discovered and extracted from the Licence areas: see Howard 2 at [211] *et seq*.

3 This figure is expressed in 2024 real-terms: see Howard 2 at [307].

experts have made many mistakes, and their overall conclusions are unsound. Nevertheless, Rockflow have made certain adjustments to the inputs of the DCF model since the date of the Memorial. The most significant adjustment arises from a large drop in market price forecasts for oil and gas since the date of the Memorial, as well as the recent imposition by Slovakia of a severe windfall tax on energy companies.[4] These adjustments mean that the revised sum claimed by Discovery on its primary case is: (*i*) USD 133,054,614 (the output of Rockflow's DCF model); plus (*ii*) an additional USD 1,965,198.39 in respect of the sum payable by Discovery to Akard (the "**Akard Sum**").

(2) In the alternative, the Tribunal should order Slovakia to pay compensation to Discovery on a loss of opportunity basis. Slovakia's breaches of the BIT deprived Discovery of a valuable commercial opportunity to earn substantial profits from the exploitation of the Licence areas. Even if the Tribunal is not persuaded to award the full amount claimed by Discovery on its primary case using the DCF model, the Tribunal can derive assistance from the Rockflow reports to quantify the value of Discovery's lost opportunity. On this alternative case, Discovery seeks compensation: (*i*) in an amount not less than USD 53 million for the loss of a valuable commercial opportunity to earn profits from the exploitation of the Licence areas; plus (*ii*) the Akard Sum.

(3) In the further alternative, the Tribunal should adopt a market-based valuation methodology. Slovakia's quantum experts advocate for this methodology, although they have made basic errors in their analysis. Mr Howard disagrees that the companies or transactions identified by Slovakia's experts are comparable. But if the Tribunal is persuaded to adopt a market-based approach, then after correcting the errors which Slovakia's experts have made (as Mr Howard has done), this would lead to an award of compensation of either: (*i*) USD 36 million (using a comparable companies approach) plus the Akard Sum plus pre-award interest; or (*ii*) alternatively, USD 5.01 million (using a comparable transaction approach).

---

[4] See [427] *et seq* below.

(4) In the further alternative, and only if the Tribunal is not persuaded to adopt any of the approaches summarised at (1)-(3) above, the Tribunal should order Slovakia to compensate Discovery for the sunk costs incurred in connection with the project in an amount not less than USD 6,169,761 (inclusive of pre-award interest as at the date of this Reply).

7. Slovakia has raised specious objections to the Tribunal's jurisdiction and to admissibility. No jurisdictional objections were raised by Slovakia prior to the commencement of this arbitration, despite the consultations and communications which took place between the parties. The belated appearance of these objections in the Counter-Memorial speaks volumes as to their merit. Each objection should be dismissed for the reasons explained in Section III below.

8. There are many missing witnesses on Slovakia's side, namely the key decision-makers within the MoE, the MoA, the Police and the District Offices who were responsible for the impugned measures summarised at [3] above. It is clear that Slovakia has chosen not to submit witness statements from these key decision-makers for tactical reasons because Slovakia knows their testimony (if subjected to scrutiny under cross-examination) would not assist Slovakia's case.[5]

9. There are also gaping holes in Slovakia's disclosure. In response to Discovery's requests and Procedural Order No. 3, Slovakia produced a sum total of ***40 documents***. By contrast, Discovery disclosed over ***2,000 documents***. Slovakia has failed to provide a satisfactory explanation for its woeful disclosure, as explained in detail in Section II below. It is implausible to suppose that Slovakia has only 40 internal documents on a project of this scale where Discovery interacted with multiple Slovak organs over many years. Discovery therefore invites the Tribunal to draw certain adverse inferences against Slovakia.[6]

10. On causation, the direct cause of the project's failure and Discovery's losses was Slovakia's conduct. Slovakia is wrong to contend that Discovery's project failed because of supposedly independent reasons. In particular, Slovakia is wrong to

[5] See [109], [121], [138(4)], [183] below.

[6] See [97], [109], [124], [132], [138(4)], [183] below.

contend that Discovery/AOG lacked sufficient capital.[7] Slovakia is also wrong to assert that AOG failed to obtain a social licence to operate ("**SLO**").[8] Even on Slovakia's own case, the concept of a SLO has no basis in either domestic Slovak law or in international law.[9] AOG was not obliged to obtain a SLO and Slovakia cannot rely on any such alleged failure to excuse its breaches of the BIT. In any event, the record shows that Discovery and AOG engaged extensively with local communities throughout the project and received support from local mayors, church leaders and many of the citizens at the drilling locations. Slovakia's assertions that AOG "*ran roughshod over the local community*" and showed a "*brazen disregard for the local community*" are inaccurate and wrong.[10]

* * *

11. Discovery's Reply is accompanied by:

    (1) Exhibits **C-244** to **C-426**.

    (2) Legal Authorities **CL-070** to **CL-100**.

    (3) The following witness statements:

        (a) The second witness statement of Michael Lewis ("**Lewis 2**").

        (b) The second witness statement of Alexander Fraser ("**Fraser 2**").

        (c) The first witness statement of Vladimír Baran ("**Baran 1**"). Mr Baran has been the Mayor of Smilno since 2014 and he has lived in Smilno for his entire life.

    (4) The following expert reports:

        (a) The second expert legal opinion of Professor JUDr. Marek Števček on

---

7 Counter-Memorial at [21]-[24]. See further at [391]-[396] below.

8 Counter-Memorial at [11]-[20]. See further at [397]-[401] below.

9 Slovakia describes a SLO as "an unwritten social contract" (Counter-Memorial at [12], [444]).

10 Counter-Memorial at [14].

certain issues of Slovak law ("**Stevček 2**").

(b) The second expert report of Mr Alan Atkinson ("**Atkinson 2**")

(c) The second expert report of Dr Simon Moy ("**Moy 2**").[11]

(d) The second expert report of Mr Colin Howard ("**Howard 2**").

12. This Reply is structured as follows:

(1) **Section II** addresses the facts.

(2) **Section III** addresses jurisdiction/admissibility.

(3) **Section IV** addresses attribution.

(4) **Section V** addresses liability.

(5) **Section VI** addresses causation.

(6) **Section VII** addresses quantum.

(7) **Section VIII** sets out Discovery's request for relief.

(8) **Annex 1** summarises the evidence of AOG's community engagement.

(9) **Annex 2** responds to the detailed criticisms raised by Slovakia and its quantum experts to Rockflow's DCF model.

(10) **Annex 3** contains a glossary of defined terms used by Discovery/Slovakia.

(11) **Annex 4** contains a dramatis personae.

---

[11] Since the date of his first report, Dr Moy has moved from Rockflow to Xodus Group, a global energy consultancy serving the energy sector. For ease of reference, Discovery continues to refer herein to Mr Atkinson, Dr Moy and Mr Howard as the Rockflow experts.

II. THE FACTS

A. GENERAL THEMES

13. Before responding to Slovakia's description of the facts, Discovery deals with certain common themes which appear throughout the Counter-Memorial, namely:

    (1) Slovakia's description of the domestic legislative framework for oil and gas exploration and extraction in Slovakia;

    (2) Slovakia's incorrect assertion that AOG allegedly understood that it only needed an Exploration Area Licence to carry out exploratory drilling;

    (3) Slovakia's partial description of AOG's rights and obligations under the Exploration Area Licences; and

    (4) Slovakia's inaccurate portrayal of AOG's engagement with local communities throughout the project.

1. The domestic legislative framework for oil and gas exploration and extraction in Slovakia

14. Broadly speaking, Discovery accepts the accuracy of Slovakia's summary of the domestic legislative framework for oil and gas exploration and extraction, as set out in the table in the Counter-Memorial at [33]. As would be expected, the list of permits and approvals is "*similar but not identical to the upstream oil & gas industry permitting requirements of many other countries*", particularly in Europe.[12] However, Discovery emphasises the following points for the avoidance of doubt.

15. Discovery complied with each of steps (a)-(f) in the table in respect of its exploration activities.[13] As to step (g), the amendment to the EIA Act, which came into effect on 1 January 2017, did not apply to AOG's exploration activities, as

---

12 Fraser 2 at [6].

13 Lewis 2 at [22].

Discovery has explained in its Memorial and further below.[14] As to step (h):

(1) AOG understood that it needed to obtain a separate permit if it planned to use explosives during the testing of any exploration well. However, as explained in the Memorial and in this Reply, Slovakia's conduct prevented AOG from drilling any exploration wells and hence AOG did not reach the stage where it needed to apply for such a permit.

(2) AOG also understood that it needed to obtain a separate permit under Act No. 543/2002 (the "**Nature Protection Act**") to drill any exploration well in an area protected by the Nature Protection Act.[15] Indeed, the District Offices granted permits to AOG in respect of the Krivá Ol'ka well (the only proposed well site which was located in a NATURA 2000 protected area).[16]

16. As to step (i), save for one isolated incident, AOG provided the relevant notifications to the District Mining Offices.[17] As to steps (j)-(l), as explained in the Memorial and in this Reply, Slovakia's conduct prevented AOG from drilling any exploration wells and hence AOG did not reach these stages.

17. As to steps (m)-(s), these only applied to oil and gas exploitation after the completion of geological exploration. Slovakia's conduct also prevented AOG from exploiting the blocks covered by the Exploration Area Licences. In this regard, Discovery emphasises the following points:

(1) Under Articles 24-25 of the Geology Act, the holder of an Exploration Area Licence has a priority right to move from exploration to the production of hydrocarbons pursuant to the grant of a Mining Area Licence.[18] Slovakia does not dispute this proposition in the Counter-Memorial.

---

[14] Memorial at [159] *et seq*. See also [149]-[158] below.

[15] Nature Protection Act, Articles 13(2)(f) and 14(2)(f), **Exhibit R-043**.

[16] See *e.g.* Expert Opinion of the District Office in Prešov, 16 January 2015, **Exhibit C-265**; Statement of the District Office in Medzilaborce, 23 January 2015, **Exhibit C-266**.

[17] Lewis 2 at [22(f)].

[18] Memorial at [26], [30]-[31].

(2) The reason why Slovak law confers this priority right upon the holder of an Exploration Area Licence is to incentivise companies to engage in oil and gas exploration in order to assist Slovakia to achieve its domestic policy goal of diversifying its primary energy sources and improving its energy security.[19]

(3) If the grant of a Mining Area Licence was subject to a competitive process by rival parties, companies would have no incentive to engage in oil and gas exploration in the first place (which involves a substantial investment). The regime under Articles 24-25 of the Geology Act was set up precisely to give companies like Discovery the confidence to invest in oil and gas exploration projects so they would be able to reap the rewards of any discoveries which were made by being granted a Mining Area Licence in due course.

2. AOG understood that it needed to acquire certain permits and consents in order to carry out exploration activities

18. At various points in the Counter-Memorial,[20] Slovakia mischaracterises Mr Lewis's testimony and asserts that AOG allegedly understood that it only needed an Exploration Area Licence (and no other permits or consents) in order to carry out exploratory drilling. This is incorrect and is not what Mr Lewis said:

(1) The passage of Mr Lewis' first statement on which Slovakia relies was made in the context of his discussion about the EIA process and the amendment to the EIA Act which came into effect on 1 January 2017. What Mr Lewis said (in this context) was that AOG was advised that the Exploration Area Licences did not require AOG to undertake "*any further procedures such as a preliminary EIA process*".[21] Mr Lewis did not say that the Exploration Area Licences *alone* gave AOG the automatic right to drill an exploratory well.

(2) Moreover, Mr Lewis confirms in his second statement that AOG understood that an Exploration Area Licence did not confer an automatic right to drill and that AOG needed to obtain either: (*i*) landowner consent; or (*ii*) a

---

19 Memorial at [8].

20 Counter-Memorial at [2], [14].

21 Lewis 1 at [79].

compulsory access order under Article 29 of the Geology Act.[22] Mr Lewis' testimony is supported by numerous documents which show that AOG understood that certain permits and consents (in addition to the Exploration Area Licences) were required in order to carry out exploratory drilling.[23]

3. AOG had an obligation to carry out the "*geological task*" under the Exploration Area Licences

19. Slovakia states the Exploration Area Licences "*granted AOG the* <u>*right*</u> *to explore for oil and gas*" (emphasis added).[24] This is only a partial description of the Exploration Area Licences. The Exploration Area Licences also imposed an express <u>obligation</u> upon AOG to carry out the "*geological task*" (*i.e.* explore for oil and gas), as emphasised by the imperative word "*shall*" in each of the Licences. This is important when the Tribunal comes to examine Discovery's legitimate expectations based upon the Licences.[25] For example, the 2006 Licences stated:[26]

---

22 Lewis 2 at [21].

23 See *e.g.* OCM Minutes dated 10 April 2014, **Exhibit C-58**, p. 2 ("Mr. Lewis stated that he hoped drilling permits could be obtained within 90 to 180 days […]"); Permit from Bardejov District Office, 4 November 2014, **Exhibit C-64** (to enable agricultural land at Smilno to be used for a non-agricultural purpose, *i.e.* geological exploration); Permit from Humenné District Office, 13 January 2015, **Exhibit R-097** (to enable AOG to use State Forestry land at Krivá Ol'ka to be used for a non-forestry purpose, *i.e.* geological exploration); Permit from Bardejov District Office, 17 June 2015, **Exhibit C-77** (to enable agricultural land at Smilno to be used for a non-agricultural purpose, *i.e.* geological exploration); Email from Michael Lewis to Partners, 24 June 2015, **Exhibit C-78**, p. 3 (attaching document setting out AOG's estimated timeline to complete "permitting" for each well); Consent from MoA, 19 October 2015, **Exhibit C-73** (approving the Lease between AOG and State Forestry in respect of the Krivá Ol'ka site).

24 Counter-Memorial at [2], [4].

25 See [22] and [287] *et seq* below.

26 **Exhibit R-014** / **C-2** (Svidník); **Exhibit R-030** / **C-3** (Medzilaborce); **Exhibit R-031** / **C-4** (Snina). The same language was used in the 2010 Licences— **Exhibit C-5** (Svidník); **Exhibit C-6** (Medzilaborce); **Exhibit C-7** (Snina)—as well as the 2014 Licences—**Exhibit C-8** (Svidník); **Exhibit C-9** (Medzilaborce); **Exhibit C-10** (Snina)—and the 2016 Licences— **Exhibit C-12** (Svidník); **Exhibit C-13** (Medzilaborce); **Exhibit C-14** (Snina).

> **2. Conditions for carrying out geological work**
>
> The Exploration Area Holder shall:
>
> 1. carry out geological work in accordance with the project of the geological task, which must be prepared in accordance with the Geology Act and other legislation
> 2. pursuant to Article 14 of the Geology Act, prepare a final report and, pursuant to Article 16(2) of the Geology Act, submit a separate part of the final report with the calculation of reserves to the Ministry for review and approval
> 3. pursuant to Article 17 of the Geology Act, submit the approved final report to the Dionýz Štúr State Geological Institute Bratislava in the prescribed form for permanent retention

20. Pursuant to the Geology Act, the "*geological task*" which AOG was obliged to carry out comprised: (*i*) preparing a project design (to carry out the geological exploration); (*ii*) investigating the geological task (by carrying out geological exploration) to achieve the completion of the task "*as quickly and efficiently as possible*"; and (*iii*) preparing and submitting a "*final report*" calculating any reserves discovered during the geological task.[27]

21. Throughout the project—and in particular when AOG sought consent from State Forestry to extend the Lease at Krivá O'lka[28] and when AOG applied to the MoE for a compulsory access order under Article 29 of the Geology Act[29]—AOG made the point that it had an obligation to Slovakia under the express terms of the Exploration Area Licences to carry out its geological exploration.

22. In the light of AOG's express obligation under the Licences, Discovery legitimately expected that AOG would not be prevented from completing its geological exploration, across all three blocks, and without any relevant organ of the Slovak State objecting to or preventing such geological exploration.[30]

---

27 Memorial at [23].

28 Letter from AOG to State Forestry, 17 January 2016, **Exhibit C-118** ("Interruption of work would bring significant financial losses to our company and, above all, **the impossibility of performing the obligation to the Slovak Republic** represented by the ME SR and threaten the investment of foreign owners which is protected by international law"), emphasis added.

29 AOG Application to the MoE under Article 29 of the Geology Act, 30 August 2016, **Exhibit C-143**, p. 3 ("As part of the Decision on determination of the surveyed area, the petitioner undertook to conduct a geological survey in order to obtain information on the existence of hydrocarbon reserves in the surveyed area. **This obligation may be fulfilled by the petitioner only if it is able to carry out geological work** for this purpose in the appropriate parts of the surveyed area"), emphasis added.

30 Memorial at [226]. See further at [268] *et seq* below.

4. Discovery engaged extensively with local communities throughout the project

23. Slovakia is wrong to assert that Discovery failed to engage with local communities and that this was the cause of the project's failure.[31] Slovakia goes as far as to assert that Discovery/AOG "*ran roughshod over the local community*", showed a "*brazen disregard for the local community*", and "*demonstrated total disregard for the local community*".[32] The record does not support Slovakia's assertions in this regard.

24. As explained in the Memorial[33] and by Mr Lewis and Mr Fraser,[34] Discovery/AOG engaged extensively with local communities throughout the project. Mr Lewis and Mr Fraser give further examples in their second witness statements and respond to the evidence given on this topic by Mrs Varjanová and Mr Leško.[35] Moreover, in Annex 1 of this Reply, Discovery summarises the extensive evidence of community engagement undertaken by Discovery/AOG throughout the project.

B. AOG's Operations Prior to its Acquisition by Discovery in 2014

25. Having addressed these four general themes, Discovery now responds to the remainder of Slovakia's description of the factual background, beginning with the events prior to Discovery's acquisition of AOG in 2014.

26. As would be expected in the early stages of any project to explore for oil and gas deposits, Aurelian undertook significant documentary research in order to ascertain which parts of the Licence areas (which covered some 2,442 km^2) would be the most prospective. From 2008 onwards, it is common ground that significant work took place by Aurelian/AOG acquiring and processing seismic surveys.[36]

27. Slovakia is wrong to suggest that in this early period: (*i*) Aurelian/AOG did not inform local communities about its activities; (*ii*) Aurelian/AOG did not identify any specific drilling locations; and as a result (*iii*) Aurelian suffered a drop in its

---

31 Counter-Memorial at [11]-[14], [450]-[455].

32 Counter-Memorial at [14], [450].

33 Memorial at [94], [103]-[104], [181]-[183].

34 Lewis 1 at [39]; Fraser 1 at [34].

35 Lewis 2 at [25]-[28]; Fraser 2 at [40]-[51]. See also Baran 1 at [14]-[16], [31].

36 Counter-Memorial at [38]-[39]. See also Slovakia 2010 Survey, 17 February 2011, **Exhibit C-37**.

share price.[37] Discovery addresses each point in turn below.

1. Aurelian/AOG informed local communities about its activities

28. Slovakia asserts that Mrs Varjanová and Mr Leško have testified that Aurelian/AOG did not make meaningful efforts to inform local inhabitants about its planned activities in 2008-2010.[38] Yet Mrs Varjanová says nothing about this time period in her witness statement; her evidence instead focuses on the period from 2015 onwards.[39] Mr Leško asserts that he first learned about AOG in around 2008 through his involvement in VLK and its chairperson (Mr Juraj Lukáč).[40] However, Mr Leško's recollection of events during this early period is hazy and is clearly incorrect.[41] In any event, Mr Leško accepts that VLK had taken an active interest in Aurelian/AOG's activities for some time.[42]

29. Mr Leško alleges that AOG failed to inform local residents and that "*many people were concerned about shale gas, fracking, and use of dangerous chemicals*".[43] Yet Slovakia has produced a media article from 2012 which contradicts his testimony.[44] The article noted that a plane hired by AOG had been "*flying above a large area from Bardejov to Nová Sedlica for weeks*" as part of a "*six-year survey by which the company wants to localize rich deposits of oil and gas*".[45] The article also quoted AOG's Country Manager (Mr Benada) who said that: "*they have been informing the authorities and local governments about everything*".[46] The article also stated:[47]

> "The company refuses that it has been searching for shale gas in Slovakia that is extracted from a great depth by hydraulic fracking. It is a relatively new method that has many opponents worldwide. 'We are searching for conventional deposits,' Benada assures."

---

37 Counter-Memorial at [40]-[52].
38 Counter-Memorial at [40]-[41].
39 Varjanová 1 at [9].
40 Leško 1 at [7].
41 See *e.g.* Lewis 2 at [30]-[32].
42 Leško 1 at [7].
43 Leško 1 at [20].
44 Pilots Search Oil in Eastern Slovakia, 30 August 2012, **Exhibit R-034**, p. 2.
45 *Ibid.*
46 *Ibid.*
47 *Ibid.*

30. It is therefore clear that: (*i*) AOG's exploration activities in Slovakia over this early period were being discussed in the local media; (*ii*) communities and organisations (including VLK) were well aware of the seismic surveys and had taken an active interest in AOG's activities for some time; and (*iii*) AOG had no intention to search for shale gas or engage in fracking.

2. Aurelian/AOG identified specific drilling locations in Slovakia

31. Slovakia is also wrong to suggest that (*i*) Aurelian/AOG had not identified any drilling locations by 2010-2011; and (*ii*) there was growing pessimism that oil and gas deposits would be discovered.[48] Contemporaneous documents establish that: (*i*) specific prospects and leads had been identified by Aurelian/AOG as a result of the seismic surveys and analysis undertaken from 2008 onwards; and (*ii*) Aurelian (a listed company on the London Stock Exchange) had announced significant prospective resources in Slovakia to the market. For example:

    (1) An Aurelian presentation dated September 2010 contained an inventory of "*prospects and leads*" which it had identified in Slovakia. This inventory included: the Smilno prospect (located on the Svidník block); the Medzilaborce-D, E, F, G and H leads (each located on the Medzilaborce block); the Snina-I, J and K leads (each located on the Snina block); and the Svidník-B and C leads (each located on the Svidník block).[49]

    (2) A Macquarie Equities Research briefing paper dated April 2010 summarised Aurelian's exploration activities in Central Europe and the prospective resource estimates in Aurelian's portfolio. The briefing paper stated that independent experts—the well-known energy consultancy Gaffney, Cline & Associates—had "*materially increase[d]*" Aurelian's "*contingent and prospective resource estimates*", noting that "*[s]ignificant prospective resources include 408 bcf net in Slovakia*".[50] The paper noted that this resource estimate was based on the Smilno prospect.[51] However, Aurelian's

---

48 Counter-Memorial at [39], [48].

49 Aurelian Prospects and Leads Inventory 2010, 7 September 2010, **Exhibit C-35**.

50 Macquarie Equities Research Briefing Paper, 13 April 2010, **Exhibit C-247**, p. 1.

51 Macquarie Equities Research Briefing Paper, 13 April 2010, **Exhibit C-247**, p. 5 and p. 16.

"*most significant current asset*" was the Siekierki well in Poland which was expected to begin drilling operations in June 2010 with results later in 2010.[52]

(3) By 2011, Aurelian had also identified a well location at Šarišské Čierne on the Svidník block. This discovery was reported in JKX's 2012 Annual Report which stated: "*[t]he well is currently planned to be drilled to more than 3,500m with a [sic] multiple targets identified in this sub-thrust play*".[53]

(4) Slovakia refers to an Aurelian presentation from February 2013 which described the seismic quality as "*difficult*".[54] However, the same presentation also identified reasons why there was still "*Potential Value*" in carrying exploration activities in Slovakia, including the fact that the Licence areas were situated in an "*[o]il & gas prone area*" and that there was "*[p]otential for material shallow oil prospects*".[55]

(5) Finally, a report was prepared for Aurelian/AOG by consultants (Bridgeporth) in March 2013 to interpret existing seismic data, provide information for subsequent exploration and "*[d]etermine the prospectivity of the three blocks*".[56] Bridgeporth concluded that "*[a] number of leads and prospects are located within the Svidník block*".[57] This included the Smilno site which AOG subsequently attempted to drill.[58] Further leads and prospects were also identified by Bridgeporth on the Medzilaborce and Snina blocks.[59]

3. The drop in Aurelian's share price in 2011 was not attributable to the alleged failure to identify drilling locations in Slovakia

32. Slovakia asserts that Aurelian/AOG's failure to identify any drilling locations

---

52 Macquarie Equities Research Briefing Paper, 13 April 2010, **Exhibit C-247**, pp. 1-2 and p. 7.

53 JKX Oil & Gas plc Annual Report, 2012, **Exhibit C-42**, p. 64.

54 Counter-Memorial at [52], referring to Slovakia Project Update, February 2013 **Exhibit C-45**, p. 32.

55 Slovakia Project Update, February 2013 **Exhibit C-45**, p. 32.

56 Bridgeporth Report, March 2013, **Exhibit C-46**, pp. 11 and 76.

57 Bridgeporth Report, March 2013, **Exhibit C-46**, p. 81.

58 Bridgeporth Report, March 2013, **Exhibit C-46**, p. 82; Bridgeporth Presentation, March 2013 **Exhibit C-47**, p. 57.

59 Bridgeporth Report, March 2013, **Exhibit C-46**, pp. 82-85.

between 2010-2014 "*caused a massive drop of its share price*".[60] Discovery has already explained above that Aurelian/AOG *did* identify drilling locations in Slovakia. In any event, the drop in Aurelian's share price in 2011 was not attributable to any alleged failure to identify drilling locations in Slovakia. The drop was caused by poor results in Aurelian's operations in Poland. In particular:

(1) Aurelian's share price dropped because of disappointment over the poor results at its flagship Siekierki project in Poland at the end of 2011. Flow tests undertaken by Aurelian indicated recoveries of between 4-8 bcf of gas, which was significantly lower than the 16-20 bcf range which it had previously announced to the market.[61]

(2) Aurelian's next biggest project was the Niebieszczany well on the Bieszczady licence in the Polish Carpathians, targeting 196mmbo gross, 49 mmbo net at 4000m depth. The operator was the Polish State oil company, PGNiG. However, in late 2011, PGNiG failed to drill the well to its target depth.[62]

(3) Aurelian had therefore over-promoted the company's prospects in Poland. When the Siekierki and (to a lesser extent) Bieszczady projects later disappointed, this triggered a drop in Aurelian's share price, forcing management effectively to put the company up for sale in early 2012. This was a well-known story in the regional oil and gas sector at the time.

(4) Prior to the share price drop, analysts had attributed only a small proportion of Aurelian's net asset value to its prospects in Slovakia (in comparison to the much larger interests held by Aurelian in Poland, in particular the Siekierki project).[63] Moreover, no exploratory wells had been drilled in Slovakia by Aurelian/AOG by 2011-2012. Slovakia is therefore wrong to suggest that the

---

60 Counter-Memorial at [47]-[53].

61 See *e.g.* Investors' Chronicle, *Aurelian appraises prospects for Siekierki*, 7 October 2011, **Exhibit C-249**; Oil & Gas Journal, *Poland: Siekierki tight gas appraisal well falls short*, 16 September 2011, **Exhibit C-248**.

62 Aurelian Corporate Presentation, 1 January 2012, **Exhibit C-250**, p. 32.

63 See *e.g.* Macquarie Equities Research Briefing Paper, 13 April 2010, **Exhibit C-247**, p. 6 (Fig 6 – Aurelian sum-of-parts breakdown).

drop in Aurelian's share price was attributable to any alleged failure to identify drilling locations in Slovakia (as opposed to poor results in Poland).

C. Discovery's Acquisition of AOG in 2014

1. Discovery's acquisition of AOG and the Overriding Royalty

33. Discovery has already described the facts which led to its acquisition of AOG in March 2014.[64] Slovakia points out that the consideration for the transaction comprised both: (*i*) the payment of €153,054 to acquire AOG; and (*ii*) the grant by AOG of an overriding royalty to Aurelian (the "**Royalty**").[65]

34. As Mr Lewis explains,[66] the Royalty granted by AOG to Aurelian was 7% net (3.5% gross) of any petroleum recovered from the Licence areas and was payable from AOG's 50% share of gross revenues, after the payment of Government royalties and VAT but before any other deductions, set-offs or any other taxes.[67]

35. The contingent obligations which AOG assumed under the Royalty (if petroleum was recovered from the License areas) were therefore very substantial. Indeed, the rate of 7% net payable by AOG to Aurelian under the Royalty exceeded the royalty payable by AOG to the Slovak Government (of 5%) under the Mining Act in respect of any oil or natural gas recovered from the License areas.[68]

36. In December 2013, when Discovery agreed commercial terms to acquire AOG from San Leon, crude oil was trading at over US$100 per barrel.[69] By January 2015, however, the oil price had fallen to approximately US$40 per barrel and this "*completely changed investor sentiment in the sector*".[70] Moreover, by the end of 2014, a combination of factors placed Discovery in a unique position to reacquire the Royalty from San Leon for a "*bargain price*" and as part of a "*fire sale*" by San

---

64 Memorial at [47]-[56].
65 Counter-Memorial at [55].
66 Lewis 2 at [49]-[54]. See also Lewis 1 at [16].
67 Gross Overriding Royalty Deed, 24 March 2014, Clause 3.1 **Exhibit C-59**.
68 Howard 1 at [206]-[208]; Baker Tilly Memo, 15 January 2015, **Exhibit CH-020**, p. 2.
69 Lewis 2 at [50].
70 Lewis 2 at [50].

Leon.[71] In this regard:

(1) Between 2010-2011, Aurelian had suffered a series of poor results especially in Poland, as explained at [32] above.

(2) By the end of 2014, San Leon had completed four separate transactions[72] and held a "*large and unfocused portfolio, with licences in seven different countries and still no production*".[73]

(3) By the end of 2014, San Leon was in a dire financial position, which was well known to the market. San Leon's 2014 Annual Report recorded that:

(a) San Leon's 2014 revenues were €2.4 million and it had made an overall loss in 2014 of €34.4 million;[74]

(b) San Leon's cash had declined from €11.4 million (at the end of 2013) to €1.8 million (at the end of 2014);[75]

(c) San Leon's net current assets had declined from €32.8 million[76] (at the end of 2013) to an astonishing *minus* €4.4 million[77] (at the end of 2014).

37. Mr Crow had been the COO of Aurelian from 2011-2013 and had a strong personal relationship with San Leon's CEO, Mr Oisín Fanning. Mr Lewis agreed that Mr Crow would liaise with Mr Fanning to reacquire the Royalty from San Leon for the cheapest price possible.[78]

38. A combination of "*good timing and human resourcefulness*"[79] meant that San Leon agreed to sell the Royalty to Alpha Exploration LLC ("**Alpha**") (a company wholly

71 Lewis 2 at [51]-[52].
72 San Leon Annual Report, 31 December 2014, **Exhibit C-259**, p. 8.
73 Lewis 2 at [50].
74 San Leon Annual Report, 31 December 2014, **Exhibit C-259**, p. 26.
75 San Leon Annual Report, 31 December 2014, **Exhibit C-259**, p. 29.
76 *Ibid*, *i.e.* current assets of €46,846,928 minus current liabilities of €13,997,326 = €32,849,612.
77 *Ibid*, *i.e.* current assets of €13,808,458 minus current liabilities of €18,235,251 = €(4,426,793).
78 Lewis 2 at [52].
79 Lewis 2 at [53].

owned by Mr Lewis) on 30 January 2015 for the sum of £120,000.[80] As Mr Lewis explains, this price was:[81]

> "not based on any valuation of the royalty at the time and it did not represent its real value in the open market. It was, in a sense, a fire sale, and they had no one else they could possibly sell it to. […] In the circumstances, and bearing in mind San Leon's financial position […] it is understandable that Mr Fanning was persuaded by Mr Crow to sell it for what was in effect a nominal sum, as Mr Crow and Discovery had the upper hand."

39. In November 2015, Alpha then assigned the Royalty to AOG and it was cancelled.[82] As a result, AOG was no longer burdened by an obligation to pay a royalty of 3.5% gross of revenues to Aurelian from any petroleum recovered from the Licence areas.

2. In 2014, the MoE extended the Exploration Area Licences

40. Slovakia does not dispute that, in July 2014, the MoE extended the Exploration Area Licences for a further term of two years.[83] Slovakia notes that this extension occurred after Discovery had acquired AOG (in March 2014) and Slovakia points to Mr Lewis' testimony that the Licences "*gave me (ie Discovery) the confidence to invest in Slovakia*".[84] Slovakia has taken Mr Lewis' testimony out of context.

41. Mr Lewis was not referring specifically to the 2014 Licences but to *all* of the Exploration Area Licences and the legitimate expectations Discovery held based upon their terms. What Mr Lewis said was this:[85]

> "The original licence decisions and subsequent extensions issued by the Ministry of Environment were the premise on which we undertook our operations. Without these decisions, we would not have been able to do our exploration work. The decisions gave me (ie Discovery) the confidence to invest in Slovakia. Based on these formal decisions, Discovery legitimately expected that: […]"

42. Mr Lewis also clarifies in his second statement that the Exploration Area Licences (as extended from time to time after March 2014) gave him and Discovery the

---

80 Agreement for Purchase of Overriding Royalty Interest, 30 January 2015, Clause 2, **Exhibit C-67**.
81 Lewis 2 at [52].
82 Assignment of Overriding Royalty Interest, 3 November 2015, **Exhibit C-84**.
83 Memorial at [60]-[62].
84 Counter-Memorial at [57]-[58], referring to Lewis 1 at [19].
85 Lewis 1 at [19].

confidence to *continue* to invest in Slovakia.[86]

43. As explained later in this Reply,[87] Discovery does not accept Slovakia's assertion that Discovery only made one single investment in March 2014 when it acquired AOG. Discovery made continuous investments in each year from 2014 onwards when: (*i*) AOG continued to pay annual Licence fees to Slovakia; (*ii*) AOG received renewals and extensions of the Exploration Area Licences; and (*iii*) Discovery continued to fund AOG's activities in Slovakia. Accordingly:[88]

    (1) The 2006 and 2010 Licences by Slovakia gave Discovery the confidence to make its initial investment in Slovakia in March 2014; and

    (2) The 2014 and 2016 Licences (which post-dated Discovery's initial investment) gave Discovery the confidence to continue to invest.

3. The JOAs and AOG's role and strategy as the Operator

44. As is common for oil and gas projects involving multiple JV partners, the parties entered into Joint Operating Agreements ("**JOAs**") for each Licence pursuant to which AOG was the "*Operator*". In this regard:

    (1) On 28 November 2008 (*i.e.* prior to Discovery's acquisition of AOG in 2014) a set of identical JOAs were initially concluded between AOG's operating subsidiaries—namely, Dukla Oil & Gas s.r.o., Magura Oil & Gas s.r.o. and Radusa Oil & Gas s.r.o. (the "**Operating Subsidiaries**")—and JKX.[89]

    (2) In 2009, following the farm-in by Romgaz into each of the Licences (pursuant to which Romgaz acquired a 25% interest in each of the Licences[90]), the Operating Subsidiaries (together with JKX and Romgaz) entered into

---

86 Lewis 2 at [8].

87 See [212]-[216] below.

88 Lewis 2 at [8].

89 JOA between Magura Oil & Gas s.r.o and JKX Slovakia B.V. relating to the area known as Medzilaborce in the Slovak Republic, 28 November 2008, **Exhibit C-237**; JOA between Radusa Oil & Gas s.r.o and JKX Ondava B.V. relating to the area known as Svidník in the Slovak Republic, 28 November 2008, **Exhibit C-238**; JOA between Dulka Oil & Gas s.r.o and JKX Carpathian B.V. relating to the area known as Snina in the Slovak Republic, 28 November 2008, **Exhibit C-239**.

90 See Memorial at [40].

identical sets of Novation and Amendment Agreements pursuant to which (*inter alia*) Romgaz became a party to each of the JOAs.[91]

(3) In 2010, following the Merger Agreement,[92] the Operating Subsidiaries then merged with their parent company (AOG), after which AOG became the successor of the Operating Subsidiaries and hence a party to the JOAs.

(4) In September 2014, after Discovery had acquired AOG, the Operating Committee (comprising representatives of AOG, JKX and Romgaz) agreed that AOG would be the "*Operator*" under the JOAs.[93]

45. Article 4.2(A) of the JOAs provided:

> "Subject to the terms and conditions of this Agreement, Operator shall have all of the rights, functions and duties of the Parties under the Licence and shall have exclusive charge of and shall conduct all Joint Operations. Operator may employ independent contractors and agents […] in such Joint Operations."

46. The term "*Joint Operations*" was defined by Article 1.40 of the JOAs to mean "*those operations and activities carried out by Operator pursuant to this Agreement, the costs of which are chargeable to all Parties*". Article 4.2(B) of the JOAs also set out a detailed list of obligations which the Operator was obliged to perform in the conduct of Joint Operations, including:

(1) para (6): "*acquire all permits, consents, approvals, and surface or other rights that may be required for or in connection with the conduct of Joint Operations*";

---

91 Novation and Amendment of JOA for area known as Medzilaborce in the Slovak Republic, 1 May 2019, **Exhibit C-241**; Novation and Amendment of JOA for area known as Svidník in the Slovak Republic, 1 May 2019, **Exhibit C-242**; Novation and Amendment of JOA for area known as Snina in the Slovak Republic, 1 May 2019, **Exhibit C-243**.

92 Merger Agreement, 20 July 2010, **Exhibit C-33**, (as discussed in the Memorial at [43]).

93 Minutes of Operating Committee Meeting, 11 September 2014, **Exhibit C-61**. The minutes record that the JOAs would subsequently be amended in this regard. However, no such amendment was in fact made and all parties proceeded on the basis from 2014 onwards that AOG was the Operator. A further JOA was concluded in 2015 between AOG and JKX Slovakia B.V relating to the area known as Pakostov in the Slovak Republic, 16 September 2015, **Exhibit C-240**.

(2) para (8): "*[…] pay and discharge all liabilities and expenses incurred in connection with Joint Operations in a timely manner […]*";

(3) para (10): "*carry out the obligations of the Parties pursuant to the Licence*"; and

(4) para (11): "*have, in accordance with any decisions of the Operating Committee, the exclusive right and obligation to represent the Parties in all dealings with the Government with respect to matters arising under the Licences and Joint Operations*".

47. Moreover, Article 6.1 of the JOAs obliged the Operator to "*deliver to the Parties a proposed Work Programme and Budget detailing the Joint Operations to be performed for the following Calendar Year*." The Operating Committee (details of which were set out in Article 5) was obliged to "*meet to consider and endeavour to agree on a Work Programme and Budget*" (Article 6.1).

48. Having regard to: (*i*) the obligations of AOG as the Operator under the JOAs; (*ii*) the minutes of the Operating Committee Meetings; (*iii*) the numerous status reports sent by AOG to JKX and Romgaz throughout the project; and (*iv*) the testimony of Mr Lewis and Mr Fraser, it is clear that representatives of both AOG and Discovery played a material and decisive role in the project and the operational decisions which were made from 2014 onwards. For example:

(1) Mr Lewis was the CEO of Discovery as well as the President of AOG and he played a critical role overseeing AOG's strategy and operational decisions;[94]

[94] Lewis 1 at [1], [27]-[28]. See also *e.g.* Minutes of Operating Committee Meeting, 11 September 2014, **Exhibit C-61**; Minutes of Operating Committee Meeting, 28 November 2014, **Exhibit C-66**; Letter from AOG to JKX and Romgaz, 5 November 2015, **Exhibit C-87**; Minutes of Operating Committee Meeting, 3 December 2015, **Exhibit C-100**; Letter from AOG to JKX and Romgaz, 9 March 2016, **Exhibit C-301**; AOG Well Status Report, 25 October 2015, **C-152**; Minutes of Operating Committee Meeting, 8 November 2016, **Exhibit C-342**; Resolution of Operating Committee, 8 November 2016, **Exhibit C-343**; Letter from AOG to JKX and Romgaz, 11 February 2017, **Exhibit C-368**; Minutes of Operating Committee Meeting, 3 October 2017, **Exhibit C-382**; Letter from AOG to JKX and Romgaz, 6 March 2018, **Exhibit C-389**.

(2) Mr Fraser was the CFO of Discovery as well as the CFO of AOG and he played a critical role overseeing AOG's finances dealing with the Slovak Government and liaising with AOG's attorneys and contractors throughout the project;[95] and

(3) Mr Crow was the COO of AOG who (together with Mr Lewis) led the preparation of AOG's drilling program and budgets.[96]

49. As to AOG's overall strategy as Operator:

(1) Prior to Discovery's acquisition of AOG in 2014, Aurelian/AOG had been focused on identifying deeper targets using the seismic survey data which had been acquired over each of the Licences. This strategy was reflected in JKX's comment in the minutes of the Operating Committee Meeting ("**OCM**") on 11 September 2014, to which Slovakia refers.[97]

(2) After Discovery acquired AOG in 2014, Discovery/AOG's strategy shifted to focus on shallower targets. The deeper targets were difficult to identify on the seismic data, due to the folded and thrusted nature of the geology. Discovery/AOG therefore persuaded JKX and Romgaz that shallow targets were the appropriate place to begin, and the JV partners agreed with this. This is reflected in Mr Lewis' comments in the minutes of the OCM on 11 September 2014, to which Slovakia refers.[98]

50. Slovakia is wrong to suggest that, by November 2014, AOG was "*plagued with financial problems caused by its inability to secure funds from the JV Partners*".[99] It is true that, as at the date of the OCM on 28 November 2014, JKX's Finance Director and CEO had not yet approved AOG's Authorisation for Expenditure proposals ("**AFEs**").[100] However, it is clear that by February 2015, AOG, JKX and Romgaz had approved the JOA Budget for 2015 which envisaged firm expenditure

---

[95] Fraser 1 at [1], [11], [21] *et seq*. See also *e.g.* the same documents referred to in footnote 94 above.

[96] Lewis 1 at [50]-[52], [72]-[73]. See also *e.g.* the same documents referred to in footnote 94 above.

[97] Counter-Memorial at [59].

[98] Counter-Memorial at [60]-[61].

[99] Counter-Memorial at [62].

[100] Minutes of Operating Committee Meeting, 28 November 2014, **Exhibit C-66**.

of €3.9m and optional expenditure of €12.2m.[101] Thereafter, the JOA Budgets for 2016, 2017 and 2018 were also approved by AOG, JKX and Romgaz.[102]

51. Slovakia alleges that: (*i*) it took AOG eight years to identify exploratory drilling locations and (*ii*) AOG made "*legal mistakes*" and "*poor business decisions*" which were fatal to the project.[103] Both assertions are untrue. Discovery had only acquired AOG in 2014. By the end of 2015, Discovery/AOG had:[104]

   (1) settled on a firm plan to drill three exploratory wells (namely Smilno, Krivá Ol'ka and Ruská Poruba);

   (2) prepared a Detailed Drilling Program, a Project of Geological Works and Authorisation for Expenditure for each proposed well; and

   (3) obtained approval from JKX and Romgaz to drill these wells.

52. Moreover, and as explained in the Memorial and in this Reply, the direct cause of the failure of the project was due to Slovakia's conduct, which prevented Discovery/AOG from carrying out its exploration activities and ultimately destroyed the value of Discovery's investment in Slovakia.

D. SMILNO

1. The Road was publicly accessible and AOG understood this

53. Slovakia asserts that: (*i*) the Road which AOG attempted to use to access the drilling site at Smilno was private property (*i.e.* not publicly accessible); and (*ii*) AOG understood at the time that landowner consent was required in order for it to use the Road to access the Smilno site.[105] Both assertions are incorrect. When considering this issue, it is necessary to distinguish between:

---

[101] 2015 JOA Budget, 5 February 2015, **Exhibit C-68**.

[102] 2016 JOA Budget, 3 December 2015, **Exhibit C-97**; 2016 JOA Budget Amendment, 16 February 2016, **Exhibit C-297**; 2017 JOA Budget, 10 February 2017, **Exhibit C-367**; 2018 JOA Budget, 10 February 2018, **Exhibit C-388**.

[103] Counter-Memorial at [65].

[104] Memorial at [67]-[69].

[105] Counter-Memorial at [5]-[8], [67]-[83].

(1) the drilling site, which Discovery accepts was located on privately-owned land in Smilno (which Slovakia describes as the "**Smilno Site**"[106]); and

(2) the Road, which AOG needed to use to bring heavy machinery and the drilling rig to the Smilno Site from the Smilno village (which Slovakia describes as the "**Access Land**"[107] – a term which is apt to mislead).

54. As to (1), there is no dispute that AOG obtained landowner consent to use the Smilno Site by entering into a lease with the landowners in June 2015.[108] As to (2), the term Access Land is misleading because it implies that the Road was not publicly accessible. Discovery therefore refers to this as the Road. Discovery accepts that the plot of land on which the Road was located was co-owned by 166 individual landowners.[109] Nevertheless, it is clear that the Road was publicly accessible under Slovak law because it was a (public) purpose road.[110]

55. Throughout the project, Discovery/AOG's clear understanding was that the Road was publicly accessible. Contrary to Slovakia's assertions, this is not a new legal theory that Discovery has "*invented [...] ex-post in this arbitration*".[111] The fact that the Road was publicly accessible (and that AOG knew this) is borne out by:

(1) numerous contemporaneous documents;

(2) witness testimony; and

(3) expert evidence on Slovak law.

56. Discovery expands on each point below at [59] *et seq*.

---

106 Counter-Memorial at [67].

107 Counter-Memorial at [69].

108 Memorial at [81]; Counter-Memorial at [67]; Lease for Smilno Site, 1 June 2015, **C-74**; Lease for Smilno Site, 15 June 2015, **Exhibit C-76**.

109 Memorial at [83].

110 Road Act, Article 1(2)(d), **Exhibit R-057**. Discovery notes that Article 1(2)(d) refers (in Slovak) to *účelové komunikácie*. The literal translation of this term in English is 'purpose road' or 'functional road'. Slovakia refers throughout its Counter-Memorial to a 'special purpose road'. However, the word 'special' is not used in Article 1(2)(d). Nothing appears to turn on this point but Discovery simply notes this for completeness.

111 *Cf.* Counter-Memorial at [314]. See also Counter-Memorial at [8], [131].

57. Notwithstanding the fact that the Road was publicly accessible, AOG also purchased a co-ownership share of the plot of land on which the Road was located in December 2015 (the "**Smilno Share**"). This purchase (from one of the 166 individual co-owners) was strictly unnecessary and was only done by AOG as a backup plan in an attempt to secure an additional basis to access the Smilno Site.[112] Contrary to Slovakia's assertions, AOG's purchase of the Smilno Share did not confirm that AOG believed that the Road was private property.[113]

58. Mrs Varjanová subsequently exploited AOG's backup plan because of AOG's failure to respect the pre-emption rights of the other 165 co-owners of the Road when it purchased the Smilno Share, which led to the Interim Injunction. However, the Interim Injunction was illegitimate and should never have been granted by the Slovak Judiciary because: (*i*) the conditions for granting an interim injunction were manifestly not met; and (*ii*) the Interim Injunction inexplicably prevented AOG from using the publicly accessible Road.[114] When AOG conceded Mrs Varjanová's substantive claim in June 2016, AOG *only* conceded that it had acquired the Smilno Share in breach of the co-owners' pre-emption rights.[115] AOG was not conceding that the Road was private property, nor did AOG abandon its position that the Road was publicly accessible.[116]

a. Contemporaneous documents

59. Numerous contemporaneous documents confirm that the Road was publicly accessible. For example, in June 2016, the Mayor of Smilno (Mr Vladimír Baran) issued the following statement (emphasis added):[117]

> "[…] the track situated on parcel of land registered in EKN Register, Parcel No. 2721/780 situated in the Smilno Real Estate Registration Area **has been used by the general public for many decades (100 – 200 years) as access road to access the adjacent plots of land and a quartz mine** (it served as a connecting road between

---

112 Lewis 2 at [39]; Fraser 2 at [10].

113 *Cf.* Counter-Memorial at [87].

114 See further at [343] *et seq* below.

115 As Slovakia accepts: see Counter-Memorial at [132].

116 Fraser 2 at [10].

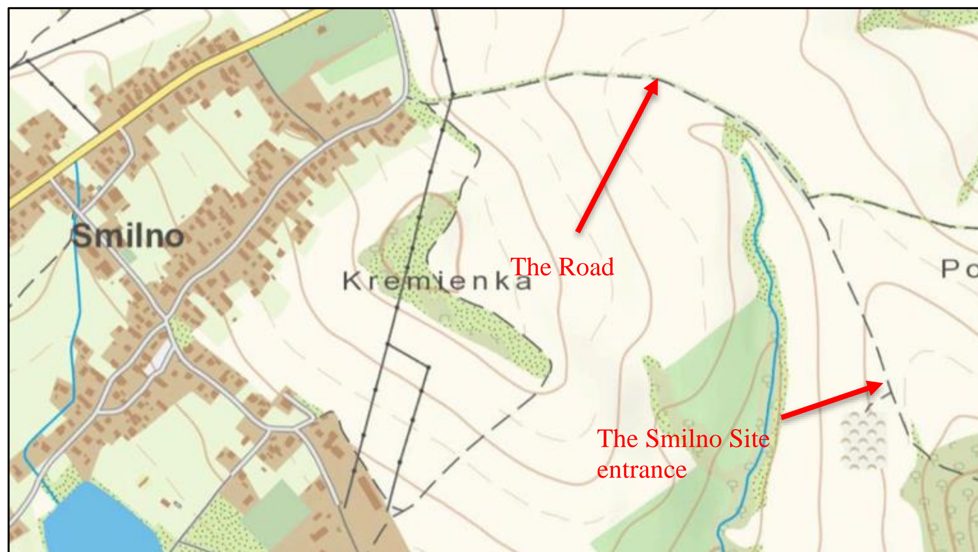
117 Request for information pursuant to Act No. 211/2000 Coll – Response dated 6 June 2016, **Exhibit C-18**.

the villages of Zborov – Smilno – Mikulášová until the construction of the road between the towns Bardejov and Svidník), **and is publicly accessible**."

60. Official maps published by Slovakia, as well as satellite images, also confirm that the Road was, and always has been, publicly accessible. For example:

(1) The website of the Office of Geodesy, Cartography and Cadastre of the Slovak Republic ("**ÚGKK**")[118] has an online "Geoportal" which publishes numerous current and historical maps of Slovakia.[119] These official maps demonstrate that the Road was, and always has been, publicly accessible.

(2) For example, the official map of Smilno (which can be viewed on the ÚGKK Geoportal[120]) identifies the Road as a dashed line connecting the Smilno village to the entrance of the Smilno site, as shown in the following image:[121]



(3) The legend of this official map states that a dashed line is an "*unpaved road*".[122] The Geoportal also provides further information about the Road,

---

[118] In Slovak, *Úrad geodézie, kartografie a katastra Slovenskej republiky*.

[119] See https://zbgis.skgeodesy.sk. At the time when Discovery/AOG was attempting to drill at Smilno, ÚGKK's Geoportal was accessible at https://mapka.gku.sk. Contemporaneous documents establish that Discovery/AOG consulted and relied upon these official maps: see [61(4)] and [61(9)] below. See also Fraser 2 at [7]-[12] and Lewis 2 at [36]-[40].

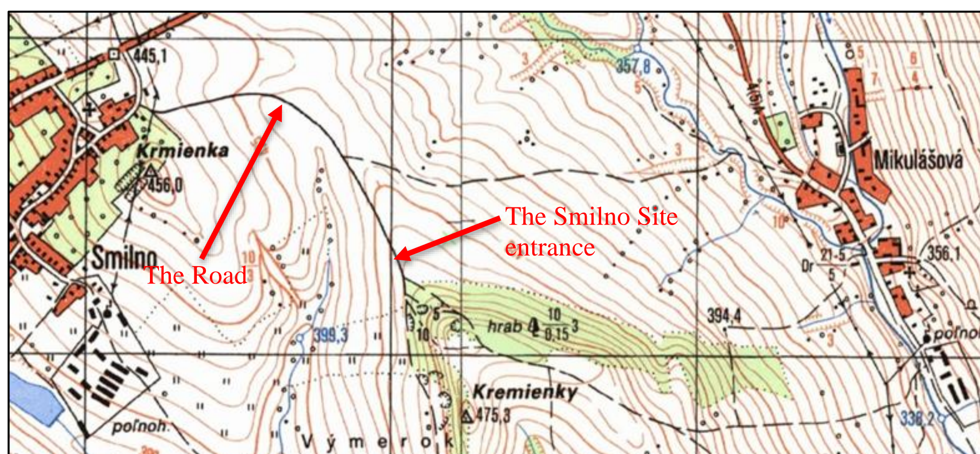
[120] See https://zbgis.skgeodesy.sk/mkzbgis/sk/zakladna-mapa/legend?pos=49.383345,21.364600,16

[121] Map of Smilno, 23 August 2023, **Exhibit C-418**, p. 1.

[122] Map of Smilno, 23 August 2023, **Exhibit C-418**, p. 3.

stating it is a "*local, purpose-built communication*" whose "*surface type*" is "*loose/unpaved*".[123]

(4) Historical maps of Slovakia also demonstrate that the Road was, and always has been, publicly accessible. For example, a ÚGKK map dated from the year 2000 (available on the Geoportal) identifies the Road as a solid black line connecting the Smilno village to the entrance of the Smilno Site, as indicated by the red arrows in the following image:[124]



(5) Satellite images from Google Earth (taken between 2006-2016) also show the Road connecting the Smilno village to the entrance of the Smilno Site. For example, see the following satellite image taken in December 2006 and hence well *before* AOG attempted to use the Road (annotated with red arrows):[125]

123 Map of Smilno, 23 August 2023, **Exhibit C-419**.

124 Map of Smilno, 2000, **Exhibit C-245**. See also Discovery Presentation – Smilno Shallow Gas, **Exhibit AA-068**, p. 3 (which also shows the Road). See also a historical military map of Slovakia from 1920 (also available on the ÚGKK Geoportal) which identifies the Road as a solid black line: **Exhibit C-420** (see https://zbgis.skgeodesy.sk/mkzbgis/sk/archiv/toc/history?pos=49.382999,21.368113,15).

125 Google Earth Satellite Images of Smilno, 2006-2016, **Exhibit C-246**.

61. Contemporaneous documents also establish that, throughout the project, Discovery/AOG understood that the Road was publicly accessible. For example:

(1) Following a visit to Smilno in August 2014—before any exploratory drilling attempts were made—Discovery/AOG prepared a presentation which confirmed its understanding that: (*i*) the Road provided a "*route*" to access the Smilno Site from the Smilno village;[126] and (*ii*) the Road was an "*[a]ccess road*".[127] There was no suggestion in this early presentation that AOG needed to obtain landowner consent to access the Smilno Site.

(2) On 21 July 2015, AOG attended a meeting with the Mayor of Smilno (Mr Baran) and a representative of the Smilno agricultural cooperative ("**Biodružstvo Smilno**"). The minutes of this meeting record that the Mayor described the Road as an "*access road*".[128] Moreover, in response to a

[126] Discovery Presentation – Potential well site locations visit, 20 August 2014, **Exhibit C-60**, p. 3.
[127] Discovery Presentation – Potential well site locations visit, 20 August 2014, **Exhibit C-60**, p. 16.
[128] Minutes of Meeting, 21 July 2015, **Exhibit C-280**.

criminal complaint which Mrs Varjanová subsequently brought against an AOG representative in 2016, the Mayor gave evidence to the Bardejov District Office and he described this meeting with AOG on 21 July 2015 as follows (emphasis added):[129]

> "On July 21, 2015, he met with representatives of the mentioned company and representatives of Biodružstvo Smilno and participated in the investigation **in order to locate the access road to the place where the exploratory well is to be carried out**. Directly on the spot, they found out that the said parcel was reinforced with gravel in the past, which is still there, but due to potholes and puddles that people used to bypass in the past, this plot was copied inaccurately, while places on the original plot were partially overgrown with weeds, below which, however, places with gravel that strengthened the road were also clearly visible. He is aware that some works were carried out on the parcel in question, **which were supposed to improve the quality of the said parcel and which improved the road compared to its original condition**."

(3) On 5 August 2015, Mr Lewis sent a report to AOG's JV partners, following on from the meeting held with the Mayor on 21 July 2015. In his report, Mr Lewis stated (emphasis added):[130]

> "**Access road is a public road**. Agreement between AOG and mayor + land user was done to use and prepare current track. It will be moved a few meters from its original position **as mayor requested**."

(4) On 19 November 2015, a surveyor engaged by AOG prepared a report which marked out the coordinates of the Smilno Site as well as the "*access road*", the coordinates of which had been based on the "*current cadastral map*", thus reinforcing the importance of the ÚGKK maps referred to at [60] above.[131]

(5) On 3 December 2015, Discovery/AOG prepared a presentation for its JV Partners in advance of an OCM. In this presentation, Discovery/AOG continued to describe the Road as an "*[a]ccess road*" and stated that a land

---

129 Decision of Bardejov District Office – Case No. OU-BJ-OVVS-2016/001484-LES, 7 March 2016, **Exhibit C-300**, p. 2.

130 Email from Michael Lewis, 5 August 2015, **Exhibit C-281**, p. 2. The photographs on pp. 3-4 also show AOG's meeting with the Mayor on 21 July 2015 and the "Smilno location with road change marked by sticks and location surveyed week before."

131 Delineation Protocol, 19 November 2015, **Exhibit C-284**.

lease for the Road was "*not required*".[132] It is impossible to reconcile these clear statements with Slovakia's suggestion that AOG understood that the Road was private property.

(6) On 14 December 2015, after Ms Varjanová had parked her car across the entrance of the Road from the Smilno village, AOG's Project Manager (Mr Karabin) filed a report at the District Police Department of Bardejov. In his report, Mr Karabin described the Road as a "*country road*". He stated that the Smilno Site was inaccessible because Mrs Varjanová's car had been parked across the entrance of the Road and it had not been removed by the Police.[133]

(7) On 14 December 2015, AOG's Team Geologist (Mr Sopel) sent an email to Mr Lewis and others attaching a copy of Mr Karabin's report. Mr Sopel stated that Ms Varjanová had "*left her car in the access road to the wellsite*", that he and Mr Karabin had gone to the Police to file a statement, but that the car was still "*left on the road*".[134]

(8) On 20 January 2016, Mr Lewis sent a report to AOG's JV partners and he continued to described the Road as an "*access road*" and stated that Mrs Varjanová "*keeps chaining her car to the ground to block the access road*".[135] Slovakia is wrong to assert[136] that AOG acknowledged in this report that the Road was "*private property*" (on the basis that the report also acknowledged that Mrs Varjanová "*has a legal right to park her car on the road*").[137] It was true that Mrs Varjanová had a "*legal right to park her car on the road*" (just as any other member of the public did). However:

(a) AOG's report did <u>not</u> state that the Road was "*private property*" (as falsely asserted by Slovakia[138]); and

---

132 Operations Update for OCM, 3 December 2015, **Exhibit C-101**, p. 1.

133 Police Report filed by Maciej Karabin, 14 December 2015, **Exhibit C-102**, p. 2.

134 Email from Łukasz Sopel, 14 December 2015, **Exhibit C-102**, p. 1.

135 AOG Update Report, 20 January 2016, **Exhibit C-120**, p. 2.

136 Counter-Memorial at [6] and [71].

137 AOG Update Report, 20 January 2016, **Exhibit C-120**, p. 2.

138 Counter-Memorial at [6(i)].

(b) Mrs Varjanová did not have a legal right to block the Road from being accessed or used by AOG or any other member of the public.

(9) In June 2016, AOG's attorney wrote to the Bardejov Police[139] setting out a detailed analysis explaining why the Road was a public special purpose road under the Roads Act, including by referring to official maps of Slovakia which were available on the ÚGKK website and the land registers for the plot of land on which the Road was located.

62. Moreover, in 2016, Mrs Varjanová brought multiple criminal complaints against AOG's representatives.[140] Her complaints were dismissed by the Bardejov District Office in two separate decisions. These decisions also demonstrate that the Road was publicly accessible and that AOG understood this at the time.

63. By a decision dated 7 March 2016,[141] the Bardejov District Office rejected Mrs Varjanová's complaint that Mr Marek Jackiewicz (a contractor engaged by AOG) had committed a misdemeanour by allegedly carrying out certain maintenance work on the Road. At the beginning of its decision, the District Office noted that the Road "*has been used for a long time as a field road*". The decision also recorded that:

(1) The District Office had ordered an oral hearing for the purposes of questioning Mr Jackiewicz, Mrs Varjanová, Mr Baran (the Mayor of Smilno) and Mr Jančošek (a member of the board of directors of the agricultural cooperative in Smilno, Biodružstvo Smilno).

(2) Mr Baran testified that the Road "*has been used for many years as an access road to the surrounding lands and forests*" and Mr Jančošek testified that the Road "*has been used for a long time as an access road to the surrounding land by the cooperative, hunting association,* ***as well as by private individuals***" (emphasis added).

139 Letter from AOG's Attorney to Bardejov Police, 17 June 2016, **Exhibit C-315**.

140 Slovakia refers to one of these criminal complaints: Counter-Memorial at [372].

141 Decision of Bardejov District Office – Case No. OU-BJ-OVVS-2016/001484-LES, 7 March 2016, **Exhibit C-300**.

(3) After having heard all the evidence, the District Office concluded that it had not been proven that Mr Jackiewicz had committed the act which Mrs Varjanová alleged he had committed.

64. By a further decision dated 14 March 2016,[142] the Bardejov District Office rejected Mrs Varjanová's complaint against Mr Lewis, Mr Crow, Mr Jackiewicz, Mr Karabin (AOG's Project Manager), Mr Sopel (AOG's Team Geologist), and Mr Meluš (AOG's Well Engineer). Mrs Varjanová had alleged that they had each committed a misdemeanour by removing her vehicle from the Road. In its decision, the District Office reached the following conclusion (emphasis added):

> "[…] the intention of the accused was not sufficiently proven in the actions of the accused - to prevent the said vehicle from being used by the witness Marianne Varjanová. In her testimony, the witness did not state in which specific activity, in which of her activities, the defendants should have restricted her by pushing aside the car she had parked there, **which prevented the proper use of the dirt road, which has been used as an access road for a long time**."

b. Witness testimony

65. In addition to the contemporaneous documents listed above, the Mayor of Smilno confirms that the Road was, and always has been, publicly accessible.[143] The testimony of Mr Fraser and Mr Lewis supports this conclusion:

(1) Mr Lewis testifies that:[144]

> "As I knew at the time, there was a public right to use the road […] we had right to access the public road and that we had a licence to drill on the site we were trying to access via this public road."

(2) To the same effect, Mr Fraser testifies that:[145]

> "The Road was essentially a country road which was publicly accessible and had been historically used as a public highway by both pedestrian and vehicular traffic. It was our understanding that the Road was a public road,

---

142 Decision of Bardejov District Office – Case No. OU-BJ-OVVS-2016/002305-Pe, 14 March 2016, **Exhibit C-302**.

143 Baran 1 at [19]-[20].

144 Lewis 1 at [57]. See also Lewis 2 at [36]-[40].

145 Fraser 1 at [35]. See also Fraser 2 at [8]-[12].

that no permission was required from any person to use the Road […]"

66. Even Mrs Varjanová (one of Slovakia's witnesses in this arbitration and a resident of Smilno) appears to accept that the Road was publicly accessible. For example:

(1) In her witness statement, she refers to the Road as the "*Land*" but later on she accepts that "*[a] visible track can be seen on the surface of the Land by vehicles passing through it*".[146]

(2) On 23 June 2016, Mrs Varjanová posted on her Facebook page (*Ropa v Smilne*, *i.e.* "Oil in Smilno") acknowledging that until that morning her car had been parked on the "*access road*". In the same post, she stated: "*We towed the car and the road is clear.* ***Anyone except miners can use it***".[147]

(3) On her blog, created at some point in 2016 to explain her own views about AOG's activities in Smilno, Mrs Varjanová described herself in the following terms: "*In my free time, I* ***block roads*** *and give statements to the police*".[148]

c. Expert evidence on Slovak law

67. Prof Števček, Discovery's expert on Slovak law, also confirms that the Road was publicly accessible. In his first report, Prof Števček explained that the Road was a "*public access road*" which meant that, under Slovak law: (*i*) it was accessible by vehicles and pedestrians; (*ii*) any person who obstructed the Road was obliged to remove the obstruction immediately; and (*iii*) the failure to remove the obstruction could be enforced by the Police.[149] Slovakia's expert on Slovak law (Prof Fogaš) does not disagree with Prof Števček's opinions in this regard.

d. Slovakia's arguments

68. Slovakia contends that Discovery has failed to establish its burden of proving that the Road was publicly accessible. In the light of the weight of evidence set out above, this is clearly wrong. Slovakia advances various technical arguments in

---

146 Varjanová 1 at [17].

147 *Ropa v Smilne*, 23 June 2016 **Exhibit C-325** (emphasis added).

