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 MEMORIAL

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30 September 2022

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

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I. OVERVIEW

1. This Memorial 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), and sets out Discovery's claim against the Respondent, the Slovak Republic.

2. In brief summary:

   (1) As part of the Slovak Republic's efforts to improve its energy security by increasing domestic production of oil and gas and thereby reducing dependence on Russian imports (which represented 99% of domestic supply), the Slovak Republic granted (and successively extended) licences to Discovery's subsidiary company, AOG (as defined below), which expressly permitted AOG to explore for oil and gas in specified areas.

   (2) Based on the assurances and specific commitments contained in the licences, Discovery made a significant investment in Slovakia (of time, money and effort) exploring for oil and gas. Discovery assembled a team of experts and contractors who were tasked to carry out these tasks from 2014 onwards. In reliance on clear and specific representations made by Slovakia, Discovery sunk millions of dollars into the project.

   (3) Nonetheless, Slovakia subsequently frustrated Discovery's legitimate expectations that it would be entitled to do what the State had expressly permitted it to do – explore for oil and gas. Roadblock after roadblock was put in AOG's way by organs of the State that acted inconsistently, arbitrarily and treated Discovery less favourably than a domestic State-owned competitor, NAFTA. What is more, Discovery was denied justice by manifestly arbitrary decisions of the Slovak courts and unwarranted delays.

(4) By its conduct, Slovakia breached its obligations under 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 (the "**BIT**"). As a result of those breaches, Discovery is entitled to recover full reparation from Slovakia, in the form of monetary compensation of at least **USD 568.2 million**.

* * *

3. This Memorial is submitted on behalf of Discovery and is accompanied by:

(1) Exhibits **C-27** to **C-236**.[1]

(2) Legal Authorities **CL-12** to **CL-62**.[2]

(3) The following witness statements:

(a) The witness statement of Michael Lewis ("**Lewis 1**"). Mr Lewis is the President and Chief Executive Officer of Discovery, and a highly experienced geologist who has worked in oil and gas exploration and development since 1979. Mr Lewis was the architect of, and directly involved in, Discovery's planned operations in Slovakia that are the subject of this arbitration.

(b) The witness statement of Alexander Fraser ("**Fraser 1**"). Mr Fraser is the Chief Financial Officer of Discovery and has worked in the oil and gas sector since 2007. Mr Fraser was also heavily involved in the planned operations that are the subject of this arbitration.

(4) The following expert reports:

[1] Exhibits C-1 to C-26 were filed with the Claimant's Request for Arbitration.

[2] Exhibits CL-1 to CL-11 were filed the Claimant's letter dated 5 April 2022.

(a) The expert legal opinion of Professor JUDr. Marek Števček on certain issues of Slovak law ("**Stevček 1**"). Prof. Števček is a professor of Civil Law at, and the Rector (President) of, the Comenius University in Bratislava. He has also chaired Commissions on the Recodification of Civil Procedure (2012-2015) and on the Preparation of the new Civil Code (2015-2020).

(b) The expert geological report of Alan Atkinson ("**Atkinson 1**"). Mr Atkinson is Geoscience Director and Principal Geophysicist at Rockflow Resources Ltd ("**Rockflow**"). He is a highly experienced geophysicist and worked in the oil and gas industry from 1988-2007 and subsequently as a consultant and expert. As set out at [299] below, Mr Atkinson has been asked to independently assess the hydrocarbon exploration prospectivity of the Licence areas, including an independent estimate of the hydrocarbon volumes in place attributable to the Licence areas, and estimate the chance of finding them. In his report, Mr Atkinson also refers to and relies on an independent study carried out in 2021 (and published in 2022) by the Energy & Geoscience Institute, a branch of the University of Utah with links to Slovakia. Although this study was commissioned at the request of Discovery, it was conducted on a wholly independent basis with a resulting wholly independent report, and has not been influenced or altered by Discovery.

(c) The expert report of Dr Simon Moy ("**Moy 1**"). Dr Moy is a Partner and Director at Rockflow, and a highly experienced reservoir engineer, having working in the oil and gas industry from 1995-2013 when he joined Rockflow. As set out at [299] below, Dr Moy has been asked to identify the likely volume of hydrocarbons which hypothetically could be produced from the prospects in the Licence areas should they contain hydrocarbons,

and then separately for both oil and gas, generate representative most-likely production profiles for the prospects in the Licence areas and outline a feasible development scheme.

(d) The expert report of Colin Howard ("**Howard 1**"). Mr Howard is a Petroleum Economist and Associate (ie consultant) at Rockflow, and is highly experienced, having worked in the oil industry for 22 years. As set out at [299] below, Mr Howard has been asked to calculate the fair market value of the Licences.

(Atkinson 1, Moy 1 and Howard 1 are collectively referred to as the "**Rockflow Expert Reports**")

4. This Memorial is structured as follows:

(1) **Section II** explains the relevant factual background.

(2) **Section III** explains why the Tribunal has jurisdiction over this dispute.

(3) **Section IV** explains why Slovakia has breached its obligations under the BIT.

(4) **Section 0** explains Discovery's case on quantum.

(5) **Section VI** contains Discovery's request for relief.

* * *

II. FACTUAL BACKGROUND

A. FROM THE EARLY 2000S, THE SLOVAK REPUBLIC WANTED TO DIVERSIFY ITS ENERGY SUPPLIES AND IMPROVE ENERGY SECURITY

6. For many decades, oil and gas have both been major energy sources in the Slovak Republic,[3] the vast majority of which is imported from the Russian Federation. As a result, the issue of energy security has been high on the domestic policy agenda in the Slovak Republic for many decades.

7. For example, a 2012 report issued by the International Energy Agency ("**IEA**") stated as follows:[4]

> *"Because of high dependence on oil and gas imports, energy security is very high on the policy agenda in the Slovak Republic. Natural gas is currently the most significant energy source, accounting for about 30% of the country's primary energy supply. […]*
>
> *Energy policy is also driven by high dependence on energy imports from Russia. Gas imports from Russia are 98% of consumption and oil imports, 99%. The government is aware of inherent risks of such dependence and energy security is a dominant theme of Slovak energy policy."*

8. The Slovak Republic's desire to diversify its energy supplies, reduce its dependence on Russian imports and improve its energy security was acknowledged in successive energy policies adopted by the Slovak Government from at least 2006 onwards. For example:

   (1) Slovakia's 2006 Energy Policy contained a commitment to analyse *"opportunities to diversify the sources and transportation routes for crude oil and natural gas"*.[5] This analysis was later completed and incorporated into Slovakia's 2008 Energy Security Strategy.[6]

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3 **Exhibit C-208**.

4 **Exhibit C-203**, p. 11 and p. 26. See also **Exhibit C-183**, p. 13, p. 31 and p. 44.

5 **Exhibit C-63**, p. 9.

6 **Exhibit C-63**, p. 9.

(2) Slovakia's 2014 Energy Policy identified *"energy security"* as one of its main pillars.[7] The same Policy stressed *"the need for greater energy security in Slovakia and increased focus on the diversification of primary energy sources"*.[8] The same Policy also stated:[9]

> *"Thanks to major investments made by private companies into geological research, new gas reserves have been discovered and opened, which has helped to stabilise overall gas extraction in recent years. […]*
>
> *The future of gas extraction efforts in Slovakia depends on the verification of new exploration concepts (deep exploration) that are financially intensive and associated with significant geological and technical risks. The feasibility of such projects fully depends on the clarity provided in geological and mining legislation and on the enforcement of exploration rights on the basis of this legislation."*

9. Successive reports issued by the European Commission reached substantially the same conclusions as the Slovak Government's own energy policies. For example, a 2013 report by the European Commission stated that *"Slovakia has an import dependency which is ten points above the EU average […] the high import dependency for gas and oil gives rise to some concerns because it is combined with a very limited pool of import sources, mainly non-EEA countries"*. The same report concluded that:[10]

> *"Slovakia is among the most vulnerable Member States as far as energy and carbon intensities are concerned, due to the high share of energy-intensive sectors in the economy and the high energy- and carbon-intensive transport sector."*

10. Discovery was one of a few private companies which made a substantial investment from 2014 onwards to assist Slovakia to achieve its stated goal of diversifying its primary energy sources and increasing domestic supplies

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7 **Exhibit C-63**, p. 23. The 2014 Energy Policy was subsequently approved by the Slovak Government on 30 October 2014: see https://rokovania.gov.sk/RVL/Material/11327/1

8 **Exhibit C-63**, p. 23.

9 **Exhibit C-63**, p. 56.

10 **Exhibit C-48**, p. 259.

of oil and gas. As Discovery pointed out in a contemporaneous presentation, *"Slovakia's heavy dependence on imported hydrocarbons is a cause of concern to Brussels […] Slovakia thus has a strong incentive to develop domestic sources of hydrocarbons where possible"*.[11]

11. Discovery invested based on specific commitments contained (*inter alia*) in exploration licences (described below). Slovakia subsequently acted in breach of the obligations it owed to Discovery under the BIT by consistently thwarting Discovery's attempts to explore for oil and gas from 2015 onwards. By so doing, Slovakia (*i*) prevented Discovery from reaping the benefits of the substantial investment it had made and (*ii*) ultimately destroyed the value of its investment.

B. THE DOMESTIC OIL AND GAS SECTOR IS DOMINATED BY ENTITIES OWNED BY THE SLOVAK REPUBLIC

12. The domestic oil and gas sector in Slovakia is dominated by entities which are ultimately owned by the Slovak Republic. There are two key players in the domestic oil and gas market: Slovenský Plynárenský Priemysel a.s. ("**SPP**") and NAFTA a.s. ("**NAFTA**").

13. SPP has been the leading domestic supplier and importer of natural gas in Slovakia for many decades. SPP is 100% owned by the Slovak Republic.[12] SPP holds a 56.15% stake in NAFTA. The remaining 40.45% stake in NAFTA is held by Czech Gas Holding Investment BV,[13] a company which is beneficially owned by Peter Kretinsky, a Czech billionaire.[14]

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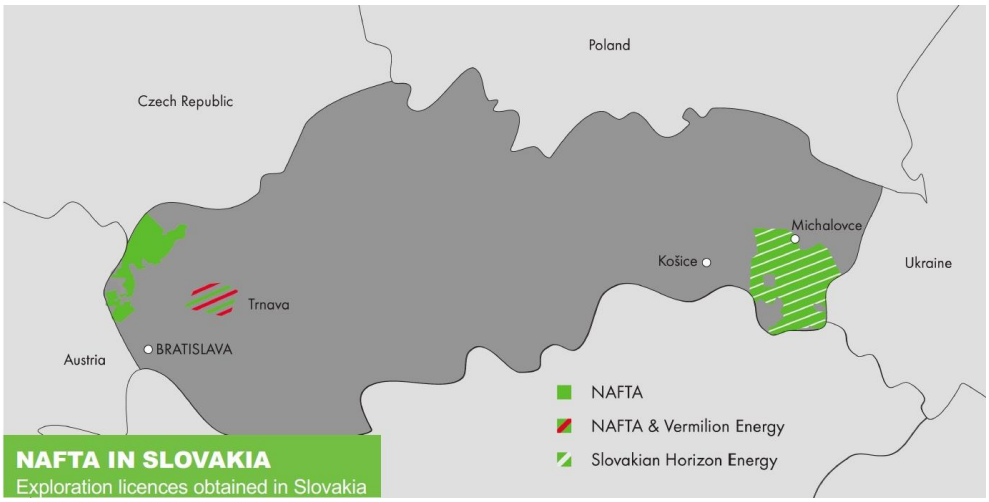
11 **Exhibit C-178**, p. 15.
12 **Exhibit C-54**, p. 5.
13 **Exhibit C-226**.
14 **Exhibit C-202**.

14. NAFTA has a long history of oil and gas exploration and production in the Slovak Republic. NAFTA describes itself as *"the most important player in Slovakia's oil and gas exploration and production sector"*.[15]

15. NAFTA (together with its partners) holds exploration and production licences issued by the Slovak Ministry of Environment[16] ("**MoE**") in western and eastern Slovakia. The exploration licences held by NAFTA (and its partners) cover an area of some 3,040 km^2, as shown in the following map:[17]



16. Pursuant to exploration licences, NAFTA and other entities had successfully drilled thousands of exploration wells across Slovakia without any environmental problems having been identified by the MoE (see further at [179] below). Yet when Discovery (via its subsidiary) attempted to drill its own exploration wells, Slovakia consistently prevented Discovery from doing so, as explained in further detail below.

15 **Exhibit C-210**.

16 In Slovak: *Ministerstvo životného protredia*.

17 **Exhibit C-209**, p. 26 and p. 30.

C. DISCOVERY IDENTIFIED AN OPPORTUNITY TO INVEST IN SLOVAKIA

17. Discovery is a privately held company incorporated in the State of Texas, USA which operates in the oil and gas sector.[18] Discovery is solely owned by its President and CEO, Michael P. Lewis, who has extensive experience in the oil and gas sector. From 1979 to 1996, he developed numerous conventional oil and gas prospects in Texas and the Midcontinental areas of the U.S., managing all aspects of exploration and development. From 1996 to 2004, he was responsible for the initiation and development of the highly successful unconventional Middle Bakken Play in Montana; from 2004 to 2008 he developed numerous prospects for Brigham Exploration and others in the Middle Bakken Play. In Europe, as Chief Geologist for 3Legs Resources plc from 2007 to 2012, he developed and operated the first four shale gas exploration wells in Poland, in conjunction with ConocoPhillips.[19]

18. In 2012-2013, Mr Lewis began to investigate further oil and gas opportunities in southern Poland as well as Slovakia.[20] In particular, Mr Lewis identified that an Irish-based company— San Leon Energy plc, listed on the AIM market in London ("**San Leon**")—held oil and gas exploration licences in northern Slovakia as a result of its recent acquisition of an English publicly-listed company Aurelian Oil & Gas plc, later renamed Aurelian Oil & Gas Limited ("**Aurelian**").[21] The licences, which were held through a local subsidiary, Aurelian Oil and Gas Slovakia s.r.o., had been granted to Aurelian by the MoE in 2006 and they were subsequently extended, as explained below.

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18 **Exhibit C-28**.

19 Lewis 1 at [8].

20 Lewis 1 at [11].

21 Lewis 1 at [14].

19. The exploration licences granted and extended by the MoE from 2006 onwards are referred to collectively in this Memorial as the "**Licences**". In the following sections, Discovery explains:

(1) the legislative background to the grant of the Licences; and

(2) the key events which led to the grant and extension of the Licences.

D. THE LICENCES WERE GRANTED UNDER LEGISLATION DESIGNED TO ENCOURAGE OIL AND GAS EXPLORATION IN THE SLOVAK REPUBLIC

1. The Geology Act was designed to encourage exploration

20. In 2006, the MoE granted Aurelian its first set of exploration Licences pursuant to Act No. 313/1999 (the "**Old Geology Act**").[22] From 2010 onwards, the Licences were extended by the MoE pursuant to Act No. 569/2007 (the "**Geology Act**"),[23] which replaced the Old Geology Act. At the time of the key events in this arbitration, the Geology Act was in force.

21. The Geology Act was designed to encourage oil and gas exploration within the Slovak Republic under exploration licences granted by the MoE. The Geology Act established a clear legislative framework which set out (*inter alia*) (*i*) the conditions for performing geological works in Slovakia, (*ii*) the design and evaluation of those geological works, (*iii*) the areas in which geological works may be carried out, and (*iv*) the grant of compulsory access orders over land in order to carry out geological works.

22. As to (*i*), geological works can be carried out by a *"contractor of geological works"* which includes a *"legal person holding a geological licence"*.[24] A

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22 **Exhibit C-217**.

23 **Exhibits C-218** and **C-219**. **Exhibit C-218** is the Geology Act as in force from 1 November 2009, while **Exhibit C-219** is a slightly amended version in force from 1 November 2013. For the purposes of this section, the latter is used being the legislation in force at the time of Discovery's acquisition of AOG, as set out below.

24 **Exhibit C-219**, Geology Act, §4(1)(a).

geological licence is issued by the MoE upon an application submitted by the contractor.[25]

23. As to (*ii*), a contractor of geological works is responsible for designing and evaluating the *"geological task"* namely the *"subject-matter, local and temporal definition of a range of questions that convey an economic, scientific or technical objective of the task"*.[26] In particular:

(1) The contractor must prepare a *"geological design"* which *"conveys the objective of the geological task, proposes and justifies the selected types of geological work to investigate the geological task, and determines the methodology and technical procedure for professional and safe carrying out of such work"*.[27]

(2) Once the geological design has been approved (by the contractor), the contractor is entitled to start *"to investigate the geological task […]so as to achieve the objective of such geological task as quickly and efficiently as possible"*.[28]

(3) Once the geological task has been investigated, the contractor must evaluate it by preparing a *"final report"*. The final report must contain detailed information, including a description of any discoveries of *"minerals"* and *"a comprehensive qualitative assessment of the mineral in terms of its potential exploitation, and a calculation of reserves of such mineral and associated minerals in the deposit or a part thereof"*.[29]

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25 **Exhibit C-219**, Geology Act, §§5-6.
26 **Exhibit C-219**, Geology Act, §11.
27 **Exhibit C-219**, Geology Act, §12(1).
28 **Exhibit C-219**, Geology Act, §14(1) and §14(2).
29 **Exhibit C-219**, Geology Act, §16(1), §16(2) and §16(3).

(4) Once the final report has been prepared, it must be submitted to the State Geological Institute of Dionýz Štúr (the "**State Geological Institute**").[30]

24. As to (*iii*), the MoE determines the areas in which geological exploration for oil and natural gas may be carried out by granting exploration licences.[31] In particular:

(1) If an entity wishes to explore for oil and gas, it must apply for an exploration licence to the MoE. Once an application has been granted, the MoE will determine the *"exploration area"* for the period which is required in order to complete the geological works.[32]

(2) If the exploration period specified by the MoE in the licence is insufficient, *"it may be extended, on application filed by the exploration area* [licence] *holder, by such time that is strictly necessary to complete the geological work"*.[33]

(3) An exploration licence can be held by a group of entities *"who jointly finance geological work in the designated exploration area"*. In such cases, each entity *"shall hold the relevant exploration interest, which represents the share in which such holder participates in rights and obligations attributable to* [the] *exploration area* [licence] *holder under this Act and in geological work, and such share is determined, as a rule, in per cent"*.[34]

(4) The holder of an exploration licence must submit an annual report to the MoE summarising the exploration activity it has performed.[35]

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30 **Exhibit C-219**, Geology Act, §19(1).
31 **Exhibit C-219**, Geology Act, §24(1).
32 **Exhibit C-219**, Geology Act, §24(1)-(8).
33 **Exhibit C-219**, Geology Act, §24(8).
34 **Exhibit C-219**, Geology Act, §24(10)-(11).
35 **Exhibit C-219**, Geology Act, §25(1).

25. As to (*iv*), the Geology Act established a mechanism to enable a contractor to apply to the MoE in order to obtain a compulsory access order (also known as a §29 order) over land in order to carry out geological works in the public interest[36] if the owner of the land does not agree on the scope, method and duration of the proposed geological works. When an application for a §29 order is made, "*a decision shall be taken by the Ministry on request filed by the geological contractor"*.[37]

26. An important feature of the legislative scheme is that §24(2) of the Mining Act (as defined below) and §25(2) of the Geology Act grant the licence holder a pre-emptive right to move from exploration to production of hydrocarbons, *i.e.* to apply for the designation of a mining area: see further at [30]-[32].

2. The Geology Act implemented Directive 94/22/EC which was also designed to encourage exploration

27. By the Geology Act, the Slovak Republic implemented Directive 94/22/EC of the European Parliament and Council on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons ("**Directive 94/22/EC**").[38]

28. The recitals to Directive 94/22/EC recorded (*inter alia*) as follows:

(1) *"Whereas the Community largely depends on imports for its hydrocarbon supply; whereas it is consequently advisable to encourage the best possible prospection, exploration and production of the resources located in the Community;"*

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36 **Exhibit C-219**, Geology Act, §29(1).

37 **Exhibit C-219**, Geology Act, §29(4).

38 **Exhibit C-27**; **Exhibit C-219**, Geology Act, §46 (adopting the legally binding acts listed in Annex 2, which includes Directive 94/22/EC).

(2) *"Whereas steps must be taken to ensure the non-discriminatory access to and pursuit of activities relating to the prospection, exploration and production of hydrocarbons under conditions which encourage greater competition in this sector and thereby to favour the best prospection, exploration and production of resources in Member States and to reinforce the integration of the internal energy market;"*

(3) *"Whereas, for this purpose, it is necessary to set up common rules for ensuring that the procedures for granting authorizations for the prospection, exploration and production of hydrocarbons must be open to all entities possessing the necessary capabilities; […]"*

29. The Geology Act set up the rules which were applicable in the Slovak Republic for granting authorisations for the exploration of hydrocarbons. The objectives of Directive 94/22/EC (*i.e.* to reduce dependence on imports of hydrocarbons by diversifying domestic supplies of energy) were fully consistent with the objectives established in the domestic energy policies adopted by the Slovak Government from at least 2006 onwards: see [8] above.

3. The holder of an exploration licence has a priority right to apply for a Mining Area Licence to extract hydrocarbons

30. In order to extract any hydrocarbons which are discovered under an exploration licence, the holder of an exploration licence must apply for and obtain a further licence, a "**Mining Area Licence**", pursuant to Act No. 44/1988 (the "**Mining Act**").[39]

31. Slovak law confers a priority right to the holder of an exploration licence to apply for a Mining Area Licence, in recognition of the costs and risks

[39] **Exhibit C-216**.

associated with carrying out exploration activities under an exploration licence. In this regard:

(1) Under the Geology Act, the holder of an exploration licence has a *"priority right"* to *"have designated the extraction area"* once the final report has been approved by the MoE after the geological exploration task has been completed (as referred to at [23(3)] above).[40]

(2) The *"priority right"* to determine the mining area can be exercised if the licence holder submits a proposal no later than one year after the assessment and approval of the final report by the MoE.[41] Thereafter, the relevant District Mining Office will carry out proceedings to determine the mining area.[42]

32. The Main Mining Office is an agency integrated into the structure of the Ministry of Economy of the Slovak Republic. There are five District Mining Offices located in cities across the Slovak Republic.[43]

E. BETWEEN 2006 AND 2010, THE MOE GRANTED AND SUBSEQUENTLY EXTENDED SUCCESSIVE EXPLORATION LICENCES TO AURELIAN AND AOG

1. In 2006, the MoE granted the Licences to Aurelian

33. In July 2006, the MoE granted three exploration licences to Aurelian to explore for crude oil and natural gas in three specified blocks located in the Prešov region in northern Slovakia, namely:[44]

(1) the Svidník block, which covered an area of 760 km^2;

40 **Exhibit C-219**, Geology Act, §25(2).
41 **Exhibit C-216**, Mining Act, §24(2).
42 **Exhibit C-216**, Mining Act, §24(3).
43 **Exhibit C-29**.
44 **Exhibit C-2** (Svidník); **Exhibit C-3** (Medzilaborce); **Exhibit C-4** (Snina).

(2) the Medzilaborce block, which covered an area of 721 km^2; and

(3) the Snina block, which covered an area of 961 km^2;

(together, the "**2006 Licences**").

34. The express terms of the 2006 Licences were materially identical. They recorded that the MoE had issued the 2006 Licences after having received (*i*) a written application by Aurelian, (*ii*) positive responses from other Slovak State organs, and (*iii*) further comments from Aurelian at an oral hearing.

35. The 2006 Licences identified Aurelian as the *"holder of the exploration area"* and stated that the holder *"[w]ill carry out the geological works in accordance with the project of geological work, which has to be worked out in accordance with the [Geology Act] and other legal regulations"* (condition no. 1).[45] The 2006 Licences were issued for an (initial) period of four years and obliged the holder to pay an annual licence fee to the Slovak Republic. Furthermore, it is Discovery's understanding that a portion of those funds is then allocated to the local communities. In particular, section 26(4) of the Geology Act provides that the municipality or municipalities in which the exploration area is located receives or receive 50%. (Where the area covers more than one municipality, this is shared in accordance with their size.)

36. The three blocks covered by the 2006 Licences (Svidník, Medzilaborce and Snina) were located near the Carpathian mountain range which runs from the Czech Republic, through southern Poland and northern Slovakia, and into Ukraine and Romania.[46] The areas surrounding the Carpathians have a long history of oil and gas production, dating back to the late 19th century.[47]

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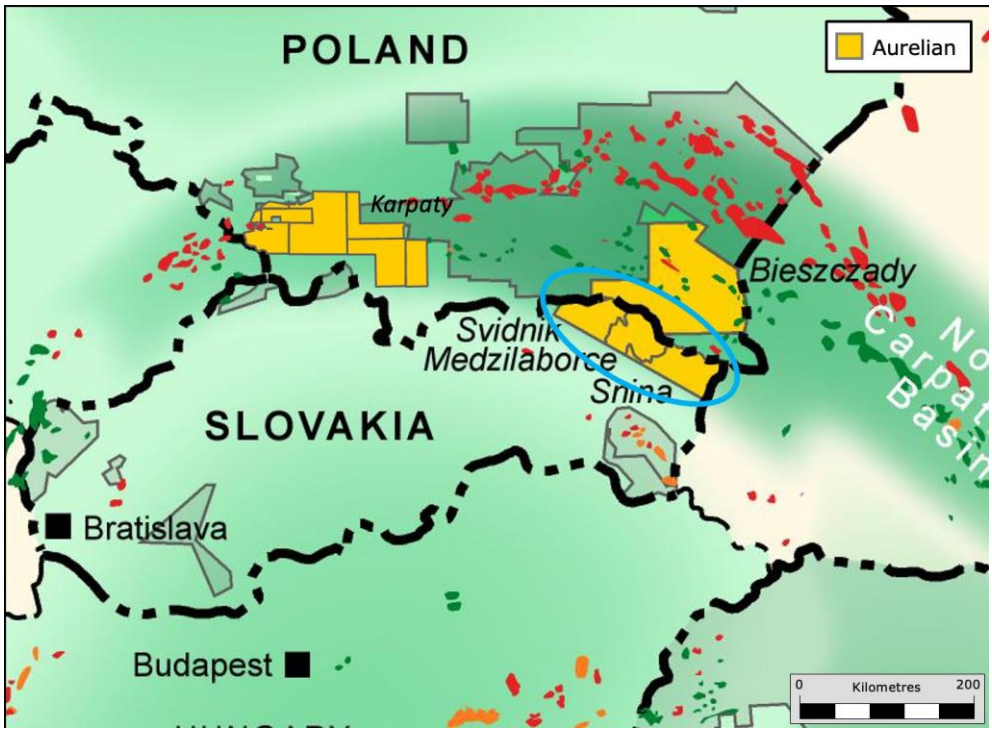
45 **Exhibit C-2**, p. 5; **Exhibit C-3**, p. 5; **Exhibit C-4**, p. 4.

46 Lewis 1 at [13].

47 Lewis 1 at [23(a)].

Poland, Ukraine and Romania each have a large number of existing oil and gas fields in the areas surrounding the Carpathians.[48]

37. Between the 1890s and 1990s, a number of exploration wells had been drilled on the blocks covered by the 2006 Licences. These wells had reported strong showings of oil and gas.[49] The following diagram shows the location of the Svidník, Medzilaborce and Snina blocks (circled in blue), the existing gas fields (shown in red) and the existing oil fields (shown in green) located in neighbouring Poland, Ukraine and the Czech Republic:[50]



38. Between 2008 and 2011, Aurelian (*i*) carried out exploration activities in each block covered by the 2006 Licences, including by obtaining some 770 km of 2D seismic data,[51] (*ii*) carried out geological fieldwork and analysis

48 **Exhibit C-39**, pp. 4-18; **Exhibit C-159** , pp. 3-7.

49 Lewis 1 at [23(d)] and [23(e)]. See also **Exhibit C-53** , pp. 54-59 (referring to the Mikova Oil Field situated in the Medzilaborce block).

50 **Exhibit C-39**, p. 5.

51 Lewis 1 at [24].

in each block,[52] (*iii*) submitted annual reports to the MoE describing its exploration activities, and (*iv*) paid substantial annual licence fees to the Slovak Republic.

2. In 2008, JKX and Romgaz joined Aurelian as JV partners

39. In 2008, two important players in the international oil and gas sector joined Aurelian as joint venture ("**JV**") partners in the quest to explore for oil and gas deposits in Slovakia, namely:

(1) JKX Oil & Gas plc ("**JKX**")—a British upstream oil and gas exploration and production company which was publicly listed on the London Stock Exchange and had a significant focus on the market in Eastern Europe;[53] and

(2) S.N.G.N. Romgaz S.A. ("**Romgaz**")—the largest producer and supplier of natural gas in Romania, owned as to 70% by the Romanian State.[54]

40. The decision by each of JKX and Romgaz to join Aurelian as a JV partner was effected by two separate Farm-In Agreements ("**FIAs**") concluded in April and June 2008:

(1) In April 2008, Aurelian (via its operating subsidiaries[55]) entered into an FIA to transfer a 25% interest in each of the 2006 Licences to JKX (Nederland) BV (a subsidiary of JKX);[56] and

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52 See *e.g.* the summary of the work carried out by Aurelian between 2006-2010 in **Exhibit C-40**, p. 27.

53 For relevant background on JKX, see **C-042**.

54 **Exhibit C-211**.

55 Namely Radusa Oil & Gas s.r.o (for Svidník), Magura Oil & Gas, s.r.o (for Medzilaborce) and Dukla Oil & Gas, s.r.o (for Snina). The 2006 Licences were transferred to these three operating subsidiaries by resolutions issued by the MoE in 2007.

56 [redacted]

(2) In June 2008, Aurelian (via its operating subsidiaries) entered into a separate FIA to transfer a 25% interest in each of the 2006 Licences to Romgaz.[57]

41. The acquisition by each of JKX and Romgaz of a 25% interest in the 2006 Licences was later confirmed by the MoE and reported in each of the annual reports submitted by Aurelian to the MoE from 2008 onwards.[58] As a result, from 2008 onwards, Aurelian held a 50% interest in the Licences; JKX and Romgaz held the remaining 50% interest in equal shares.

3. In 2010, AOG was incorporated and became the exploration licence holder together with JKX and Romgaz

42. In July 2010, a new Slovak entity called Aurelian Oil & Gas Slovakia s.r.o. ("**AOG**") was incorporated. Slovak limited liability companies do not issue shares; instead, they issue participation interests to their owners. AOG's participation interests were held solely by Aurelian and a related company (AOG Finance Ltd).[59]

43. On 20 July 2010, AOG entered into a Merger Agreement with Aurelian's operating subsidiaries in Slovakia pursuant to which AOG (as the successor company) merged with each of those operating subsidiaries. Following the conclusion of the Merger Agreement, the operating subsidiaries were wound up and ceased to exist.[60] Thereafter, AOG (together with JKX and Romgaz) became the entity which held the exploration rights under the Licences.

4. In 2010, the MoE extended the 2006 Licences until 2014

44. On 26 July 2010, following an application submitted by Aurelian/AOG, the MoE extended the 2006 Licences for a further term of four years each until

57 [redacted]

58 See *e.g.* **Exhibit C-36** .

59 **Exhibit C-34**.

60 **Exhibit C-33**.

2014 (the "**2010 Licences**"). The express terms of the 2010 Licences were materially identical. They identified AOG, JKX and Romgaz as a *"group of permit holders"*. They stated (*inter alia*) that:[61]

(1) the purpose of the extension of the Licences was to enable the permit holders to conduct a *"geological survey"* in each block for *"crude oil and flammable natural gas […] in order to perform geological work in the phase: geological survey in search for mineral deposits"*; and

(2) the permit holders were *"authorized to carry out geological work"* under §4(1)(a) of the Geology Act.

45. The 2010 Licences also obliged the permit holders to pay annual licence fees to the Slovak Republic. Following the grant of the 2010 Licences, AOG, JKX and Romgaz continued to (*i*) carry out exploration activities and geological fieldwork in each of the blocks,[62] (*ii*) submit annual reports to the MoE, and (*iii*) pay substantial annual licence fees to the Slovak Republic.

5. In 2013, San Leon Acquired Aurelian

46. On 25 January 2013, San Leon acquired Aurelian for a total price of €62m.[63] Between the date of this transaction and the date of Discovery's subsequent acquisition of AOG in 2014 (see below), Aurelian and AOG Finance Ltd continued to hold the entirety of the participation interests in AOG.

F. IN 2014, DISCOVERY ACQUIRED AOG

47. In late 2013, as part of its desire to expand into the oil and gas sector in Central Europe (see [18] above), Mr Lewis entered into negotiations with San Leon to acquire AOG.

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61 **Exhibit C-5**; **Exhibit C-6**; **Exhibit C-7**.

62 See *e.g.* **C-45**.

63 **C-228**, p. 83.

48. In September 2013, an affiliate of Discovery entered into a Confidentiality Agreement with San Leon and obtained access to certain information relating to AOG's interests in the Svidník, Medzilaborce and Snina blocks (including the Licences and certain geological data).[64]

49. Thereafter, Mr Lewis and his team carried out a detailed assessment of the information provided by San Leon. Mr Lewis concluded that the geological data was promising, and he identified the prospects which he thought were *"worth spending money on to refine and develop the data further for the purpose of identifying and prioritising well drilling locations"*.[65]

50. On 1 December 2013, Discovery and San Leon entered into a Non-Binding Letter of Intent ("**LOI**").[66] The LOI set out the terms upon which Discovery would acquire AOG. The transaction was subject to various conditions, including obtaining written confirmation from JKX and Romgaz (who were described in the LOI as the *"JV Partners"*) waiving their right of first refusal to acquire AOG's interest in the Licences.

51. On 3 and 9 December 2013, JKX and Romgaz (respectively) informed San Leon that they did not wish to acquire AOG's interest in the Licences.[67] Discovery therefore had a clear path to acquire AOG.

52. On 24 March 2014, Aurelian and AOG Finance Ltd (as *"Sellers"*) entered into a Sale and Purchase Agreement ("**SPA**") with Discovery (as the *"Buyer"*). The SPA recorded (*inter alia*) that:[68]

    (1) the Sellers were the owners of 100% of the issued and outstanding capital of AOG, in which they each held participation interests;

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64 **C-49**.

65 Lewis 1 at [25].

66 **C-50.**

67 **Exhibit C-51**; **Exhibit C-52** .

68 **Exhibit C-56**.

(2) in consideration for the sum of €153,054.50, the Sellers agreed to sell their participation interests in AOG to Discovery; and

(3) AOG's assets on the *"Closing Date"* would include (*inter alia*) AOG's 50% interest in the Licences and AOG's business as a going concern.

53. On 24 March 2014, Aurelian and AOG Finance Limited (as *"Transferors"*) entered into an Agreement on Transfer of Participation Interests ("**ATPI**") with Discovery (as *"Transferee"*). The ATPI recorded (*inter alia*) that:[69]

(1) the Transferors were the *"exclusive participants"* of AOG; and

(2) each of the Transferors sold and transferred their respective participation interests to the Transferee.

54. On 24 March 2014, the consideration payable under the SPA (€153,054.50) was paid to Aurelian and the transaction was completed.

55. As a result of this transaction (*i*) Discovery became the sole owner of AOG and (*ii*) Discovery (via AOG) held a 50% interest in the Licences. The remaining 50% interest in the Licences was held by JKX and Romgaz in equal shares.

56. In April 2014, AOG changed its name to Alpine Oil & Gas Slovakia s.r.o.[70]

57. Following the acquisition of AOG, Discovery/AOG undertook a significant amount of work (*i*) reviewing and reworking the exploration data which Aurelian/AOG had already obtained, and (*ii*) devising a strategy for future exploration activities on the three blocks covered by the Licences. It also acquired, processed and interpreted MT surveys.[71]

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69 **Exhibit C-55**.

70 **Exhibit C-236**.

71 Lewis 1 [47]; Fraser 1 [21].

58. In March 2014, Discovery/AOG prepared a presentation to discuss with JKX and Romgaz. This presentation described a *"[n]ew exploration concept"* consisting of the use of magneto-telluric ("**MT**") surveys.[72] MT surveys involve the non-invasive use of magnetic and electric frequencies to identify oil and gas reservoirs.[73] Mr Lewis had successfully used MT surveys in previous projects. He was confident that they could be used in the Slovak Republic to successfully identify suitable prospects for exploration drilling.[74]

59. On 10 April 2014, Mr Lewis met with representatives of San Leon, JKX and Romgaz as part of a hand-over meeting following the completion of Discovery's acquisition of AOG in March 2014. At this meeting, the parties:[75]

(1) agreed to apply to the MoE for an extension of the Licences and a partial (further)[76] relinquishment of the Licence for the Snina block; and

(2) approved the proposed work program and budget for the remainder of 2014.[77]

G. IN 2014, THE MOE EXTENDED THE 2010 LICENCES UNTIL 2016

60. On 10 July 2014, and following an application submitted by AOG, the MoE granted further extensions to each of the Licences for further terms of two years (the "**2014 Licences**"). The 2014 Licences identified AOG, JKX and Romgaz as the *"holders of the Exploration Area"*.

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72 **Exhibit C-53**.
73 Lewis 1 at [27].
74 Lewis 1 at [27].
75 **Exhibit C-58**.
76 All three areas had already been reduced in 2013.
77 **Exhibit C-57**.

61. The terms of the 2014 Licences were materially identical. They provided (*inter alia*) that:[78]

(1) the purpose of the extension of the Licences was to enable the permit holders *"to carry out geological deposit exploration in respect of reserved minerals: crude oil and flammable natural gas within the phase of geological deposit exploration"*;

(2) the MoE had requested the State Geological Institute to provide an opinion in response to AOG's request for an extension of the Licences, and the State Geological Institute did not object to this request for an extension;

(3) the MoE had requested other administrative bodies to provide their opinions in response to AOG's request for an extension of the Licences, and in this regard:

(a) the Prešov District Office—the body responsible for the protection of nature and landscapes under Act No. 543/2002—had informed the MoE that *"no interests concerning protection of nature and [landscape] would be injured and therefore it has no objections against extension of the exploration area term"*;

(b) the Košice District Mining Authority—one of the competent authorities designated by Slovakia in connection with Directive 94/22/EC—informed the MoE that it had approved the extension request *"without any comments"*; and

(c) the Ministry of Health, Inspectorate of Spas and Natural Springs, informed the MoE that they had *"no objections"* to the request for an extension;

78 **Exhibit C-8**; **Exhibit C-9**; **Exhibit C-10**.

(4) the opinions expressed by these administrative bodies *"[did] not differ"* from the opinions they had expressed when the Exploration Area was originally granted to Aurelian in the 2006 Licences, and hence the terms and conditions of the 2006 Licences *"remain valid without any modification"*;

(5) between 2006 and 2013, the holders of the Licences had spent the following sums in connection with exploration activities:

(a) Svidník block – €6,946,582 (*"which represents 138.8% of the geological task budget"*);

(b) Medzilaborce block – €3,329,567 (*"which represents 124.8% of the geological task budget"*); and

(c) Snina block – €4,124,739 (*"which represents 266.7% of the geological task budget"*);

(6) the above facts *"show that the Exploration Area Holder complied with all the terms and conditions set out in the* [Geology Act] *in respect of the extension of the term of the Exploration Area"*.

62. The 2014 Licences obliged the permit holders to pay an annual licence fee to the Slovak Republic and to submit annual reports to the MoE.

H. BETWEEN 2014 AND 2015, DISCOVERY IDENTIFIED THREE EXPLORATION WELLS TO DRILL

63. Following the grant of the 2014 Licences, Discovery/AOG undertook a significant amount of work and effort:[79]

(1) carrying out MT surveys in the blocks covered by the Licences;

[79] Lewis 1 at [24]-[29]; Fraser 1 at [21]; **Exhibit C-62**; **Exhibit C-61**.

(2) analysing the survey data;

(3) comparing this data against previous survey data obtained by Aurelian/AOG prior to 2014;

(4) identifying suitable sites to drill exploratory wells in each block;

(5) engaging with the local communities where it was proposing to drill by (*inter alia*) holding meetings with local mayors;

(6) entering into leases with landowners to obtain access to the proposed drilling sites, as well as obtaining relevant permits; and

(7) entering into contracts with contractors to carry out drilling work at the proposed drilling sites.

64. Discovery/AOG also assembled a team of highly experienced staff and contractors, including Mr Lewis (as Discovery/AOG's President), Ron Crow (AOG's Chief Operating Officer), Alex Fraser (Discovery/AOG's Chief Financial Officer), Stanislav Benada (AOG's Country Manager who had been working on the project for Aurelian/AOG since 2006), Maciej Karabin (AOG's Project Manager/Engineering Geologist), Łukasz Sopel (AOG's Team Geologist) and others.

65. What is more, AOG continued to pay substantial annual licence fees to the Slovak Republic and submitted detailed annual reports to the MoE describing (*i*) the activities it had performed in respect of each block in each year from 2014 onwards, and (*ii*) the substantial expenditures which had been incurred in connection with those activities on an annual basis.

66. In a report dated 24 June 2015 addressed to AOG's JV partners (JXK and Romgaz) Mr Lewis set out an estimated timeline for AOG to drill three exploration wells, namely:[80]

(1) The Smilno well on the Svidník Licence – AOG estimated that the permitting process would completed by the end of June 2015.

(2) The Krivá Ol'ka well[81] on the Medzilaborce Licence – AOG estimated that the permitting process would be completed by the end of June 2015.

(3) The Ruská Poruba well on the Snina Licence – AOG estimated that the permitting process would be completed by late August 2015.

67. By 25 August 2015, AOG had submitted a Detailed Drilling Program for all three exploratory wells to the Mining Authority for review.[82]

68. By November 2015, AOG had prepared the following documents for each exploratory well:

(1) a Project of Geological Works;[83]

(2) a Detailed Drilling Program;[84] and

(3) an Authorisation for Expenditure.[85]

69. By December 2015, AOG, JKX and Romgaz had settled on a firm plan to drill the three exploratory wells identified at [66] above.[86] Based on the detailed geological analysis carried out over the preceding months,

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80 **Exhibit C-78**.

81 Prior to 2015, this proposed well was referred to as "Stromy-1": see Fraser 1 at [22].

82 **Exhibit C-79**.

83 **Exhibit C-88** (Smilno 1); **Exhibit C-83** (Poruba 1); **Exhibit C-82** (Krivá Ol'ka-1).

84 **Exhibit C-95** (Smilno-1); **Exhibit C-91** (Krivá Ol'ka-1); **Exhibit C-94** (Poruba-1).

85 **Exhibit C-86** (Smilno-1); **Exhibit C-85** (Krivá Ol'ka-1); **Exhibit C-98** (Poruba-1).

86 **Exhibit C-80**; **Exhibit C-81**; **Exhibit C-87**; **Exhibit C-100**; **Exhibit C-101**.

Discovery/AOG anticipated that (*i*) the Smilno well would predominantly produce gas, and (*ii*) the Krivá Ol'ka and Ruská Poruba wells would predominantly produce oil.[87]

70. The Project of Geological Works and Detailed Drilling Program which AOG had prepared for each well described in great detail the process that AOG would follow when drilling each of the exploratory wells.

71. Each Detailed Drilling Program recorded (*inter alia*) that:[88]

    (1) it formed part of the *"geological task"* which AOG had been carrying out under the Licences;

    (2) it set out the *"project of geological works"*, the goal of which was to *"search for oil and natural gas deposits"*;

    (3) the geological works had been prepared (*inter alia*) by Mr Melus[89] and approved by Mr Crow.

72. Despite having secured the necessary Licences and prepared and submitted the Detailed Drilling Plans, organs of the Slovak Republic prevented AOG from drilling any of the three exploratory wells referred to at [66] above. In particular, as explained below, the Slovak Republic prevented AOG from:

    (1) drilling the Smilno well (see [78]-[129] below);

    (2) drilling the Krivá Ol'ka well (see [130]-[157] below); and

    (3) drilling <u>any</u> exploration well unless it had first conducted a preliminary environmental impact assessment ("preliminary **EIA**") (see [158]-[197] below).

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87 **Exhibit C-80**, p. 82.

88 **Exhibit C-95** (Smilno-1); **Exhibit C-91** (Krivá Ol'ka-1); **Exhibit C-94** (Poruba-1).

89 Igor Melus is a well engineer from eastern Slovakia.

73. These are the three key events which give rise to Discovery's claims in this arbitration. The factual background relating to each key event is addressed in turn below. Before doing so, it is necessary to consider the MoE's decision in 2016 to further extend the Licences. This provides the relevant background, against which each of the complaints has to be assessed.

I. IN 2016, THE MOE EXTENDED THE LICENCES UNTIL 2021

74. In June 2016, following an application submitted by AOG to the MoE which was accompanied by the Detailed Drilling Programs for each exploratory well, the MoE granted extensions to each of the Licences for a further term of five years until August 2021 (the "**2016 Licences**").[90] The express terms of the 2016 Licences were materially identical. In particular:

(1) The MoE stated that, under the terms of the previous Licences, the *"holder of the Exploration Area was authorized to carry out prospecting activities in the Exploration Area, namely deposit geological prospection for designated minerals: crude oil and combustible natural gas."*

(2) The MoE stated that *"the key objective of the geological task was to find deposit of crude oil and natural gas in the flysch layers of the North-Eastern Slovakia. The goal is to discover conventional structural or lithological traps containing accumulated crude oil or natural gas".*

(3) The MoE acknowledged that geological works on the Svidník, Medzilaborce and Snina blocks were *"mutually interconnected and could not be severed from each other in the performance of and interpreting the extensive geophysical surveying data"*.

[90] **Exhibit C-12**; **Exhibit C-13**; **Exhibit C-14**. AOG had requested the MoE to modify the Licence area for the Svidník block because MT surveys had indicated *"excellent results"* in these specific areas, indicating the presence of hydrocarbons: see **Exhibit C-128**.

(4) The MoE acknowledged (*i*) the 2D seismic survey work carried out by Aurelian/AOG between 2006-2013, (*ii*) the MT survey work carried out by AOG between 2014-2015, (*iii*) the fact that an evaluation of these surveys *"confirmed deep structures […] that might indicate [the] potential accumulation of hydrocarbons"*, and (*iv*) the *"overall potential of the area has been evaluated as very good and promising"*.

(5) The MoE acknowledged that, as described in more detail in AOG's application, AOG was proposing to perform (*i*) *"boring activities"* (*i.e.* drilling exploration wells) in each block with *"at least two (2) vertical or diverted holes of 1,200 and 1,500m"* (*i.e.* the depth of the exploration wells), (*ii*) *"short term and protracted pumping tests"*, and (*iii*) *"additional geophysical (seismic and magnetotelluric) surveys"*.

(6) The MoE stated that, under §24 of the Geology Act, the MoE *"shall determine areas where it is permitted to carry out prospection for crude oil and combustible natural gas"*. (These areas included the three blocks covered by the Licences).

(7) The MoE stated that, under §24(8) of the Geology Act, the MoE *shall define and grant an exploration area for a period as requested by the applicant as needed for completion of geological works"* and that such licences may be extended for such *"period of time as may be required for the completion of geological works"*.

(8) The MoE acknowledged that it had requested the State Geological Institute and other administrative bodies to provide an opinion on AOG's request for an extension. Each body had adopted the same position as recorded in the 2014 Licences (see [61(2)]-[61(3)] above).

(9) The MoE stated that *"[t]he exploration area in question is situated in an area <u>where geological prospecting for deposits of crude oils and combustible natural gas is permitted</u>"* (<u>emphasis</u> added).

(10) The MoE acknowledged that, when assessing the application for an extension of the Licences, it had relied on *"ascertained and evidenced facts"* including that:

(a) the application *"reflects the need to carry out additional geological works the performance of which is required to achieve the objective of the geological task"* (emphasis added); and

(b) the MoE *"took into account that the holder of exploration area has performed geological works"* and *"the Geology Activities performed by the holder of exploration area are beneficial"* (emphasis added).