148 Marianna Varjanová Blog, denník.sk, 2016, **Exhibit C-290** (emphasis added).

149 Števček 1 at [28]-[32]. See also Števček 2 at [23]-[39].

support of its 'burden of proof' submission,[150] each of which has no merit.

69. ***First***, Slovakia contends (by reference to three photographs[151]) that "*the track on the Access Land was grassy land*".[152] Yet the official maps issued by the ÚGKK and the satellite images referred to at [60] demonstrate that Slovakia's assertion is wrong. The vast majority of the Road body consisted of visible gravel and/or stones.[153] To the extent any gravel/stones were not visible in certain photographs, this was either because: (*i*) the photographs were taken in winter (after snow had fallen); or (*ii*) certain limited sections of the Road had not been properly maintained over the years and the gravel/stones had disappeared under mud and grass.[154]

70. ***Second***, Slovakia contends that "*AOG never argued that the field track was a public special purpose road—not even in its initial court appearances*".[155] This is also incorrect. The contemporaneous documents referred to at [61] above show that AOG understood throughout the project that the Road was publicly accessible. As to the Slovak court proceedings brought by Mrs Varjanová against AOG:

    (1) Mrs Varjanová obtained the Interim Injunction from the Bardejov District Court *ex parte* and without notifying AOG.[156] AOG therefore had no opportunity to argue (before the Interim Injunction was issued) that it should not be granted because the Road was publicly accessible.

    (2) AOG's only option under the Civil Procedure Code was to appeal against the grant of the Interim Injunction to the Prešov Regional Court. In the appeal, AOG argued that the Road was a "*field road*" (and hence a public purpose

---

150 Counter-Memorial at [70]-[83].

151 The first two photographs are taken from Discovery's presentation referred to at [61(1)] above. The provenance of the third photograph is unclear (both as to the location of the photograph and the date when the photograph was taken).

152 Counter-Memorial at [70].

153 Discovery Presentation – Potential well site locations visit, 20 August 2014, **Exhibit C-60**, pp. 9-11; Email from Łukasz Sopel, 14 December 2015, **Exhibit C-102**, pp. 2-3 (showing Mrs Varjanová's car parked across the Road); Photograph of white van **Exhibit C-106** (showing Mrs Varjanová's white van parked across the Road). See also Baran 1 at [28] and Varjanová 1 at [17].

154 Baran 1 at [28]. See also [61(2)] above.

155 Counter-Memorial at [71]. See also Counter-Memorial at [8], [9(c)] and [96].

156 Decision of District Court of Bardejov, 18 February 2016, **Exhibit C-125**.

road).[157] Moreover, even Slovakia's expert Prof Fogaš accepts that "*AOG stated in one place of the Appeal that there is a field road on the Land Plot*".[158]

71. ***Third***, Slovakia appears to argue that, in order to qualify as a public purpose road, a road must consist of a "*road body*" which must itself fulfil certain technical criteria.[159] Slovakia refers to Article 1(3) of the Road Act, which provides:[160]

> "Surface communication consists of the road body and its components. The road body is demarcated the outer edges of ditches, gutters, embankments and cuts of slopes, frame and cladding walls, at the foot of retaining walls and on local roads half a meter behind raised curbs sidewalks or green belts."

72. Slovakia's argument is wrong for at least two reasons:

(1) Slovakia's argument is irreconcilable with Article 22 of Decree No. 35/1984, Coll. implementing the Road Act, which provides:[161]

> "[Special] purpose roads include, in particular, field and forest roads, access roads to plants, construction sites, quarries, mines, sand pits, and other objects, and roads in enclosed areas and sites."

A "*purpose road*" is a "*surface communication*" within the meaning of Article 1 of the Road Act. If Slovakia were correct in suggesting that a road body must fulfil certain technical criteria, the definition in Article 22 of Decree No. 35/1984 would make no sense because it specifically includes "*field and forest roads*". In the present case, the Road is a field road and thus a purpose road within the meaning of Article 1(2)(d) of the Road Act.[162]

(2) Slovakia's argument misconstrues the effect of Article 1(3) of the Road Act. Article 1 is headed "*Introductory provisions*". Article 1(3) merely provides a description of the different components of any "*surface communication*".

---

157 Decision of Regional Court in Prešov, 14 April 2016, **Exhibit C-17**, p. 2.
158 Fogaš 1 at [74].
159 Counter-Memorial at [74].
160 Roads Act, Article 1(3), **Exhibit R-057**.
161 Decree No. 35/1984, Coll. implementing the Road Act, Article 22, **Exhibit C-223**.
162 Števček 2 at [36]-[38].

Neither the Road Act nor any other provision of Slovak law prescribes any particular technical characteristics for a road body.[163] It is not necessary for a road body to be constructed using any particular materials.

73. ***Fourth***, Slovakia refers to Article 2(1) of the Road Traffic Act and asserts that "*road traffic takes place only on surface communications*".[164] This is incorrect. Article 2(1) of the Road Traffic Act provides:[165] "*For the purposes of this Act, road traffic means the use of motorways, roads, local roads and [special] purpose roads (the 'road') by drivers of vehicles and pedestrians.*" Since the Road was a (public) purpose road, it fell within the scope of Article 2(1) of the Road Traffic Act and hence could be used by members of the public, including AOG, for road traffic.

74. ***Fifth***, Slovakia argues that two photographs allegedly taken in March 2023 do not show "*any signs of a suitable technical condition for road traffic*".[166] However:

    (1) The provenance of these photographs is unclear. Slovakia has not explained where, when, and by whom the photographs were taken. In any event, it is clear that the Road had been used by vehicles for many decades (see above). Even Mrs Varjanová accepts that vehicles used the Road.[167]

    (2) Slovakia asserts that the second picture was taken "*right above the drilling location*".[168] If Slovakia means that the picture was taken on the Smilno Site itself, the photograph does not show the technical condition of the Road. If Slovakia means that the picture was taken on a section of the Road located south of the Smilno Site,[169] AOG did not need to use that section of the Road to access the Smilno Site from the Smilno village.

75. ***Sixth***, Slovakia repeatedly asserts that AOG made an "*illegal upgrade*" to the

---

163 And neither does Instrument STN 73 6100, **Exhibit R-058** (as cited by Slovakia in its Counter-Memorial at [74], fn. 123): see Števček 2 at [39].

164 Counter-Memorial at [74].

165 Road Traffic Act, Article 2(1), **Exhibit C-214**.

166 Counter-Memorial at [76].

167 Varjanová 1 at [17].

168 Counter-Memorial at [76].

169 See map in Discovery Presentation – Potential well site locations visit, 20 August 2014, **Exhibit C-60**, p. 3.

Road.[170] This is also wrong:

(1) Slovakia's reliance on Article 19(1) of the Road Act is misplaced. AOG did not carry out "*major constructions, mining works or landscaping that require a building permit or other permit according to special regulations*".[171] Rather, AOG simply maintained the Road by laying gravel on top of certain sections of the existing Road body (and improving the drainage) for the benefit of the entire population of Smilno and with the knowledge and support of the Police and Mayor Baran.[172] This maintenance work did not require a permit and did not constitute an "*adjustment*" under Article 19(1).

(2) Slovakia's reliance on the Construction Act is also misplaced. The Construction Act only applies if major construction work was being carried out to a "*structure*" pursuant to an "*occupation permit*" or a "*construction permit*".[173] However, the maintenance work carried out by AOG: (*i*) did not require a permit; [174] (*ii*) did not involve major construction work; and (*iii*) did not involve any change in "*the purpose of use of the structure*" within the meaning of Article 85(1) or Article 104(1) of the Construction Act.

2. Local residents were aware of AOG's plans at Smilno in 2015

76. Slovakia implies that Mrs Varjanová knew nothing about AOG's proposal to drill an exploration well at Smilno until trucks and machinery arrived in late 2015.[175] Yet Mrs Varjanová accepts that she became aware of AOG's plans at Smilno in May 2015.[176] Moreover, Mrs Varjanová's Facebook page reveals that she had taken an active interest in AOG's plans from at least June 2015 onwards. For example:

---

170 Counter-Memorial at [70], [76]-[83], [102]-[103].

171 Road Act, Article 19(1), **Exhibit R-057**, p. 2.

172 See [61(2)-(3)] above. See also email from Maciej Karabin attaching request for quotation from GMT Projekt, 18 May 2016, **Exhibit C-309**; AOG Weekly Status Report, 15 June 2016, **Exhibit C-135**, pp. 1-3. Fraser 2 at [13]-[15].

173 Construction Act, Article 85(1), **Exhibit R-060**.

174 Fraser 2 at [14]-[15].

175 Counter-Memorial at [84].

176 Varjanová 1 at [10].

(1) Mrs Varjanová attended a town hall meeting in Smilno on 17 June 2015 during which she accepts that AOG gave a public presentation about its proposed activities to the residents of Smilno.[177]

(2) Mrs Varjanová received a pamphlet from AOG on 22 June 2015 which: (*i*) explained that AOG was planning to drill an exploratory well in Smilno to a depth of 1200m; (*ii*) included a map showing the location of the Smilno Site; and (*iii*) described the benefits of the project to the Smilno village.[178]

(3) After a limited number of Smilno residents had voted in response to a petition opposing AOG's project, Mrs Varjanová sent the results of the petition to the MoE. This led the MoE to respond to Mrs Varjanová by letter dated 21 August 2015. In its response, the MoE refused to grant this petition:[179]

> "Since there is no illegality in the procedure or the decision-making activity of the Ministry in the given matter, and since all decisions regarding the Svidník exploration area are final and for this reason they are presumed to be factually correct and legal, and in the given matter there is also no contradiction with the public or other general interest, **the petition submitted by the residents of the village of Smilno cannot be granted**."

3. AOG's first drilling attempt

77. Slovakia does not dispute that: (*i*) throughout December 2015 and January 2016, Mrs Varjanová and other activists repeatedly blocked the Road by parking vehicles across the entrance of the Road and chaining them to the ground; (*ii*) these vehicles prevented AOG from using the Road to move the drilling rig and other heavy machinery to the Smilno Site; and (*iii*) the Police refused to remove the vehicles from the Road, as Discovery described in detail in its Memorial.[180]

78. Slovakia suggests that AOG should have obtained Mrs Varjanová's permission to use the Road and should have called her on a telephone number.[181] AOG did not need to obtain Mrs Varjanová's permission because the Road was publicly

177 *Ropa v Smilne*, 23 December 2015 **Exhibit C-286**.
178 *Ropa v Smilne*, 24 December 2015 **Exhibit C-287**.
179 *Ropa v Smilne*, 24 December 2015 **Exhibit C-288** (emphasis added).
180 Memorial at [89]-[93].
181 Counter-Memorial at [84]-[86].

accessible. Further, Slovakia fails to acknowledge that Mrs Varjanová and her fellow activists were acting illegally by blocking a public road. In any event, the plot of land on which the Road was located was co-owned by 166 individual landowners.[182] Yet Mrs Varjanová was acting as if she was its sole owner.

79. The inaction of the Police over this period was particularly concerning to Discovery/AOG in view of the extreme and unlawful conduct of the activists.[183] As Mr Lewis and Mr Fraser both testify (and as Mrs Varjanová freely admits)[184] not only did Mrs Varjanová chain her vehicle to the Road using bolts and chains; she also parked a white van across the Road and left a sign which stated: "***Zone 2 danger of explosion***". This incident can be seen in the following photograph:[185]

80. When AOG called the Police and asked them to remove the white van from the Road, the Police "*refused to have it removed*" and "*didn't give a reason for their inaction*".[186] After AOG discovered that Mrs Varjanová's explosion sign was fake, and in view of the inaction of the Police, AOG was left with no other option but to remove the vehicle itself.[187] Slovakia suggests that AOG acted improperly by doing

---

182 Memorial at [83].

183 See Števček 1 at [32], referring to Article 43(1) of the Road Traffic Act, ("whoever caused an obstacle to road traffic is obliged to remove it immediately. If he fails to do so, the road administrator is obliged to remove it immediately at his expense").

184 Lewis 1 at [59]; Fraser 1 at [40]-[41]; Varjanová 1 at [21]-[22].

185 Photograph of White Van, 18 January 2016, **Exhibit C-96**. See also Photograph of White Van, 18 January 2016, **Exhibit C-107**.

186 Lewis 1 at [60].

187 Fraser 1 at [41].

so. Yet when Mrs Varjanová subsequently brought a criminal complaint against AOG's representatives, her complaint was dismissed by the Bardejov District Office.[188]

4. The Interim Injunction

81. Slovakia accepts that: (*i*) the Interim Injunction granted by the Bardejov District Court on 18 February 2016 prohibited AOG from using the Road; and (*ii*) the Regional Court in Prešov refused to overturn the Interim Injunction in April 2016 following AOG's appeal.[189] Slovakia does not dispute that the Interim Injunction had a profound and wholly unjustified effect on AOG's business, by preventing AOG from using the Road to access the Smilno Site to drill its exploration well.[190]

82. Slovakia asserts that the Interim Injunction and the appellate court's decision were "*appropriate and consistent with Slovak law*".[191] Discovery's expert (Prof. Števček) disagrees. In his first expert report, he concluded that "*the decisions of both courts are, from a legal perspective, inexplicable to me. They involve serious errors that I cannot explain*."[192] Prof. Števček remains of this opinion in his second report and he disagrees with Slovakia's expert (Prof Fogaš).[193]

83. Slovakia suggests that: (*i*) AOG attempted to circumvent the Interim Injunction by establishing a new company ("**Smilno Roads**" or "**Cesty Smilno**") in April 2016; and (*ii*) the establishment of Cesty Smilno demonstrates that AOG did not believe that the Road was publicly accessible.[194] Slovakia is wrong on both points.

84. As to (*i*), Cesty Smilno was a separate entity, was not a party to the proceedings brought by Mrs Varjanová and was not bound by the Interim Injunction. Further, Mr Fraser testifies as follows (emphasis added):[195]

---

188 See [64] above.
189 Memorial at [96]; Counter-Memorial at [95].
190 Memorial at [97]-[98].
191 Counter-Memorial at [96]; Fogaš 1 at [3.1].
192 Števček 1 at [33].
193 See Števček 2.
194 Counter-Memorial at [98]-[101].
195 Fraser 1 [47].

> "Following the rejection of AOG's appeal against the interim injunction, and upon the advice of our legal advisers (in respect of which no privilege is waived), AOG agreed with Milan Jančošek, the legal owner of a share in the Road, to incorporate a new company, Cesty Smilno, as a subsidiary of AOG. AOG invested cash in Cesty Smilno, and the other shareholder invested his share in the Road. **We were advised that incorporation of Cesty Smilno in this way did not constitute a breach of other owners' pre-emption rights under Slovak law and that Cesty Smilno would be lawfully entitled to use the Road both in reliance on the Road's status as a public special purpose road, and in reliance on its status as a co-owner of the Road**."

85. As to (*ii*), Mr Fraser's testimony shows that—even after the Interim Injunction and even after Cesty Smilno was established—AOG continued to believe that the Road was publicly accessible and that Cesty Smilno was lawfully entitled to use it.

5. AOG's second drilling attempt

86. Slovakia does not dispute that during AOG's second drilling attempt between 15-18 June 2016: (*i*) Mrs Varjanová and several other activists continued to block the Road with their vehicles (which prevented AOG from bringing additional equipment onto the Smilno Site); (*ii*) a group of activists trespassed onto the Smilno Site and posed a serious danger to themselves and to AOG's operations by lying on the ground and sitting around the heavy machinery; (*iii*) another group of activists blocked the Road by forming a human chain; and (*iv*) the Police were present throughout.[196]

87. By blocking the Road, Mrs Varjanová and the activists were acting illegally. By trespassing onto the Smilno Site the activists were also acting illegally. Slovakia does not dispute that, on 17 June 2016 and at AOG's request, the Police started to disperse the activists from the Smilno Site.[197] Discovery's complaint relates to the conduct of the State Prosecutor, Dr Slosarčíková, on Saturday, 18 June 2016 which led the Police to cancel their policing operation, notwithstanding the fact that: (*i*) AOG had landowner consent to use the Smilno Site; and (*ii*) the activists were trespassing on the Smilno Site and illegally blocking the Road.[198]

---

[196] Fraser 1 at [53]-[56]; Varjanová 1 at [31], [34]-[35].

[197] Fraser 1 at [56]; Memorial at [107], referring to Email from Mr Fraser, 18 June 2016, **C-137**.

[198] Memorial at [106]-[108].

88. As explained below, Slovakia's case as to the circumstances which led Dr Slosarčíková to arrive at the Smilno Site, and Slovakia's description of the events, does not withstand scrutiny. Moreover, it is clear that Dr Slosarčíková abused her authority by her conduct on 18 June 2016.

89. ***First***, Slovakia asserts that Dr Slosarčíková arrived after her office had been contacted by the Police who (according to Slovakia) were "*concerned that crime could occur, and that the situation could escalate*".[199] Yet Slovakia has produced no documents to substantiate this assertion, despite having agreed to search for records held by the Police and State Prosecutor's Office.[200] If (as Slovakia asserts) the State Prosecutors' office had been contacted by the Police on the basis that they were concerned about a crime, it is inconceivable that neither the Police nor the State Prosecutor's Office has any record of this alleged communication.

90. ***Second***, Mrs Varjanová denies that she contacted Dr Slosarčíková.[201] Yet again, however, Slovakia has produced no documents to substantiate this denial, despite Discovery's request and the Tribunal's order.[202] Moreover, publicly available documents appear to contradict Mrs Varjanová's account of events. On 19 June 2016, Mrs Varjanová stated as follows in a post on her Facebook page about the events of the previous day when Dr Slosarčíková arrived (emphasis added):[203]

> "That is why I want to commend the fact that the higher command of the police **and the representative of the Public Prosecutor's Office finally arrived**, who once again explained the legal situation to the company's lawyer in our presence and checked whether he understood the text of the injunction **and asked him to respect it**."

---

199 Counter-Memorial at [107]; Slosarčíková 1 at [12].

200 See Slovakia's Response to Discovery's Requests for Production of Documents, 23 May 2023, Request No. 1 ("Documents evidencing: (i) Communications between the Police and the Prosecutor's Office (including any direct communications with JUDr Vladislava Slosarčíková) regarding the Police's request for a State Prosecutor to attend the Smilno site on 18 June 2016").

201 Varjanová 1 at [36].

202 See Procedural Order No. 3, Annex A, Request No. 2 ("All records of communications between the State Prosecutor JUDr Vladislava Slosarčíková or her office and Mrs Varjanová between 1-30 June 2016"); Slovakia's Consolidated Index of Produced Documents, 14 July 2023 ("The Slovak Republic conducted reasonable search for responsive documents and confirms that no responsive documents exist").

203 *Ropa v Smilne*, 19 June 2016, **Exhibit C-321**.

91. The words "*finally arrived*" imply that Mrs Varjanová had been in contact with the Prosecutor's Office on or prior to 18 June 2016. Dr Slosarčíková accepts that a State Prosecutor has no authority to intervene in a civil dispute.[204] Yet Mrs Varjanová's own Facebook post shows that Dr Slosarčíková did precisely that, by asking AOG's attorney to respect the Interim Injunction which had been issued in civil proceedings between Mrs Varjanová and AOG.

92. Mrs Varjanová's Facebook post therefore contradicts Dr Slosarčíková's assertion (and Slovakia's case) that she did not intervene in the civil dispute and that she "*neither had the authority nor a reason to act*".[205] Dr Slosarčíková's intervention was all the more significant because: (*i*) the Interim Injunction was arbitrary and should never have been granted in the first place (not least because the conditions for injunctive relief were not even met); and (*ii*) in any event, the Interim Injunction did not prohibit AOG from using the Smilno Site.

93. Dr Slosarčíková's intervention was therefore a clear abuse of her authority and ultimately led the Police to cancel their policing operation.

94. ***Third***, there are other reasons to reject Dr Slosarčiková's account of events. Her witness statement (prepared in 2023) recounts in great detail the events which occurred over seven years ago. Yet Dr Slosarčiková does not refer to a single contemporaneous statement or incident report in her witness statement. It is unclear how she was able to recall the events of 18 June 2016 in her witness statement so vividly, without having referred to any such documents to refresh her memory. It is reasonable to believe that such documents exist, given that:

    (1) a letter from the Bardejov District Prosecutor's Office dated 4 July 2016 specifically refers to a "***statement** of the prosecutor of the District Prosecutor's Office - JUDr. Vladislava Slosarčíková - who was present at the site on the given day*";[206] and

---

204 Slosarčíková 1 at [14]; Counter-Memorial at [111] ("prosecutors do not have authority to act in civil disputes […] state prosecutors do not have authority to act in these types of civil disputes").

205 Slosarčíková 1 at [16]; Counter-Memorial at [111].

206 Letter from District Prosecutor's Office, 4 July 2016, **Exhibit R-066** (emphasis added).

(2) it is standard practice for a State Prosecutor to prepare an incident report after having been called out to a scene on emergency service duty if they suspect a crime may be committed (as Dr Slosarčiková asserts was the case here).[207]

95. In response to Discovery's request for production, Slovakia agreed to search for Dr Slosarčiková's statement (referred to at subparagraph (1) above) and any incident reports prepared by the Police and/or Dr Slosarčíková and/or the Prosecutor's Office relating to the events of 16-18 June 2016 at the Smilno Site.[208] Yet Slovakia has produced no documents in response. It is implausible to suppose that Slovakia does not have a single internal document relating to these events or that Dr Slosarčíková did not refer to any contemporaneous statements or incident reports when she prepared her witness statement.[209]

96. ***Fourth***, contrary to Slovakia's assertions and Dr Slosarčiková's denials,[210] it is also clear that Dr Slosarčiková told the Police to cancel their policing operation. Slovakia does not dispute that: (*i*) before Dr Slosarčíková turned up, the Police were dispersing activists; and (*ii*) after Dr Slosarčíková turned up, the Police stopped dispersing activists. Discovery submits that the natural inference from (*i*) and (*ii*), when taken together with the available documentary evidence,[211] is that that Dr Slosarčiková told the Police to cancel their policing operation (notwithstanding the

---

[207] Slosarčiková 1 at [6], [9]-[10], [12].

[208] See Slovakia's Response to Discovery's Requests for Production of Documents, 23 May 2023, Request No. 1.

[209] See Letter from Signature Litigation LLP to Squire Patton Boggs (US) LLP, 15 June 2023, **Exhibit C-415**, pp. 1-2; Letter from Squire Patton Boggs (US) LLP to Signature Litigation LLP, 22 June 2023, **Exhibit C-416**, pp. 1-2.

[210] Slosarčiková 1 at [15]-[16].

[211] See Email from Mr Fraser, 18 June 2016, **Exhibit C-137** ("The police came and would have helped out save that the local prosecutor […] then showed up and told the police to stop"); Email from Mr Crow, 21 June 2016, **Exhibit C-141** ("Since the prosecutors statement for the police to stand down the protestors are more embolden [sic]"); Letter from AOG's Attorney to District Prosecutor's Office, 21 June 2016, **Exhibit C-323** ("(i) What was the reason for calling off the Police intervention in the cadastral area of Smilno […] (ii) On the basis of what decision, measure or instruction was the intervention by the Police called off?"); Email from Michael Lewis, 28 June 2016, **Exhibit C-327**, p.1 ("We were only successful in drilling a portion of the conductor hole before a lady representing herself as representing the public attorney's office told the police to stand down") and p. 6 ("Complaint filed at local state attorney's office regarding unlawful instruction preventing police from ensuring site access"); Photographs of Dr Slosarčíková and Mrs Varjanová speaking with the Police, 18 June 2016, **Exhibit C-319**.

fact that the activists were acting illegally by trespassing on the Smilno Site and blocking the Road). This is a further instance where Dr Slosarčiková abused her authority which prevented AOG from drilling its exploration well at Smilno.

97. ***Fifth***, in the light of Slovakia's failure to produce any documents in connection with the events of 18 June 2016 without a satisfactory explanation, Discovery invites the Tribunal to draw an adverse inference[212] against Slovakia that Dr Slosarčiková abused her authority by intervening in a civil dispute and/or instructing the Police to cancel their policing operation.

6. The Road signage scheme

98. Slovakia does not dispute that: (*i*) between July and October 2016, AOG engaged extensively with the Bardejov Police Force and the Mayor in connection with a scheme to erect new traffic signs in Smilno; (*ii*) the Mayor supported the scheme; but (*iii*) in October 2016, the Bardejov Police Force refused to approve the erection of the crucial signs at the entrance of the Road which would have acknowledged that the Road was publicly accessible.[213]

99. Slovakia asserts that the Police had no obligation to approve the scheme or erect the signs.[214] This misses the point. Discovery's complaints are as follows:

    (1) ***First***, the Police initially promised to approve the signs but then *reneged* on their earlier promise and put forward inconsistent positions regarding the status of the Road. Contrary to Slovakia's assertion,[215] there are numerous documents which show that the Police had promised to erect the signs and accepted that the Road was publicly accessible (see [101] *et seq* below).

    (2) ***Second***, the Police failed to adopt a transparent and fair decision-making process. Discovery/AOG engaged with the scheme for many months and was strung along by the Police in the expectation that the entire scheme would be

---

[212] See IBA Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**"), Article 9(6), **Exhibit CL-001**.

[213] Memorial at [117]-[121]; Counter-Memorial at [113]-[116].

[214] Counter-Memorial at [116].

[215] Counter-Memorial at [117].

approved. But at the last moment, the Police performed a *volte face* and put forward a legally flawed justification for refusing to approve the crucial signs at the entrance of the Road, without giving AOG the opportunity to respond.

(3) ***Third***, the justification which the Bardejov Police Force put forward in October 2016 to refuse to approve the crucial signs was, in any event, pretextual. It is to be inferred that the real reason why the signs were not approved was because Dr Jozef Sliva (the Director of the District Traffic Inspectorate, and a division of the Bardejov Police Force) and/or his subordinate (Mr Peter Cicvara) had made a personal decision to thwart AOG's exploration activities in Smilno.

100. Discovery elaborates below on each point by reference to the key facts.

101. The signage scheme was first discussed at a meeting on 15 July 2016 between AOG's attorney (Dr Matěj Sŷkora) and the Director of the Bardejov Police Force (Mr Jozef Štefanskŷ). Dr Sŷkora emailed Mr Fraser after the meeting to report on what had been discussed. In his email, Dr Sŷkora stated (emphasis added):[216]

> "There is a tension between the police and the attorney's office so they need something to do in order to behave in a way that would clean the track. **The plan is to open the procedure to place the traffic signs on the village communication** (we also visited the place yesterday). **At least 2 traffic signs should be installed. One at the crossroad between the village and the state road another one between the village and the public purpose track**. The traffic sign should clarify that there is another track coming out from the village road. Moreover so called passport of the communication shall be created where the specifications of the track should be stated (it comes out from the methodical regulations of the Ministry of transportation that are not generally binding). There should be also the examination in place where mayor and the officials from the traffic police should attend. **This should be sufficient for everyone to see the track as public - they agree that the law states that our track is public even without such a procedure but they say we need to do something more to calm the nervous situation down. It should last a couple of weeks.** If you agree I will contact the mayor immediately to start the process."

102. This email supports Discovery's case[217] that it was the Bardejov Police Force (not AOG) which had initially suggested that the signs be erected at the Road in order

[216] Email from Matej Sŷkora, 16 July 2016, **Exhibit C-331**. See also Fraser 1 at [66].

[217] Memorial at [117], [126].

to "*calm the nervous situation down*" as a result of the activists' conduct. The email also shows that the Police accepted that the Road was publicly accessible, but they wanted to erect the signs to put the position beyond any doubt. Discovery/AOG was entitled to (and did in fact) rely on these assurances from the Police and it engaged with the Mayor and the Police in good faith over the following months.

103. On 1 August 2016, AOG reported to JKX and Romgaz that "*negotiations with the police chief went very well, and the police are ready to support us during the road usage*".[218] Thereafter, the Mayor confirmed that he would support the scheme and he submitted the proposal to the Police for approval. Mr Lewis informed JKX and Romgaz that "*[t]he police have already informally approved it, and should do so formally in the next couple of days*".[219]

104. Thereafter, the Bardejov Police Force unexpectedly performed a *volte face*. By letter dated 11 October 2016, the Director of the District Traffic Inspectorate of the Bardejov Police Force (Dr Sliva) informed the Mayor Baran that the Police would not approve the erection of the two crucial signs (P8 and P1) at "*crossroads no. 2*", located at the intersection of the Road with the municipal road running from the Smilno village. The purported justification for this decision was as follows:[220]

> "According to attachments No. 1 and 2, 'crossroads No. 2' is where the proposed traffic signs P8 and P1 are to be installed. The District Traffic Inspectorate (of OR PZ – District Headquarters of the Police Force) in Bardejov does not agree with the proposed traffic signs because it is not a crossroads but merely a conjunction of a country road."

105. The Police gave no prior warning to AOG that it would refuse to approve the signs on the basis that the intersection was not a "*crossroads*" but merely "*a conjunction of a country road*". AOG was also given no prior opportunity to comment. Moreover, this purported justification given by the Police was legally flawed. As explained above,[221] it is clear under Slovak law that the Road was publicly accessible and hence formed a crossroads with the municipal road running from the

---

218 AOG Status Report, 1 August 2016, **Exhibit C-333**, p. 2.

219 Email from Mr Lewis, 3 October 2016, **Exhibit C-145**.

220 Letter from Bardejov Police Force, 11 October 2016, **Exhibit C-153**.

221 See [53]-[75] above.

Smilno village.

106. In any event, the Police's purported justification was pretextual. It is to be inferred that the real reason why the signs were not approved was because Dr Sliva and/or his subordinate (Mr Cicvara) had made a personal decision to thwart AOG's exploration activities. In this regard:

(1) On 12 October 2016 (*i.e.* the day after the Police had sent the letter to the Mayor refusing to approve the signs) Mr Lewis emailed JKX and Romgaz because AOG had been informed that the Police had "*approved the signage scheme and the document has gone back to the mayor to initiate installation*".[222]

(2) On 14 October 2016, AOG had been told of the Police's actual decision. Mr Fraser emailed JKX and Romgaz stating as follows:[223]

> "Cicvara indicated to Igor [Melus] on Wednesday that he would approve the signage scheme and return it to the mayor. The mayor received the signed scheme late yesterday and it turned out that Cicvara had approved the 7 signs for 7 other locations in the village, but not the sign that would go at the end of our track (so he misled Igor). Cicvara apparently still considers that the track is an agricultural track and so not suitable for a regular road sign. On the other hand Cicvara does appear to accept that the track is a public communication, or right of way. It seems like Silva, Cicvara's boss, has also been misleading us and possibly misleading his own brother-in-law as well, Mr. Gmitter."

107. A meeting then took place between AOG's attorneys, the Police and the Mayor on 26 October 2016.[224] During the meeting, Mr Cicvara was "*not prepared to agree that the track could be a special purpose road, even though [REDACTED] the senior traffic policeman in Humenne thought it was*".[225] The Police were therefore adopting patently inconsistent positions, given that at the earlier meeting on 15 July 2016 the Police had already <u>accepted</u> that the Road was publicly accessible (see [101] above).

---

222 Email from Mr Lewis, 12 October 2016, **Exhibit C-150**.

223 Email from Mr Fraser, 14 October 2016, **Exhibit C-151**.

224 AOG Report, 25 October 2016, **Exhibit C-152**, p. 1 at [1.1.2].

225 Email from Mr Fraser, 26 October 2016, **Exhibit C-340**.

108. Once again, Slovakia's disclosure in connection with these events has been woeful. The Tribunal ordered Slovakia to produce documents between July 2016 and October 2016 evidencing the Police's internal consideration of the signage scheme, in particular internal documents between Mr Sliva and Mr Cicvara.[226] However:

(1) Slovakia has produced no emails or other internal communications between Mr Sliva and Mr Cicvara which reveal their internal consideration of the scheme. It is implausible to suppose that there is not a single internal communication within the Bardejov Police Department relating to a scheme which was discussed extensively at multiple meetings over a 4-month period.

(2) Instead, Slovakia has produced only *three documents*[227] which do not comply with the Tribunal's order because they do not evidence the Police's internal consideration of the signage scheme:

(a) The first document is a letter dated 4 July 2016 from the Mayor of Smilno to the Bardejov Police Force in which the Mayor elaborated on his earlier statement in June 2106 (see [59] above) that the Road was publicly accessible.[228] This letter was sent *before* the meeting between AOG and the Police 15 July 2016 at which the proposed signs were first discussed (see [101] above).

(b) The other two documents are identical letters dated 26 October 2016 from the Bardejov Police Force to the Mayor of Smilno requesting him to provide certain documents relating to the Road.[229] These letters were sent *after* the Police had already refused to approve the signage scheme (see [104] above) and therefore they do not evidence the internal decision-making process which led to the decision on 11 October 2016.

109. In the light of Slovakia's failure, without a satisfactory explanation, to produce

---

226 Procedural Order No. 3, Annex A, Request No. 3.

227 See Slovakia's Consolidated Index of Produced Documents, 14 July 2023, Request No. 3.

228 Letter from the Mayor of Smilno, 4 July 2016, **Exhibit C-329**.

229 Letter from the Bardejov Police Force, 26 October 2016, **Exhibit C-338**; Letter from the Bardejov Police Force, 26 October 2016, **Exhibit C-339**.

documents evidencing the Police's internal consideration of the scheme which led to its decision on 11 October 2016—and in the light of Slovakia's tactical decision not to call any witnesses from the Police to testify—Discovery invites the Tribunal to draw an adverse inference against Slovakia[230] that the Police refused to approve the signs at the entrance of the Road because Mr Sliva and/or Mr Cicvara made a personal decision to thwart AOG's exploration activities at Smilno.

7. The inconsistent positions adopted by the MoT and MoI

110. The inconsistent positions adopted by the Bardejov Police Force on the issue of whether the Road was publicly accessible (as described above) were compounded when the MoT and MoI subsequently adopted inconsistent positions on this same issue in November and December 2016.[231] Slovakia's attempts to explain away this inconsistency are unconvincing.

111. ***First***, Slovakia suggests that, by its letters dated 29 November 2016 and 9 December 2016, the MoT merely made "*general statements*" which were not specific to the Road in Smilno; whereas, by its letter dated 19 December 2016, the MoI specifically addressed the Road in Smilno, such that the positions adopted by the MoI and the MoT were "*compatible*".[232] This is wrong:

    (1) By its letter dated 9 December 2016, the MoT confirmed that:[233]

    > "[…] 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."

    (2) In the present case, the Smilno Municipality does not possess a building permit for the Road nor is there any decision which approves its use.[234]

---

230 IBA Rules, Article 9(6), **Exhibit CL-001**.

231 Memorial at [122]-[124].

232 Counter-Memorial at [118]-[123], referring to Letter from the MoT, 29 November 2016, **Exhibit C-21**; Letter from the MoT dated 9 December 2016, **Exhibit C-22**; and Letter from the MoI, 19 December 2016, **Exhibit C-23**. See also Letter from AOG's attorney, 22 November 2016, **Exhibit C-347**; Letter from AOG's Attorney, 7 December 2016, **Exhibit C-349**.

233 Letter from the MoT dated 9 December 2016, **Exhibit C-22**.

234 Counter-Memorial at [82], referring to Letter from Smilno Municipality, 3 November 2016, **Exhibit**

Nevertheless, the MoT confirmed in its letter that in such circumstances the Road "*can be deemed a [special] purpose road, taking into account its traffic-related importance, designation and technical condition*".

(3) By contrast, in its letter dated 19 December 2016, the MoI gave the following categorical opinion/instruction to the Police:[235]

> "[…] if the Smilno Municipality does not have available any documentation evidencing the existence of a road on land plot with Parcel No. 2721/780 in the Smilno Real Estate Registration Area, and no other documentation evidencing the existence of such road exists, **then the road in question is not a [special] purpose road and must be seen as private land the public use of which is not justified by any tangible evidence**."

(4) If the MoI had bothered to consult the official maps of Slovakia which were accessible at a click of a button on the ÚGKK website (see [60] above), they would have found *"documentation evidencing the existence"* of the Road. There was accordingly a clear contradiction between the position of the MoI (in its instruction to the Police) and the position of ÚGKK.

(5) What is more, there was a further contradiction between the positions adopted by the MoT and the MoI:

(a) The MoT stated that *even if* there was no building permit or document from the Smilno Municipality evidencing the "*use*" of the Road, the Road could still be deemed a public purpose road.

(b) By contrast, the MoI stated that the *absence* of any documents evidencing the "*existence*" of the Road was fatal and that the Road was therefore private land.

(6) The positions of the MoT and the MoI were not compatible—they were incompatible. Moreover, the position of the MoI was patently incompatible

---

R-061.

235 Letter from the MoI, 19 December 2016, **Exhibit C-23**.

with the position of ÚGKK and with the earlier position of the Bardejov District Police (see [101]-[102] above).

112. ***Second***, and in any event, Slovakia has no credible answer to Discovery's separate point that the MoI had no competence to issue *any* instruction to the Police as regards whether the Road was publicly accessible. The MoI should therefore never have issued its instruction to the Police on 19 December 2016. By its own admission in a subsequent letter dated 30 December 2016, the MoI admitted that the MoT was the competent agency to express an opinion on whether the Road was a public purpose road.[236] Slovakia has no credible response to this:

(1) Slovakia suggests that the MoI was "*authorised to apply the law within its competence*"[237] and it refers to certain Slovak legal provisions.[238] However, it is clear that:

(a) any instructions issued by the MoI to the Police must be in compliance with the law and within the MoI's field of competence; and

(b) the MoI and MoT must both "*closely cooperate in fulfilling their tasks*".[239]

(2) Thus if the MoI is asked to express an opinion or provide an instruction to the Police on a matter which is not within its field of competence (such as whether the Road was publicly accessible), the MoI should cooperate with and procure a statement from the competent state body (here, the MoT). The MoI did not do so in the present case.

(3) In its letter to the Police dated 19 December 2016, the MoI expressly referred to the MoT and acknowledged that the MoT had taken the view that a track

---

236 Letter from the MoI, 30 December 2016, **Exhibit C-24**.

237 Counter-Memorial at [125].

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

239 Act No. 575/2001 Coll. on Organization of Government Activities and Organization of Central Government, Article 38(1), **Exhibit R-071**.

is "*always*" a public purpose road if (*inter alia*) it "*is registered in the Land Register in the cadastral map or special survey real estate-related documentation*".[240] The MoI therefore knew that the MoT was the competent authority to opine on the legal status of the Road. And yet the MoI interpreted the Road Act for itself and issued its instruction to the Police.

8. AOG's third drilling attempt

113. Slovakia does not dispute that AOG made a third attempt to drill at the Smilno Site in November 2016 and that, during this attempt, the Police: (*i*) continue to refuse to accept that the Road was publicly accessible; (*ii*) continued to refuse to remove any of the activists' vehicles which were blocking the Road (which prevented AOG from bringing heavy machinery to the Smilno Site); and (*iii*) even instructed AOG to remove its own trucks off the Road.[241]

114. Slovakia suggests that AOG should have either: (*i*) obtained a majority of the co-owners' consent to use the Road; or (*ii*) obtained a compulsory access order from the MoE under Article 29 of the Geology Act.[242] AOG did not need to pursue either option because the Road was publicly accessible, and the Police should have removed the vehicles and activists who blocked the Road and thereby prevented AOG from accessing the Smilno Site.

115. Slovakia asserts that, after the Interim Injunction was eventually discharged in May 2017, AOG never returned to Smilno.[243] This ignores the following facts:[244]

    (1) But for the conduct of the Police (by failing to accept that the Road was publicly accessible, by failing to remove the activists and their vehicles from blocking the Road, and by refusing to approve the Road signs) AOG would have completed its exploratory drilling at Smilno by the end of 2016.

---

240 Letter from the MoI, 19 December 2016, **Exhibit C-23**.

241 Memorial at [127]; Counter-Memorial at [127].

242 Counter-Memorial at [128]-[130].

243 Counter-Memorial at [136].

244 Lewis 2 at [24].

(2) But for the conduct of the Slovak Judiciary in granting and then upholding the Interim Injunction (which should never have been granted in the first place) AOG would have been able to use the Road and would have completed its exploratory drilling at Smilno by the end of 2016.

(3) But for the conduct of the State Prosecutor (abusing her authority by intervening in a civil dispute and ordering the Police to cancel their policing operation at Smilno) AOG would have been able to use the Road and would have completed its exploratory drilling at Smilno by the end of 2016.

(4) But for the conduct of the MoI (by issuing an unlawful instruction to the Police as regards the legal classification of the Road in a matter outside its field of competence) AOG would have been able to use the Road and would have completed its exploratory drilling at Smilno by the end of 2016.

E. KRIVÁ OL'KA

1. AOG acquired the rights to drill an exploration well at Krivá O'lka

116. Slovakia is wrong to contend that AOG failed to satisfy the three necessary conditions to perform exploratory drilling at Krivá Ol'ka on State-owned forestry land which was managed by State Forestry (the State-owned entity which Slovakia refers to in its Counter-Memorial as "**LSR**"):[245]

(1) As to the ***first*** condition, AOG had an Exploration Area Licence granted by the MoE which covered the Krivá Ol'ka Site. Contrary to Slovakia's assertion, the Exploration Area Licence did not expire on 1 August 2016: the 2014 Licences were extended by the MoE in June 2016 for a further term of five years, expiring in August 2021.[246]

(2) As to the ***second*** condition, AOG had a Forest Exemption granted by the Humenné District Office which covered the Krivá Ol'ka Site. The initial term of the Forest Exemption was granted for a period of one year, expiring on 15

[245] Counter-Memorial at [139]-[144].
[246] Memorial at [74].

January 2016.[247] Slovakia omits the fact that in December 2015 the Humenné District Office extended the term of the Forest Exemption for an additional period of two years, expiring on 31 January 2017.[248]

(3) As to the ***third*** condition, AOG obtained a Property Right by entering into the Lease with State Forestry. The Lease was signed on 4 May 2015 and was approved by the MoA in October 2015.[249] Discovery's complaint, however, is that the MoA subsequently refused to approve an extension of the Lease.

2. The MoA refused to approve the Amendment to the Lease

117. It is true that the initial term of the Lease was due to expire on 15 January 2016. Nevertheless, as Slovakia admits, on 14 January 2016 State Forestry agreed to extend the term of the Lease until 1 August 2016 pursuant to Addendum No. 1 (which Slovakia refers to as the "**Amendment**").[250] Unless and until the MoA approved the Amendment, AOG was not able to perform exploratory drilling at Krivá Ol'ka. Obtaining MoA approval of the Amendment was therefore crucial.

118. Discovery/AOG reasonably believed that obtaining MoA approval would be a mere formality, not least because the MoA had already approved the Lease in October 2015. In January 2016, AOG and State Forestry both wrote to the MoA to seek such approval.[251] In its letter to the MoA:[252]

(1) AOG noted that it had paid substantial annual fees to Slovakia under the Licences (as well as further fees to the Humenné District Office for the Forest Exemption);

---

247 Decision of Humenné District Office, 13 January 2015, **Exhibit R-097**.

248 Decision of Humenné District Office, 22 December 2015, **Exhibit C-104**.

249 Memorial at [134]-[135]; Lease between AOG and State Forestry, 4 May 2015, **Exhibit C-73**, pp. 1-6; Letter from MoA, 19 October 2015, **Exhibit C-73**, pp. 7-8.

250 Counter-Memorial at [149]; Amendment to the Lease between AOG and State Forestry, 14 January 2016, **Exhibit C-116**.

251 Letter from State Forestry, 14 January 2016, **Exhibit C-296**; Letter from AOG, 22 January 2016, **Exhibit C-121**.

252 Letter from AOG, 22 January 2016, **Exhibit C-121**.

(2) AOG stated that interruption of AOG's work would "*bring significant financial losses to our company*" and would "*threaten the investment of foreign owners which is protected by international law*"; and

(3) AOG asked the MoA to grant approval "*in a short period of time (1-2 weeks), since the contract has already been discussed and approved once, [and] the exploration work can be completed within the deadline set by the [MoE]*".

119. On 22 January 2016, the Managing Director of the Forestry and Timber Processing Section of the MoA (Mr Határ) responded to AOG stating as follows:[253]

> "[…] The file **together with the processed draft of the prior consent to the lease of the state property** was forwarded to the office of the Head of the Service Office of the Ministry of Agriculture and Rural Development of the Slovak Republic for further processing.
>
> According to the organizational rules of the Ministry of Agriculture and Rural Development of the Slovak Republic, the competence to issue and sign prior consent to the lease of forest land belongs to the Head of the Service Office of the Ministry of Agriculture and Rural Development of the Slovak Republic, while the Managing Director of the Forestry and Timber Processing Section does not interfere in this competence in any way."

120. The point Mr Határ was making here was that a "*processed draft*" of the MoA's approval of the Amendment had *already* been prepared and forwarded to the Head of the Service Office of the MoA for "*further processing*".[254] This reinforced Discovery/AOG's belief that obtaining approval from the MoA was a mere formality and that approval had, indeed, already been informally given. As it transpired, the MoA disregarded AOG's request to approve the Amendment within a short period of time (1-2 weeks) (see [118(3)] above). Instead, as explained below:

(1) the MoA sat on AOG's request for six months (between January-June 2016);

(2) the MoA's decision-making process was arbitrary, opaque and lacking in good faith;

[253] Letter from MoA, 22 January 2016, **Exhibit C-121**.

[254] Slovakia has, without satisfactory explanation, failed to disclose a copy of the "*processed draft*" (approving the Amendment) which Mr Határ forwarded to the Head of the Service Office.

(3) on 23 June 2016, the MoA gave pretextual reasons for refusing to approve the Amendment; and

(4) as a direct result of the MoA's conduct, AOG was unable to carry out exploratory drilling at Krivá Ol'ka which it would otherwise have completed within no more than a couple of months and hence within the extended term of the Lease (*i.e.* by 1 August 2016 at the latest).[255]

121. Slovakia's Counter-Memorial is conspicuously silent about the stonewalling that occurred inside the MoA between January and June 2016.[256] AOG had been told that it would ordinarily take a matter of days for the MoA to grant its consent.[257] The lengthy delay by the MoA was indicative of an ulterior motive. Further, Slovakia has not produced a single witness to testify as to the internal decision-making process of MoA in relation to its refusal to approve the Amendment. It is to be inferred that Slovakia knows such testimony would be adverse to its case.

122. Discovery requested Slovakia to produce internal communications and briefings by MoA officials to the Head of the Service Office and Minister of Agriculture between January-June 2016 relating to the MoA's decision whether or not to approve the Amendment. Slovakia objected to Discovery's request but the Tribunal ordered Slovakia to produce these documents, noting that they "*appear to be prima facie relevant to the extent that they relate to the decision-making process of Minister Matečná and/or of the Head of the Service Office, Mr. Regec, not to approve Addendum N. 1 to the Lease*".[258]

123. Once again, Slovakia has failed without satisfactory explanation to produce relevant documents which fall within the scope of the Tribunal's order. Slovakia has produced a sum total of *three documents*.[259] None reveal the decision-making process of the two MoA officials (Minister Matečná and Mr Regec) who were responsible for refusing to approve the Amendment. Indeed, Slovakia has not

255 Lewis 2 at [23].
256 Counter-Memorial at [150], [154].
257 Fraser 1 at [30].
258 Procedural Order No. 3, Annex A, Request No. 6.
259 Slovakia's Consolidated Index of Produced Documents, 14 July 2023, Request No. 6.

produced a single internal email or other document created by Minister Matečná or Mr Regec which reveal their decision-making process. In this regard:

(1) The first document—a letter from State Forestry to the MoA dated 14 January 2016 requesting the MoA's consent to approve the Amendment[260]—does not reveal the decision-making process of Minister Matečná or Mr Regec.

(2) The second document—a briefing note prepared by MoA officials dated 17 June 2016 relating to a complaint which had been submitted by an activist organisation (AROPANE) to the MoA regarding AOG's Exploration Area Licences[261]—does not reveal the decision-making process of Minister Matečná or Mr Regec:

(a) The briefing note recorded that AROPANE's complaint had asked the MoA to verify whether AOG had complied with the conditions of the Exploration Area Licences under the Geology Act. The briefing note concluded that the MoA should forward AROPANE's complaint to the MoE.

(b) The briefing note also stated that the MoA (emphasis added):

> "[…] **is conducting proceedings in the matter of Alpine Oil and Gaz, s.r.o. related to the lease contract for the forest property of the State on forest land affected by the implementation of works in the exploration area, in the cadastral area of Krivá Oľka**. The lease agreement in question is an 'agreement with the owner' within the meaning of the Geological Act. The lease agreement therefore only deals with details relating to the lease relations for the implementation of geological works on forest land owned by the State and does not interfere with the conditions set by the Ministry of the Environment of the Slovak Republic in the matter in question according to the Geological Act."

(c) The oblique acknowledgement in this note that the MoA was "*conducting proceedings*" relating to the decision whether or not to approve the Amendment strongly suggests that other internal

260 Letter from State Forestry, 14 January 2016, **Exhibit C-296**.
261 MoA Briefing Note, 17 June 2016, **Exhibit C-316**.

documents exist which reveal the decision-making process of Minister Matečná or Mr Regec. Yet those documents have not been disclosed.

(3) The third document—a briefing note prepared by MoA officials dated 23 June 2016[262]—attaches a draft of the letter which Minister Matečná sent to AOG on 23 June 2016 in which the MoA refused to approve the Amendment. The text of the draft letter is identical to the text of the letter which was actually sent to AOG on the same day.[263] The briefing note therefore does not reveal the decision-making process of Minister Matečná or Mr Regec.

124. It is implausible to suppose that Slovakia does not have a single internal document between January-June 2016 which reveals the decision-making process of Minister Matečná or Mr Regec and the reason why the Minister took the unusual decision to sign the letter dated 23 June 2016 instead of Mr Regec. Discovery invites the Tribunal to draw the inference that these internal documents have not been disclosed by Slovakia because they would be adverse to Slovakia's interests,[264] namely they would reveal that: (*i*) the MoA's decision-making process was arbitrary, opaque and lacking in good faith; and (*ii*) the MoA's reasons for refusing to approve the Amendment were pretextual.

125. The following contextual matters provide strong support for the drawing of these inferences:

(1) A parliamentary election took place in Slovakia on 5 March 2016. In this election, the ruling Smer-SD government was replaced by a new four-party governing coalition—comprising the Smer-SD, SNS, Most-Híd and Network parties—which was formed on 17 March 2016.[265]

(2) It appears that the reason why the MoA did not approve the Amendment between January and March 2016 was because the MoA did not wish to take any decision in the lead-up to the election. If that was the real (albeit

262 MoA Briefing Note, 23 June 2016, **Exhibit C-326**.
263 *Cf.* Letter from the MoA, 23 June 2016, **Exhibit C-19**.
264 See IBA Rules, Article 9(6), **Exhibit CL-001**.
265 Fraser 1 at [79]-[80].

illegitimate) reason for the MoA's delay, it should have told AOG rather than keeping AOG in the dark.

(3) After the election, AOG learned through its PR adviser (Mr Miškovčík) and a Slovak lobbying firm ("**Dynamic**") whom it had engaged that:[266]

(a) Mr Regec (a member of the SNS party) was one of the candidates vying to become the new Minister of Agriculture in the coalition government;

(b) Mr Regec lost out to Gabriela Matečna who was appointed as the Minister of Agriculture instead; and

(c) Mr Regec was appointed instead as the Head of the Service Office of the MoA and his function was to "*pay*".

(4) On 9 May 2016, Mr Miškovčík emailed Mr Fraser referring to Mr Regec and stating as follows:[267]

> "Supposedly his stubbornness may also stem from the fact that he is forester and at the same time is also a member of Snina parliament, but also in the Prešov Region. **Links with local activists in Oľka/Kriva Oľka or the Forest Protection Association VLK I found. What about his opinions he appears to be a person who is politically and programmatically against the entry of foreign capital in Slovakia**."

(5) AOG was receiving the same feedback from Mr Karol Wolf of Dynamic who told Mr Fraser on 9 May 2016 that "*Mr. Regec is determined not to approve our Forestry lease, **even though it has been informally approved by the Ministry of Agriculture already***".[268] (The fact the MoA had already informally approved the Amendment is also supported by the letter from Mr Határ dated 22 January 2016, referred to at [119] above).

(6) On 13 May 2016, Mr Wolf emailed Mr Fraser stating (emphasis added):[269]

> "The situation at the Ministry of Agriculture in relation to your supplement is

---

[266] Fraser 1 at [80]-[81]; Email from Mr Miškovčík, 9 May 2016, **Exhibit C-109**.

[267] Email from Mr Miškovčík, 9 May 2016, **Exhibit C-109**.

[268] Email from Alexander Fraser, 9 May 2016, **Exhibit C-307**.

[269] Email from Mr Wolf, 13 May 2016, **Exhibit C-130**.

> extremely complicated. **The current Chief of Staff of the Office [Mr Regec] has refused to sign the addendum despite the instruction of his superiors. He has no factual or legal reasons - it is simply a personal decision based on the fact that he himself comes from the area where you plan your activities.** […] He simply does not want his personal signature on this document. From his perspective it is personal, which is always the worst possible case, because it cannot be rationally argued."

(7) In the light of Slovakia's failure without satisfactory explanation to disclose a single internal document which reveals the decision-making process of Mr Regec or Minister Matečna, there is no reason for the Tribunal to doubt the veracity of what AOG was told in this email.

(8) On 13 May 2016, Mr Fraser asked Mr Wolf if it would be possible for Minister Matečna to sign the Amendment. Mr Wolf advised that "*[t]he minister is the last solution, which is not fully legally correct*".[270]

(9) On 19 May 2016, Mr Benada of AOG met with MoE officials to ascertain whether the MoE would be able to assist. The MoE officials told AOG that they were unable to help with the "*Regec problem*". AOG was also told that Mr Regec "*will not change his mind and will not sign*".[271]

(10) On 26 May 2016, Mr Fraser met with Mr Gabriel Csicsai (the Chairman of the Parliamentary Committee on Environment and Agriculture). As Mr Fraser reported in his email after the meeting (emphasis added):[272]

> "[Mr Csicsai] had heard there were some issues and wanted to find out wat was going on. He was very sympathetic, said it was the problem with coalition government and that **Mr. Regec was a law to himself. Also he said he did not think the minister of agriculture could override him.** He seemed to agree that there was a lot at stake and this was a bad outcome for Slovakia. His initial reaction was he did not think he could do much about Regec, but then said he would give it some thought and get back to us in the next 2 weeks. […]
>
> Karol Wolf thought that Regec might not remain in office more than a couple of months. However we later heard from Pavol our lawyer that the minister of

[270] Email from Mr Wolf, 13 May 2016, **Exhibit C-130**.

[271] Email from Mr Benada, 20 May 2016, **Exhibit C-131**; Fraser 1 at [82].

[272] Email from Alexander Fraser, 26 May 2016, **Exhibit C-310**; Fraser 1 at [84].

agriculture is rumoured to be due to leave office in 2 months' time. **That would suggest Regec has the upper hand over the minister.**"

(11) Once again, in the light of Slovakia's failure without satisfactory explanation to disclose a single internal document as to the decision-making process of Mr Regec or Minister Matečna, there is no reason for the Tribunal to doubt the veracity of what is stated in this email.

(12) On 27 May 2016, AOG requested a meeting with Minister Matečna, noting that its request for the MoA to approve the Amendment had been "*postponed numerous times since January 2016, without explanation*" and stating that AOG was "*highly concerned that its investment is in jeopardy*".[273]

(13) On 7 June 2016, AOG was told by the MoA that Minister Matečna was too busy to meet with AOG.[274] Discovery infers that the real reason why Minister Matečna did not wish to meet with AOG was because the meeting would have revealed the opaque and arbitrary decision-making process which the MoA had undertaken since January 2016.

(14) On 15 June 2016, AOG sent a report to JKX and Romgaz stating as follows (emphasis added):[275]

> "The State Forestry lease of this well location is awaiting approval from Mr. Regec, the newly appointed chief of the service division within the Ministry of Agriculture. Obtaining this approval would have been a mere formality in the past. **Mr. Regec is an elected politican from the Medzilaborce area, a member of the Slovak National Party, and has pledged to his voters not to permit exploration drilling.** We have endeavored to lobby him through different channels, so far without success. Most recently, the chairman of the parliamentary select committee for agriculture and the environment has taken up the issue on our behalf and has prompted a formal meeting with senior Ministry officials, to be held in the next two weeks, at which AOG will be present. The chairman of this committee is from a different party called 'Most'. The US Embassy is also increasing its support."

273 Letter from AOG, 27 May 2016, **Exhibit C-132**.

274 Email from MoA Official, 7 June 2016, **Exhibit C-134**.

275 AOG Report, 15 June 2016, **Exhibit C-135**, p. 3.

(15) On the same day, Mr Fraser learned from AOG's PR advisers that Mr Csicsai had spoken with Mr Regec who had told him that he definitely would not sign the Amendment because of Mr Regec's "***political career and he wants to gain 'points' form [sic] it***".[276] In the light of Slovakia's woeful disclosure, there is no reason for the Tribunal to doubt the veracity of this email.

126. Against this background, it is clear that the reasons given by Minister Matečna for the MoA's refusal to approve the Amendment in the letter dated 23 June 2016 were a pretext for the real reason, namely Mr Regec's personal prejudice against AOG and Mr Regec's attempts to score political *"points"* by preventing AOG from carrying out exploration.[277] Minister Matečna purported to justify the MoA's refusal on the basis that "*the negotiated contractual terms and conditions required for this have not been fulfilled*". Specifically, she asserted that:

(1) the Lease had already terminated as a result of the expiry of its term pursuant to Article III(1); and

(2) AOG had not fulfilled the conditions for the extension of the Lease under Article III(2), namely the time limit for applying for an extension.

127. As to (1), this was incorrect. The General Director of State Forestry had *already* signed the Amendment to the Lease on 14 January 2016 which had extended the term of the Lease until 1 August 2016 (see [117] above).

128. As to (2), this was also incorrect. State Forestry had *already* waived AOG's non-compliance with Article III(2) by signing the Amendment. Further and in any event, the MoA was not a party to the Lease (or the Amendment). Slovakia admits that State Forestry is an "*independent entity with discretion to decide whether to lease any of the forest land to third parties for a non-forest use*".[278] It was therefore within State Forestry's power to extend the Lease by the Amendment, notwithstanding that AOG's extension was requested shortly after the deadline specified in Article III(2).

---

276 Email from Snowball, 15 June 2016, **Exhibit C-314**.

277 Letter from MoA, 23 June 2016, **Exhibit C-19**.

278 Counter-Memorial at [142], footnote 224.

129. In her letter, Minister Matečna also asserted that "*CEOs of a State-owned enterprises may sign similar documents only after having obtained the prior consent to such lease from the Ministry; otherwise such an act is invalid and the document is not legally binding*".[279] Apart from repeating what Minister Matečna said in this regard,[280] Slovakia has not sought to defend the correctness of her assertion in its Counter-Memorial as a matter of Slovak law, and rightly so:

(1) This was not the process followed when State Forestry signed the Lease in May 2015 which was then *subsequently* approved by the MoA in October 2015 (see [116(3)] above).[281]

(2) This was not State Forestry's understanding of the correct process, having regard to its decision to sign the Amendment and *only later* to seek MoA approval (see [117] above).

(3) This was not even the MoA's understanding of the correct process, having regard to Mr Határ's letter to AOG dated 22 January 2016 (see [119] above). If State Forestry had no authority to sign the Amendment, one would have expected Mr Határ to inform AOG immediately.

(4) This was also not the procedure followed by State Forestry when it signed a lease agreement with NAFTA in May 2014 and only thereafter sought approval from the MoA in August 2014 (see [362(1)-(2)] below).

130. But for the MoA's refusal to approve the Amendment, Discovery/AOG would have been able to carry out exploratory drilling at the Krivá Ol'ka Site and would have completed that drilling within the extended term of the Lease (*i.e.* by 1 August 2016).[282] As a direct result of the MoA's conduct, Discovery was:

(1) prevented from carrying out exploratory drilling at Krivá Ol'ka; and

---

[279] Letter from MoA, 23 June 2016, **Exhibit C-19**.
[280] Counter-Memorial at [158].
[281] Fraser 2 at [25].
[282] Lewis 2 at [23].

(2) left with no other option but to apply to the MoE for a compulsory access order to access the Krivá Ol'ka Site under Article 29 of the Geology Act.

131. As Discovery pointed out in its Memorial,[283] the timing of the MoA's decision on 23 June 2016 to refuse to approve the Amendment was significant:

(1) The MoA's decision came a matter of days after the MoE had extended the Exploration Area Licences on 7 June 2016—including the Licence for the Medzilaborce block where the Krivá Ol'ka Site was located—in which the MoE acknowledged that AOG's geological exploration activities were "*beneficial*" and "*necessary*" to "*ensure that additional valuable knowledge about the territory of the Slovak Republic will be gathered*".[284] Slovakia does not dispute that the MoA failed to take this significant fact into account when declining to approve the Amendment,[285] contrary to the obligation of the MoA to "*closely cooperate*" with the MoE under Slovak law.[286]

(2) In its Counter-Memorial, Slovakia has also failed to explain why it took the MoA six months to decide to 'pass the parcel' to the MoE by recommending AOG to apply for a compulsory access order from the MoE under Article 29 of the Geology Act. As Discovery pointed out, if AOG had known that this was going to be the MoA's position, it could have made the Article 29 application many months earlier.[287]

132. On 18 July 2016, after the MoA had refused to approve the Amendment, AOG requested State Forestry to conclude a further lease over the Krivá Ol'ka Site.[288] Slovakia does not dispute that State Forestry never responded to this request.[289] Discovery requested (and the Tribunal ordered) Slovakia to produce internal communications within and between State Forestry and the MoA evidencing their

---

283 Memorial at [141].

284 Memorial at [74(10)-(11)]; Exploration Area Licence (Medzilaborce), 7 June 2016, **Exhibit C-13**.

285 Memorial at [141(1)].

286 Act No. 575/2001 Coll. on Organization of Government Activities and Organization of Central Government, Article 38(1), **Exhibit R-071**.