(11) The MoE stated that it *"deems it necessary to admit the application"* to *"ensure that additional valuable knowledge about the territory of the Slovak Republic will be gathered during the so extended period"*.

(12) The MoE concluded that a five-year extension was *"sufficient for the performance of geological works (exploratory wells, pumping tests, supplementary geophysical surveys and development of the final report"*.

(13) The MoE stated that the Geology Act had implemented Directive 94/22/EC into Slovak law.[91] The MoE recalled that one of the recitals to Directive 94/22/EC stated as follows:

> *"Whereas the Community largely depends on imports for its hydrocarbon supply; whereas it is consequently advisable to encourage the best possible prospection, exploration and production of the resources located in the Community;"*

(14) The MoE stated that the *"current activities"* of the permit holders were *"fully compatible"* with *"Community legal regulation"* as required

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91 **Exhibit C-27**.

under Directive 94/22/EC and that the extension of the Licences would fulfil the objectives set out in Directive 94/22/EC.

(15) The MoE stated that the permit holders had *"complied with all the conditions set out in the [Geology Act]"* for an extension of the Licences and therefore the application was upheld.

75. Importantly, the 2016 Licences did not include a condition requiring AOG to conduct a preliminary EIA prior to drilling any exploration wells.

76. The express terms of the 2016 Licences demonstrate that (*i*) Slovakia was satisfied with the geological exploration activities AOG had carried out to date, and (*ii*) Slovakia was eager to approve the extension to enable AOG to complete its geological exploration by 2021 (which included drilling boreholes of up to 1,500m in the exploration wells AOG had identified).

77. In the 2016 Licences, Slovakia also acknowledged that AOG's exploration activities were *"beneficial"*, in that those activities would (*i*) result in Slovakia gaining valuable knowledge about its territory and the location of hydrocarbons, and (*ii*) assist Slovakia to achieve its stated policy goal of reducing its reliance on imports of hydrocarbons by encourage domestic exploration of oil and gas deposits. Indeed, these acknowledgements are all the more significant because the protests (described further below) are also mentioned in the very same 2016 Licences.

J. SLOVAKIA PREVENTED AOG FROM DRILLING THE SMILNO WELL

78. Between December 2015 and November 2016, AOG made three separate attempts to drill an exploration well at the Smilno site which AOG had identified as part of its work program: see [66]-[71] above. As explained below, AOG was prevented from drilling the exploration well by the acts and omissions of Slovakia's organs and agents, including (*i*) the judiciary, (*ii*) the Police, (*iii*) a State Prosecutor, (*iv*) the Parliament of the Prešov region, and (*v*) the Ministry of the Interior. Such conduct is attributable to

Slovakia under international law and placed Slovakia in breach of its obligations towards Discovery under the BIT.

1. AOG prepared a Program of Geological Works for the Smilno well and obtained the necessary permits to drill

79. The Program of Geological Works for the Smilno well had been prepared by Mr Karabin and Mr Sopel, both of whom worked for AOG.[92] It explained that *"[t]he aim of the planned geological works is to explore and test the potential gas accumulation within the structure called the Smilno tectonic window"*. The Program described the basic steps that would be taken during the exploration phase, namely:[93]

(1) drilling an exploration well;

(2) testing the recognised perspective intervals;

(3) verifying the geophysical methods used in previous stages;

(4) gathering data for the next stage of exploration; and

(5) planning the production stage (if gas was successfully discovered).

80. The Program acknowledged that the area of planned works was situated *"in close proximity to the village Smilno"* but that the well site would be *"situated near the south east boundary of the village on the crop field"*. The Program also stated that *"[n]o environmental protected areas are situated within the planned drilling location"*.[94] Discovery/AOG had selected the Smilno well site due to its proximity to existing infrastructure and roads in order to *"minimize both costs and environmental impact"*.[95]

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92 Lewis 1 at [53].

93 **Exhibit C-88**, pp. 3-4.

94 **Exhibit C-88**, pp. 15-16.

95 Lewis 1 at [54].

81. In June 2015, AOG entered into the necessary leases with the owners of the land on which the Smilno well site was located.[96] On 4 November 2014, AOG also obtained a permit from the Bardejov District Office (with the consent of the previous lessee, Biodruzstvo Smilno), to enable AOG to use what was otherwise agricultural land for a non-agricultural purpose, *i.e.* geological exploration.[97] Moreover, upon an application dated 1 June 2015,[98] a further permit was issued by the Bardejov District Office for the same purpose on 17 June 2015.[99] When taken together with the express terms of the Licences, Discovery/AOG therefore had all the necessary permits and approvals from Slovakia to enable it to drill an exploration well at the Smilno site.

2. The Smilno site was accessible via a Road from Smilno village which had been used by the public for centuries

82. The Smilno well site was accessible via a road which runs from Smilno village (the "**Road**"). The following pictures show the location of the well site (the red dot in the first picture) and the location of the Road (the two curved green lines in the second picture):[100]

96 **Exhibits C-74** and **C-76**.
97 **Exhibits C-64** and **C-65**.
98 **Exhibit C-75**.
99 **Exhibit C-77**
100 **Exhibit C-88**, p.18; **Exhibit C-227**.

AOG-Smilno-1 well location

83. The Road is situated on a plot of land which is registered on Slovakia's land registry, namely "E" No. 2721/780 (which is co-owned by 166 individual landowners). The same plot is also registered as "C" No. 945, but this plot does not have a title deed.[101]

84. According to a statement issued by the Smilno municipality on 6 June 2016, the Road *"has been used by the general public for many decades (100 – 200 years) as an access road to access the adjacent plots of land […] and is publicly accessible."*[102] Slovakia's land registry for the plot of land on which the Road is located states that the *"way of using the plot"* for this plot includes *"[l]and on which an engineering structure is built – road, local and special-purpose road, forest road, field road, sidewalk […]"*.[103]

85. Under Slovak law,[104] the fact that the Road is used by vehicles and pedestrians in order to access other plots of land (and is not in an enclosed area) means that the Road is classified as a public special purpose road.[105] This classification operates automatically by operation of Slovak law and is not dependent on any decision from any Slovak authority or other body.

86. Further, a 2011 decision of the Prešov Regional Court confirmed that a public special purpose road may be used by the public and its use is not restricted only to the registered co-owners of the plot where the road is situated.[106] The owners of any land on which a public special purpose road is situated are therefore bound to respect the public nature of the road. It is

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101 **Exhibits C-139** and **C-140**.

102 **Exhibit C-18**.

103 **Exhibit C-139**.

104 **Exhibit C-221** §1(2)(d), §22(1) and §22(3) of Act No. 135/1961 (the "**Road Act**"); **Exhibit C-223** §22 of Decree No. 35/1984 (the "**Road Decree**").

105 In Slovak: *účelova cesta.*

106 **Exhibit C-16** Resolution of the Regional Court in Prešov dated 17 October 2011, file no. 6Co/85/2011.

contrary to Slovak law for landowners to attempt to prohibit members of the public from accessing such a road.

87. Under Slovak law,[107] the Slovak Police Force (the "**Police**") are obliged to ensure that public special purpose roads (including the Road) remain open for use by members of the public. AOG was a member of the public. If any vehicles are obstructing traffic on a public special purpose road, the Police are also authorised to remove these vehicles, in order to keep the road open for use by the public.

88. On each occasion when AOG attempted to access the Smilno well site via the Road, AOG was prevented from doing so and the Police did nothing to enable AOG to access the well site via the Road. Indeed, the actions taken by the Police and other State personnel and authorities (as described below) effectively sought to prevent AOG from accessing the site. As a result, AOG was prevented from drilling its exploration well at Smilno.

3. AOG's first drilling attempt in December 2015

89. On 6 December 2015, AOG mobilised contractors—Trans-Wiert sp. z o.o. ("**Trans-Wiert**")—who started levelling and preparing the Smilno site for drilling operations. The site was prepared using earth-moving equipment without incident.[108] However, problems began on 14 December 2015 when AOG found that a vehicle had been parked across the entrance to the Road.[109] The Road was the only viable access route for AOG in due course to move the drilling rig and other heavy machinery to the Smilno well site.[110]

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107 See *e.g.* **Exhibit C-222** §2(1)(a), §2(1)(i), §2(1)(j) and §27(a) of Act No. 171/1993 (the "**Police Act**"); **Exhibit C-214** §2(1), §43(4), §43(5) of Act No. 8/2009 (the "**Road Traffic Act**").

108 Fraser 1 at [35]; Lewis 1 at [55].

109 Lewis 1 at [55].

110 Lewis 1 at [56].

90. The vehicle belonged to Marianna Varjanová, a local resident who owned a neighbouring ski resort. Ms Varjanová was an activist who was opposed to AOG's activities. This was reported to the Police who were called, but they took no action to remove the vehicle.[111]

91. Thereafter, AOG agreed to buy a share in the plot of land on which the Road was situated to try to secure additional access rights, notwithstanding the fact that (under Slovak law and as a member of the public) AOG was already entitled to use the Road. This purchase completed on 28 December 2015.[112] However, the Road continued to be blocked by the activists' vehicles after 28 December 2015. Once again, the Police declined to remove any of the vehicles.[113]

92. In mid-January 2016, one of the activists' vehicles was parked across the Road near the entrance to the well site. As well as being chained down, a warning sign had been placed on the vehicle which stated that the vehicle might explode. This posed a serious threat to the safety of the local population and to AOG's workforce. The Police were called, but once again they took no steps to remove the vehicle.[114]

93. After concluding that the sign on the vehicle was not genuine, and since the Police were refusing to remove the vehicle, AOG (with the assistance of Trans-Wiert) was forced to remove the vehicle itself in order to provide a clear route of access for the conductor drilling rig to reach the well site. However, after this vehicle was removed, further vehicles were parked across the Road by the activists. As a result, AOG was unable to move the conductor drilling rig to the Smilno well site.[115]

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111 Lewis 1 at [57]; Fraser 1 at [36].
112 Fraser 1 at [38]; **Exhibit C-105**.
113 Lewis 1 at [59]; Fraser 1 at [38].
114 Lewis 1 at [59]; Fraser 1 at [40].
115 Lewis 1 at [61]; Fraser 1 at [41].

94. Throughout this entire period, AOG was engaging with the local mayor (who supported AOG's activities) and with the local community.[116] However, AOG continued to encounter resistance from the activists, led by Ms Varjanová who escalated matters by applying for an interim injunction against AOG.

95. On 21 January 2016, Ms Varjanová brought a civil action against AOG in the Bardejov District Court claiming that the sale of the share of the land to AOG in December 2015 (see [91] above) was in breach of the existing co-owners' pre-emption rights under Slovak law.[117] Judge Hanuščaková was allocated to hear Ms Varjanová's claim against AOG. Even though the substantive proceedings related to the question of whether the sale was voidable as a result, she also applied for an interim injunction that prevented AOG from using the Road, which had nothing to do with the contested ownership over a parcel of land.

96. On 18 February 2016, and upon Ms Varjanová's application, Judge Hanuščaková granted an interim injunction against AOG (the "**Interim Injunction**"):[118]

    (1) By the Interim Injunction, AOG was "*to refrain from using the real property registered in the Land Register in Ownership Certificate No. 1367, cadastral territory Smilno, namely the lot of land of the "E" Register registered on the map of the specified documentation no. 2721/780, arable land with an area of 11,660 m^2, and to refrain from removing things placed by the plaintiff on the property registered in the Land Register in Ownership Certificate No. 1367, cadastral territory Smilno, namely the lot of land of the "E" Register registered on the map*

116 Lewis 1 at [39]; Fraser 1 at [34].
117 Case Number 1C/29/2016.
118 **Exhibit C-125** .

of the specified documentation no. 2721/780, arable land with an area of 11,660 m²".

(2) The Interim Injunction was stated to last until *"the termination of the main proceedings conducted by the local court upon a final judgment under file no. 1 C/29/2016".*"

97. The grant of the Interim Injunction had a profound and wholly unjustified effect on AOG's business. AOG was prevented from using the Road to bring the drilling rig and other heavy machinery to the well site despite the fact that (*i*) AOG held a Licence from the MoE which expressly permitted AOG to explore for oil and gas at the Smilno well site, (*ii*) AOG had entered into leases over the well site and had secured permits to enable it to carry out its exploration activities, (*iii*) AOG had mobilised contractors to carry out the drilling operation at significant expense, and (*iv*) AOG was a member of the public and thus automatically entitled to use the Road (since it was a public special purpose road).

98. As a result of the Interim Injunction, AOG was prevented from drilling its exploration well at the Smilno well site.

99. The Interim Injunction should, as a matter of Slovak law, never have been granted. As set out in the expert report of Prof Števček, "*the interim injunction should not have been granted: the conditions for granting an interim injunction were not met and the issue of road use is not within the jurisdiction of the court but of the municipality*":[119]

(1) The Bardejov District Court had entirely failed to engage with the public nature of the Road. This is "*despite the fact that the subject of the dispute between the parties were mainly the passage of the (first)*

[119] Števček 1 at [27].

defendant on the road"[120] (the Court having noted that the claimant was preventing the defendant, AOG, from using the Road).

(2) Furthermore, the Bardejov District Court failed to consider what loss (let alone irreversible loss) Ms Varjanová would have been liable to suffer to her protected interest, *i.e.* her share in the ownership of the relevant plot of land. The only potential loss to her was to her vehicle. However, this vehicle was unlawfully blocking the Road.[121]

(3) The illegality of Ms Varjanová's conduct was itself a sufficient reason for the injunction not to be granted. In particular, "[i]*n view of the fact that, by placing the motor vehicle on the road, the applicant deliberately and repeatedly blocked the passage of cars on a public road … she acted in breach of the law*".[122]

100. In March 2016, AOG appealed against the grant of the Interim Injunction. However, AOG's appeal was rejected in a decision issued by the Prešov Regional Court on 14 April 2016.[123] Since the Interim Injunction should never have been granted, the appeal court should have reversed it.[124]

101. There is no rational explanation for why the Bardejov District Court or the Prešov Regional Court acted in the way they did. As explained further in **Section IV** below, the decisions of the Bardejov District Court and the Prešov Regional Court amounted to a denial of justice.

4. AOG's second drilling attempt in June 2016

102. In June 2016, AOG made a second attempt to drill at the Smilno well site. On this occasion, AOG was prevented from drilling an exploration well not

120 Števček 1 at [21].
121 Števček 1 at [22].
122 Števček 1 at [23].
123 **Exhibit C-17**.
124 Števček 1 at [33].

only by the conduct of the Police but also by the intervention of a State Prosecutor.

103. In early June 2016, AOG had mobilised a local Slovak contractor (GMT projekt, spol. s.r.o.) to complete certain construction work at the Smilno well site, including upgrading the Road to the well site. As noted in an internal AOG report dated 15 June 2016, this work was completed without significant delay.[125] The same report also stated:[126]

> *"Although we continue to meet opposition from the same local protestor (Ms. Varjanova) and her immediate family, the village as a whole, and the mayor in particular have been very supportive. Public Relations efforts such as contacts with the local press and a fact-finding trip to the Czech Republic have clearly helped. We continue to coordinate closely with security, legal and Public Relations advisors."*

104. This fact-finding trip to the Czech Republic had been led by AOG's Country Manager (Mr Benada) who had arranged for approximately 40 people (including residents of Smilno village) to visit well sites in the Czech Republic in April 2016 to demonstrate how the proposed well would look and operate at Smilno. The fact-finding visit was very 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. [127]

105. Serious problems arose between 16-18 June 2016 when a group of activists (led by Ms Varjanová) prevented AOG once again from using the Road and carrying out drilling operations at the well site. Over this period, the activists (*i*) gained access to the well site, (*ii*) laid down on the ground under trucks and machinery belonging to AOG's contractor, (*iii*) sat on the Road and parked vehicles on the Road in an attempt to block further equipment from

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125 **Exhibit C-135**, pp. 1-2.

126 **Exhibit C-135**, pp. 3.

127 Fraser 1 at [48].

passing, and (*iv*) attempted physically to damage the equipment belonging to AOG's contractor. This conduct posed a serious danger to the activists and to AOG's workforce who were placed in a difficult and compromising situation.

106. On Saturday, 18 June 2016 a State Prosecutor (JUDr. Vladislava Slosarčíková) arrived at the scene. Intervening in this situation was not within her responsibilities or authority.[128] As explained in a report prepared by AOG's attorney (JUDr. Pavol Vargaeštok) who was present at the scene on 17-18 June 2016:[129]

    (1) on 18 June 2016, the activists had created a *"blockade"* across the Road and on the adjacent plots of land;

    (2) the Police were called to protect public order, and Dr Vargaeštok was present at the scene as AOG's attorney;

    (3) at approximately 2pm on 18 June 2016, the State Prosecutor arrived and referred Dr Vargaeštok to the Interim Injunction against AOG;

    (4) in response, Dr Vargaeštok explained (*inter alia*) that:

        (a) the Road was a special purpose road (which any member of the public was entitled to use); and

        (b) in any event, a majority of the co-owners of the Road had authorised AOG to use the Road;

    (5) the State Prosecutor did not accept these arguments, spoke with the Police and then left at approximately 3:30pm; and

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128 Fraser 1 at [56].

129 **Exhibit C-161**.

(6) as a result of the intervention by the State Prosecutor, AOG was unable to continue their operations at the well site.

107. As Mr Fraser observed in an internal email sent to his colleagues at AOG on 18 June 2016 (emphasis added):[130]

> *"Yesterday afternoon the police were removing protesters from in front of vehicles so that seemed quite encouraging. Today we decided we needed to get just one vehicle onto the location but there were 10 vehicles blocking the entrance to the access road and there were protesters blocking the side route round the road.* ***The police came and would have helped out save that the local prosecutor […] then showed up and told the police to stop****. We think she was cross because she was dragged out on a Saturday."*

108. Discovery/AOG could not understand why a State Prosecutor had (*i*) arrived on the scene since this situation was outside of her authority, (*ii*) had come on a Saturday (outside of normal working hours) and (*ii*) instructed the Police to stop its policing operation, against the background of the serious and concerning events described at [105] above. As a direct result of the State Prosecutor's intervention, and the subsequent failure by the Police to disperse the activists, AOG was unable to bring the drilling rig and other heavy machinery to the Smilno well site and AOG was forced to abandon the second drilling attempt, at considerable cost.[131]

109. Against the background of these events, the Parliament of the Prešov region (one of eight self-governing regions in Slovakia which form part of the public administration[132] of the Slovak Republic, and which included the areas under the 2016 Licences), approved the following resolution on 24 June 2016:[133]

> *"The Council of the Prešov Self-Governing Region hereby fully supports the citizens and councils of villages/municipalities in North-Eastern Slovakia that*

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130 **Exhibit C-137**.

131 Fraser 1 at [57].

132 In Slovak: *verejná správa*.

133 **Exhibit C-20**.

do not agree with exploration works in the exploration area for production of oil and natural combustible gas associated with the activities of the company Alpine Oil and Gas s.r.o.

Exploration areas of Svidník, Medzilaborce, Snina, Pakostov and Klenová situated in the Districts of Bardejov, Svidník, Stropkov, Medzilaborce and Snina are concerned.

The Council of the Prešov Self-Governing Region will apply their best efforts and abilities to achieve that the affected municipalities/villages be excluded from the exploration and production areas."

110. This resolution was approved and published (*i*) at around the same time that the MoE had granted the 2016 Licences in June 2016 (see [74] above); and (*ii*) at a time when AOG was in active dialogue with a range of contractors, landowners, local authorities and other parties in the region, regarding its exploration activities. The resolution represented a public, official condemnation of Discovery/AOG's proposed activities in the region, from the principal regional elected body (and thus attributable to Slovakia), and was moreover intended to impair Discovery's ability to reap the benefits of its investment. Regardless of whether or not the Parliament of the Prešov self-governing region had any direct legal capacity to impose obligations or restrictions on AOG, on the Licences or on any other State authorities (for example, the Police)—or whether or not those State authorities, and particularly the Police, considered themselves bound to abide by resolutions of the Parliament of the Prešov self-governing region—there can be no doubt that the resolution would have had a substantial negative impact on AOG's reputation and standing in the eyes of the local population, including members of the local Police. Its intention and effect, therefore, can only have been to harm AOG's ability to do business in the region and it thus represented a serious infringement by the self-governing regional parliament of AOG's rights under the Licences. Moreover, at no stage subsequently was any effort made by any part of the central government of the Slovak Republic to reverse, or in any other way mitigate the effect of, this resolution of the Parliament of the Prešov self-governing region.

5. AOG conceded Ms Varjanová's substantive claim

111. AOG had a sound legal basis for using the Road, on the basis that the Road was a public special purpose road and therefore accessible by any member of the public. However, the activists, the Police and the State Prosecutor were able to exploit the existence of the (wrongly granted) Interim Injunction to prevent AOG from using the Road in order to conduct is exploration activities.[134]

112. AOG understood that if it conceded Ms Varjanová's claim (*viz.* that the share of the land to AOG in December 2015 was in breach of the existing owners' pre-emption rights) this would result in the discharge of the Interim Injunction (which would have otherwise continued until the substantive dispute was resolved). AOG's hope was that the discharge of the Interim Injunction would enable it to use the Road once again, as a member of the public, to bring the drilling rig and other heavy machinery to the well site to perform the necessary exploratory drilling.

113. In June 2016, AOG therefore filed an application in the Bardejov District Court to concede Ms Varjanová's claim in full. However, it took until October 2016 for Judge Hanuščaková to issue a judgment and order in favour of Ms Varjanová following AOG's concession of the claim.[135] From this point onwards, the Interim Injunction should have been of no further effect.

114. Nevertheless, on 23 November 2016, Ms Varjanová filed an appeal to the Prešov Regional Court against Judge Hanuščaková's judgment, even though her claim had already been conceded by AOG in full and none of the reasons

134 Fraser 1 at [59].

135 **Exhibit C-147**.

allowing an appeal were applicable to her case or were relied upon in her appeal.[136]

115. The fact that AOG had conceded Ms Varjanová's claim meant there was no decision or issue against which she could, as a matter of Slovak law, appeal.[137] Her appeal was clearly inadmissible under §358 and §359 of the Civil Procedure Act.[138] Yet the effect of the appeal was to keep the Interim Injunction alive for the duration of the appeal, and this was evidently the reason why Ms Varjanová had filed the appeal. The appeal was an abuse of the court's processes in an attempt to prolong the existence of the Interim Injunction to the detriment of AOG.

116. On 8 December 2016, AOG filed an application to have Ms Varjanová's appeal struck out. This application was not determined until 27 February 2017 when the notice of appeal was indeed struck out.[139] Further delays then ensued. It took until 4 April 2017 for the Prešov Regional Court to deliver the decision to the Bardejov District Court, which in turn sent it to both parties only on 2 May 2017.[140] This decision only came into effect when the parties had been served. As a result, the Interim Injunction had been kept in force by the Slovak judiciary for almost exactly one year after the date when AOG had conceded Ms Varjanová's claim (*i.e.* from June 2016 until May 2017).

6. Negotiations with Police and Mayor to erect a road sign

117. In July 2016, following on from the second drilling attempt, the Police indicated that if AOG could arrange for the Smilno municipality to erect a road sign at the entrance to the Road, which acknowledged that the Road was a public special purpose road, they would keep the Road open.

136 **Exhibit C-155**.
137 Števček 1 at [40]-[42].
138 **Exhibit C-229**.
139 **Exhibit C-170**.
140 **Exhibit C-170**.