287 Memorial at [141(2)].

288 Letter from AOG to State Forestry, 18 July 2016, **Exhibit C-142**.

289 Memorial at [147].

internal consideration of AOG's request between 18 July 2016 and 25 October 2016.[290] Without any satisfactory explanation, Slovakia has failed to produce any documents which fall within the scope of the Tribunal's order in this regard. Once again, Discovery invites the Tribunal to infer that such documents would be adverse to the interests of Slovakia.[291]

3. The MoE refused to grant a compulsory access order pursuant to an application under Article 29 of the Geology Act

133. In the light of the MoA's decision to refuse to approve the Amendment or a new lease with State Forestry, AOG was left with no alternative but to apply for a compulsory access order from the MoE over the Krivá O'lka Site under Article 29. AOG's application fared no better than AOG's attempt to obtain the MoA's consent to the Amendment. As explained below:

(1) the MoE's decision-making process with respect to AOG's Article 29 application was arbitrary, opaque and lacking in good faith;

(2) on 6 March 2017, the MoE gave pretextual reasons for refusing to grant AOG's Article 29 application;

(3) after the MoE's decision was overturned in June 2017, the MoE imposed an arbitrary and unjustified suspension on the proceedings in July 2017 to avoid having to grant AOG's Article 29 application; and

(4) as a direct result of the MoE's conduct, AOG was unable to carry out exploratory drilling at Krivá Ol'ka which it would otherwise have completed within no more than a few months.[292]

134. On 30 August 2016, AOG filed its Article 29 application.[293] Slovakia does not dispute that AOG's Article 29 application was made on the basis that: (*i*) there was an overriding public interest for oil and gas exploration to take place, as the MoE

---

290 Procedural Order No. 3, Annex A, Request No. 7(i).

291 See IBA Rules, Article 9(6), **Exhibit CL-001**.

292 Lewis 2 at [23].

293 Memorial at [144]; AOG's Article 29 Application, 30 August 2016, **Exhibit C-143**.

had acknowledged when it extended the Exploration Area Licences in June 2016;[294] and (*ii*) State Forestry and the Humenné District Office had already consented to the Krivá O'lka Site being used for non-forest purposes.

135. Slovakia also does not dispute Mr Fraser's testimony that the MoE's legal department was "*initially very positive about our application, confirming that this was a clear case where the public interest requirement was met and that it was quite clear that the [MoE] had refused to approve the lease*".[295] In this regard, on 17 October 2016, an official in the MoE's legal department (Mr Tomáš Hrvol) informed AOG's attorney that:[296]

    (1) during his time at the MoE, they had decided approximately 10 applications for compulsory access orders under Article 29 of the Geology Act;

    (2) it "*typically took 2 to 4 months*" for the MoE to reach a decision;

    (3) based on AOG's application there was "*no reason why the Ministry should not decide in favour of [AOG]*"; and

    (4) he expected that the decision "*should be issued sometimes [sic] between middle to the end of November*";

    (5) the involvement of the MoA in the proceedings "*should not complicate the process, as it is a participant as any other one would be*".

136. Despite Mr Hrvol's confirmation that AOG's application would be processed swiftly and in favour of AOG, delays soon started to occur. In particular, AOG's application became bogged down by an unseemly procedural dispute between the MoE and the MoA as to whether the MoA was (or should be) a party to the Article 29 proceedings. AOG was caught in the middle of this dispute. In this regard:

---

294 Memorial at [74(10)-(14)].

295 Fraser 1 at [86].

296 Email from Viktor Beran, 17 October 2016, **Exhibit C-337**.

(1) On 9 November 2016, the MoE told the MoA that it was a party to the Article 29 proceedings and invited the MoA to respond to certain questions, including whether AOG's application was in the public interest.[297]

(2) On 23 November 2016, the MoA responded to the MoE asserting that it was not a party to the proceedings and that it was "*pointless*" for the MoA to comment on AOG's application or respond to the MoE's questions.[298]

(3) Slovakia seeks to justify the MoA's stance on the basis that the "*parties to the proceedings are owners of the affected property*".[299] Yet the very provision cited by Slovakia (Article 50 of the Act on Forests) states that the forest land (which was the subject of AOG's application) is "*owned by the State*". It was therefore obvious for the MoA to be a party to the proceedings.

(4) By February 2017 (*i.e.* 5 months after AOG's application had been filed and well in excess of the typical 2-4 month timeframe – see [135(2)] above) the procedural dispute between the MoA and the MoE had still not been resolved. The MoE therefore convened an oral hearing on 7 February 2017 between representatives of AOG, the MoE, the MoA and State Forestry.

(5) In advance of the oral hearing, a flurry of correspondence was exchanged between the MoE and MoA. In this correspondence, the MoA continued to deny that it was a party to the proceedings and initially even refused to attend the hearing.[300] However, the MoA eventually did attend the oral hearing.

(6) The minutes of the oral hearing on 7 February 2017 record that:[301]

(a) no substantive discussion took place about whether it was in the public

---

297 Letter from the MoE, 9 November 2016, **Exhibit C-156**, p. 8

298 Letter from the MoA, 23 November 2016, **Exhibit C-156**, p. 1.

299 Counter-Memorial at [162], referring to Act on Forests, Article 50, **Exhibit R-070**.

300 See *e.g.* Letter from MoA, 30 January 2017, **Exhibit C-360** ("It follows that we will not attend the oral hearing in the present case"); Letter from MoA, 31 January 2017, **Exhibit C-361**; Emails between the MoA and MoE, 31 January 2017 to 1 February 2017, **Exhibit C-362**; Emails between the MoA and MoE, 3-6 February 2017, **Exhibit C-363**;

301 Minutes of Oral Hearing regarding AOG's Article 29 Application, 7 February 2017, **Exhibit C-365**.

interest for the MoE to grant a compulsory access order; and

(b) instead, officials of the MoE and the MoA continued to bicker about whether the MoA was (or should be) a party to the proceedings.

(7) Discovery received a report of the meeting from AOG's attorney who had attended the meeting and who stated as follows (emphasis added):[302]

> "Most of the time, the two ministry's representatives (Ministry of Agriculture and Ministry of Environment) argued, whether the Ministry of Agriculture is the participant to the section 29 proceeding or whether not.
>
> Mr Hrvol tried to persuade us to submit new request to LESY SR with regard to the lease agreement, which we denied resolutely as we do not trust LESY SR or Ministry of Agriculture that they will process our request in due course. Especially when we know about the attitude of the top management of the Ministry of Agriculture towards AOG and geological survey in the east.
>
> **The hearing ended with no specific conclusion whatsoever, with Mrs. Maťová (chief of the state geological administration) saying that they have not moved anywhere. I think they wanted to persuade the Ministry of Agriculture to grant their approval to the lease agreement, as the Ministry of Environment does not want to be the one that will have to decide. However, the Minsitry of Agriculture did not want to grant the approval and they refused to state anything else on the hearing besides saying that they are not the participant to the proceeding.**"

137. It is clear from the foregoing that the MoA and MoE were both playing a game of 'pass the parcel' at AOG's expense. The prize AOG sought and expected was access to the Krivá Ol'ka Site (either via the MoA's approval to a lease or via the MoE's grant of a compulsory access order). Yet when the music stopped, the MoA and the MoE both denied AOG that prize and the proceedings of both Ministries had dragged on for over 1 year (commencing in January 2016 when AOG sought the MoA's approval). All the while, AOG was unable to carry out any exploratory drilling at Krivá Ol'ka as a direct result of the Ministries' conduct.

138. On 6 March 2017, the MoE issued its decision refusing AOG's Article 29

[302] Email from Viktor Beran, 8 February 2017, **Exhibit C-366**.

application.[303] As noted in the Memorial,[304] it is clear that the MoE was preparing to issue a decision granting AOG's application but then received an instruction from higher up in the MoE to refuse the Article 29 application. In this regard:

(1) Slovakia asserts that Discovery has not said "*who at the MoE gave this supposed instruction or to whom it was given*".[305] The reason is because this person's name is exclusively within Slovakia's knowledge. Moreover, this wording in the Counter-Memorial has evidently been drafted very carefully. It is notable that Slovakia has not positively denied the fact that such an instruction was given. It is clear that such an instruction was given.

(2) The instruction was referred to in AOG's report to JKX and Romgaz dated 10 March 2017.[306] This report was in turn based on an email from AOG's attorneys dated 9 March 2017 who had spoken with Mr Hrvol at the MoE and stated as follows:[307]

> "we have a bad news, we talked to Mr. Hrvol regarding the decision under section 29 proceeding. He informed us that the decision has been issued and sent to AOG, but that it will be negative. It should be delivered today or tomorrow. **He said they were finalizing the wording in favour of AOG, when they received instruction from the high levels of the Ministry, to decide negatively.** […] **In our view they are just scared to pass any decision that might rise negative public reaction. Mr. Hrvol kept assuring us whole time that there is no reason why they should not issue a decision.**"

(3) Slovakia strenuously resisted Discovery's request for production of documents on this point, specifically documents sent to and from Mr Hrvol. Yet the Tribunal concluded that these documents appeared to be *prima facie* relevant and ordered Slovakia to produce them.[308] Without any satisfactory explanation, Slovakia has failed to produce evidence of:

303 Decision of the MoE, 3 March 2017, **Exhibit C-25**.
304 Memorial at [152]-[153].
305 Counter-Memorial at [163], footnote 253.
306 AOG Report, 10 March 2017, **Exhibit C-169**, p. 2.
307 Email from Viktor Beran, 9 March 2017, **Exhibit C-370**. See also Fraser 1 at [87].
308 Procedural Order No. 3, Annex A, Request No. 7.

(a) the wording of the draft decision which the MoE was finalising in favour of AOG; and

(b) the instruction which Mr Hrvol and/or his colleagues received from high levels of the MoE "*to decide negatively*".

(4) It is implausible to suppose that there are no documents evidencing the existence of the instruction, especially in the light of Mr Hrvol's comments earlier in October 2016 (see [135] above) and Mr Hrvol's further comments in March 2017 (see [138(2)] above). Discovery also notes that Slovakia has, for tactical reasons, not called any witnesses from the MoE (*e.g.* Mr Hrvol) to testify as to the decision-making process adopted by the MoE in relation to AOG's Article 29 application. Slovakia knows that such testimony would be adverse to its case. In the premises, Discovery invites the Tribunal to draw the inference that Slovakia has not produced these documents because they would be adverse to its case.[309]

(5) Discovery notes that Slovakia's privilege log states that, on 13 February 2017, Mr Hrvol prepared a document for the Minister of Environment which contained (according to Slovakia's description):[310]

> "[…] an assessment of potential implications of positive and negative decisions on AOG's request under Article 29 of the Geology Act to the Ministry of Environment, as well as a description of the proceedings under Article 29 of the Geology Act preformed [sic] to date."

(6) Discovery infers that the instruction which Mr Hrvol and/or his colleagues received from high levels of the MoE was given at some point in time between the date of this document (13 February 2017) and the date of the MoE's eventual decision (on 6 March 2017).

139. Against this background, it is clear that: (*i*) the MoE's refusal to grant AOG's Article 29 application was inconsistent, arbitrary, opaque and lacking in good faith; and (*ii*) the reasons given by the MoE for refusing AOG's Article 29 application

---

309 IBA Rules, Article 9(6), **Exhibit CL-001**.

310 Slovakia's Privilege Log, 14 July 2013, Request No. 7.

were pretextual. The real reason why the application was refused was because officials higher up within the MoE did not want AOG to carry out its exploratory drilling activities at Krivá O'lka.

140. It is true that the Minister of Environment, Mr Sólymos, quashed the MoE's decision in June 2017 after AOG had filed an appeal.[311] However, Discovery was then back to square one and had made no further progress in being able to carry out exploratory drilling at the Krivá Ol'ka Site, and had engaged in two lengthy and arbitrary processes with two different Ministries (first the MoA then the MoE) over an 18-month period (starting in January 2016).

141. Slovakia alleges that, after Minister Sólymos quashed the MoE's decision in June 2017, AOG "*ceased participating in the procedure*".[312] This is untrue. AOG continued to engage with the MoE in its attempts to obtain a compulsory access order. Yet the MoE imposed unjustified and arbitrary procedural roadblocks to delay AOG's application. Discovery concluded that the MoE was "*not prepared to act with us in good faith, and consider our application fairly*."[313] In this regard:

    (1) On 27 June 2017, the MoE told AOG it had suspended further consideration of the Article 29 application pending the resolution of a "*preliminary issue*", namely "*the submission of documents demonstrating the results of negotiations between the parties to the proceedings on the conclusion or non-conclusion of an agreement on the use of the [Krivá Ol'ka Site]*".[314]

    (2) The MoE's suspension and its request for AOG to submit these documents was inconsistent, arbitrary, inexplicable and pretextual:

        (a) On 26 September 2016, AOG had already received a letter from the MoE requesting AOG to provide the same documents.[315] On 27 September 2016, AOG wrote to the MoE attaching a copy of its letter

---

311 Counter-Memorial at [163]; Decision of Minister of Environment, 13 June 2017, **Exhibit C-174**.

312 Counter-Memorial at [164]-[165].

313 Fraser 1 at [88].

314 Decision of the MoE, 27 June 2017, **Exhibit R-075**.

315 As referred to in Letter from AOG to the MoE, 27 September 2016, **Exhibit C-334**.

dated 18 July 2016 addressed to State Forestry attaching the draft lease agreement (see [132] above) and AOG noted that State Forestry had not responded to this request.[316]

(b) By letter dated 10 October 2016 addressed to State Forestry, the MoE had already accepted that "*no agreement on access to and use of property*" had been reached between State Forestry and AOG regarding the Krivá Ol'ka Site.[317] By letter dated 9 November 2016 addressed to the MoA, the MoE reiterated this fact.[318]

(c) Moreover, at the oral hearing on 7 February 2017, State Forestry stated that it had not even submitted AOG's draft lease agreement (see [132] above) to the MoA for approval because the MoA's position, namely that it would not provide its consent, was already known.[319]

(d) In its decision dated 6 March 2017, the MoE stated (emphasis added):[320]

> "**It is clear from the content of the petitions of [AOG] and the provided documentary correspondence with the administrator of the real estate concerned [*i.e.* State Forestry], as well as with the Ministry of Agriculture that no agreement (granting consent) was reached between these entities**, which means the submitted petition of [AOG] for a decision in the matter pursuant to the Section 29 subsect. 4 and 5 of the Geological Act can be considered justified and the Ministry is therefore obliged to act in the given matter."

(3) On 4 July 2017, in response to the MoE's suspension, AOG told the MoE that it had been in possession of the relevant documents since 2016. AOG noted that State Forestry: (*i*) had not responded to AOG's draft lease agreement submitted in July 2016; and (*ii*) had made its position clear at the oral hearing

316 Letter from AOG to the MoE, 27 September 2016, **Exhibit C-334**.

317 Letter from MoE, 10 October 2016, **Exhibit C-336**.

318 Letter from MoE, 9 November 2016, **Exhibit C-345**.

319 Minutes of Oral Hearing regarding AOG's Article 29 Application, 7 February 2017, **Exhibit C-365**, p. 3.

320 Decision of the MoE, 3 March 2017, **Exhibit C-25**, p. 4.

on 7 February 2017.[321] Yet the MoE did not respond to this letter and did not lift the suspension it had imposed on the proceedings on 27 June 2017.

(4) By October 2017, the MoE had still not lifted the suspension. On 2 October 2017, AOG attended a meeting with MoE officials at which it complained about the MoE's inaction and the suspension. On 5 October 2017, Mr Fraser sent a follow-up email to the MoE stating:[322]

> "We were surprised to learn that an additional document is now required, given that we have been discussing this process with the Ministry of Environment since August 2016 and there has never been any doubt, since that date, that the Ministry of Agriculture was not prepared to cooperate. Moreover, this new requirement (in particular the one communicated to us in the meeting, that we are supposed to provide express written refusal of the Ministry of Agriculture or Lesy SR to enter into the lease agreement) is inconsistent (i) with the published guidelines on the Ministry of Environment's own website, attached, and (ii) with the decision of the Minister of Environment on the appeal (see page 8, last paragraph, of the attached decision). **It is difficult to escape the impression that additional documentary requirements are being imposed simply in order to prolong this process further, or even indefinitely**."

(5) By November 2017, the MoE had still not (*i*) lifted the suspension or (*ii*) responded to AOG's letters. On 27 November 2017, AOG wrote again to the MoE and asserted that the MoE's suspension and inaction was "*illegal*" and was causing "*unjustified delays*". AOG also noted:[323]

(a) The MoE's guidance on its website for Article 29 applications stated that it was not necessary for an applicant to contact the owner of the property repeatedly, provided that the applicant had sent a draft proposal to enter into a lease to the owner and a period of 15 days had elapsed without any response.

(b) This was the case here because State Forestry had not responded to the draft lease agreement which AOG had submitted in July 2016 and, in

321 Letter from AOG, 4 July 2017, **Exhibit C-374**.

322 Email from Alexander Fraser, 5 October 2017, **Exhibit C-383**.

323 Letter from AOG, 27 November 2017, **Exhibit C-384**.

any event, had confirmed at the oral hearing on 7 February 2017 that it had not submitted the draft lease agreement to the MoA for approval because the MoA's position was clear.

(6) Yet the MoE still did not lift the suspension or respond to AOG's letters. AOG heard nothing further from the MoE until:

(a) 31 January 2018 when Minister Sólymos wrote to AOG insisting that AOG should provide new documents to show that AOG had attempted to negotiate a new lease with State Forestry;[324] and

(b) 21 June 2018 when the MoE eventually rejected AOG's Article 29 application, on the basis that AOG had by this date relinquished the Medzilaborce Exploration Area Licence.[325]

(7) As to (a), this request was arbitrary and inexplicable because the position of State Forestry and the MoA had been made tolerably clear ever since: (*i*) the MoA refused to approve the Amendment in June 2016; and (*ii*) State Forestry refused to submit AOG's draft new lease agreement in July 2016 to the MoA for approval because the MoA's position was already known.

(8) As to (b), as Discovery pointed out in its Memorial, AOG's decision to relinquish the Medzilaborce Exploration Area Licence was taken in order to mitigate AOG's losses.[326] If the MoE had granted AOG's Article 29 application (as it should have done) AOG would have been able to complete its exploratory drilling at Krivá O'lka within a couple of months[327] and AOG would not have relinquished the Medzilaborce Exploration Area Licence.

F. RUSKÁ PORUBA

142. As Discovery explained in its Memorial, AOG also planned to drill an exploration

---

324 Letter from Minister Sólymos, 31 January 2018, **Exhibit C-387**.

325 Decision of the MoE, 21 June 2018, **Exhibit C-201**.

326 Memorial at [190].

327 Lewis 2 at [23].

well at Ruská Poruba.[328] Slovakia's factual description of AOG's attempts to drill at Ruská Poruba omits numerous important details, as explained below.

143. The proposed site for the well (the "**Poruba Site**") was located on privately owned farmland located approximately 1.5 km out of the town. In 2015, AOG secured the necessary leases and permits for the Poruba Site. However, AOG began to encounter problems accessing the Poruba Site via a track which ran through woodland and farmland and across different land plots (the "**Poruba Track**").[329]

144. Part of the Poruba Track ran across land which belonged to a local Urbariát (a forest landowners' community).[330] Another part of the Poruba Track ran across land which was managed by State Forestry. State Forestry had granted permission to AOG to use the Poruba Track but the Urbariát had refused to grant permission.[331]

145. On 27 November 2015, AOG obtained an interim injunction from the Humenné District Court which ordered the Urbariát to allow AOG to use the Poruba Track to access the Poruba Site (the "**Poruba Injunction**").[332] In December 2015, AOG attempted to bring heavy machinery and equipment along the Poruba Track to the Poruba Site. In defiance of the Poruba Injunction, activists blocked the Poruba Track with vehicles as well as a concrete highway divider which had been chained to the ground by the activists. What is more, the Police refused to intervene. As a result, AOG was forced to suspend operations.[333]

146. Slovakia criticises AOG for having attempted to use the Poruba Track to access the Poruba Site in December 2015. Slovakia asserts that: "*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*".[334]

---

[328] Memorial at [66]-[71].

[329] Fraser 1 at [25].

[330] Fraser 1 at [25]; Lewis 1 at [77].

[331] Fraser 1 at [26]; Decision of the Humenné District Court, 27 November 2015, **Exhibit R-077**, p. 2 ("[…] this forest road is also partly under the management of [State Forestry] which however had granted [AOG] permission to passage across these lands").

[332] Fraser 1 at [26]; Decision of the Humenné District Court, 27 November 2015, **Exhibit R-077**.

[333] Lewis 1 at [77]; Fraser 1 at [27]-[28]; AOG Report, 21 January 2016, **Exhibit C-120**, pp. 5-6.

[334] Counter-Memorial at [170].

Slovakia's criticism is incoherent and incorrect. The Urbariát had been ordered by the Humenné District Court to allow AOG to use the Poruba Track to access the Poruba Site pursuant to the express terms of the Poruba Injunction. Moreover, Slovakia does not dispute that the Police refused to intervene on this occasion. The Police's inaction ultimately prevented AOG from accessing the Poruba Site and carrying out its exploration activities.

147. AOG made a further attempt to access the Poruba Site via the Poruba Track in January 2016. Slovakia concedes that, on this occasion, the Poruba Injunction was still effective in AOG's favour.[335] On this occasion, activists continued to block the Poruba Track and the Police once again refused to intervene.[336] Slovakia asserts that AOG was attempting to use land plot No. 513 and that "*AOG had obtained the Poruba Injunction against Urbariát only, but not against the owners of land plot No. 513*".[337] Once again, Slovakia's criticism is incoherent and incorrect. The Poruba Injunction expressly referred to land plot No. 513 and ordered the Urbariát to allow AOG to use this plot to access the Poruba Site.[338]

148. On 19 February 2016, the Poruba Injunction was overturned by the Prešov Regional Court, following an appeal by the Urbariát.[339] In order to access the Poruba Site, AOG would have needed to apply to the MoE for a compulsory access order over the Poruba Track under Article 29 of the Geology Act. Given the arbitrary and unfair way in which AOG was treated by the MoE in respect of its Article 29 application at Krivá Ol'ka (as described above), AOG decided it would be pointless to file a separate Article 29 application for the Poruba Site.

G. EIA

1. The Amendment to the EIA Act and the EIA Directive

149. Slovakia contends that the amendment to the EIA Act, which was adopted in October 2016 and became effective on 1 January 2017 (the "**EIA Amendment**"),

---

335 Counter-Memorial at [171].

336 Fraser 1 at [28].

337 Counter-Memorial at [171].

338 Decision of the Humenné District Court, 27 November 2015, **Exhibit R-077**, p. 1.

339 Decision of the Prešov Regional Court, 19 February 2016, **Exhibit C-126**.

was enacted in response to infringement proceedings commenced by the European Commission in 2013 due to Slovakia's failure properly to transpose Directive 2011/92/EU, as amended by Directive 2014/52/EU (together, the "**EIA Directive**"), into Slovak law.[340]

150. Slovakia does not dispute that the EIA Act, *prior* to its amendment by the EIA Amendment, did not apply to AOG's activities and did not require AOG to perform a Preliminary EIA.[341] Yet Slovakia contends that, from 1 January 2017 onwards, the EIA Amendment applied to AOG's activities.[342] As explained in the Memorial,[343] and as elaborated below, this is incorrect.

151. Since the EIA Act adopted the EIA Directive into Slovak law,[344] it is convenient to consider the terms of the EIA Directive and EIA Act in further detail.[345] Slovakia's Counter-Memorial skips over important terms in the EIA Directive and the EIA Act which show that AOG was *not* required to perform a Preliminary EIA before drilling exploration wells, even after the EIA Amendment came into force.

152. Article 2(1) of the EIA Directive provides (emphasis added):

> "Member States shall adopt all measures necessary to ensure that, **before development consent is given**, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for **development consent** and an assessment with regard to their effects. Those projects are defined in Article 4."

153. The term "*development consent*" is defined in Article 1(2)(c) of the EIA Directive to mean "*the decision of the competent authority or authorities which entitles the*

---

340 Counter-Memorial at [180]-[181]; Sólymos 1 at [8]-[9] (footnote 1); Directive 2011/92/EU of the European Parliament and of the Council, 13 December 2011, **Exhibit R-083**; Directive 2014/52/EU of the European Parliament and of the Council, 16 April 2014, **Exhibit R-086**.

341 Memorial at [161].

342 Counter-Memorial at [182].

343 Memorial at [160].

344 EIA Act (2017), **Exhibit C-225**; EIA Act, Article 1(1)(a), footnote 2, Article 66 and Annex No. 16, 1 January 2017, **Exhibit C-358**.

345 References below to specific Articles in the EIA Directive are to Directive 2011/92/EU of the European Parliament and of the Council, 13 December 2011, **Exhibit R-083**, as amended by Directive 2014/52/EU of the European Parliament and of the Council, 16 April 2014, **Exhibit R-086**.

developer to proceed with the project". In this case:

(1) the grant of the Exploration Area Licences by the MoE authorised AOG to proceed with its exploration project;

(2) the Exploration Area Licences were originally granted in 2006 (over a decade before the EIA Amendment came into effect);[346] and

(3) the Exploration Area Licences were renewed for a period of five years in June 2016 (six months before the EIA Amendment came into effect).[347]

154. Article 2(1) of the EIA Directive, and the definition in Article 1(2)(c), was reflected in Article 1 of the EIA Act which provided that the EIA Act regulated the procedure for the assessment of environmental impacts of *"proposed activities prior to a decision on their location or prior to their permit under **separate legislation**.*"[348]

155. Footnote 2 of Article 1 of the EIA Act contained a list of the "*separate legislation*" pursuant to which such activities could be permitted. This list specifically included the Geology Act, as amended.[349] It goes without saying that the Exploration Area Licences had been granted by the MoE pursuant to the express terms of the Geology Act and hence AOG's exploration activities were already permitted.

156. Moreover, a decision on the location of AOG's three exploration wells at Smilno, Krivá Ol'ka and Ruská Poruba had been made well before the EIA Amendment came into force. By December 2015, AOG had settled on a firm plan to drill these three exploration wells[350] and was dealing with Slovak authorities who knew full well about AOG's proposed activities at these three locations. Thus:

346 Memorial at [33].
347 Memorial at [74].
348 EIA Act, Article 1(1)(a), **Exhibit C-225** (emphasis added).
349 EIA Act (2017), **Exhibit C-225**; EIA Act, Article 1(1)(a), footnote 2, Article 66 and Annex No. 16, 1 January 2017, **Exhibit C-358**.
350 Memorial at [66]-[69].

(1) The Bardejov District Office had granted permits to enable AOG to carry out exploratory drilling on the Smilno Site in 2014 and 2015;[351]

(2) The Humenné District Office had granted permits to enable AOG to carry out exploratory drilling on the Krivá O'lka Site in 2015;[352] and

(3) AOG had also secured permits for the Ruská Poruba Site in 2015.[353]

157. It is therefore clear that the EIA Act and the EIA Amendment—by their express terms and when read together with the EIA Directive—did not apply to AOG's projects and/or activities because they were already authorised under an existing "*development consent*" and/or an existing permit granted under "*separate legislation*" (*viz.* the Exploration Area Licences granted under the Geology Act).

158. Slovakia is therefore wrong to contend that AOG was required to perform a Preliminary EIA under the EIA Amendment for any of its proposed exploration wells.[354] Slovakia also mischaracterises the numerous statements issued by the MoE and Minister Sólymos from November 2016 onwards (upon which Discovery relied). These statements clearly confirmed that AOG was under no legal obligation to conduct a Preliminary EIA.[355] In this regard:

(1) Slovakia asserts, by reference to the testimony of Minister Sólymos, that the statements of the MoE and Minister Sólymos from November 2016 onwards (as quoted by Discovery in its Memorial) "*consistently connected the EIA preliminary assessment with actual exploration drills*".[356] In its Counter-Memorial and in Minister Sólymos' testimony, Slovakia is trying to rewrite history and resile from consistent statements made from November 2016

[351] Memorial at [81].
[352] See [116(2)] above.
[353] Fraser 1 at [26].
[354] Counter-Memorial at [186].
[355] Memorial at [164]-[165], [168], [174]-[180]. See also [309] below.
[356] Counter-Memorial at [186], footnote 293.

onwards (upon which Discovery reasonably relied[357]) which confirmed that AOG was not legally obliged to perform a Preliminary EIA.

(2) Indeed, the repeated requests made by Minister Sólymos urging AOG to agree to perform a Preliminary EIA "*beyond the scope of the law*"[358] would make no sense if AOG was already legally obliged to perform a Preliminary EIA by reason of the EIA Amendment.

(3) Moreover, in an op-ed article published on 3 December 2016 in the Slovak daily newspaper *Denník N*, Minister Sólymos stated (emphasis added):[359]

> "[…] I would like to remind you that as of January 1, 2017, the legislation in this area is being tightened, and companies conducting geological exploration will have to submit a mandatory environmental impact assessment (EIA) **when obtaining a Licence**."

(4) This statement by Minister Sólymos was consistent with his other statements and reinforces the correctness of the analysis set out at [151]-[157] above, namely that since the Exploration Area Licences had already been granted to AOG prior to the EIA Amendment, AOG was under no legal obligation to perform a Preliminary EIA.

2. AOG's Press Release in April 2017

159. Slovakia alleges that AOG reached an agreement "*with the local community*" to submit applications for Preliminary EIA clearance, as embodied in AOG's press release from April 2017.[360] This mischaracterises AOG's press release and the context in which it was issued.

160. From late 2016 onwards Minister Sólymos had repeatedly requested AOG to agree

---

[357] See Lewis 1 at [82]. See also *e.g.* AOG Report, 24 January 2017, **Exhibit C-359**, p. 1 ("We met with the Minister of the Environment on 15 December, as planned. This followed an announcement by him that he would seek to persuade AOG to conduct a preliminary environmental screening procedure on all of its wells, **even though AOG is not obliged to do so by law**", emphasis added).

[358] See *e.g.* Memorial at [180(5)], quoting MoE Press Release, 15 February 2017, **Exhibit C-168**.

[359] Minister Sólymos Article, *Denník N*, 3 December 2016, **Exhibit C-348**.

[360] Counter-Memorial at [15]-[16], [187]-[192], referring to AOG Press Release, 5 April 2017, **Exhibit C-171**.

to perform a Preliminary EIA beyond the scope of its legal obligations.[361] These requests were unjustified because the EIA Amendment did not apply to AOG's activities, as explained above. But for Minister Sólymos' repeated and unjustified public interventions:

(1) AOG would not have needed to issue this press release;

(2) AOG would not have submitted any applications for Preliminary EIA clearance; and hence

(3) AOG would not have been ordered by the District Offices to perform a Full EIA prior to carrying out any exploratory drilling.

161. Moreover, AOG's press release explicitly stated that AOG was "*not obliged by law*" to submit the applications for Preliminary EIA clearance but that AOG "*will do so as a sign of good faith*".[362] Slovakia is therefore wrong to imply that, by submitting the applications for Preliminary EIA clearance, AOG somehow acknowledged that the EIA Amendment applied to AOG's exploration activities and/or that AOG engaged in the EIA process willingly.

162. The reality is that Discovery/AOG was left with no other option but to submit applications for Preliminary EIA clearance as a result of Minister Sólymos' repeated and unjustified public interventions. Moreover, when Discovery/AOG did submit those applications, it was treated by the District Offices in the same arbitrary and unfair way in which it had been treated by other Slovak State agencies during its attempts to drill at Smilno and Krivá O'lka, as described above.

163. Slovakia asserts that the "*local community*" asked AOG to submit Preliminary EIA applications.[363] This is an exaggeration:

(1) As Mr Fraser explains, the activists with whom AOG engaged over a series of meetings in early 2017 "*comprised a core group of only 5-10 people, of*

[361] Memorial at [168], [174], [179], [180(5)], [181]-[182].

[362] AOG Press Release, 5 April 2017, **Exhibit C-171**, p. 1.

[363] Counter-Memorial at [188].

which two or three controlled the opposition at each of the three planned well locations".[364]

(2) According to Slovakia's 2021 Census,[365] Slovakia has a population of over 5 million people, of whom over 800,000 live in the Prešov region in northern Slovakia where AOG was carrying out its exploration activities. Moreover, and according to the 2021 Census, within the Prešov region:

(a) over 11,000 people live in the District of Bardejov;

(b) over 60,000 people live in the District of Humenné; and

(c) over 11,000 people live in the District of Medzilaborce.

(3) Slovakia has not come close to establishing that an overwhelming majority of the local community (or, indeed, a majority of the population of the Prešov region) was opposed to AOG's exploration activities or that AOG's press release in April 2017 was issued in order to placate mass public unrest.

(4) As to AOG's activities in Smilno, even Minister Sólymos acknowledged in his December 2016 op-ed article that "*there is also* ***a significant part of the residents of this village that supports the company's geological surveys****, so the whole matter cannot be viewed in black and white*".[366]

164. Slovakia asserts that AOG's press release in April 2017 was a "*fresh start*" which severed "*any causal connection between the alleged breaches of the US-Slovakia BIT and the ultimate failure of the project*".[367] Discovery addresses causation separately in Section VI below.[368] In summary, however, Slovakia is wrong to contend that the April 2017 press release was a *novus actus interveniens*:

---

364 Fraser 1 at [93].

365 See https://www.scitanie.sk/en/population/basic-results/number-of-population/SR/SK0/SR.

366 Minister Sólymos Article, *Denník N*, 3 December 2016, **Exhibit C-348** (emphasis added).

367 Counter-Memorial at [16]-[19], [192].

368 See [382] *et seq* below.

(1) But for the conduct of the Police, the Judiciary, the State Prosecutor and the MoI at Smilno between 2015-2016,[369] AOG would have been able to drill its exploration well on the Smilno Site before 2017 and hence before the EIA Amendment even came into effect.

(2) But for the conduct of the MoA and the MoE between 2015-2016,[370] AOG would have been able to drill its exploration well on the Krivá Ol'ka Site before 2017 and hence before the EIA Amendment even came into effect.

(3) The conduct of these State organs and agents prior to April 2017 prevented Discovery/AOG from drilling any exploration wells at Smilno and Krivá O'lka. As explained in the Memorial and in Section V below, Slovakia's conduct breached its obligations to Discovery under the BIT. This led directly to the failure of the project and cannot be ignored by the Tribunal.

(4) By submitting applications for Preliminary EIA clearance in April 2017, Discovery did not waive or abandon these past breaches of the BIT. Moreover, as explained in the Memorial and below, Slovakia committed further breaches of the BIT after April 2017 during the EIA process. Slovakia's causation argument therefore does not even get off the ground.

3. AOG's Applications for Preliminary EIA Clearance in 2017

a. An order for a Full EIA is only justified if the activities are likely to have significant adverse environmental effects

165. Before considering AOG's applications for Preliminary EIA clearance and the decisions made by the District Offices in response,[371] it is relevant to recall the purpose of an EIA as embodied in Article 1(1) of the EIA Directive, namely to assess the "*environment effects of those public and private projects which are likely to have* ***significant effects*** *on the environment*" (emphasis added).[372]

---

369 As described in the Memorial at [78]-[129] and as described at [53]-[115] above.

370 As described in the Memorial at [130]-[157] and as described at [116]-[141] above.

371 See Memorial at [184]-[187]; Counter-Memorial at [201].

372 Directive 2011/92/EU of the European Parliament and of the Council, 13 December 2011, **Exhibit R-083**.

166. Similarly, under the EIA Act, an order for a Full EIA can only ever be issued by a District Office if a project is likely to have "*significant effects*" on the environment: this is accepted by Slovakia.[373] The threshold is deliberately set at a high level to ensure that projects which are unlikely to have significant effects on the environment are not impeded. It goes without saying that, in order for this high threshold to be crossed, the District Offices must base their conclusion on a rational foundation of fact and/or expert opinion.

167. In the applications AOG submitted to the District Offices in 2017, AOG provided a detailed explanation as to why its proposed exploration activities were unlikely to have significant effects on the environment.[374] If an order was to be made requiring AOG to conduct a Full EIA, it was incumbent upon the District Offices to explain (on a rational basis and by reference to facts and/or expert opinion) why AOG was incorrect.

b. The EIA Decisions ordered AOG to perform a Full EIA on arbitrary, unfair and pretextual grounds

168. As explained below, by their decisions which ordered AOG to perform a Full EIA (the "**EIA Decisions**"):

(1) The Bardejov District Office and the Humenné District Office did not conclude that AOG's exploration activities were likely to have significant effects on the environment. These decisions did not even meet the threshold required under the EIA Act for a Full EIA.

(2) Although the Medzilaborce District Office concluded that AOG's exploration activities were likely to have significant effects on the environment, the reasons given in support of that conclusion were pretextual and were not supported by any rational or objective foundation of fact or expert opinion.

---

[373] See Counter-Memorial at [33(g)] ("If District Office concludes that there is a **significant effect** to the environment, then a Full EIA must be performed"), emphasis added.

[374] See *e.g.* AOG Project Proposal for the Enquiry Procedure (Smilno), May 2017, **Exhibit C-373**.

(3) The decisions of all three District Offices were arbitrary, unfair and inconsistent with numerous earlier statements attributable to Slovakia which had already concluded that AOG's exploration activities were not likely to have significant effects on the environment.

169. The decision of the Bardejov District Office dated 2 August 2017 in relation to the Smilno Site (the "**Smilno EIA Decision**") is a 56-page document.[375] However, the length of the document should not be taken as proxy for the quality of its reasoning:

(1) Pages 1-3 simply summarise AOG's application, without any analysis or assessment by the District Office.

(2) Pages 3-55 then quote (in verbatim) the comments filed by 55 separate activists and organisations in response to AOG's application, without any analysis or assessment by the District Office.

(3) Pages 55-56 set out the conclusion of the District Office. The purported justification for the decision requiring a Full EIA is contained in three short paragraphs which state as follows (emphasis added):

> "Bardejov District Office, Department of the Environment, as the competent state administration body pursuant to Section 53 subsection 1 (c) and section 56 (b) of Act No. 24/2006 Statutes on the environmental impacts assessment, as amended, in the framework of the assessment procedure, assessed the designed construction operation in terms of the significance of the expected impacts on the environment and public health, the state of use of the land and the sustainability of the natural environment, the nature and extent of the designed construction operation, compliance with the land-planning documentation and the level of processing of the designed construction operation. In doing so, it took into account the opinions of the participants in the assessment procedure pursuant to Section 23 subsection 4 of the Act, including the public, and made the ruling as set out in the operative part of this Ruling.
>
> **From the opinions received on the project proposal and from the measures proposed in the designed construction operation, some specific requirements in relation to the designed construction operation have emerged, which will need to be taken into account in the assessment**

[375] Decision of the Bardejov District Office (Smilno), 2 August 2017, **Exhibit C-377**.

procedure in the assessment report.

> Other requirements and details will be specified in the scope of the assessment of the designed construction operation, which will be determined by the Bardejov District Office, Department of the Environment in cooperation with the departmental authority, the permitting authority and after discussion with the contracting authority."

(4) The Tribunal will note that the Smilno EIA Decision contained no finding that AOG's proposed exploration activities were likely to have significant effects on the environment (the threshold required by the EIA Directive and the EIA Act before an order for a Full EIA can be made).

(5) Instead, the District Office merely noted that certain "*opinions*" had been filed (by activists and organisations) from which "*some specific requirements in relation to designed construction operation have emerged*". Yet these alleged "*requirements*" were not even identified by the District Office, let alone assessed by reference to objective facts and/or expert opinion.

(6) The Smilno EIA Decision was not based upon any rational evidential foundation. Rather, the Decision was arbitrary and was reached in bad faith by the District Office. The purpose and effect of the Smilno EIA Decision was to delay the project even further (by requiring a Full EIA) and hence prevent AOG from carrying out its exploration activities.

170. The decision of the Humenné District Office dated 7 September 2017 in relation to the Ruská Poruba Site (the "**Ruská Poruba EIA Decision**") is a 45-page document.[376] It follows an almost identical format to the Smilno EIA Decision.[377] The same points made at [169(4)-(6)] above apply *mutatis mutandis*. Indeed, the conclusion section of the Ruská Poruba EIA Decision is materially identical to the conclusion section of the Smilno EIA Decision.

171. The decision of the Medzilaborce District Office dated 8 March 2018 (the "**Krivá Ol'ka EIA Decision**") is a 126-page document.[378] It follows a slightly different

---

376 Decision of the Humenné District Office (Ruská Poruba), 7 September 2017, **Exhibit C-179**.

377 Fraser 2 at [35].

378 Decision of the Medzilaborce District Office (Krivá Ol'ka), 8 March 2018, **Exhibit C-186**.

format from the Ruská Poruba EIA Decision and Smilno EIA Decision. However, the same fundamental point made at [169(6)] applies *mutatis mutandis*. The District Office purported to justify its decision on the three pretextual grounds which:

(1) were inconsistent with earlier statements attributable to Slovakia; and

(2) were not supported by any rational evidential foundation.

172. ***First***, the Medzilaborce District Office asserted that: (*i*) part of the Krivá Ol'ka Site was located in a "*Protected Birds Area of Laborecká vrchovina (SKCHVU011)*" (a NATURA 2000 protected area); and (*ii*) "*[a]mong the activities that are likely to have a significant negative impact on the objects of protection in the locality are the proposed terrain adjustments and changes in outflow conditions*".[379] This was a pretextual justification. It was not based on any rational evidential foundation and was inconsistent with numerous earlier statements attributable to Slovakia:

(1) On 16 January 2015, the Prešov District Office had already issued an "*expert opinion*" under the Nature Protection Act in response to AOG's application dated 17 December 2014 in respect of its proposal to drill an exploration well on the Krivá Ol'ka Site. The District Office's opinion was as follows:[380]

> "From the point of view of the coherent European network of NATURA 2000 protected areas, the said forest section is located in the SKCHVU011 Laborecká Upland Protected Bird Area.
>
> [...]
>
> According to the expert assessment by the State Nature Conservancy of the Slovak Republic – a report of the East Carpathians Protected Landscape Area No. CHKO VK 435/14 dated 13 January 2014, the submitted plan of the *applicant* is planned only in a small part of the Laborecká Upland Protected Bird Area (less than 0.001% of the Protected Bird Area, less than 0.01% of the forest stands in the entire Protected Bird Area in question), and there is no threat to territory fragmentation […]
>
> **On the basis of the above-stated, the district office in the seat of the region, as the competent nature and landscape protection authority considers that** with the presented plan of the applicant *"Conducting of*

[379] Decision of the Medzilaborce District Office (Krivá Ol'ka), 8 March 2018, **Exhibit C-186**, p. 123.

[380] Expert Opinion of the Prešov District Office (Krivá Ol'ka), 16 January 2015, **Exhibit C-265**.

exploratory drilling in the cadastral territory Krivá Oľka" and with the fulfilment of the established conditions, **there is no assumption of its significant impact on the integrity of the Laborecká Upland Protected Bird Area included in the network of NATURA 2000 protected areas**."

(2) On 23 January 2015, the Medzilaborce District Office also issued a "*statement*" under the Nature Protection Act in response to AOG's application dated 17 December 2014 in respect of its proposal to drill an exploration well on the Krivá Ol'ka Site. The District Office concluded:[381]

> "The location of the construction will not have a significant impact on the threat and change of the current habitat as well as the habitats of wild fauna and flora, or no habitat of European importance or habitat of national importance will be damaged or destroyed."

(3) Moreover, on 27 January 2017, Minister Sólymos stated that: (*i*) circa 8,000 exploratory wells had been drilled to date in Slovakia; and (*ii*) the MoE was "*not aware of even a single environment-related problem occurring as a consequence of those 8,000 prospector bore holes*".[382]

173. ***Second***, the Medzilaborce District Office asserted that "*[e]xecution of the activity proposed might result in contamination of groundwater and surface water with harmful substances, which poses a **possible** negative impact*" (emphasis added).[383] The Tribunal will note that the District Office did not find that this specific issue was likely to have significant effects on the environment (*i.e.* the relevant threshold under the EIA Act). Moreover, this was another pretextual justification. It was not based on any rational evidential foundation and was inconsistent with numerous earlier statements attributable to Slovakia. In this regard:

(1) In its submission to the Medzilaborce District Office dated 18 December 2017 (providing a detailed response to each of the objections which had been raised by activists and other organisations) AOG had already explained why the 'groundwater contamination' objection was unfounded. In particular:[384]

---

381 Statement of the Medzilaborce District Office (Krivá Ol'ka), 23 January 2015, **Exhibit C-266**.

382 Minister Sólymos Interview, *Korzár*, 27 January 2017, **Exhibit C-164**.

383 Decision of the Medzilaborce District Office (Krivá Ol'ka), 8 March 2018, **Exhibit C-186**, p. 124.

384 AOG Submission to the Medzilaborce District Office (Krivá Ol'ka), 18 December 2017, **Exhibit**

(a) AOG stated that contamination of surface and groundwater sources would be "*prevented by 3 layers of steel sheet piling and 3 layers of cement mixture*" inside the exploration well;

(b) AOG also stated that the site would be "*under the constant supervision of authorised workers and their supervisors*" and that prior to commencement of works the piping system would be pressure tested and a leak test report would be prepared;

(c) AOG also explained that groundwater quality "*cannot be affected in any way by the proposed activity*" because "*the drilling process uses a rinse that consists only of water with a natural additive that is labelled as safe for health and the environment*" by the Slovak Environmental Inspectorate in Košice;

(d) AOG also observed that after the initial borehole had been "*cased […] neither surface water nor subsurface water can be endangered by drilling, because it does not come into contact with the borehole body*" and this was a "*standard drilling procedure that sufficiently protects the surrounding area from leakage of unwanted substances into the surroundings*".

(2) In its Decision, the Medzilaborce District Office did not explain (by reference to objective facts or expert opinion) why AOG's explanations in this regard were incorrect or why AOG's activities "*might*" result in groundwater contamination. The District Office's assertion was also inconsistent with the MoE's earlier statement dated 15 February 2017 (emphasis added):[385]

> "Envirorezort has dealt with the topic of exploratory wells in Smilna several times in the past. And not once was there evidence of a violation of the law, and thus a threat to the environment. An example is the inspection results of the Slovak Environmental Inspection, which did not prove a violation of the Water Act. **Thus, the suspicion that groundwater pollution would occur**

C-182, pp. 2-4.

385 MoE Statement – The inspection of the geological survey did not show any serious irregularities, 15 February 2017, **Exhibit C-168**.

as a result of the survey was not confirmed.”

174. ***Third***, the Medzilaborce District Office asserted that AOG’s proposed activities were located in an area affected by landslides and that “*[t]errain adjustments as well as the exploration well under the activity proposed are likely to have a significant impact on the site*”.[386] Yet again, this justification was pretextual and was not based upon any rational evidential foundation:

   (1) In its submission to the Medzilaborce District Office dated 18 December 2017, AOG had already explained why the ‘landslide’ objection (which had been raised by a number of activists in their objections) was unjustified.[387]

   (2) Indeed, Annex 7 of AOG’s application for Preliminary EIA clearance contained a detailed geological study by experts which had already assessed the risk of landslides.[388] The study had concluded that (emphasis added):[389]

      (a) “*The immediate area of the designated well is **not affected** by slope deformations [i.e. landslides]*”; and

      (b) “*The exploratory well is situated in a complex of fluvial sediments **outside** the potential landslide.*”

   (3) In its Decision, the Medzilaborce District Office did not explain (by reference to objective facts or expert opinion) why AOG’s explanation and this expert report was incorrect or why AOG’s proposed activities gave rise to a significant risk of landslides.

175. Moreover, any suggestion by the District Offices that AOG’s activities were likely to have significant effects on the environment was inconsistent with numerous other earlier statements which are attributable to Slovakia. For example:

---

386 Decision of the Medzilaborce District Office (Krivá Ol’ka), 8 March 2018, **Exhibit C-186**, p. 124.

387 AOG Submission to the Medzilaborce District Office (Krivá Ol’ka), 18 December 2017, **Exhibit C-182**, pp. 3, 9, 20, 26-29, 33-39, 47-48, 56-57, 68-69, 75, 79, 88-90, 91-93, 97.

388 AOG’s Application, 7 August 2017, **Exhibit C-378**; Annex 7 of AOG’s Application (Krivá Ol’ka), 14 July 2017, **Exhibit C-375**.

389 Annex 7 of AOG’s Application (Krivá Ol’ka), 14 July 2017, **Exhibit C-375**, pp. 14-15.

(1) In 2014, in response to AOG's applications to renew all three Exploration Area Licences, the Prešov District Office Environmental Department confirmed that "*no interests concerning protection of nature and [the environment] would be injured and therefore the Office has no objections against extension of the term of the Exploration Area*".[390]

(2) In 2016, in response to AOG's application to renew all three Exploration Area Licences, the Prešov District Office Environmental Department again confirmed that the extension "*will not affect the interests associated with conservation of nature and landscape*".[391]

(3) In January 2017, Minister Sólymos "*assured*" local people that AOG's exploration activities "*will not have any unfavourable impacts on their surroundings and the environment in general*".[392]

c. The EIA Decisions, taken with Slovakia's earlier conduct, destroyed the project's commercial viability

176. The EIA Decisions: (*i*) came as an unexpected shock to Discovery/AOG; (*ii*) would have prevented AOG from carrying out its exploration activities for at least a further 12 months (but potentially as long as 36 months[393]) if AOG had performed a Full EIA for each exploration well; and (*iii*) when taken together with Slovakia's earlier conduct, destroyed the commercial viability of the project.[394] Discovery/AOG's contemporaneous reaction to the EIA Decisions was clear:

(1) Discovery/AOG attended a meeting with officials from the MoE (including the State Secretary of the MoE, Mr Kurilla) on 2 October 2017 to discuss the EIA Decisions. In advance of the meeting, AOG prepared a presentation for the MoE which stated:[395]

---

390 See **Exhibit C-8** (Svidník), p. 4; **Exhibit C-9** (Medzilaborce), pp. 3-4; **Exhibit C-10** (Snina), pp. 5-6

391 See **Exhibit C-12** (Svidník), p. 7; **Exhibit C-13** (Medzilaborce), p. 7; **Exhibit C-14** (Snina), p. 7.

392 Memorial at [178], citing Minister Sólymos Interview, *Korzár*, 27 January 2017, **Exhibit C-164**.

393 Fraser 1 at [98].

394 Lewis 1 at [87].

395 AOG Presentation, September 2017, **Exhibit C-178**, pp. 3 and 5 (emphasis added).

> AOG has filed applications for preliminary EIA clearance in respect of the 3 wells Smilno, Kriva Olka and Ruska Poruba; the first two of these (Smilno and Ruska Poruba) have resulted in orders for a full EIA **notwithstanding the absence of any obvious environmental issues**; the expectation is therefore that the Kriva Olka application will also result in an order for a full EIA"
>
> If every application for preliminary EIA clearance results in an order for a full EIA, it makes the preliminary EIA process redundant since AOG would do better to proceed directly to a full EIA; **it also extends the standard permitting process from 6 months to 18 months, which is simply not practical for an exploration well**
>
> […]
>
> On 2 August 2017, against expectations, the Bardejov District Office ordered a full EIA for the planned Smilno well; **this process is likely to last a further 12 months, so that AOG will not be able to drill before the end of 2018 at the earliest – 3 years behind schedule**"

(2) After the meeting with the MoE, Mr Fraser sent an email to Mr Kurilla in which he stated:[396]

> "2. <u>Preliminary EIA decisions in relation to Smilno and Ruska Poruba</u>: We find the lack of reasoning or justification in these decisions, and the unprofessional manner in which they have been prepared (for example, referring to non-existent planning zones) to be extremely discouraging. **It is for this reason that we concluded there was no point in appealing the decisions, since the appeal is to a similar authority, and the message to Alpine from these decisions seemed to be pretty clear.** If we appeal and the process is handled in the same way, we just create one more unwelcome precedent for future applications. Nevertheless, we are willing to appeal against the Ruska Poruba decision as you suggested, to see if this results in a fairer process. […]
>
> Lastly I should add, for the sake of completeness, that if Alpine does decide to abandon its concessions in Slovakia in view of the considerable difficulties which it faces, its investors and partners will expect it to take advice on whether to bring an international arbitration claim against Slovakia."

177. As Mr Fraser testifies, "*[b]y the end of 2017, and against the background of the decisions ordering full EIAs, it was beginning to prove economically unviable to continue, particularly if we were to be required to undergo a full EIA procedure for*

[396] Email from Alexander Fraser, 5 October 2017, **Exhibit C-383**, p. 1.

every exploration well".[397] And as Mr Lewis testifies:[398]

> "Ultimately, the combined effect of Slovakia's actions by the end of 2017 and into 2018 made exploration activities commercially and economically unviable and destroyed the value of Discovery's investment in Slovakia. The requirement to carry out a full EIA process for drilling was particularly devastating due to the additional time and cost that would follow with no certainty in the meantime as to when the project would carry on; all the while AOG would need to keep staff on standby and paying them to retain their availability and knowledge of the project and our plan. There was also the costs associated with preparing a full EIA submission as well as retaining attorneys to continue dealing with the Ministry."

178. Against this background, it is disingenuous for Slovakia to suggest that the EIA Decisions "*did not stop Discovery's project*".[399] The practical effect of the EIA Decisions and the further lengthy delays which would have inevitably ensued as a result of engaging in the Full EIA process—when taken together with Slovakia's earlier conduct at the three well sites from December 2015 onwards—rendered the project commercially and economically unviable.

179. Slovakia asserts that Discovery/AOG "*chose*" not to proceed further and "*walked away from the project*" when the EIA Decisions were made.[400] This is incorrect and ignores the fact that Slovakia should never have issued the EIA Decisions in the first place. But for the EIA Decisions, and but for Slovakia's earlier conduct from December 2015 onwards, Discovery/AOG would have been able to complete its exploration project and would have been able to start producing oil and gas.

d. Slovakia has failed to disclose relevant documents relating to the EIA Decisions

180. In response to Discovery's requests, Slovakia agreed to search (*inter alia*) for "*internal communications within and briefings and reports prepared by*" each of the District Offices relating to AOG's Preliminary EIA applications and the EIA Decisions.[401] Without any satisfactory explanation, Slovakia has not disclosed any

[397] Fraser 1 at [104].

[398] Lewis 1 at [87].

[399] Counter-Memorial at [196].

[400] Counter-Memorial at [196]-[197].

[401] Slovakia's Responses to Discovery's Requests for Production of Documents, 23 May 2023, Request Nos. 11-13.

documents in response to these requests. On this issue, Discovery's counsel informed Slovakia's counsel that it was reasonable to expect that:[402]

(1) preliminary drafts of the EIA Decisions would have been prepared internally and then reviewed and discussed by others; and

(2) these preliminary drafts would have been sent to officials within the District Offices who would have provided input and comments.

181. In response, Slovakia's counsel asserted as follows (emphasis added):[403]

> "This speculation misunderstands how administrative proceedings usually work. **It is established administrative practice that an application is assigned to a specific officer who deals with the assigned case.** That individual then communicates with all parties to the administrative proceedings, assesses all objections and comments submitted within the procedure, and prepares a decision that is ultimately signed. Meanwhile, it is generally not common practice that drafts of decisions are widely distributed or commented on by other individuals at the administrative authority. As such, it is understandable if no such internal communication was located."

182. Slovakia has not identified any internal procedures of the District Offices which support the points made in this letter. Nor has Slovakia:

(1) identified the "*specific officer*" at the District Offices who was supposedly assigned to deal with each Preliminary EIA application submitted by AOG;

(2) explained why that "*specific officer*" has no contemporaneous documents to show that he/she allegedly assessed the objections and comments which were filed after AOG's application was submitted.

183. It is implausible to suppose that the District Offices have no internal communications relating to their consideration of AOG's applications or the preparation of the EIA Decisions. Discovery also notes that Slovakia has, for tactical reasons, not called any witnesses to testify as to the decision-making

---

402 Letter from Signature Litigation LLP to Squire Patton Boggs (US) LLP, 15 June 2023, **Exhibit C-415**.

403 Letter from Squire Patton Boggs (US) LLP to Signature Litigation LLP, 22 June 2023, **Exhibit C-416**.

process adopted by the District Offices in relation to the EIA Decisions. Discovery invites the Tribunal to draw the adverse inference that these documents and testimony have not been disclosed because they would have been adverse to Slovakia's case.[404]

184. Alternatively, if it is the case that the District Offices have no internal documents relating to AOG's application or the preparation of the EIA Decisions, this only serves to reinforce Discovery's case that the District Offices' decision-making processes were not the product of any rational consideration or evaluation of the evidence but rather were pre-determined outcomes to require Full EIAs based upon pretextual justifications.

4. AOG did not participate in the Full EIA process, and did not appeal, because it had no confidence that it would be treated fairly

185. Slovakia asserts that AOG should have appealed against the EIA Decisions.[405] However, the BIT contains no requirement for Discovery to have exhausted local remedies before it can complain of a violation by Slovakia of its obligations under the BIT in respect of the EIA Decisions.

186. Slovakia notes that in October 2017 AOG appealed against the Krivá Ol'ka EIA Decision on the basis that it did not contain any reasoning in support of the order for a Full EIA.[406] It is true that, by a decision dated 11 January 2018, the Prešov District Office accepted AOG's appeal and ordered the Humenné District Office to redetermine AOG's application for Preliminary EIA clearance.[407] This decision reinforces Discovery's case that the Krivá Ol'ka EIA Decision was arbitrary. After the Krivá Ol'ka EIA decision was quashed, however, AOG was back to square one and had no confidence that it would be treated fairly by the District Offices.

187. AOG did not appeal against the Smilno EIA Decision or the Ruská Poruba EIA Decision because it had no confidence that—even if the decisions were overturned

---

404 IBA Rules, Article 9(6), 17 December 2020 **Exhibit CL-001**.

405 Counter-Memorial at [204]-[209].

406 Counter-Memorial at [204]-[205], referring to AOG Appeal against Krivá Ol'ka EIA Decision, 6 October 2017, **Exhibit C-181**.

407 Decision of the Prešov District Office, 11 January 2018, **Exhibit C-184**.

and then remitted back to the District Offices for reconsideration—it would be treated fairly by the District Offices, in view of their patently unfair and arbitrary approach when issuing the original EIA Decisions in the first place.[408]

188. Moreover, AOG did not continue to participate in the Full EIA process for similar reasons.[409]

H. JKX's Withdrawal from the Project in 2018

189. Slovakia implies that JKX's decision to withdraw from the project in 2018[410] was not due to Slovakia's treatment of Discovery/AOG but rather because the assets of a Ukrainian oligarch, Mr Igor Kolomoisky, had been frozen by the English High Court in December 2017.[411] This is wrong.

190. The freezing order had nothing to do with JKX's investment in Slovakia, nor with JKX's operations. The freezing order was sought by a Ukrainian bank in support of civil claims brought against Mr Kolomoisky in which it was alleged that he and others had fraudulently misappropriated substantial sums from the bank.[412] Slovakia is wrong to draw a link between the grant of the freezing order in December 2017 and JKX's decision to withdraw from the project in Slovakia in February 2018. The two events were not connected:

    (1) Mr Kolomoisky only held a 27.4% stake in JKX.[413] Mr Kolomoisky therefore did not have majority control of JKX and so could not have directed JKX's board to withdraw from Slovakia.

---

408 Fraser 1 at [98], [103].

409 Fraser 1 at [98].

410 Memorial at [188]-[189].

411 Counter-Memorial at [211]-[212].

412 London Evening Standard, *JKX oligarch's assets frozen over bank spat*, 21 December 2017, **Exhibit R-90**, p. 2.

413 London Evening Standard, *JKX oligarch's assets frozen over bank spat*, 21 December 2017, **Exhibit R-90**, p. 2.

(2) Further, the record shows that the decision to withdraw from Slovakia was made by JKX's board, not its shareholders.[414] Moreover, JKX's 2017 annual report explains the reasons why the Board had decided to withdraw:[415]

> "In Slovakia repeated delays to the drilling plans of the operator (Alpine Oil & Gas) have been caused by local protestors **and lack of cooperation from authorities at both central and local levels**. As a result, all project partners have been considering their future options. In early February 2018 the Board made a decision to withdraw from Slovakia."

191. Slovakia is therefore wrong to allege that JKX's decision to withdraw was not caused by the State's treatment of AOG.[416] The record shows the opposite.[417]

I. AOG APPLIES TO REDUCE THE EXPLORATION LICENCE AREA IN 2018

192. Slovakia accepts that, after JKX withdrew from the project, AOG decided to (*i*) relinquish the Medzilaborce and Snina Exploration Area Licences and (*ii*) apply to the MoE to reduce the area of the Svidník Exploration Area Licence, which application was granted by the MoE on 8 June 2018 (the "**2018 Licence**").[418]

193. As Discovery noted in its Memorial, the MoE imposed a new condition in the 2018 Licence (the "**EIA Condition**") requiring AOG to perform a Preliminary EIA before drilling any exploration wells to a depth greater than 600m.[419] Slovakia asserts that the imposition of the EIA Condition was legitimate.[420] However:

(1) As AOG noted in a contemporaneous report, the imposition of the EIA Condition "*contradicts earlier public statements by the Minister, that AOG could not be compelled to carry out the preliminary EIA procedure for wells on its existing Licences, since they predated the change in the law*".[421]

---

[414] Email Mr Wayland, 22 February 2018, **Exhibit C-185**.

[415] JKX Annual Report, 2017, **Exhibit C-352**, p. 13 (emphasis added).

[416] Counter-Memorial at [214].

[417] See also Fraser 2 at [40]-[41].

[418] Memorial at [191]-[192]; Counter-Memorial at [216].

[419] Memorial at [193], referring to the 2018 Licence, **Exhibit C-15**, p. 4 (condition no. 2).

[420] Counter-Memorial at [217].

[421] AOG's Report to Partners, 2 November 2018, **Exhibit C-204**, p. 2.

(2) Moreover, guidance issued by the European Commission shows that the Slovakia's imposition of the EIA Condition was illegitimate. The guidance states that "*renewal of an existing permit [...] cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'project'*".[422]

(3) When the MoE granted the 2018 Licence, it was simply renewing an existing permit which had first been issued in 2006. In its application to reduce the Licence area, AOG did not indicate that it would be making any alterations to its proposed exploration activities. Slovakia's imposition of the EIA Condition therefore contradicted this guidance.

III. JURISDICTION AND ADMISSIBILITY

194. The Tribunal should dismiss each objection raised by Slovakia as to both jurisdiction and admissibility. In summary, the Tribunal has jurisdiction under the BIT (**A**) and under the ICSID Convention (**B**). Slovakia's allegation that Discovery did not act in good faith is misconceived (**C**). Finally, Discovery complied with Article VI(2) of the BIT by attempting to resolve its dispute with Slovakia prior to the commencement of this arbitration (**D**).

A. THE TRIBUNAL HAS JURISDICTION UNDER THE BIT

1. Discovery is an eligible "*investor*"

195. Slovakia argues that Discovery is not an eligible "*investor*" under the BIT because Discovery made no contribution or act of investing and Discovery was only a passive shareholder in AOG.[423] This is wrong. Slovakia's argument: (*i*) is irreconcilable with the ordinary meaning of the terms used in the BIT which impose no such requirements; (*ii*) is unsupported by the consistent jurisprudence of numerous awards; and (*iii*) in any event, ignores the true facts of the case.

---

422 European Commission *Interpretation of definitions of project categories of annex I and II of the EIA Directive*, 2015, **Exhibit R-084**, p. 9.

423 Counter-Memorial at [223]-[234].

a. Slovakia's argument is irreconcilable with the ordinary meaning of the terms used in the BIT

196. In the Memorial, Discovery explained why the Tribunal had jurisdiction under the BIT.[424] It is common ground that the Tribunal must interpret the BIT "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".[425] Slovakia's jurisdictional objection finds no support in the ordinary meaning of the terms used in the BIT.

197. The BIT does not even use the term "*investor*" and the BIT does not require a company to have made any contribution or act of investing in order to qualify as an "*investor*", as Slovakia asserts. Instead, the BIT uses the term "*company of a Party*" in Article I(1)(b), which is defined as follows:[426]

> "[…] any kind of corporation, company, association, state or other enterprise, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned;"

198. The term "*company of a Party*" is then used again in Article VI:[427]

(1) Article VI(1) provides:

> "For the purposes of this Article, an investment dispute is defined as a dispute involving […] (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment."

(2) Article VI(2) provides (emphasis added):

> "In the event of an investment dispute between a Party and a national or **company of the other Party**, the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation, which may include the use of non-binding, third party procedures. Subject to paragraph 3 of this Article, if the dispute cannot be resolved through consultation and negotiation, the dispute shall be submitted for settlement in accordance with previously

---

424 Memorial at [198]-[205].

425 Vienna Convention on the Law of Treaties ("**VCLT**"), Article 31(1), **Exhibit CL-014**.

426 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, ("**BIT**"), Article I(1)(b), **Exhibit C-1**.

427 BIT, Article VI(1), **Exhibit C-1**.

agreed, applicable dispute-settlement procedures […]"

(3) Article VI(3) provides:

> "At any time after six months from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by conciliation or binding arbitration to the International Centre for the Settlement of Investment Disputes ('Centre') […]"

199. It follows that, under the BIT, Discovery does not need to establish it is an "*investor*" or that it made an active contribution or act of investing in accordance with Slovakia's supposed test. Instead, Discovery need only establish that:

(1) it is a "*company of a Party*";

(2) an "*investment dispute*" has arisen between Discovery and Slovakia within the meaning of Article VI(1); and

(3) the procedural requirements in Articles VI(2) and (3) were satisfied.[428]

200. As to (1), Slovakia does not dispute that Discovery is a "*company of a Party*" within the meaning of this definition, nor could it.[429]

201. As to (2), Discovery's claims undoubtedly involve an alleged breach of rights conferred or created by the BIT with respect to an investment[430] (Article VI(1)(c)).

202. As to (3), Discovery complied with these preconditions for the reasons explained in the Memorial[431] and further below.[432]

203. The Tribunal thus has jurisdiction under the BIT and the claims are admissible.

---

428 For the avoidance of doubt, the requirements in Article VI(2) and (3) are not jurisdictional preconditions but go to the admissibility of Discovery's claims: see further at [250] below.

429 Memorial at [17] and [200].

430 Slovakia's argument that Discovery did not make an "*investment*" within the meaning of the BIT is addressed separately at [212] *et seq* below.

431 Memorial at [203], [205].

432 See [249] et seq below.

b. Slovakia's argument is unsupported by the consistent jurisprudence of numerous investment tribunals

204. Slovakia's argument also finds no support in the consistent jurisprudence of numerous investment tribunals. In support of its 'active contribution' argument, Slovakia relies heavily on the award of the tribunal in *Standard Chartered Bank v Tanzania* ("***SCB***").[433] The *SCB* award is distinguishable and, in any event, is an outlier in investment treaty jurisprudence which should not be followed in this case.

205. The terms of the UK-Tanzania BIT, which were critical to the outcome in *SCB*, are materially different from the US-Slovakia BIT. Article 8(1) of the UK-Tanzania BIT granted jurisdiction to the tribunal over a dispute "*arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment **of** the latter in the territory of the former*" (emphasis added).[434] The tribunal held that:[435]

    (1) its jurisdiction depended upon a finding that certain loans (which had been acquired by the claimant's subsidiary and had been advanced to a company in Tanzania) were investments "*of*" the claimant under Article 8(1);

    (2) the claimant therefore needed to show that it had "*do[ne] something as part of the investing process, either directly or through an agent or entity under the investor's direction*"; but

    (3) the claimant had performed no such actions: it had "*made no contribution to any relevant loans*" and it had "*neither exercised any control over any credit to the Tanzanian debtor nor provided any direction*" to its subsidiary.

206. The tribunal's reasoning in the *SCB* award is distinguishable for two reasons:

    (1) ***First***, the terms of Article VI of the US-Slovakia BIT are not the same as Article 8(1) of the UK-Tanzania BIT (which was critical to the outcome of

---

[433] Counter-Memorial at [224] and [233], citing *Standard Chartered Bank v. United Republic of Tanzania I*, ICSID Case No. ARB/10/12, Award, 2 November 2012, ("***SCB***") at [257], **Exhibit RL-042**.

[434] *SCB* at [205], **Exhibit RL-042**.

[435] *SCB* at [196]-[201] and see further detailed reasoning at [202]-[270], **Exhibit RL-042**.

the *SCB* award). Article VI of the US-Slovakia BIT contains terms which, on their ordinary reading, establish a different test which is easily satisfied on the facts of the present case, as explained above.[436]

(2) ***Second***, Discovery's investment in Slovakia did not consist of a loan but rather its ownership of and interest in AOG, and its interest in and control of the Exploration Area Licences (as extended from time-to-time).[437] Discovery's officers/agents also made a significant and active contribution of time and money into AOG's exploration activities throughout the project.[438]

207. Moreover, the *SCB* award has been criticised in subsequent investment treaty jurisprudence and in academic writing.[439] In a subsequent arbitration brought under the same UK-Tanzania BIT, the *SCB* award was recently described by the tribunal in *Nachingwea U.K. Limited v Tanzania* as "*somewhat of an outlier in investment treaty jurisprudence*".[440] The same tribunal also held:[441]

> "[…] the *SCB v Tanzania* interpretation rests upon a rather strained reading of the words 'of', 'by' and 'made'. It is not immediately apparent on the face of these words, nor their use in the BIT, that a requirement for investments to be 'actively made' was intended to be introduced into the BIT."

208. The tribunal noted that neither the preamble of the BIT, nor its context, object or purpose, "*justif[ied] the introduction of an additional requirement [viz. that an investment must be actively made] that is not apparent from the ordinary language of the BIT*".[442] The Tribunal should reach the same conclusion in this case. There is no basis to depart from the ordinary meaning of the terms used in the US-Slovakia BIT, which provide no support for Slovakia's argument.

---

436 See [197]-[203] above.

437 See further at [212]-[216] below.

438 See [42]-[51] above and see further at [209] *et seq* below.

439 See *e.g. Garanti Koza LLP v Turkmenistan,* ICSID Case No. ARB/11/20, Award, 19 December 2016, at [231] **Exhibit CL-028**; C. McLachlan et al, *International Investment Arbitration: Substantive Principles* (2nd ed, OUP, 2017) at [6.128] **Exhibit CL-091**. See also the other jurisprudence and academic writing summarised in *Nachingwea U.K. Limited v Tanzania*, ICSID Case No. ARB/20/38, Award, 14 July 2023, ("***Nachingwea***") at [146]-[147] **Exhibit CL-100**.

440 *Nachingwea* at [152] **Exhibit CL-100**.

441 *Ibid*.

442 *Ibid*.

c. Slovakia's argument ignores the true facts

209. Even if (which is denied) Slovakia's interpretation of the BIT were correct, Slovakia's argument also fails on the facts. The record shows that: (*i*) Discovery made numerous active contributions and acts of investing throughout the project; and (*ii*) Discovery was an active (not a passive) shareholder in AOG. In summary:

    (1) In March 2014, Discovery acquired 100% of the issued and outstanding share capital of AOG and, thus, became the sole owner of AOG. In addition, Discovery, via AOG, acquired rights under the Exploration Area Licences to explore for oil and gas in Slovakia.[443]

    (2) From March 2014 onwards, Discovery made a significant and active contribution to AOG's activities in Slovakia.[444] In particular, Discovery used its own agents and officers (including Mr Lewis, Mr Crow and Mr Fraser) to enable AOG to carry out its exploration activities in Slovakia, including in AOG's capacity as the Operator under the JOAs.[445]

    (3) Moreover, Discovery funded AOG's operations each year, which enabled AOG to: (*i*) pay the annual Exploration Area Licence fees to Slovakia;[446] (*ii*) engage numerous agents and contractors in Slovakia;[447] and (*iii*) carry out AOG's exploration activities in Slovakia.

    (4) Slovakia is therefore wrong to assert that Discovery is a "*mailbox company that lacks its own activities and assets*."[448] This description is contradicted by the extensive documentary record and witness testimony.

---

443 Memorial at [52]-[55].

444 Memorial at [63]-[64], citing Lewis 1 at [24]-[29] and Fraser 1 at [21]. See also Lewis 2 at [7].

445 See [42]-[51] above.

446 Memorial at [65].

447 For example, GMT Projekt – a Slovak construction company (see Fraser 1 at [52]); Chempro – a Slovak environmental consultancy (see Fraser 1 at [96]); Dynamic Relations 2000 – a Slovak lobbying firm (see Fraser 1 at [80]); Snowball Communications – a Slovak PR firm (see Lewis 1 at [80]); Slamka & Partners – Slovak attorneys (see *e.g.* Letter from Mr Slamka, 30 December 2015, **Exhibit R-036**); Majerník & Miháliková – Slovak attorneys (see *e.g.* Email from Viktor Beran, 12 July 2016, **Exhibit C-330**).

448 Counter-Memorial at [232] *et seq*.

210. Slovakia also asserts that Discovery acquired AOG for "*nominal consideration*" which allegedly did not constitute a "*sufficient contribution*" for the purposes of its supposed test under the BIT.[449] In support of this argument, Slovakia relies on the award of the tribunal in *Caratube v Kazakhstan*.[450] Slovakia's argument is hopeless.

211. The discussion in *Caratube* relates to the separate question of whether Discovery made an "*investment*" under the BIT, which is addressed below.[451] At this stage, Discovery makes the following key points:

(1) ***First***, in order to qualify as a protected "*investment*" under the BIT, it is not necessary for Discovery to prove that it made a "*sufficient contribution*" when it acquired 100% of the share capital of AOG in March 2014. Under Article I(1)(a), the term "*investment*" is described in broad terms and covers ownership or control of "*a company*", irrespective of how much was paid by the shareholder to acquire ownership of the company. It is indisputable that Discovery owned and controlled AOG at all times from March 2014 onwards.

(2) ***Second***, and in any event, Discovery did not acquire AOG for "*nominal consideration*" as asserted by Slovakia. This is not a case where Discovery acquired AOG for USD 1 or where Discovery was gifted a shareholding in AOG. In addition to the purchase price of €153,054, Discovery (via AOG) also incurred further (significant) contingent obligations to Aurelian in connection with the grant of the Royalty if hydrocarbons were later found.[452]

(3) ***Third***, Slovakia's argument ignores the fact that, after Discovery acquired AOG in March 2014, Discovery continued to fund AOG's activities in Slovakia. It is wrong for Slovakia simply to focus on the purchase price paid by Discovery to acquire AOG in March 2014. This purchase price paid in

---

449 Counter-Memorial at [227]-[231].

450 *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012, ("***Caratube***") **Exhibit RL-044**.

451 See [212]-[216] below.

452 See [33]-[34] above.

March 2014 reflected the fact that AOG's exploration activities were then at an early stage.

(4) ***Fourth***, Slovakia's focus on Discovery's investment in the form of its ownership and control of AOG ignores the separate investment namely Discovery's interest (via AOG) in the Exploration Area Licences. This interest is also a protected "*investment*" under Article I(1)(a)(v) of the BIT.[453] In this regard, Discovery made a further contribution by funding AOG's share of the annual fees payable under the Exploration Area Licences from 2014 onwards.[454]

2. Discovery made an eligible "*investment*"

212. Slovakia concedes that Discovery's ownership of AOG qualifies as an "*investment*" under the BIT. Slovakia contends that the rights of AOG under the Exploration Area Licences (as renewed and extended from time-to-time) did not also qualify as an "*investment*" because the Licences were not "*owned or controlled*" by Discovery.[455] This argument has no merit.

213. Article I(1)(a) of the BIT defines the term "*investment*" to mean "*every kind of investment in the territory of one Party owned or controlled directly or indirectly by […] companies of the other Party*", including "*any right conferred by law or contract, and any* ***licenses and permits*** *pursuant to law, including concessions to search for, cultivate, extract or exploit natural resources*" (Article I(1)(a)(v)).[456]

214. It is indisputable that the Exploration Area Licences satisfy the definition in Article I(1)(a)(v). They each constituted "*licenses and permits*" granted by the MoE pursuant to the Geology Act which conferred a right upon the holders to search for natural resources in Slovakia. Furthermore, each successive renewal/extension of the Exploration Area Licences after March 2014 (*i.e.* in July 2014[457] and in June

453 See [212]-[216] below.
454 See Spreadsheet of License Expenditure, 2014-2020, **Exhibit CH-019**.
455 Counter-Memorial at [235]-[238].
456 BIT, Article I(1)(a), **Exhibit C-1**, emphasis added.
457 Memorial at [60].

2016[458]) also satisfied the definition in Article I(1)(a)(v).

215. At all material times from March 2014 onwards, AOG, JKX and Romgaz were each described in the Exploration Area Licences as a "*group of permit holders*" who were "*authorised to carry out geological work*" under the Geology Act.[459] Moreover, since AOG was the Operator under the JOAs, AOG had all of the rights, functions and duties of JKX and Romgaz under the Exploration Area Licences and AOG had exclusive charge and conduct of all Joint Operations.[460]

216. It follows that the rights of the "*group of permit holders*" under the Exploration Area Licences (*i.e.* AOG, JKX and Romgaz) were controlled directly or indirectly by Discovery (via its 100% ownership of AOG) and hence constituted an "*investment*" within the meaning of Article I(1)(a) of the BIT. Further or alternatively, AOG held a 50% interest in the Exploration Area Licences[461] and that interest also qualified for protection as an "*investment*" under Article I(1)(a).

3. Public order and essential security interests

217. Next, Slovakia refers to Article X(1) of the BIT, which provides:[462]

> "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection its own essential security interests".

218. Slovakia's reliance on Article X(1) is misconceived for numerous reasons.

219. ***First***, Article X(1) does not give rise to a jurisdictional objection. Instead, if the requirements of Article X(1) are satisfied, the clause operates as a defence to liability because the substantive obligations owed by Slovakia to Discovery under the BIT will not apply.[463] Since Article X(1) has the potentially far-reaching

---

458 Memorial at [74].

459 Memorial at [44], [60], [74].

460 See [44]-[51] above.

461 Memorial at [55].

462 BIT, Article X(1), **Exhibit C-1**.

463 Slovakia appears to accept this: see Counter-Memorial at [240] ("Article X(1) therefore limits the scope of the BIT's substantive obligations […]"). See also *Deutsche Telekom AG v India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, ("***Deutsche Telekom***") at [227], **Exhibit RL-045**.

consequence of *entirely* disapplying the BIT, the limits of Article X(1) and its asserted application by Slovakia must be carefully scrutinised by the Tribunal.

220. ***Second***, Slovakia does not argue that Article X(1) is a self-judging clause, nor could it. According to settled jurisprudence, "*clear indications in the text of the treaty would be required in order to infer that such a provision is self-judging*."[464] There are no such indications in Article X(1). Accordingly, the Tribunal must conduct an objective and substantive assessment of whether Slovakia can rely on Article X(1).

221. ***Third***, Discovery accepts that Article X(1) is formally distinct from the customary international law defence of state necessity, as codified in Article 25 of the ILC Articles.[465] Nevertheless, Article X(1) establishes certain strict conditions, each of which must be satisfied before Slovakia can invoke the clause, namely:

(1) Condition 1: Slovakia must have applied "*measures*".

(2) Condition 2: Those measures must have been "*necessary*" for either:

(a) "*the maintenance of public order*" in Slovakia; or

(b) "*the protection of [Slovakia's] essential security interests*".

222. Any deference given by the Tribunal to Slovakia in relation to such matters cannot be unlimited. Article X(1) expressly uses the term "*necessary*". This objective standard requires the Tribunal to consider:[466]

(1) whether the impugned measure is "*principally targeted*" at protecting the public order or essential security interests and is "*objectively required*" to achieve that protection; and

---

464 *Deutsche Telekom* at [231], **Exhibit RL-045** (citing numerous other decisions).

465 ILC Articles, Article 25, **Exhibit CL-054**. The relationship between Article 25 of the ILC Articles and essential security interest clauses in BITs has been considered in numerous investment treaty awards, including *Deutsche Telekom* at [228]-[229], **Exhibit RL-045**.

466 *Deutsche Telekom* at [239], **Exhibit RL-045**.

(2) whether Slovakia could have availed itself of other "*reasonable alternatives*" that were less in conflict with its international obligations.

223. The concepts of "*maintenance of public order*" and "*essential security interests*" cannot be stretched beyond their natural and ordinary meaning.[467] The meaning of these two concepts under Article XI of the US-Argentina BIT[468] has been examined by several tribunals in the wake of Argentina's economic crisis in 2002.

224. As to the concept of "*maintenance of public order*", the tribunal in *Continental Casualty v Argentina* held as follows:[469]

> "[…] The expression 'maintenance of public order' indicates however rather clearly that 'public order' is intended as a broad synonym for 'public peace,' which can be threatened by actual or potential insurrections, riots and violent disturbances of the peace. This is the ordinary and principal meaning of '*orden público*' in the Spanish text of the BIT, corresponding to the same meaning in the French legal concept of '*ordre public*' in public and criminal law. Thus, in the Tribunal's view, actions properly necessary by the central government to preserve or to restore civil peace and the normal life of society (especially of a democratic society such that of Argentina), to prevent and repress illegal actions and disturbances that may infringe such civil peace and potentially threaten the legal order, even when due to significant economic and social difficulties, and therefore to cope with and aim at removing these difficulties, do fall within the application under Art. XI."

225. As to the concept of "*essential security interests*", the tribunal in *Continental Casualty v Argentina* held that "*[a] severe economic crisis*" (which involved the "*near collapse of the domestic economy*", coupled with "*soaring inflation*", "*social hardships bringing down more than half of the population below the poverty line*", and "*the collapse of the Government*") was as a matter which affected an "*essential security interest*" of Argentina.[470] This establishes a very high threshold.

226. ***Fourth***, Discovery accepts that condition 1 (see [221(1)] above) is satisfied with respect to each of the impugned measures summarised at [3] above. However,

---

467 *Deutsche Telekom* at [235]-[236], **Exhibit RL-045**.

468 Article XI of the US-Argentina BIT is worded in identical terms to Article X(1) of the US-Slovakia BIT.

469 *Continental Casualty Co v Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ("***Continental Casualty***") at [174], **Exhibit CL-078**.

470 *Continental Casualty* at [178]-[180], **Exhibit CL-078**.

condition 2 (see [221(2)] above) is not satisfied:

(1) Slovakia asserts the measures were necessary to protect the "*safety and security of a region renowned as a pristine habitat*", "*the Slovak Republic's environment and drinking water*" and "*the Slovak Republic's own security interests in preventing civil unrest*".[471] Yet Slovakia has neither cited nor produced any contemporaneous evidence (let alone witness testimony) to support these assertions. Slovakia's argument is a lawyer's afterthought.

(2) Moreover, and in any event, on an objective analysis, the impugned measures were not necessary for the maintenance of public order or the protection of essential security interests of Slovakia. Slovakia has fallen far short of the high threshold set out at [224]-[225] above

(3) With respect to Slovakia's measures at Smilno:

(a) This was not a case where there was mass public unrest. The Police and the State Prosecutor were dealing with no more than a handful of activists.[472] Moreover, the conduct of the Police and the State Prosecutor did not result in the *maintenance* of public order or the *protection* of essential security interests. Instead, their conduct only served to *exacerbate* the activists' illegal behaviour.

(b) Slovakia also cannot establish that the Police's refusal to remove vehicles and activists who persistently and illegally blocked the Road (and the Police's refusal to approve the Road signs) was necessary for the maintenance of public order or the protection of essential security interests. The same applies to the State Prosecutor's interventions.

(c) Slovakia cannot establish that the Slovak Judiciary's decision to grant and uphold the Interim Injunction was necessary for the maintenance of public order or the protection of essential security interests. These

---

471 Counter-Memorial at [243] and [245].

472 See [163(1)-(4)] above.

considerations were simply not the basis of the decisions.

(4) With respect to Slovakia's measures at Krivá Ol'ka, Slovakia cannot establish that the MoA's refusal to approve the Amendment (or the MoE's refusal to grant the Article 29 order) was necessary for the maintenance of public order or the protection of essential security interests. This was not the basis upon which the MoA and MoE made their respective decisions.

(5) With respect to Slovakia's measures relating to the EIA process, Discovery reiterates that the EIA Decisions were not based upon any rational evidential foundation.[473] Indeed, the Smilno EIA Decision and the Ruská Poruba EIA Decision contained no finding at all that AOG's proposed exploration activities were likely to have a significant adverse effect on the environment. The Krivá Ol'ka EIA Decision was based on pretextual grounds which were inconsistent with numerous earlier statements attributable to Slovakia.

(6) Further, Discovery notes that fostering domestic oil and gas exploration and production (to improve Slovakia's energy security) was an essential security interest of Slovakia, as indicated by Article 4(1) of the Slovak Constitution[474] and successive energy policies adopted by the Slovak Government from at least 2006 onwards.[475] The suggestion by Slovakia that it was apparently entitled to thwart Discovery's exploration activities on the grounds of public order and the protection of essential security interests therefore rings particularly hollow and has no objective factual foundation.

227. ***Fifth***, Slovakia relies on the award in *Deutsche Telekom v India*. This award provides no support for Slovakia's argument:

(1) Slovakia fails to acknowledge that the tribunal in *Deutsche Telekom* refused to apply the "*essential security interests*" clause in the BIT to absolve India from liability for its decision to annul an agreement for the lease of an

---

473 See [168]-[175] above.

474 Slovak Constitution, Article 4(1), **Exhibit C-244**.

475 Memorial at [6]-[12].

electromagnetic spectrum on two satellites. The tribunal reasoned that, if an essential security interest did exist and it was necessary, India would not have engaged in protracted debates about who the spectrum should be allotted to, after subsequently cancelling the agreement.[476]

(2) This reasoning applies by analogy here. If (which is denied) Discovery's exploratory drilling activities would in fact have had a significant adverse effect on the environment or risked contaminating drinking water, Slovakia would not have granted the Exploration Area Licences to AOG in the first place, nor would Slovakia have repeatedly extended the Licences. It is inconsistent for Slovakia to assert (on the one hand) that it was keen to promote exploration activities and yet assert (on the other hand) that there were supposedly essential reasons to prohibit such activities.

4. Ownership of real property and hydrocarbons reservations

228. Finally, Slovakia refers to the Annex to the BIT (as amended by the Additional Protocol) which provides that Slovakia "*reserves the right to make or maintain limited exceptions to national treatment in the sectors or matters it has indicated below*" including "*ownership of real property*" and "*hydrocarbons*".[477] Slovakia has dedicated three short paragraphs to this issue.[478] It is easy to see why.

229. ***First***, in order to rely on these exceptions, Slovakia needed to notify the US of a derogation from its obligation to accord national treatment to investments under Article II(1) of the BIT. Yet Slovakia made no such notification to the US. That alone is fatal. In this regard:

(1) The Annex (as amended by the Additional Protocol) provides that Slovakia "*reserves the right to make or maintain limited exceptions to national treatment*" in the listed sectors/matters. Article II(1) uses the same language

[476] *Deutsche Telekom* at [287], **Exhibit RL-045**.
[477] BIT, Annex I and Additional Protocol, **Exhibit C-1**.
[478] Counter-Memorial at [246]-[248].

("*[...] subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to the Treaty*").

(2) Article II(1) then goes on to state that, in order avail itself of these exceptions, Slovakia must:

(a) "*notify*" the US "*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*"; or

(b) after the date of entry into force of the BIT, "*notify*" the US "*of any future exception with respect to the sectors or matters listed in the Annex, and to limit such exceptions to a minimum*".

(3) As to (a), Slovakia made no such notification to the US prior to the entry into force of the BIT on 19 December 1992.[479] Moreover, para 3 of the Annex to the BIT (prior to its amendment by the Additional Protocol in 2003) was limited to "*ownership or real property; and insurance*". Discovery does not challenge any measures which affect these sectors or matters.

(4) As to (b), Slovakia made no such notification to the US after the entry into force of the BIT on 19 December 1992. It is true that the Additional Protocol amended the Annex and permitted Slovakia to "*reserve the right to make or maintain exceptions to national treatment*" in respect of "*hydrocarbons*".[480] However, Slovakia did not notify the US under Article II(1) of any limited exceptions to national treatment with respect to hydrocarbons.

230. ***Second***, and in any event, Slovakia has failed to acknowledge the context in which these reservations were made. This context confirms that the reservations contained in the Annex (as amended by the Additional Protocol) do not apply in this case. The preamble of the Additional Protocol, which amended the Annex to include

---

479 BIT, Article XIV(1), **Exhibit C-1**. As to the date of entry into force of the BIT, see the table at https://www.state.gov/investment-affairs/bilateral-investment-treaties-and-related-agreements/united-states-bilateral-investment-treaties/.

480 BIT, Additional Protocol, Articles IV and VI, **Exhibit C-1**.

reservations as to "*hydrocarbons*", recognised that Slovakia was in the process of joining the EU and desired to ensure that its obligations under the BIT conformed with EU law. The preamble states that representatives of the Governments of Slovakia and the United States:[481]

> "Have acknowledged that the Slovak Republic, pursuant to Article 307 of the Treaty Establishing the European Community and Article 6.10 of the Slovak Republic's Act of Accession, as applicable, must take all appropriate steps to eliminate incompatibilities between the Treaty Establishing the European Community and its other international agreements, including the Treaty;"

231. Consistent with that, Article IV of the Additional Protocol amended the Annex of the BIT to add the following paragraphs:[482]

> "4. […] as necessary to meet its obligations pursuant to measures adopted by the European Union, the Slovak Republic reserves the right to make or maintain exceptions to national treatment in the sectors or matters it has indicated below: […] Hydrocarbons […]".
>
> "5. […] as necessary to meet its obligations pursuant to measures adopted by the European Union, the Slovak Republic reserves the right to make or maintain exceptions to most-favored-nation treatment in the sectors or matters it has indicated below: […] Hydrocarbons".

232. These additional paragraphs made it clear that Slovakia reserved the right to make or maintain exceptions, but they did not confirm that any such exceptions previously existed or were being made, and only then to the extent "*necessary to meet its obligations pursuant to measures adopted by the European Union*". None of the impugned measures were necessary to enable Slovakia to meet its obligations pursuant to measures adopted by the EU. That too is fatal.

233. At all material times, the policy of both Slovakia and the EU was to diversify its energy supplies and improve energy security by encouraging the exploration of hydrocarbons, as acknowledged in successive energy policies adopted by Slovakia from 2006 onwards and as acknowledged in the Geology Act which implemented EU Directive 94/22/EC.[483] It is therefore untenable for Slovakia to suggest that any

---

481 BIT, Additional Protocol, **Exhibit C-1**.

482 BIT, Additional Protocol, Article IV, **Exhibit C-1**.

483 Memorial at [6]-[11] and [27]-[29]. See also 2013 European Commission Report *Member States'*

of the exceptions in the Annex of the BIT are applicable in the present case.

B. THE TRIBUNAL HAS JURISDICTION UNDER THE ICSID CONVENTION

234. Slovakia argues that Discovery has failed to establish that it made an eligible "*investment*" under Article 25(1) of the ICSID Convention.[484] Slovakia's argument is wrong because: (*i*) the BIT's definition of "*investment*" automatically satisfies Article 25(1) of the ICSID Convention; and (*ii*) in any event, Discovery made an "*investment*" within the meaning of Article 25(1) of the ICSID Convention.

1. The BIT's definition of "*investment*" automatically satisfies the requirement in Article 25(1) of the ICSID Convention

235. The BIT's definition of "*investment*" automatically satisfies the requirement for an "*investment*" under Article 25 of the ICSID Convention.[485]

236. As is well-known, the ICSID Convention does not define the term "*investment*". The drafting history to the ICSID Convention shows that several attempts were made to define this term but, in the end, a deliberate decision was made not to do so and the drafters agreed to "*accord great weight to the definition of investment agreed by the Parties in the instrument providing for recourse to ICSID*".[486]

237. In this case, the States parties to the US-Slovakia BIT decided which transactions they wished to submit to ICSID arbitration by: (*i*) defining the term "*investment*" capaciously (Article I(1)(a)); (*ii*) defining an "*investment dispute*" as (*inter alia*) a dispute involving an alleged breach of any right conferred by the BIT with respect to an "*investment*" (Article VI(1)); and (*iii*) consenting to the settlement of any investment dispute by arbitration under the ICSID Convention (Article VI(3)).

238. There is no basis for the Tribunal to apply any additional requirements when considering the meaning of Article 25(1) of the ICSID Convention. Since

---

Energy Dependence, 18 April 2013, **Exhibit C-48**, pp. 259-264.

484 Counter-Memorial at [222], [249]-[253].

485 Memorial at [208(2)].

486 *Malaysian Historical Salvors v The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, ("***Malaysian Historical Salvors***") at [80(c)], **Exhibit CL-080**.

Discovery made an "*investment*" under the BIT, this automatically qualifies as an "*investment*" under Article 25(1) of the ICSID Convention.

239. Slovakia asserts that, under Article 25(1) of the ICSID Convention, Discovery must also satisfy the *Salini* test as part of a so-called "*double-barrel or double-keyhole test*".[487] Discovery does not accept this. The tribunals in *Biwater v Tanzania*[488] and *Philip Morris v Uruguay*[489] confirm that there is no basis for a rote or strict application of the *Salini* criteria in every case, not least because these criteria do not appear in the ICSID Convention.

2. In any event, Discovery made an "*investment*" within the meaning of Article 25(1) of the ICSID Convention

240. Even if the foregoing analysis is not accepted, it is clear that Discovery made an "*investment*" within the meaning of Article 25(1) of the ICSID Convention. In order to interpret the meaning of this term, the Tribunal must apply the ordinary rules of interpretation in Articles 31 and 32 of the VCLT. As noted by the tribunal in *Rand Investments Ltd v Serbia* (emphasis added):[490]

> "[…] Applying those rules, the Tribunal must interpret the term 'investment' in Article 25(1) by giving the term its ordinary meaning, in its context and in light of the object and purpose of the Treaty. As held by many investment awards, in the ordinary meaning of the term, **an investment is (i) a contribution or allocation of resources, (ii) made for a duration; and (iii) involving risk, which includes the expectation of a profit (albeit not necessarily fulfilled).** As noted by the tribunal in *Saba Fakes*, these components 'are both necessary and sufficient to define an investment within the framework of the ICSID Convention.' The development of the host State's economy is a consequence of a successful investment, not a self-standing condition of the latter's existence. As such, it is not a component of an investment, an opinion shared by a number of prior investment awards.

---

487 Counter-Memorial at [251].

488 *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ("***Biwater***") at [312]-[314] **Exhibit CL-023**. See also *Malaysian Historical Salvors* at [73]-[80], **Exhibit CL-080**.

489 *Philip Morris Brand Sàrl (Switzerland) v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, at [206], **Exhibit CL-087**. See also *Hassan Awdi, Enterprise Business Consultants Inc v Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, at [197] **Exhibit CL-012**.

490 *Rand Investments Ltd v Republic of Serbia*, ICSID Case No. ARB/18/8, Award, 29 June 2023, ("***Rand Investments***") at [228], **Exhibit CL-099**.

241. Numerous investment tribunals have had no hesitation in holding that investors who engaged in oil and gas exploration under State-granted licences or permits made an "*investment*" within the meaning of Article 25(1) of the ICSID Convention. For example, as noted by the tribunal in *RSM Production v Grenada*:[491]

> "[…] Under the most commonly accepted notions, an agreement whereby, on the one hand, a state confers upon a private party the right to search for natural resources while, on the other, the private party undertakes to commit the necessary means to that end, is undoubtedly an investment.
>
> There would be no need for actual expenses to have been incurred by the private party, the relevant criterion being the *commitment* to bring in resources toward the performance of such exploration. The Tribunal further notes that not only is an exploration agreement not significantly distinct in nature from the agreement to exploit known resources, but if anything, it is even more of an investment on the part of the private party given the magnitude of the commercial risk involved."

242. Having regard to these considerations and to the three criteria identified in *Rand Investments Ltd v Serbia*, it is clear that Discovery made an "*investment*" within the meaning of Article 25(1) of the ICSID Convention:

(1) Contribution/allocation of resources: As already noted above,[492] Discovery made a substantial contribution of time, money and resources throughout the project.

(2) Duration: Discovery invested in Slovakia over an extended period of time. Discovery's investment began in March 2014 when it acquired AOG. Discovery's investment then continued from March 2014 onwards whilst it attempted to carry out its exploration activities in Slovakia. Moreover, in June 2016, following an application submitted by AOG to the MoE, the MoE granted extensions to each of the Licences for a further term of five years until August 2021.[493] As Mr Lewis testifies, this extension gave Discovery the confidence to continue to invest in Slovakia.[494]

---

491 *RSM Production Corp v Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009, at [242]-[243], **Exhibit CL-079**.

492 See [209]-[211] above. See also Lewis 2 at [7]-[8].

493 Memorial at [74].

494 Lewis 2 at [8].

(3) Risk and expectation of profit: Discovery undertook its oil and gas exploration activities in Slovakia (via AOG) "*at its own expense and risk*".[495] This was inherent in the nature of any oil and gas exploration project. Moreover, Discovery also undertook these activities in the expectation of a commercial return,[496] which it would have generated but for Slovakia's conduct in violation of the BIT.

243. Slovakia asserts that Discovery does not meet the *Salini* criteria because Discovery acquired certain funding from Akard Acquisitions 2001 LLC ("**Akard**").[497] This submission is heretical. Investment tribunals have consistently held that the origin of capital used to make an investment is immaterial for jurisdictional purposes.[498] In the words of the *Caratube* tribunal: "*The capital can come from the investor's own funds located in any country, from its subsidiaries or affiliates located in any country, from loan, credit or other arrangements*."[499]

244. The record also shows that, from March 2014 onwards, Discovery (via its officers and agents) was the entity which bore the financial burden of the contribution:

(1) Discovery was the entity which acquired AOG in March 2014.[500]

(2) Discovery was the entity which bore the financial burden of funding AOG's exploration activities from March 2014 onwards.[501]

(3) Discovery's representatives played a material and decisive role in the project and the operational decisions which were made from 2014 onwards.[502]

---

495 Lewis 2 at [9]; AOG's Presentation, December 2016, **Exhibit C-159**, pp. 8 and 20.

496 Lewis 2 at [9].

497 Counter-Memorial at [252]-[253].

498 See *e.g. Rand Investments* at [234] (citing numerous prior awards) **Exhibit CL-099**.

499 *Caratube* at [355], **Exhibit RL-044**.

500 See [33] above.

501 See *e.g.* Fraser 2 at [8]-[12] and see further at [468(3)] below. See also Spreadsheet of JV Expenditure, 2014-2020, **Exhibit CH-019**.

502 See [48]-[51] above.

(4) Discovery's representatives frequently met and corresponded with officials of Slovakia throughout the project from 2014 onwards.[503]

(5) Discovery did not enter into any funding agreement with Akard until October 2015.[504] Akard subsequently defaulted on its obligations and ceased to make any further contributions to Discovery after November 2016.[505] Further, Discovery has an ongoing liability to repay Akard in respect of the funding provided prior to November 2016.[506]

C. SLOVAKIA'S GOOD FAITH JURISDICTIONAL OBJECTION IS MISCONCEIVED

245. Slovakia asserts that Discovery "*cannot establish its good faith in the making of an investment*."[507] This is not a valid objection to the Tribunal's jurisdiction.

246. ***First***, good faith is not an element of the definition of the term "*investment*" in the BIT. There is no basis to read any such qualification into the BIT.[508] Good faith is not an element of the definition of the term "*investment*" under Article 25(1) of the ICSID Convention. As held by the tribunal in *Rand Investments v Serbia*:[509]

> "The Tribunal does not share the view expressed for instance by the *Phoenix* tribunal pursuant to which compliance with the laws of the host State and respect of good faith are elements of the objective definition of investment under Article 25(1) of the ICSID Convention. Contracting Parties to an investment treaty are free to include these requirements in their investment treaties, and many do so. This does not mean, however, that requirements of lawfulness and compliance with good faith are part of the definition of investment and should thus be implied into Article 25(1) of the Convention, as several tribunals have observed."

247. ***Second***, Slovakia cannot derive any support from investment awards which have addressed corporate restructurings made by investors, in order to "*internationalise*"

---

503 See *e.g.* Memorial at [63(5)], [117]-[126], [133], [139]-[140], [144]-[152], [166]-[173].

504 See [395(5)] below.

505 See [395(5)] below.

506 See Lewis 2 at [44]. See further [395(5)(c)] below.

507 Counter-Memorial at [221] and [254]-[257].

508 See by analogy *Vanessa Ventures Ltd v Venezuela*, ICSID Case No. Arb(AF)/04/6, Award, 16 January 2013, at [127] ("good faith is not an independent element of the definition of a protected investment in the BIT") **Exhibit CL-085**.

509 *Rand Investments* at [229], **Exhibit CL-099**.

an "*already-foreseeable dispute*".[510] At all times since March 2014, Discovery held an investment in AOG and in the rights granted to AOG under the Exploration Area Licences. No corporate restructuring took place and Discovery did not internationalise an already-foreseeable dispute.

248. ***Third***, and in any event, Slovakia is wrong to assert that Discovery is abusing its corporate form by reason of the matters included in Mr Lewis' personal tax returns as filed in the US.[511] In this regard:

(1) Discovery is a limited liability company ("**LLC**") registered in Texas.[512] Under Texas law, a LLC has separate legal personality from its shareholders. Mr Lewis is Discovery's sole shareholder.[513] Yet Slovakia seeks to conflate the position of Mr Lewis with the position of Discovery. This is wrong in principle because it fails to respect Discovery's separate legal personality.

(2) Slovakia points out that, in Mr Lewis' personal tax filings in the US for the years 2017-2020, Mr Lewis "*appears to be using Discovery as a 'pass-through' entity*."[514] This has no bearing at all on the Tribunal's jurisdiction and does not amount to an abuse of process or a breach of good faith.

(3) Under US law, if a LLC only has a single shareholder (as in the case of Discovery) it automatically becomes a "*pass-through*" entity for tax purposes. This means all income and expenses of the LLC are reported on that shareholder's personal income tax filing. This tax treatment is extremely common. For example, as noted in one article:[515]

> "The overwhelming majority of businesses in the U.S. are not C-corporations subject to the corporate tax. Rather, most businesses—about 95 percent—are 'pass-throughs,' which have their income 'pass through' to their owners to be taxed under the individual income tax."

---

510 Counter-Memorial at [254]-[255].

511 Counter-Memorial at [256]-[257].

512 Certificate of Amendment of Discovery Polska LLC, 14 July 2006, **Exhibit C-28**.

513 Lewis 1 at [2].

514 Counter-Memorial at [256].

515 Brookings Institute, *9 facts about pass-through businesses*, 15 May 2017, **Exhibit C-372**.

(4) This is a quirk of US tax law which has no bearing on the Tribunal's jurisdiction and does not amount to an abuse of process or a breach of good faith. An LLC, like any corporation, can own assets in its own name and is deemed a separate entity for all purposes other than the limited aspect of being a pass-through entity for tax purposes under US law for sole member LLCs.

D. DISCOVERY COMPLIED WITH ARTICLE VI(2) OF THE BIT

249. Contrary to Slovakia's assertions,[516] Discovery complied with Article VI(2) of the BIT, which provides that "*the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation*".

250. ***First***, Slovakia accepts that Article VI(2) does not establish a jurisdictional precondition to arbitration but instead goes to admissibility.[517] It is also clear that Article VI(2) is an obligation of means, not of results. As noted by the tribunal in *Murphy v Ecuador* when interpreting a similar provision in the US-Ecuador BIT, "*there is no obligation to reach, but rather to try to reach, an agreement*."[518]

251. ***Second***, the record shows that Discovery discharged its obligation under Article VI(2) and sought to resolve its dispute with Slovakia by consultation and negotiation, prior to the commencement of this arbitration. In this regard:

(1) Slovakia is wrong to assert that Discovery failed to provide "*material legal or factual substantiation*" for the claims asserted in its Notice of Dispute.[519] As noted by the tribunal in *Tulip Real Estate v Turkey* when interpreting a similar provision in Article 8(2) of the Netherlands-Turkey BIT:[520]

> "In this regard, Article 8(2) does not require the investor to spell out its legal case in detail during the initial negotiation process. Nor does Article 8(2) require the investor, on the giving of notice of a dispute arising, to invoke specific BIT provisions at that stage. Rather, what Article 8(2) requires is that

---

516 Counter-Memorial at [258]-[262].

517 Counter-Memorial at [258].

518 *Murphy Exploration and Production Company International v. Republic of Ecuador I*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, at [135], **Exhibit RL-049**.

519 Counter-Memorial at [259].

520 *Tulip Real Estate Investment and Development Netherlands BV v Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, at [83] **Exhibit CL-086**.

> the investor sufficiently informs the State party of allegations of breaches of the treaty made by a national of the other Contracting State that may later be invoked to engage the host State's international responsibility before an international tribunal."

(2) Discovery's Notice of Dispute[521] satisfied this test. The Notice of Dispute was a 22-page document. It ran to 79 paragraphs, was accompanied by 7 annexes and explained in great detail the factual events which underpinned Discovery's claims, Slovakia's violations of the BIT and Discovery's losses. The penultimate paragraph of the Notice of Dispute also stated:[522]

> "Pursuant to Article Vl(2) of the BIT, Discovery hereby requests Slovakia to engage in negotiations to amicably settle the above-described dispute. The facts of this dispute evidence a clear misuse of power by the Slovak authorities and undermine the image of Slovakia as a State governed by the rule of law and encouraging of foreign investment. It is, therefore, Discovery's sincere belief that reaching an amicable settlement without formal proceedings before an international tribunal in the public eye is in the mutual interest of all the parties involved. Such settlement would help save valuable resources for both parties and would demonstrate Slovakia's goodwill as an investment-friendly jurisdiction."

(3) Despite this entreaty, Slovakia declined to engage in negotiations to amicably settle the dispute. Indeed, it took Slovakia *four months* even to provide a substantive response to the Notice of Dispute. When Slovakia's response eventually came on 27 January 2021,[523] it was limited to a brief and conclusory 2-page letter which: (*i*) failed to address the vast majority of the issues raised in the Notice of Dispute; (*ii*) raised factually inaccurate assertions with respect to certain discrete points with which Slovakia chose to engage; and (*iii*) contained a blanket denial of liability.[524]

(4) Notwithstanding Slovakia's meagre response, Discovery's counsel continued to correspond with Slovakia and provide further extensive factual and legal substantiation for its claims between February and April 2021. Indeed, the

---

521 Letter from Signature Litigation LLP to Slovakia, 2 October 2020, **Exhibit C-26**.

522 Letter from Signature Litigation LLP to Slovakia, 2 October 2020, **Exhibit C-26**, p. 21.

523 In the meantime, Discovery's counsel had sent a chaser letter to Slovakia: see Letter from Signature Litigation LLP to Slovakia, 8 January 2021, **Exhibit C-396**.

524 Letter from Slovakia to Signature Litigation LLP, 27 January 2021, **Exhibit C-397**.

parties exchanged no fewer than 16 separate letters/emails over this period.[525] Yet in its letters/emails to Discovery's counsel, Slovakia chose to respond to isolated paragraphs or sub-paragraphs in the Notice of Dispute,[526] rather than providing a single comprehensive response to all allegations made by Discovery in the Notice of Dispute. Discovery's counsel informed Slovakia that the factual events needed to be considered as a whole and that:[527]

> "[…] while our client is willing to engage in a point-by-point discussion of the Notice as a whole, our client is not prepared to discuss, in isolation, individual points arising in each particular sub-paragraph of the Notice, as to do so fundamentally ignores the overall nature of our client's complaint and, as such, will not assist in advancing the negotiations."

(5) Discovery continued to correspond with Slovakia. However, by the end of the six-month cooling off period established by Article VI(3) of the BIT, the parties had not reached an amicable settlement of their dispute. Discovery therefore commenced this arbitration by filing its Request for Arbitration on 30 September 2021.[528]

252. ***Third***, and in any event, numerous investment tribunals have held that (*i*) provisions such as Article VI(2) are "*procedural and directory in nature, rather than jurisdictional and mandatory*"; and (*ii*) if further negotiations would have been futile, no purpose would be served by dismissing the claim and sending the parties

---

525 Letter from Signature Litigation LLP to Slovakia, 5 February 2021, **Exhibit C-398**; Email from Slovakia to Signature Litigation LLP, 9 February 2021, **Exhibit C-399**; Letter from Signature Litigation LLP to Slovakia, 17 February 2021, **Exhibit C-400**; Email from Slovakia to Signature Litigation LLP, 18 February 2021, **Exhibit C-401**; Email from Slovakia to Signature Litigation LLP, 24 February 2021, **Exhibit C-402**; Letter from Signature Litigation LLP to Slovakia, 8 March 2021, **Exhibit C-403**; Email from Slovakia to Signature Litigation LLP, 9 March 2021, **Exhibit C-404**; Email from Slovakia to Signature Litigation LLP, 12 March 2021, **Exhibit C-405**; Email from Slovakia to Signature Litigation LLP, 16 March 2021, **Exhibit C-406**; Letter from Signature Litigation LLP to Slovakia, 16 March 2021, **Exhibit C-407**; Email from Slovakia to Signature Litigation LLP, 23 March 2021, **Exhibit C-408**; Email from Slovakia to Signature Litigation LLP, 24 March 2021, **Exhibit C-410**; Letter from Signature Litigation LLP to Slovakia, 24 March 2021, **Exhibit C-409**; Letter from Slovakia to Signature Litigation LLP, 2 April 2021, **Exhibit C-411**; Email from Slovakia to Signature Litigation LLP, 21 April 2021, **Exhibit C-412**; Letter from Signature Litigation LLP to Slovakia, 21 April 2021, **Exhibit C-413**;

526 See *e.g.* Email from Slovakia to Signature Litigation LLP, 24 February 2021, **Exhibit C-402** (which focused on a single sub-paragraph in the Notice of Dispute, namely para 66(d)).

527 Letter from Signature Litigation LLP to Slovakia, 8 March 2021, **Exhibit C-403**, p. 2.

528 Discovery's Request for Arbitration, 30 September 2021, **Exhibit C-414**.

back to the negotiating table.[529] This would be the position here, especially given the stance and approach adopted by Slovakia in the correspondence referred to at [251(3)-(4)] above. Accordingly, Discovery's claims are admissible.

IV. ATTRIBUTION

253. Contrary to Slovakia's assertions, Discovery does not contend that the private conduct of the activists (as referred to in the Memorial and herein) is attributable to Slovakia under the ILC Articles.[530] Rather, Discovery contends that the conduct of Slovakia's organs—namely the Police, the Mayor of Smilno, ÚGKK, the Judiciary, a State Prosecutor, the MoT, the MoI, the MoA, the MoE and the District Offices and the officials who acted on behalf of those State bodies—is attributable to Slovakia under Article 4 of the ILC Articles.[531] This is not disputed by Slovakia.

254. Article 4 of the ILC Articles provides:

> "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

255. As the commentary to Article 4 makes clear:

(1) "*[T]he reference to a State organ in Article 4 is intended in the most general sense*". It is not limited to the organs of the central government, or to officials at a high level, but rather "*extends to organs of government of whatever kind*

---

529 See *e.g. Biwater* at [343]-[344], **Exhibit CL-023**; *SGS Société Générale de Surveillance S.A v Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, at [184], **Exhibit CL-075**; *Westwater Resources, Inc v Turkey*, ICSID Case No. ARB/18/46, Procedural Order No. 2, 28 April 2020, at [37], **Exhibit CL-096**.

530 *Cf.* Counter-Memorial at [263]-[271].

531 Or alternatively under Articles 5 and/or 8 of the ILC Articles.

or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level."[532]

(2) No distinction is drawn in this regard between the acts of "*superior*" and "*subordinate*" officials, provided they are acting in their official capacity:[533]

> "Mixed commissions after the Second World War often had to consider the **conduct of minor organs of the State, such as** administrators of enemy property, **mayors and police officers, and consistently treated the acts of such persons as attributable to the State**."

(3) Furthermore, Article 4 "*applies equally to organs of the central government and to those of regional or local units*."[534]

(4) All of the persons and entities listed at [253] above qualify as organs of Slovakia under domestic Slovak law. But even if this were not so, Article 4(2) (specifically, the word "*includes*") makes clear that a State cannot avoid responsibility for the conduct of its organs under international law merely by denying that they have that status under domestic law.[535]

V. LIABILITY

A. SLOVAKIA VIOLATED THE FET STANDARD

256. Discovery now responds to Slovakia's submissions with respect to the FET Standard in Article II(2)(a) of the BIT.[536] In summary, and as elaborated below:

(1) The FET Standard in the BIT is not limited to the minimum standard of treatment ("**MST**") under customary international law (**1**).

(2) In considering whether Slovakia violated the FET Standard, the Tribunal must consider the individual and/or cumulative effect of Slovakia's measures (**2**).

---

532 ILC Articles on State Responsibility, Article 4, commentary para (6), **Exhibit CL-054**.

533 *Ibid*, Article 4, commentary para (7), **Exhibit CL-054** (emphasis added).

534 *Ibid*, Article 4, commentary para (8), **Exhibit CL-054**.

535 *Ibid*, Article 4, commentary para (11), **Exhibit CL-054**.

536 Memorial at [209] *et seq*; Counter-Memorial at [272] *et seq*.

(3) It is clear that Slovakia breached the FET Standard because it violated Discovery's legitimate expectations (**3**), acted inconsistently (**4**) and acted arbitrarily (**5**). It is also clear that the conduct of Slovakia's Judiciary violated the FET Standard (**6**).

1. The FET Standard in the BIT is not limited to the MST

257. Discovery's interpretation of the FET Standard is not "*maximalist*" and does not involve an "*outcome-driven, teleological method of interpretation*".[537] Slovakia is wrong to assert that the FET Standard is limited to the MST under customary international law.[538] Slovakia's minimalist interpretation is irreconcilable with the ordinary meaning of the terms used in the BIT and is contrary to the consistent jurisprudence of investment tribunals which have interpreted equivalent provisions.

258. ***First***, applying Article 31(1) of the VCLT, Slovakia's interpretation is irreconcilable with the ordinary meaning of the terms used in Article II(2)(a), when read in their context and in the light of the object and purpose of the BIT.[539] There is nothing in the text or context of the BIT which limits the FET Standard to the MST standard under customary international law. It is clear that Article II(2)(a) imports an autonomous standard of protection. In this regard:

(1) In support of its interpretation, Slovakia appears to rely on the reference in the latter part of Article II(2)(a) to "*treatment less than that which conforms to principles of international law*". Slovakia interprets these words to mean the MST under customary international law.[540] However:

(a) these words cannot even be interpreted as a reference to customary international law; and

(b) in any event, Slovakia's argument overlooks the opening words of Article II(2)(a) which establish an autonomous FET Standard.

---

537 *Cf.* Counter-Memorial at [275], [277], [278], [283].

538 Counter-Memorial at [273]-[292].

539 VCLT, Article 31, **Exhibit CL-014**.

540 Counter-Memorial at [280].

(2) As to (a), the ordinary meaning of the words "*principles of international law*" cannot be interpreted as a reference to customary international law (still less the MST under customary international law). These words must instead be interpreted to mean either: (*i*) general principles of international law (as referred to in Article 38(1)(c) of the ICJ Statute);[541] or (*ii*) all sources of international law in Article 38(1) of the ICJ Statute, of which customary international law is but one (in addition to treaties and general principles).[542]

(3) As to (b), the opening words of Article II(2)(a), on their ordinary meaning, import an autonomous FET Standard. It is trite that words in a treaty provision must be given "*appropriate effect whenever possible*".[543] Slovakia's interpretation violates this basic rule because it renders redundant the opening words of Article II(2)(a) (*"Investment shall at all times be accorded fair and equitable treatment [...]"*) and instead ascribes sole importance to the latter words (*"[...] and shall in no case be accorded treatment less than that which conforms to principles of international law"*).

(4) By including the opening words in Article II(2)(a), Slovakia and the US evidently did not intend to limit the FET Standard to the MST under customary international law. That interpretation would be meaningless because no legal consequences would then flow from the opening words of Article II(2)(a). Accordingly, the later words of Article II(2)(a) operate as a floor whilst the opening words establish an autonomous standard which affords additional protection beyond the MST under customary international law.[544] Discovery's interpretation gives appropriate effect to all parts of Article II(2)(a) and hence respects this basic rule of treaty interpretation.

---

541 Statute of the International Court of Justice, Article 38, 18 April 1946, **Exhibit CL-070**.

542 See by analogy *Infinito Gold* at [331]-[334], **Exhibit CL-015**.

543 See *e.g. Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, at [133]-[134], **Exhibit CL-083**.

544 See by analogy *Infinito Gold* at [350], **Exhibit CL-015**; *LSG Building Solutions GmbH v Romania*, ICSID Case No. ARB/18/19, Decision on Jurisdiction, Liability and Principles of Reparation, 11 July 2022, at [1019], **Exhibit CL-098**.

259. ***Second***, having regard to Article 31(2) of the VCLT, there is no "*agreement relating to the treaty which was made between all the parties in connection with the conclusion of the [BIT]*" which supports Slovakia's case.

260. ***Third***, having regard to Article 31(3)(a) of the VCLT, there is no "*subsequent agreement between the parties regarding the interpretation of the [BIT] or the application of its provisions*". Slovakia relies on the US Model BIT and the joint statement of the three contracting States to NAFTA (as it was formerly known).[545] Yet Slovakia was not a party to either document. Moreover, these documents do not amount to a "*subsequent agreement*" regarding the interpretation of the US-Slovakia BIT within the meaning of Article 31(3)(a) of the VCLT.

261. ***Fourth***, Slovakia asserts that light is thrown on the meaning of the FET Standard by the fact that the MST is part of customary international law which is a "*relevant rule[] of international law applicable in the relations between the parties*" under Article 31(3)(c) of the VCLT.[546] Yet Slovakia's argument founders on the ordinary meaning of the words used in Article II(2)(a) of the BIT (see [258] above) which import an autonomous FET Standard.

262. ***Fifth***, Slovakia seeks to rely on a single paragraph of the award of the tribunal in *El Paso v Argentina*.[547] Slovakia has taken this paragraph out of context. In other paragraphs of *El Paso* (which Slovakia has omitted):

(1) The tribunal held that it was "*futile*" to compare the content of the MST under customary international law with the BIT's FET standard. Rather, the "*true question*" was to decide "*what substantive protection is granted to foreign investors through the FET*" and this question was not assisted by "*comparing two undefined or weakly defined standards*".[548]

(2) The tribunal held that the FET standard in the US-Argentina BIT protected the legitimate expectations of investors (in line with the "*overwhelming*"

---

545 Counter-Memorial at [278], [280].

546 Counter-Memorial at [283].

547 Counter-Memorial at [281].

548 *El Paso* at [335], **Exhibit CL-025**.

trend of decisions reached by other investment tribunals)[549] and also protected investors against unreasonable or unjustified modifications of the legal framework.[550] These protections go beyond the floor created by the MST under customary international law.

263. ***Sixth***, Slovakia asserts the tribunal in *Biwater* held that the FET standard in the UK-Tanzania BIT was "*essentially, a treaty codification of the customary international legal doctrine*".[551] This is not what the *Biwater* tribunal held. It held that the FET standard encompassed "*a number of different components*": (*i*) protection of an investor's reasonable and legitimate expectations; (*ii*) an obligation to act in good faith; and (*iii*) "*conduct of the State must be transparent, consistent and non-discriminatory, that is, not based on unjustifiable distinctions or arbitrary*."[552] These protections go beyond the MST floor under customary international law.

264. ***Seventh***, numerous other investment awards support Discovery's case that the FET Standard in the BIT is an autonomous standard. For example, Slovakia relies elsewhere in its Counter-Memorial[553] on the award in *Muszynianka v Slovakia*. In that award, when interpreting an equivalent autonomous FET standard in the Poland-Slovakia BIT, the tribunal held as follows:[554]

> "Irrespective of the difficulty of capturing the elusive essence of FET, and of the nuances in the formulation of the standard by each tribunal, there is a common understanding of the core elements of FET among investment treaty tribunals. Autonomous FET provisions, such as Article 3(2) of the BIT, have been deemed to protect against State conduct that frustrates an investor's reasonable and legitimate expectations, or that is otherwise contrary to the minimum standard of treatment, unreasonable, discriminatory, disproportionate, or overall lacking in good faith, due process, transparency and consistency. The Tribunal shares this understanding."

265. ***Eighth***, Slovakia is wrong to contend (by reference to the decision in *Unglaube v*

---

549 *El Paso* at [355], **Exhibit CL-025**.

550 *El Paso* at [365]-[374], **Exhibit CL-025**.

551 Counter-Memorial at [284].

552 *Biwater* at [602], **Exhibit CL-023**.

553 See *e.g.* Counter-Memorial at [300]-[301].

554 *Muszynianka spółka z ograniczoną odpowiedzialnością v The Slovak Republic*, PCA Case No. 2017-08, Award, 7 October 2020, ("***Muszynianka***") at [461], **Exhibit RL-065**. See also the numerous awards cited in the Memorial at [210]-[223].

Costa Rica) that primary decision-makers are owed a "*considerable degree of deference*" and that Discovery must prove that Slovakia engaged in conduct which "*shock[s] the conscience*" or is *"clearly 'improper or discreditable'"* or *"which otherwise blatantly def[ies] logic or elemental fairness*".[555] In this regard:

(1) Any deference owed to primary decision-makers in respect of certain decisions[556] "*cannot be unlimited, as otherwise a host state would be entirely shielded from state responsibility and the standards of protection contained in BITs would be rendered nugatory*".[557] Moreover, Slovakia has omitted the following pertinent observation of the tribunal in *Unglaube v Costa Rica*:[558]

> "This deference, however, is not without limits. Even if such measures are taken for an important public purpose, governments are required to use due diligence in the protection of foreigners and will not be excused from liability if their action has been arbitrary or discriminatory."

(2) As to the threshold required to amount to a breach of the FET Standard, Discovery does not need to prove that Slovakia engaged in shocking, outrageous or bad faith conduct.[559] It is well-established that such a high threshold do not apply to an autonomous FET standard in a BIT.[560]

2. The Tribunal must have regard to the individual and/or the cumulative effect of Slovakia's measures

266. Discovery's primary case is that the conduct of the Slovak State organs at Smilno, Krivá Ol'ka and during the EIA process (as summarised at [3] above and as described in detail in Section II above) taken individually each amounted to a

---

555 Counter-Memorial at [290].

556 Discovery does not accept that the decisions made by Slovakia in this case fall within the category to which the tribunal in *Unglaube* referred *viz.* "where the action or decision taken relates to the State's responsibility 'for the protection of public health, safety, morals or welfare, as well as other functions related to taxation and police powers of states'": see *Unglaube v Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, ("***Unglaube***") at [247], **Exhibit RL-056**.

557 *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ("***Crystallex***") at [584], **Exhibit CL-026**.

558 *Unglaube* at [247], **Exhibit RL-056**.

559 *Muszynianka* at [461], footnote 962 (citing earlier authorities), **Exhibit RL-065**.

560 See *e.g. Crystallex* at [543], **Exhibit CL-026** (citing other authorities).

separate breach of the FET Standard.

267. Discovery's alternative case is that Slovakia's conduct (as summarised at [3] above and as described in detail in Section II above) was a composite act[561] and amounted to a creeping violation of the FET Standard. The Tribunal must therefore consider the cumulative effect of Slovakia's conduct, starting in late 2015 and ending in 2018. As explained by the tribunal in *El Paso*:[562]

> "[…] A creeping violation of the FET standard could thus be described as a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result.
>
> The Tribunal, taking an all-encompassing view of consequences of the measures complained of by El Paso, including the contribution of these measures to its decision to sell its investments in Argentina, concludes that, by their cumulative effect, they amount to a breach of the fair and equitable treatment standard."

3. Slovakia violated Discovery's legitimate expectations

a. Legal standard

268. Slovakia accepts that the protection of an investor's legitimate expectations forms part of the FET Standard. Save for three discrete issues, the parties do not appear to disagree significantly over the legal principles which apply in this regard.[563] The three discrete issues over which the parties disagree are:

(1) whether Discovery can rely on representations/assurances made by Slovakia after Discovery acquired AOG in March 2014;

(2) whether Discovery can rely on representations/assurances made by Slovakia to AOG in the Exploration Area Licences; and

---

561 See in this regard ILC Articles, Article 15, **Exhibit CL-054**; Rudolf Dolzer, Christoph Schreuer & Ursula Kriebaum Principles of International Investment Law (3rd ed, OUP 2022) at pp. 228-230, **Exhibit CL-052** ("Adverse action by the host State need not take place through a single event but may occur through several acts and may be scattered over time. The phenomenon of composite acts is well-known in the law of State responsibility […]"). See also *El Paso* at [516]-[519], **Exhibit CL-025**; *Crystallex* at [668]-[671], **Exhibit CL-026**.

562 *El Paso* at [518]-[519], **Exhibit CL-025**.

563 Memorial at [215]-[216]; Counter-Memorial at [295]-[300].

(3) whether the concept of a SLO is relevant to the reasonableness of Discovery's legitimate expectations.

269. For the reasons given below, the Tribunal should answer issues (1) and (2) in the affirmative and issue (3) in the negative.

i. Discovery can rely on representations/assurances made by Slovakia after March 2014

270. Slovakia contends that an investor's legitimate expectations must arise "*at the time the investment was made*" and Discovery "*cannot base its legitimate expectations on decisions post-dating its investment in 2014*".[564] This is wrong. For the reasons given below, Discovery can rely on representations and/or assurances made by Slovakia when it renewed and extended the Exploration Area Licences in July 2014 and June 2016 (after the date when Discovery acquired AOG in March 2014).

271. It is true that some investment tribunals have held that legitimate expectations must be based on representations or assurances given by the host State at the "*time of the investment*".[565] However, as the tribunal in *AES* noted, "*the interpretation of 'time of the investment' has been quite broad*" and this has been held to encompass the time when "*the investment was decided and made*".[566] Thus, in *AES*, the tribunal examined whether the claimants held legitimate expectations both:[567]

(1) in 1996, at the time when the claimants acquired the shares of a local subsidiary; and

(2) in 2001, at the time when the claimants began to invest in (and spend money on) the activities of the local subsidiary to advance the project.

272. As explained below, this approach is supported by (*i*) the definition of the term "*investment*" in the BIT; (*ii*) the consistent jurisprudence of investment tribunals;

---

564 Counter-Memorial at [295(iii)], [301], [309].

565 See *e.g.* the awards cited by Slovakia in the Counter-Memorial at [296].

566 *AES Summit Generation Limited v Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, at [9.3.12], **Exhibit RL-062**.

567 *Ibid*, at [9.3.13]-[9.3.26], **Exhibit RL-062**.

and (*iii*) the views of distinguished academic commentators.

273. ***First***, the capacious definition of the term "*investment*" in the BIT supports Discovery's case that its legitimate expectations cannot be frozen in time at the moment when it acquired AOG in March 2014. The term "*investment*" in Article I(1)(a) expressly includes "*licenses and permits*" (in addition to shares in a company). As explained above, the renewal and extension of each Exploration Area Licence by the MoE in July 2014 and then again in June 2016 (*i.e.* after Discovery had acquired AOG in March 2014) qualified as an "*investment*".[568] The Tribunal must therefore assess whether Discovery held legitimate expectations:

(1) as at March 2014 (when Discovery acquired AOG);

(2) as at July 2014 (when the 2014 Licences were granted); and

(3) as at June 2016 (when the 2016 Licences were granted).