Extensive discussions took place between AOG, the Mayor of Smilno and the Police, which were initially very positive.[141] As Mr Lewis explained in an email to JKX and Romgaz on 29 September 2016:[142]

> *"It appears that we have finally broken through the bureaucratic log-jam. The revised signage proposal for Smilno was finalised today and the mayor will deliver it to the Bardejov police on Monday. We expect that Mr. Silva (the head of the traffic police) will sign it promptly, following which the mayor can proceed to install the signs (there are 5-7 in total in various spots in Smilno).*
>
> *The mayor has his own staff who can install the signs. However, we are going to try to have our folks do it, since they would be much faster. If our folks do it, it would cost an estimated €2,000."*

118. In early October 2016, the proposed signage scheme was submitted by the Mayor to the Police for approval. AOG was then led to believe that the signage scheme would be approved by the Police. As Mr Lewis stated in an email sent on 3 October 2016 to JKX and Romgaz:[143]

> *"I am happy to confirm that the Smilno mayor has executed the signage proposal and delivered it to the police, as expected. The police have already informally approved it, and should do so formally in the next couple of days. We are now trying to line up the installation of the signs so that this can be performed as quickly as possible. We will keep you posted."*

119. On the basis of the positive responses AOG had received from the Mayor and the Police, AOG decided to mobilise contractors in order to attempt to drill the exploration well at the Smilno well site. As AOG explained in a report dated 11 October 2016 and sent to JKX and Romgaz (emphasis added):[144]

> *"The documents were modified and approved by the mayor, and are in the hands of the police for final approval. But, unfortunately, they are taking their time. Once these final documents are approved by the police, the signs will be installed.* ***On condition of the signs being in place, the police have promised***

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141 Fraser 1 at [66].

142 **Exhibit C-145**.

143 **Exhibit C-145**.

144 **Exhibit C-148**, p. 1.

> ***complete support for our access.*** *As the trucks from Trans Wiert are rolling from Poland, we plan a meeting with the police, our security team, the mayor and the Smilno town council to review all procedures and make sure everyone knows their job. […] Trans Wiert (main location contractor) is ready to proceed with finalizing construction."*

120. On 12 October 2016, AOG was informed that (*i*) the Police had *"approved the signage scheme and the document has gone back to the mayor to initiate installation"* and (*ii*) the Mayor had also agreed to allow AOG's contractor to install the signs, which could be completed within a matter of days.[145]

121. It subsequently transpired that—without informing AOG at the time—the Police had approved every other sign in the scheme apart from the sign at the entrance of the Road (the only sign AOG was concerned about) ostensibly on the basis that the Road was a *"field track"*. (This, of course, misses the point that a field track can nevertheless be a public special purpose road.) AOG learned about the Police's decision for the first time on 14 October 2016 when it was provided with a copy of a letter sent by the Police to the Smilno municipality.[146] However, to the extent the position adopted by the Police was based on its understanding that the Road was not a public special purpose road, this understanding was subsequently proven to be incorrect.

122. On 22 November 2016, AOG submitted a freedom of information request to the Ministry of Transport and to the Police Praesidium to enquire whether a field track, if registered on the land registry, was a public special purpose road. On 29 November 2016, the Ministry of Transport confirmed that field tracks are indeed special purpose roads.[147] In a subsequent clarification issued on 9 December 2016, the Ministry of Transport confirmed that if a field track was recorded on the land registry of the Slovak Republic, then it

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145 **Exhibit C-150**.

146 **Exhibit C-151**; **Exhibit C-153**.

147 **Exhibit C-21**.

is classified as a public special purpose road.[148] The Road meets these conditions and is therefore a public special purpose road.

123. Notwithstanding this clarification from the Ministry of Transport, on 23 November 2016, the Police separately sought directions from the Ministry of the Interior as to how the Road should be classified (*i.e.* whether a public special purpose road or some other category of road). The Ministry of the Interior issued an instruction to the Police on 19 December 2016, stating that the Road was not a public special purpose road.[149] The instruction issued by the Ministry of Interior directly contradicted the position adopted by the Ministry of Transport as referred to at [122] above.

124. The Ministry of Interior then issued a subsequent opinion on 30 December 2016 declaring that, with regard to the question of field tracks and special purpose roads, the competent authority was not the Ministry of Interior but rather the Ministry of Transport.[150] Thus the Ministry of the Interior, by its own admission, had no competence to issue its instruction to the Police.

125. The result of this protracted exercise was that AOG had wasted many months (from July 2016 onwards) negotiating in good faith with the Police and the Mayor to erect a road sign at the entrance of the Road which would have:

    (1) clarified that the Road was a public special purpose road (accessible by any member of the public), as confirmed by the Ministry of Transport; and

    (2) enabled AOG to carry out its drilling operations at the Smilno well site by bringing heavy machinery along the Road.

148 **Exhibit C-22**.
149 **Exhibit C-23**.
150 **Exhibit C-24**.

126. The proposal to erect a road sign originated with the Police: see [117] above. AOG pursued all ensuing discussions over the following months (with the Police and the Mayor) in good faith. The Police led AOG to believe that the signage scheme had been approved, which encouraged AOG to mobilise its contractors to recommence construction activities at the well site: see [118]-[120] above. But without informing AOG at the time, the Police declined to approve the erection of the crucial sign at the entrance of the Road: see [121] above. And then, when prompted by the Police, the Ministry of Interior issued an invalid instruction to the Police as to the status of the Road which contradicted the Ministry of Transport and undermined AOG's lawful right to use the Road: see [122]-[124] above.

7. AOG's third drilling attempt in November 2016

127. On 15-17 November 2016, AOG and its contractors made a third attempt to bring the necessary heavy machinery to the Smilno well site in order to drill the exploration well. Once again, however, AOG was prevented from drilling the well by (*i*) the Police's refusal to accept that the Road was a public special purpose road, (*ii*) the Police's refusal to remove any of the vehicles which the activists had parked across the Road (which prevented AOG's contractors from transporting heavy machinery to the well site), (*iii*) the Police's instruction to AOG to remove its own trucks off the Road, and (*iv*) the Police's refusal to disperse the activists who were aggressive towards AOG's employees.[151] AOG was therefore unable to conduct its drilling operations at the well site and substantial costs were wasted in the process.

[151] Fraser 1 at [72].

8. Conclusion in relation to Smilno

128. Discovery/AOG had made three attempts to drill an exploratory well at the Smilno site between 2015-2016, but it was prevented from drilling an exploration well by:

(1) the Slovak judiciary's decision to issue the Interim Injunction which prohibited AOG from using the Road, which should never have been granted and should have been (but was not) overturned on appeal, and which was then in effect for far longer than it should have been, despite the substantive claim having been conceded by AOG;

(2) the Police's failure and/or refusal to accept that the Road was a public special purpose road;

(3) the Police's failure to disperse the activists to allow AOG to access the Road as they were entitled to do as members of the public; and

(4) the Police's decision to decline to approve the erection of a crucial sign at the entrance of the Road.

129. The conduct summarised at [128] above was exacerbated by:

(1) the intervention of the State Prosecutor who directed the Police to stop their policing operation during the second drilling attempt in June 2016;

(2) the resolution of the Prešov Parliament in June 2016;

(3) the Ministry of Interior commenting on an issue outside of its competence and, relatedly, the inconsistent stances adopted by the Ministry of Interior and the Ministry of Transport as to the status of the Road in November and December 2016; and

(4) the unwarranted delays experienced by AOG in the local Slovak courts in discharging the Interim Injunction between June 2016 and June 2017.

K. SLOVAKIA PREVENTED AOG FROM DRILLING THE KRIVÁ OL'KA WELL

130. In addition to the Smilno well, Discovery/AOG had also planned to drill an exploration well at Krivá Ol'ka on the Medzilaborce block: see [66]-[71] above. The detailed and extensive geological surveys which Discovery/AOG had carried out since 2014 had revealed that the Krivá Ol'ka well had good prospects of producing oil. Discovery/AOG were therefore keen to move forward to drill this exploration well.

131. As explained below, Discovery/AOG was prevented from drilling the Krivá Ol'ka well by the acts and omissions of Slovakia's organs including the MoE and the Ministry of Agriculture[152] ("**MoA**"). Such conduct is attributable to Slovakia under international law and placed Slovakia in breach of its obligations towards Discovery under the BIT. Moreover, and as explained below, Discovery/AOG was treated less favourably than NAFTA in like circumstances.

1. In 2015, AOG entered into a Lease with State Forestry which was approved by the MoA

132. The Krivá Ol'ka well site was situated outside the village of Krivá Oľka on land owned by the Slovak Republic and managed by LESY Slovenskej republiky ("**State Forestry**"). State Forestry is a state-owned enterprise responsible for managing forests owned by the Slovak Republic. State Forestry is controlled by the MoA. According to its own website, the General Director of State Forestry (*i*) is appointed by the Minister of Agriculture, (*ii*) works *"directly under his supervision"* and (*iii*) implements the *"instructions of the Minister of Agriculture"*.[153]

133. On 27 April 2015, AOG met with a negotiator for the General Director of State Forestry to discuss the proposed lease to enable AOG to drill the Krivá

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152 In Slovak: *Ministvo pôdohospodárstva a rozvoja vidieka*.

153 **Exhibit C-230**.

Ol'ka well. The negotiator informed AOG that State Forestry had previously entered into leases with NAFTA to enable it to drill exploration wells.[154] Such leases had to be approved by the Minister of Agriculture, but this was considered a mere formality. Discovery does not know precisely (*i*) how many leases (or lease extensions) State Forestry had concluded with NAFTA, and (*ii*) how many of those leases (or lease extensions) were approved by the MoA. However, it was apparent from the meeting held with AOG on 27 April 2015 that State Forestry was familiar with such leases and that the MoA had previously approved those leases for NAFTA.

134. On 4 May 2015, AOG entered into a lease with State Forestry (the "**Lease**"). The express purpose of the Lease was to enable AOG to carry out *"geological survey and possible extraction of natural hydrocarbons"* at the Krivá Oľka well site.[155] The area covered by the Lease was approximately 1 hectare. The initial period of the Lease expired on 15 January 2016. AOG had a right to request an extension of the Lease from State Forestry, but any such extension had to be approved by the MoA.[156]

135. On 19 October 2015, MoA approved the grant of the Lease. The MoA acknowledged that the Lease had been granted to AOG *"for the purpose of geological exploration and possible subsequent extraction of natural hydrocarbons"*.[157] Slovakia was therefore well aware of the purpose of the Lease and evidently content, at this stage, for AOG to carry out geological exploration at the Krivá Ol'ka well site. As explained below, the MoA subsequently performed a *volte face* in 2016.

136. In December 2015, following the MoA's decision to approve the Lease, certain standing timber located at the well site was felled after State Forestry

154 **Exhibit C-72**.
155 **Exhibit C-73**, Article II and Article VII(1)-(3).
156 **Exhibit C-73**, Article III.
157 **Exhibit C-73**, pp. 6-7.

had granted approval for this timber felling to take place.[158] Over the preceding months, AOG had also taken a number of steps to prepare the Krivá Oľka well site for drilling operations. However, as a result of the delay in the MoA approving the grant of the Lease between May and October 2015, the initial term of the Lease was due to expire in January 2016. AOG therefore needed to obtain an extension of the Lease.

2. In 2016, the MoA refused to approve an extension of the Lease

137. On 14 January 2016, AOG and State Forestry entered into Addendum No. 1, extending the term of the Lease until 1 August 2016. Addendum No. 1 provided that the extension would enter into force after the MoA had approved the extension of the Lease.[159] Addendum No. 1 was signed on behalf of State Forestry by Peter Morong, the-then General Director. Having regard to the matters set out at [132(i)–(iii)] above, and pending disclosure from Slovakia, it is reasonable to infer that the General Director would have:

(1) obtained the prior approval of the Minister of Agriculture before signing Addendum No. 1; or at the very least

(2) notified the Minister of Agriculture that it was necessary for the MoA promptly to approve the extension of the Lease.

138. By letter dated 17 January 2016, AOG applied for the necessary consent from the MoA.[160] On 22 January 2016, the MoA responded to inform AOG that granting the relevant consent was within the competence of the Head of the Service Office of the Ministry.[161] AOG then waited for the MoA formally to communicate its approval of the extension of the Lease. Without MoA approval, AOG was unable to conduct drilling operations at the Krivá Oľka well site. The approval process dragged on for many months and the

158 Fraser 1 at [32].
159 **Exhibit C-116**, Articles I-II.
160 **Exhibit C-118**.
161 **Exhibit C-121**.

MoA postponed its decision to approve the extension. Pending disclosure from Slovakia, it is reasonable to infer that the MoA was giving extensive internal consideration to the approval of Addendum No. 1 from January 2016 onwards. However, AOG was kept completely in the dark regarding the approval process.

139. At the end of May 2016, AOG wrote to the Minister of Agriculture (Gabriela Matečná) expressing its frustration at the lack of approval. AOG sought a meeting with Minister Matečná to discuss the situation. In its letter, AOG noted that the total amount invested by AOG and its partners was *"approximately €18 million over the period ending 31 December 2014, including €3.8 million which was paid to the Government as license fees"*. In its letter, AOG continued:[162]

> *"AOG's new lease agreement with the State Forestry for this site is not valid until approved by the Ministry of Agriculture. However, approval of the lease has been postponed by the Minister of Agriculture numerous times since January 2016, without explanation.*
>
> *AOG has invested considerable time and expense in fulfilling its license commitments and preparing to drill at this site, and is highly concerned that its investment is in jeopardy. We therefore urgently request a meeting with you to explain our concerns in more detail, clarify our position, and seek your help in attempting to remedy this situation."*

140. On 7 June 2016, the MoA wrote to AOG stating that it was *"unfortunately not possible in the near future to carry out this meeting with Madam Minister"*.[163] On 23 June 2016, Minister Matečná wrote directly to AOG. Minister Matečná asserted that the MoA would not consent to the extension of the Lease because *"the contractually agreed requirements were not fulfilled"*. Minister Matečná did not explain (*i*) what the alleged requirements were or (*ii*) why they were allegedly not fulfilled (or by whom). Minister Matečná did, however, *"recommend"* that AOG make an

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162 **Exhibit C-132**.

163 **Exhibit C-134**.

application to the MoE under §29 of the Geology Act for a compulsory access order instead.

141. The timing of the Minister's letter was significant for two reasons:

(1) ***First***, the Minister's refusal to approve Addendum No. 1 was inconsistent with MoE's decision to grant the 2016 Licences, which expressly permitted AOG to carry out its exploration activities at the Medzilaborce block: see [74] above. The MoA does not seem to have taken this significant fact into account when declining to approve the extension of the Lease. The MoA's recommendation for AOG to apply to the MoE for a compulsory access order under §29 of the Geology Act is all the more significant given that this decision frustrated the legitimate expectations which the MoE generated in granting the Licences, that were periodically extended and culminating in the 2016 Licences in June 2016.

(2) ***Second***, the Minister's letter came after six months of delay since Addendum No. 1 was first executed between AOG and State Forestry in January 2016. As a result, six months of valuable time was lost. All the while, AOG was unable to carry out exploration activities at the Krivá Oľka well site. The Minister did not explain why it had taken six months to decide simply to 'pass the buck' to another Government Ministry (*viz.* the MoE) by recommending that AOG should apply for a compulsory access order under §29 of the Geology Act. If AOG had known that this was going to be the MoA's position prior to June 2016, it could have made the §29 application much sooner.

142. It is clear that (*i*) Discovery/AOG was not being treated fairly or transparently (and, indeed, AOG was being treated arbitrarily) by the MoA in connection with its application for an extension of the Lease and (*ii*) Discovery/AOG was being treated less favourably than NAFTA in connection with the leases which it had concluded with State Forestry to

carry out exploration drilling (which leases were evidently approved by the MoA without any issue – see [133] above).

3. The MoE refused to grant a compulsory access order to AOG under §29 of the Geology Act

143. Under §29 of the Geology Act, an entity may apply to the MoE for a compulsory access order over land for the purposes of carrying out geological works.[164] It is not necessary to apply for a compulsory access order if the landowner consents to the contractor carrying out geological works on the land (*e.g.* by granting a lease for this purpose). In this case, the Krivá Oľka well site was located on land owned by the Slovak Republic and managed by State Forestry. State Forestry was evidently content for AOG to carry out the geological works (having entered into the Lease and Addendum No. 1). However, since the MoA had refused to approve the extension of the Lease, AOG was left with no other option but to apply for a compulsory access order under §29.

144. By a detailed application dated 30 August 2016, AOG applied for a compulsory access order under §29 of the Geology Act in respect of three parcels of land owned by the Slovak Republic and managed by State Forestry.[165] The application was made principally on the basis that:

(1) it was in the interests of the Slovak Republic that oil and gas exploration should take place (as the MoE had itself confirmed in the 2016 Licences: see [74(10)-(14)] above); and

(2) the relevant parcels of land had no economic or other use, not least in circumstances where State Forestry and the District Office of

164 **Exhibit C-219**.

165 **Exhibit C-143**.

Humenne[166] had already consented to the land being used for exploration activities.

145. In an initial response dated 20 September 2016,[167] the MoE asserted that AOG had failed to demonstrate that the owner of the relevant land had not consented to AOG using the land for exploration activities. In particular, the MoE asserted that it was not apparent that AOG had attempted to enter into an agreement with the landowner. Against the background of AOG already having entered into a Lease and Addendum No. 1 (which the MoA had refused to approve) the MoE's initial response made no sense.

146. This is despite AOG sending a letter to State Forestry dated 18 July 2016, by which it sought State Forestry's agreement to enter into a lease following the MoA's refusal to consent.[168]

147. On 27 September 2016, and in an attempt to demonstrate to the MoE as part of the §29 application that the landowner had not consented to AOG using the land for exploration activities, AOG wrote a letter to the State Forestry's General Director asking State Forestry to enter into a further lease and attached a draft lease agreement. However, State Forestry never responded to this request. Pending disclosure by Slovakia, AOG infers that the MoA refused to authorise State Forestry to enter into a further lease with AOG, hence the reason for State Forestry's non-response to AOG's request.

148. Having been invited to respond to AOG's §29 application by letter dated 9 November 2016, the MoA responded to the MoE by letter dated 23 November 2016. In that letter, the MoA asserted that it was not a *"party to the proceedings"* on the basis that State Forestry (and not the MoA) had an interest in the land.[169] This response was confusing since it was the MoA

166 **Exhibit C-104**.
167 **Exhibit C-144**.
168 **Exhibit C-142**.
169 **Exhibit C-156**, pg.1.

who had encouraged AOG to apply for a §29 order in the first place: see [140] above.

149. A statement issued by State Forestry on 25 October 2016 was equally non-committal. State Forestry asserted that *"the state-owned enterprise cannot assess whether the oil and gas prospecting is of greater interest to society than the function of the forest in question."*.[170] State Forestry's suggestion was that *"the subject-matter be decided pursuant to the applicable law"*.

150. On 9 February 2017 (*i.e.* more than six months after AOG's initial application was submitted) the MoE sought further input from AOG, in particular relating to the length of time required to carry out the exploration activities at Krivá Ol'ka.[171] AOG responded on 15 February 2017 with a detailed timeline for the various steps.[172]

151. By a decision dated 6 March 2017,[173] the MoE rejected AOG's application for a §29 order. In essence, the MoE concluded that because the MoA had not consented to an extension of the Lease under Addendum No. 1, §29 of the Geology Act should not be used to *"replace"* such consent. This decision was all the more surprising in circumstances where the MoA had recommended that AOG make an application under §29 and the MoA itself also said that it did not consider it to be a participant in the procedure under §29. Furthermore, the MoE made no finding that the application had not been in the public interest. On the contrary, the MoE had itself determined that exploration was in the public interest; that is, after all, why it had granted and then extended the Licences as recently as June 2016.

152. Discovery's understanding at the time was that the relevant department of the MoE was initially minded to grant the §29 application. However, this

170 **Exhibit C-156**, pg.5.
171 **Exhibit C-165**.
172 **Exhibit C-167**.
173 **Exhibit C-25**.

was reversed after an order had come from *"above"* that it should be refused. As AOG noted in a report dated 10 March 2017 sent to JKX and Romgaz:[174]

> *"On 9 March we were advised by the Ministry of Environment that our application for a compulsory access order under s. 29 of the Geology Act would be rejected. The legal department indicated to us that they had been preparing to issue an order in our favor when they received an instruction from 'above' to refuse the order, instead. We are awaiting formal confirmation and some clarification, and will then consider our next steps. This is most unexpected."*

153. Discovery was not privy to internal communications between the MoA and the MoE in connection with its §29 application. Pending disclosure by Slovakia, and having regard to the MoA's opposition to the extension of the Lease, it is not clear who (within either the MoE or the MoA) issued this instruction from *"above"*. Discovery reserves the right to plead further as to this matter in its Reply once Slovakia has provided disclosure. Whoever issued this instruction from *"above"*, it is clear that Discovery/AOG was not being treated fairly or transparently by the MoE (and, indeed, AOG was being treated arbitrarily) in connection with its application under §29.

154. On 24 March 2017, AOG appealed the MoE's decision, and, by a decision dated 13 June 2017, the Minister of Environment quashed the previous decision dated 6 March 2017 and remitted it for reconsideration. This meant that, over nine months after it had initially made an application, AOG was exactly where it had started. As a result, AOG was prevented from drilling the Krivá Ol'ka well.

4. The MoE treated AOG less favourably than NAFTA in connection with its §29 application

155. AOG's experience of applying for a compulsory access order under §29 of the Geology Act stands in stark contrast to the favourable treatment afforded

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174 **Exhibit C-169**.

by the MoE to NAFTA in like circumstances. Having regard to these comparable applications, it is clear that AOG was treated less favourably and that AOG was the victim of arbitrary and discriminatory treatment.

156. Pending disclosure by Slovakia of all such applications, Discovery is aware of at least one such application issued by NAFTA in May 2010 for a compulsory access order under §29 of the Geology Act against a private landowner near Malacky in western Slovakia. That application was contested vigorously but the MoE issued a decision in favour of NAFTA and granted a compulsory access order in April 2012. The landowner then appealed against the decision, but his appeal was rejected in March 2013.[175]

157. AOG's justification for a compulsory access order was essentially the same as the justification offered by NAFTA. In NAFTA's case, a private landowner disputed the grant of an order, and asserted its property rights in a vigorous and sustained manner, but was still overruled, both at first instance and on appeal. In AOG's case, the MoA barely engaged with the adjudication process at all. The MoA never suggested that AOG was not entitled to a compulsory access order. To the contrary: the MoA had *"recommend[ed]"* that AOG should apply to the MoE for a compulsory access order under §29: see [140] above.

L. SLOVAKIA PREVENTED AOG FROM DRILLING ANY EXPLORATION WELL UNLESS AOG FIRST CONDUCTED A PRELIMINARY EIA

158. Despite the MoE having extended each of the Licences in June 2016 for a further five years, the Slovak Republic prevented AOG from drilling its exploration wells at Smilno and Krivá Oľka as explained above. The final nail in the coffin occurred when the Slovak Republic required AOG to carry out a preliminary EIA before it could drill any exploration wells under any of the Licences, which would have added significant additional delay and

175 **Exhibit C-32**.

cost to an already long-delayed project. By requiring AOG to conduct a preliminary EIA, the Slovak Republic (*i*) reneged on clear and specific representations that AOG was not legally required to conduct a preliminary EIA, (*ii*) caused JKX and Romgaz to withdraw from the joint venture, and (*iii*) treated AOG less favourably than NAFTA and other entities.

1. In late 2016, the Slovak Republic passed an amendment to the EIA Act which did not apply to AOG

159. On 25 November 2016, the National Council of the Slovak Republic (*i.e.* the Slovak legislature) passed an amendment to Act No. 24/2006 (the "**EIA Act**")[176] which changed the list of proposed activities which were subject to a requirement to conduct a preliminary EIA (described in the legislation as a *"screening procedure"*[177]) and a full EIA (described in the legislation as a *"compulsory assessment"*[178]).

160. The amendment to the EIA Act took effect on 1 January 2017, but it did not apply to AOG's exploration activities because (*i*) those activities had been authorised by the MoE since 2006 when the Licences were first granted and successively extended (as recently as June 2016) and (*ii*) the amended EIA Act could not apply retroactively to those already-authorised activities.[179]

161. Prior to 1 January 2017, (*i*) the EIA Act did not require AOG to conduct a preliminary EIA or a full EIA in respect of any of its exploration activities, and (*ii*) no investigation procedures had even been started in respect of those activities. Under the provisions of the EIA Act which were effective until 31 December 2016:[180]

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176 **Exhibit C-225.**

177 In Slovak: *zisťovacie konanie*.

178 In Slovak: *povinné hodnotenie*.

179 See *e.g.* Slovak Constitution, Article 1(1).

180 **Exhibit C-224**.

(1) The activities in the mining industry which were subject to a requirement to conduct a preliminary/full EIA were comprehensively identified in Part 1 of Annex No. 8. None of AOG's exploration activities was covered by the list of activities identified in Part 1 of Annex No. 8.

(2) In particular, Item No. 16 in Part 1 of Annex No. 8 covered the drilling of *"extraction wells"*.[181] However, AOG's exploration wells were not *"extraction wells"*. AOG would only be entitled to drill extraction wells for oil and gas extraction after it had (*i*) completed the geological exploration works (by drilling exploration wells) under the Licences and (*ii*) obtained a Mining Area Licence: see [30]-[31] above.

162. By contrast, under the provisions of the EIA Act which became effective on 1 January 2017, Part 1 of Annex No. 8 was amended so as to require a preliminary EIA to be conducted before drilling *"boreholes"* to a depth greater than 600m.[182]

163. As explained below, the fact that AOG was under no legal obligation under the amended EIA Act to conduct a preliminary EIA was confirmed by the Minister of Environment (László Sólymos) and the MoE in numerous clear and specific representations issued from November 2016 onwards, upon which AOG reasonably relied.

164. On 29 November 2016—just four days after the legislature had passed the amendment to the EIA Act—Minister Sólymos held a press conference. After the press conference, the MoE issued a press release on its website which stated (*inter alia*) as follows (emphasis added):[183]

> *"With the license holder – Alpine Oil & Gas – [the Minister] plans to agree a compromise step, 'I would like to ask them that they themselves offer to*

[181] In Slovak: *Ťažobné vrty*.
[182] In Slovak: *vrty*.
[183] **Exhibit C-157**.

carry out an environmental impact assessment (EIA),' added Sólymos. ***A legal analysis has shown that the current legislative and procedural does not give rise to a legal obligation on the license holder to carry out an EIA****. The new – and stricter – EIA legislation becomes effective as of 1 January 2017.*

Alpine Oil & Gas first acquired exploration license to explore oil and natural gas deposits in the Svidník, Medzilaborce and Snina area ten years ago. This year, the company has applied to extend the license for a period of 8 more years and, at the same time, applied for the reduction of the exploration license area by some 88 percent on average. After thorough review, the Ministry has legitimately extended the exploration license by 5 years.

The aim of geological exploration is to determine the presence of mineral deposits, in this case deposits of oil and natural gas, located under the Earth's surface. Pursuant to the Geology Act, each such exploration license application is thoroughly reviewed by the Ministry.

Currently, there are 80 exploration licenses in Slovakia where there is no statutory obligation to assess their environmental impact*. In Slovakia, oil and natural gas is produced in the region of Zahorie as well as in the region of East Slovakia (e.g. in Michalovce and Trebisov districts)."*

165. The MoE and Minister Sólymos were therefore publicly acknowledging that AOG was under no legal obligation to carry out an EIA in respect of its exploration activities under the amended EIA Act. This conclusion had been reached a result of a *"legal analysis"* undertaken by the MoE.

2. Between late 2016 and early 2017, Minister Sólymos asked AOG voluntarily to agree to conduct a preliminary EIA

166. On 15 December 2016, AOG attended a meeting with Minister Sólymos and five other State officials, namely:

(1) Ľubomíra Kubišová – General Secretary;

(2) Vlasta Jánová – General Manager of the Geology Department

(3) Daniela Medžová – General Manager of the Legislation and law department;

(4) Ľubica Kováčová – General Manager of the Minister's office; and

(5) Gabriel Nižňanský – Director of the EIA department.

167. AOG was represented at the meeting by Mr Lewis, Mr Fraser, Mr Benada, Katarina Mihalikova (AOG's lawyer) and an interpreter.[184] In advance of the meeting, AOG had sent a presentation to the Minister which was discussed at the meeting.[185] AOG's presentation noted that:[186]

(1) the Slovak Republic was heavily dependent on imports of Russian oil and gas at an annual cost of over €2.1 billion and that *"[n]ew domestic production could reduce this import bill, generate tax revenues and create local employment"*;

(2) the Licences held by AOG were located in the Carpathian region which *"contains many successful shallow fields"*;

(3) AOG had carried out significant work over previous years including the acquisition, processing and interpretation of 2D seismic data and MT surveys to identify suitable well sites;

(4) AOG had incurred significant costs *"with no guarantee of success"* and had paid substantial annual licence fees to the Slovak Republic;

(5) AOG was committed to protecting the environment and to *"use the most advanced technology available in order to protect the environment"*;

(6) AOG had been working on drilling three exploration wells since late 2015 (at Smilno, Kriva Ol'ka and Ruská Poruba) but *"unfortunately with little progress"*;

184 Lewis 1 at [80]; Fraser 1 at [91].
185 **Exhibit C-160**.
186 **Exhibit C-159**.

(7) these exploration wells were *"designed to test the oil or gas potential of the target reservoirs by demonstrating commercial flow rates"*;

(8) AOG had been met with *"opposition and/or obstruction from a wide variety of sources"* (*i.e.* the MoA, the Police, the State Prosecutor's Office, and the judiciary) – AOG's presentation included a detailed table summarising its core complaints in relation to the conduct of each of these organs and agents of the Slovak Republic;

(9) *"[a] small (and unrepresentative) number of local protesters has succeeded in corrupting the public debate, causing the authorities to turn away"* – and the complaints raised by the limited group of protestors had no substance;

(10) AOG had *"already implemented a significant program of geological evaluation, entirely at its own expense and risk"*; and

(11) *"[w]ithout Government support and leadership, the implementation of the Government's own natural resources policy by private sector companies becomes almost impossible"*.

168. During the meeting, AOG made it clear that it was under no legal obligation to conduct a preliminary EIA in respect of its exploration activities. Minister Sólymos agreed with AOG. However, he asked AOG (as he had done during his press conference held on 29 November 2016) to agree voluntarily to conduct a preliminary EIA.

169. AOG explained that it could not agree to conduct a preliminary EIA because this would add significant cost and delay to a project which had already been delayed for over a year as a result of the obstacles created by the Slovak

Republic in response to AOG's attempts to drill at Smilno and Krivá Ol'ka.[187]

170. On 21 December 2016, AOG wrote to Minister Sólymos (following on from the meeting) and set out a proposal.[188] AOG began by noting that it was willing to provide the MoE with *"all necessary cooperation, even beyond the scope of our legal obligations"*. But AOG stated it also had a *"responsibility to our investors"* (*i.e.* JKX and Romgaz) and that AOG would need to consider very carefully *"whether further obstacles and delays to our operations in Slovakia will still be acceptable to the investors"*. AOG continued:

> *"We understand that in the Ministry's opinion, voluntary submission to* [a preliminary EIA] *[…] would be the most convincing argument in favour of improving the public opinion in relation to drilling in the north-east of Slovakia. However, we do not entirely share this opinion, as the most radical opponents of drilling are even now accusing the Ministry officials of acting in favour of the company Alpine Oil and Gas ("Alpine"). These opponents are already questioning the transparency of the administrative procedures in which the exploration areas were designated to Alpine. We are therefore convinced that, even if the environmental impact assessment (EIA) clearly demonstrates that there is no need for a full environmental impact assessment and that all of Alpine's activities are perfectly safe from an environmental perspective, these radical opponents will once again challenge the results of the fact-finding process, as well as the independence and impartiality of the Ministry. In addition, this environmental impact assessment (EIA) would mean to Alpine approximately 6 months of further delay and additional costs of up to EUR 450,000."*

171. In its letter, AOG explained that it could not agree voluntarily to carry out a preliminary EIA in respect of the Smilno well or the Krivá Ol'ka well because (*i*) the drilling of these wells was supposed to have started more than 1 year ago and (*ii*) AOG had already experienced *"significant delay"* due to the *"actions of the drilling opponents and actions or inactions of the*

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187 Lewis 1 at [81].

188 **Exhibit C-162**.

police, courts and the Ministry of Agriculture and Rural Development of the Slovak Republic".

172. AOG then proposed, as a compromise, that it would agree voluntarily to conduct a preliminary EIA in respect of its other planned wells in Zborov, Habura, Ruská Poruba and Oľka[189] provided that:

    (1) a *"voluntary"* preliminary EIA was *"legally feasible"* and would be dealt with promptly by the MoE; and

    (2) the MoE would provide AOG with *"all necessary cooperation regarding the use of real estate in Krivá Ol'ka, Zborov, Habura, Ruská Poruba and Ol'ka and will not unreasonably decide against Alpine or cause unreasonable delays"* in connection with applications under §29 of the Geology Act for compulsory access orders over land.

173. AOG confirmed in its letter that it was eager to assist the MoE to *"improve the reputation of exploration and drilling in the eyes of the public"*. In its letter, AOG noted that it had made several proposals as to how best to achieve this goal during the meeting with Minister Sólymos. AOG concluded its letter by stating as follows:

> *"We will be happy to provide the Ministry with all necessary assistance. At the same time, we would like the Slovak authorities to treat us the same way as other foreign investors in the Slovak Republic, as currently we do not consider the approach by the Slovak Republic as such. Therefore, we much appreciate the meeting at the Ministry and see it as a positive sign and an attempt to reach a mutually acceptable solution."*

174. Following on from the meeting held with AOG in December 2016, Minister Sólymos (*i*) met with a range of individuals and bodies in an attempt to assuage their concerns about AOG's exploration activities, (*ii*) reiterated

189 AOG had identified additional proposed exploration wells over the preceding months as a result of the delays caused at Smilno and Krivá Ol'ka: see Lewis 1 at [69] and Fraser at [106]-[107].

that AOG was under no legal obligation to conduct an EIA, and (iii) sought to persuade AOG to agree voluntarily to conduct a preliminary EIA.

175. On 17 January 2017, Minister Sólymos met with Church leaders in Prešov to discuss AOG's exploration activities in Smilno. Minister Sólymos stressed the importance of keeping *"discussion on the issue at a professional level and without hateful emotions"*. Minister Sólymos also informed Church leaders about the *"new stricter rules"* which applied to new geological surveys. The MoE's press release about the meeting stated (emphasis added):[190]

> *"An amendment to the Environmental Impact Assessment Act has been in effect since the beginning of this year, according to which new exploratory wells are subject to an environmental impact assessment process.* ***However, this does not apply to surveys*** **[*i.e.* explorations]** ***that have already been approved.****"*

176. In AOG's case, the MoE had approved the geological exploration surveys as long ago as 2006 when the Licences were first issued. Moreover, as recently as June 2016, the MoE had extended the Licences which permitted AOG to continue to carry out the geological exploration surveys until 2021 without any requirement to conduct a preliminary EIA.

177. On 27 January 2017, the regional newspaper *Korzár* published an interview with Minister Sólymos. The article noted that some local activists were opposed to AOG's plan to drill an exploration well in Smilno. When asked about the MoE's position, Minister Sólymos was quoted as stating as follows (emphasis added):[191]

> *"There is a company that has obtained the licence back in 2006. According to the applicable legislation, the company had complied with all the conditions and has been here since then.* ***This is like a driving licence. Their driving license has been granted in 2006 and there is no legal or legitimate reason for its revocation, unless they do something illegal****. This* [is] *what the*

190 **Exhibit C-163**.

191 **Exhibit C-164**.

Ministry has on its desk."

178. When asked about the concerns raised by local residents, Minister Sólymos was quoted as stating as follows (emphasis added):

> *"Those concerns are the product of the way the communication happened, and that is the core of the problem. I negotiated with activists and the mining company in order to calm the situation and to get the issue back to the expert level.* ***What matters is that local people can be assured that the activities will not have any unfavourable impacts on their surroundings and the environment in general****."*

179. In the same interview, Minister Sólymos also stressed that approximately 8,000 exploratory wells had been drilled in the Slovak Republic (including a previous well in Smilno) and *"[t]o this day, we at the Ministry are not aware of even a single environment-related problem occurring as the consequence of those 8,000 prospector bore holes"*. Minister Sólymos also reiterated that—although AOG was not legally obliged to carry out a preliminary EIA—he had asked AOG voluntarily to agree to conduct a preliminary EIA during his meeting at the end of 2016.

180. On 15 February 2017, the MoE released a statement summarising the results of an in-depth Ministerial inspection of AOG's activities to date at Smilno. In its statement, the MoE:[192]

(1) dismissed as unfounded the environmental concerns which had been raised by the activists in late 2015 and early 2016 regarding AOG's activities at Smilno (including the allegation that the drilling of an exploration well would result in *"groundwater pollution"*);

(2) stated that the results of the inspection *"did not show violations that would have a significant impact on the environment"* and that therefore

192 **Exhibit C-168**.

the MoE *"currently has no legal option to stop the exploratory drilling in Smilno"*;

(3) confirmed that the MoE had *"dealt with the topic of exploratory wells in Smilno several times in the past. And not once was there evidence of a violation of the law, and thus a threat to the environment"*;

(4) reiterated that the *"stricter legislation"* (*i.e.* the amended EIA Act) only applied to *"[n]ew exploratory wells"* but not to *"old wells"* (*i.e.* the exploration wells which AOG was authorised to drill under the Licences); and

(5) confirmed that AOG *"is not legally obliged to perform"* a preliminary EIA in respect of its exploration activities, but noted that Minister Sólymos had asked AOG to agree voluntarily to carry out a preliminary EIA *"beyond the scope of the law"*.

3. After AOG agreed voluntarily to conduct a preliminary EIA, AOG was later ordered to perform a full EIA

181. In early 2017, against the background of the repeated requests by Minister Sólymos to agree voluntarily to conduct a preliminary EIA, AOG held a number of meetings with the activists who were invariably accompanied by representatives of a Slovak environmental NGO called Forest Protection Movement VLK ("**VLK**").[193] The activists initially demanded that no exploration wells should be drilled until AOG had conducted a full EIA. AOG explained that (*i*) this was not required under Slovak law (as the MoE had repeatedly confirmed in its public statements – see above) and (*ii*) this would neither be customary nor feasible in the case of exploration wells.[194]

182. AOG recognised, however, that unless it took some voluntary steps *"beyond the scope of the law"* (to use the MoE's words in its February 2017

193 In Slovak: *Lesoochranárske zoskupenie VLK*.

194 Fraser 1 at [94]; Lewis 1 at [79].

statement – see [180(5)] above) its future drilling attempts were likely to be thwarted by the same conduct which it had experienced at the hands of the Slovak authorities from December 2015 onwards. AOG therefore agreed voluntarily to conduct a preliminary EIA for each of the proposed exploration wells in order to (*i*) satisfy Minister Sólymos' repeated demands, (*ii*) respond to the concerns raised by the activists about AOG's activities and (*iii*) encourage the Slovak Republic to support (rather than block) AOG's activities.[195] AOG agreed to do so on a voluntary basis and in reliance on the clear and specific statements made by the MoE and Minister Sólymos (see [164]-[180] above).

183. In April 2017, AOG released a public statement which set out eight key principles demonstrating AOG's commitment to the environment and to the local communities where it was intending to drill exploration wells.[196] Key principle (1) embodied AOG's commitment voluntarily to conduct a preliminary EIA for its exploration wells. AOG stated that it was *"not obliged by law to follow this procedure"* but that AOG had agreed to carry out a preliminary EIA *"as a sign of good faith"*. AOG also set out other key principles demonstrating its commitment to the environment and to the local community, including:

> *"(4) If AOG makes a discovery and proceeds to apply for a production licence over the discovery, then a full environmental impact assessment will be conducted as part of that process.*
>
> *[…]*
>
> *(7) AOG is committed to supporting the local economy and will, wherever possible, (a) invite local contractors and suppliers to tender for work (although a number of specialised oilfield services are not currently provided by Slovak contractors), and (b) seek to hire local staff."*

195 Fraser 1 at [95]; Lewis 1 at [81].

196 **Exhibit C-171**.

184. Thereafter, AOG engaged expert consultants (ChemPro a.s.) to prepare preliminary EIAs for each exploration well. AOG then submitted applications for preliminary EIA clearance for each exploration well between June and September 2017 to the relevant District Offices. As explained at [185]-[187] below, the District Offices inexplicably ordered AOG to conduct a full EIA for each exploration well. The order to conduct a full EIA:[197]

(1) was inconsistent with both the express acknowledgement that none of the 8,000 wells drilled to date had had any adverse impact on the environment (see [179] above) and the MoE's own in-depth inspection (see [180] above);

(2) was not required under the Licences and contradicted the clear and repeated specific statements by the MoE and Minister Sólymos in late 2016 and early 2017 (described above) *viz.* that the amended EIA Act did not apply to AOG's exploration wells;

(3) would have added at least an additional 12-24 months to the well permitting process;

(4) precipitated the withdrawal of JKX from the joint venture; and

(5) when taken together with the other events described earlier in this memorial, ultimately destroyed the value of Discovery's investment in the Slovak Republic.

185. In relation to the Smilno well:

[197] Fraser 1 at [97]-[102]; Lewis 1 at [86].

(1) On 6 June 2017, AOG submitted an application for preliminary EIA clearance for the Smilno well to the Bardejov District Office, together with various appendices.[198]

(2) The Bardejov District Office then published the application for comments from the public, a number of which were subsequently filed. A large proportion of the comments simply made generic objections to oil and gas exploration as a whole, without explaining why AOG's exploration activities were specifically objected to. Other comments made unfounded criticisms of AOG's preliminary EIA, or of AOG's planned operations. Many of the comments also appeared to have been coordinated between different authors.

(3) On 2 August 2017, the Bardejov District Office issued a decision ordering AOG to carry out a full EIA in relation to the Smilno exploration well.[199]

186. In relation to the Ruská Poruba well:

(1) On 4 July 2017, AOG submitted an application for preliminary EIA clearance for the Ruská Poruba well to the Humenné District Office, together with various appendices.[200]

(2) The Humenné District Office then published the application for comments from the public. Again, a number of comments were filed, similar in nature to those filed in relation to the Smilno well.

(3) On 7 September 2017, the Humenné District Office issued a decision ordering a full EIA in relation to the Ruská Poruba well.[201]

198 **Exhibit C-173**.
199 **Exhibit C-176**.
200 **Exhibit C-175**.
201 **Exhibit C-179**.

187. In relation to the Krivá Ol'ka well:

(1) On 7 August 2017, AOG submitted an application for preliminary EIA clearance for the Krivá Ol'ka well to the Medzilaborce District Office, together with various appendices.[202]

(2) The Medzilaborce District Office then published the application for comments from the public. Again, a number of comments were filed, similar in nature to those filed in relation to the Smilno and Ruská Poruba wells.

(3) On 18 October 2017, the Medzilaborce District Office issued a decision suspending the Krivá Ol'ka preliminary EIA process and asked AOG to deliver responses to the comments filed. AOG prepared responses to each objection filed (which amounted to approximately 300 objections from 86 participants) and these were delivered to the Medzilaborce District Office on 18 December 2017.[203] The Medzilaborce District Office twice extended its deadline to deliver a decision and finally issued a decision on 8 March 2018, ordering a full EIA for the Krivá Ol'ka well.[204]

4. The Slovak Republic's conduct precipitated JKX's withdrawal from the JV and the Licences

188. In February 2018, and against the background of the Slovak Republic's conduct including the decision to order a full EIA, JKX informed AOG and Romgaz that it had decided to relinquish its exploration interests in Slovakia.[205] On 22 February 2018, Romgaz's representative emailed AOG and JKX stating as follows (emphasis added):[206]

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202 **Exhibit C-177**.
203 Fraser 1 at [102]; **Exhibit C-182**.
204 **Exhibit C-186**.
205 **Exhibit C-185**.
206 **Exhibit C-185**.

"I am sorry to hear that but it was to be expected. ***Slovakia seems to be a bad place to do business after all.*** *Just to let you know Romgaz is still committed to have at least one well drilled in Slovakia."*

189. On 16 March 2018, JKX emailed AOG and Romgaz attaching formal notices withdrawing from each of the three Licences.[207] In its covering email, JKX's representative stated as follows (emphasis added):[208]

> *"It's been over ten years since JKX acquired its interest in these licences and the technical work completed has gone a long way to derisking drilling targets in this internal section of the Carpathian Fold Belt.* ***I only wish that we have been able to drill the three wells as agreed back in 2015.*** *I would have dearly loved to have seen the calibration for the MT versus the seismic versus the drilling.*
>
> ***Thanks to you and the Alpine team for ploughing ahead through considerable and unfair opposition.*** *Perhaps the possible change of government that seem likely in Slovakia will help the exploration process – but I have to say that the uncertainty only grows. I can only wish you and Romgaz the best of luck going forward – getting any well drilled in the current climate will be a major achievement."*

5. AOG and Romgaz agreed to relinquish the Medzilaborce and Snina Licences and reduce the area of the Svidník Licence

190. On 22 March 2018, AOG proposed (*i*) to relinquish the Licences for the Medzilaborce and Snina blocks and (*ii*) to reduce the area of the Licence for the Svidník block.[209] Under the Geology Act, AOG enjoyed a preferential right to re-apply for the Licences at a future date.[210] The fact that AOG was proposing to relinquish the Licences was the only realistic decision available to mitigate AOG's losses, to save the annual licence fees payable to the Slovak Republic and to salvage what remained of the project on the

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207 **Exhibit C-188**; **Exhibit C-189**; **Exhibit C-190**.

208 **Exhibit C-187**.

209 **Exhibit C-192**.

210 **Exhibit C-219**, Geology Act, §24(7).

Svidník block in the face of the Slovak Republic's conduct described above.[211]

191. On 13 April 2018, AOG, JKX and Romgaz notified the MoE of their decision to withdraw from the Licences for the Medzilaborce and Snina blocks.[212] On 25 May 2018, the MoE confirmed the decision to relinquish the Licences for the Medzilaborce and Snina blocks.[213]

6. When AOG applied to reduce the Svidník licence area, the MoE required AOG to conduct a preliminary EIA

192. In April 2018, AOG submitted a separate application to the MoE to reduce the area of the Licence for the Svidník block and to remove JKX as a participant.

193. On 8 June 2018, MoE notified AOG of its decision to confirm the reduction of the area of the Licence.[214] However, the MoE imposed a new condition on the Licences requiring AOG to carry out a preliminary EIA prior to drilling any exploration wells to a depth of over 600m. This decision:

(1) was not required under the Licences issued prior to 2018 and contradicted the clear and repeated specific statements by the MoE and Minister Sólymos in late 2016 and early 2017 (described above) *viz.* that the amended EIA Act did not apply to AOG's exploration wells;

(2) would have added a further significant delay to the well permitting process;

(3) precipitated the withdrawal of Romgaz from the joint venture; and

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211 Fraser 1 at [110].

212 **Exhibit C-193**; **Exhibit C-194**; **Exhibit C-195**; **Exhibit C-196**; **Exhibit C-197**; **Exhibit C-198**.

213 **Exhibit C-199**; **Exhibit C-200**.

214 **Exhibit C-15**.

(4) when taken together with the other events described earlier in this memorial, ultimately destroyed the value of Discovery's investment in the Slovak Republic.

194. Moreover, as a matter of Slovak law, any decision to amend the area of an exploration licence should only consist of the delimitation of the exploration area itself and should not seek to impose additional conditions which are not relevant or requested as part of the application.[215] Indeed, in the MoE's decision dated 8 June 2018, the terms and conditions dictate that the geological works were to be carried out in accordance with the terms and conditions as set out in the 2006 Licence. The retrospective imposition of the preliminary EIA condition on the Svidník Licence was inconsistent with those terms and conditions, and was a clear case of arbitrary discrimination against AOG.