274. ***Second***, numerous other investment awards support Discovery's case. For example:

(1) In *Frontier Petroleum v Czech Republic*, the tribunal held that:[569]

> "[W]here investments are made through several steps, spread over a period of time, legitimate expectations must be examined for each stage at which a decisive step is taken towards the creation, expansion, development, or reorganisation of the investment."

(2) In *Crystallex v Venezuela*, the tribunal held that:[570]

> "As the tribunal in *Frontier Petroleum v. Czech Republic* noted, in these instances 'legitimate expectations must be examined for each stage at which a decisive step is taken towards the creation, expansion, development, or reorganisation of the investment'. In this case, Crystallex continued to invest throughout the process, and made investments after the 16 May 2007 letter. Therefore, the 16 May 2007 letter is in principle capable of founding a claim of legitimate expectations, if it fulfills the requisite characteristics of a specific promise, which was later frustrated."

---

568 See [42]-[43] and [214]-[216] above.

569 *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Final Award, 12 November 2010 at [287], **Exhibit CL-082**.

570 *Crystallex* at [557], **Exhibit CL-026**.

(3) In *Tethyan v Pakistan*, the claimant had made its "*main investment decision*" when it became a party to an investment contract in 2006 but the tribunal still considered whether Pakistan's conduct after 2006 gave rise to legitimate expectations:[571]

> "In principle, Respondent's conduct after 1 April 2006 would therefore be irrelevant because it could not have influenced Claimant's decision to enter into the 2006 Novation Agreement. However, in light of the fact that Claimant incurred the major part of its exploration expenditures only after it had become party to the CHEJVA, the Tribunal considers that Respondent's conduct in the years following the 2006 Novation Agreement has to be taken into account as well – to the extent that it encouraged Claimant to continue investing in the Reko Diq Project and thereby to repeatedly confirm its investment decision."

(4) The approach in these awards supports Discovery's case. Slovakia's decisions to renew and extend the Exploration Area Licences in July 2014 and June 2016 gave Discovery the confidence to continue to invest and fund AOG's exploration activities.[572] Each successive renewal and extension of the Exploration Area Licences was a "*decisive step*" towards the "*expansion*" and "*development*" of Discovery's investment in Slovakia.

275. ***Third***, distinguished academic commentators support this approach as a matter of principle by pointing to the doctrine of the general unity of an investment operation. For example, Professors Schreuer and Kriebaum correctly observe that an investment is "*often a process rather than an instantaneous act*" which "*can take place incrementally over a certain period of time*" and in this regard:[573]

> "The acceptance of an investment as a complex process involving a number of different transactions means that it is not possible to focus only on one particular point in time for the identification of legitimate expectations. Rather, it is necessary to identify the diverse transactions and activities, which combine to constitute the investment, and to examine individually whether they were based on contemporary

---

571 *Tethyan Copper Co Pty Ltd v Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, at [901], **Exhibit RL-109**. See also *Murphy Exploration & Production Company – International v The Republic of Ecuador II*, Partial Final Award, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award, 6 May 2016, ("***Murphy v Ecuador II***") at [251] **Exhibit CL-090**.

572 See [42]-[43] above.

573 Christoph Schreuer and Urusla Kriebaum *At What Time Must Legitimate Expectations Exist?* (2012) 9(1) Transnational Dispute Management, (January 2012), pp. 7-8, **Exhibit CL-084**.

legitimate expectations. In other words, it is necessary to ascertain the existence of legitimate expectations held by the investor at the time of each individual decision. The key issue is the actual reliance on expectations which existed at the particular point in time when the relevant decision was taken. […]"

ii. Discovery can rely on representations/assurances made by Slovakia to AOG in the Exploration Area Licences

276. Next, Slovakia contends that the Exploration Area Licences were addressed to AOG (not Discovery) and hence they do not qualify as representations or assurances addressed to Discovery for the purposes of Discovery's legitimate expectations claim.[574] This submission is obviously wrong.

277. ***First***, Slovakia seeks to rely on the formulation used by the tribunal in *Muszynianka v Slovakia* ("*addressed specifically to the investor*")[575] as if it were a statute or treaty to be interpreted and applied in a rigid manner. This is wrong in principle. The Tribunal is not bound by this precise formulation:

(1) The tribunal in *Muszynianka v Slovakia* was not considering the specific issue which now arises, namely whether a representation or assurance given by Slovakia in a permit or Licence granted to an investor's wholly-owned operating subsidiary may give rise to a legitimate expectation by the investor.

(2) The tribunal in *Muszynianka v Slovakia* noted that "*the main components of the doctrine of FET and legitimate expectations are helpfully summarized by the tribunal in Antaris v Czech Republic*".[576] In *Antaris v Czech Republic*, the tribunal did not use the formulation upon which Slovakia so heavily relies ("*addressed specifically to the investor*"). Instead, the tribunal held:[577]

> "A claimant must establish that (a) clear and explicit (or implicit) representations were made by or attributable to the state in order to induce the investment, (b) such representations were reasonably relied upon by the Claimants, and (c) these representations were subsequently repudiated by the

[574] Counter-Memorial at [301], [309].

[575] Counter-Memorial at [300]-[301].

[576] *Muszynianka* at [462], **Exhibit RL-065**.

[577] *Antaris Solar GmbH v The Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018, at [360(3)], **Exhibit CL-034**.

state."

(3) This formulation is to be preferred and is consistent with numerous other awards.[578] It is therefore not necessary for Discovery to prove that Slovakia made representations or assurances addressed specifically to Discovery. A representation or assurance made by Slovakia to AOG in order to induce Discovery's investment will suffice.

278. ***Second***, Slovakia's argument cannot be reconciled with the ordinary meaning of the words used in Article II(2)(a) of the BIT. Slovakia's obligation under Article II(2)(a) is to accord FET to "*investments*". It is clear that, under Article I(1)(a) of the BIT, the Exploration Area Licences (as renewed/extended from time-to-time) were each "*investments*" which were controlled by Discovery.[579] The terms of the Exploration Area Licences as alleged by Discovery[580] were representations and/or assurances made by Slovakia to induce Discovery's investment. The immediate addressees of those representations and/or assurances were AOG, JKX and Romgaz (as the holders of the Exploration Area Licences). However, having regard to the definition of the term "*investments*" in the BIT and the fact that Discovery (via AOG) controlled the rights of all the holders of the Exploration Area Licences,[581] Discovery is entitled to base its legitimate expectations claim on representations and/or assurances contained in the Licences.

279. ***Third***, numerous investment awards have held that representations or assurances given by States in licences, resolutions or contracts which were granted to an investor's operating subsidiary are capable of generate legitimate expectations upon which an investor may rely.

280. For example, in *Masdar v Spain*, the tribunal held that the claimant (an investor in

---

578 See *e.g. RREEF Infrastructure (G.P.) Limited v Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, at [388] **Exhibit RL-058**; *Philip Morris Brands Sàrl v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, at [426] **Exhibit RL-057**.

579 See [214]-[216] above.

580 See Memorial at [35] (2006 Licences), [44] (2010 Licences), [61] (2014 Licences), [74] (2016 Licences).

581 See [214]-[216] above.

solar energy plants) held a legitimate expectation that renewable energy incentives provided by a Spanish Royal Decree (RD661/2007) would remain unaltered and that Spain had violated its obligation under the Energy Charter Treaty to accord FET by repealing those incentives.[582] In this regard:

(1) Between June 2008 and April 2010, the claimant had invested in three solar plants which were operated by three operating companies.[583] The operating companies were not parties to the arbitration.

(2) In December 2010, the three operating companies requested a Spanish Ministry to confirm that the incentives in RD661/2007 would apply for the "*operating life*" of each of the plants. In response, the Ministry issued a "*Resolution*" providing this confirmation to each operating company.[584]

(3) The tribunal held that the Resolution granted by Spain to the operating companies was a "*specific commitment*" upon which the claimant was entitled to rely for the purposes of its legitimate expectations claim:[585]

> "It would be difficult to conceive of a more **specific commitment than a Resolution issued by Spain addressed specifically to each of the Operating Companies**, confirming that each of the Plants qualified under the RD661/2007 economic regime for their 'operational lifetime'.
>
> Because of these specific commitments […] the Tribunal concludes that, in any event, **Claimant had legitimate expectations that the benefits granted by RD661/2007 would remain unaltered**."

281. In *Greentech v Italy*, the facts were similar, save that the incentives had been provided by Italy under decrees which were subsequently rescinded. The tribunal reached the same conclusion as in *Masdar*. In particular:

---

582 *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 ("***Masdar***"), at [521], **Exhibit CL-093**.

583 *Ibid*, at [5], [92]-[95] **Exhibit CL-093**.

584 *Ibid*, at [96]-[97] **Exhibit CL-093**.

585 *Ibid*, at [520]-[521] **Exhibit CL-093**.

(1) Between 2008 and 2013, the claimants had invested in Italian operating companies which owned 134 solar energy plants in Italy. The operating companies were not parties to the arbitration.[586]

(2) The operating companies (but not the claimants) received "*GSE letters*" from Italy which expressly stated that the tariff specified in the *Conto Energia* decrees would remain constant for a twenty-year period.[587]

(3) The operating companies (but not the claimants) also entered into "*GSE Agreements*" with Italy which stated that the tariff specified in the *Conto Energia* decrees would be constant for a twenty-year period.[588]

(4) The tribunal held as follows:[589]

> "At the time of investing, Claimants had been led to believe, reasonably, that the incentive tariffs would remain the same as promised in the *Conto Energia* decrees, GSE letters and GSE Agreements throughout a twenty-year period.
>
> Respondent has not provided any persuasive reason to conclude that despite entitlement to the incentive tariffs, an investor, when making the investment, should not expect the tariffs to remain constant. While the investor might need to live with some minor adjustments, nothing alerted the Claimants that they would need to accept changes of the magnitude imposed by the *Spalma-incentivi* Decree.
>
> When Claimants invested in the PV facilities, they received assurances which were not subject to any reservation of a discretion to change the rate of return as effected by the *Spalma-incentivi* Decree."

282. These awards are analogous to the present case because the resolutions, letters and agreements were granted to the investor's operating subsidiary and yet the tribunals held that they gave rise to a legitimate expectation on the part of the investor. Here, the Exploration Area Licences (as renewed/extended from time to time) were granted by Slovakia to Discovery's wholly-owned operating subsidiary (AOG). The Exploration Area Licences are therefore capable of generating legitimate

---

586 *Greentech Energy Systems A/S v The Italian Republic*, SCC Arbitration V (2015/095), Final Award, 23 December 2018, ("***Greentech***") at [11], [132]-[142] **Exhibit CL-095**.

587 *Ibid*, at [127].

588 *Ibid*, at [128], [220] ("Claimants are not party to the GSE Agreements").

589 *Ibid*, at [447]-[449].

expectations, as explained in the Memorial[590] and further below.[591]

iii. The concept of a SLO is irrelevant to the reasonableness of Discovery's legitimate expectations

283. Slovakia contends that the "*legitimacy and reasonableness*" of Discovery's expectations must be assessed by reference to "*a concept known among energy and mining companies as a 'social licence to operate'*".[592] This is wrong.

284. ***First***, the sole authority relied upon by Slovakia (*South American Silver v Bolivia*) is distinguishable. Unlike the investor in *South American Silver*, Discovery did not "*operate[] in an area inhabited by indigenous communities, under specific political, social, cultural, and economic conditions*".[593]

285. ***Second***, the very concept of a SLO has no basis in either domestic Slovak law or in relevant and applicable rules of international law. That alone is fatal to Slovakia's attempt to invoke the concept:

(1) As to domestic law, Slovakia concedes that the concept of a SLO is merely "*an unwritten social contract*".[594] Such a concept is not enforceable under domestic Slovak law.

(2) As to international law, the tribunal in *Bear Creek v Peru* linked the concept of a SLO to the obligation to consult with "*indigenous communities*", under Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**").[595] Discovery/AOG were not operating in areas inhabited by indigenous communities. The UNDRIP and the other

---

590 Memorial at [224]-[226], [227], [232].

591 See [287] *et seq* below.

592 Counter-Memorial at [304].

593 *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, at [655], **Exhibit RL-066**.

594 Counter-Memorial at [12], [444].

595 *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ("***Bear Creek***") at [406], **Exhibit RL-039**. See also *Bear Creek*, Partial Dissenting Opinion of Professor Philippe Sands QC, at [7]-[16] **Exhibit RL-039**. See also *South American Silver* at [655], **Exhibit RL-066** (referring to the claimant having operated "in an area inhabited by indigenous communities"). Article 35 of the UNDRIP provides that: "Indigenous peoples have the right to determine the responsibilities of individuals to their communities."

international conventions referred to in *Bear Creek* therefore do not apply. Slovakia does not identify any other international legal obligation pursuant to which Discovery/AOG was obliged to obtain a SLO (and there is none).

286. ***Third***, Slovakia asserts that the concept of a SLO applies in the mining industry. Slovakia also relies on reports prepared by consultancies which discuss current issues affecting the mining industry.[596] Neither AOG nor Discovery is a mining company. There is no basis to extend the concept of a SLO beyond the mining industry to cover oil and gas exploration. Even if (which is denied) there were any basis to extend the concept of a SLO to cover oil and gas exploration:

(1) the concept of a SLO could only be relevant (if at all) to causation which is addressed separately in Section VI below[597] and not to the assessment of the reasonableness of Discovery's legitimate expectations; and

(2) in any event, the record shows that AOG engaged extensively with local communities throughout the project (see [76] above and see Annex 1 hereto) and therefore Discovery/AOG did not fail to obtain a SLO.

b. The Exploration Area Licences gave rise to legitimate expectations which were protected under the FET Standard

287. Slovakia does not dispute the *content* of the four expectations held by Discovery on the basis of the terms of the Exploration Area Licences.[598] Rather, Slovakia contends that Discovery's expectations were not legitimate and thus were not protected under the FET Standard.[599] This is wrong. Discovery's expectations satisfy the three conditions in *Antaris v Czech Republic*, as set out at [277(2)] above.

288. ***First***, the Exploration Area Licences (as renewed/extended from time to time) contained clear and explicit/implicit representations and/or assurances by the MoE which are attributable to Slovakia and which induced Discovery's investments.[600]

---

596 Counter-Memorial at [305].
597 See [397] *et seq* below.
598 Memorial at [226].
599 Counter-Memorial at [308]
600 As to inducement, see [42]-[43] above.

These representations and/or assurances have already been set out by Discovery in its Memorial and are not repeated here.[601] The assurances were not merely a restatement of AOG's application.[602] They were an adoption by Slovakia of a formal position in a "*Decision*" under the heading "*Justification*".[603] It would be difficult to conceive of more specific and explicit representations and/or assurances to induce an investment than those contained in the Exploration Area Licences.

289. ***Second***, Discovery reasonably relied on these representations and/or assurances.[604] Slovakia asserts that Discovery's reliance was unreasonable because the Exploration Area Licences contained "*numerous specific conditions*" which Slovakia asserts "*include the obligation to secure all rights required to access and use third-party land, or to undergo EIA*".[605] This is wrong:

(1) AOG secured the necessary access rights by entering into leases with the owners of the Smilno Site and the Krivá Ol'ka Site. Discovery's complaint is that Slovakia frustrated Discovery's legitimate expectations when it subsequently prevented AOG from drilling exploration wells at these Sites.

(2) The obligation to perform a Preliminary EIA was not a condition of the Exploration Area Licences when they were granted/extended by the MoE in 2006, 2010, 2014 and 2016. Discovery's complaint is Slovakia violated Discovery's legitimate expectations by subsequently making the EIA Decisions and subsequently imposing the EIA Condition.

(3) Contrary to Slovakia's submissions, Discovery does not contend that it "*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*

601 Memorial at [226].

602 *Cf.* Counter-Memorial at [309].

603 See *e.g.* **Exhibit C-12**, pp. 2 and 4 (Svidník).

604 See [42] above. See also Lewis 1 at [19]-[20].

605 Counter-Memorial at [310]-[311].

permission of that landowner".[606] This is a blatant mischaracterisation by Slovakia of Discovery's case.[607]

290. ***Third***, the representations and/or assurances upon which Discovery reasonably relied were violated by Slovakia, as explained in the Memorial and further below.

c. Slovakia violated Discovery's legitimate expectations by its conduct at Smilno

291. As explained in the Memorial,[608] Slovakia's conduct at Smilno (specifically the conduct of the Police, the State Prosecutor and the MoI) violated Discovery's legitimate expectations and prevented AOG from drilling an exploration well at Smilno. None of the arguments raised by Slovakia in response has any merit.

292. ***First***, Slovakia contends that AOG allegedly failed to secure landowner consent and failed to obtain other consents and permits to drill its exploration well at the Smilno Site.[609] As Discovery has already explained, this is wrong.[610] In summary:

    (1) AOG had obtained landowner consent to use the Smilno Site;

    (2) AOG did not need to obtain landowner consent to use the Road because it was publicly accessible; and

    (3) AOG had obtained all other permits and consents to drill its exploration well on the Smilno Site.

293. ***Second***, Slovakia asserts that AOG understood that the Road was private property.[611] As Discovery has already explained, this is wrong. Discovery/AOG's clear understanding was that the Road was publicly accessible and this understanding was plainly reasonable.[612]

---

606 Counter-Memorial at [311].
607 See [18] above.
608 Memorial at [227].
609 Counter-Memorial at [313].
610 See [15]-[16], [18], [53]-[75] above. See also Memorial at [81].
611 Counter-Memorial at [314].
612 See [53]-[75] above.

294. ***Third***, Slovakia asserts that the Exploration Area Licences did not contain a representation authorising AOG to use private property without landowner consent.[613] This is a straw man argument and a mischaracterisation of Discovery's case. AOG had obtained the necessary rights to use the Smilno Site and it did not need to obtain landowner consent to use the publicly accessible Road.

295. ***Fourth***, Slovakia denies that the Police were obliged to remove the activists and their vehicles from the Road and from the Smilno Site.[614] Slovakia's argument rests on its assertion that the Road was private property. Discovery has already explained why this wrong.[615] By trespassing on the Smilno Site and by blocking the Road, the activists were acting illegally and the Police were obliged to intervene. Slovakia's assertion that the Police were entitled to stand by idly (on the basis that the Police were "*not entitled to intervene in a civil-law dispute*"[616]) is absurd.

296. ***Fifth***, Slovakia denies that the Police violated Discovery's legitimate expectations by refusing to place signs at the entrance of the Road. This is wrong. There is no dispute that the Police refused to approve the signs. As Discovery has explained,[617] it is clear that the Police performed a *volte face* after initially promising to erect the signs and initially accepting that the Road was publicly accessible. It is clear that the Police's conduct in this regard violated Discovery's legitimate expectations by preventing AOG from completing its exploration activities. That was the intended and practical effect of the Police's refusal to erect the signs.

297. ***Sixth***, Slovakia denies that the State Prosecutor intervened or directed the Police to cancel their policing operation.[618] Yet, as Discovery has explained, it is clear that this is what happened.[619] The State Prosecutor's conduct violated Discovery's legitimate expectations by preventing AOG from completing its exploration activities. That was the intended and practical effect of her conduct.

---

[613] Counter-Memorial at [315].
[614] Counter-Memorial at [318]-[320].
[615] See [53]-[75] above.
[616] Counter-Memorial at [320].
[617] See [98]-[109] above.
[618] Counter-Memorial at [322].
[619] See [86]-[97] above.

298. ***Seventh***, Slovakia contends that the MoI was entitled to issue instructions to the Police stating that the Road was private property.[620] As Discovery has explained, this was incorrect because the Road was publicly accessible. What is more, the MoI acted outside their field of competence and in breach of Slovak law because the competent State body in this matter was the MoT.[621] The MoI's conduct violated Discovery's legitimate expectations by preventing AOG from completing its exploration activities. That was the intended and practical effect of the instruction.

d. Slovakia violated Discovery's legitimate expectations by its conduct at Krivá Ol'ka

299. As Discovery has explained in the Memorial,[622] Slovakia's conduct at Krivá Ol'ka (specifically, the conduct of the MoA and the MoE) also violated Discovery's legitimate expectations and prevented AOG from drilling an exploration well at Krivá Ol'ka. Slovakia's arguments in response have no merit.

300. ***First***, Slovakia asserts that it was not within the MoA's competence to approve AOG's exploratory drilling.[623] This is another straw man argument. Discovery does not contend that approval of the Exploration Area Licences was within the MoA's competence.[624] But it is clear that approving the Amendment to the Lease *was* within the MoA's competence: this is not disputed by Slovakia. Moreover, by *refusing* to approve the Amendment, Slovakia violated Discovery's legitimate expectations by preventing AOG from completing its exploration activities at Krivá Ol'ka. That was the intended and practical effect of the MoA's refusal.[625]

301. ***Second***, Slovakia asserts that the MoA was "*not required to approve a lease simply because AOG held the Exploration Area Licences*" or because the MoE had extended the Exploration Area Licences in June 2016.[626] Yet it was Discovery's

---

620 Counter-Memorial at [322]. Contrary to Slovakia's assertion, the MoI did not issue "guidance" but instead issued a clear instruction to the Police: see [111(3)] above.

621 See [112] above.

622 Memorial at [232].

623 Counter-Memorial at [324].

624 Approval of AOG's exploratory drilling was, however, a matter within the MoE's competence under the Geology Act.

625 See [117]-[131] above.

626 Counter-Memorial at [325].

legitimate expectation that AOG would not be prevented from completing its geological exploration at Krivá Ol'ka and that such exploration could be carried out without the MoA objecting to such exploration. The intended and practical effect of the MoA's refusal to approve the Amendment was to prevent AOG from doing precisely that. This conduct violated Discovery's legitimate expectations.

302. ***Third***, Slovakia asserts that 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*".[627] However, State Forestry had already agreed to extend the Lease; the MoA was not a party to the Lease; and it was not open to the MoA to raise this objection.[628] The reasons given by Minister by Minister Matečna for the MoA's refusal to approve the Amendment in the letter dated 23 June 2016 (*i.e.* the fact that AOG had allegedly requested an extension 8 days after the deadline) were never raised by the MoA prior to this letter.[629] Moreover, the reasons given by Minister Matečna for the MoA's refusal to approve the Amendment were a pretext for the real reason, namely Mr Regec's personal prejudice.[630] Slovakia's conduct was unfair, non-transparent and prevented AOG from carrying out its exploratory drilling at Krivá Ol'ka in violation of Discovery's legitimate expectations.

303. ***Fourth***, Slovakia denies that the MoA's delay in issuing a decision until June 2016 prevented AOG from making an earlier application to the MoE under Article 29 of the Geology Act, supposedly on the basis that "*AOG knew in December 2015 that it failed to timely seek an extension of the Lease*".[631] This is wrong. In January 2016, State Forestry *agreed* to extend the Lease by the Amendment.[632] The Amendment then required MoA approval. Slovakia has no credible answer to explain the inexplicable delay which occurred between January and June 2016.[633]

---

[627] Counter-Memorial at [326]. Slovakia later asserts that this was the "main reason" (rather than the "sole reason") for refusing to approve the Amendment: Counter-Memorial at [329(i)].

[628] See [126]-[128] above.

[629] Fraser 2 at [23] ("The first time we heard that the 8-day delay was an issue was when we received the letter of the Minister dated 23 June 2016").

[630] See [117]-[126] above.

[631] Counter-Memorial at [328].

[632] See [117] above.

[633] See [118]-[131] above.

304. ***Fifth***, Slovakia also has no answer to Discovery's case that the MoE's conduct in refusing to grant a compulsory access order under Article 29 of the Geology Act[634] (and suspending further consideration of AOG's application after the MoE's original order was quashed) violated Discovery's legitimate expectations. The MoE's conduct violated Discovery's legitimate expectation that AOG would not be prevented from completing its geological exploration at Krivá Ol'ka. Slovakia's conduct is exacerbated by the fact that the MoE had granted/extended the Exploration Area Licences (on the one hand) and then refused to grant AOG's Article 29 application (on the other hand) for pretextual reasons. Slovakia's conduct in this regard was unfair and non-transparent.

e. Slovakia violated Discovery's legitimate expectations by reason of the EIA Decisions and the EIA Condition

305. Slovakia's conduct (specifically, the District Offices and the MoE) in issuing the EIA Decisions and imposing the EIA Condition also violated Discovery's legitimate expectations.[635] Slovakia is wrong to contend otherwise.

306. ***First***, Slovakia asserts it was entitled to enact the EIA Amendment under the police powers doctrine.[636] This is another straw man argument. Discovery does not dispute that Slovakia was entitled to *enact* the EIA Amendment. Discovery's complaint is that Slovakia's *application* of the EIA Amendment to AOG (by making the EIA Decisions and imposing the EIA Condition) breached the FET Standard. By engaging in such conduct, Slovakia:

(1) violated Discovery's legitimate expectations;

(2) acted inconsistently; and

(3) acted arbitrarily.

307. Discovery expands on points (2) and (3) below.[637] In this section, Discovery focuses

---

634 See [133]-[141] above. See also Memorial at [232].
635 Memorial at [235]-[238].
636 Counter-Memorial at [331]-[341].
637 See [315] *et seq* below.

on point (1). There were two sources for Discovery's legitimate expectations in relation to the EIA process, namely:

(1) the terms of the Exploration Area Licences; and

(2) the public statements made by the MoE and Minister Sólymos between November 2016 and February 2017.

308. When the Exploration Area Licences were renewed in July 2014 and June 2016 (*i.e.* well before the EIA Amendment came into force) Discovery legitimately expected it would not need to perform a Preliminary EIA before completing its exploratory drilling activities. That expectation was based upon the clear and explicit (or implicit) representations and/or assurances contained in the Exploration Area Licences upon which Discovery reasonably relied, namely that:[638]

(1) AOG would be permitted to drill exploration wells of between 1200m and 1500m in depth;

(2) AOG would be able to complete such exploration across all three concessions;

(3) Slovakia had already determined that such exploration was both permissible and desirable; and

(4) AOG would be able to carry out its exploration without any other relevant organ objecting to such activities.

309. What is more, between November 2016 and February 2017, the MoE and Minister Sólymos made further explicit (or implicit) representations and/or assurances which reinforced Discovery's legitimate expectation that it would not need to perform a Preliminary EIA before completing its exploratory drilling activities across all three blocks. Specifically, the MoE and/or Minister Sólymos stated that:

---

638 Memorial at [226].

(1) AOG was under no "*legal obligation*" to "*carry out an EIA*" (Minister Sólymos' press conference and the MoE's press release dated 29 November 2016);[639]

(2) "*[C]ompanies conducting geological exploration will have to submit a mandatory environmental impact assessment (EIA) when obtaining a Licence*" – the logical implication being that AOG was not required to submit an EIA because AOG had already obtained an Exploration Area Licence (Minister Sólymos' press article dated 3 December 2016);[640]

(3) "*[T]here was no requirement on [AOG] to complete a preliminary EIA*" (Minister Sólymos' confirmation at the meeting with representatives of Discovery/AOG on 15 December 2016);[641]

(4) The EIA Amendment "*does not apply to surveys [i.e. explorations] that have already been approved*" – which was the case for AOG because its geological activities had been approved (Minister Sólymos' public statement and the MoE's press release dated 17 January 2017);[642]

(5) AOG's exploration activities "*will not have any unfavourable impacts on their surroundings and the environment in general*" (Minister Sólymos' press article dated 27 January 2017);[643]

(6) The EIA Amendment only applied to "*[n]ew exploratory wells*" but not to "*old wells*" – including the wells which AOG was proposing to drill (the MoE's statement dated 15 February 2017);[644] and

(7) AOG "*is not legally obliged to perform*" a Preliminary EIA (MoE's statement dated 15 February 2017).[645]

---

639 Memorial at [164].
640 See [158(3)] above.
641 Memorial at [168]; Lewis 1 at [80].
642 Memorial at [175]-[176] (AOG's surveys had already been approved).
643 Memorial at [178].
644 Memorial at [180(4)].
645 Memorial at [180(5)].

310. Discovery reasonably relied on all these representations/assurances.[646] Discovery legitimately expected that it would not be required to perform a Preliminary EIA before drilling its exploration wells under the Exploration Area Licences.[647]

311. The EIA Decisions issued by the District Offices[648] violated Discovery's legitimate expectations. Slovakia cannot escape liability by asserting that AOG "*voluntarily*" submitted its Preliminary EIA applications:[649]

(1) Discovery has already explained that it was left with no other option but to submit Preliminary EIA applications due to the repeated and unjustified public interventions of Minister Sólymos.[650] Minister Sólymos was blowing hot and cold at the same time, on the one hand asserting that a Preliminary EIA was not required and on the other hand asking AOG to undertake a Preliminary EIA. In the light of his unjustified and inconsistent interventions, AOG was left with no other realistic option but to submit Preliminary EIA applications. Slovakia therefore cannot escape liability because otherwise it would benefit from its own wrong, which would be contrary to the general principle *nullus commodum capere de sua injuria propria*.[651]

(2) Further and in any event, by issuing the EIA Decisions, Slovakia acted inconsistently and arbitrarily, as explained further below.[652] The fact that AOG submitted Preliminary EIA applications therefore does not absolve Slovakia from liability for a breach of the FET Standard. By submitting the Preliminary EIA applications, Discovery was entitled to be treated fairly and equitably and that meant the District Offices were not entitled to act inconsistently or arbitrarily. Yet the District Offices did act inconsistently and arbitrarily when issuing the EIA Decisions, as explained below.

---

646 Memorial at [237]; Lewis 1 at [82]; Fraser 1 at [64].

647 *Cf.* Counter-Memorial at [342].

648 See [168]-[179] above. See also Memorial at [184]-[187], [238].

649 Counter-Memorial at [342].

650 See [159]-[164] above.

651 See *e.g. Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA*, Iran-US Claims Tribunal, Award No. ITL 14-7-2, 29 June 1984, p. 16, **Exhibit CL-048**.

652 See [315] below.

312. ***Second***, Slovakia contends that it cannot be held liable under the BIT because its enactment of the EIA Amendment was "*required by, or reasonably related to the implementation of, EU law*".[653] Once again, this is a straw man argument:

(1) Discovery does not dispute that Slovakia enacted the EIA Amendment in order to transpose the EIA Directive into Slovak law.[654] Discovery's complaint is that the *application* of the EIA Amendment to AOG's activities breached the FET Standard under the BIT.

(2) Slovakia cannot derive assistance from the award of the tribunal in *Electrabel v Hungary*. In that case, the European Commission had ordered Hungary to terminate a power purchase agreement on the grounds that it was contrary to EU law rules on state aid. Unsurprisingly, the tribunal held that Hungary was not legally responsible for the acts of the European Commission under the Energy Charter Treaty or under international law. Rather, Hungary could only be held responsible for its "*own wrongful acts*".[655]

(3) The present case is not analogous to the facts of *Electrabel*. The European Commission did not order Slovakia to insist that AOG perform a Preliminary EIA or a Full EIA. The infringement proceedings commenced by the EU against Slovakia in 2013 did not relate in any way to AOG's activities. Rather, Slovakia merely adopted the EIA Amendment to transpose the EIA Directive into Slovak law. As Discovery has explained, the EIA Amendment did not even apply to AOG's activities. But in any event, the *application* of the EIA Amendment to AOG's activities violated the FET Standard.

313. ***Third***, Slovakia argues that the MoE and Minister Sólymos never represented to AOG/Discovery that the EIA Amendment did not apply to AOG's activities.[656] The documentary record proves the opposite: see [309] above.

---

653 Counter-Memorial at [339]-[340].

654 See [149]-[158] above.

655 *Electrabel S.A. v Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, at [6.71]-[6.72], **Exhibit RL-074**.

656 Counter-Memorial at [343].

314. ***Fourth***, Slovakia asserts that the MoE's imposition of the EIA Condition in the 2018 Licence[657] is "*irrelevant*".[658] This is wrong. The imposition of the EIA Condition violated Discovery's legitimate expectations, which were based upon the clear and explicit (or implicit) representations and assurances contained in the Exploration Area Licences and in the public statements of the MoE and Minister Sólymos between November 2016 and February 2017.

4. Slovakia acted inconsistently

315. In the Memorial, Discovery has already explained why Slovakia's inconsistent conduct breached the FET Standard.[659] Discovery now responds to Slovakia's case on this issue, having regard to the facts set out in Section II above. It is convenient to begin by summarising Slovakia's inconsistent conduct across all three categories of measures (i.e. at Smilno, Krivá Ol'ka and during the EIA process).

316. With respect to Smilno:

(1) The position adopted by the Police (*viz.* that the Road was not publicly accessible[660]) was inconsistent with:

(a) the position adopted by the Smilno Municipality, as set out in the Mayor's meetings with Discovery/AOG in 2015 (see [61(2)] above);

(b) the position adopted by the Smilno Municipality, as set out in the Mayor's statement issued in June 2016 (see [59] above);

(c) the position adopted by ÚGKK, as set out in the official maps of Slovakia (see [60] above); and

(d) the position adopted by the Police at the meeting on 15 July 2016 (see [101]-[102] above).

---

657 See [193] above.

658 Counter-Memorial at [344].

659 Memorial at [213(2)], [217]-[218], [230]-[231], [233], [235]-[238].

660 This was the basis for the Police's decision not to remove the activists or their vehicles from the Road and the Police's decision not to approve the signs at the entrance of the Road.

(2) The position adopted by the MoI when it issued its opinion/instruction to the Police on 19 December 2016 that the Road was private property (see [111(3)] above) was inconsistent with:

(a) the position adopted by the MoT in its letter dated 9 December 2016 (see [111(1)] above); and

(b) the position adopted by the other Slovak State organs listed at [316(1)(a)-(d)] above.

317. With respect to Krivá Ol'ka:

(1) By refusing to approve the Amendment to the Lease, the MoA acted inconsistently with the MoA's prior conduct (when it originally approved the Lease) and with the MoE's prior conduct (when it granted the 2016 Licences).

(2) By rejecting AOG's Article 29 application for a compulsory access order, the MoE acted inconsistently by:

(a) initially accepting in October 2016 that AOG's application was a clear case where the public interest requirement was met (see [135] above);

(b) preparing to issue a decision in AOG's favour but then reversing course after having received instructions from higher up in the MoE to refuse the application (see [138] above);

(c) suspending further consideration of the application in June 2017 until it had received documents showing AOG was unable to reach agreement with State Forestry (see [141(1)] above), despite the fact that:

(i) the MoE had been in possession of the relevant documents evidencing this fact since late 2016 (see [141(2)(a)]); and

(ii) the MoE had already accepted in October 2016 and March 2017 that no agreement had been reached between State Forestry and AOG (see [141(2)(b) and (d)] above).

318. With respect to the EIA process:

(1) The EIA Decisions issued by the District Offices were inconsistent with numerous earlier statements attributable to Slovakia which had concluded that AOG's exploration activities were not likely to have a significant adverse effect on the environment: these statements are set out in detail above.[661]

(2) The EIA Condition imposed by the MoE was inconsistent with the statements of the MoE and Minister Sólymos between November 2016 and February 2017 (*viz.* that the EIA Amendment did not apply to AOG and that AOG was not legally obliged to perform an EIA).[662]

319. Slovakia accepts that the FET Standard obliged it to act consistently.[663] It is self-evident from the summary at [316]-[318] above that Slovakia breached this obligation. Slovakia's only response is to assert that the facts of this case are distinguishable from three awards cited by Discovery in its Memorial. Slovakia's response is unavailing.

320. ***First***, Slovakia argues that *MTD Equity v Chile* is distinguishable since: (*i*) a foreign investment committee did not sign an "*umbrella grant of entry or authorisation*" in favour of Discovery; and (*ii*) different institutions did not reach a different outcome on the same issues in the present case.[664] Taking each point in turn:

(1) As to (*i*), Discovery does not need to show that the facts of this case are identical. What matters are the statements of principle set out by the tribunal in *MTD Equity*. Slovakia does not dispute that the host State must be "*considered by the Tribunal as a unit*" such that, although two agencies may be separate under municipal law, they must be taken as a "*unit*" or "*monolith*" for the purposes of Slovakia's obligations to Discovery under the BIT.[665]

---

[661] See [172] and [175] above.
[662] See [309] above.
[663] Counter-Memorial at [345].
[664] Counter-Memorial at [347].
[665] Memorial at [217], citing *MTD* at [165]-[166], **Exhibit CL-016**.

(2) As to (*ii*), it is clear from the summary at [316]-[318] above that different organs of Slovakia adopted many inconsistent positions on the same issues throughout the project. Applying the principle in *MTD Equity*, it does not avail Slovakia to assert that each institution had "*clearly-demarcated competencies and spheres of authority*" under domestic Slovak law:[666]

(a) The different Slovak State organs must be considered as a "*unit*" or "*monolith*" for the purposes of Slovakia's obligations to Discovery under international law, specifically the FET Standard under the BIT.

(b) Further and in any event, Ministries and other central authorities were obliged to "*closely cooperate*" in fulfilling their tasks (see further [322] below). Thus, even under Slovak law, the different Slovak State organs cannot be considered as separate silos.

321. ***Second***, Slovakia argues that *Garanti Koza v Turkmenistan* is distinguishable.[667] Again, Discovery does not need to show that the facts of this case are identical. What matters is that the tribunal applied the principle in *MTD Equity* and held that "*inconsistency of behaviour between one agency of the Turkmenistan Government [...] and other arms of the same Government*" amounted to a breach of the FET provision.[668] Slovakia's conduct at [316]-[318] above satisfies this test.

322. ***Third***, Slovakia argues that *Glencore v Colombia* is distinguishable because the "*competencies*" of the MoE and the MoA differ.[669] Slovakia relies on Act No. 575/2001 Coll. on Organization of Government Activities and Organization of Central Government, Article 38(1) of which provides as follows:[670]

> "Ministries and other central authorities of state administration closely cooperate in fulfilling their tasks. They exchange necessary information and materials and discuss

666 Counter-Memorial at [347].

667 Counter-Memorial at [348]-[349].

668 *Garanti Koza LLP v Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, at [381]-[382], **Exhibit CL-028**.

669 Counter-Memorial at [350]-[352].

670 Act No. 575/2001 Coll. on Organization of Government Activities and Organization of Central Government, **Exhibit R-071**.

measures affecting them with other ministries."

323. It is therefore clear that, under Slovak law, the MoA and the MoE cannot be viewed as distinct bodies which do not cooperate. In this case, the MoA and MoE were both acting within the same sphere of powers. The MoA was therefore required to cooperate with the MoE in fulfilling its task. Accordingly, in deciding whether the approve the Amendment, the MoA was required to take account of the fact that the MoE had granted the 2016 Licences to AOG. The MoA did not do so.

324. Further and in any event, it is clear that all of the organs referred to at [316]-[318] above were acting within the same sphere of powers in their interactions with AOG. Those organs must be treated as a "*unit*" or "*monolith*" for the purposes of Slovakia's obligations under international law (irrespective of the position under domestic law). In short, Slovakia cannot escape liability under international law by pointing to its own internal provisions of domestic Slovak law.

5. Slovakia acted arbitrarily

325. Slovakia does not dispute that the FET Standard in Article II(2)(a) of the BIT also imposed an obligation upon Slovakia to act transparently, in good faith and not to act arbitrarily.[671] As the tribunal in *Musznianka* held:[672]

> "Third, FET implies that State authorities are under an obligation to act in good faith in accordance with the law that governs them. The non-compliance with domestic laws by State authorities may form the basis of a successful FET claim, if (i) there is proof of arbitrary conduct in the application of the laws in question; or (ii) there is some form of abuse of power."

326. It is clear that Slovakia's obligation not to act arbitrarily under the FET Standard is broader than Slovakia's separate obligation under Article II(2)(b) of the BIT not to "*impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments*"

---

671 Memorial at [213(4)].

672 *Musznianka* at [467] and [591], **Exhibit RL-065** (citing numerous other investment awards, including *Crystallex v Venezuela* at [552], **Exhibit CL-026**, where the tribunal held that State conduct may form the basis of "a successful FET claim […] if […] there is proof of arbitrary, or non-transparent conduct in the application of the laws in question or some form of abuse of power").

(the "**Non-Impairment Standard**").[673] As explained by numerous tribunals that have considered the relationship between these two standards:

(1) The Non-Impairment Standard is a "*specification*" of the "*general requirement*" to accord FET to investors and the Non-Impairment Standard "*merely identifies more specific effects of such violation, namely, with regard to the operation, management, maintenance, use, enjoyment or disposal of the investment by the investor*."[674]

(2) The key distinction is that a breach of the FET Standard can exist irrespective of the harm or impairment that the breach may have caused to the investor. This is because "*while a FET breach exists irrespective of the harm it may have caused, the non-impairment standard, as its name indicates, implies the existence of an impairment, i.e., of harm*".[675]

327. To take just one example, in *Deutsche Telekom v India*, the tribunal concluded that India's decision to annul an agreement was arbitrary and unjustified (and hence breached the FET standard) because it was "*manifestly not based on facts, but on conclusory allegations, and was the product of a flawed process*."[676]

328. These principles are directly applicable here. In its Counter-Memorial, Slovakia repeatedly asserts that it "*conducted itself in accordance with Slovak and international law*".[677] Yet, as explained in the Memorial[678] and as elaborated below, the Police, the State Prosecutor, the MoA and the MoE each acted arbitrarily and abusively in breach of the FET Standard.

329. As to the conduct of the Police in refusing to accept that the Road at Smilno was publicly accessible:

---

673 BIT, Article II(2)(b), **Exhibit C-1**.

674 *Musznianka* at [645], **Exhibit RL-065** (citing numerous other investment awards).

675 *Ibid* at [646], **Exhibit RL-065** (citing *CMS v Argentina*, at [290], **Exhibit RL-096**).

676 *Deutsche Telekom* at [363], **Exhibit RL-045**.

677 Counter-Memorial at [25]. See also Counter-Memorial at [317], [324]-[325], [420] (final sentence).

678 See Memorial at [2(3)], [105]-[108], [125]-[126], [142], [153], [194], [252]-[254] and [257(1)].

(1) Under Slovak law, it is clear that: (*i*) the Road was accessible by vehicles and pedestrians; (*ii*) any person who obstructed the Road was obliged to remove the obstruction immediately; and (*iii*) the failure to remove the obstruction could be enforced by the Police.[679] The fact that the Road was publicly accessible was also clear and obvious from official maps of Slovakia published by ÚGKK which were available via the online Geoportal.[680]

(2) Yet, throughout AOG's drilling attempts, the Police refused to accept that the Road was publicly accessible and refused to remove the activists and their vehicles from the Road. The Police's conduct in this regard involved an arbitrary application of Slovak law. Instead of removing the activists and their vehicles, the Police idly stood by and did nothing which prevented AOG from bringing its heavy machinery to the Smilno Site to drill its exploration well.

(3) The conduct of the Police in this regard placed Slovakia in breach of the FET Standard.

330. As to the conduct of the State Prosecutor during AOG's second drilling attempt:

(1) It is common ground that, under Slovak law, a State Prosecutor has no authority to intervene in a civil dispute.[681] The record establishes that this is what Dr Slosarčíková did during AOG's second drilling attempt at Smilno in June 2016.[682] Her conduct involved a clear abuse of power which ultimately led the Police to cancel their policing operation.

(2) It is also common ground that, under Slovak law, a State Prosecutor's role during the "*pre-preparatory proceedings*" of any criminal proceeding is to *"investigate (i) whether certain act constitutes a crime and (ii) who committed that act."*[683] During this phase, a State Prosecutor must "*supervise*

679 See [67] above.
680 See [60] above.
681 Counter-Memorial at [111]; Slosarčíková 1 at [14].
682 See [87]-[97] above.
683 Slosarčíková 1 at [5]-[6].

investigation of crimes and the conduct of police officers."[684] It is clear that crimes were being committed at the Smilno Site, specifically:[685]

(a) the activists were trespassing onto the Smilno Site and endangering the safety of the proposed drilling operation by lying on the ground and sitting around the heavy machinery on the Smilno Site; and

(b) moreover, the activists and their vehicles were blocking the Road which was publicly accessible.

(3) Despite these uncontested facts, Dr Slosarčíková inexplicably ordered the Police to cancel their policing operation at Smilno.[686] This involved a clear abuse of power. She ought to have directed the Police to disperse the activists from the Smilno Site and to remove the activists and their vehicles from the Road. The State Prosecutor's conduct in this regard placed Slovakia in breach of the FET Standard.

331. As to the conduct of the Police in refusing to approve the Road signs at Smilno:

(1) It is common ground that, under Slovak law, the Police had no obligation to approve the Road signs.[687] Instead, 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*".[688] Yet the Police engaged in arbitrary conduct in the application of this provision by refusing to approve the Road signage scheme:

(a) Against the background of the alarming and unlawful conduct of the activists and their vehicles in blocking the Road from December 2015 onwards, and in order to "*calm the nervous situation down*", the Police proposed to AOG in July 2016 that traffic signs should be placed at the

---

684 *Ibid* at [7].
685 See [87]-[97] above.
686 See [87]-[97] above.
687 Counter-Memorial at [116].
688 Road Traffic Act, Article 61(1), **Exhibit R-069**.

entrance of the Road acknowledging that it was publicly accessible.[689]

(b) Between July and October 2016, AOG engaged in extensive negotiations with the Police and the Mayor in good faith in relation to the signage scheme.[690] It was clear that the Road signs were "*inevitably required for the safety and fluency of a road traffic*" within the meaning of Article 61(1) of the Road Act. Yet at the last moment, and without informing AOG, the Police arbitrarily refused to approve the Road signs and gave legally flawed and pretextual reasons for doing so.[691]

(c) As Discovery has explained above, the scheme was undermined at the last moment by Police officials (Mr Sliva and Mr Cicvara) who had made a personal decision to thwart AOG's exploration activities.

(2) The conduct of the Police in this regard placed Slovakia in breach of the FET Standard.

332. As to the conduct of the MoA in refusing to approve the Amendment to the Lease:

(1) It is common ground that, under Slovak law, the MoA had the competence to approve any lease (or lease extension) concluded between State Forestry and a private party over State-owned forestry land. The MoA's refusal to approve the Amendment involved an arbitrary and non-transparent application of this competence and/or an abuse of power for two separate reasons.

(2) ***First***, as Discovery has explained in the Memorial and in detail in Section II above,[692] the MoA's decision-making process and the outcome of the decision was arbitrary, abusive and lacked transparency. The reasons put forward by Minister Matečna for refusing to grant MoA approval were a pretext for the real reason, namely Mr Regec's "*personal decision*" and

689 See [101]-[102] above.
690 See [98] and [102]-[103] above.
691 See [104]-[105] above.
692 See [117]-[132] above.

"*personal prejudice*" to thwart AOG's exploration activities in order to score "*points*" for his own "*political career*".[693]

(3) ***Second***, the process followed by the MoA when it considered AOG's request for approval of the Amendment was materially different from the process followed by the MoA when it considered NAFTA's request for approval of a lease over State-owned forestry land.[694] In particular, there is no evidence that the MoA's Forestry Property Commission met to consider AOG's application (as was the case for NAFTA).

(4) The conduct of the MoA in this regard placed Slovakia in breach of the FET Standard.

333. As to the conduct of the <u>MoE</u> in relation to AOG's Article 29 application:

(1) It is common ground that, under Slovak law, the MoE had the competence to grant a compulsory access order under Article 29 of the Geology Act. That competence required the MoE to consider whether such an order would be in the public interest.

(2) The MoE's refusal to grant a compulsory access order to AOG involved an arbitrary and non-transparent application of its competence and/or an abuse of power. As Discovery has explained in the Memorial and in detail in Section II above,[695] the MoE's decision-making process and the outcome of the decision was arbitrary, abusive and lacking in transparency:

(a) The MoE had initially been preparing to issue a decision granting AOG's application but it received an instruction at the last moment from higher up in the MoE to refuse the application.

(b) Further, the reasons given by the MoE for refusing the application were a pretext for the real reason, namely officials higher up within the MoE

693 See in particular the numerous documents referred to [125] above.

694 See further at [365] below.

695 See [133]-[141] above.

did not want AOG to carry out its activities at Krivá O'lka. This was arbitrary and abusive because the MoE was required to decide the application based on whether it would be in the public interest. In this case, AOG's exploration activities were manifestly beneficial and in the public interest, as the MoE had itself determined in the 2016 Licences.

(3) The conduct of the MoE in this regard placed Slovakia in breach of the FET Standard.

334. As to the conduct of the MoE in suspending further consideration of AOG's Article 29 application (after Minister Sólymos had quashed the original decision):

(1) As explained above, in June 2017 the MoE suspended further consideration of AOG's Article 29 Application pending the resolution of a "*preliminary issue*" namely the submission of documents showing that AOG had been unable to reach agreement with State Forestry to lease the Krivá Ol'ka Site.[696]

(2) Discovery accepts that, in principle, a Slovak administrative authority may suspend an administrative proceeding pending the resolution of a "*preliminary issue*". A similar issue arose in *Muszynianka v The Slovak Republic.* In its award, the tribunal observed as follows:[697]

> "While Slovak law does not define the notion of 'preliminary issue', administrative law doctrine suggests that a preliminary issue is a condition to the decision of a State authority over which condition that authority has no decision-making power."

(3) In the present case, it is clear that the MoE's decision to suspend the proceedings pending the resolution of its asserted "*preliminary issue*" involved an arbitrary application of Slovak law and/or an abuse of power. This is because, as Discovery has already explained above:

(a) the MoE had already been in possession of the relevant documents

[696] See [141(1)] above.

[697] *Muszynianka* at [605], **Exhibit RL-065** (referring to Slovak academic commentary).

evidencing this fact since late 2016;[698] and

(b) the MoE had already accepted in October 2016 and March 2017 that no agreement had been reached between State Forestry and AOG.[699]

(4) The conduct of the MoE in this regard placed Slovakia in breach of the FET Standard.

335. The EIA Decisions issued by the District Offices also involved an arbitrary application of the EIA Act and/or an abuse of power for the following reasons:[700]

(1) ***First***, the EIA Act and the EIA Amendment did not even apply to AOG's activities.[701] The fact that AOG submitted Preliminary EIA applications to the District Offices is irrelevant. Since the EIA Act and the EIA Amendment did not apply to AOG's activities, the District Offices should never have issued the EIA Decisions at all. On this ground alone, their decisions involved an arbitrary application of Slovak law.

(2) ***Second***, even if (which is denied) the EIA Act and the EIA Amendment applied to AOG's activities, the EIA Decisions on their own terms involved an arbitrary application of Slovak law and/or abuse of power. As Discovery has explained in detail in Section II above:[702]

(a) The Bardejov District Office and the Humenné District Office did not conclude that AOG's exploration activities were likely to have significant effects on the environment and hence the orders for a Full EIA did not even meet the threshold required under the EIA Act.

(b) Whilst the Medzilaborce District Office concluded that AOG's exploration activities were likely to have significant effects on the environment, the reasons for this conclusion were pretextual and were

---

698 See [141(2)(a)] above.

699 See [141(2)(b) and (d)] above.

700 See [165]-[188] above.

701 See [150]-[158] above.

702 See [168]-[175] above and [180]-[184] above.

not supported by any rational foundation of fact or expert opinion.

(c) The decisions of all three District Offices were arbitrary, unfair, non-transparent and inconsistent with numerous statements attributable to Slovakia which had concluded that AOG's exploration activities were not likely to have significant adverse effects on the environment.

(3) The conduct of the District Offices in this regard placed Slovakia in breach of the FET Standard.

336. The conduct of the MoE in imposing the EIA Condition also involved an arbitrary application of Slovak law and/or an abuse of power.[703] The same points made at [335(1)] above apply *mutatis mutandis* here. This conduct also placed Slovakia in breach of the FET Standard.

6. The conduct of the Slovak Judiciary violated the FET Standard

a. Legal standard

337. Slovakia accepts that the FET Standard prohibits a *procedural* denial of justice by the host State's judiciary.[704] Slovakia is wrong to assert that the FET Standard does not also prohibit conduct of a State's judiciary which otherwise breaches the FET Standard *e.g.* because the judicial decision is arbitrary.[705] Whether this is described as a *substantive* denial of justice or a breach of the FET Standard[706] does not matter.

338. ***First***, the premise of Slovakia's argument is that the FET Standard in the BIT is equivalent to the MST under customary international law and since customary international law only prohibits a *procedural* denial of justice, Discovery's case must fail. This is wrong: the FET Standard in the BIT is not equivalent to the MST under customary international law.[707]

339. ***Second***, it is uncontroversial that the acts of Slovakia's Judiciary are attributable to

---

703 See [192]-[193] above.

704 Counter-Memorial at [356]-[365].

705 Memorial at [219]-[223].

706 Specifically, a State's obligation not to act arbitrarily: see Memorial at [213(4)] and see [325] above.

707 See [257]-[265] above. See also Memorial at [222(1)].

Slovakia under Article 4(1) of the ILC Articles.[708] The following observation of the majority of the tribunal in *Infinito Gold* applies with equal force here:[709]

> "[…] The BIT does not distinguish between the acts of different Government branches. When Costa Rica committed itself to treating the Claimant's investments fairly and equitably, it did not exclude the acts of the judiciary from this obligation. Nor did it specify that breaches of the FET standard were limited to instances of denial of justice or other forms of manifest arbitrariness or lack of due process."

340. ***Third***, it is clear that the FET Standard in the BIT prohibits Slovakia from engaging in conduct which is arbitrary.[710] It follows that there is no principled reason to limit Slovakia's responsibility for judicial decisions which involve only a procedural denial of justice. As the majority of the tribunal in *Infinito Gold* held:[711]

> "[…] Holding otherwise would mean that part of the State's activity would not trigger liability even though it would be contrary to the standards protected under the investment treaty. While the Tribunal agrees that domestic courts must be given deference in the application of domestic law, this does not mean that their decisions are immune from scrutiny at the international level. As noted by the tribunal in *Sistem*, court decisions may deprive investors of their property rights 'just as surely as if the State had expropriated [them] by decree.' In the same vein, judicial decisions that are arbitrary, unfair or contradict an investor's legitimate expectations may also breach the FET standard even if they do not rise to the level of a denial of justice."

341. ***Fourth***, Slovakia is wrong to contend that the "*wrongful application of domestic law by national courts is never a sufficient ground for host States' international liability*."[712] The sole authority cited by Slovakia in support of this proposition is an article by de Visscher published in 1935 (as cited by Paulsson).[713] However:

---

708 ILC Articles, Article 4(1) ("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, ***judicial*** or any other functions […]", emphasis added), **Exhibit CL-054**.

709 *Infinito Gold* at [358], **Exhibit CL-015**.

710 See Memorial at [213(2)] and [213(4)]. See also [315] and [325] above.

711 *Infinito Gold* at [359], **Exhibit CL-015**.

712 Counter-Memorial at [361].

713 J. Paulsson, *Denial of Justice in International Law* (4th ed., 2007), p. 73, **Exhibit RL-077**. The full citation of de Visscher's 1935 article can be found in Paulsson's bibliography at p. xxv.

(1) de Visscher was expressing the position under customary international law at a time well before BITs had been interpreted to encompass a modern autonomous FET standard.

(2) In any event, de Visscher accepted that—even under customary international law in 1935—the "*wrongful application*" of domestic law by judges may "*constitute elements of proof of a denial of justice*".[714]

(3) In any event, Slovakia is wrong to argue that the misapplication of domestic law by a host State's judiciary can never trigger international liability. As observed by the majority of the tribunal in *Infinito Gold*:[715]

> "Crucially, the question before investment tribunals is not whether the domestic court misapplied its own domestic law. **The question is whether, in its application of domestic law, the court has breached international law, and more specifically, the standards of protection contained in the relevant treaty.** In the words of the *Azinian* tribunal, '[w]hat must be shown is that the court decision itself constitutes a violation of the treaty.' **This can happen if the court misapplies domestic law, but also when it applies domestic law correctly, if it leads to a result that is incompatible with international law**. In the latter case, it could be said that it is the underlying law which breaches the treaty. However, if the court is the first State organ to apply that law to the investor, it is the court decision which perpetrates the breach of the treaty."

342. ***Fifth***, Slovakia is also wrong to contend that Discovery must satisfy the "*three cumulative requirements*" espoused by Judge Jiménez de Aréchaga in his 1978 Hague Academy lectures:[716]

(1) Judge Jiménez de Aréchaga was expressing the position under customary international law at a time well before BITs had been interpreted to encompass a modern autonomous FET standard.

(2) Judge Jiménez de Aréchaga was not expressing a view as to the threshold required to prove a breach of the FET Standard. To prove a breach of the FET

---

714 *Ibid*, p. 73, **Exhibit RL-077**.

715 *Infinito Gold* at [360], **Exhibit CL-015** (emphasis added)

716 Counter-Memorial at [366]-[368].

Standard, Discovery does not need to show a flagrant violation or bad faith conduct or discriminatory intention on the part of the Slovak Judiciary.[717]

(3) Slovakia is also wrong to assert that Discovery must show that AOG exhausted local remedies before it can complain of a violation of the FET Standard by the Slovak Judiciary:

(a) The BIT and the ICSID Convention do not impose any obligation upon Discovery to exhaust local remedies before pursuing a claim against Slovakia under the BIT.[718] Nor can any such requirement be engrafted onto the BIT based on customary international law.

(b) In any event, it is well-established that the victim of a denial of justice is only required to pursue remedies which: (*i*) are "*reasonably available*"; and (*ii*) have an "*expectation that they will be effective*".[719] As to (*ii*), "*[t]he aggrieved alien is not under an obligation to resort to an appeal which, although available, was obviously futile*."[720]

b. Application to the facts

343. The conduct of Slovakia's Judiciary (specifically, the Bardejov District Court's decision to grant the Interim Injunction and the Prešov Regional Court's decision to uphold the Interim Injunction) breached the FET Standard because:[721]

(1) the decisions were arbitrary; and/or

(2) it is to be inferred that the Courts were biased against AOG.

344. Slovakia's arguments in response have no merit.[722]

---

717 See [265(2)] above.

718 Article 26 of the ICSID Convention, 14 October 1966 provides: "A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention" **Exhibit CL-072**. No such condition was included by Slovakia in the BIT before consenting to arbitration under the ICSID Convention.

719 *Lion Mexico* at [562], **Exhibit CL-040**.

720 *Ibid* at [567], **Exhibit CL-040**.

721 Memorial at [228]-[229].

722 Counter-Memorial at [370]-[373].

345. ***First***, as Prof. Števček explains in his further expert report, he disagrees with Prof. Fogaš and maintains that the conditions for granting the Interim Injunction were not fulfilled.[723] In particular, Dr. Fogaš is wrong to say that an application need not show "*significant, serious and even irreparable harm*".[724] The short point is that Mrs Varjanová did not come close to demonstrating that this condition was satisfied. The decisions of the Slovak Courts in granting and upholding the Interim Injunctions thus involved an arbitrary application of Slovak law which Prof. Števček finds "*inexplicable*".[725] That alone is sufficient to establish a breach of the FET Standard based on the Slovak Judiciary's arbitrary application of Slovak law.

346. ***Second***, and in any event, the Bardejov District Court and the Prešov Regional Court were also obliged to deal with the fact that the Road was publicly accessible in deciding whether or not to grant and uphold the Interim Injunction. Their failure to do so provides a further (and independent) basis for establishing a breach of the FET Standard based upon their arbitrary application of Slovak law:

(1) As Prof. Števček explained in his first report, the legal status of the Road was a "*fundamental question*".[726] The evidence which Mrs Varjanová placed before the Bardejov District Court included an "*investigation file*" of the Bardejov District Police Department in respect of one of Mrs Varjanová's criminal complaints (to which Discovery has referred at [62]-[64] above).[727]

(2) The decision of the Bardejov District Court expressly refers to this "*investigation file*".[728] Slovakia has not disclosed a copy of this "*investigation file*". But it is clear from the subsequent decisions issued by the Bardejov District Office (see [62]-[64] above) that the legal status of the Road would inevitably have been considered by the Police as part of its investigation.

---

723 Števček 2 at [6]-[22]. *Cf.* Fogaš 1 at [37]-[39].
724 This is clear from long-standing decisions of the Slovak Supreme Court: see Števček 2 at [13]-[16].
725 Števček 1 at [33].
726 Števček 1 at [21].
727 Decision of District Court of Bardejov, 18 February 2016, **Exhibit C-125**, p. 3.
728 Decision of District Court of Bardejov, 18 February 2016, **Exhibit C-125**, p. 3.

(3) It follows that the Bardejov District Court was either aware of the existence of the Road or, alternatively, ought to have been aware of this fact. In any event, as Prof. Števček explains, the courts were *not* bound by the content of Mrs Varjanová's action or her request for an Interim Injunction. The decisions of the Slovak Courts were therefore manifestly arbitrary by not taking into account the fact that the Road was publicly accessible.

(4) As Dr Fogaš admits in his expert report:[729]

> "[The court's] jurisdiction in Slovak procedural law represents one of the conditions for the conduct of a court proceeding, the lack of which cannot be remedied. Thus, **if a court establishes that a certain matter does not fall within its jurisdiction, it must terminate the proceedings.**"

(5) Prof. Števček agrees with this, noting that "*[i]t is the duty of the court [...] to constantly review its jurisdiction, which is a procedural requirement of the proceedings*" and, because "*the court was aware of the existence of the road from the documentary evidence [...] the court should have been aware of the fact that access roads are in principle public*".[730]

(6) Moreover, Prof. Števček opines that: "*the competent administrative body has the authority to decide on the rights and obligations in relation to roads, and not the general court in a private-law action*".[731] The decisions by the Slovak Courts were therefore manifestly arbitrary because they trespassed upon the competence of the competent administrative body.

(7) Finally, Slovakia is wrong to assert that AOG did not argue during the proceedings that the Road was publicly accessible.[732] Discovery has already addressed this point at [70] above.

347. ***Third***, contrary to Slovakia's assertions,[733] Prof. Števček explained in his first report why: (*i*) Mrs Varjanová's unlawful conduct disentitled her from obtaining an

---

729 Fogas 1 at [26].

730 Števček 2 at [29].

731 Števček 2 at [9]. See also Števček 1 at [29].

732 Counter-Memorial at [371].

733 Counter-Memorial at [372].

interim injunction;[734] and (*ii*) the Interim Injunction was not aimed at protecting Mrs Varjanová's alleged interest (because it prevented AOG from using the Road which was publicly accessible).[735]

348. ***Fourth***, if it be suggested by Slovakia that AOG ought to have pursued a further appeal against the decision of the Prešov Regional Court, Discovery does not need to show that it exhausted local remedies before it can complain of a violation of the FET Standard. In any event, any further appeal would have been futile. In particular, there would have been no purpose in AOG appealing the Interim Injunction to a higher court. AOG had filed an application to concede Mrs Varjanová's substantive claim in June 2016 in order to remove the Interim Injunction and enable AOG to use the Road on the basis that it was publicly accessible.[736] However, there were unwarranted delays in the proceedings after June 2016 which meant that the Interim Injunction remained in force for many more months, which itself involved a separate breach by Slovakia's Judiciary of the FET Standard.[737]

B. SLOVAKIA TREATED DISCOVERY ARBITRARILY AND DISCRIMINATORILY

349. Discovery has already explained why Slovakia's arbitrary conduct breached the FET Standard.[738] If the Tribunal agrees with Discovery, it would not be necessary to consider whether Slovakia's conduct also breached the arbitrariness prong of the Non-Impairment Standard. For the avoidance of doubt, Discovery maintains that Slovakia's arbitrary conduct was also a breach of the Non-Impairment Standard.[739]

350. As to discrimination, Slovakia correctly notes that Discovery relies on both Article II(1) of the BIT (the "**National Treatment Standard**") and the discrimination prong of the Non-Impairment Standard in Article II(2)(b).[740] It is clear that Slovakia breached both provisions by treating NAFTA more favourably than AOG.