195. Prior to the MoE's decision in June 2018, AOG had been investigating alternative exploration wells to drill on the Svidník block, including the Zborov well and the Šarišské Čierne well. However, the MoE's requirement to conduct a preliminary EIA prior to drilling any new exploration wells on the Svidník block made these proposed exploration wells commercially and economically unviable. By April 2020, and against this background, Romgaz had notified AOG that it had decided to withdraw from the joint venture.[216]

7. By imposing a requirement to conduct a preliminary EIA, AOG was treated less favourably than other entities

196. By the MoE's decision to impose a condition requiring AOG to carry out a preliminary EIA on its Licences, the Slovak Republic not only acted inconsistently with the clear and repeated specific statements by the MoE and Minister Sólymos in late 2016 and early 2017; the Slovak Republic also

215 **Exhibit C-219**, Geology Act §23(14).

216 **Exhibit C-207**.

treated AOG less favourably than other entities which also applied to extend their exploration licences or modify their licence areas.

197. Discovery is aware of at least 64 applications to the MoE between 2017-2021 (including multiple applications submitted by NAFTA) concerning the extension of exploration licences and/or the modification of the licence area.[217] Of these 64 applications, it was only in AOG's case that the MoE imposed additional EIA conditions on the Licence when the application was merely to reduce the Licence area.[218]

* * *

[217] There are, of course, many other applications made to the MoE concerning such licences; these 64 applications relate specifically to applications to extend and/or modify exploration licence areas.

[218] **Exhibit C-212**.

III. JURISDICTION

A. THE TRIBUNAL HAS JURISDICTION UNDER THE BIT

198. The Tribunal has jurisdiction under the BIT for the reasons set out below.

199. Article VI(1) of the BIT provides:[219]

> *"For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to*
>
> *(a) an investment agreement between that Party and such national or company;*
>
> *(b) an investment authorization granted by that Party's foreign investment authority to such national or company; or*
>
> *(c) an alleged breach of any right conferred or created by this Treaty with respect to an investment."*

200. Discovery is a *"company of a Party"* within the meaning of Article VI(1), because it is constituted under the laws of a political subdivision of the United States, Texas: see Article I(1)(b) and see [17] above.

201. The present dispute arises out of or relates to an alleged breach of rights conferred or created by the BIT with respect to an investment. As to that:

(1) The BIT defines *"investment"* as *"every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party"* (Article I(a)).

(2) It specifically includes *"a company or shares of stock or other interests in a company or interests in the assets thereof"* (Article I(a)(iii)).

(3) What is more, it also includes *"licenses and permits pursuant to law"* and "*concessions to search for … natural resources*".

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219 **Exhibit C-1**.

(4) Discovery's investments include its ownership of and interest in AOG and its economic interest in AOG's assets (in particular, the Licences).

(5) Discovery first paid for its interest in AOG and its assets and then invested further significant sums in exploration activities.[220]

202. Article VI(2) of the Treaty provides that

> *"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 agreed, applicable dispute-settlement procedures; any dispute-settlement procedures, including those relating to expropriation, specified in the investment agreement shall remain binding and shall be enforceable in accordance with the terms of the investment agreement, relevant provisions of domestic laws and applicable international agreements regarding enforcement of arbitral awards.."*

203. In accordance with Article VI(2), Discovery initially sought to resolve this dispute by consultation and negotiation. Specifically, Discovery's lawyers, Signature Litigation LLP, sent a notice of dispute to the Slovak Republic by letter dated 2 October 2020.

204. Article VI(3)(a) provides that:

> *"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') or to the Additional Facility of the Centre of pursuant to the Arbitration Rules of the United Nationals Commission on International Trade Law ('UNICTRAL') or pursuant to the arbitration rules of any arbitral institution mutually agreed between the parties to the dispute."*

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220 See [54] above and see also Lewis 1 at [24]-[25].

205. More than six months after October 2020, Discovery consented in writing to the submission of this dispute for settlement by binding arbitration to ICSID by filing its Request for Arbitration dated 30 September 2021.

B. THE TRIBUNAL HAS JURISDICTION UNDER THE ICSID CONVENTION

206. The Tribunal also has jurisdiction under the ICSID Convention for the reasons set out below.

207. Article 25(1) of the ICSID Convention has four conditions:

(1) ***First***, a condition *rationae personae* – the dispute must involve a Contracting State and a national of another Contracting State.

(2) ***Second***, a condition *rationae materiae* – the dispute must be a *"legal"* dispute.

(3) ***Third***, a condition *rationae voluntatis* – the Contracting State and investor must consent in writing that the dispute be settled through ICSID arbitration.

(4) ***Fourth***, a condition *rationae temporis* – the ICSID Convention must have been applicable at the relevant time.

208. Each of these conditions is satisfied, and the Tribunal therefore has jurisdiction under the ICSID arbitration. Indeed, the Respondent does not appear to take issue with this proposition. Nonetheless, for completeness:

(1) Slovakia is a *"Contracting State"*, and Discovery is a national of the United States, *i.e.* a national of *"another Contracting State"*.

(2) The dispute is a legal dispute, and it arises *"directly out of an investment"*. In particular, Discovery's primary position is that the *"principal legal framework to determine the exercise of an 'investment'* [under Article 25 of the ICSID Convention] *must lie in the will of the*

Parties set forth in the definition of an 'investment' under the BIT as long as such will is compatible with Article 25 of the ICSID Convention".[221] There is no inconsistency between the definition of an "*investment"* set out at [201] above and Article 25 of the ICSID Convention. In any event, Discovery's investment also fulfils the alternative '*Salini* test' of contribution, duration and risk (as interpreted in subsequent authorities):[222]

(a) Discovery contributed money by acquiring AOG, by paying substantial licence fees to the Slovak Republic and by funding AOG's exploration activities from 2014 onwards;

(b) Discovery contributed this money over an extended period of time (from 2014 onwards); and

(c) Discovery undertook these activities in the expectation of a commercial return and at its own risk.

(3) By Article VI(3)(b) of the BIT, Slovakia consented (in writing) to the submission of an investment dispute for binding arbitration to ICSID in the event that it became a party to the ICSID Convention.

(4) Slovakia became a party to the ICSID Convention in 1994 and remains a party to this day. The *rationae temporis* condition is therefore also satisfied.

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221 *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015 at [197] **Exhibit CL-012**.

222 See e.g. *Ickale Insaat Limited Sirketi v Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016 at [289]-[291] **Exhibit CL-013**.

IV. LIABILITY

A. FAIR AND EQUITABLE TREATMENT

1. Legal principles

209. Article II(2)(a) of the BIT provides that *"[i]nvestment shall at all times be accorded fair and equitable treatment"*.

210. In order to determine the content of the relevant standard, *i.e.* fair and equitable treatment ("**FET**"), the starting point is the ordinary meaning of the words of Article II(2)(a).[223] However, this *"is of limited assistance"*:[224]

(1) The ordinary meaning of *"fair"* and *"equitable"* is *"just"*, *"even-handed"*, *"unbiased"* and *"legitimate"*.[225]

(2) Those terms are *"of almost equal vagueness"*.[226]

(3) For instance, the tribunal in *SD Myers v Canada* held that an infringement of the FET standard requires *"treatment in such an unjust or arbitrary manner that the level rises to the level that is unacceptable from the international perspective"*.[227]

(4) As the *Saluka* tribunal recognised, this is *"probably as far as one can get by looking at the 'ordinary meaning' of the terms"*.[228]

211. The ordinary words of Article II(2)(a) also have to be read in their context:

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223 Vienna Convention on the Law of Treaties ("**VCLT**"), Article 31.1 **Exhibit CL-014**.

224 *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 03 June 2021 ("***Infinito Gold***") at [351] **Exhibit CL-015**.

225 *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 ("***MTD***") at [113] **Exhibit CL-016**.

226 *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 ("***Saluka***") at [297] **Exhibit CL-017**.

227 *S.D. Myers Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 ("***SD Myers***") at [263] **Exhibit CL-018**.

228 *Saluka* at [297] **Exhibit CL-017**.

(1) The immediate context is that Article II(2)(a) enshrines not only the FET standard, but also provides that the investment *"shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law"*. Accordingly, the BIT expressly distinguishes FET from (*i*) the full protection and security ("**FPS**") standard and (*ii*) the customary international law minimum standard of treatment ("**MST**"). Therefore, it is clear that *"the terms 'fair and equitable' treatment envisage conduct which goes far beyond the minimum standard"*.[229]

(2) The wider context is provided by the BIT's preamble, and this also elucidates the object and purpose of the BIT. It demonstrates that the purpose of the protections is to provide a stable environment for investment:

(a) The *"[r]ecogni[tion] that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties"*; and

(b) The *"agree[ment] that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources"*.

212. The FET standard is *"a flexible one which must be adapted to the circumstances of each case"*.[230] In the frequently cited words of the tribunal in *Técnicas Medioambientales Tecmed SA v Mexico*:[231]

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229 *Vivendi v Argentina*, ICSID Case No ARB/97/3, Award, 20 August 2007 ("***Vivendi***") at [7.4.8] **Exhibit CL-019** citing FA Mann, *British Treaties for the Promotion and Protection of Investments* (1981) 52 British Yearbook of International Law 241, 244.

230 *Waste Management, Inc. v. Mexico*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, at [99] **Exhibit CL-020**.

231 *Tecnicas Medioambientales Tecmed SA v Mexico* ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 ("***Tecmed***") at [154] **Exhibit CL-021**.

> *"The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities."*

213. Accordingly, the *"broad requirement"*[232] of the FET standard encompasses several related but distinct legal standards:[233]

(1) Most obviously, the State must not frustrate an investor's legitimate expectations: *"legitimate expectations of the investors have generally been considered central in the definition of FET, whatever its scope. There is an overwhelming trend to consider the touchstone of fair and equitable treatment to be found in the legitimate and reasonable expectations of the Parties, which derive from the obligation of good faith"*.[234]

(2) The State must act also consistently: *"One arm of the State cannot finally affirm what another arm denies to the detriment of a foreign*

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232 *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, at [450] **Exhibit CL-022**.

233 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008, ("***Biwater***") at [602] **Exhibit CL-023** ("*The general standard of 'fair and equitable treatment' … comprises a number of different components…*").

234 *El Paso Energy International Company v Argentina*, ICSID Case No ARB/03/15, Award, 31 October 2011 ("***El Paso***") at [348] **Exhibit CL-025**. See also *EDF (Services) Limited v. Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, at [216] **Exhibit CL-024** (*"one of the major components of the FET standard is the parties' legitimate and reasonable expectations with respect to the investment they have made. Claimant has specifically referred to this component"*).

investor".[235] For example, the tribunal in *Garanti Koza v Turkmenistan* held that the inconsistency of behaviour between one agency of the Turkmenistan Governemnt and the other arms of the same Government *"would alone have been sufficient to call into question whether the Claimant had been treated fairly and equitably"*.[236]

(3) Furthermore, it is well-recognised that *"[d]enial of justice […] constitutes a violation of the FET standard. Tribunals have unanimously held that the FET standard subsumes the prohibition of denial of justice"*.[237]

(4) Lastly, the host state must act transparently, in good faith, and the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process.[238] Article II(2)(a) of the BIT also expressly provides that *"[n]either Party shall in any way impair by arbitrary or discriminatory measures […] investments*" and forbids discrimination.

214. Discovery elaborates below on each legal standard summarised at [213] above.

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235 *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN 3481, Award, 3 February 2006, at [158] **Exhibit CL-027**, cited with approval in *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 ("***Crystallex***") at [579] **Exhibit CL-026**.

236 *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016 at [382] **Exhibit CL-028**.

237 *OOO Manolium Processing v. Republic of Belarus*, PCA Case No. 2018-06, Final Award, 22 June 2021, at [534] **CL-030**. See also *Jan de NulN.V. and Dredging International N.V. v. Arab Republic of Egypt* , ICSID Case No. ARB/04/13, Award, 6 November 2008, at [188] **Exhibit CL-029** ("*the fair and equitable treatment standard encompasses the notion of denial of justice*") and *Infinito Gold* at [437] **Exhibit CL-015** ("*the Parties agree – and rightly so – that it* [i.e. the concept of denial of justice] *is comprised in the FET standard…"*).

238 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v, Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, at [609] **Exhibit CL-032**. See also *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 ("***Lemire***"), at [284] **Exhibit CL-031**.

(i) Legitimate Expectations

215. As to legitimate expectations, the purpose of this standard *"is to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment, as long as these expectations are reasonable and legitimate and have been relied upon by the investor to make the investment"*.[239]

216. The basic elements of a legitimate expectation that must not be violated (at least not in a more than *de minimis* fashion) by a host State[240] are as follows:

(1) ***First***, an expectation is generated by *"clear and explicit (or implicit) representations […] by or attributable to the state"*.[241] A licence granted by a relevant state body is a paradigm example of such a representation. For example, in *Tecmed* itself, the tribunal referred to *"permits issued by the State that were relied upon by the investor"*.[242]

(2) ***Second***, an expectation is legitimate *"where specific promises or representations are made by the State to the investor"*,[243] and *"*[e]*xplicit undertakings and representations made by the host State are the strongest basis for legitimate expectations"*.[244]

(3) ***Third***, the investor must have relied on the expectation, and this reliance must have been reasonable.[245]

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239 *Biwater* at [602] **Exhibit CL-023**.

240 *Photovoltaik Knopf Betriebs-GmbH v. Czech Republic*, PCA Case No. 2014-21, Award, 15 May 2019 ("***Photovoltaik Knopf***") at [496] **Exhibit CL-033**.

241 *Antaris Solar GmbH and Dr. Michael Göde v The Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018, at [360(3)] **Exhibit CL-034**.

242 *Tecmed* at [154] **Exhibit CL-021**. See also *Metalclad Corp v United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, at [85]-[93] **Exhibit CL-035**.

243 *El Paso* at [395] **Exhibit CL-025**.

244 R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP, 2022) at p.209 **Exhibit CL-052** (p.14).

245 *Ioan Micula and others v. Romania I,* ICSID Case No. ARB/05/20, Award, 11 December 2013 at [668] **Exhibit CL-036**; *Photovoltaik Knopf* at [496] **Exhibit CL-033**.

(ii) Consistency

217. As to the State's obligation to act consistently, under international law the host State *"needs to be considered by the Tribunal as a unit"*.[246] Thus, where two branches of the State act inconsistently, a State may breach the FET standard in a BIT. In *MTD Equity v Chile*, an investor with whom Chile's foreign investment commission had signed an investment contract for the construction of an urban development was denied the necessary permits pursuant to applicable zoning regulations. Although the relevant agencies were separate as a matter of municipal law, they constituted a *"unit"* or *"monolith"* for the *"purposes of the obligations of Chile under the BIT"*.[247]

218. The tribunal in *Glencore v Colombia*[248] articulated the relevant principles as follows:

> *"The Tribunal agrees with Claimants that an investor may legitimately hold the expectation that different branches of government will not take inconsistent actions affecting the investment: a government agency should not make a decision that contradicts a prior decision made by the same or another agency, acting within the same sphere of powers, on which the investor has relied, causing harm to the investor. This is part of the core meaning of the FET standard.*
>
> *There is no inconsistency and no breach of legitimate expectations, however, when the second agency, applying substantive legal criteria established in a pre-existing legal framework, takes a decision which diverges from that previously adopted by another agency. The reason is simple: The modern nation-state typically endows different agencies with different legal and policy responsibilities and objectives."*

246 *MTD* at [165] **Exhibit CL-016**.

247 *MTD* at [166] **Exhibit CL-016.**

248 *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019 ("***Glencore***") at [1419]-[1420] **Exhibit CL-037**.

(iii) Denial of Justice

219. As to denial of justice, the Tribunal in *Infinito Gold* authoritatively summarised the legal test as follows:[249]

> *"[…] a denial of justice occurs when there is a fundamental failure in the host's State's administration of justice. The following elements can lead to this conclusion (i) the State has denied the investor access to domestic courts; (ii) the courts have engaged in unwarranted delay; (iii) the courts have failed to provide those guarantees which are generally considered indispensable to the proper administration of justice (such as the independence and impartiality of judges, due process and the right to be heard); or (iv) the decision is manifestly arbitrary, unjust or idiosyncratic."*

220. Although the *"threshold of the international delict of denial of justice is high and goes far beyond the mere application of domestic law"*,[250] bad faith and malicious intent are not necessary. As the tribunal in *Loewen v USA* put it: *"[n]either State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice"*.[251]

221. At the same time, *"[i]nternational law does […] attach special importance to discriminatory violations of municipal law"*.[252]

222. For completeness, in this case, the *Infinito Gold* test should be applied instead of *e.g.* the alternative reasoning in *Lion Mexico Consolidated LP v Mexico* where the NAFTA tribunal concluded that *"there is no 'substantive denial of justice'"*.[253] This is for at least the following reasons:

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249 *Infinito Gold* at [445] **Exhibit CL-015**.

250 *Liman Caspian v Kazakhstan*, ICSID Case No ARB-07-14, Excepts of Award, 22 June 2010, at [274] **Exhibit CL-038**.

251 *Loewen v USA*, ICSID Case No ARB(AF)/98/3, Final Award, 26 June 2003, at [132] ("***Loewen***") **Exhibit CL-039**.

252 *Loewen* at [135] **Exhibit CL-039**.

253 *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, 20 September 2021 ("***Lion Mexico***") at [217] **Exhibit CL-040**.

(1) ***First***, the tribunal in *Lion Mexico* applied the FET standard in Article 1105 of NAFTA which encompassed only the MST standard under customary international law. The tribunal expressly held that it had to *"determine what 'customary international law minimum standard of treatment of aliens' is expected from* [the host state's] *Courts"*.[254] For this reason alone, the *Lion Mexico* decision is inapplicable because the FET standard under the BIT in this case goes beyond the MST standard under customary international law (see [211(1)] above).

(2) ***Second***, and in any event, the tribunal in *Lion Mexico* applied the test articulated by Professor Paulsson that *"[e]xtreme cases should […] be dealt with on the footing that they are so unjustifiable that they could have been only the product of bias or some other violation of the right of due process"*.[255] This test plainly calls for an assessment of the merits of a judicial decision, even if only so as to (in Paulsson's words) *"impel the adjudicator to conclude that it* [i.e. the substantive decision on the merits] *could not have been reached by any impartial body worthy of that name"*.[256]

(3) ***Third***, if the submission at (2) is accepted, then the terminological disagreement may make little practical difference. A decision that is manifestly arbitrary, unjust or idiosyncratic in the *Infinito Gold* sense is (or, at least, should be) one that is so unjustifiable as to impel a tribunal to conclude that it could not have been reached by an impartial judicial body worthy of that name in the *Lion Mexico* sense.

223. If it is necessary for this Tribunal to decide between the two strands of reasoning, the *Infinito Gold* reasoning is to be preferred. As a matter of principle and authority, the better analysis is that adopted by the *Infinito*

254 *Lion Mexico* at [210] **Exhibit CL-040**.
255 *Lion Mexico* at [218] **Exhibit CL-040**.
256 *Lion Mexico* at [218] **Exhibit CL-040**.

Gold tribunal, which avoids needless line-drawing and instead accepts that *"a denial of justice may be procedural or substantive"*.[257] In this regard:

(1) As the *Lion Mexico* tribunal recognised, the concept of denial of justice has medieval origins and, *"[t]raditionally, some authors perceived denial of justice as any internationally illegal treatment of aliens"*.[258] Thus, at least historically, there was substance to the concept: it protected against a substantive denial of justice.

(2) In one of the first modern attempts to codify the standard, Article 9 of the Harvard Law School draft (1929) provides that:[259]

> *"Denial of justice exists when there is*
>
> *[i] a denial, unwarranted delay or obstruction of access to courts,*
>
> *[ii] gross deficiency in the administration of judicial or remedial process,*
>
> *[iii] failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or*
>
> *[iv] a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice."*

(3) Thus, under this definition, the manifest injustice of a judgment does constitute a denial of justice in the relevant sense.

(4) At the same time, an error of a national court (absent manifest injustice) does not meet the relevant threshold. The Harvard Law School's draft formulation thus ensures that the *"an international arbitration tribunal is not an appellate body and its function is not to correct errors"*.[260]

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257 *Infinito Gold* at [445] **Exhibit CL-015**.

258 *Lion Mexico* at [200] **Exhibit CL-040**.

259 As quoted in *Lion Mexico* at [213] **Exhibit CL-040**.

260 *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan,* ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010 at [274] **Exhibit CL-038**.

(5) For this reason, the tribunal in *Lion Mexico* was wrong to base its decision on the so-called *"trite"* proposition that *"international tribunals cannot be and do not constitute domestic courts of appeal"*.[261] The tribunal in *Infinito Gold*, and the tribunals in the line of cases that recognised a substantive dimension to the concept, were not purporting to exercise the powers of appellate bodies. They recognised that the threshold is very high – a mere error is insufficient.

(6) In any event, the argument that international bodies do not constitute courts of appeal proves far too much. Since municipal courts of appeal review both substance and procedure, it is unclear why the international tribunal is any less of a court of appeal when it reviews one but not the other. At the same time, it is widely (and rightly) accepted that there is nothing improper about reviewing the procedure. The correct analysis is that, in neither scenario, does the international tribunal constitute a domestic court of appeal: in both cases, it is applying an international legal standard to domestic proceedings.

(7) What is more, one of the main reasons *why* due process matters is because a fair process is likely to result in better substantive outcomes. There is no hard and fast line between procedure and substance, and Professor Paulsson himself accepts that drawing the line is *"the greatest difficulty"*.[262]

(8) The only way to avoid such line-drawing is to accept, as the tribunal in *Infinito Gold* did, that some decisions can be so egregiously wrong that they amount to a denial of justice.

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261 *Lion Mexico* at [217] **Exhibit CL-040**.

262 As cited in *Lion Mexico* at [219] **Exhibit CL-040**.

2. Discovery's Legitimate Expectations

224. The Licences granted to AOG (before and after Discovery became an investor) all contained representations to the licence holder that it would be permitted to carry out geological deposit exploration in respect of oil and gas in the blocks covered by each Licence. These representations were both clear and specific to AOG. It was therefore legitimate for Discovery (and AOG) to rely on them, and they did so rely on them.

225. Discovery relied on the terms of the Licences when deciding to invest in AOG and continued to rely on them when it funded the exploration activities after its investment in 2014.[263]

226. What, then, was the content of these expectations? At a minimum,[264] Discovery legitimately expected the following:

(1) ***First***, Discovery legitimately expected that AOG would not be prevented from completing the geological exploration that it was permitted to conduct under the terms of the Licences. This would, as for example the terms of the 2016 Licences expressly acknowledged (see [74(5)] above), include drilling exploration wells of between 1200m and 1500m in depth, pumping tests and geophysical surveys.

(2) ***Second***, Discovery legitimately expected that, having been granted the Licences in respect of Svidnik, Medzilaborce and Snina, AOG would be able to complete the necessary geological exploration works in all three blocks. As, for example, the 2016 Licences expressly acknowledged, those three blocks were *"mutually interconnected and could not be severed from each other"* (see [74(3)] above).

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263 Lewis 1 at [19]; Fraser 1 at [64].

264 As to the additional legitimate expectation generated by the Slovak Republic's specific representations in relation to the EIA process, see [236] below.

(3) ***Third***, Discovery legitimately expected that the three blocks covered by the Licences were designated areas for geological exploration, and that the Slovak State had already determined that such exploration was permissible (see [74(6)] and [74(9)] above) and desirable (see [74(10)]-[74(14)] above).

(4) ***Fourth***, Discovery legitimately expected that geological exploration could be carried out without any other relevant organ of the Slovak State objecting to such exploration so that no other organ would prevent the exploration. The Licences would not have been granted by the MoE had other relevant organs (*e.g.* the State Geological Institute) not also agreed: see [74(8)] above. Therefore, the Licences (at least impliedly) represented that no relevant organ would object to the exploration activities: if the Slovak state had considered some other organ to be relevant, the grant of the Licences would have been contingent on obtaining that organ's consent.

3. Application to Smilno

227. When Discovery/AOG attempted to drill at the Smilno well site, numerous Slovak State organs frustrated the legitimate expectations that the Slovak Republic had created and upon which Discovery reasonably relied. Those state organs included (in particular) the Police and the Ministry of Interior, whose conduct was exacerbated by the conduct of other State organs as summarised at [129] above. By their conduct summarised at [128(2)]-[128(4)] above, the Police frustrated all of Discovery's legitimate expectations at [226] above. In particular, having been granted the Licences, Discovery legitimately expected no other organ of the Slovak state would prevent AOG from carrying out all of the exploration activities which it was expressly permitted to undertake. Yet the Police's conduct frustrated that legitimate expectation and ultimately prevented Discovery/AOG from being able to drill an exploratory well at Smilno.

228. What is more, Discovery suffered a denial of justice by (*i*) the conduct of the Bardejov District Court in issuing the Interim Injunction and (*ii*) the decision of the Prešov Regional Court in declining to overturn the Interim Injunction. Those decisions were manifestly arbitrary, unjust or idiosyncratic and again prevented Discovery/AOG from being able to drill an exploratory well at Smilno. In the words of Prof Števček, both decisions are "*inexplicable*" and contain errors that he "*cannot explain*".[265] In particular:

(1) The application for an Interim Injunction by Ms Varjanová did not meet the basic criteria for the grant of an interim injunction under Slovak law. There was, in particular, no "*significant, serious and even irreparable harm*".[266]

(2) Neither the Bardejov District Court nor the Prešov Regional Court dealt in their judgments with the legal regime governing the use of the Road or the fact that the Road was a public special purpose road. This is so even though "*it is undoubtedly a fundamental question*".[267]

(3) The applicant herself had broken the law by unlawfully blocking the Road. Such unlawful conduct would have disentitled any applicant from obtaining an interim injunction. And yet Ms Varjanová was still granted an Interim Injunction to restrain AOG from using the Road.

(4) In any event, the Interim Injunction was not aimed at protecting the applicant's alleged interest – that interest was in the loss of the pre-emption right over a 1/700 share in the Road.

229. Alternatively, the decisions of the Bardejov District Court and the Prešov Regional Court were sufficiently arbitrary, unjust or idiosyncratic that they

265 Števček 1 at [33].
266 Števček 1 at [16].
267 Števček 1 at [21].

should compel the Tribunal to conclude that the decisions could not have been reached by an impartial judicial body worthy of its name. It is reasonable to infer that, by their decisions, the Bardejov District Court and the Prešov Regional Court were biased against AOG and biased in favour of Ms Varjanová. Once again, such conduct prevented Discovery/AOG from being able to drill an exploratory well at Smilno.

230. Furthermore, the Slovak Republic also failed to act consistently; and such conduct again prevented Discovery/AOG from being able to drill an exploratory well at Smilno. In particular, the Ministry of Interior and Ministry of Transport reached inconsistent conclusions regarding the status of the Road (see [122]-[126] above). This is all the more problematic in circumstances where, albeit belatedly, the Ministry of the Interior acknowledged that the competent authority was not the Ministry of Interior but rather the Ministry of Transport (see [124] above).

231. Further, the Police in the event failed to act in accordance with the guidance issued by the Ministry of Transport (see [122]) and adopted a position which was patently inconsistent with that of the Smilno municipality (see [84]) viz. that the Road was *"publicly accessible"* and had been used by the public for *"100-200 years"*. By refusing to disperse the protesters and refusing to put up the relevant sign clarifying that the Road was a public special purpose road, the Police's actions were at odds with the clear position of the Ministry of Transport and the Smilno municipality, namely that the Road was publicly accessible. This is a further instance of inconsistent behaviour by organs of the Slovak State which prevented Discovery/AOG from being able to drill an exploratory well at Smilno.

4. Application to Krivá Ol'ka

232. Numerous Slovak State organs also frustrated the legitimate expectations that the Slovak Republic had created and upon which Discovery reasonably relied in connection with its attempts to drill an exploratory well at Krivá

Ol'ka. Those state organs included (in particular) the MoA and the MoE. Their conduct as described above frustrated all of Discovery's legitimate expectations at [226] above. In particular, having been granted the relevant Licence and then the Lease in respect of the land owned by the State Forestry, Discovery/AOG had a legitimate expectation that the MoA would not actively prevent them from doing what both the MoE (as the relevant Ministry) and the MoA (who had granted its consent to enter into the Lease) had previously approved: namely, exploratory drilling. Yet that is precisely what the MoA did: it refused to approve Addendum No. 1 to the Lease and did not treat Discovery/AOG fairly or transparently (see [137]-[142]).

233. What is more, by refusing to approve Addendum No. 1 to the Lease, the MoA acted inconsistently with both with (*i*) the MoE's prior conduct (in granting the 2016 Licences – see [74] and [141(1)] above) and (*ii*) the MoA's own prior conduct (in approving the Lease in October 2015 – see [135] above). Having originally approved the Lease (which included a right to request an extension – see [134] above) Discovery legitimately expected that the MoA would not perform a *volte face* and decline to approve an extension and thereby prevent AOG from completing its exploration activities. Yet the MoA frustrated Discovery's legitimate expectation by refusing to approve Addendum No. 1.

234. Furthermore, the MoE itself failed to act consistently by refusing AOG's §29 application (see [151] above). Having determined in the Licences, which were periodicially extended and culminating in the 2016 Licences, that AOG was permitted to carry out exploration activities on the very land that was the subject of the §29 application (see [74] above), and that it was in the public interest for AOG to do so, it was inconsistent for the MoE then to dismiss the §29 application and thereby prevent AOG from carrying out those exploration activities.

5. Application to EIA

235. The preamble of the BIT expressly acknowledges that *"fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment"*.[268] This stability was destroyed by the Slovak Republic's conduct in (*i*) requiring AOG to carry out a full EIA in respect of the Smilno well, the Ruská Poruba well and the Krivá Ol'ka well (see [184]-[187] above) and (*ii*) requiring AOG to carry out a preliminary EIA prior to drilling any future exploration wells (see [193] above).

236. As explained at [164]-[180] above, the MoE and Minister Sólymos had made it entirely clear that, notwithstanding the amendment to the EIA Act in November 2016, AOG was under no legal obligation to conduct an EIA prior to drilling its exploration wells under the Licences. The representations to this effect were clear, and they were made to AOG directly. The representations generated a further legitimate expectation (in addition to the legitimate expectations set out at [226] above, and which existed as a result of the terms of the Licences, and the relevant legislation in force, at the time of Discovery's investment) upon which Discovery reasonably relied, namely that AOG would not be required to conduct a preliminary EIA.

237. In reliance on those representations:

(1) AOG, in the first instance, agreed to undertake a preliminary EIA on a voluntary basis (see [182]-[184] above). AOG was under no legal obligation to do so, but agreed to do so on a voluntary basis for the specific reasons set out at [182] above.

(2) AOG, in the second instance, applied to reduce the area of the Licence for the Svidník block. AOG, again, did not have to do so. But it did so

[268] **Exhibit C-1**.

in the reasonable belief that no requirement to conduct an EIA was going to be imposed by the MoE.

238. By its conduct in (*i*) requiring AOG to carry out a full EIA in respect of the Smilno well, the Ruská Poruba well and the Krivá Ol'ka well (see [184]-[187] above) and (*ii*) requiring AOG to carry out a preliminary EIA prior to drilling any future exploration wells (see [193] above), the Slovak Republic frustrated Discovery's legitimate expectations at [226] and [236] above. Such conduct was the last nail in the coffin of Discovery's investment and (as explained at [188]-[195] above) precipitated the withdrawal of AOG's JV partners and ultimately destroyed the value of Discovery's investment.

B. ARBITRARY AND DISCRIMINATORY TREATMENT

1. Legal principles

239. Article II(1) of the BIT provides that:[269]

> *"Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favourable that that accorded in like situations to investment […] of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favourable"*

240. This protection expressly extends to "*activities associated*" with investment, and Article II(10) provides that, "*(a) the granting of franchises or rights under licenses*" and "*(b) access to registrations, licenses, permits and other approvals (which shall in any event be issued expeditiously)*" constituted such "*associated*" activities.

241. The purpose of this BIT standard is that *"foreigners should be afforded treatment no less favourable than the one granted to local citizens"*.[270] The content of the standard is that *"there shall be no treatment less favourable*

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269 **Exhibit C-1**.

270 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 ("***Parkerings***") at [367] **Exhibit CL-041**.

– i.e. no discrimination – between foreign and national investments when they are in like situations".[271] However:[272]

> *"[w]hether discrimination is objectionable does not […] depend on subjective requirements such as the bad faith or the malicious intent of the State […] to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State. An objective justification may justify differentiated treatments of similar cases. It would be necessary, in each case, to evaluate the exact circumstances and the context".*

242. The relevant analytical framework to assessing whether the State has violated the arbitrary and discriminatory treatment standard in a BIT is as follows:[273]

> *"[A]s a first step, the treatment accorded a foreign owned investment […] should be compared with that accorded domestic investment in the same business or economic sector*.
>
> *Once it is established that a foreign and domestic investor are in the same business or economic sector, '[d]ifference in treatment will presumptively violate [the principle] unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing of* [the BIT]*'".*

243. Furthermore, Article II(2)(b) of the BIT provides that:

> *"Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments."*

244. Article II(2)(b) has two prongs: (*i*) arbitrariness and (*ii*) non-discrimination. Those two prongs are to be read disjunctively. In *Lemire v Ukraine II*, the tribunal construed a materially identical clause in the Ukraine-US bilateral

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271 *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award, 27 October 2006, at [128] **Exhibit CL-042**.

272 *Parkerings* at [368] **Exhibit CL-041**.

273 *Parkerings* at [370] **Exhibit CL-041**, citing *Pope & Talbot Inc. v. The Government of Canada*, NAFTA Case, Award on the Merits of Phase 2, 10 April 2001, at [78]-[79].

investment treaty[274] and held that *"for a measure to violate the BIT it is sufficient if it is either arbitrary or discriminatory; it need not be both"*.[275]

245. As to the first prong of Article II(2)(b)—arbitrariness—the tribunal in *Lemire* summarised the notion of arbitrariness as the substitution of prejudice, preference or bias for the rule of law:[276]

> *"Arbitrariness has been described as 'founded on prejudice or preference rather than on reason or fact';[277] '…contrary to the law because…[it] shocks, or at least surprises, a sense of juridical propriety';[278] or 'wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety';[279] or conduct which 'manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination'.[280] Professor Schreuer has defined (and the Tribunal in EDF v. Romania[281] has accepted) as 'arbitrary':*
>
> *'a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;*
>
> *b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;*
>
> *c. a measure taken for reasons that are different from those put forward by the decision maker;*
>
> *d. a measure taken in wilful disregard of due process and proper procedure.*
>
> *Summing up, the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law.'"*

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274 Article II.3 of which provides that *"Neither party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments"*: see *Lemire* at [256] **Exhibit CL-031**.

275 *Lemire* at [260] **Exhibit CL-031**.

276 *Lemire* at [262]-[263] **Exhibit CL-031**.

277 *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award of 3 September 2001, at [221] **Exhibit CL-043**.

278 *Tecmed* at [154] **Exhibit CL-021**.

279 *Loewen* at [131] **Exhibit CL-039**.

280 *Saluka* at [307] **Exhibit CL-017**.

281 See *EDF(Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award of 8 October 2009 at [303] **Exhibit CL-024** (Professor Schreuer acted as expert and his opinion was quoted and accepted by the tribunal in that case).

246. This test has been subsequently applied by numerous tribunals.[282]

247. As to the second prong of Article II(2)(b)—discrimination—the *Lemire* tribunal held that *"[t]o amount to discrimination, a case must be treated differently from similar cases without justification"*.[283] Similarly, the tribunal in *Saluka* held that:[284]

> *"A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies bona fide by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and nondiscrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment".*

248. Consistently with this, the elements of a claim for unlawful discrimination were summarised in *Pawlowski v Czechia* as follows:[285]

> *"First, an appropriate comparator must be identified, i.e., an investor which is in a situation similar to that of Claimants (or an investment which is in a situation similar to investment in the Czech Republic);*
>
> *Second, Claimant must prove that the Czech Republic has applied to this comparator a treatment more favourable than that accorded to Pawlowski AG and Projekt Sever, or to their investment in the Czech Republic;*
>
> *Third, there must be a lack of a reasonable or objective justification for the difference of treatment."*

2. Application to Krivá Oľka

249. The clearest instance of Slovakia's conduct in failing to treat Discovery as favourably as a domestic investor (NAFTA) and its discriminatory

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282 *Glencore* at [1448]-[1450] **Exhibit CL-037**; *Infinito Gold* at [549] **Exhibit CL-015**.

283 *Lemire* at [261] **Exhibit CL-031**.

284 *Saluka* at [307] **Exhibit CL-017**.

285 *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 01 November 2021, at [534] **Exhibit CL-044**.

treatment was the MoE's refusal of AOG's application for a compulsory access order under §29 of the Geology Act (see [143]-[157] above). In so doing, Slovakia violated Article II(2)(b) of the BIT. In particular:

(1) NAFTA is a domestic investor in the same business or economic sector as AOG; it also constitutes an appropriate comparator for the purposes of the test articulated in *Pawlowski* at [248] above.

(2) AOG sought a compulsory access order under §29 in order to enable it to drill the exploration well at Krivá Ol'ka. Similarly, NAFTA had sought a compulsory access order as well. (The only difference was that the landowner was private in NAFTA's case. However, this is either immaterial or militates in favour of granting access, since the various organs of the Slovak state should act consistently.)

(3) NAFTA was treated more favourably than AOG. It was granted a §29 order by the MoE. Yet AOG was denied a §29 order. By so doing, the MoE prevented AOG from drilling the exploration well at Krivá Ol'ka.

(4) There is a lack of any reasonable or objective justification for the difference in treatment as between NAFTA and AOG. In this regard, it is particularly significant that in its decision regarding NAFTA dated 1 March 2013,[286] the MoE stated as follows:

> *"The Ministry's view is that, if license holders have a right to perform geological works in exploration areas that had been granted by decisions of state orders and over long periods of time invest not insignificant financial means for geological exploration, the Ministry considers it undesirable for the investigation of the parts with the best prospects to be made impossible by the owner of the affected land by a refusal for purely subjective reasons. …"*

250. Pending disclosure, it is not presently clear whether there were either other applications by NAFTA or other relevantly similar applications that were

[286] **Exhibit C-206**, p.30 (SVK), pg.8 (ENG).

granted. If so, those would be further instances of the Slovak Republic treating Discovery less favourably and discriminating against it and thereby violating its obligations under Article II(2)(b) of the BIT. Those decisions inflicted damage on Discovery without serving any apparent legitimate purpose. They were also not based on any legal standards but on discretion, prejudice or personal preference.

251. Another instance of Slovakia's conduct in failing to treat Discovery as favourably as a domestic investor (NAFTA) and its discriminatory treatment was the MoA's refusal to approve the extension of the Lease under Addendum No. 1 in respect of the Krivá Ol'ka well (see [137]-[142] above). In so doing, Slovakia violated Article II(2)(b) of the BIT. In particular:

(1) NAFTA is a domestic investor in the same business or economic sector as AOG; it also constitutes an appropriate comparator for the purposes of the test articulated in *Pawlowski* at [248] above.

(2) AOG sought an extension of the Lease in order to enable it to drill the exploration well at Krivá Ol'ka. Similarly, NAFTA had sought the approval of the MoA in respect of leases which it had concluded with State Forestry (see [133] above).

(3) NAFTA was treated more favourably than AOG. Its leases with State Forestry were approved by the MoA. By contrast, the MoA declined to approve Addendum No. 1. By so doing, the MoA prevented AOG from drilling the exploration well at Krivá Ol'ka.

(4) There is a lack of any reasonable or objective justification for the difference in treatment as between NAFTA and AOG.

252. In the absence of any rational purpose, the MoA and MoE also acted arbitrarily—and hence in breach of Article II(2)(b) of the BIT—by,

respectively, refusing to consent to the extension of the Lease and by dismissing the §29 application.

253. As to the MoA's refusal to consent to the extension of the Lease, Discovery understands that the Head of the Service Office of the MoA (Mr Regec) refused to sign the extension on the basis of *"a personal decision based on the fact that he himself comes from the area"*.[287] In so doing, the MoA substituted prejudice, preference and bias for the rule of law and due process. Such conduct was self-evidently arbitrary.

254. The MoE also acted arbitrarily. It had already decided that exploratory activities were in the public interest, but nonetheless refused the application on the basis that the lack of consent by the MoA in and of itself predetermined the application. This was not only at odds with the MoA's own position (as it was the MoA's suggestion that an application be made) but also lacked any proper rationalisation.

255. In any event, the initial application for the MoA's consent as well as the subsequent §29 application both constituted "*permits*" or "*other approvals*" within the meaning of Article II(10)(b). Those "*shall in any event be issued expeditiously*". On both occasions, the respondent State has failed to do so:

    (1) AOG applied for the consent from the MoA in January, but did not get the decision of the Ministry until June 2016.

    (2) Similarly, AOG made its §29 application in August 2016 but did not get a substantive response rejecting the application until March 2017.

256. Failing to resolve these entirely straight-forward applications within less than 5 and 6 months respectively amounts to a failure to act expeditiously.

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287 **Exhibit C-130**.

3. Application to EIA

257. By its conduct in (*i*) requiring AOG to carry out a full EIA in respect of the Smilno well, the Ruská Poruba well and the Krivá Ol'ka well (see [184]-[187] above) and (*ii*) requiring AOG to carry out a preliminary EIA prior to drilling any future exploration wells (see [193] above), the Slovak Republic also violated both prongs of Article II(2)(b) of the BIT. In particular:

(1) As to (*i*), it is to be inferred that by requiring AOG to carry out a full EIA, the District Offices substituted prejudice, preference and bias for the rule of law and due process. In January 2017, Minister Sólymos had publicly proclaimed that 8,000 exploration wells had been drilled in Slovakia and that the MoE was *"not aware of any environmental problem arising from these 8,000 exploratory wells"* (see [179] above). And yet the District Offices ordered AOG to carry out a full EIA, without any rational justification and for no legitimate purpose other than to thwart AOG's exploration activities. Pending disclosure of decisions issued by District Offices in like circumstances, Discovery reserves the right to contend that the Slovak Republic also treated Discovery less favourably than other (domestic or foreign) investors.

(2) As to (*ii*), of the 64 applications submitted to the MoE to extend or amend pre-existing licences, it was only in AOG's case that the MoE imposed additional EIA conditions on the Licence when the application was merely to reduce the Licence area. In all other applications, no such requirement was imposed. It is clear that Discovery was being discriminated against and that it was being treated arbitrarily.

C. EFFECTIVE MEANS

1. Legal principles

258. Article II(6) of the BIT provides:[288]

> *"Each Party shall provide effective means of asserting claims and enforcing rights with respect to investments and authorizations relating thereto and investment agreements."*

259. Article II(6) imposes the following obligation on the Slovak Republic:[289]

> *"The fundamental criteria of an 'effective means' for the assertion of claims and the enforcement of rights within the meaning of Article 10(2) is law and the rule of law. There must be legislation for the recognition and enforcement of property and contractual rights. This legislation must be made in accordance with the constitution, and be publicly available. An effective means of the assertion of claims and the enforcement of rights also requires secondary rules of the procedure so that the principles and objectives of the legislation can be translated by the investor into effective action in the domestic tribunals."*

260. Article II(6) therefore imposes *"a positive obligation [on] the host State to provide effective means, as opposed to a negative obligation not to interfere in the functioning of those means"*.[290]

261. There is an overlap between the effective means standard and denial of justice (as protected by the FET standard) at least insofar as unwarranted delay is concerned. The tribunal in *Chevron v Ecuador* cited Paulsson's opinion that:[291]

> *"The delict of denial of justice by unreasonable delay is fully consummated at the point in time at which the length of the delay, in the circumstances of the case, rises to the level of a breach of the international standard. The*

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288 **Exhibit C-1**.

289 *Limited Liability Company Amto v. Ukraine*, Arbitration No. 080/2005, Final Award, 26 March 2008, at [87] **Exhibit CL-045**.

290 *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador I*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010 ("***Chevron***") at [248] **Exhibit CL-046**.

291 *Chevron* at [278] **Exhibit CL-046**.

obligation on the part of the state is to provide justice within a reasonable period. Once the period of reasonableness has lapsed, the alien has been definitively deprived of an opportunity to have his/her rights properly vindicated in the domestic courts; time cannot be recaptured."

2. Application to the facts

262. There were a number of instances where, in breach of Article II(6), Slovakia failed to provide effective means of asserting claims and enforcing rights:

(1) The first instance was the unwarranted and unreasonable delay in resolving Mrs Varjanova's hopeless appeal: see [111]-[116] above.

(2) A further instance was the unwarranted and unreasonable delay in, first, dealing with AOG's application under §29 and then resolving AOG's appeal: see [144]-[154] above.

D. EXPROPRIATION

1. Legal principles

263. Article III(1) of the BIT provides that:[292]

"Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation') except for a public purpose; in accordance with due process of law; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation and in accordance with the general principles of treatment provided for in Article II(2)."

264. The effect of the express language in Article III(1) is that:[293]

"When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a 'creeping' or 'indirect' expropriation or, as in the BIT, as measures 'the effect of which is tantamount to expropriation.' As a matter of fact, the investor is deprived by such measures of parts of the value

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292 **Exhibit C-1**.

293 *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, at [107] **Exhibit CL-047**.

of his investment."

265. A well-established definition of an indirect expropriation is the definition articulated in the *Tippetts, Abbett, McCarthy, Stratton* case before the Iran-US Claims Tribunal:[294]

> *"A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.*
>
> *While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of the fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact."*

266. This definition was cited by, amongst many others, the tribunal in *Compañia del Desarrollo de Santa Elena v Costa Rica*, which articulated the relevant principles in the following terms:[295]

> *"As is well known, there is a wide spectrum of measures that a state may take in asserting control over property, extending from limited regulation of its use to a complete and formal deprivation of the owner's legal title. Likewise, the period of time involved in the process may vary—from an immediate and comprehensive taking to one that only gradually and by small steps reaches a condition in which it can be said that the owner has truly lost all the attributes of ownership. It is clear, however, that a measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title. […]*
>
> *There is ample authority for the proposition that a property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property. […]"*

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294 Award No. ITL 141-7-2 (29 June 1984), pgs. 11 - 12 **Exhibit CL-048**.

295 *Compañia del Desarrollo de Santa Elena v Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, at [76]-[77] **Exhibit CL-049**.

267. The critical *"benchmark for testing indirect expropriation is whether a measure taken by the state results in a substantial deprivation of the value, use or enjoyment of the investor's investment"*.[296]

268. Where, however, none of the challenged measures separately constitutes expropriation, the expropriation may be creeping even where none of the measures individually constitutes an expropriation in and of itself.[297] In other words, a creeping expropriation is *"a specific form of expropriation that results from a series of measures taken over time that cumulatively have an expropriatory effect, rather than from a single measure or group of measures that occur at one time"*.[298]

2. Application to the facts

269. In the present case, the following measures, either individually or cumulatively, amounted to an indirect expropriation of Discovery's investments which placed Slovakia in breach of Article III(1) of the BIT:

(1) ***First***, the conduct of the Police at Smilno (as summarised at [128] above) deprived AOG of the access to the benefit and economic use of its property, *i.e.* the state-granted Licence to explore for oil and gas, and the rights to do so it derived under the lease it entered into with the owner of the Smilno well site: see [78]-[129] above.

(2) ***Second***, the conduct of the MoA in refusing to consent to the extension of the Lease by Addendum No. 1 at the Krivá Ol'ka well site, and the subsequent conduct of the MoE in refusing to grant the §29 application,

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296 *Olympic Entertainment Group AS v. Republic of Ukraine*, PCA Case No. 2019-18, Award, 15 April 2021, at [104] **Exhibit CL-050**.

297 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, at [538] **Exhibit CL-051**, where the tribunal held that *"creeping expropriation only exists when 'none' of the challenged measures separately constitutes expropriation"*.