---

734 Števček 1 at [23]-[24]. See also Števček 2 at [20].

735 Števček 1 at [22].

736 Memorial at [111]-[113].

737 Števček 2 at [36]-[41].

738 See [325]-[336] above.

739 Memorial at [243]-[246], [252]-[256].

740 Counter-Memorial at [374].

1. Legal standard

351. ***First***, Slovakia asserts that the National Treatment Standard "*is subject to numerous exceptions*".[741] Discovery has explained why these exceptions do not apply.[742]

352. ***Second***, Slovakia asserts that "*there is a high bar for proving breach of national treatment*" and that the "*burden of proof falls on the investor to prove the individual elements of a discrimination claim*".[743] Discovery accepts that it bears the burden but it does not accept there is a "*high bar*". Discovery need only establish that each of the following elements is satisfied, namely:[744]

    (1) that an appropriate comparator must be identified;

    (2) that Slovakia applied to this comparator treatment more favourable than that which was accorded to Discovery or its investment in Slovakia; and

    (3) that there is a lack of a reasonable or objective justification for the difference of treatment.

353. As explained in the Memorial and below, each element is satisfied in this case.

354. ***Third***, Slovakia asserts that "*discrimination cannot be found solely based on limited summaries of oil and gas licenses held or sought by certain entities*".[745] The authority cited by Slovakia (*Festorino v Poland*) is distinguishable:

    (1) In that award, the claimants had based their discrimination claim on limited summaries of certain licences held by the Polish State-owned oil and gas company (PGNiG)[746] in a single paragraph of PGNiG's 2017 Annual Report and in PGNiG's 2017 Directors' Report.[747]

---

741 Counter-Memorial at [375]-[376].

742 See [228]-[233] above.

743 Counter-Memorial at [378].

744 Memorial at [248], citing *Palowski* at [534], **Exhibit CL-044**. Slovakia appears to agree that these three elements must be satisfied: see Counter-Memorial at [385] *et seq*.

745 Counter-Memorial at [380]-[381].

746 *Festorino Invest Limited v Poland*, SCC Case No. V2018/098, Award, 30 June 2021, ("***Festorino***") at [745], **Exhibit RL-082**.

747 *Ibid* at [745], **Exhibit RL-082**.

(2) Unsurprisingly, the tribunal held that: (*i*) the "*limited summaries*" upon which the claimants had relied were insufficient to prove that Poland had treated the claimants less favourably than PGNiG; and (*ii*) the claimants "*would have needed to provide additional evidence regarding the facts present in PGNiG reports*" to establish discrimination.[748]

(3) In this case, Discovery does not rely on "*limited summaries*" of licences held by NAFTA as recorded in its annual reports. Rather, as explained below, Discovery relies on underlying primary documents.

2. Application to the facts

a. NAFTA is an appropriate comparator

355. Turning now to the first element at [352(1)] above, it is clear that NAFTA is an appropriate comparator.[749] Slovakia does not dispute that:

(1) SPP (a company which is wholly owned by Slovakia) holds a 56.15% stake in NAFTA;[750]

(2) NAFTA is the most important player in Slovakia's oil and gas exploration and production sector;[751]

(3) NAFTA holds numerous exploration and production licences in Slovakia issued by the MoE and covering many thousands of square kilometres;[752] and

(4) NAFTA drilled thousands of exploration wells across Slovakia without any environmental problems having ever been identified by the MoE.[753]

356. Slovakia asserts that "*NAFTA is controlled by a foreign national, Mr Daniel Křetinský*".[754] The sole exhibit upon which Slovakia relies in this regard does not

---

748 *Ibid* at [749], **Exhibit RL-082**.
749 *Cf.* Counter-Memorial at [385]-[386].
750 Memorial at [13].
751 Memorial at [14].
752 Memorial at [15].
753 Memorial at [15].
754 Counter-Memorial at [386].

support Slovakia's assertion. It merely shows that, as at 17 August 2022, Mr Křetinský was a beneficial owner.[755] It does not identify: (*i*) who was a beneficial owner of NAFTA at the time of the impugned measures about which Discovery complains (*i.e.* between 2015-2018); or (*ii*) the extent of Mr Křetinský's beneficial ownership. In any event, it is clear that since 2015 Mr Křetinský has beneficially owned a 40.45% stake in NAFTA via his company, Czech Gas Holding Investment BV.[756] Mr Křetinský therefore does not have majority control of NAFTA.

357. In any event, Slovakia is wrong to focus on the alleged control of NAFTA. What matters for the purposes of Slovakia's obligations under Article II(1) of the BIT is that NAFTA is a Slovak entity.[757] That fact alone is sufficient to constitute NAFTA as an appropriate comparator under the BIT. This is because:

    (1) Article II(1) obliges Slovakia to "*treat investment, and activities associated therewith, on a nondiscriminatory basis [...]*".

    (2) The term "*nondiscriminatory*" is defined in Article I(1)(f) to mean "*treatment that is at least as favourable as the better of national treatment or most-favoured nation treatment*".

    (3) The term "*national treatment*" is defined in Article I(1)(g) to mean "*treatment that is at least as favourable as the most favourable treatment accorded by a Party to companies or nationals of that Party in like circumstances*".

    (4) NAFTA is a "*company of a Party*" (*i.e.* a company of Slovakia) within the meaning of Article I(1)(b) because it is a Slovak corporation. NAFTA is therefore an appropriate comparator.

---

755 Extract from the Register of Public Sector Partners of Nafta a.s., 16 February 2023, **Exhibit R-098**, p. 3.

756 Memorial at [13]; Extract from NAFTA's Website, **Exhibit C-226**. See also NAFTA Annual Report for 2015, **Exhibit R-102**, p. 9; Verification Report for the identification of the Beneficial Owners of Czech Gas Holding BV, 9 October 2018, **Exhibit C-202**.

757 This is common ground: see Counter-Memorial at [386].

b. Slovakia treated NAFTA more favourably than AOG without any reasonable or objective justification

358. The second and third elements at [352(2) and (3)] above are also satisfied.

i. The MoE granted a compulsory access order in favour of NAFTA under Article 29 of the Geology Act

359. Slovakia accepts that the MoE granted a compulsory access order in favour of NAFTA under Article 29 of the Geology Act to allow NAFTA to carry out exploration activities on privately-owned land.[758] Discovery's complaint of discrimination is not about the length of time it took for the MoE to reach its decision.[759] Discovery's complaint is that NAFTA was treated more favourably than AOG because the MoE *granted* NAFTA's application whereas the MoE *declined* to grant an order in favour of AOG. The differential treatment in like circumstances satisfies the second element of the test at [352(2)] above.

360. In its decision in NAFTA's favour, the MoE concluded that granting a compulsory access order was in the public interest for the following reasons:[760]

> "[…] **the Geology Act itself** and Act No. 44/1989 Coll. on the Protection and Use of Mineral Resources (Mining Act), as amended, and the related implementing legislation, in connection with the adopted strategic documents, **presuppose that geological and closely related mining activities are, from a general point of view, activities in the public interest**. In view of the fact that in the present case there is a clash between the public interest and the private interest, on the basis of the above facts, which are supported by the evidence provided by the Ministry and are reasoned in detail in the contested decision of the Ministry, **it can be concluded that in the present case the public interest represented by the geological exploration of the deposit associated with the possible exploitation and subsequent use of the reserved mineral (flammable natural gas) outweighs the subjective interests of the owner of the Real Estate Concerned.** The administrative authority considers the geological works planned by the Contractor of Geological Works on the proposed Real Estate Concerned, as described in the operative part of this decision, to be of general interest, i.e. it has been proven that the Contractor of Geological Works has demonstrated a public interest in carrying out the envisaged geological

---

758 Memorial at [249]; Counter-Memorial at [388]-[390]. See also NAFTA Application to MoE, 12 May 2010, **C-32**; MoE Decision, 17 May 2013, **Exhibit R-099**.

759 *Cf.* Counter-Memorial at [390].

760 MoE Decision, 17 May 2013, **Exhibit R-099**, p. 7 (emphasis added).

works, as explained in the decision under appeal."

361. Discovery asserted in its Memorial that there was no reasonable or objective justification for the differential treatment between AOG and NAFTA, so as to satisfy the third element of the test at [352(3)] above.[761] Tellingly, Slovakia has not responded to this submission in its Counter-Memorial. Indeed, AOG's Article 29 application was *a fortiori* because the forestry land over which AOG sought a compulsory access order was State-owned (whereas, in NAFTA's case, the land was privately-owned). Discovery's investment (AOG) was therefore the victim of discriminatory treatment by Slovakia in breach of the BIT.

ii. The MoA approved a lease between NAFTA and State Forestry

362. The second instance of Slovakia's discriminatory treatment arises out of the MoA's approval of a lease between NAFTA and State Forestry to enable NAFTA to carry out its activities on State-owned forestry land. Slovakia objected to Discovery's requests for disclosure of documents evidencing the MoA's approval of leases between NAFTA and State Forestry between 2014-2016. However, in Procedural Order No. 3, the Tribunal ordered Slovakia to disclose these documents.[762] In response, Slovakia disclosed documents which reveal that:

(1) On 20 May 2014, State Forestry signed a lease with NAFTA (the "**NAFTA Lease**") for a term of 4 years to enable NAFTA to perform "*natural gas extraction*" on State-owned forestry land covering an area of 14,348m^2.[763]

(2) On 1 August 2014, State Forestry submitted a request to the MoA to approve the NAFTA Lease.[764]

---

[761] Memorial at [249(4)].

[762] Procedural Order No. 3, Annex A, Request No. 5.

[763] Lease between NAFTA and State Forestry, 20 May 2014, **Exhibit C-255**.

[764] MoA Minutes from the meeting of the Forestry Property Commission, 22 October 2014, **Exhibit C-256**, p. 4.

(3) On 22 October 2014, the Forest Property Commission (a division within the MoA) met and considered this application. The three members of the Commission recommended the MoA to approve the NAFTA Lease.[765]

(4) On 27 October 2014, the Head of the Service Office of the MoA (Dr Anton Stredák) wrote to State Forestry to confirm that the MoA had approved the NAFTA Lease.[766]

363. By contrast, the MoA refused to approve the Amendment to the Lease between AOG and State Forestry.[767] NAFTA was therefore treated more favourably than AOG in like circumstances. Slovakia's treatment of NAFTA satisfies the second element of the test at [352(2)] above.

364. Discovery asserted in its Memorial that there was no reasonable or objective justification for the differential treatment between AOG and NAFTA, so as to satisfy the third element of the test at [352(3)] above.[768] Slovakia's only response is to assert that AOG allegedly failed to request a timely extension of the Lease.[769] Discovery has already explained why this is wrong.[770]

365. The Tribunal will also note that the process followed by the MoA in approving the NAFTA Lease was materially different from the process followed in AOG's case:

(1) The NAFTA Lease was approved by the MoA within 3 months. By contrast, the MoA took 6 months to consider AOG's straightforward request for the MoA to approve the Amendment to the Lease. And yet the NAFTA Lease:

(a) was for a much longer term (4 years) than the Amendment to the Lease between AOG and State Forestry (8 months);[771] and

(b) was for a much larger land area (14,348m^2) than the Amendment to the

---

765 *Ibid*, p. 4.

766 Letter from MoA to State Forestry, 27 October 2014, **Exhibit C-257**.

767 See [117]-[131] above.

768 Memorial at [251(4)].

769 Counter-Memorial at [394].

770 See [126]-[128] above.

771 Amendment to the Lease between AOG and State Forestry, 14 January 2016, **Exhibit C-116**.

Lease between AOG and State Forestry (9,354m^2).[772]

(2) The issue of whether the MoA should approve the NAFTA Lease was considered at a meeting of the Forestry Property Commission at which the three members of this Commission voted in favour. By contrast, there is no evidence that the Commission even met to consider AOG's application.

(3) The MoA's decision approving the NAFTA Lease was communicated by the-then Head of the Service Office (Dr Stredák). In contrast, the MoA's decision refusing to approve AOG's lease was communicated by Minister Matečná.

366. Slovakia's treatment of NAFTA stands in stark contrast to Slovakia's treatment of AOG. Discovery's investment (AOG) was the victim of discriminatory treatment by Slovakia in breach of the BIT.

iii. EIA

367. The third instance of Slovakia's discriminatory treatment arises out of the MoE's imposition of the EIA Condition in 2018.[773] Slovakia does not dispute that:[774]

(1) Slovak licence holders submitted 64 separate applications to the MoE by between 2017-2021 (including multiple applications submitted by NAFTA) to extend the licence terms and/or modify the licence area; and

(2) of these 64 applications, it was only in AOG's case that the MoE imposed an EIA Condition when the application was merely to reduce (*i.e.* modify) the licence area.

368. Slovakia therefore treated these Slovak licence holders (who are appropriate comparators) more favourably than AOG by not imposing any equivalent EIA Condition. The second element of the test at [352(2)] above is therefore satisfied. It is also clear that there was no reasonable or objective justification for the differential treatment between AOG and these other licence holders. The third

772 *Ibid*. See also Letter from MoA to State Forestry, 19 October 2015, **Exhibit C-73**, p. 9.

773 See [193] above.

774 Memorial at [197] and [257(2)], referring to the summary table at **Exhibit C-212**.

element at [352(3)] is thus satisfied.

369. Slovakia's only response[775] is to assert that, in two cases, the MoE imposed a similar EIA Condition when NAFTA and another licence holder applied to extend the term of their licences.[776] These are not appropriate comparators because Discovery's complaint is that when AOG applied to reduce the licence area the EIA Condition was imposed.

C. SLOVAKIA FAILED TO PROVIDE EFFECTIVE MEANS TO ENABLE AOG TO ASSERT CLAIMS AND ENFORCE ITS RIGHTS

370. Slovakia also violated Article II(6) of the BIT by failing to provide "*effective means of asserting claims and enforcing rights with respect to investments and authorizations relating thereto*".[777]

371. Slovakia is wrong to assert that Article II(6) does not apply in "*non-adjudicatory administrative decision-making*".[778] The award cited by Slovakia (*Apotex v USA*) is distinguishable. The tribunal in *Apotex* was interpreting Article II(6) of the Jamaica-USA BIT, which provided "*Each Party shall provide effective means of asserting claims and enforcing rights with respect to investments*".[779] Article II(6) of the US-Slovakia BIT is broader and also covers "*authorizations relating*" to investments. It is clear that "*authorizations*" covers administrative decision-making. This is unambiguously the language of non-adjudicatory administrative decision-making.

372. Slovakia is therefore wrong to contend that AOG's Article 29 application fell outside the scope of Article II(6).[780] Slovakia is also wrong to assert that the reason for the delay was AOG's fault. As Discovery has explained in detail above,[781] the

---

775 Counter-Memorial at [400].

776 Decision of MoE on extension of NAFTA exploration area licence, 19 March 2018, **Exhibit R-091**; Decision of MoE on extension of Ochtiná exploration area licence, 17 July 2018, **Exhibit R-100**.

777 Memorial at [285]-[262].

778 Counter-Memorial at [403].

779 *Apotex Holdings Inc v United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, at [4.17], **Exhibit RL-087**.

780 Counter-Memorial at [408].

781 See [133]-[141] above.

reason for the delay was entirely Slovakia's fault.

D. SLOVAKIA EXPROPRIATED DISCOVERY'S INVESTMENT

1. Legal standard

373. Slovakia is also wrong to assert that Discovery's expropriation claim fails as a matter of law.[782] Slovakia argues that: (*i*) Discovery has not identified the rights or assets which were indirectly expropriated;[783] (*ii*) an indirect expropriation can never be established by "*proof of a reduction of value of [an] investment*";[784] and (*iii*) Discovery "*voluntarily*" relinquished the Exploration Area Licences therefore its claim must fail.[785] For the reasons set out below, each argument is wide of the mark.

374. ***First***, Discovery made it clear in the Memorial that the assets/rights which Slovakia indirectly expropriated were Discovery's protected "*investments*" under the BIT, *i.e.* Discovery's shareholding in AOG and the rights of the group of permit holders under the Exploration Area Licences.[786] This is important because Slovakia's obligation not to expropriate is linked to the definition of "*investments*" under Article I(1) of the BIT. Article III(1) of the BIT provides: "***[i]nvestments*** *shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization [...]*" (emphasis added).[787]

375. ***Second***, it is well-established that the "*benchmark*" for an indirect expropriation is when a State's measure or series of measures result in a "*substantial deprivation of the value, use or enjoyment of the investor's investment.*"[788] Slovakia is therefore wrong to assert that proof of a reduction in the value of an investment can "*never*" amount to an indirect expropriation. Slovakia's narrow conception is unsupported by the consistent jurisprudence of investment tribunals. For example:[789]

---

782 Counter-Memorial at [419].

783 Counter-Memorial at [410]-[411].

784 Counter-Memorial at [412]-[416].

785 Counter-Memorial at [417]-[418].

786 Memorial at [269]. See also [212]-[216] above.

787 BIT, Article III(1), **Exhibit C-1**.

788 *Olympic Entertainment Group AS v. Republic of Ukraine*, PCA Case No. 2019-18, Award, 15 April 2021, ("***Olympic***") at [104], **Exhibit CL-050**.

789 See also the authorities cited in the Memorial at [264]-[266].

(1) In *Burlington Resources v Ecuador*, the tribunal held:[790]

> "When a measure affects the environment or conditions under which the investor carries on its business, what appears to be decisive, in assessing whether there is a substantial deprivation, is the **loss of the economic value or economic viability of the investment.** In this sense, some tribunals have focused on the use and enjoyment of property. The loss of viability does not necessarily imply a loss of management or control. **What matters is the capacity to earn a commercial return.** After all, investors make investments to earn a return. If they lose this possibility as a result of a State measure, then they have lost the economic use of their investment.
>
> Most tribunals apply the test of expropriation, however it is phrased, to the investment as a whole. Applied to the investment as a whole, **the criterion of loss of the economic use or viability of the investment implies that the investment as a whole has become unviable.** The measure is expropriatory, whether it affects the entire investment or only part of it, as long as the operation of the investment cannot generate a commercial return."

(2) In *Telenor Mobile v Hungary*, the tribunal (citing numerous prior awards) held that the test it had to apply was "*whether, viewed as a whole, the investment has suffered substantial erosion of value*" and noted that:[791]

> "Though different tribunals have formulated the test in different ways, they are all agreed that the interference with the investor's rights must be such as substantially to deprive the investor of the economic value, use or enjoyment of its investment."

(3) In *Metalclad v Mexico*, the tribunal held that indirect expropriation encompasses "*covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property*". Mexico's conduct (in denying permits which were necessary to enable Metalclad to operate its project) was held to be an indirect expropriation.[792]

376. ***Third***, Discovery did not "*voluntarily*" relinquish the Exploration Area Licences. It

---

790 *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, ("***Burlington***") at [397]-[398], **Exhibit CL-051** (citing numerous other awards).

791 *Telenor Mobile Communications A.S. v Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, at [65] and [67], **Exhibit CL-076**.

792 *Metalclad Corp v United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, at [103]-[107], **Exhibit CL-035**.

was forced to do so in 2018 (in order to mitigate its losses) as a result of Slovakia's conduct in breach of the BIT.[793] Slovakia is also wrong to assert that the "*voluntary*" relinquishment of a licence must mean that any expropriation claim "*fails as a matter of law*".[794] Slovakia cites no authority in support of this proposition.

2. Application to the facts

377. As Discovery explained in the Memorial, Discovery's case is that Slovakia committed a 'creeping' indirect expropriation.[795] Discovery relies on the totality of the measures which Slovakia imposed throughout the project between 2015-2018 (as summarised at [3] above). In this regard:

(1) The cumulative effect of these measures resulted in a substantial deprivation of the value, use or enjoyment of Discovery's investments. These measures (which qualify as a composite act[796]) satisfy the test at [375] above and therefore constitute an indirect expropriation of Discovery's investments.

(2) The combined effect of Slovakia's conduct resulted in a loss of the economic value or economic viability of Discovery's investments and deprived Discovery of the capacity to earn a commercial return. There is no other way of characterising Slovakia's conduct, which prevented AOG from drilling any exploration wells and from completing its exploration activities and hence deprived AOG of the ability to apply for a Mining Area Licence and therefore earn revenue and profits from the exploitation of oil and gas.

(3) This indirect expropriation was unlawful because (*inter alia*) Slovakia's conduct was not undertaken "*for a public purpose; in accordance with due process of law; in a nondiscriminatory manner; upon the payment of prompt, adequate and effective compensation*" under Article II(2) of the BIT.[797]

---

793 Lewis 1 at [89]-[92]; Fraser 1 at [108]-[110].

794 Counter-Memorial at [418]-[419].

795 Memorial at [268]-[269].

796 See the authorities cited in fn 561 above.

797 BIT, Article II(2), **Exhibit C-1**.

378. Slovakia's submissions in response have no merit.

379. ***First***, Slovakia asserts that the Exploration Area Licences did not give "*AOG any right to use the [Road] to the Smilno Site*."[798] This is a straw man argument. The Road was publicly accessible. AOG did not need to rely on the Exploration Area Licences to use the Road to access the Smilno Site. The conduct of the Police at Smilno (as described in the Memorial and above) prevented AOG from using the Road to access the Smilno Site and to drill an exploration well.

380. ***Second***, Slovakia asserts that the MoA/MoE did not deprive AOG of any economic benefits under the Exploration Area Licences.[799] In support of this argument, Slovakia merely recycles its earlier arguments to defend the conduct of the MoA and the MoE. Discovery has already explained why these arguments are misguided.

381. ***Third***, Slovakia asserts that the EIA Decisions and the EIA Condition did not deprive AOG of the value, use or enjoyment of the Exploration Area Licences.[800] Discovery disagrees. Slovakia asserts that operators are required to perform a <u>preliminary</u> EIA before drilling exploration wells across the entire the EU. This ignores the fact that: (*i*) the EIA Amendment did not apply to AOG's activities, which had already been authorised before the EIA Amendment came into force; and (*ii*) in any event, the EIA Decisions required AOG to perform a <u>Full</u> EIA therefore Slovakia's comparison to preliminary EIAs is misconceived. Mr Lewis testifies that "*the combined effect of Slovakia's actions by the end of 2017 and into 2018 made exploration activities commercially and economically unviable and destroyed the value of Discovery's investment*".[801] The test at [375] is satisfied.

---

798 Counter-Memorial at [420].

799 Counter-Memorial at [421].

800 Counter-Memorial at [422].

801 Lewis 1 at [87]. See also [176]-[178] above.

VI. CAUSATION

382. Slovakia's next line of defence is that there is "*no causal link*" between Slovakia's breaches of the BIT and Discovery's damages because (*i*) Discovery allegedly lacked the necessary funding; and (*ii*) Discovery failed to obtain a SLO. Alternatively, Slovakia contends that Discovery's damages should be reduced for contributory fault.[802] This is wrong. Discovery briefly elaborates on the applicable legal standard (**A**). Discovery then explains why Slovakia is wrong to contend that Discovery allegedly lacked the necessary funding (**B**) or that Discovery allegedly failed to obtain a SLO (**C**). Finally, Discovery explains why its damages should not be reduced because it was not guilty of any contributory fault (**D**).

A. LEGAL STANDARD

1. Causation

383. Discovery agrees with Slovakia that the tribunal in *Archer Daniels v Mexico* correctly identified the applicable legal test as regards causation: "*[a]ny determination of damages under principles of international law require[s] a sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such injury*."[803] This test is consistent with Article 31 of the ILC Articles which provides as follows:[804]

> "1. The responsible State is under an obligation to make full reparation for the injury ***caused*** by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, ***caused*** by the internationally wrongful act of a State."

384. The commentary to Article 31(2) of the ILC Articles states:[805]

> "Paragraph 2 addresses a further issue, namely the question of a causal link between the internationally wrongful act and the injury. It is only '[i]njury … caused by the internationally wrongful act of a State' for which full reparation must be made. This

---

802 Counter-Memorial at [426]-[427].

803 Counter-Memorial at [426], citing *Archer Daniels Midland Company v United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, at [282], **Exhibit RL-097**.

804 ILC Articles, Article 31, **Exhibit CL-054** (emphasis added).

805 *Ibid*, Article 31, commentary para (9), **Exhibit CL-054**.

phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act."

385. This test is clearly satisfied here. There is a sufficiently clear direct link between Slovakia's breaches of the BIT and the injury which Discovery suffered as a result of its inability to complete its exploration activities and thereafter to exploit oil and gas prospects in the Licence areas.

386. Slovakia alleges that, even if it committed a breach of the BIT, there were concurrent causes for the failure of the project which are not attributable to Slovakia (*i.e.* the conduct of the activists). This is wrong for the reasons set out below. In any event, Slovakia cannot escape liability by pointing to concurrent causes. As explained in the commentary to Article 31 of the ILC Articles (emphasis added):[806]

> "Often two separate factors combine to cause damage. […] Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, **international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes**, **except in cases of contributory fault**. In the *Corfu Channel* case, for example, the United Kingdom recovered the full amount of its claim against Albania based on the latter's wrongful failure to warn of the mines even though Albania had not itself laid the mines. **Such a result should follow a fortiori in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals** […]"

2. Contributory fault

387. Slovakia also invokes the concept of contributory fault.[807] Discovery agrees that Article 39 of the ILC Articles sets out the applicable legal test for contributory fault. The threshold is high. Slovakia must prove that Discovery committed a "*wilful or negligent act or omission*" which "*materially contributed to the damage*

---

806 *Ibid*, Article 31, commentary para (12), **Exhibit CL-054**. See also *Gavazzi v Romania*, ICSID Case No. ARB/12/25, Award, 18 April 2017, ("***Gavazzi***") at [269]-[272], **Exhibit CL-092**.

807 Counter-Memorial at [427] ("any damages this Tribunal awards should be reduced because of these (and additional) contributory actions.")

[caused]".[808] Moreover, and as held by the tribunal in *Abengoa v Mexico*:[809]

> "For the international responsibility of a State to be excluded or reduced based on the investor's omission or fault, it is necessary not only to prove said omission or fault, but also to establish a causal link between [the omission or fault] and the harm suffered. In other words, for the argument to succeed, there must be evidence that if a social communication program had been timely implemented since 2003, the 2009 and 2010 events that led to the loss of the Claimants' investment would not have occurred."

388. As explained below, Slovakia has not come close to satisfying this test.

389. Slovakia refers to *Copper Mesa v Ecuador* where the tribunal reduced the claimants' damages by 30% on account of contributory fault.[810] The present facts are a world apart from the facts of *Copper Mesa v Ecuador*. In that case, the claimant had resorted 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-funded plans to take the law into its own hands*".[811] Such conduct clearly satisfied the test in Article 39 of the ILC Articles. Discovery engaged in no such conduct in this case.

390. Slovakia also refers to *Bear Creek v Peru*.[812] This award is also distinguishable. In that case, the Peruvian government was faced with "*massive and growing social unrest caused in part by the [claimant's] Santa Ana Project*" which led the Peruvian government to revoke the claimant's mining licences.[813] The conduct of the small group of activists in the present case who were opposed to AOG's activities is not comparable.[814] Moreover, and as Slovakia concedes, the majority of the tribunal

---

808 ILC Articles, Article 39, commentary para (1) and para (5), **Exhibit CL-054**. See also *Burlington Resources Inc v The Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, at [582], **Exhibit CL-058**.

809 *Abengoa v Mexico* at [670], as quoted by the tribunal in *Bear Creek* at [410], **Exhibit RL-039**.

810 Counter-Memorial at [457].

811 *Copper Mesa Mining Corporation v Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016, at [6.99], [6.102], **Exhibit RL-100**.

812 Counter-Memorial at [446]-[447], [457].

813 *Bear Creek*, Partial Dissenting Partial Dissenting Opinion of Professor Philippe Sands QC, at [2], **Exhibit RL-039**.

814 The massive social unrest which occurred in the *Bear Creek* case included: (*i*) multiple city-wide protests and strikes involving tens of thousands of people, which led to "*food shortages and poor sanitation throughout the city and resulted in injuries*" and resulted in blockades of several roads,

held that (applying the test at [387] above) the claimant's damages should not be reduced on account of contributory fault.[815]

B. DISCOVERY DID NOT LACK THE NECESSARY FUNDING

391. Slovakia is wrong to contend that the project failed because Discovery allegedly "*lacked necessary capital funding*".[816] This causation defence is misconceived.

392. ***First***, the record shows that Discovery/AOG remained committed to the project to the bitter end. However, Discovery/AOG were rebuffed by Slovakia's State organs at every stage of its attempts to drill exploration wells across the Licences between 2015 and 2018. As described in the Memorial and in Section II above, roadblock and after roadblock was put in Discovery/AOG's way by these State organs which thwarted AOG's exploration activities. It is self-evident that this was the direct cause of the failure of the project.

393. ***Second***, Slovakia does not dispute that the project was backed from the outset by Discovery/AOG's JV Partners, JKX and Romgaz—two important and substantial players in the international oil and gas sector.[817] JKX and Romgaz each held a 25% interest in the Exploration Area Licences and together were obliged to fund 50% of the expenditures for the project under the terms of the JOAs.[818] AOG's share of the expenditures for the project was therefore limited to 50%, reflecting AOG's (and hence Discovery's) 50% interest in the Exploration Area Licences.[819]

394. ***Third***, Discovery had the ability to fund its 50% share of the expenditures for the project. The evidence establishes that Discovery (in addition to JKX and Romgaz) contributed substantial funds to AOG from 2014 onwards to enable it to carry out

---

including a bridge connecting Bolivia and Peru; (*ii*) further violent protests in which the protesters "*looted government institutions and destroyed commercial establishments*"; and (*iii*) clashes between the police and protesters which caused the death of six Peruvian citizens: see *Bear Creek*, Award, at [155]-[197] **Exhibit RL-039**.

815 Counter-Memorial at [447]; *Bear Creek*, Award, at [565]-[569], **Exhibit RL-039**.

816 Counter-Memorial at [428].

817 Memorial at [39].

818 See *e.g.* JOA between Magura Oil & Gas s.r.o and JKX Slovakia B.V. relating to the area known as Medzilaborce in the Slovak Republic, 28 November 2008, Article 3.3(C), Articles 6-7, Exhibit A (Accounting Procedure), Section I, Articles 2.1-2.4, **Exhibit C-237**. See also [44]-[47] above.

819 Memorial at [55].

AOG's exploration activities.[820] Moreover, and as noted earlier, the JOA Budgets for the years 2015-2018 were approved by AOG, JKX and Romgaz at the OCMs.[821]

395. ***Fourth***, it is true that Discovery sought funding from Gulf Shores Resources Ltd ("**Gulf Shores**") and Akard during the project.[822] Discovery's efforts in this regard do not show that Discovery lacked the necessary funding for the project:[823]

(1) Slovakia has omitted the relevant context in which Discovery sought outside funding for the project, as explained by Mr Lewis in his first statement:[824]

> "At the outset of the project, I had sufficient funds of my own to cover Discovery's 50% share of the cost of drilling the first three wells referred to above with the remaining 50% share of the costs of the first three wells being met by JKX and Romgaz who each held a 25% interest. My expectation was that these first three wells would have led to AOG generating sufficient revenue with which it would have been able to fund subsequent wells in its initial drilling program. Nevertheless, while I had sufficient funds, I had also by this stage invested quite significant sums in our Polish activities, and consequently was quite open to sharing the cost and upside with a suitable investor that might come in alongside Discovery."

(2) Mr Lewis elaborates on this point in his second statement:[825]

> "If well operations had not been blocked by Slovakia's conduct, as described in Discovery's Memorial, I would have provided additional funding for further wells even if (which in my view is highly unlikely) none of the first two wells (ie, Smilno and Krivá Ol'ka) had resulted in a discovery of oil or gas. It is very common for oil and gas investors to reduce risk by sharing the cost of initial exploration activities with partners. This both reduces the financial exposure and provides additional discipline in the evaluation of exploration risk, and it is the approach which Discovery adopted for its first three wells in Slovakia. However, I maintain that, even if the first three wells had not resulted in a discovery of oil or gas, they would have provided enough data to reduce sufficiently the exploration risk for further wells, which gives me confidence to say that I would have been able to justify providing additional funding to drill further exploration wells without seeking external funding, that is to say, at my sole risk in relation to Discovery's net 50%

820 Lewis 2 at [7]; Fraser 2 at [52]-[53].
821 See [50] above.
822 Fraser 1 at [14]-[15], [105].
823 Counter-Memorial at [429]-[436].
824 Lewis 1 at [34].
825 Lewis 2 at [43].

interest in the project."

(3) The fundamental point on causation, therefore, is that Discovery's sole shareholder (Mr Lewis) had sufficient funds to cover Discovery/AOG's 50% share of the expenditures for the project *irrespective* of whether Discovery was able to secure outside funding.[826] On this ground alone, Slovakia's causation defence must fail. Nevertheless, and for completeness, Discovery describes briefly below its discussions with Gulf Shores and Akard.

(4) As to Gulf Shores, Slovakia asserted that Discovery had not disclosed the Letter of Intent (signed in November 2014) or the Farm-In Agreement (signed in March 2014) with Gulf Shores.[827] These documents were disclosed by Discovery during document production.[828] By May 2015, Gulf Shores had withdrawn from the transaction and did not provide any funding for the project.[829] However, this does not mean that Discovery lacked the necessary funds for the project: see subparagraphs (1)-(3) above. Moreover, Discovery continued to seek funding from other parties (see below).

(5) As to Akard, Slovakia asserted that Discovery had not disclosed its agreement or correspondence with Akard.[830] These documents were also disclosed by Discovery during document production. In summary:

(a) On 23 October 2015, Discovery entered into an agreement with Akard under which Akard agreed to provide funding of USD 3.7m in certain tranches between October 2015 and April 2016 (the "**Akard Agreement**").[831] In November 2015, the date by which Akard was required to provide the second tranche of funding was extended.[832]

(b) Akard subsequently defaulted on its obligations. Akard (and its

826 *Cf.* Counter-Memorial at [435] (penultimate and final sentence).

827 Counter-Memorial at [431].

828 See Letter of Intent between Discovery and Gulf Shores, 24 November 2014, **Exhibit C-258**; Farm-In Agreement between Discovery and Gulf Shores, 19 March 2015, **Exhibit C-270**.

829 Lewis 1 at [35]; Fraser 1 at [14].

830 Counter-Memorial at [434]-[435].

831 Agreement between Discovery and Akard, 23 October 2015, **Exhibit C-282**.

832 Amendment Agreement between Discovery and Akard, 3 November 2015, **Exhibit C-283**.

affiliated entities) provided total funding of approximately USD 1.49 million.[833] From November 2016, Akard ceased to make any further advances to Discovery. In January 2017, Discovery served Akard with a notice of default.[834]

(c) On 30 March 2018, Discovery and Akard (and its affiliated entities) agreed to settle their dispute. Under the terms of the settlement, Discovery is obliged to pay Akard (and its affiliated entities) up to a maximum sum of USD 1,965,198.39 from "*Eligible Cash*".[835]

(d) Akard's default does not prove that Discovery lacked the necessary capital funding for the project. Discovery repeats the points already made at subparagraphs (1)-(3) above. Moreover, Akard defaulted because of the delays and opposition encountered throughout the project.[836] But for Slovakia's conduct in breach of the BIT, Akard would have continued to fund the project.[837]

(6) As to Discovery's attempts to secure funding from <u>other third party investors</u> in late 2017 and early 2018,[838] Mr Fraser explains that "*Discovery's Slovakia project failed because Slovakia's own actions in preventing AOG from carrying out its exploration activities rendered AOG unfinanceable*".[839] It is unsurprising that Discovery was unable to secure funding from other third parties at this late stage.[840] However, this does not prove that Discovery lacked the necessary capital funding for the project. But for Slovakia's conduct in breach of the BIT, AOG would have been drilling wells and the project would have been generating revenue and profits from which Discovery would have funded its share of the expenditures.

---

833 Waiver and Release between Discovery and Akard, 30 March 2018, Recital C, **Exhibit C-390**.

834 *Ibid*, Recital D, **Exhibit C-390**.

835 *Ibid*, Clause 5(A) **Exhibit C-390**. See also Memorial at [325].

836 Lewis 2 at [44]. See also Fraser 1 at [104].

837 Memorial at [298(2)].

838 Counter-Memorial at [436]-[437].

839 Fraser 2 at [56].

840 Fraser 2 at [56]-[58].

396. ***Fifth***, Slovakia points to JKX's failure in 2018 to secure a buyer for its 25% interest in the Exploration Area Licences.[841] This does not assist Slovakia:

(1) But for Slovakia's conduct in breach of the BIT, JKX would not have withdrawn from the project in the first place. Instead, AOG would have been drilling its exploration wells and, thereafter, the project would have been generating revenue and profits for AOG and its JV Partners.

(2) It is clear that JKX's decision to withdraw from the project in 2018 was due to "*repeated delays to the drilling plans of the operator*" (*i.e.* AOG) caused by "*lack of cooperation from authorities at both central and local levels*".[842]

(3) Against this background, it is obvious that few investors would have been interested in acquiring JKX's 25% interest under the Exploration Area Licences in 2018 given Slovakia's conduct over the preceding years which prevented AOG from drilling its exploration wells.

C. DISCOVERY DID NOT FAIL TO OBTAIN A SOCIAL LICENCE TO OPERATE

397. Slovakia's next defence on causation is to assert that the project failed because Discovery failed to obtain a SLO.[843] This is wrong. As already explained above:[844]

(1) The awards cited by Slovakia which have invoked the concept of a SLO are distinguishable. They each involved mining companies operating in areas inhabited by indigenous communities. AOG was not a mining company and it was not operating in areas inhabited by indigenous communities.

(2) The concept of a SLO has no basis in either domestic Slovak law or relevant and applicable rules of international law. In prior awards which have referred to this concept (*e.g. Bear Creek v Peru*) it has been linked to Article 32 of the

---

841 Counter-Memorial at [441], [443].

842 See [190(2)] above. See also Fraser 2 at [39]-[44].

843 Counter-Memorial at [444]-[455].

844 See [283]-[285] above.

UNDRIP and other international conventions relating to the rights of indigenous peoples. These have no application to the facts of this case.

398. These reasons alone are sufficient to dispose of Slovakia's causation defence based on the concept of a SLO. In any event, Slovakia's causation defence must fail for the further reasons highlighted below.

399. ***First***, Slovakia seeks to compare AOG with NAFTA by pointing out that NAFTA has a community engagement website (www.dobryvrt.sk). This website was only created by NAFTA in September 2021,[845] many years *after* NAFTA had been carrying out its exploration activities in Slovakia. In any event, the evidence in Annex 1 of this Reply shows that AOG engaged extensively with local communities throughout the project.[846] Slovakia's comparison with NAFTA is misguided.

400. ***Second***, Slovakia is wrong to assert that Discovery was "*combative*" and "*demonstrated total disregard for the local community*".[847] The record does not support these assertions. As to the three incidents highlighted by Slovakia:

(1) Mrs Varjanová was acting illegally by blocking the publicly accessible Road with her car.[848] AOG did not act illegally by physically moving her car: Mrs Varjanová's subsequent criminal complaint against AOG's representatives in relation to this incident was dismissed.[849]

(2) As explained earlier, Discovery did not attempt to circumvent the Interim Injunction.[850]

(3) As to Mrs Varjanová's video of Mr Crow, there is no evidence that this isolated incident "*increased tensions with the activists*", as Slovakia asserts.

845 See https://who.is/whois/dobryvrt.sk
846 See also [76] above.
847 Counter-Memorial at [450].
848 See [78] above.
849 See [64] and [80] above.
850 See [83]-[84].

The persistent conduct of Slovakia in breach of the BIT, which prevented AOG from drilling its exploration wells, pales in comparison to this incident.

401. ***Third***, Discovery's complaint in this arbitration is not about the conduct of the activists. Discovery's complaint is about Slovakia's conduct in breach of the BIT, which was the direct cause of the failure of the project. Applying the legal principles set out at [383]-[384] above, the conduct of the activists was not the direct cause of the failure of the project. Further, even if (which is denied) the conduct of the activists was causally relevant to the failure of the project, this would (at the very most) amount to a concurrent cause which does not sever the causal link between Slovakia's breaches of the BIT and Discovery's injury: see [386] above.

D. DAMAGES SHOULD NOT BE REDUCED BASED ON CONTRIBUTORY FAULT

402. None of the matters referred to by Slovakia amounts to contributory fault under the strict test established by Article 39 of the ILC Articles and the legal principles set out [387]-[390] above.[851] In particular:

(1) Contrary to Slovakia's assertion, Discovery did not "*bypass Article 29 of the Geology Act*". But for the MoA's conduct in refusing to approve the Amendment to the Lease, AOG would not have needed to apply for a compulsory access order under Article 29 of the Geology Act at Krivá Ol'ka. AOG's separate attempt to use the Poruba Track to access the Poruba Site after the Poruba Injunction was entirely lawful.[852] Moreover, AOG decided that it would be pointless to file an Article 29 application at Ruská Poruba in the light of the arbitrary and unfair conduct of the MoE in respect of AOG's separate application at Krivá Ol'ka.[853] In short, AOG was not guilty of any contributory fault (*i.e.* a wilful or negligent act or omission).

(2) Similarly, AOG was not guilty of any contributory fault (*i.e.* a wilful or negligent act or omission) in relation to its request to State Forestry to extend the term of the Lease at Krivá Ol'ka. As explained above, State Forestry had

---

[851] Counter-Memorial at [458].

[852] See [142]-[147] above.

[853] See [148] above.

already waived AOG's non-compliance with Article III(2) of the Lease by signing the Amendment. Moreover, the reasons given by Minister Matečna for refusing to approve the Amendment were pretextual.[854]

VII. QUANTUM

403. Slovakia's final line of defence relates to quantum. For the reasons set out below, Slovakia's submissions on quantum are misconceived. At [6] above, Discovery has summarised the four alternative options available to the Tribunal to quantify the compensation due to Discovery. Discovery elaborates on these four options below.

A. DISCOVERY PRIMARY CASE: THE TRIBUNAL SHOULD ADOPT AN INCOME-BASED VALUATION METHODOLOGY USING ROCKFLOW'S DCF MODEL

1. Investment awards support the use of an income-based valuation methodology using a DCF model, even for early-stage investments

404. Slovakia does not dispute that its obligation is to provide "*full reparation*" to wipe out the consequences of its breaches of the BIT and restore Discovery to the position in which it would, in all probability, have been but for Slovakia's breaches.[855] This obligation requires Slovakia to pay compensation to Discovery for the loss of the FMV of Discovery's investment.[856]

405. Different valuation methodologies can be used to determine FMV but an income-based methodology using a DCF model is the most common and widely accepted method.[857] A DCF model assesses the economic value of an investment by projecting its post-tax future cash flows and then discounting those cash flows to the present value by applying a discount rate to reflect the risks involved in the project and costs of capital involved.

406. Commentators have praised an income-based valuation methodology using a DCF model, with its direct and exclusive focus on future cashflows, as "*theoretically the*

[854] See [126]-[128] above.

[855] Memorial at [274], citing *Chorzów Factory* at [125], **Exhibit CL-053**.

[856] Memorial at [278].

[857] Memorial at [282]-[283].

strongest"[858] and "*a real-world method that businessmen and financiers apply every day in deciding how much to invest in a business*".[859] Moreover, DCF models are *"constantly used*" by tribunals to establish the FMV of an investment.[860]

407. Slovakia accepts that DCF models have been used by tribunals to quantify the FMV of early-stage investments, without a track record of predictable cash flows and profitability.[861] Accordingly, there is no blanket legal rule which precludes the Tribunal from using a DCF model for an early-stage investment like Discovery's. Indeed, the only legal rule is that Slovakia must provide full reparation to Discovery by compensating it for the FMV of its lost investment. The appropriate methodology to reach that result is then a matter of expert evidence.

408. The awards cited by Slovakia in its Counter-Memorial (*Bahgat v Egypt* and *Al-Bahloul v Tajikistan*) confirm that, in principle, a DCF model can be used to quantify the FMV of an early-stage investment. Slovakia is wrong to suggest that these awards establish legal criteria which must be satisfied before a DCF model can be used.[862] The tribunals merely indicated a non-exhaustive list of factors which would need to be considered in deciding whether or not to use a DCF model. Again, this is a question of expert evidence and is addressed in detail the Rockflow reports.

409. For example, in *Al-Bahloul v Tajikistan* (which involved an early-stage project to explore for hydrocarbons but where the claimant did not have a historic track record of profitability) the tribunal observed as follows:[863]

> "The Tribunal considers that the application [of a DCF model] might be justified, *inter alia*, where the exploration of hydrocarbons is at issue. The determination of future cash flow from the exploitation of hydrocarbon reserves need not depend on a past record of profitability. There are numerous hydrocarbon reserves around the world, and sufficient data allowing for future cash flow projections should be

858 S Ripinsky & K Williams *Damages in International Investment Law* (BIICL, 2015) at p. 193 ("***Ripkins & Williams***"), **Exhibit CL-088**.

859 M Ball "Assessing Damages in Claims by Investors against States" (2001) 16 ICSID Review – Foreign Investment law Journal 419 at p. 12, **Exhibit CL-074**.

860 Memorial at [282], citing *Enron v Argentina* at [385], **Exhibit CL-059**.

861 Counter-Memorial at [463]-[464], [469].

862 See *e.g.* the criteria listed in the Counter-Memorial at [465], [467], [487].

863 *Al-Bahloul v The Republic of Tajikistan* SCC Case No. V (064/2008), Final Award, 8 June 2010, at [75], **Exhibit RL-107**.

available to allow a DCF-calculation."

410. Although the tribunal was ultimately not persuaded to use a DCF model in that case, it held that it would have been appropriate to use the model to assess the FMV of the licences if the following questions had been answered in the affirmative:[864]

(1) Was the claimant able to finance the exploration for hydrocarbons?

(2) Would the exploration have been successful, *i.e.* would the claimant have found oil and gas reserves which could be exploited?

(3) Would the claimant have been able to finance and perform the exploitation of any hydrocarbon reserves found?

(4) Would it have been possible to sell any hydrocarbons produced?

411. These questions (which are not legal criteria) are addressed in detail in the Rockflow reports and the factual evidence upon which Discovery relies, some of which has already been considered above.[865] These questions must all be answered in the affirmative in the present case. Accordingly, the Tribunal can and should use the Rockflow DCF model to quantify the FMV of Discovery's investment.

412. To take another example, in *Divine Inspiration Group Pty v Democratic Republic of Congo* the tribunal found that the Democratic Republic of Congo had breached its obligations under a contract which permitted the claimant to explore and exploit certain oil and gas concessions in the DRC.[866] As at the date of the DRC's breach, the claimant was at an early stage of its exploration activities. Nevertheless:

(1) The tribunal accepted the evidence of the experts in that case[867] (which was equivalent to the expert evidence in the Rockflow reports in this case) and

864 *Ibid* at [77], **Exhibit RL-107**.

865 See [391]-[396] above (as to Discovery's ability to finance the project).

866 *Divine Inspiration Group Pty v Democratic Republic of Congo* ICC Case No. 22370/DDA, Final Award, 7 November 2018, **Exhibit CL-094**.

867 *Ibid* at [196] (the experts in that case had: (*i*) adopted a "*probabilistic approach*" to estimate the amount of hydrocarbons in the concession areas, according to "*three scenarios*": the low scenario (P90), the best scenario (P50), and the high scenario (P10); (*ii*) assessed the chances of commercial success; (*iii*) took into account the economic parameters of the project; and (*iv*) estimated the gross

held that *"[t]he likelihood that hydrocarbon resources in the Central Basin are exploitable is thus established and cannot be considered hypothetical"*;[868]

(2) The tribunal then used a DCF model (which it described as *"a recognised and commonly used method in the world of finance for the evaluation of projects and companies"*) to quantify the net present value of the claimant's share of the loss of future earnings;[869] and

(3) The tribunal ordered the DRC to pay nearly USD 600 million in compensation which was quantified using a DCF model.[870]

413. Slovakia devotes many pages of its Counter-Memorial in an attempt to distinguish the present case from the four awards cited by Discovery in its Memorial (*Crystallex v Venezuela*; *Gold Reserve v Venezuela*; *East Mediterranean Gas v EGPC*; and *Tethyan Copper v Pakistan*).[871] Little would be gained by a detailed point-by-point rebuttal of Slovakia's lengthy submissions regarding these awards. Instead, Discovery merely notes the following key points:

(1) ***First***, Discovery does not need to show that the facts of this case are precisely identical to the facts of these earlier awards in order to justify the use of a DCF model. Discovery cited these four awards as examples to illustrate that tribunals have used DCF models to quantify the FMV of early-stage investments without a historic track record of profitability.

(2) ***Second***, Discovery repeats the points already made at [407]-[408] above. The tribunals in these awards did not lay down legal criteria which would need to be satisfied before a DCF model could be used. Instead, the tribunals simply considered various factors (with the assistance of expert evidence) by which

---

revenues that the claimant would have earned) **Exhibit CL-094**. This is the same approach which Rockflow have adopted in the present case in their expert reports.

868 *Ibid* at [198], **Exhibit CL-094**.

869 *Ibid* at [205]-[206], **Exhibit CL-094**.

870 *Ibid* at [217], **Exhibit CL-094**.

871 Memorial at [284]-[287]; Counter-Memorial at [470]-[487].

they were persuaded to use a DCF model. The absence of any particular factor in this case does not prove that a DCF model is inappropriate.

(3) ***Third***, in a But For Scenario, the Tribunal must disregard the effect of Slovakia's breaches of the BIT and consider what would likely have happened if Discovery had not been prevented by Slovakia from completing its exploration. Slovakia's case on quantum proceeds on the basis that the project was doomed to fail because Discovery had never drilled any exploration wells. That was precisely because of Slovakia's own conduct in breach of the BIT. Slovakia cannot rely on this conduct in a But For Scenario.

2. Rockflow's expert evidence supports the use of a DCF model as a matter of principle

414. The expert evidence of Rockflow supports the use of a DCF model in this case. Mr Howard explains why an income-based valuation methodology using a DCF model is appropriate and why Slovakia's experts are wrong to contend otherwise.[872] Dr Moy also makes similar points.[873] The primary objection raised by Slovakia's experts is that the inputs for the DCF model are too uncertain or unreliable.[874] Mr Howard disagrees for three key reasons. (Discovery addresses Slovakia's detailed criticisms of the inputs to the DCF model in Annex 2 of this Reply.)

415. ***First***, Mr Howard notes that the opinion of Slovakia's experts is based on their classification of the potential hydrocarbon volumes as 'prospective resources' (as opposed to 'reserves', or even 'contingent resources') which they assert are too uncertain. Yet, as Mr Howard makes clear, his DCF model is on the basis of a But For Scenario in which exploration drilling would have proceeded as planned and any subsequent discoveries would have been developed. He further notes that Dr Moy has re-iterated his opinion that, in the But For Scenario, the "*discovered volumes would be considered as reserves*", [875] a conclusion with which Mr Howard

---

[872] Howard 2 at [50]-[81] and [120]-[145].
[873] Moy 2 at [155]-[160].
[874] Longman 1 at [2] (9th bullet); Duarte-Silva 1 at [22] and [35].
[875] Moy 2 at [125.2].

agrees.[876] On this basis, Mr Howard concludes that "*the claims of both Dr Longman and Dr Duarte-Silva that my DCF valuation is not valid because it relates to prospective resources, is irrelevant*."[877]

416. ***Second***, Mr Howard maintains that, contrary to the position taken by Slovakia's expert (Dr Longman), his other primary input for the DCF analysis, namely costs, is appropriate and not underestimated.[878] This is addressed further at [553]-[554] below.

417. ***Third***, Mr Howard confirms that even for valuing 'prospective resources' a DCF model is appropriate while a valuation based on a market approach is less reliable (as he concludes to be the case here, as explained at [453]-[465] below). In this regard, Mr Howard notes that the SPEE Guidelines and the SPE PRMS Guidelines both include all resource categories, the latter expressly stating that a DCF model can be used provided that the risks of discovery and development are applied correctly (which Mr Howard notes that he has done). Further, he makes clear that the reliance by Dr Duarte-Silva on the VALMIN and CIMVAL codes is misplaced as these are focused on the mining industry (indeed, the CIMVAL Code expressly states that it does not cover petroleum assets), and Mr Howard is able to confirm from his own experience that "*[p]etroleum projects are fundamentally different from mining projects in the way the project uncertainties change from exploration, through to discovery and potential development*."[879]

418. In addition, Mr Howard notes that a Macquarie Equities Research briefing paper on Aurelian (published in April 2010) used a DCF model to derive the value-per-share of Aurelian which was attributable to the different assets in Aurelian's portfolio, including the Licences. Mr Howard considers that this demonstrates that the use of a DCF model is not inappropriate for valuing early-stage investments, and particularly Discovery's share in the Licences.[880]

---

876 Howard 2 at [54].
877 Howard 2 at [55].
878 Howard 2 at [58]-[59].
879 Howard 2 at [61]-[81].
880 Howard 2 at [96]. The 2010 Macquarie Research Note is referred to at [31(2)] above.

419. Dr Moy also confirms that the use of a DCF model is appropriate.[881] He refers to a paper issued by the Society of Petroleum Engineers from 2016 which he notes confirms that "*the use of decision tree analysis and discounted cash flow is appropriate for a multi-prospect exploration portfolio containing only prospective resources.*"[882] In particular, he notes that the authors of the paper "*recommend the use of appropriate Monte Carlo software (such as Crystal Ball or similar) to "[c]apture the value of all possible outcomes and ensure the final expected value of a true representation of the value uncertainty"*" and concludes that this "*is exactly what Mr Howard has done in his report*".[883]

3. Slovakia's criticisms of Rockflow's DCF model are misconceived

420. Slovakia has raised a barrage of criticisms to Rockflow's DCF model and to the assumptions on which it is based.[884] These criticisms are misconceived. In the main body of this Reply, Discovery focuses on Slovakia's overarching criticisms of the DCF model. The detailed criticisms are addressed separately in Annex 2 to this Reply (which demonstrates that Slovakia's quantum experts have made numerous errors in their analysis).

421. It is inherent in a But For Scenario (and when quantifying the FMV of an investment using a DCF model) that the Tribunal will need to determine, on the balance of probabilities, what would likely have happened if:

(1) Slovakia had not breached its obligations under the BIT; and

(2) Discovery had not been prevented from completing its exploration activities and thereafter from exploiting the areas covered by the Licences.

422. This inevitably requires the Tribunal to adopt a forward-looking approach and make certain assumptions. The same is true of any case where damages are assessed using a DCF model. Contrary to Slovakia's assertions, adopting a forward-looking

---

881 Moy 2 at [155]-[160].

882 Moy 2 at [157].

883 Moy 2 at [159].

884 Counter-Memorial at [489]-[609].

approach does not render Rockflow's DCF valuation "*speculative*" or *"uncertain*". This is because the inputs to the DCF model (and Rockflow's methodology) are robust and reasonable. Further, the outputs derived by Rockflow are conservative.

423. Slovakia criticises Rockflow for having identified "*40 oil and gas leads*" across the Licence areas for the purposes of Mr Atkinson's assessment of total PIIP estimates.[885] Slovakia asserts that "*there is no evidence to suggest that Discovery identified these 40 leads*".[886] As Mr Atkinson explains, this is factually incorrect and the approach he has adopted is both reasonable and appropriate.[887] Moreover:

    (1) Slovakia's own expert (Dr Longman) has "*not provided his own estimate of PIIP on [Discovery's] licence area*";[888]

    (2) Mr Atkinson has undertaken a "*benchmarking analysis*" which shows that his total estimates of PIIP are "*reasonable by comparison with analogue areas in Poland*";[889] and

    (3) The FMV valuation conducted by Mr Howard using his DCF model is "*based only on the volumes of the P50 development case (i.e. 5 gas and 3 oil prospects), not the total volume of all 40 prospects.*"[890]

424. Slovakia asserts that Rockflow's decision not to use Discovery's MT data "*reflects the artificial nature of its DCF*".[891] This criticism is wide of the mark. Mr Atkinson has explained why he did not use Discovery's MT data for his assessment of GCOS or PIIP.[892] The fact that Mr Atkinson has not used Discovery's MT data demonstrates that Mr Atkinson has adopted a truly independent assessment. Contrary to Slovakia's assertion, Rockflow's DCF model is not "*artificial*".

425. Rockflow's reports use industry-standard techniques (including well-established

[885] Counter-Memorial at [494].
[886] Counter-Memorial at [494].
[887] Atkinson 2 at [112].
[888] Atkinson 2 at [113].
[889] Atkinson 2 at [113] and [72]-[77].
[890] Atkinson 2 at [113]. See also Howard 2 at [211]-[215], [252] and Section 9.
[891] Counter-Memorial at [499].
[892] Atkinson 1 at [74]-[75]. See also Atkinson 2 at [46.4].

probabilistic methods) to derive the inputs for the DCF model, which inputs are then benchmarked against comparable producing fields as well as worldwide success rates for exploration drilling. The inputs and outputs derived by Rockflow are reasonable, robust and conservative. Far from being "*artificial*"; they are based on objective and verifiable calculations and reasonable assumptions.

426. The industry-standard techniques used by Rockflow are comparable to the techniques used by the experts in the awards cited above, where tribunals adopted similar approaches to quantifying compensation for early-stage investments using a DCF model. Furthermore, the key assumptions upon which Rockflow's reports are based[893] are reasonable and appropriate, as explained in the Memorial and further below as well as in the Rockflow reply reports.

427. Rockflow have made some changes to the inputs of the DCF model since the date of the Memorial to take into account:

    (1) certain criticisms made by Dr Longman on behalf of Slovakia (which demonstrates the independence of approach of the Rockflow experts);

    (2) a drop in market price forecasts for oil and gas since the date of the Memorial;[894] and

    (3) the imposition of a severe (if not draconian) windfall tax by Slovakia on energy companies, including oil and gas producers, for the years 2022-2023.[895]

428. As to point (2), Mr Howard's first report (which was filed in October 2022) coincided with the peak in gas price forecasts following supply-side constraints after the COVID-19 pandemic and Russia's invasion of Ukraine. Since the date of his first report, gas price forecasts have dropped, as shown in the following graph:[896]

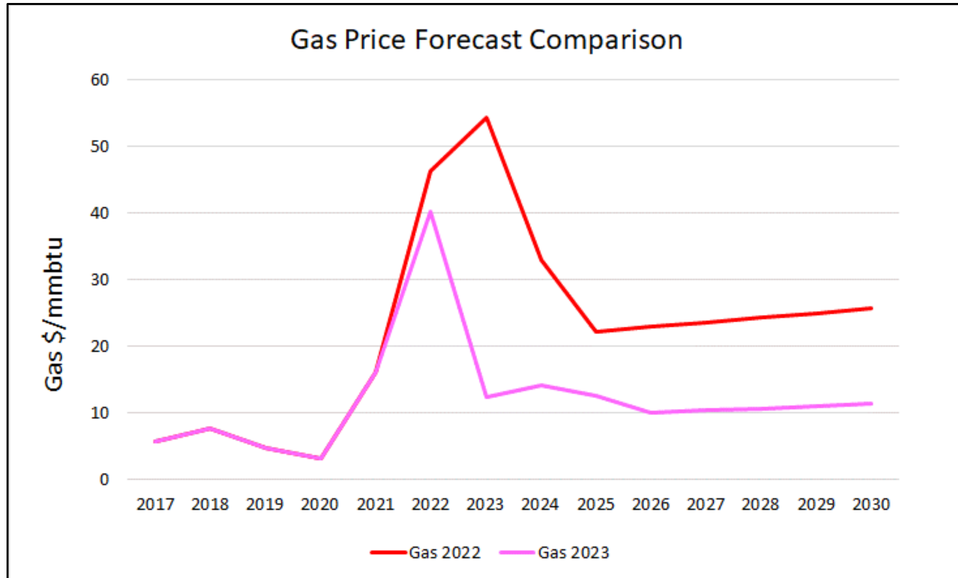
---

893 Memorial at [298]; Counter-Memorial at [490].

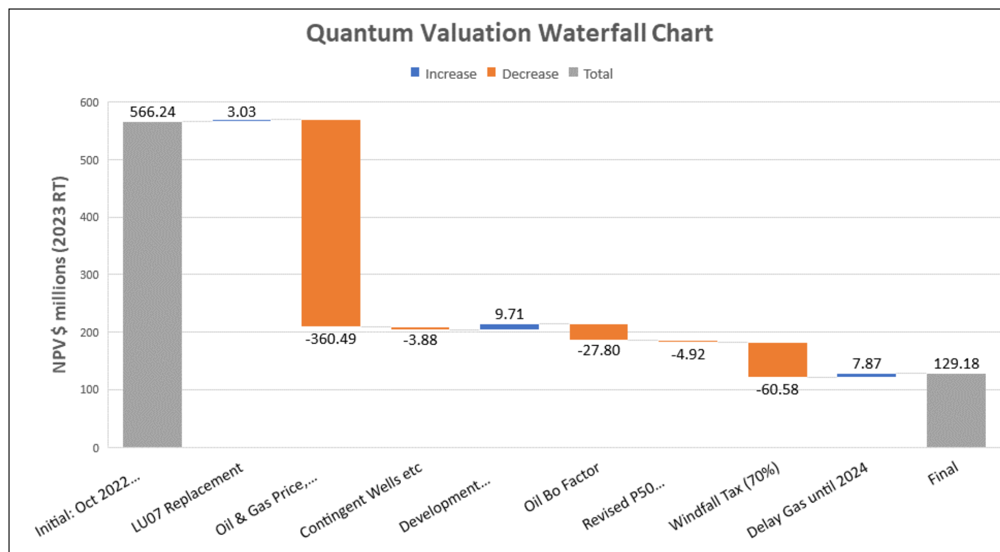
894 Howard 2 at [234]-[242].

895 Howard 2 at [244]-[250]; Lewis 2 at [55]-[56].

896 Howard 2 at [241], Figure 14.



429. The following chart illustrates the cumulative impact of the three changes at [427] above to the overall FMV derived by Rockflow's DCF model:[897]



430. As shown in this chart, the drop in the market price forecasts for oil and gas since October 2022 has led to a USD 360 million reduction in the FMV, followed by the windfall tax which has led to a further USD 60 million reduction. These changes have reduced the total sum claimed in respect of Discovery's loss of the FMV of its investment from USD 566,237,054 to **USD 133,054,614**.[898]

---

897 Howard 2 at [288]-[298], and Figure 16.

898 Howard 2 at [303]. The reference to USD 129.18 million in the chart at [429] above is expressed in

4. The additional Akard Sum

431. As explained in the Memorial and at [395(5)(c)] above, Discovery owes a sum of USD 1,965,198.39 to Akard (*i.e.* the Akard Sum) following its withdrawal from the project as a direct result of the delays and opposition encountered throughout the project. As Discovery explained in the Memorial:[899]

(1) in a But For Scenario, the Akard Sum would have been repaid to Akard as part of Discovery's share of the profits earned by AOG during the project and Discovery should not be required to pay the Akard Sum from its own share of those profits; and

(2) in order to restore Discovery to the position in which it would have been but for Slovakia's breaches of BIT, Discovery must receive the amount calculated by Mr Howard (USD 133,054,614) net of the payment of the Akard Sum by Discovery to Akard.[900]

432. In its Counter-Memorial, Slovakia does not dispute the proposition, as a matter of principle, that the Akard Sum should be paid to Discovery in addition to the sums calculated by Mr Howard (assuming that the Tribunal were to adopt an income-based valuation model using Rockflow's DCF model). Accordingly, the total amount claimed by Discovery in its primary case is USD 135,019,812.39 (*i.e.* USD 133,054,614 plus an additional USD 1,965,198.39).

B. DISCOVERY'S ALTERNATIVE CASE: SLOVAKIA MUST COMPENSATE DISCOVERY FOR ITS LOST OPPORTUNITY TO EARN PROFITS

433. In the alternative to its primary case, the Tribunal should order Slovakia to compensate Discovery for the loss of a valuable commercial opportunity to earn substantial profits from the exploitation of the Licence areas in an amount not less than USD 53 million (plus the Akard Sum).

2023 real-terms: see Howard 2 at [299]. The USD 133,054,614 figure is expressed in 2024 real terms: see Howard 2 at [300]-[303].

899 Memorial at [326]-[327].

900 Memorial at [326]-[327].

1. Legal principles

434. The principle of awarding compensation for the loss of an opportunity is a "*general principle of law that is applied in many civil legal systems as well as in common law systems*".[901] It is recognised in Article 7.4.3 of the UNIDROIT Principles on International Commercial Contracts,[902] has been discussed by numerous distinguished commentators, and has been adopted by numerous tribunals in well-known awards as a basis for awarding compensation. As Jan Paulsson explains:[903]

> "A loss of opportunity (or chance) is a sub-category of lost profits where not only the magnitude but even the existence of monetary prejudice is doubtful. Ordinarily, this would be viewed as a matter of speculation and therefore not lead to recovery at all. What distinguishes this category of damages and rescues the claimant's prospects for recovery is that the possibility of profits itself has a value. The paradigm case is *Sapphire*, which involved the cancellation of rights to explore and exploit any hydrocarbon resources found in a specific area. At the time of the breach, there was no way of knowing whether there would be any discovery of commercial value. Yet the chance itself had a value; a third party would have paid something for the licensee's rights."

435. The "*paradigm case*" of *Sapphire v NIOC*[904] has proved influential[905] and is particularly relevant to the present case given its factual analogies. The parties had entered into a concession which permitted Sapphire to explore for oil deposits in Iran. During the exploration phase (*i.e.* before any exploratory drilling had taken place) NIOC repudiated the agreement and thereby prevented Sapphire from

---

[901] *Gavazzi* at [213] **Exhibit CL-092**. See also *Gemplus v The United Mexican States* ICSID Case Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010 ("***Gemplus***"), at [13-88]-[13-90] ("[…] the concept of damages for the loss of a chance (opportunity) is recognised in many national systems of law […] the tribunal is in no doubt that similar principles form part of international law, as expressed in the ILC Articles") **Exhibit CL-081**.

[902] As cited and discussed in *Gavazzi* at [214]-[216], **Exhibit CL-092**.

[903] Jan Paulsson "The Expectation Model" in Derains & Kreindler (eds) *Evaluation of Damages in International Arbitration* (Dossier IV, ICC Institute of World Business Law, ICC Publication No 668, 2008), p. 66 **Exhibit CL-077**. See also Borzu Sabahi & Lukáš Hoder "Certainty in Recovery of Damages for Losses to New or Incomplete Businesses" (2016) 3(2) *Journal of Damages in International Arbitration*, pp. 102-104, **Exhibit CL-089**; Sergey Ripinsky & Kevin Williams *Damages in International Investment Law* (2008), p. 291 (as quoted in *Gavazzi* at [217], **Exhibit CL-092**).

[904] *Sapphire International Petroleums Ltd v National Iranian Oil Company* (1963) 35 ILR 136, Arbitral Award, 15 March 1963 ("***Sapphire***"), **Exhibit CL-071**.

[905] To take just one example, it is cited in the Commentary to Article 36 of the ILC Articles, para (27) concerning awards of compensation for loss of profits, **Exhibit CL-054**.

completing its exploration activities and then exploiting the oil deposits. Yet Sapphire was awarded substantial damages for the loss of an opportunity to earn profits from the exploitation of the concession.

436. In his award (issued in 1963) Judge Cavin reasoned as follows:[906]

> "Once the principle on which such an award is based is recognized in law, the determination of the amount of compensation becomes a question of fact to be evaluated by the arbitrator.
>
> Since the question concerns the concession of an area which has not yet been prospected and where therefore the presence of oil-bearing beds in commercially workable quantities was and still is today uncertain, the existence of damage is not without doubt. No one today can affirm that the operation would have been profitable, and no one can deny it. But if the existence of damage is uncertain, it is nevertheless clear that the plaintiff had an opportunity to discover oil, an opportunity which both parties regarded as very favourable. Does the loss of this opportunity give the right to compensation?
>
> It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behaviour of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage."

437. Judge Cavin heard expert evidence from a geologist who was a "*specialist in the prospecting and appraisal of oil-bearing concessions*".[907] The expert had concluded that it was "*highly likely that the geological characteristics common to every oil-bearing territory are to be found in the territory granted to Sapphire under the concession*" and there was a "*very strong chance, but not a certainty, that deposits of commercially workable oil exist in the concession area*".[908]

438. Judge Cavin also observed that NIOC (the State-owned Iranian oil company) would not have granted a concession to Sapphire of an area where they did not think there was a "*serious chance of discovering oil*".[909] Judge Cavin concluded that Sapphire had "*satisfied the legal requirement of proof by showing a sufficient probability of the success of the prospecting undertaken, if they had been able to carry it through*

---

906 *Ibid* at 187-188, **Exhibit CL-054**.
907 *Ibid* at 188, **Exhibit CL-054**.
908 *Ibid* at 188, **Exhibit CL-054**.
909 *Ibid* at 189, **Exhibit CL-054**.

to a finish".[910] Sapphire was awarded substantial damages for the loss of the opportunity to earn profits from exploiting the concession.

439. Numerous other tribunals have awarded compensation to investors for the loss of an opportunity to earn profits from an early-stage investment. The compensation awarded in these cases exceeded by a significant margin the amounts invested by the investors (*i.e.* their out-of-pocket expenses). This is important because Slovakia contends that Discovery should be confined to an award of damages (USD 1.2 million)[911] which is significantly lower than the amounts invested in the project.[912] Such an award would be fundamentally unjust.

440. In *SPP v Egypt*, SPP had been granted consent by Egypt to build a residential and tourist development project, which included the sale by SPP of thousands of residential lots to foreign and domestic buyers. Egypt passed a decree cancelling the project during its early stages (shortly after construction had commenced and after only 6% of the lots had been sold by SPP to buyers). The tribunal held that Egypt's cancellation had expropriated SPP's investment and that SPP was entitled to recover substantial damages to compensate it for the loss of a "*commercial opportunity*" (in an amount higher than SPP's out-of-pocket expenses).[913] In quantifying the value of this lost opportunity, the tribunal observed as follows:[914]

> "It remains, then, for the Tribunal to determine the amount by which the value of the Claimants' investment in ETDC exceeded their out-of-pocket expenses—that part of the alternative claim which the Claimants have called the 'opportunity of making a commercial success of the project'. This determination necessarily involves an element of subjectivism and, consequently, some uncertainty. However, it is well settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss has been incurred."

441. In *Gemplus v Mexico*, the claimants were minority shareholders in a concessionaire which had been authorised in September 1999 to operate a national vehicle registry

---

910 *Ibid* at 189, **Exhibit CL-054**.

911 Counter-Memorial at [612].

912 Fraser 2 at [52]-[53].

913 *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, ("***SPP***") **Exhibit CL-073**.

914 *Ibid* at [215], **Exhibit CL-073**.

in Mexico for 10 years.[915] In June 2001, Mexico ordered the requisition of the concessionaire's operations.[916] In December 2002, Mexico then revoked the concession.[917] The tribunal held that Mexico's conduct breached the BITs[918] Notwithstanding the fact that the project was at an early stage, the tribunal awarded substantial compensation to the claimants for the concessionaire's "*lost opportunity (or chance) to make future profits*" for the remaining term of the concession.[919] There was "*no certainty or realistic expectation of this project's profitability as originally envisaged*" but "*there was nonetheless a reasonable opportunity*" and this opportunity had a "*monetary value for the purpose of Article 36 of the [ILC] Articles*".[920] Two related factors influenced the tribunal's decision:

(1) ***First***, the tribunal rejected Mexico's argument that because the quantification of loss in the form of lost future profits was uncertain, the claimants should be treated as having failed to prove an essential element of their claims in respect of lost future profits, with the result that their claims for compensation should be dismissed. In this regard, the tribunal held (emphasis added):[921]

> "The Tribunal considers that this approach is not required by the terms of either BIT or international law; and that it would also produce a harsh and unfair result in this case. The Tribunal emphasises that it is here addressing contingent future events and not actual past events; it is seeking to determine not what did or did not happen as past facts but what could have happened in the future. This exercise necessarily involves the Tribunal in assessing whether such future events would have occurred and in quantifying that assessment in money terms, as compensation. **It is not always possible for a claimant to prove that a future event could or could not happen with certainty; and a tribunal can only evaluate the chances of such a future event happening.** That is not therefore an exercise in certainty, as such; but it is, in the circumstances, an exercise in "sufficient certainty", as indicated by the ILC's Commentary cited above."

915 *Gemplus* at [4-44], [4-48], **Exhibit CL-081**.
916 *Ibid* at [4-177], **Exhibit CL-081**.
917 *Ibid* at [4-184], **Exhibit CL-081**.
918 *Ibid* at [7-76] and [8-82], **Exhibit CL-081**.
919 *Ibid* at [13-95], **Exhibit CL-081**.
920 *Ibid* at [13-98], **Exhibit CL-081**.
921 *Ibid* at [13-91], **Exhibit CL-081**.

(2) ***Second***, the tribunal held that the claimants' evidential difficulties in proving their claim for loss of future profits had been directly caused by Mexico's breaches of the BITs. But for those breaches, the claimants would have had an opportunity to exploit their investment. In this regard, the tribunal held:[922]

> "The Tribunal considers that, as a general legal principle, when a respondent has committed a legal wrong causing loss to a claimant (as found by a tribunal), the respondent is not entitled to invoke the burden of proof as to the amount of compensation for such loss to the extent that it would compound the respondent's wrongs and unfairly defeat the claimant's claim for compensation – as was indicated in the *Sapphire* award regarding the 'behaviour of the author of the damage' (see above). At this point, confronted by evidential difficulties created by the respondent's own wrongs, the tribunal considers that the claimant's burden of proof may be satisfied to the tribunal's satisfaction, subject to the respondent itself proving otherwise."

442. In *Cyprus Popular Bank v Greece*, the tribunal ultimately rejected the claimant's claim for damages for loss of opportunity because there was "*no factor exogenous to the State's conduct which disturbs the chain of causality*" between Greece's breach of the BIT and the claimant's damages. However, the tribunal accepted that, in principle, an award of damages for loss of an opportunity could be claimed by an investor in a suitable case (emphasis added):[923]

> "A loss of opportunity arises where there is uncertainty as to whether the investor would have enjoyed (or not) the chance to achieve a profit. **The uncertainty is created by an exogenous factor, which causes the chance to occur or not to occur, and to which the tribunal must attribute a probability** (e.g. were it not for the host State's wrongful conduct, the investor would have participated in a bid and would or would not have been awarded the contract). The tribunal must first calculate the probability that the exogenous event occurs, and the loss of profit is moderated taking into consideration this probability."

2. Application to the facts

443. It is clear that Discovery has lost a valuable commercial opportunity to earn profits from the exploitation of the Licence areas, as a direct consequence of Slovakia's

---

[922] *Ibid* at [13-92], **Exhibit CL-081**.

[923] *Cyprus Popular Bank v The Hellenic Republic*, ICSID Case No. ARB/1416, Award, 15 April 2021, **Exhibit CL-097**. For other awards which have discussed the principles governing compensation for lost opportunities, see *Burlington Resources Inc v The Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, at [279], **Exhibit CL-058**.

conduct (in breach of the BIT). Slovakia must compensate Discovery for the value of that lost opportunity. The exogenous factor (to which the Tribunal must attributable a probability) is the chance that Discovery would have discovered hydrocarbons but for Slovakia's breaches of the BIT which prevented Discovery from completing its exploration activities and exploiting the Licence areas. The Rockflow reports—like the expert evidence in *Sapphire v NIOC*—enable the Tribunal to assess that probability by applying recognised and industry-standard techniques to determine the PIIP and GCOS in the License areas.

444. The value of the commercial opportunity which Discovery lost is clearly not zero:

(1) Slovakia would not have granted and successively renewed the Exploration Area Licences to AOG if Slovakia had thought there was a zero chance of hydrocarbons being discovered.

(2) Discovery and its JV Partners would not have invested many years of time and over €20 million into the project[924] if they had thought that the project was a worthless commercial opportunity.

(3) Moreover, in the 2016 Licences, Slovakia expressly acknowledged that the "*overall potential of the area has been evaluated as very good and promising*" and that AOG's exploration activities were "*beneficial*".[925]

445. In assessing the value of this lost opportunity, Discovery submits that the Tribunal should have regard to two key metrics:

(1) ***First***, the amounts invested into the project by Discovery and AOG since the inception of the project in 2006 right through until its end (which provide a proxy for the minimum value of the lost opportunity); and

(2) ***Second***, the chances of hydrocarbons being discovered and successfully exploited in the areas covered by the Exploration Area Licences and the

---

924 Spreadsheet of JV Expenditure, 2006-2020, **Exhibit CH-019** (see the sheet entitled 'Licence reports', column H, which represents the total expenditure incurred by AOG and its JV Partners on the project between 2006-2020, as reported by AOG to the MoE in its annual reports).

925 Memorial at [74(4)] and [74(10)(b)].

expected profits which Discovery would have earned from exploiting those prospects (which indicates the maximum value of the lost opportunity).

446. As to the ***first*** metric, the Tribunal's consideration of the amounts invested into the project should not be limited to the period from March 2014 onwards after Discovery acquired AOG. The Tribunal should look back at the entire period of the project since its inception in 2006. This figure represents the minimum value of the opportunity that a rational businessperson would have seen in the project. Thus:

(1) Between 2006 and 2020, AOG incurred total expenditures of €10.9m on its exploration activities.[926] Between 2014 and 2020, AOG incurred total expenditures of USD 3.3 million on its exploration activities.[927]

(2) Accordingly, the minimum value of the lost commercial opportunity was €10.9m. Alternatively, if the Tribunal were to have regard only to the amounts incurred since 2014 (after Discovery acquired AOG), the minimum value of the commercial opportunity was USD 3.3 million.

447. As to the ***second*** metric, Rockflow's expert reports enable the Tribunal to assess the maximum value of the lost opportunity. Even if (contrary to Discovery's primary case) the Tribunal were not persuaded to use the DCF model to quantify the compensation due to Discovery, the Tribunal is still entitled to have regard to Rockflow's expert reports in assessing the chances of hydrocarbons being discovered and exploited for commercial gain and hence in evaluating the maximum value of the opportunity which was lost.

448. Mr Atkinson (a respected and experienced geoscientist with 34 years of industry experience) has used industry-standard methods to independently assess the prospectivity of the Exploration Area Licences by providing an independent estimate of the hydrocarbon volumes in place (*i.e.* PIIP) and then estimating the geological chance of successfully exploiting those hydrocarbons (*i.e.* GCOS). Mr

---

926 See Spreadsheet of JV Expenditure, 2006-2020, **Exhibit CH-019** (see the sheet entitled 'Licence reports', column J, which represents the total expenditure incurred by AOG on the project between 2006-2020, as reported by AOG to the MoE in its annual reports).

927 See [468]-[469] below.

Atkinson has also benchmarked his analysis which demonstrates that his conclusions are conservative. Mr Atkinson's overall conclusions are that:

(1) Having regard to the oil and gas production history in neighbouring Polish fields which are "*on trend*" with the Licence areas, as well as past drilling results in Slovakia, the Licence areas are prospective for oil and gas.[928] Dr Longman is wrong to assert that the Polish fields are not "*on trend*" with the Licence areas.[929] Moreover, *"it is very reasonable to assume that substantial accumulations of hydrocarbons will be found, since the Claimant's licence area comprises extensions of both the Magura and Dukla Nappes*".[930]

(2) The regional geology confirms the presence of "*all necessary components of a working petroleum system*" in the Licence areas (namely source rocks, migration routes, reservoirs, seals and structural trapping configurations).[931] Moreover, oil seeps have been found on the Licence areas. Contrary to Dr Longman's opinions, the presence of these oil seeps provides "*excellent evidence*" of prospectivity.[932]

(3) Mr Atkinson has then estimated PIIP and GCOS for 40 prospects in the Licence areas (namely 18 oil prospects and 22 gas prospects, which include the exploration wells planned by AOG at Smilno, Krivá Ol'ka and Zborov).[933] Benchmarking analyses show that: (*i*) Mr Atkinson's estimates of PIIP are "*substantially smaller than volumes produced in equivalent areas within Poland*";[934] and (*ii*) Mr Atkinson's estimates of GCOS are conservative in comparison with comparable Polish fields and worldwide averages.[935]

449. Importantly, Slovakia's expert (Dr Longman) has <u>not</u> performed his own independent estimates of PIIP or GCOS in the Licence areas, nor has Dr Longman

928 Atkinson 1 at [16], [24]-[48]. Atkinson 2 at [40]-[44]
929 Atkinson 2 at [13.1], [19]-[24].
930 Atkinson 2 at [13.2], [17]-[18].
931 Atkinson 1 at [49]-[65].
932 Atkinson 2 at [33]-[38].
933 Atkinson 1 at [20]-[22], [122]-[198]; Atkinson 2 at [16.2], [131]-[133].
934 Atkinson 2 at [77] and [156]-[162]. See also Atkinson 1 at [174]-[180].
935 Atkinson 1 at [22]; Atkinson 2 at [72]-[77].

provided revised estimates or even suggested revisions to input parameters in Mr Atkinson's models.[936] For the reasons given in detail in Annex 2 to this Reply, the numerous criticisms raised by Slovakia and Dr Longman in respect of Mr Atkinson's analysis are simply unfounded.

450. The methodology adopted by Mr Atkinson to estimate PIIP and GCOS represents "*industry standard practice*" in the oil and gas sector.[937] Mr Atkinson's evidence provides the foundation for the expert opinions reached by Dr Moy and then by Mr Howard in his DCF model which is based on the P50 development case (*i.e.* 5 gas and 3 oil prospects) not the total volume of all 40 prospects identified by Mr Atkinson.[938] The evidence of the Rockflow experts is equivalent to the expert evidence which Judge Cavin considered in the *Sapphire* award in assessing the value of Sapphire's lost opportunity. The FMV derived by Mr Howard's DCF model (USD 133,054,614) therefore represents the maximum value of the commercial opportunity which Discovery lost.

451. The value of Discovery's lost opportunity lies somewhere in between the minimum and maximum values indicated at [446] and [450] above. As noted by the tribunals in the awards considered above, assessing the value of Discovery's lost opportunity is not an exact science. It is accepted that the Tribunal will need to exercise its own judgment based upon the inherent probabilities and risks associated with the project. Nevertheless, Discovery submits that the value of its lost opportunity is not less than USD 53 million (*i.e.* 40% of the USD 133,054,614 figure derived by Mr Howard's DCF model) for at least the following reasons:

(1) The PIIP and GCOS as quantified by Mr Atkinson are robust and conservative. The Rockflow reports demonstrate that this was a project which was commercially viable and which would have been extremely lucrative. The project would in all likelihood have succeeded and would have yielded substantial profits for Discovery but for Slovakia's breaches of the BIT.

---

936 Atkinson 2 at [95] and [121].

937 Atkinson 1 at [122]-[129], [181]-[185].

938 Atkinson 2 at [113]; Howard 2 at [211]-[215], [252] and Section 9.

(2) Discovery was not a new player in the market. Mr Lewis and Mr Fraser had decades of experience in the oil and gas sector.[939] Their knowledge and experience, taken together with the financing provided by JKX and Romgaz, would have enabled the project to succeed.

(3) Unlike the claimant in *Sapphire v NIOC*, Discovery was not operating in a politically unstable country which was exposed to the risk of wars or mass civil unrest. As Dr Moy explains, Slovakia is a "*benign, politically stable country with a developed infrastructure and with an existing extractive oil and gas industry*".[940] This inevitably reduces the risks associated with Discovery's project.

(4) It is inherently likely that Slovakia would have supported Discovery's project following the discovery of oil and gas deposits, not least because of:

(a) the significant monetary benefits which Slovakia stood to gain from the project in the form of over USD 677 million in taxes and royalties, as well as boosting local employment;[941] and

(b) the fact that Slovakia had committed itself in successive energy policies (from 2006 onwards) to reduce its near-total dependence on Russian imports of oil and gas, in order to improve domestic energy security.[942]

452. In addition to the sum claimed for loss of opportunity to earn profits, Discovery also seeks additional compensation in respect of the Akard Sum. The analysis set out at [431]-[432] above applies *mutatis mutandis* to this additional claim.

C. DISCOVERY'S FURTHER ALTERNATIVE CASE: ADOPTING A MARKET-BASED VALUATION METHODOLOGY

453. If the Tribunal is not persuaded to adopt either of the two approaches outlined above to quantify the compensation due to Discovery, the next option for the Tribunal to

---

939 Lewis 1 at [5]-[12]; Fraser 1 at [6]-[7]; Fraser 2 at [58].

940 Moy 2 at [24]. See also Moy 2 at [135(vi)] and Howard 2 at [304]-[308].

941 See [5] above.

942 Memorial at [6]-[11], [27]-[29].

consider is a market-based valuation methodology.

454. Slovakia's expert (Dr Duarte-Silva) having rejected an income-based valuation methodology, sets out an alternative valuation based on a market approach. He considers (*i*) other companies which he alleges are comparable;[943] and (*ii*) past transactions which he alleges are comparable.[944]

455. Discovery's primary position is that the companies and transactions identified by Dr Duarte-Silva are not comparable and that a market-based valuation methodology is unsound. If, however, the Tribunal disagrees, then a market-based valuation methodology would result in substantial compensation due to Discovery, of either (*i*) USD 36 million (adopting a comparable companies approach); or (*ii*) USD 5.01 million (adopting a comparable transaction approach).

1. Comparable companies

456. As to the comparable companies identified by Dr Duarte-Silva, Mr Howard explains that:

(1) Dr Duarte-Silva has incorrectly used the companies selected by Discovery for the purposes of estimating a representative weighted average cost of capital ("**WACC**") (as part of the calculation of the appropriate discount rate) as comparators for determining the FMV of the Licences. Mr Howard explains that these companies (particularly Cub Energy) were chosen as comparators at the time when Discovery was raising finance for its first planned exploration wells in 2015-2016. At that point, Mr Howard accepts that Discovery had prospective resources only and that the WACC calculated by him took this into account. However, in the valuation of the FMV of the Licences in the But For Scenario, Dr Moy has made clear that the discovered resources would be considered as reserves,[945] and so the companies used as comparators for the WACC calculation are <u>not</u> comparable companies for determining the FMV of the Licences. Mr Howard therefore disagrees with

943 Duarte-Silva 1 at [62]-[72].
944 Duarte-Silva 1 at [49]-[61].
945 See [546]-[551] below.

the use of these companies by Dr Duarte-Silva and does not consider them to be comparable.[946]

(2) In any event, Mr Howard points out that Dr Duarte-Silva has not performed the comparison exercise correctly, even using those companies he has chosen (which, as noted above, Mr Howard does not consider to be comparable). In particular, Dr Duarte-Silva's inclusion of JKX in his comparison—when this is a clear outlier and, for the reasons explained by Mr Howard, is not a typical indicator of 2P value—is flawed and indicates that his conclusions are unreliable.[947] When excluding JKX, Mr Howard notes that the other companies chosen by Dr Duarte-Silva would show an average enterprise value of USD 4.375 per boe at 7 June 2018. This, Mr Howard calculates, would result in a value of approximately **USD 36 million** for Discovery's share of the Licences as at that date.[948] If (contrary to Discovery's primary case) the Tribunal were persuaded to adopt a market-based valuation, then this would be the minimum amount of compensation due to Discovery.

457. In addition, if the Tribunal is persuaded to adopt a market-based valuation methodology and to award compensation to Discovery of USD 36 million (see [456(2)] above), Discovery would also seek in addition: (i) the Akard Sum; and (ii) pre-award interest because the USD 36 million figure is calculated as at 7 June 2018.

458. Further, Mr Howard notes that, in his *ex-ante* valuation, Dr Duarte-Silva has made two fundamental errors. First, he has taken a company, ADX Energy, which had both prospective and contingent resources and then incorrectly sought to calculate a value of prospective resources only (which Mr Howard notes is inappropriate in any event as they are not a valid comparator given the nature of those resources), ignoring that the enterprise value will be heavily weighted to the contingent resource element. Mr Howard notes that it is "*incorrect to calculate a value of prospective resources from a value that is largely determined by the contingent*

946 Howard 2 at [357]-[367].
947 Howard 2 at [368]-[372].
948 Howard 2 at [373]-[375].

resource element."[949] Second, he has taken the wrong resource volumes form Dr Moy's report, significantly underestimating the implied $/boe value.[950]

459. Finally, in his *ex-post* valuation, Mr Howard notes that Dr Duarte-Silva has again made fundamental errors. He repeats the error noted above in taking the wrong resource volumes form Dr Moy's report. In addition, he has used the JKX data point only to derive his valuation, notwithstanding that it is both an outlier and in fact had de-listed by that time and so his data is based on extrapolation only. As a result, Mr Howard does not consider the JKX data to be representative of the data as a whole. Mr Howard notes that Dr Duarte-Silva's exclusion of all of the other companies' data "*significantly underestimates the $/boe value [and so] the resulting Discovery valuation will also be underestimated.*"[951] To then exacerbate this underestimation, Dr Duarte-Silva incorrectly applies a 95% reduction apparently to account for the fact that the volumes are prospective resources (which in any event is not the case in the But For Scenario as further explained at [546]-[551] below), despite the fact that no such reduction is appropriate as the volumes are already 'risked' and the geological chance of success accounted for, as explained by Mr Howard.[952]

2. Comparable transactions

460. Dr Duarte-Silva also identifies certain transactions which he asserts are comparable and can be used to derive the FMV of Discovery's interest in the Licences.

461. In particular, Dr Duarte-Silva points to Discovery's reacquisition of the Royalty from San Leon in 2015 as a transaction on the project itself and he concludes that this "*arm's length transaction of the asset itself is the most comparable transaction of which we are aware*".[953] The circumstances in which Discovery reacquired the Royalty from San Leon are explained at [33]-[39] above.[954] Mr Howard has considered those circumstances but he disputes that this transaction was a FMV

949 Howard 2 at [376]-[377].
950 Howard 2 at [378].
951 Howard 2 at [380]-[383].
952 Howard 2 at [384].
953 Duarte-Silva 1 at [54].
954 See also Lewis 2 at [49]-[54].

transaction for the following reasons:

(1) San Leon's financial position at the time of the transaction was "*dire*" and so it "*preferred the certainty of cash now*" and was "*under financial pressure to sell*".[955]

(2) There was no "*market*" for the transaction and the Royalty had not been offered for sale to other parties.[956]

(3) San Leon evidently had no interest in the Royalty and its core interest was in its shale gas portfolio, and so the sale "*removed the administrative burden of monitoring what, to San Leon, was a management distraction*".[957]

462. Mr Howard concludes that, since the sale of the Royalty cannot be considered a FMV transaction (within the widely accepted definition of that term), it is "*in no way possible to use this deal price as a basis for calculating the value of the licence areas at that time*".[958]

463. Alternatively, if the Tribunal were persuaded that this transaction was a FMV transaction and an appropriate comparable for the purposes of valuing Discovery's interest, Dr Duarte-Silva has incorrectly calculated that value:

(1) Dr Duarte-Silva has used the purchase price of £120,000 to calculate the equivalent 100% of the value of the Licences. However, he has only attributed a 25% share of that value to Discovery. Yet it is undisputed that Discovery held a 50% interest in the Licences. The 25% share used by Mr Howard in his DCF analysis represents the But For Scenario where it is assumed that Akard would have continued to finance the project. This assumption, however, is irrelevant to an *ex ante* valuation based on the purchase price of the Royalty. As at the date of the transaction with San Leon in January 2015, Discovery had not even entered into an agreement with Akard.[959] As Mr

---

955 Howard 2 at [331]-[333].
956 Howard 2 at [335].
957 Howard 2 at [336].
958 Howard 2 at [337].
959 See [395(5)(a)] above.

Howard notes, "*[b]ased on Discovery's correct share of 50%, Dr Duarte-Silva's calculated values should be doubled to account for this error*".[960]

(2) Further, Mr Howard disputes the use by Dr Duarte-Silva of the FTSE 350 Oil and Gas index to adjust his valuation to bring it to his valuation date of 7 June 2018. Mr Howard notes that it would be "*more correct to adjust the valuation based on the changes in prices*".[961]

(3) Mr Howard has calculated that the correct value if (contrary to Discovery's primary position and Mr Howard's opinion) the Tribunal were to consider that this was a comparable transaction. As at the assumed date of the Tribunal's award, the correct value implied by this transaction is **USD 5.10 million**.[962] If (contrary to Discovery's primary case) the Tribunal were persuaded to adopt a market-based valuation, and if it was not persuaded to adopt a comparable companies approach as referred to at [456(2)] above, then this would be the minimum amount of compensation due to Discovery.

464. Dr Duarte-Silva also refers (very briefly) to two other past transactions, namely the funding arrangement pursued with Gulf Shores, and the one concluded with Akard.[963] Neither is a comparable transaction for the reasons given by Mr Howard.[964] Mr Howard understands Dr Duarte-Silva to assume that, because under each deal the funder would acquire a post-payback 25% share of the Licences, then the value of Discovery's 25% must equal the funding to be provided. Mr Howard notes that this is a flawed analysis as the deals were not simple equity farm-in deals:

(1) In relation to the Akard deal, Mr Howard notes that "*the deal structure is more akin to a financing or conditional loan in its early stages*" with Akard receiving accelerated payback from a pool four times the size of Discovery's and significant staged 'risk compensation payments' pre-payback. He concludes that "*Akard's compensation and financial risk was not in*

960 Howard 2 at [326].
961 Howard 2 at [327]-[328].
962 Howard 2 at [338].
963 Duarte-Silva 1 at [56]-[58].
964 Howard 2 at [339]-[355].

proportion to its post-payback share of the licences. It is therefore inaccurate to value any share of the licence by simply pro-rating equity, as Dr Duarte-Silva does."[965]

(2) As to the proposed Gulf Shores deal, while noting that it differs in its detail from the Akard deal, Mr Howard nonetheless demonstrates that this "*was quite different to a simple equity farm-in, and therefore Gulf Shores' compensation and financial risk would not be in proportion to its post-payback share of the licences.*" Again, he concludes that it is not accurate therefore to value and share of the Licence by simply pro-rating equity.[966]

(3) Mr Howard further concludes that the structure of both deals indicate that they were viewed as "*short-term investments which would generate a rapid return on capital invested in specific wells/prospects, and that they were not interested in the long-term prospects and wider exploration potential of the whole licence areas.*"[967]

465. In any event, Discovery notes that even Dr Duarte-Silva does not state that he considers the Akard transaction or the proposed Gulf Shores transaction to be comparable transactions (or attempt to substantiate such an argument), nor does he rely on these in any way in his estimate of value (which is based solely on the purchase of the overriding royalty from San Leon).[968]

D. DISCOVERY'S FINAL ALTERNATIVE CASE: SLOVAKIA MUST COMPENSATE DISCOVERY FOR WASTED EXPENSES

466. In the further alternative, Slovakia must (at the very least) be ordered to compensate Discovery for the sunk costs incurred in connection with the project in the total amount of USD 3,736,375.

965 Howard 2 at [339]-[345].
966 Howard 2 at [346]-[352].
967 Howard 2 at [354].
968 Duarte-Silva 1 at [59].

1. Legal principles

467. Investment tribunals have occasionally awarded compensation to investors based upon their out-of-pocket expenses (*i.e.* sunk costs) incurred in connection with a project that has failed as a result of a State's breach of a BIT.[969] This measure of compensation is backwards-looking and seeks to restore the investor to the position it would have been in prior to the investment.

2. Application to the facts

468. Applying these principles, the sunk costs incurred by Discovery in connection with the project fall into three categories:

(1) The amount paid to acquire AOG in March 2014 – €153,054;[970]

(2) The amount paid to reacquire the Royalty in January 2015 – £120,000;[971] and

(3) AOG's share of the exploration expenditures incurred on the project between 2014 and 2020 – €2.8 million.[972]

469. Mr Fraser has converted these three sums into USD at the prevailing exchange rates. The total principal amount claimed by Discovery in respect of sunk costs is therefore USD 3,736,375.[973] Discovery also seeks pre-award interest on this sum, as explained further at [470] *et seq* below.

E. DISCOVERY IS ENTITLED TO COMPOUND INTEREST

470. Finally, Slovakia is also wrong to contend that it should only have to pay simple interest at a rate equal to the Slovak government 10-year bond, together with a six-

---

[969] See *e.g. SPP v Egypt* at [198]-[211], **Exhibit CL-073**; *MTD v Chile* at [237]-[241], **Exhibit CL-016**; *Cengiz İnşaat Sanayi ve Ticaret A.S v Libya*, ICC Case No. 21537/ZF/AYZ, Award, 7 November 2018, at [581]-[594], **Exhibit RL-083**.

[970] See [33] above.

[971] See [37] above.

[972] Fraser 2 at [52]-[53]. See also Spreadsheet of JV Expenditure, 2006-2020, **Exhibit CH-019**. These expenditures were reported by AOG to the MoE in each year pursuant to the terms of Exploration Area Licenses.

[973] Fraser 2 at [52]-[53] and Annex 1.

month "*grace period*" from the date of the Tribunal's award.[974]

471. ***First***, the Tribunal should order Slovakia to pay compound interest. This is necessary in order to ensure full reparation to Discovery. Interest should also be compounded annually. As explained by the tribunal in *Gemplus v Mexico*:[975]

> "[…] it is the universal practice of banks and other loan providers in the world market to provide monies at a cost amounting to or equivalent to compound rates of interest and not simple interest. In addition, it is […] the current practice of international tribunals (including ICSID) is to award compound and not simple interest. In the Tribunal's opinion, there is now a form of *jurisprudence constante* where the presumption has shifted from the position a decade or so ago with the result it would now be more appropriate to order compound interest, unless shown to be inappropriate in favour of simple interest, rather than vice-versa."

472. ***Second***, the Tribunal should order Slovakia to pay pre-award interest on Discovery's alternative cases based on a market comparable approach to valuation and based on sunk costs, as set out at [457] and [466] above. In this regard:

    (1) If the Tribunal were to award compensation to Discovery on its primary case (*i.e.* using Mr Howard's DCF model) Discovery does not seek pre-award interest on the total sum claimed because the valuation date in the Rockflow reports has been set as of the (anticipated) date of the Tribunal's final award.[976] The same analysis applies to Discovery's alternative case based on loss of opportunity to earn profits.

    (2) If, however, the Tribunal were to award compensation to Discovery on its further alternative case (*i.e.* based on a market comparable approach to valuation using comparable companies) then the Tribunal should also order Slovakia to pay both pre-award interest and post-award interest, and such interest should be compounded. The interest rate which should be applied is USD LIBOR plus 4% to reflect the approximate borrowing costs which

---

974 Counter-Memorial at [622].

975 *Gemplus* at [16-26], **Exhibit CL-081**. See also *Gavazzi* at [302]-[306], **Exhibit CL-092** and *Murphy v Ecuador II* at [519]-[520], **Exhibit CL-090**.

976 Memorial at [331].

Discovery would have had to pay.[977] Pre-award interest should accrue from 7 June 2018, being the valuation date referred to at [456(2)] above.

(3) If, however, the Tribunal were to award compensation to Discovery on its final alternative case (*i.e.* sunk costs) the Tribunal should also order Slovakia to pay both pre-award interest and post-award interest, and such interest should be compounded. The interest rate which should be applied is USD LIBOR plus 4% to reflect the approximate borrowing costs which Discovery would have had to pay.[978] As to the date from which pre-award interest should accrue:

(a) Pre-award interest should start to accrue from 2014 onwards (being the first year in which Discovery commenced the project) on the expenditures incurred by AOG on the project during that first year of operations in 2014.

(b) Pre-award interest should also accrue on the additional expenditures incurred by AOG on the project in each year between 2015 to 2020 (on top of the sums incurred in 2014).

(c) Mr Fraser has included a schedule which quantifies the pre-award interest payable by Slovakia in respect of Discovery's further alternative claim for wasted investment costs, applying an interest rate of USD LIBOR plus 4%, compounded annually. The total amount claimed by Discovery in respect of sunk costs (inclusive of pre-award interest) is USD 6,169,761.[979]

473. ***Third***, the Tribunal should order Slovakia to pay post-award interest at the rate of USD LIBOR plus 4%, compounded annually, from the date of the award to the date of final payment.[980] There is no basis for Slovakia to be entitled to a "*grace period*" of 6 months from the date of the Tribunal's award. This would deprive Discovery

---

977 See by analogy *Murphy v Ecuador II*, at [516]-[517], **Exhibit CL-090**.

978 See by analogy *Murphy v Ecuador II*, at [516]-[517], **Exhibit CL-090**.

979 Fraser 2 at [52]-[53], and Annex 1.

980 Memorial at [331], [335(5)].

of its entitlement to full reparation, would represent a windfall to Slovakia and is not supported by the prevailing practice of investment awards.[981]

VIII. REQUEST FOR RELIEF

474. For the reasons set out above, Discovery requests the Tribunal to grant the following relief:

(1) **DECLARE** that it has jurisdiction over Discovery's claims and that Discovery's claims are admissible;

(2) **DECLARE** that Slovakia has breached its obligations to Discovery under the BIT;

(3) **ORDER** Slovakia to compensate Discovery for the loss of the FMV of its investments arising from Slovakia's breaches of the BIT, by paying reparation to Discovery in the form of monetary compensation quantified using a DCF model in an amount to be determined by the Tribunal, but in any event not less than USD 133,054,614 plus an additional USD 1,965,198.39;

(4) in the alternative to (3), **ORDER** Slovakia to compensate Discovery for the loss of opportunity to earn profits arising from Slovakia's breaches of the BIT, by paying reparation to Discovery in the form of monetary compensation in an amount to be determined by the Tribunal, but in any event not less than USD 53,000,000 plus an additional USD 1,965,198.39;

(5) in the alternative to (4), **ORDER** Slovakia to compensate Discovery for the loss of the FMV of its investments arising from Slovakia's breaches of the BIT, by paying reparation to Discovery in the form of monetary compensation quantified using a market comparable method in an amount to be determined by the Tribunal, but in any event not less than USD 36,000,000, plus an additional USD 1,965,198.39;

[981] See *e.g. Murphy v Ecuador II*, at [532], **Exhibit CL-090**.

(6) in the alternative to (5), **ORDER** Slovakia to compensate Discovery for the wasted investment costs arising from Slovakia's breaches of the BIT, by paying reparation to Discovery in the form of monetary compensation in an amount to be determined by the Tribunal, but in any event not less than USD 3,736,375;

(7) **ORDER** Slovakia to pay pre-award interest at a rate and in an amount to be determined by the Tribunal on: (*i*) any monetary compensation ordered pursuant to request for relief (5) or (6) above; and (*ii*) Discovery's legal and other costs as determined by the Tribunal under request for relief (8) below;

(8) **ORDER** Slovakia to pay post-award interest at a rate and in an amount to be determined by the Tribunal on any monetary compensation and costs awarded to Discovery from the date of the Tribunal's award to the date of final payment by Slovakia of the sums due under the award;

(9) **ORDER** Slovakia to reimburse Discovery for all of its legal and other costs incurred in connection with this arbitration, including:

(a) the total premium (including the deferred and contingent premium), plus applicable taxes, payable by Discovery to its ATE insurer (Arcadian Risk Capital Limited); and

(b) the sums payable by Discovery to its funder (24LF Capital LLC) in connection with the funding of Discovery's legal costs;

(10) **GRANT** such further and other relief as the Tribunal considers just and appropriate.

475. Discovery hereby expressly reserves its right to introduce (at a subsequent stage of this arbitration) additional claims, arguments, and evidence.

Respectfully submitted

<table>
<tr><td>Neil Newing / Elliott Phillips
Pietro Grassi / Colin Grech</td><td align="right">Mark Tushingham</td></tr>
<tr><td>SIGNATURE LITIGATION LLP
138 Fetter Lane
London
EC4A 1BT</td><td align="right">TWENTY ESSEX
20 Essex Street
London
WC2R 3AL</td></tr>
</table>

ANNEX 1: EVIDENCE OF AOG COMMUNITY ENGAGEMENT

A. MEETINGS WITH LOCAL MAYORS

476. Throughout the project, AOG met with local mayors to provide information about its proposed exploration activities. As the elected representatives of their communities, the meetings with the local mayors enabled AOG to engage with the communities. For example:

(1) AOG had extensive meetings with the Mayor of Smilno (Mr Vladimír Baran), which included visits to the well site.[982] For instance, on 18 May 2015, AOG representatives met with Mr Baran and took him to visit the well site. Mr Baran recalls that the board of the Smilno Municipality was optimistic about the possibility of foreign investment in Smilno.[983] On 2 June 2015, Mr Lewis met with Mayor Baran along with other council members of Smilno to explain AOG's proposed plans to the other council members. Further meetings took place between AOG and Mayor Baran in July 2015 (see [61(2)] above) and throughout AOG's drilling attempts from late 2015 onwards.[984]

(2) On 18 May 2016, AOG met with the Mayor of Ruská Poruba (Mr Demeter Ferko) for the first time outside of the Town Hall meeting described in paragraph 480 below. AOG and Mr Ferko visited the well site together and Mr Ferko expressed his support to the project. He reported a visit he had received from two individuals from Ol'Ka who had opposed the project and noted that he had asked those individuals not to come back to Ruská Poruba. He also stated that he would assist AOG's permit group in getting all required permits. In that same meeting, Mr Ferko asked AOG to give a presentation to the town council and invited AOG to attend Ruská Poruba's summer festival on 5 July 2016.[985]

---

982 See *e.g.* **Exhibit C-78**, p. 1.
983 Baran 1 at [6].
984 Baran 1 at [8]-[13].
985 Email from Ron Crow, 20 May 2015, **Exhibit C-424**, p. 1; Email from Michael Lewis, 20 May 2015, **Exhibit C-423**, pp. 1-2.

(3) AOG also met with Mayor Vladimir Scerba and the Town Council of Krivá Ol'ka throughout 2015.[986]

(4) AOG also held several meetings with the Mayor Jan Lukáč of Zborov in 2016 and 2017 as well as with the Mayor Stanislav Buvalič of Šarišské Čierne in 2017.

B. TOWN HALL MEETINGS

477. AOG also attended various Town Hall meetings in which it explained to the local community its proposed exploration activities, answered questions about the project and dispelled any misinformation or concerns.

478. On 20 February 2015, representatives of AOG (Mr Ron Crow, Mr Sebastian Lenart, Mr Maciej Karabin and Mr Łukasz Sopel) attended a Town Hall meeting in Ol'ka, which was organised and presided by Mayor Vladimir Scerba. In the meeting, AOG presented on past, current and planned future activities, and corrected the record on some misinformation around the project. For example, four out of circa 30 participants of the Town Hall meeting had come to the meeting thinking that AOG's operation would involve shale gas, which was incorrect. AOG took the time to dispel that misunderstanding. AOG also answered other questions from the audience, following which AOG was left with the impression that they had the support of the majority of Ol'ka's citizens to carry out the planned exploration activities at Krivá Ol'ka.[987]

479. AOG (Mr Lewis, Mr Crow, Mr Benada, Mr Karabin and Mr Lenart) participated in a Town Hall meeting in Smilno on 16 June 2015,[988] during which AOG made a detailed public presentation about its proposed activities to about a hundred residents of Smilno. (According to Mr Baran, this was a significant turn-out, considering the total population of Smilno and the number of people who typically

---

[986] Email from Michael Lewis, 25 February 2015, **Exhibit C-69**; Email from Ron Crow, 20 May 2015, **Exhibit C-424**; Email from Michael Lewis, 20 May 2015, **Exhibit C-423**.

[987] **Exhibit C-69**.

[988] Meeting with the citizens of Smilno, 16 June 2015, **Exhibit C-275**.

attend such meetings.[989]) The meeting was well received and AOG answered various questions from the attendees about the proposed exploration activities. At the end of the meeting, Mr Baran thanked AOG for the presentation. AOG representatives attended a community bonfire on or around 20 June 2015, in which they had the opportunity to continue interreacting with the local community.[990]

480. On 21 June 2015, AOG (Mr Lewis, Mr Fraser, Mr Crow, Mr Benada, Mr Karabin, and Mr Lenart) attended a long Town Hall meeting at Ruská Poruba.[991] Mayor Ferko introduced the AOG team to the circa 20 residents in attendance, following which the AOG team gave a presentation on the project. Given that the selected drilling location did not require the town's approval (it was more than a kilometre outside of the town) the purpose of the meeting was to inform the local community about AOG's activities. AOG's representatives also took the time to answer various questions from the attendees. AOG's presentation was well received, despite the fact that two activists disrupted the Town Hall meeting at the end. Several townspeople were upset with the interruption and behaviour of the activists.[992]

481. On 23 July 2015, representatives of AOG attended a special Town Hall meeting at Smilno to discuss a petition against AOG's activities in Smilno which Mrs Varjanová and VLK had organised (see [76(3)] above). The meeting was also attended by Smilno citizens, council members, and representatives of VLK. During the meeting, VLK strongly pushed for the issuance of a statement making negative remarks about AOG's activities in Smilno. As Mr Baran recalls:[993]

> "The meeting became quite heated because approximately half of the village refused to sign the petition as they did not actually object to AOG's project. However, at around the same time the Municipal Council then began to experience pressure as a result of a campaign on behalf of those who organised the petition, particularly from Mrs Varjanová, to make a statement about the petition. Mrs Varjanová would contact television channels and reporters and requested that Council members answer questions concerning AOG's proposed drilling plans. She would also stop Council members on the street and try and pressure them into answering these types of

---

989 Baran 1 at [11].

990 **Exhibit R-017**; **Exhibit C-78**; Email from Ron Crow, 22 June 2015, **Exhibit C-277**.

991 Meeting with the citizens of Ruská Poruba, 21 June 2015 **Exhibit C-276**.

992 **Exhibit C-78**; Email from Ron Crow, 22 June 2015, **Exhibit C-277**.

993 Baran 1 at [14].

questions. It was very uncomfortable […]"

482. It became clear at the meeting that the Smilno council did not want to issue such an antagonistic statement on behalf of the entire village because almost half of the citizens had refused to sign the petition. The council, however, was forced to issue a statement, but in doing so highlighted that their statement did not have any legal force against AOG's operations.[994]

483. The MoE subsequently dismissed the petition by letter to Mrs Varjanová on 21 August 2015. As mentioned at [76(3)] above, in its letter the MoE said that "*the petition submitted by the residents of the village of Smilno cannot be granted.*"[995]

C. MEETINGS WITH BUSINESSES AND CHURCH LEADERS

484. In addition to meeting with local mayors and other politicians, AOG also understood the importance of meeting with local leaders who were not government officials. These included meetings with members of the church and local businesses. For example:

    (1) On 27 April 2015, AOG met with the Catholic Church Archbishop's Office in Prešov, including their lawyer and head of the financial group. On that occasion, AOG and the Catholic Church discussed how they could work together to accomplish AOG's goal of drilling wells and the Church's goal of replenishing the labour market with offers that would stop reducing the 'brain drain' from the Prešov region. The representatives of the Church explained to AOG that many inhabitants of Prešov had to undergo long commutes to their jobs or to move to other regions in order to find a job.[996] The Church offered to identify areas that could be potentially interesting for AOG for drilling purposes in which they had priests who had established a good relationship with the local community. AOG saw this as a good opportunity to engage

---

994 Baran 1 at [14]-[15].

995 *Ropa v Smilne*, 24 December 2015, **Exhibit C-288**.

996 See also in this regard Baran 1 at [10].

with the local community and to obtain a positive response from local inhabitants to the drilling project.[997]

(2) On 28 April 2015, AOG met with Mr Ivan Barna, the owner of a hotel and one of the community leaders of Smilno, who promised to assist organising a meeting with the Mayor and the Town Council of Smilno. Mr Barna said that he was aware of the opposition faced by AOG in Ol'ka, but he did not anticipate that AOG would encounter the same difficulty in Smilno. Mr Barna also informed AOG that he owned a construction company and that he was willing to provide a quote on AOG's locations so AOG could compare with the quotes received to that date. In an email by Mr Ron Crow to Mr Michael Lewis, Mr Crow highlighted that engaging Mr Barna's company would have the benefit of employing local people,[998] which had been discussed the day before with representatives of the Catholic Church.

D. PRESS CONFERENCES AND INTERVIEWS WITH LOCAL MEDIA

485. As explained below, AOG attended several press conferences and gave interviews to the local media to ensure that the community would be kept informed about the project. AOG also maintained its own publication, *Ropa Na Východe* (which translates as: '*Oil in the East*'), which was distributed to residents of Smilno and other communities, and contained informative articles written on behalf of AOG. In addition to *Ropa Na Východe*, AOG communicated important developments and updates to the local community through the publication of press releases.

486. On 27 April 2015, AOG met with local newspaper and TV company, *Slovensky Vychod Regionalne noviny*, and gave an interview. During the interview, AOG confirmed that it would be willing to hold a press conference open to all the media in the region in the near future.[999]

487. On 12 May 2015, the regional newspaper, *Slovenky Vychod*, published an article written by Anna Kornajová. The article discussed AOG's plans to conduct

[997] **Exhibit C-72**, p. 1.
[998] **Exhibit C-72**, p. 2.
[999] **Exhibit C-72**.

exploratory drilling in the village of Ol'ka. The article also addressed the opposition from some of the residents. Throughout the article, there was confirmation that AOG had all the necessary permits, as well as permission for survey operations from the MoE. The article also quoted Mr Benada's explanation that AOG would be conducting the survey activities in such a way that all conditions of the licences would be met. The article concluded with a direct quote from Mr Benada: [1000]

> "[I]f the survey is successful, the company can be expected to bring new job opportunities for locals to the region. The biggest benefit from our activity will be for the municipalities on whose cadastral territories the hydrocarbons will be extracted. AOG will try to communicate with the local communities, to seek the most viable option for cooperation within the framework of the dialogue, to avoid misunderstandings and respect as much as possible the requirements for nature protection in this unique part of Slovakia".

488. On 16 and 17 May 2015, Mr Crow met with an internet news group, *actuality.sk*, and gave an interview in Bratislava.[1001] On 19 May 2015, Mr Crow also met with the press in Košice and gave an interview for the TV station, *TA3*.[1002]

489. On 6 April 2016, Mr Benada participated in a live debate on Radio Regina with Mrs Mat'ová from the MoE and Mrs Varjanová. Mr Benada informed the listeners of Radio Regina about AOG's project. During the live debate, Mrs Mat'ová confirmed that AOG had followed all procedures required by law and had obtained the necessary authorisations to carry out its activities. She also clarified that, from a legal perspective, the consent of the people was not necessary for AOG to proceed with the project. Mr Benada took the opportunity to invite Mrs Varjanová to join the fact-finding trip to the Czech Republic discussed in Section E below.[1003] However, Mrs Varjanová did not take up this invitation.[1004]

490. In May 2016, *Ropa Na Východe* published an article directly addressed to the inhabitants of Smilno. The article contained a detailed summary of AOG's

---

1000 Slovenky Vychod Article, 12 May 2015, **Exhibit C-274**.

1001 Email from Ron Crow, 20 May 2015, **Exhibit C-424**, p. 1; Email from Michael Lewis, 20 May 2015, **Exhibit C-423**, p. 1.

1002 Email from Ron Crow, 20 May 2015, **Exhibit C-424**, p. 2; Email from Michael Lewis, 20 May 2015, **Exhibit C-423**, p. 2.

1003 Email from Vladimír Miškovičík, 6 April 2016, **Exhibit C-304**.

1004 Fraser 2 at [47].

proposed exploration programme in Smilno (including a timeline) and the benefits it would offer to the local community. The article highlighted that: (*i*) between 2006 and 2016, article AOG had paid significant Licence fees to the Slovak government for its exploration activities and part of those fees went directly to Smilno; and (*ii*) AOG used various local suppliers such as consultants, carriers, and hospitality providers. AOG also pledged to assist with the removal of a black waste dump near Smilno, to work with local colleges and universities to promote the skills necessary for the successful development of the local mining industry, and to look into other ways to assist with further development of the Smilno village. The article also set out AOG's contact details to enable Smilno's residents personally to reach out to ask any questions about the project.[1005]

491. On 17 June 2016, AOG issued a press release titled "*Construction work on an exploratory well in the village of Smilno has started*".[1006] The press release explained that the preparatory work and subsequent drilling at Smilno was expected to take approximately two months. The press release also said that:

    (1) as part of the preparatory work, AOG had modified the access road to the drilling location and in the near future, at its own expense, it would also ensure the removal of an illegal waste dump near the village of Smilno; and

    (2) considering that many households in the region were not connected to the public water supply, AOG would offer support to municipalities in developing and building their water facilities.

492. In July 2016, *Ropa Na Východe* published a further article which sought to debunk some of the myths surrounding AOG's project. Notably, the article clarified that AOG was not planning to extract shale gas and oil, only conventional deposits of oil and natural gas, and would not be performing fracking. Any oil or natural gas to be extracted would pass through a double-jacketed steel pipe as the steel and the solid casing would prevent contact with the surrounding rocks and the environment, particularly any drinking water supplies. The article further clarified that the

[1005] Ropa Na Východe Article, May 2016, **Exhibit C-305**.
[1006] AOG Press Release, 17 June 2016, **Exhibit C-317**.

number one rule and duty of every exploratory well was to isolate sources of potable water and to protect aquifers from any drilling activity. Any water source would be separated from the beginning of the drilling activities. Importantly, the article recalled that the MoE had issued an expert opinion which stated that all the exploration work carried out by AOG had been in accordance with the requirements for the protection of the environment. In addition, the article mentioned that millions of Euros had been allocated local municipalities impacted by AOG's activities from the Licence fees paid by AOG since 2006.[1007]

493. On 9 November 2016, AOG issued a press release titled "*Continuation of work on the exploration well in the village of Smilno*".[1008] The press release stated that AOG was preparing to resume work at the Smilno Site "*in the coming days*". The press release also stated:

> "Since 2006, Alpine Oil and Gas has so far paid approximately EUR 3.8 million for fees for the exploration area in Slovakia and has not yet produced any oil or gas. Half of these fees have gone directly to the municipalities concerned. […]
>
> No toxic substances are injected into the soil during this work, and there is no fracking, shale gas or shale oil involved in any way. […]
>
> The company currently uses the services of various local suppliers, such as consultants, carriers, or providers of accommodation and catering services. If the well is successful, the company anticipates that it will significantly contribute to the development of the local economy, directly employ local residents and indirectly support many other jobs at the local level."

494. In late November 2016, *Ropa Na Východe* published a further article in which it explained to the local community that, between 16 June 2016 and 22 August 2016, experts from the Department of State Geological Service of the MoE had inspected the location of the well in Smilno to ascertain whether AOG had fulfilled the conditions for the execution of geological works. The article also informed readers that, in their final report, the members of the expert commission unanimously stated that AOG fulfilled and continued to fulfil all contractual conditions in accordance

[1007] Ropa Na Východe Article, July 2016, **Exhibit C-328**.

[1008] AOG Press Release, 9 November 2016, **Exhibit C-344**, pp. 1-6.

with Slovak law.[1009]

495. On 16 December 2016, the newspaper *DennikN* published an interview with Mr Benada and Mr Fraser regarding AOG's project.[1010] Mr Fraser and Mr Benada explained why they expected to find hydrocarbons in Slovakia, that a pipeline could be built for oil depending on the volumes, that gas could be supplied to local consumers in the Prešov region, and that AOG and its partners had invested millions of Euros in exploration activities in Slovakia since 2006.

496. On 5 April 2017, AOG issued a press release informing the public that it voluntarily had submitted a request for an EIA investigation for each of the exploratory wells.[1011]

E. Coach Trips to Czech Republic

497. On 22 April 2016, Mr Stanislav Benada, AOG's country manager, led a fact-finding trip for approximately 40 people (including Mayor Baran, other elected representatives and residents of Smilno and Zborov, as well as journalists) to visit well sites in Moravia in the Czech Republic to visit well sites where oil and gas extraction was in progress and to demonstrate how the proposed well would look and operate at Smilno. The fact-finding visit was well-received and illustrated clearly, to those participating, the wider benefits to the local community, which in this case had been able to secure additional investment in social infrastructure such as roads and schools.[1012]

498. AOG also organised a second fact finding trip to Moravia on 31 May 2016, for about twelve local journalists. This was the first time that many of these journalists saw the equipment and machinery for oil and gas activities. The feedback from the journalists was very positive.[1013]

[1009] Ropa Na Východe Article, November 2016, **Exhibit C-341**.

[1010] DennikN Article, 16 December 2016, **Exhibit C-351**.

[1011] AOG Press Release, 5 April 2017, **Exhibit C-171**.

[1012] Fraser 1 at [48]; Baran 1 at [23]; AOG Status Update, 11 May 2016, **Exhibit C-308**, p. 1; AOG Press Release, **Exhibit C-422**.

[1013] Email from Vladimír Miškovičík, 7 June 2016, **Exhibit C-311**.

F. LETTERS TO THE LOCAL COMMUNITY

499. Before the re-commencement of operations at the Smilno drilling location, a letter and survey were prepared and sent to all Smilno residents.[1014] The purpose of the letter was to inform the community about AOG's plans to commence operations. The survey was also important as an indicator in identifying the level of support from the Smilno residents. As recorded in the Status Update of 11 May 2016 and consistent with the previous surveys, AOG expected that a large majority of the residents of Smilno would support AOG's activities.[1015] Consistent with this evidence, Mr Fraser confirms that the majority of residents of Smilno were supportive of AOG's activities.[1016] Mr Baran's evidence is to the same effect.[1017]

G. SUPPORT FOR LOCAL BUSINESSES

500. Throughout the project, the activities of AOG contributed significantly to local businesses as AOG sought services from the local hospitality sector and hired local construction and security firms.

501. AOG supported the hospitality sector of the Smilno village as the entire AOG team used the Alnus Hotel in Smilno as a base during operations, often holding meetings with stakeholders and local businesses at the hotel.[1018] AOG's continued use of the services provided at Alnus were greatly appreciated by staff members.[1019] AOG also took further steps to build a relationship with the local hotel as they arranged for the owner of the Alnus, Mr Ivan Barna, to visit the potential well site in Smilno to review the construction works and get input from other community leaders.[1020] The success of the Alnus Hotel was directly connected to the success of AOG's

---

1014 Status Update, 11 May 2016, **Exhibit C-308**.

1015 Status Update, 11 May 2016, **Exhibit C-308**.

1016 Fraser 2 at [51].

1017 Baran 1 at [13], [15], [31].

1018 Snowball Communications Press Release, 6 February 2017, **Exhibit C-364**; Status Update and Activity Summary, 16 February 2016, **Exhibit C-298**; Notice of Operating Committee Meeting, 16 February 2016, **Exhibit C-299**; Email from Michael Lewis, 5 August 2015, **Exhibit C-281**.

1019 Email from Stansilav Benada, 7 May 2016, **Exhibit C-306**.

1020 Email from Michael Lewis, 12 May 2015, **Exhibit C-273**.

activities.[1021]

502. AOG also worked closely with the local security company, ZAPO, at the Smilno location. AOG liaised with ZAPO to secure the Road protecting people from possible injury and the equipment from possible damage.[1022]

503. AOG also hired a local construction company, GMT, to work on the Road in June 2016.[1023]

504. At various points throughout the project, AOG also made the use of local legal and PR advisers to ensure they took the most appropriate actions during operations. For example, a meeting was held on 27 April 2016 with local legal and PR advisors to discuss the planned re-commencement of operations at the Smilno and Krivá Ol'ka drilling locations. In these discussions, AOG carefully considered what procedures they would have in place to navigate resistance from protesters.[1024]

H. LICENCE FEES ALLOCATED TO MUNICIPALITIES

505. A proportion of the annual Licence fees—which were paid to Slovakia between 2006-2021—were allocated to local municipalities in which AOG was proposing to carry out its exploration activities.[1025] In particular, §26(5) of the Geology Act provides that the MoE "*shall remit to the municipality the part of the fee under paragraph 4 within 30 days of collection of such fee*".[1026]

506. Between 2006 and 2020, AOG paid over €4 million in annual Licence fees to the Slovak Government.[1027] In the light of the MoE's obligation under §26(5) of the Geology Act, it is clear that a substantial proportion of those fees were paid to the municipalities to invest in local projects and social infrastructure. Indeed, in December 2016, Minister Sólymos publicly acknowledged that €1.8 million of

[1021] Snowball Communications Press Release, 6 February 2017, **Exhibit C-364**.

[1022] Affidavit of Maciej Karabin, 17 November 2016, **Exhibit C-346**.

[1023] Email from Maciej Karabin, 18 May 2016, **Exhibit C-309**.

[1024] AOG Status Update, 11 May 2016, **Exhibit C-308**.

[1025] Memorial at [35]; Geology Act, §26(4)-(5), **Exhibit C-218**, pp. 17-18.

[1026] Geology Act, §26(5), **Exhibit C-218**, pp. 17-18.

[1027] Spreadsheet of License Expenditure, 2006-2020, **Exhibit CH-019**. See also Memorial at [38(iv)], [45(iii)], [65], [139].

AOG's license fees had been paid to "*affected municipalities*" since 2006.[1028]

I. SPONSORSHIP AND CO-OPERATION

507. Throughout the project, AOG sponsored local community groups and community activities. For example:

    (1) In late December 2015, AOG sponsored a Christmas ball that took place in Smilno on 5 January 2016.[1029]

    (2) On 27 September 2016, AOG sponsored the local football club in Smilno.[1030]

    (3) In July 2017, AOG sponsored a religious festival in a town called Habura held in north-eastern Slovakia on 8-9 July 2017.[1031]

    (4) AOG co-operated with the National Park in Polonina and local communities which led to the preparation of educational boards near the water reservoir in Starina.[1032]

[1028] Minister Sólymos Article, *Denník N*, 3 December 2016, **Exhibit C-348**, p. 2.

[1029] Email from Maciej Karabin, 23 December 2015, **Exhibit C-425**.

[1030] Sponsorship Agreement between AOG and Smilno Football Club, 27 September 2016, **Exhibit C-335**.

[1031] Letter from Michael Lewis, 26 July 2017, **Exhibit C-376**, p. 2.

[1032] Fraser 2 at [50(b)].

ANNEX 2: DISCOVERY'S RESPONSE TO SLOVAKIA'S DETAILED CRITICISMS OF ROCKFLOW'S DCF MODEL

A. SLOVAKIA'S NINE KEY CRITICISMS OF THE INPUTS TO THE DCF MODEL ARE MISCONCEIVED

508. Slovakia and its quantum experts have raised nine key criticisms to the inputs used in Rockflow's DCF model.[1033] For the reasons set out below, these nine criticisms are misconceived.

1. Slovakia is wrong to contest Mr Atkinson's opinion that the Licence areas are "*on trend*" with Polish oil fields

509. Slovakia's first key criticism relates to Mr Atkinson's opinion that the three blocks covered by AOG's Exploration Area Licences are "*on trend*" with analogous Polish oil fields.[1034] It is important to recall that Mr Atkinson's comparison between the Licence areas and Polish oil fields is only one component of Mr Atkinson's overall opinion on the prospectivity of the Licence areas. In addition, Mr Atkinson has:

(1) reviewed the exploration history undertaken in Slovakia since the middle of the 19th century, which leads him to conclude that the Licence areas are "*prospective for commercial oil and gas*";[1035]

(2) analysed the tectonic history of the Licence areas and its petroleum system, which in his opinion "*confirms the presence of all the necessary components of a working petroleum system*" in the Licence areas;[1036]

(3) evaluated and interpreted an extensive body of data for the Licence areas (including data from drills of 26 wells between 1896 and the 1950s; seismic data collected by AOG between 2008-2011; gravity data collected by AOG

[1033] Counter-Memorial at [501]-[529].

[1034] Atkinson 1 at [31] and [81]-[86]; Counter-Memorial at [502]-[507].

[1035] Atkinson 1 at [29]-[48].

[1036] Atkinson 1 at [49]-[65].

in 2012 and reinterpreted in 2021; and the EGI Study) which he has compiled into a dataset to support his estimation of PIIP.

510. As to Mr Atkinson's opinion that the Licence areas are "*on trend*" with Polish oil fields, he explained in his first report that:[1037]

> "It is standard practice to use analogues in resource estimation, particularly in the exploration and early development stages of a project when information is limited. I have used the area across the border in Poland as an analogous geological basin, and fields within that basin as analogous oil and gas fields. I consider them to be analogous fields as they have comparable reservoirs and fluid types to those prognosed in my prospects.
>
> 'On trend' is a phrase used to signify that prospects share characteristics with analogue fields that are located in adjacent analogous geological settings."

511. In his second report, Mr Atkinson explains in detail why he disagrees with Dr Longman's opinion that the Licence areas are not "*on tend*" with analogue oil fields in southern Poland.[1038] In summary, Mr Atkinson explains that:[1039]

    (1) He disagrees with Dr Longman's opinion that the Silesian Nappe is not analogous to the Magura Nappe;

    (2) Even if Dr Longman were correct, this would have "*no bearing*" on Mr Atkinson's estimates of PIIP and GCOS and "*little bearing*" on his benchmarking analyses; and

    (3) The Silesian Nappe and the Dukla Nappe are "*more similar to each other than the Silesian and Magura Nappes and the Silesian Nappe can be used as an analogue to the Dukla Nappe*", but this point has "*no significant bearing*" on his analysis.

512. Slovakia also asserts that: (*i*) Dr Longman has analysed Rockflow's data from the Magura Nappe; and (*ii*) Dr Longman's analysis shows that "*historical production from the Magura nappe averages less than 0.5 MMstb per accumulation*" which is

---

1037 Atkinson 1 at [81]-[82].
1038 Longman 1 at [9]-[13].
1039 Atkinson 2 at [58]-[94].

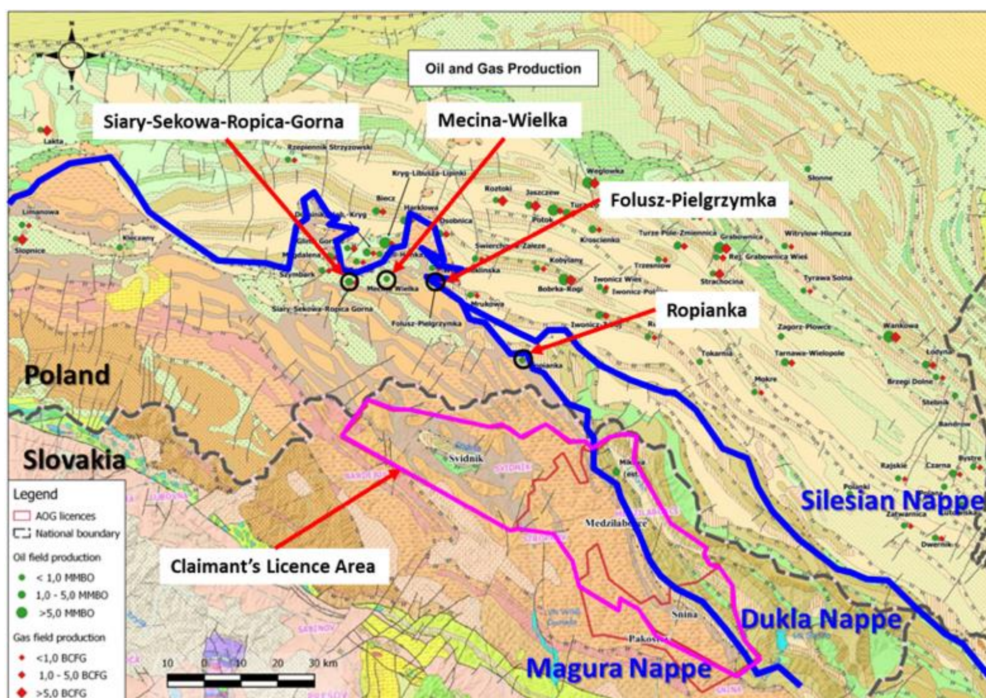
"*below Discovery's own economic viability threshold*".[1040] In response, Mr Atkinson explains that Dr Longman's assessment is "*incorrect*" because he is "*not comparing like with like*", as he is comparing the minimum economic volume which is based on in-place volumes (*i.e.* oil actually underground) with the oil volumes produced (*i.e.* actually recovered to surface), the latter of which will be much smaller, reducing the minimum economic volume threshold.[1041] When using the correct comparators, a "*better interpretation*" of the same dataset shows four substantial commercial oil fields in Poland which are adjacent to the Licence areas which significantly exceed the minimum economic threshold (as revised by Mr Howard in his reply report[1042]) of 0.75 MMstb in-place/0.19MMstb recoverable.[1043]

513. Mr Atkinson's overall opinion is as follows (emphasis added):[1044]

> "In summary, the presence of four commercial oil discoveries on the Polish Magura and Dukla Nappes (Figure 3-2) means that it is not 'extremely unlikely' that substantial accumulations of hydrocarbons will be found on the Claimant's licence area as Dr Longman believes, but that **it is very reasonable to assume that substantial accumulations of hydrocarbons will be found, since the Claimant's licence area comprises extensions of both the Magura and Dukla Nappes**."

514. Mr Atkinson illustrates his opinion in this regard (with references to the Magura and Dukla Nappe oil fields) by reference to the following map:[1045]

[1040] Counter Memorial at [505]; Longman 1 at [21].
[1041] Atkinson 2 at [21].
[1042] Howard 2 at [168]-[177]
[1043] Atkinson 2 at [22].
[1044] Atkinson 2 at [24].
[1045] Atkinson 2 at [24] (figure 3-2).



2. Slovakia has exaggerated the impact of Dr Moy's calculation error in relation to oil leads

515. Slovakia's second key criticism is that Dr Moy has made a "*calculation error for every oil lead"* because he incorrectly used metric units (m^3/m^3) when he should have used normal field units (scf/stb) for the oil formation volume factor (B_o).[1046] Dr Moy accepts that he made a calculation error in this regard. However, Dr Moy disagrees with Dr Longman about the impact of the error.[1047] Slovakia has exaggerated the impact of this calculation error.

516. Dr Moy explains that this was a "*single error on a spreadsheet*" which has now been corrected and which results in "*reduced in-place values for each of the oil prospects*".[1048] Importantly, however, this error has no impact at all on the in-place gas volumes calculated by Rockflow.[1049] Instead, it only relates to oil prospects.

517. Contrary to Slovakia's assertion, this error does not result in a 40% drop in

[1046] Counter-Memorial at [508]-[509].
[1047] Moy 2 at [30].
[1048] Moy 2 at [34].
[1049] Moy 2 at [34].

Rockflow's overall estimated oil volumes.[1050] The "*arithmetic average of the [over-estimates for the] three prospects in the original 2022 P50 case […] is 13.1%, not the 40% as stated in Dr Longman's report*".[1051] The revised B_o calculations in Dr Moy's report have been used in the subsequent analyses performed by Mr Howard in his DCF valuation, resulting in a USD 27.8m reduction in quantum.[1052]

3. Slovakia's criticisms of Mr Atkinson's probabilistic estimates for PIIP are baseless

518. Slovakia's third key criticism is that Rockflow has allegedly "*skewed its probabilistic model*" for estimating PIIP in order to produce "*artificially high results*".[1053] This criticism is baseless. As Mr Atkinson explained in his first report (emphasis added):[1054]

> "PIIP can never be precisely estimated, and it is standard industry practice to make low, mid and high estimates for the potential volumes of oil and gas in exploration prospects. This can be done using either deterministic or probabilistic methods. I have chosen to use the **probabilistic method which is more commonly used for the estimation of in-place volumes in exploration prospects**."

519. Specifically, Mr Atkinson has used a "*Monte Carlo simulation*" to derive a probabilistic range of volumes for estimated PIIP.[1055] A Monte Carlo simulation is an "*approach to solving mathematical problems which relies on random sampling to obtain results*".[1056] Leading oil and gas industry guidelines support the use of a Monte Carlo simulation to estimate "*the range of uncertainty in recoverable quantities for a project*".[1057] As Mr Atkinson explained:[1058]

> "The result of this Monte Carlo simulation is a 'probabilistic' range of volumes. The values are placed in increasing order, and the value which is exceeded by 90% of other values is termed the 90th percentile, or P90 value. Similarly the median value

[1050] Counter-Memorial at [509]; Longman 1 at [84].
[1051] Moy 2 at [37].
[1052] Moy 2 at [37]; Howard 2 at [290] and Table 9-1 and Figure 16.
[1053] Counter-Memorial at [510]-[512]; Longman 1 at [95]-[97].
[1054] Atkinson 1 at [126].
[1055] Atkinson 1 at [127].
[1056] Atkinson 1 at [212].
[1057] See *e.g.* Society of Petroleum Engineers, *Guidelines for Application of the Petroleum Resources Management System*, 2011, **Exhibit AA-001**, at pp. 15-16, p. 78, and p. 82.
[1058] Atkinson 2 at [214]-[215].

is exceeded by 50% of values and is termed the P50 value, while the value exceeded by only 10% of results is termed the P10 value. The arithmetic average of all values is the mean value, sometimes referred to as Pmean.

It is industry standard practice to quote the P90, P50 and P10 values as representative of the low, mid and high volumetric estimates of the volume distribution, respectively."

520. Dr Longman has not performed his own Monte Carlo simulation. Moreover, Dr Longman admits that he has not even performed a "*detailed review of the Monte Carlo modelling*" undertaken by Mr Atkinson.[1059] Dr Longman asserts that Mr Atkinson's probabilistic model is "*skewed towards high outcomes*".[1060] In response, Mr Atkinson explains why this is incorrect. In fact, because the data is too uncertain to use a deterministic approach, the use of the probabilistic approach is not only more appropriate (because it is based on evidence), but also conservative (because a deterministic approach is likely to have resulted in much larger volumes).[1061]

4. Slovakia is wrong to contend that Mr Atkinson's estimates of GCOS are "*inflated*"

521. Slovakia's fourth key criticism relates to Mr Atkinson's estimates of the GCOS of recovering PIIP from each of the 40 prospects.[1062] To recap, in his first report, Mr Atkinson used industry standard techniques to assess the probability of success ("**POS**") of "*six individual risk elements for each prospect*" and then multiplied these risk elements together to establish the overall GCOS for each prospect.[1063] Mr Atkinson summarised these six risk elements in Table 3-6 of his first report:[1064]

1059 Longman 1 at [98].
1060 Longman 1 at [96].
1061 Atkinson 2 at [100]-[107].
1062 Counter-Memorial at [513]-[514].
1063 Atkinson 1 at [183].
1064 Atkinson 1 at [183].

	Risk element	Description	Grouped risk element
1	Trap	Likelihood that the structure containing hydrocarbons exists as defined	Containment
2	Seal	Likelihood that hydrocarbons can be sealed (retained) within the trap	
3	Reservoir presence	Likelihood that the anticipated reservoir facies will be present in the trap	Reservoir
4	Reservoir effectiveness	Likelihood that the reservoir facies will be able to produce hydrocarbons	
5	Source effectiveness	Likelihood that source rocks are present and mature	Source
6	Migration & timing	Likelihood that hydrocarbons can move into the trap after it has been formed	

Table 3-6 Prospect geological chance of success elements

522. Of these six risk elements, 'trap' is the "*most significant risk element in all prospects*" and "*each prospect has independent trap risk, i.e. the success of drilling one prospect does not depend on whether an exploration well on any other prospect was successful in finding at trap*".[1065] Mr Atkinson allocated a POS for each risk element using the following matrix, shown in Annex 4.8 of his first report:[1066]

Chance of Success	Level of Knowledge		
	Low	Mid	High
ALMOST CERTAIN	65%	85%	95%
VERY LIKELY	60%	75%	85%
PROBABLE	55%	60%	70%
50/50 CHANCE	50%	50%	50%
POSSIBLE	45%	40%	30%
VERY UNLIKELY	40%	25%	15%
EXTREMELY UNLIKELY	35%	15%	5%

Table 4-2 Risk element chance of success matrix

523. Mr Atkinson's overall opinion on GCOS in his first report was as follows:[1067]

> "I have estimated GCOS for all prospects to be in the range from 8.7% to 32.7% with an average of 19.3%, I note that these estimates are conservative compared to world-wide averages reported in 2012 of 35%."

524. As a starting point, Discovery notes that Dr Longman: (*i*) has not performed his

---

1065 Atkinson 1 at [189].

1066 Atkinson 1 at [235] and [184] (the reference here to "*Annex 0*" is a typo for Annex 4.8).

1067 Atkinson 1 at [22], [188] and [196].

own alternative estimate of the GCOS;[1068] and (*ii*) has not addressed the extensive supporting analysis set out in Annex 4.8 of Mr Atkinson's first report.[1069] In his reply report, Mr Atkinson (*i*) explains why many of Dr Longman's criticisms are unfounded; and (*ii*) justifies the POS he has allocated to each risk factor.[1070]

525. Nevertheless, Mr Atkinson has taken on board certain of Dr Longman's criticisms and he has made a small adjustment to the POS for one risk factor (migration/timing). This results in revised GCOS estimates for the 40 prospects and a slightly lower average GCOS.[1071] Mr Atkinson's overall opinion according to his revised estimates is as follows:[1072]

> "My revised average GCOS is 18.6% (compared to 19.3% previously), ranging from a low of 8.7% to a high of 31.1% (compared with a range from 8.7% to 32.7% previously)."

526. This revised average GCOS of 18.6% is still substantially lower than the worldwide reported average of 35%.[1073] This demonstrates that Mr Atkinson's revised estimates are "*reasonable by comparison to the worldwide average*".[1074]

5. Mr Atkinson's calculations of oil prospects are not "*overstated by a factor of 30*"

527. Slovakia's fifth key criticism is that "*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*".[1075] This is incorrect and Dr Longman's report does not even support Slovakia's assertion. As Mr Atkinson observes, "*Dr Longman has not disputed the size of my gas prospects*".[1076] Accordingly, Slovakia is wrong to assert that Mr Atkinson's estimates for gas prospects are overstated by a factor of 30.

[1068] Atkinson 2 at [126].
[1069] Atkinson 2 at [126].
[1070] Atkinson 2 at [124]-[152].
[1071] Atkinson 2 at [131] (Table 6-1). *Cf.* Atkinson 1 at [189] (Table 3-8).
[1072] Atkinson 2 at [132].
[1073] Atkinson 1 at [188] and Atkinson 2 at [70].
[1074] Atkinson 2 at [70].
[1075] Counter-Memorial at [515].
[1076] Atkinson 2 at [109].

528. As to oil prospects, it is curious that Slovakia and Dr Longman assert (on the one hand) that Polish oil fields are not analogous and yet Slovakia and Dr Longman seek (on the other hand) to compare Mr Atkinson's analysis with Polish oil fields. Discovery submits that this comparison only serves to reinforce Mr Atkinson's opinion that the Licence areas are "*on trend*" with analogous Polish oil fields.[1077]

529. Mr Atkinson explains why Dr Longman has presented a "*flawed*" analysis to support his assertion that Mr Atkinson's oil prospects are overstated by a factor of 30 in comparison with Polish oil fields. Dr Longman's analysis is flawed because, once again, he is "*not comparing like for like*".[1078] Indeed, the inclusion by Dr Longman of numerous small Polish fields skews the size distribution considerably. A correct analysis of the Polish data shows that Mr Atkinson's identified oil prospects are "*consistent with Polish field sizes*", with Dr Moy noting that "*the Polish Carpathian fields have achieved historic oil recoveries of 12% to 32% […] [which] compares very well with the recovery of the 'But-for' developed prospects which range from 16% to 23%*".[1079]

6. Dr Moy's material balance calculations are not "*overstated by a factor of 20*" in comparison with Polish oil fields

530. Slovakia's sixth key criticism relates to Dr Moy's use of the material balance method to generate production profiles for each prospect. Slovakia asserts, by reference to Dr Longman's report, that Dr Moy's MBal calculations are "*overstated by a factor of 20*" when compared to producing Polish oil wells.[1080]

531. As a preliminary point, Discovery reiterates the point made at [528] above relating to Slovakia's comparison with Polish oil fields. In any event, Dr Longman's criticisms are wrong.

532. To recap, in his first report, Dr Moy explained that he had selected the "*material balance method*" (which is a reservoir engineering method) to "*generate production*

1077 See [509]-[514] above.
1078 Atkinson 2 at [109]; Moy 2 at [67].
1079 Atkinson 2 at [110]-[111]; Moy 2 at [67]-[70].
1080 Counter-Memorial at [518].

profiles for each of the prospects assuming successful exploration drilling and subsequent development".[1081] This is a "*standard reservoir engineering technique*".[1082] Dr Moy then used "*industry software called 'MBal' and 'Prosper'*" to calculate "*expected flow rates and ultimate recoveries*" for the oil and gas prospects.[1083]

533. Dr Longman claims that the use of the material balance method in this case is inappropriate.[1084] Dr Moy explains why he disagrees, noting that the method is described at length in "*numerous reservoir engineering textbooks including two standard reference works by Laurie Dake*".[1085] Dr Longman does not cite to any published materials to justify his opinion that the method is inappropriate.

534. Dr Longman also claims that, according to Dr Moy's calculations, the oil prospects "*on average, produce roughly 20 times more oil per well than the known Polish fields already in production*".[1086] In response, Dr Moy explains why Dr Longman's analysis is flawed. In summary:[1087]

(1) Dr Longman has not provided either (*i*) the source data for the Polish fields; or (*ii*) the underlying calculations to support his assertion.

(2) Dr Longman has made further "*unsubstantiated*" claims by reference to uncited material.

(3) A comparison with data from comparable Polish fields shows that Dr Moy's calculations are "*comparable to the Polish Carpathians oil fields*".

7. Mr Howard's optimal well count analysis is not "*15 times higher*" than the best recorded Polish wells

535. Slovakia's seventh key criticism relates to Mr Howard's optimal well count

1081 Moy 1 at [128]-[129].
1082 Moy 1 at [129].
1083 Moy 1 at [130].
1084 Longman 1 at [113].
1085 Moy 2 at [171]-[177].
1086 Longman 1 at [114].
1087 Moy 2 at [85]-[97].

analysis.[1088] To recap, Mr Howard determined an optimum well count for the development schemes described by Dr Moy in order to "*calculate the effect on economic value of production profile scenarios relating to different well counts*".[1089] A higher well count will result in larger quantities of hydrocarbons being produced over a shorter period of time. However, as Mr Howard observed:[1090]

> "[…] a higher well count incurs higher costs, as more wells are required, which has the opposite effect of increasing development costs and so reducing project value. There is therefore a 'sweet spot' for well count at which value is maximised."

536. Dr Longman asserts that Mr Howard's analysis has "*no credible value*" because it rests upon Dr Moy's material balance calculations which Dr Longman also finds to be inappropriate.[1091] For the reasons already summarised at [533]-[534] above, Dr Longman's opinions in this regard are flawed.

537. Dr Longman also seeks to compare Mr Howard's analysis with Polish wells. Dr Longman asserts that "*Mr Howard's 10 MMstb/well is over 15 times greater than the best wells recorded in Polish fields identified as analogues by Mr Atkinson*".[1092] Once again, however, Dr Longman's comparison with Polish wells and his calculations are incorrect, as explained by Mr Howard. In particular, Mr Howard makes clear that the "*well recoveries quoted in my optimisation analysis are not used directly in my DCF valuation model*" and that it appears that Dr Longman "*may have misunderstood the purpose of the optimal well count analysis*".[1093]

538. Mr Howard also notes that, once again, Dr Longman "*presents no alternative values or analysis, and provides no hard evidence that the values are inappropriate*".[1094]

8. Well counts for the same leads are consistent as between Dr Moy's report and Mr Howard's report

539. Slovakia's eighth key criticism is that "*divergent well counts for the same leads*

1088 Counter-Memorial at [521]-[522].
1089 Howard 1 at [101].
1090 Howard 1 at [103].
1091 Longman 1 at [132].
1092 Longman 1 at [134].
1093 Howard 2 at [152]-[153].
1094 Howard 2 at [156].

appear across the Moy and Howard reports".[1095] Dr Moy confirms that:[1096]

(1) there were typos contained in the well count values used in Tables 9-1 and 9-2 of Dr Moy's first report; but

(2) these incorrect values (as shown in Dr Moy's first report) were not used by Mr Howard in his analysis; and accordingly

(3) the error identified by Slovakia has "*no impact on the calculations*" performed by Mr Howard.

9. Mr Howard's ECOS calculations for each well are not greater than the GCOS for each well

540. Slovakia's ninth key criticism is that Mr Howard's calculations of each well's Economic Chance of Success ("**ECOS**") are greater than its GCOS.[1097] Mr Howard accepts that there was an error in this regard, but explains that this appears to have arisen solely as a result of an issue with the relevant software, and he has rectified this in his revised valuation.[1098] Accordingly, the criticism is no longer relevant.

B. Slovakia's Seven Subsidiary Criticisms of the DCF Model are Misconceived

541. In addition, Slovakia and its quantum experts have raised seven further subsidiary criticisms of the DCF model and the assumptions on which it is based.[1099] For the reasons given below, these criticisms are equally misconceived.

1. Rockflow's analyses are not contradicted by Discovery's contemporaneous documents

542. Slovakia notes that: (*i*) the number of prospects identified by Rockflow is higher than the number identified by Discovery in 2017 and by EGI in its 2021 study; and

---

[1095] Counter-Memorial at [524]; Longman 1 at [145].
[1096] Moy 2 at [116]-[117]. See also Howard 2 at [220]-[222].
[1097] Counter-Memorial at [526]-[528]; Longman 1 at [138]-[139].
[1098] Howard 2 at [188] and Appendix 1.
[1099] Counter-Memorial at [530]-[608].

(*ii*) Rockflow's estimate of PIIP is higher than Discovery's estimate in 2017.[1100]

543. As to point (*i*), Mr Atkinson explains that:[1101]

> "In accordance with my instructions, I have made an independent estimate of PIIP, resulting in 40 prospects, a greater number than those shown in the source material referenced by Dr Longman. This was an entirely independent assessment, and used mapping provided by EGI which was not available in 2017. Because different maps were used, and prospects are based on these maps, there is no reason to suppose that the same number of prospects as had previously been described would be generated."

544. Discovery also reiterates that, whilst Mr Atkinson has made an independent estimate of PIIP based on 40 prospects, Mr Howard's DCF model is "*only based on the volumes of the P50 development case (i.e. 5 gas and 3 oil prospects), not the total volume of all 40 prospects*".[1102] The P50 development case involving 8 prospects is therefore not dissimilar to the number of prospects identified by Discovery in 2017 (*i.e.* 7 prospects) and by EGI in its 2021 study (*i.e.* 5 prospects).[1103]

545. As to point (*ii*), Dr Longman's comparison between Rockflow's estimate of PIIP (836 MMboe) and Discovery's contemporaneous estimate in 2017 (170 MMboe) is misplaced.[1104] As Mr Atkinson notes, this difference in volume "*is a natural consequence of the greater number of prospects*."[1105] Furthermore:

    (1) Rockflow's 836 MMboe estimate of PIIP is based on a total of 40 prospects. By contrast, the P50 development case which is used for the purposes of Mr Howard's DCF model only uses 8 prospects[1106] which results in a significantly lower volume of 82.4 MMboe.[1107]

1100 Counter-Memorial at [530]-[533]; Longman 1 at [61]-[62].
1101 Atkinson 2 at [112.1].
1102 Atkinson 2 at [113].
1103 Atkinson 2 at [112.3]-[112.4].
1104 Longman 2 at [62].
1105 Atkinson 2 at [113].
1106 Atkinson 2 at [113].
1107 Atkinson 2, Table 7-3.

(2) Rockflow's 836 MMboe estimate of PIIP across 40 prospects is reasonable by comparison with (*i*) analogous Polish fields; and (*ii*) a report produced by Gaffney, Cline & Associates in 2009 for Aurelian.[1108]

2. Slovakia's criticisms of Rockflow's resource classification are unfounded

546. Slovakia asserts that (*i*) Rockflow's DCF model requires the Tribunal to assume that Discovery would have discovered hydrocarbons which would have been classified as Reserves; but (*ii*) Discovery's resources were only prospective resources and not reserves.[1109] Slovakia's case rests on Dr Longman's opinions,[1110] with which Dr Moy disagrees.[1111] The Tribunal should prefer Dr Moy's opinions.

547. It is common ground that the Petroleum Resource Management System ("**PRMS**") published by the Society of Petroleum Engineers is the appropriate classification system to use to determine whether resources can be classified as reserves.[1112] It is also common ground that, in order for a recoverable volume to be classified as reserves under the PRMS, seven commercial criteria must be fulfilled.[1113]

548. In his first report, Dr Moy explained in detail why each criterion was satisfied.[1114] Slovakia devotes many pages of its Counter-Memorial to a detailed discussion of each criterion.[1115] By contrast, Dr Longman's opinions on this subject are light on detail. His key point is that:[1116]

> "Dr Moy considers the chance of developing any risked hydrocarbon volumes discovered, and therefore the chance of commerciality, as 100%. I consider that figure to be untenable as it does not consider the reality of what might be discovered in terms of volumes and reservoir parameters (producibility of hydrocarbons) or the

---

1108 Atkinson 2 at [113].
1109 Counter-Memorial at [534]-[541].
1110 Longman 2 at [119]-[122].
1111 Moy 2 at [123]-[146].
1112 Memorial at [315]; Moy 1 at [208]-[225]; Counter-Memorial at [542]; Longman 1 at [120]-[121]. See Society of Petroleum Engineers, PRMS, 2018, **Exhibit AA-037**.
1113 Moy 1 at [224]; Longman 1 at [121]. See also Society of Petroleum Engineers, PRMS, 2018, **Exhibit AA-037**, at [2.1.2.1].
1114 Moy 1 at [224]-[225].
1115 Counter-Memorial at [550], [558]-[574].
1116 Longman 1 at [119].

> logistics of any development (particularly in light of historical access issues)."

549. In response, Dr Moy accepts that a 100% chance of development is required for contingent resources to be classified as reserves.[1117] However, "*this has nothing to do with uncertainty related to volumes nor to reservoir parameters as claimed by Dr Longman*".[1118] Dr Moy continues:[1119]

> "Dr Longman confuses resource classification with resource categorisation. Uncertainty in volumes to be recovered is not defined by the resource classification (i.e whether volumes are reserves or resources according to their chance of commerciality) but through the resource categorisation (i.e volume ranges defined as 1P, 2P, 3P (1C, 2C, 3C) or, for a probabilistic approach, P90, P50 and P10).
>
> On reflection of Dr Longman's comments concerning the chance of commerciality, I believe that, following the discovery of hydrocarbons, Discovery would have gone on to have developed those discoveries. I summarise the criteria required for discovered volumes to be considered as reserves (¶134) and I reiterate my belief that, in the 'But-For' case these criteria would be met, there would therefore be a 100% chance of development and discovered volumes would be considered as reserves."

550. Dr Moy then goes on to explain why he considers that, in a But For Scenario, the seven criteria in the PRMS would be satisfied such that the resources can be classified as Reserves.[1120] Dr Moy's opinion in this regard forms the basis of the primary valuation derived by Mr Howard's DCF model, producing an overall figure of USD 133,054,614.[1121]

551. Dr Moy has also presented an alternative scenario if the Tribunal decides that some of the seven criteria are not satisfied such that the chance of commercially is less than 100%.[1122] In this alternative scenario, Discovery's resources would be classified as contingent resources (not reserves), and Dr Moy has pro-rated the chance of commerciality as being 90% for the oil projects, and 85% for the gas projects.[1123] Mr Howard has then presented an alternative valuation in his DCF

1117 Moy 2 at [124].
1118 Moy 2 at [124].
1119 Moy 2 at [125.1]-[125.2].
1120 Moy 2 at [135].
1121 Howard 2 at [303].
1122 Moy 2 at [137].
1123 Moy 2 at [138]-[142].

model using Dr Moy's alternative scenario, producing an overall figure of USD 115.04m.[1124]

3. Dr Moy has presented a revised development plan, taking into account Dr Longman's comments

552. Slovakia's next criticism relates to Dr Moy's assumed development plan for the oil and gas prospects.[1125] Slovakia asserts, by reference to Dr Longman's report[1126], that Dr Moy's plan is "*unrealistic*".[1127] In response, Dr Moy has taken on board Dr Longman's comments and he has presented a revised development plan which is then reflected in Mr Howard's DCF model.[1128] Accordingly, Slovakia's criticisms are no longer valid.

4. Slovakia's criticisms of Discovery's anticipated costs are unfounded

553. Slovakia's next criticism relates to the inputs used in Mr Howard's DCF model for Discovery's CAPEX, fixed OPEX and variable OPEX.[1129] Mr Lewis explains why Slovakia is wrong to criticise these costs, pointing to the extensive experience which he and Mr Crow have of the costs involved in drilling wells in Hungary, Poland, Romania and elsewhere.[1130] Mr Lewis rejects Slovakia's assertion that these figures are "*speculative*".[1131] Mr Howard further notes that *"Dr Longman does not suggest alternative costs or specify which element he considers to be inaccurate"*[1132]and that as a result *"Dr Longman has produced no credible evidence that the cost estimation is understated"*.[1133]

554. Dr Longman's position appears to be based on his suggestion that Discovery's

---

[1124] Howard 2 at [311] and Table 9-5.
[1125] Counter-Memorial at [576]-[584]. See Moy 1 at [125], [197]-[206], [224.1].
[1126] Longman 2 at [144]-[149].
[1127] Counter-Memorial at [582].
[1128] Moy 2 at [98]-[122].
[1129] Counter-Memorial at [585]-[587], referring to Cost Estimation Summary Spreadsheet, **Exhibit C-213**.
[1130] Lewis 2 at [46].
[1131] Lewis 2 at [46].
[1132] Howard 2 at [256].
[1133] Howard 2 at [257].

anticipated costs are unreasonable in comparison with the costs incurred in developing the Lubiatów field in northern Poland.[1134] Mr Howard explains that the Lubiatów field is not comparable.[1135] Mr Longman's comparison is therefore flawed.

5. It is reasonable to assume that Discovery would have been able to finance the project

555. Slovakia's next criticism is that Discovery would not have been able to finance the project.[1136] There is no proper foundation for this criticism.

556. ***First***, Discovery has already explained in Section VI above that Discovery did not lack the necessary funding during the project.[1137]

557. ***Second***, this was not a project where Discovery was 'going it alone'. Discovery already had the support of its JV Partners who would have financed their 50% share of the total expenditures of the project in a But For Scenario.

558. ***Third***, it is clear that Discovery would have been able to fund its 50% share of the expenditures in a But For Scenario. As Mr Howard explained in his first report:[1138]

> "[…] The financing of the exploitation of the Claimant's licence areas can be treated as two distinct phases. Firstly, financing of the exploration wells which is subject to exploration risk, and secondly the funding of the development phase once resources have been discovered."

559. As to the <u>first phase</u> (the exploration phase):

    (1) In October 2015, Discovery entered into a funding agreement with Akard under which Akard agreed to provide total funding of USD 3.7m to fund three exploration wells that were planned to be drilled by AOG.[1139] In a But For

---

1134 Longman 2 at [152]-[153].

1135 Howard 2 at [262]-[270]. See also Moy 2 at [72]-[77] and [97].

1136 Counter-Memorial at [588]-[595].

1137 See [391] *et seq* above.

1138 Howard 1 at [271].

1139 Agreement between Discovery and Akard, 23 October 2015, **Exhibit C-282**.

Scenario, it is reasonable to assume that Akard would not have defaulted on its obligations.

(2) Moreover, Mr Lewis confirms that he would have been able to fund Discovery's share of at least four further wells from his own resources, making a total of seven wells, if required.[1140] Mr Lewis explains in his second statement that he owns significant royalties from other producing assets which he could have sold to fund these additional exploration wells, if that proved necessary.[1141]

(3) Mr Howard's opinion is that the chance of at least one success across these seven exploration wells would have been 77.74% and he therefore concludes that "*there is a high probability the prospect drilling programme*" laid out in his decision-tree analysis "*would be accomplished*".[1142] Mr Howard confirms that this has not materially changed following the revisions made by Mr Atkinson to the GCOS %.[1143]

(4) It is therefore clear that, in a But For Scenario, Discovery would have been able to fund its 50% share of the exploration expenditures.

(5) Slovakia points out (correctly) that exploration wells do not generate revenue and that Discovery would have needed to obtain additional permits and approvals to exploit any oil and gas discovered in the Licence areas.[1144] This point is addressed separately at [567] *et seq* below.

560. As to the <u>second phase</u> (the development phase):

(1) Mr Howard explains that "*[d]evelopment financing of the fields differs fundamentally from the exploration phase in that geological risk has been*

1140 Lewis 1 at [34].
1141 Lewis 2 at [45].
1142 Howard 1 at [277].
1143 Howard 2 at [312]-[314].
1144 Counter-Memorial at [590].

resolved" and "*[a]fter one or more discoveries have been made, obtaining development finance is relatively straightforward*".[1145] In this scenario:[1146]

(a) A Competent Person's Report ("**CPR**") would be obtained which would independently audit and verify the discovered resources;

(b) Resources which are classified as reserves would be eligible for "*reserve-based lending*"; and

(c) The CPR could also be used to obtain corporate finance or additional equity finance.

(2) Mr Howard also explains that it may not have been necessary for Discovery to obtain reserve-based lending because "*corporate finance could also be sought and may be obtained on more favourable returns*".[1147] In this regard, and as Mr Howard explains:

(a) Mr Howard's DCF model for the P50 development case produces an Internal Rate of Return ("**IRR**") of 34.8% for the combined oil and gas field developments.[1148]

(b) This is comfortably above the estimated cost of capital for Discovery and would be attractive for bank financing.[1149]

(c) The total required development finance for the project is "*small relative to the project revenues*".[1150] Total project revenue is approximately USD 2,432.76 million, whereas Discovery's maximum cash exposure is USD 39.66 million.[1151]

(d) The project would achieve payback during 2024 and be debt free

1145 Howard 1 at [279].
1146 Howard 1 at [279].
1147 Howard 1 at [280].
1148 Howard 2 at [315].
1149 Howard 2 at [316].
1150 Howard 1 at [281].
1151 Howard 2 at [317]-[319].

thereafter, and "*[c]ontinued development can be self-funded from free cash flow*".[1152] The project would thus be self-financing and Discovery would not have needed to seek further external funding.

(3) Mr Howard therefore concludes that "*obtaining development finance for the development scheme for the P50 discovered resources in the 'But For' case is highly likely to be successful*".[1153]

561. Furthermore, Mr Lewis notes that on a *"[l]onger term"* basis, after almost all of the exploration wells had been drilled, "*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*".[1154]

6. It is reasonable to assume that AOG would have reacquired Licence areas which were reduced or relinquished

562. Next, Slovakia contests Discovery's assumption in a But For Scenario that AOG (together with JKX and Romgaz) would have reacquired Licence areas which were reduced/relinquished in 2016 and 2018, *i.e.* to restore the Licences to the position they were in as at the time of Discovery's acquisition of AOG in March 2014.[1155] Slovakia asserts that AOG had "*no certainty*" this would have occurred in a But For Scenario.[1156] There is no proper foundation for Slovakia's assertion.

563. ***First***, there is no basis for Slovakia to assert that Discovery must satisfy a higher standard of proof (*i.e* a "*certainty*" that the Licences would have been reacquired). Discovery need only establish, on the balance of probabilities or the preponderance of evidence, that the Licences would have been reacquired.

564. ***Second***, under Article 24(7) of the Geology Act, AOG enjoyed a preferential right to reapply for any Licence areas which were reduced or relinquished.[1157] As Mr

---

1152 Howard 2 at [318]; Howard 1 at [281].
1153 Howard 1 at [282].
1154 Lewis 1 at [33].
1155 Memorial at [298(4)]; Counter-Memorial at [596].
1156 Counter-Memorial at [600].
1157 Memorial at [190]; Geology Act, Article 24(7), **Exhibit C-219**. See also Fraser 1 at [62].

Fraser explains:[1158]

> "This approach, involving a temporary reduction in the area of the Licences followed by a re-application for the same area at a later date with a view to reducing the licence fee cost, had been discussed with the Ministry of Environment on more than one occasion, most recently by Stanislav Benada at his meeting at the Ministry of Environment on 9 February 2016, and they had accepted it."

565. It was on this basis that AOG (*i*) applied to the MoE to reduce the Licence areas in April 2016 (which led the MoE subsequently to issue the 2016 Licences for a further term of 5 years);[1159] and (*ii*) applied to relinquish the Licences for the Medzilaborce and Snina blocks in 2018.[1160] Slovakia asserts that AOG did not have an automatic right to reacquire the Licences because the MoE would need to "*properly assess[]*" any such application.[1161] In a But For Scenario, there is no basis to suppose that the MoE would have rejected AOG's application.

566. ***Third***, Slovakia asserts that (since 1 January 2019) the MoE has a discretion under Article 23(11)(h) of the Geology Act not to issue a Licence if its issuance is "*contrary to [the] public interest*".[1162] In a But For Scenario:

(1) AOG would have applied to reacquire the Licences before 1 January 2019. Accordingly, the MoE would not have been able to invoke Article 23(11)(h).

(2) Moreover, Article 23(11)(h) only applies where the MoE is considering an application "*for determination of [an] exploration area*".[1163] The exploration areas had already been determined by the MoE in 2006 when the Licences were first issued to Aurelian.[1164] Any application by AOG under Article 24(7) to reacquire the Licences would not engage Article 23(11)(h).

(3) In any event, the reacquisition by AOG of the Licences would not have been contrary to the public interest, not least because: (*i*) as the MoE had previously

---

1158 Fraser 1 at [63]. See in this regard Email from Mr Benada, 9 February 2016, **Exhibit C-124**.

1159 Fraser 1 at [63].

1160 Memorial at [190].

1161 Counter-Memorial at [599].

1162 Counter-Memorial at [599].

1163 Geology Act (version effective 1 January 2019), Article 23(11), **Exhibit R-105**.

1164 Memorial at [33]-[35].

stated, the Geology Act presupposes that "*geological and closely related mining activities are, from a general point of view, activities in the public interest*";[1165] (*ii*) fostering domestic oil and gas exploration and production (to improve Slovakia's energy security) was an essential security interest of Slovakia, as indicated by Article 4(1) of the Slovak Constitution[1166] and successive energy policies adopted by the Slovak Government from at least 2006 onwards;[1167] and (*iii*) the MoE had repeatedly granted and extended the Exploration Area Licences to Aurelian/AOG between 2006-2016.

7. It is reasonable to assume that Discovery would have been granted all additional permits and approvals by Slovakia

567. Slovakia asserts it is "*unrealistic*" to assume in a But For Scenario that AOG would have obtained additional permits and approvals in order to extract any hydrocarbons discovered in the Licence areas.[1168] There is no basis for Slovakia's assertion.

568. ***First***, Slovakia concedes that AOG had a "*priority right*" to apply for a Mining Area Licence.[1169] In a But For Scenario, it is reasonable to assume that the MoE would have granted a Mining Area Licence to AOG, having regard to at least the following matters:

(1) Successive energy policies adopted by Slovakia from 2006 onwards acknowledged Slovakia's need to diversify its energy supplies, reduce its near-total dependence on Russian imports and improve its energy security.[1170] On the assumption that hydrocarbons would have been discovered by AOG in the Licence areas, it is more likely than not that the MoE would have granted a Mining Area Licence to AOG to enable domestic production of oil and gas in order to achieve Slovakia's stated policy goals.

1165 See [360] above.
1166 Slovak Constitution, Article 4(1), **Exhibit C-244**.
1167 Memorial at [6]-[12].
1168 Counter-Memorial at [604].
1169 Counter-Memorial at [605].
1170 Memorial at [6]-[9].

(2) This assumption is reinforced by considering the statistics of successful applications for Mining Area Licences in order to extract hydrocarbons, which the District Mining Offices provided in response to freedom of information requests filed by AOG's attorney. Between 2008-2020, 17 applications for Mining Area Licences were filed by various organisations. Of these 17 applications, 16 applications were granted by the District Mining Offices.[1171] Based on these statistics, AOG had a 94% chance of obtaining a Mining Area Licence in order to extract hydrocarbons.[1172]

(3) Slovakia stood to gain significant royalty and tax revenues from the exploitation of the Licence areas by Discovery. As explained by Mr Howard, Slovakia would have earned in excess of USD 677 million in royalties and taxes (expressed in 2024 real-terms) from the project based on Rockflow's modelling.[1173] This is a sizable figure. Given these large monetary incentives, it is inherently likely that Slovakia would have granted a Mining Area Licence to AOG.

569. ***Second***, Slovakia asserts there is "*no certainty*" that AOG would have obtained additional permits and approvals from other Slovak State agencies in order to extract hydrocarbons.[1174] Discovery repeats the point already made at [563] above: Discovery need only establish, on the balance of probabilities or the preponderance of evidence, that AOG would have obtained these additional permits and approvals. In a But For Scenario, it is reasonable to assume that AOG would have obtained these additional permits and approvals:

(1) Having regard to the points already made at [568(1)]-[568(3)] above, it is inherently likely that AOG would have obtained additional permits and approvals from the District Mining Offices. Discovery's team had ample

[1171] Letters from the District Mining Offices, August 2020, **Exhibit C-426**. As to the relationship between the Main Mining Office and the District Mining Offices, see Memorial at [32].

[1172] The only reason why the other application was refused was because the original licence holder had been wound up and the applicant was only its legal successor and the authority concluded that it did not wish to grant a Mining Area Licence to the applicant.

[1173] Howard 2 at [307].

[1174] Counter-Memorial at [607], referring to the list of such permits at [606].

experience of permitting well and other oilfield operations across the globe, as well as access to external permitting consultants.[1175]

(2) It is also reasonable to assume that AOG would have obtained either landowner consent to carry out its activities or compulsory access orders under Article 29 of the Geology Act. Slovakia owned a substantial amount of land covered by the Licence areas, including land managed by State Forestry.[1176] As Mr Fraser explains, it was always part of AOG's plan to work with Slovakia to use State-owned land for the purposes of its drilling prospects.[1177] This concept was specifically discussed during AOG's meeting with State Forestry in April 2015 and they were "*willing to cooperate*", which led AOG to enter into the Lease with State Forestry.[1178] In a But For Scenario, it is reasonable to assume that Slovakia would have granted other leases over State-owned land to enable AOG to carry out its exploration activities and subsequently to exploit the Licence areas (as Slovakia did with NAFTA).[1179]

(3) Slovakia accepts that if the planned exploitation did not exceed 500t of oil per day or 500,000m^3 of gas per day, AOG did not automatically need to perform a Full EIA before extracting hydrocarbons.[1180] Dr Moy's production profiles confirm that only one of the P50 prospects (oil field LU07D) would exceed that threshold.[1181] For all others, AOG would have needed to submit an application for Preliminary EIA clearance. In a But For Scenario, there is no basis to assume that the District Offices would have ordered AOG to perform a Full EIA before carrying out its exploitation activities. In this regard, Slovakia cannot pray in aid the EIA Decisions which were issued by the District Offices in 2017-2018 in respect of AOG's exploration activities. As explained earlier, these decisions were not based on any rational evidential foundation, involved an arbitrary application of Slovak law and were

1175 Fraser 2 at [6].
1176 Fraser 2 at [28]-[31]. See also Atkinson 2 at [46.5] and [163].
1177 Fraser 2 at [30].
1178 Fraser 2 at [30].
1179 See [362] above.
1180 Counter-Memorial at [606(c)].
1181 Moy 2, Tables 3-3 and 3-4.

inconsistent with numerous earlier statements attributable to Slovakia which had concluded that AOG's exploration activities were not likely to have any significant adverse effect on the environment.[1182] In a But For Scenario, the Tribunal must assume that the District Offices would have acted lawfully and not arbitrarily.

(4) If the planned exploitation exceeded 500t of oil per day or 500,000m^3 of gas per day, as would be the case for oil field LU07D as noted above, Discovery accepts that AOG would have needed to perform a Full EIA before extracting any hydrocarbons. However, there is no basis to assume that, at the end of the Full EIA process, the District Offices would have prevented AOG from extracting hydrocarbons. Slovakia has not pointed to any examples where operators were prevented from extracting hydrocarbons in Slovakia after a Full EIA process was undertaken. There is no basis to assume that, if the District Offices were acting lawfully and not arbitrarily, the outcome of the Full EIA process would have prevented AOG from extracting any hydrocarbons across any of its Licences.

[1182] See [168]-[175] above.

ANNEX 3: GLOSSARY OF DEFINED TERMS

Defined Term	Description
2006 Licences	The exploration area licences granted by the MoE which permitted Aurelian/AOG to explore for crude oil and natural gas in three blocks located in the Prešov region in northern Slovakia (the Svidník block, the Medzilaborce block and the Snina block): **C-2**, **C-3** and **C-4**
2010 Licences	The extension to the 2006 Licences granted by the MoE in 2010 for a further term of four years until 2014: **C-5**, **C-6** and **C-6**
2014 Licences	The extension to the 2010 Licences granted by the MoE in 2014 for a further term of two years until 2016: **C-8**, **C-9** and **C-10**
2016 Licences	The extension to the 2014 Licences granted by the MoE for a further term of five years until August 2021: **C-12**, **C-13** and **C-14**
2018 Licence	The decision by the MoE in 2018 to reduce the area of the Svidník licence and to require AOG to perform a Preliminary EIA: **C-15**
Access Land	The term used by Slovakia to describe the Road used to access the Smilno Site from the Smilno village (this term is apt to mislead and therefore Discovery uses the term Road)
Act on Explosives	Act No. 58/2014 Coll. on Explosives: **R-046**
Act on Forests	Act No. 326/2005 Coll. on Forests: **R-070**
Act on Mining Activities	Act No. 51/1988 Coll. on Mining Activities: **R-044**
AFEs	AOG's Authorisation for Expenditure proposals, as approved by JKX and Romgaz
Akard	Akard Acquisitions 2001 LLC
Akard Agreement	The agreement between Discovery and Akard under which Akard agreed to provide funding of USD 3.7m in certain tranches between October 2015 and April 2016: **C-282**
Alpine	The term used in some documents to refer to AOG

Defined Term	Description
Amendment / Addendum No. 1	The agreement signed by AOG and State Forestry on 14 January 2016 to amend the Lease in respect of the Krivá Ol'ka Site by extending its term until 1 August 2016: **C-116**
AOG	Aurelian Oil & Gas Slovakia s.r.o.
Atkinson 1	The first expert report of Alan Atkinson, submitted by Discovery with its Memorial
Atkinson 2	The second expert report of Alan Atkinson, submitted by Discovery with its Reply
ATPI	The Agreement on Transfer of Participation Interests signed by Aurelian, AOG Finance Limited and Discovery on 24 March 2014: **C-55**
Aurelian	Aurelian Oil & Gas plc (formerly Aurelian Oil & Gas Ltd)
BIT	The Treaty between the Czech and Slovak Federal Republic and the United States of America concerning the Reciprocal Encouragement and Protection of Investment dated 22 October 1991: **C-1**
But For Scenario	The scenario in which, "but for" Slovakia's unlawful conduct, AOG would have been able to commence drilling exploration wells no later than 1 January 2017
Civil Code	Act No. 40/1964 Coll. the Civil Code: **R-062** and **LF-01**
Construction Act	Act No. 50/1976 Coll. on Spatial Planning and Construction Order: **R-060**
Cooperative / Biodružstvo Smilno	Agricultural Cooperative Biodružstvo Smilno
CRA Report	The first expert report of Dr. Tiago Duarte-Silva and Richard Acklam from Charles River Associates, submitted by Slovakia with its Counter-Memorial
DCF	Discounted cash flow
Directive 94/22/EC	Directive 94/22/EC of the European Parliament and of the Council dated 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons: **C-27**
Discovery	Discovery Global LLC (the Claimant in this arbitration)
Dynamic	Slovak lobbying firm engaged by Discovery/AOG

Defined Term	Description
ECOS	Economic Chance of Success
EGI Study	An independent geological study published by the Energy & Geoscience Institute (a branch of the University of Utah with links to Slovakia) commissioned by Discovery, published in 2022 and referred to in Atkinson 1: **AA-002**
EIA	Environmental Impact Assessment
EIA Act	Act No. 24/2006 on Environmental Impact Assessment: • Version effective prior to 1 January 2017 (prior to EIA Amendment): **C-224 / R-082** • Version effective after 1 January 2017 (after EIA Amendment): **C-225** / **R-045**
EIA Amendment	The amendment to the EIA Act passed by the Slovak legislature on 25 November 2016: **C-225** / **R-045**
EIA Condition	The new condition imposed by the MoE in the 2018 Licence requiring AOG to perform a Preliminary EIA
EIA Decisions	The term used to describe: • The decision of the Bardejov District Office dated 2 August 2017 ordering AOG to perform a Full EIA at Smilno: **C-176**; and • The decision of the Humenné District Office dated 7 September 2017 ordering AOG to perform a Full EIA at Ruská Poruba: **C-179**; and • The decision of the Medzilaborce District Office dated 18 October 2017 ordering AOG to perform a Full EIA at Krivá Ol'ka: **C-186**
EIA Directive	The term used to describe: • Directive 2011/92/EU of the European Parliament and of the Council dated 13 December 2011 on the assessment of the effects of certain public and private projects on the environment: **R-083**; and • Directive 2014/52/EU of the European Parliament and of the Council dated 16 April 2014 on the assessment of the effects of certain public and private projects on the environment: **R-086**.
Exploration Area Licences	The term used to refer to the 2006 Licences and all subsequent extensions granted by the MoE
Exploration Areas	The blocks covered by the Exploration Area Licences (namely Svidník, Snina, and Medzilaborce)

Defined Term	Description
FET	Fair and equitable treatment
FET Standard	The standard contained in Article II(2)(a) of the BIT
FIAs	[redacted]
FMV	Fair market value
Fogaš ER / Fogaš 1	The first expert report of Doc. JUDr. Ľubomír Fogaš, CSc, submitted by Slovakia with its Counter-Memorial
FPS	Full protection and security
Fraser 1	The first witness statement of Alexander Fraser, submitted by Discovery with its Memorial
Fraser 2	The second witness statement of Alexander Fraser, submitted by Discovery with its Reply
Full EIA	An order issued by a District Office under the EIA Act requiring a compulsory assessment of the environmental impacts of a project
GCOS	The geological chance of success for prospects in the Exploration Area Licences, as estimated by Mr Atkinson
Geology Act	Act No. 569/2007 Coll. on Geological Works: • Version effective prior to 1 November 2013: **C-218** • Version effective after 1 November 2013: **C-219**
Gulf Shores	Gulf Shores Resources Ltd
Howard 1	First expert report of Colin Howard, submitted by Discovery with its Memorial
Howard 2	First expert report of Colin Howard, submitted by Discovery with its Reply
IEA	International Energy Agency
ILC Articles	International Law Commission *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*: **CL-054**
Interim Injunction	The interim injunction granted by the Bardejov District Court on 18 February 2016 which prevented AOG from using the Road
JKX	JKX Oil & Gas plc

Defined Term	Description
JOAs	The Joint Operating Agreements pursuant to which AOG was the Operator for each Exploration Area Licence
JV Partners	Discovery/AOG's joint venture partners (*i.e.* JKX and Romgaz)
Krivá Ol'ka Site	The site for the exploration well located on State-owned forestry land near the village of Krivá Ol'ka
Lease	The lease agreement signed by AOG and State Forestry on 4 May 2015 in respect of the Krivá Ol'ka Site
Leško WS / Leško 1	The first witness Statement of Mr. Ľuboš Leško, submitted by Slovakia with its Counter-Memorial
Lewis 1	The first witness statement of Michael Lewis, submitted by Discovery with its Memorial
Lewis 2	The second witness statement of Michael Lewis, submitted by Discovery with its Reply
Licences	The term used to refer to the Exploration Area Licences
LOI	The Letter of Intent signed by Discovery and San Leon on 1 December 2013: **C-50**
LSR / State Forestry	The term used by Slovakia to refer to the State-owned entity responsible for managing and administering State-owned forests, Lesy Slovenskej republiky, štátny podnik (which Discovery refers to as State Forestry)
MFN	Most favoured nation
Mining Act	Act No. 44/1988 on Protection and Use of the Natural Resources: **C-216** / **R-048**
Mining Area Licence	The separate licence granted by the MoE under the Mining Act which enables the holder to extract any hydrocarbons discovered under an Exploration Area Licence
MoA	Ministry of Agriculture
MoE	Ministry of Environment
Moy 1	The first expert report of Dr Simon Moy, submitted by Discovery with its Memorial
Moy 2	The second expert report of Dr Simon Moy, submitted by Discovery with its Reply
MST	Minimum standard of treatment
MT	Magneto-telluric

Defined Term	Description
NAFTA	NAFTA a.s. (the Slovak oil and gas company in which the Slovak State holds a 56.15% ownership stake)
NAFTA Lease	The lease agreement signed by NAFTA and State Forestry on 20 May 2014: **C-255**
National Treatment Standard	The standard contained in Article II(1) of the BIT
Nature Protection Act	Act No. 543/2002 on Nature and Landscape Protection: **R-043**
Non-Impairment Standard	The standard contained in Article II(2)(b) of the BIT
OCM	Operating Committee Meeting
Old Geology Act	Act No. 313/1999 on Geological Works (which was applicable until 1 November 2009 when it was superseded by the Geology Act): **C-217**
Operating Subsidiaries	Dukla Oil & Gas s.r.o., Magura Oil & Gas s.r.o. and Radusa Oil & Gas s.r.o.
PCIJ	Permanent Court of International Justice
PIIP	The petroleum initially in place in for prospects in the Exploration Area Licences, as estimated by Mr Atkinson
Police	Slovak Police Force
Police Act	Act No. 171/1993 Coll. on Police Forces: **R-067**
Poruba Injunction	The interim injunction granted by the Humenné District Court on 27 November 2015 which ordered the Urbariát to allow AOG to use the Poruba Track to access the Poruba Site
Poruba Site	The site for the exploration well located on privately-owned farmland near the village of Ruská Poruba
Poruba Track	A 0.5 km track which ran from the village of Ruská Poruba across different land plots to the Poruba Site
Preliminary EIA	A preliminary screening process under the EIA Act to determine whether a project is likely to have significant adverse effects on the environment
PRMS	Petroleum Resource Management System (a classification system created by the Society of Petroleum Engineers to classify oil and gas resources)

Defined Term	Description
Road	The publicly accessible road which runs from the Smilno village to the Smilno Site
Road Act	Act No. 135/1961 Coll. on Roads: **C-221** / **R-057**
Road Decree	Decree No. 35/1984 on Roads: **C-223**
Road Traffic Act	Act No. 8/2009 Coll. on Road Traffic: **C-214** / **R-057**
Rockflow	Rockflow Resources Ltd
ROI	Return on investment
Romgaz	S.N.G.N. Romgaz S.A. (the Romanian State-owned oil and gas company)
Royalty / Overriding Royalty	The agreement signed by AOG and Aurelian on 24 March 2014 by which AOG granted an overriding royalty to Aurelian of 7% net (3.5% gross) of any petroleum recovered from Licence areas: **C-59**
San Leon	San Leon Energy plc
SLO	Social licence to operate
Slosarčíková WS / Slosarčíková 1	First witness statement of JUDr. Vladislava Slosarčíková, submitted by Slovakia with its Counter-Memorial
SLR Report	Expert Report of Dr. Chris Longman from SLR Consulting
Smilno Roads / Cesty Smilno	Cesty Smilno s.r.o.
Smilno Share	The 1/700 co-ownership share of the plot of land on which the Road is located which AOG purchased for the sum of €100 on 17 December 2015: **C-101**
Smilno Site	The site for the exploration well located on privately-owned farmland near the village of Smilno
Sólymos WS / Sólymos 1	First witness statement of Mr. László Sólymos, submitted by Slovakia with its Counter-Memorial
SPA	The sale and purchase agreement signed by Aurelian, AOG Finance Ltd and Discovery on 24 March 2014: **C-56**
SPP	Slovenský Plynárenský Priemysel a.s. (the Slovak State-owned domestic supplier and importer of natural gas)

Defined Term	Description
State Geological Institute	State Geological Institute of Dionygz Štúr
Stevček 1	First expert legal opinion of Professor JUDr. Marek Števček on certain issues of Slovak law, submitted by Discovery with its Memorial
Stevček 2	Second expert legal opinion of Professor JUDr. Marek Števček on certain issues of Slovak law, submitted by Discovery with its Reply
Trans-Wiert	Trans-Wiert sp. z o.o.
ÚGKK	Slovakia's Office of Geodesy, Cartography and Cadastre
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
Varjanová WS / Varjanová 1	First witness Statement of Ms. Marianna Varjanová, submitted by Slovakia with its Counter-Memorial
VCLT	Vienna Convention on the Law of Treaties: **CL-014**
VLK	A Slovak environmental NGO
WACC	Weighted Average Cost of Capital

ANNEX 4: DRAMATIS PERSONAE

	Name	Description
REPRESENTATIVES OF DISCOVERY/AOG		
1.	Mr Stanislav Benada	Country Manager, AOG
2.	Mr Viktor Beran	Attorney engaged by AOG
3.	Mr Ron Crow	Chief Operating Officer, Discovery/AOG
4.	Mr Alexander Fraser	Chief Financial Officer, Discovery/AOG
5.	Mr Marek Jackiewicz	Contractor, AOG
6.	Mr Maciej Karabin	Project Manager/Engineering Geologist, AOG
7.	Mr Sebastian Lenart	Engineering Consultant, AOG
8.	Mr Michael Lewis	President and Chief Executive Officer, Discovery/AOG
9.	Mr Igor Melus	Well engineer, AOG
10.	Mr Vladimir Miškovčík	PR adviser, AOG
11.	Mr Łukasz Sopel	Team Geologist, AOG
12.	Dr Matěj Sýkora	Attorney engaged by AOG
13.	Ing Pavol Vargaeštok	Attorney engaged by AOG
14.	Mr Ritchie Wayland	Exploration Manager, JKX
REPRESENTATIVES OF THE SLOVAK GOVERNMENT		
15.	Mr Peter Cicvara	Subordinate to Dr Sliva within the Bardejov Traffic Police / District Traffic Inspectorate
16.	Mr Gabriel Csicsai	Chairman of the Parliamentary Committee on Environment and Agriculture
17.	Judge Mgr. Ivana Hanuščaková	Judge of the Bardejov District Court who issued the Interim Injunction
18.	Mr Ing. Jozef Harakaľ	Head of the Environmental Protection Department, Humenné District Office
19.	Ing Ctibor Határ	Managing Director of the Forestry and Timber Processing Section, MoA

	Name	Description
20.	JUDr. Tomáš Hrvol	Official in the MoE's Legal Department
21.	RNDr. Vlasta Jánová	General Manager of the Geology Department
22.	Ms Ľubica Kováčová	General Manager of the Minister of Environment's office
23.	Ms Ľubomíra Kubišová	General Secretary of the MoE
24.	Mr Norbert Kurilla	State Secretary of the MoE
25.	Mrs Gabriela Matečná	Former Minister of Agriculture
26.	RNDr. Viera Mat'ová	Former Director of the Department of State Geological Administration of the Section of Geology and Natural Resources, MoE
27.	Ms Daniela Medžová	General Manager of the Legislation and Law Department, MoE
28.	Mr Peter Morong	Former General Director of the State Forestry
29.	Mr Gabriel Nižňanský	Director, MoE
30.	Mr Jaroslav Regec	Head of the Service Office / Chief of Staff of the Office, MoA
31.	Dr Jozef Sliva	Head of Traffic Police / Director of the District Traffic Inspectorate
32.	Mr László Sólymos	Former Slovakia Minister of Environment
33.	Mr Jozef Štefanský	Director of the Bardejov Police Force
34.	JUDr. Vladislava Slosarčíková	State Prosecutor
	OTHER	
35.	Mr Vladimír Baran	Mayor of Smilno
36.	Mr Ivan Barna	Owner of a hotel in Smilno
37.	Mr Stanislav Buvalič	Mayor of Šarišské Čierne
38.	Mrs Emília Dinišová	Owner of the Smilno Site with whom AOG entered into a lease in 2015
39.	Mrs Mgr Dujčáková	Member of Municipal Council of Smilno

	Name	Description
40.	Mr Demeter Ferko	Mayor of Ruská Poruba
41.	Mr Milan Jančošek	The person from whom AOG acquired the Smilno Share in December 2015
42.	Mr Kimák	Member of Municipal Council of Smilno
43.	Mr Igor Kolomoisky	Ukrainian oligarch who owned a 24.7% stake in JKX
44.	Ms Anna Kornajová	Journalist for the regional newspaper *Slovenky Vychod*
45.	Mr Daniel Křetinský	Czech billionaire who owns a 40.45% stake in NAFTA
46.	Mr Ľuboš Leško	Member of VLK
47.	Mr Jan Lukáč	Mayor of Zborov
48.	Mr Jozef Lukáč	Member of Municipal Council of Smilno
49.	Mr Randár	Member of Municipal Council of Smilno
50.	Mr Vladimir Scerba	Mayor of Ol'Ka
51.	JUDr Robert Slamka	Slamka & Partners, Slovak attorneys engaged by AOG
52.	Mr Spák	Member of Municipal Council of Smilno
53.	Mrs Daniela Štefanková	Resident of Smilno
54.	Mr Rastislav Tomeček	Owner of the Smilno Site with whom AOG entered into a lease in 2015
55.	Mr Szabolcs Tóth	Representative, TDE Services
56.	Mrs Marianna Varjanová	Resident of Smilno, owner of a neighbouring ski resort and activist opposed to AOG's activities
57.	Mr Karol Wolf	Dynamic, Slovak Lobbying firm
CLAIMANT'S EXPERTS		
58.	Mr Alan Atkinson	Geoscience Director and Principal Geophysicist at Rockflow
59.	Mr Colin Howard	Petroleum Economist and Associate at Rockflow
60.	Dr Simon Moy	Reservoir Engineer and Director of Expert Services at Xodus Group (formerly at Rockflow)

	Name	Description
61.	Professor JUDr. Marek Števček	Professor of Civil Law and Rector of the Comenius University, Bratislava
RESPONDENT'S EXPERTS		
62.	Mr Richard Acklam	Expert, Charles River Associates
63.	Dr Tiago Duarte-Silva	Expert, Charles River Associates
64.	Doc JUDr. Ľubomír Fogaš, CSc.	Retired law Professor of the Comenius University, Bratislava
65.	Dr Chris Longman	Expert, SLR Consulting