298 *Crystallex* at [667] **Exhibit CL-026**.

also deprived AOG of the benefit of the Licence it held to explore for oil and gas: see [130]-[157] above.

(3) ***Third***, the imposition of the EIA requirements, either taken together with the foregoing two measures or on its own, had the effect of substantially depriving AOG of the value, use or enjoyment of all of the Licences: see [158]-[197] above.

* * *

V. QUANTUM

270. Slovakia's breaches of the BIT, as described above, destroyed the value of Discovery's investment and rendered its exploration activities commercially and economically unviable. This has caused significant damage to Discovery for which Slovakia is responsible to pay full reparation under international law. As set out below and in more detail in the Rockflow Expert Reports, the amount to be paid to Discovery by Slovakia in order to provide full reparation, including damages for lost profits, is no less than **USD 568.2 million**. Discovery also claims interest, as well as all legal and arbitration costs incurred.

A. DISCOVERY IS ENTITLED TO COMPENSATION FOR LOSS OF FAIR MARKET VALUE OF INVESTMENT AS AT THE DATE OF THE AWARD

1. Legal principles

271. Article III(1) of the BIT[299] specifies the compensation which is payable in the event of a lawful expropriation: "*prompt, adequate and effective compensation*" which is "*equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known.*"

272. The BIT does not, however, specify the compensation payable in the event of (*i*) an unlawful expropriation (ie an expropriation which does not meet the 'conduct' requirements in Article III(1) of the BIT such as public purpose or due process), or (*ii*) any other breach of the BIT (eg the FET provision contained in Article II(2) of the BIT).

273. As set out in Section IV above, Slovakia's breaches of the BIT are primarily breaches of the FET standard and/or the prohibition on arbitrary and discriminatory treatment.[300] In addition, the breaches constitute an unlawful

299 **Exhibit C-1**.

300 See [209]-[257] above.

indirect expropriation.[301] Although it is Discovery's position that Slovakia committed all of the violations set out above, any one of them would entitle Discovery to full compensation in circumstances where they have deprived Discovery of the total value of its investment.

274. As the BIT does not provide the compensation method applicable to such violations, the amount of compensation to be paid by Slovakia is to be established by reference to customary international law. The leading authority applied by investment tribunals is the Permanent Court of International Justice ("**PCIJ**") decision in *Chorzów Factory* which established the requirement for a State to make "*full reparation*" for a violation of international law. In *Chorzów Factory*, the PCIJ established (emphasis added):

> *"The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that* ***reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed****. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it."*[302]

275. This standard of full reparation has since been codified in Articles 31 and 36 of the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**").[303] The ILC Articles are

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301 See [263]-[269] above.

302 *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1928 PCIJ, Series A, No. 17 (Merits), Judgment No. 13 of 13 September 1928 ("***Chorzów Factory***") at [125] **Exhibit CL-053**.

303 International Law Commission, "*Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*", in Yearbook of the International Law Commission, 2001, Vol. II, Part Two **Exhibit CL-054**.

considered to reflect customary international law and, specifically, with regard to "*full reparation*", provide the following:

(1) Article 31(1): "*The* responsible *State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."*

(2) Article 36(1): "*The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as damage is not made good by restitution*."

(3) Article 36(2): "*The compensation shall cover any financially assessable damage including loss of profits insofar as it is established*."

276. The full reparation standard, therefore, requires a tribunal to restore the injured party to the situation which, in all probability,[304] it would have been in had the wrongful act not been committed by the responsible State.[305] This essential principle of customary international law, known also as the 'but for' principle, has been affirmed and applied in a substantial number of investor-State dispute proceedings since its inception in the PCIJ's decision in *Chorzów Factory* decision in 1928.[306]

277. As noted above, Article 36(2) of the ILC Articles confirms that, where restitution is not available (which it is not in this case), full reparation requires

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304 While *Chorzów Factory* refers to the situation which would "*in all probability*" have existed, it is generally accepted that the standard of proof for damages is the same as for any other fact, ie it must be more probable than not. See, for example, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award of 22 September 2014 ("***Gold Reserve***") at [685] **Exhibit CL-055**.

305 *Chorzów Factory* at [125] **Exhibit CL-053**.

306 See, for example, *Gold Reserve* at [685] **Exhibit CL-055**; *Vivendi* at [8.2.5] **Exhibit CL-019**; *"Calculation of Compensation and Damages in International Investment Law*", Marboe, Second Edition (2017), at [2.73] and [2.102] **Exhibit CL-056**.

compensation of "*any financially assessable damage including loss of profits insofar as it is established*."[307]

278. The assessment of such damage in a case such as Discovery's where there has been a total loss of the investment, regardless of whether that has been by way of expropriation or some other breach of the BIT,[308] is generally accepted as being on the basis of the fair market value of the property lost.[309] Fair market value ("**FMV**") is frequently defined as "*the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under an obligation to buy or sell and when both have reasonable knowledge of the relevant facts*".[310]

279. There are three main approaches to determining the FMV of a lost investment – an income-based approach, a market-based (or comparables) approach, and an asset- based (or cost) approach.[311] The appropriate approach is to be determined according to the facts of each case; as set out by the tribunal in *Lemire v Ukraine*:

> *"The aim of compensation is the elimination of all negative consequences of the wrongful act, through the payment to the injured party of an amount sufficient to cover 'any financially assessable damage including loss of profits insofar as it is established' (Article 36.2 ILC Articles) … But this is only a*

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307 International Law Commission, "*Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*", in Yearbook of the International Law Commission, 2001, Vol. II, Part Two **Exhibit CL-054**.

308 *Vivendi* at [8.2.8] to [8.2.10] **Exhibit CL-019**.

309 See Comment 22 on Article 36 in International Law Commission, "*Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*", in Yearbook of the International Law Commission, 2001, Vol. II, Part Two, page 102 **Exhibit CL-054**.

310 International Glossary of Business Valuation Terms, in AICPA (ed.), *"Statement of Standards on Valuation Services"* (New York: American Institute for Certified Public Accountants, Inc, 2015) 33, as cited in *"Calculation of Compensation and Damages in International Investment Law*", Marboe, Second Edition (2017), at [2.65] **Exhibit CL-056**.

311 *"Calculation of Compensation and Damages in International Investment Law*", Marboe, Second Edition (2017), at [4.74] **Exhibit CL-056**.

> *theoretical definition of a general standard; the actual calculation of damages cannot be made in the abstract, it must be case specific: it requires the definition of a financial methodology for the determination of a sum of money which, delivered to the investor, produces the equivalent economic value which, in all probability, the investor would enjoy, 'but for' the State's breach."*[312]

280. In considering which approach to adopt to determine the FMV, Discovery contends that the Tribunal is not to be constrained by the 'willing buyer-willing seller' analogy. As found by the tribunal in *Burlington v Ecuador*:

> *"*[…] *as the standard of compensation is full reparation, the Tribunal must value what Burlington lost as a result of the expropriation. What Burlington lost was a contract with a full set of rights, each of which must be given its value. While the Parties agree that the Tribunal must search for the FMV of these rights, the Tribunal is not bound by the "willing buyer-willing seller" analogy. This analogy is only a tool to calculate the FMV of the expropriated investment, to be used if and when it helps to appropriately quantify the investor's loss. As Burlington argued at the Hearing, as a result of the expropriation, Burlington did not lose an opportunity to sell its contract rights; it lost an opportunity to exercise them. The relevant question is thus not whether a hypothetical buyer would have paid full value for the PSCs, it is what value Burlington would have derived from exercising the rights under the PSCs, but for their expropriation."*[313]

281. For the reasons set out further below and in Howard 1, Discovery contends that an income-based approach is the only approach that will result in an FMV equivalent to full reparation which will "*wipe out*" the consequences of Slovakia's wrongful conduct and put Discovery in the position it would have been but for that conduct.

282. The method typically adopted for calculating damages under an income-based approach is the discounted cash flow ("**DCF**") method, which has been "*constantly used by tribunals in establishing the fair market value of assets*

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312 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award of 28 March 2011, at [151–2] **Exhibit CL-057**.

313 *Burlington Resources Inc. v. The Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award of 7 February 2017, at [366] **Exhibit CL-058**.

to determine compensation of breaches of international law".[314] The DCF method seeks to identify the present value of future cash flows, and is used not only for damages valuations, but also commonly by potential purchasers in valuing targets.

283. DCF is particularly appropriate where the future cash flow is reasonably ascertainable, for example in the case of commodities for which a market exists, and thus to cases where the investor has been deprived of its long-term future rights under licences or concessions (as is the case for Discovery), regardless of whether or not there is any record of past production or profitability.

284. In *Crystallex International Corporation v Bolivarian Republic of Venezuela*, which related to a gold mining operation, the Tribunal found that gold "*is an asset whose costs and future profits can be estimated with greater certainty. The Tribunal thus accepts that predicting future income from ascertained reserves to be extracted by the use of traditional mining techniques… can be done with a significant degree of certainty, even without a record of past production.*"[315]

285. Similarly, in *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, where the State cancelled the investor's construction permits to develop a gold and copper mine and ultimately terminated its mining concessions, the tribunal awarded substantial damages for loss of future profits notwithstanding that the mine had never functioned and therefore had no history of cashflow.[316] The tribunal concluded that "*a DCF method can be reliably used in the instant*

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314 *Enron Corporation and Ponderosa Assets L.P v. Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007, at [385] **Exhibit CL-059**.

315 *Crystallex* at [879] **Exhibit CL-026**.

316 *Gold Reserve* at [830] and [863] **Exhibit CL-055**.

case because of the commodity nature of the product and detailed mining cash flow analysis previously performed".[317]

286. In *East Mediterranean Gas S.A.E. v Egyptian General Petroleum Corporation*, concerning contracts for the purchase, sale and supply of gas, the tribunal again found that the DCF method was appropriate despite a lack of a past record of profitability. The tribunal found that "[t]*he important fact is not whether EMG can prove its profitability in the past, but rather whether it is reasonable to presume that, were it not for EGAS' wrongdoing, it would have obtained a foreseeable stream of income in the future*".[318]

287. A further example where the tribunal decided to apply the DCF method, and awarded significant lost profits notwithstanding that there was no past history of production is the case of *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*.[319] Indeed, in that case, the claimant had never even been able to commence the exploitation of the mine.

288. While many of the cases cited in the previous paragraphs refer to mining investments and commodities such as gold and copper, Discovery contends that the position is no different for oil and gas. An example in this regard is cited in the *Tethyan* award from Sergey Ripinsky's and Kevin Williams' text on the subject of damages in international investment law, as follows:

> *"Consider a situation where an investor obtains a concession for the exploration and exploitation of oil: the investor will carry a risk of not discovering oil and thus losing the totality of its investment. At the same time, once the exploration campaign proves successful, the major risk of the investment is gone, and one should be able to predict with reasonable certainty the range of revenues that the concession will generate, even without a prior record of profitable operations. Perhaps with such situations in mind,*

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317 Ibid.

318 *East Mediterranean Gas S.A.E. v. Egyptian General Petroleum Corporation, Egyptian Natural Gas Holding Company and Israel Electric Corporation Ltd*, ICC Case No. 18215/GZ/MHM, Award of 4 December 2015, at [1344] **Exhibit CL-060.**

319 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award of 12 July 2019 ("***Tethyan***") **Exhibit CL-061**.

> *it has been suggested that lost profits should be awarded where they can be proven with reasonable certainty and calculated on a 'rational basis,' even if the claimant is a new business … This argument makes sense; however, it remains for a tribunal in each particular case to decide whether the evidence on the record is sufficient."*[320]

289. Valuers also agree that the absence of a historical track record does not render the DCF method inappropriate: "*although a track record may give the valuer greater confidence that a similar level of expected future cash flows will be achieved, it is not a necessary requirement for a reasonable valuation because it can be compensated for through the discount rate.*"[321]

290. In calculating the FMV using the DCF method, a valuer can take an *ex*-ante approach (*i.e.* calculating the value as at the date of breach), or an *ex*-post approach (*i.e.* calculating the value as at the date of award).

291. It is submitted that the most appropriate approach to achieve full reparation in this case is the *ex-post* approach. Marboe supports this, noting that in the calculation of compensation payable after a violation of international law, *"the choice of a valuation date as late as possible ensures that all information available until that date may and can be used in order to arrive as closely as possible at full reparation*".[322] It has also been noted that this approach is appropriate in cases "*in which the asset is appreciating (such as a natural resource)*" in order to compensate the claimant "*for the increase in value from which it is unable to benefit"* and to avoid a situation where "*the respondent will otherwise benefit from an unjust enrichment*".[323]

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320 Sergey Ripinsky & Kevin Williams, "*Damages in International Investment Law*" (2008), pp. 283-284, as cited in *Tethyan* at [220] **Exhibit CL-061**.

321 Philip Haberman and Liz Perks, "*Overview of Methodologies for Assessing Fair Market Value*" (2021), in The Guide to Damages in International Arbitration, Fourth Edition, Global Arbitration Review **Exhibit CL-062**.

322 *"Calculation of Compensation and Damages in International Investment Law*", Marboe, Second Edition (2017), at [3.323-3.324] **Exhibit CL-056**.

323 Philip Haberman and Liz Perks, "*Overview of Methodologies for Assessing Fair Market Value*" (2021), in The Guide to Damages in International Arbitration, Fourth Edition, Global Arbitration Review **Exhibit CL-062**.

292. As a matter of principle and authority, applying the *Chorzów Factory* approach, post-breach events *should* be taken into account when valuing the fair market value of an investment, regardless of whether those post-breach events are a consequence of the State's unlawful act. Thus:

(1) if the State's post-act conduct has reduced the fair market value of an investment, the State should not be rewarded for such conduct and any such reduction should be left out of account when valuing the investment; but

(2) if unrelated post-act events have either increased or reduced the fair market value of an investment, such events should not be left out of account and indeed should factored into the valuation.

2. Application to the facts

293. The requirement of causation for Discovery's losses has been established. As described in Section IV above, Slovakia's breaches of the BIT caused Discovery to be deprived of its ability to exercise its rights under the Licences, and its opportunity to achieve profits, resulting in a total loss of the value of its investment.

294. Having earned nothing at all from its investment, Discovery contends (as set out at paragraph 276 above) that the Tribunal must consider what the situation would have been had Slovakia not acted in violation of the BIT. In this regard, it is Discovery's case that, "but for" Slovakia's unlawful conduct, AOG would have been able to commence drilling exploration wells no later than 1 January 2017 (the "**But For Scenario**"), and to thereafter earn profits from production arising from the development of oil and gas prospects within the Licence areas.

295. Indeed, it is likely that exploration drilling would have started much sooner than 1 January 2017 had Slovakia acted in accordance with its international law obligations, given that the first drilling attempt at the Smilno site took

place in December 2015/January 2016, and ought to have been able to be carried out had the police acted as required. At the very least, drilling should have taken place at the Smilno site by no later than the end of 2016 as (*i*) the Interim Injunction should not have been granted and/or should have been dismissed on appeal and/or should have been discharged upon AOG's concession of the underlying claim, (*ii*) the Ministry of Transport had confirmed to the police that the Road was a public special purpose road, and (*iii*) moreover, the relevant authorities, including the police, ought to have upheld the rights granted under the Licence.

296. In addition, exploration drilling at Krivá Ol'ka ought to have been able to take place during 2016 as the Ministry of Agriculture should have approved the extension of the term of the Lease (having already approved the original Lease) and in timely fashion and/or the Ministry of Environment ought to have a granted a compulsory access order under §29 of the Geology Act (there being no opposition to it from the Ministry of Agriculture).

297. Accordingly, although exploration drilling should have been able to commence during 2016, Discovery has taken a conservative approach and assumed for the purposes of the But For Scenario that drilling would have commenced no later than 1 January 2017.

298. The But For Scenario also assumes the following facts:

    (1) JKX and Romgaz would not have withdrawn from the project had drilling been able to proceed as it ought to have done. This assumption is based on the fact that both JKX and Romgaz expressly withdrew because of the delays experienced and opposition encountered (see paragraphs [188]-[189] and [195] above);

    (2) Sufficient funding would have been in place, both from Discovery's own resources, and external investment, to enable AOG to fund its share of the drilling program. This is on the basis, as set out in the

witness evidence of Mr Lewis and Mr Fraser, that: (i) Mr Lewis had sufficient resources to cover the initial drilling program,[324] and (ii) additional funding would have been provided by Akard (who would not have withdrawn from the project, as they did so only because of the delays and opposition encountered) and/or an alternative equivalent investor/funder;[325]

(3) Exploration would have resulted in a discovery of hydrocarbons (as to which, see paragraphs [301]-[306] below and Atkinson 1);

(4) AOG (together with JKX and Romgaz) would have applied for, and obtained, licences for the Svidník, Medzilaborce and Snina areas that had been 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. This is on the basis that Slovak law provides a preferential right for a party to re-apply for an area previously relinquished (see paragraph [190] above);[326] and

(5) On the assumption that hydrocarbons were discovered, Mining Area Licences would have been granted permitting the extraction of the discovered hydrocarbons. This is on the basis that Slovak law confers a priority right to the holder of an exploration licence to apply for a Mining Area Licence (see paragraphs [30]-[31 above), and there would be no reason for the Mining Area Licence not to be granted in circumstances where the domestic production of oil and gas was a key part of Slovakia's 2014 Energy Policy (see paragraph [8] above), as referred to for example in the 2016 Licences (see paragraph [77] above).

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324 Fraser 1 at [12] and [15]; Lewis 1 at [34].

325 Fraser 1 at [15]; Lewis 1 at [35].

326 See also Fraser 1 at [62].

299. To calculate Discovery's economic position in the But For Scenario, the Rockflow Expert Reports therefore:

(1) Independently assess the hydrocarbon exploration prospectivity of the Licence areas, including an independent estimate of the hydrocarbon volumes in place attributable to the Licence areas, and estimate the chance of finding them (Atkinson 1);

(2) Undertake a decision tree analysis in order to determine the P50 discoverable in-place volume (Howard 1);

(3) Identify the likely volume of hydrocarbons which hypothetically could be produced from the prospects in the Licence areas should they contain hydrocarbons, and then separately for both oil and gas, generate representative most-likely production profiles for the prospects in the Licence areas and outline a feasible development scheme (Moy 1); and

(4) Calculate the FMV of the Licences (Howard 1).

300. The conclusions of each of these reports is summarised below.

(i) Atkinson 1

301. Mr Atkinson has first reviewed the exploration history in the region in which the Licences are situated, finding that there is a long history of exploration and production, particularly in the area just over the border in Poland. Notably, he finds the Licence areas are "on trend" (*i.e.* they share characteristics) with oil fields occupying a similar geological setting in Poland.[327] Mr Atkinson also notes that historic drilling has been carried out on the Licence areas, with both oil and gas having been found.[328] Mr Atkinson concludes that "*the oil and gas production history in the neighbouring area*

327 Atkinson 1 at [30]-[31].

328 Atkinson 1 at [35]-[47] and Section 3.2.

of Poland, and drilling results in Slovakia show that the Claimant's licence areas are prospective for oil and gas".[329]

302. Having then considered the regional geology, and finding that it has "*all of the necessary components of a working petroleum system in the Claimant's licence areas*",[330] Mr Atkinson subsequently analyses the geological data available in the Licence areas, combined with data from analogous Polish fields, in order to identify prospects. Mr Atkinson proceeds to define 40 prospects (*i.e.* areas that may be expected to contain hydrocarbons), 18 of which are oil prospects and 22 are gas prospects.[331]

303. Mr Atkinson has compared those defined prospects to AOG's planned wells, and has confirmed that both the Smilno and Krivá Ol'ka planned wells would target prospects that he has identified, as would the alternative Zborov well that AOG had been considering (prior to the MoE's decision in June 2018 to impose a requirement in the Svidník Licence that an EIA must be conducted prior any exploration wells being drilled – see [195] above).[332]

304. As such, Atkinson 1 confirms that, had AOG been able to proceed with its exploration drilling as planned, it is highly likely that hydrocarbons would have been discovered.

305. For the purposes of ultimately being able to calculate the economic value of the Licences, Mr Atkinson has then estimated the volume of hydrocarbons in-place potentially available to be produced (known as the Petroleum Initially In Place or "**PIIP**") for each prospect, using a probabilistic method to determine a potential range of volumes and then calculating the mean volume. He estimates the total unrisked mean oil PIIP across the 18 oil prospects to be 697 million stock tank barrels and the total unrisked mean gas PIIP across

329 Atkinson 1 at [48].
330 Atkinson 1 at [65] and Section 3.3.
331 Atkinson 1 at [19], [107], [119] and Sections 3.4-3.5.
332 Atkinson 1 at [19] and [109]-[113].

the 22 gas prospects to be 836 billion cubic feet.[333] In this regard, Mr Atkinson notes that his estimates are conservative, and that significant volumes remain to be discovered in this area, a view supported by a wholly independent US Geological Survey study.[334]

306. As these figures are, however, unrisked, the PIIP needs to be multiplied by the geological chance of success ("**GCOS**"), *i.e.* the chance of discovering hydrocarbons which are capable of flowing to surface, in order to determine the risked volumes. These risked volumes can then be used to establish commercial value.[335] Mr Atkinson has calculated the GCOS for each of the 40 identified prospects in Section 3.7 of Atkinson 1. These GCOS figures have then been used by Mr Howard in his decision tree analysis, as discussed further below.

(ii) Moy 1

307. Using the in-place volume estimates prepared by Mr Atkinson, Dr Moy has calculated a production profile for each of the prospects, assuming an exploration well is drilled and that hydrocarbons are discovered.

308. In preparing that production profile, Dr Moy has analysed data from wells drilled in the Licence areas in the 1970s and 1980s as well as the performance of analogue fields in Poland. Dr Moy notes, however, that the performance of those wells "*appears to have been compromised by the poor and inefficient drilling practices of the time*".[336]

309. Dr Moy has then relied on Mr Howard's decision tree analysis, which has determined that of the 40 prospects identified by Mr Atkinson, six gas and three oil prospects would be considered successful in the 'P50' scenario (which Dr Moy notes "*represents the 'best' estimate and is the most*

333 Atkinson 1 at [20] and [179] and Section 3.6.
334 Atkinson 1 at [114]-[118].
335 Atkinson 1 at [181].
336 Moy 1 at [33] and Section 4.

appropriate for determining an economic evaluation"[337]) and subsequently developed. These nine prospects are then used as part of Dr Moy's oil and gas development plans to determine the likely maximum production rates from a successful development of those prospects.[338]

310. Dr Moy has then determined the best, or mid, case technically recoverable volumes for each of these nine prospects.[339]

311. Dr Moy has also considered Discovery's actions at the time and concluded that they had a clear intention to drill, and that they were planning an early gas production scheme to allow them to export and sell gas had the initial exploration well been successful.[340] He has also identified that there was a viable export route for large amounts of gas via the Polish-Slovakian gas interconnector which will open in October 2022.[341] This was known to Discovery at the time.[342]

312. Dr Moy has then concluded, in respect of the technically recoverable volumes determined, that there is a 100% chance of commerciality: "*Considering the clear intention of Discovery Global to drill the initial exploration wells and their senior management's significant operational experience, combined with the fact that the development would be on-shore, in an area with good infrastructure, using stock components, I believe that the chance of development and therefore the chance of commerciality, would be 100%.*"[343]

313. As such, Dr Moy considers that "*the recoverable volumes of oil and gas arising from the development of the prospects within the Discovery Global*

337 Moy 1 at [195].
338 Moy 1 at [44] and Section 10.
339 Moy 1 at Sections 10.1 and 10.2.
340 Moy 1 at [46]-[49] and Sections 6 and 7.
341 Moy 1 at [52] and Section 7.
342 Fraser 1 at [46]; Lewis 1 at [32].
343 Moy 1 at [55].

licence area would be considered as, and therefore valued as, reserves".[344] These recoverable volumes/reserves are then considered by Mr Howard for the purposes of determining an economic value.

(iii) Howard 1

314. Mr Howard has prepared an economic analysis of the recoverable volumes in order to determine the FMV of the Licences. As a first step, he has considered the appropriate approach to take with regard to valuation (noting, as set out above, that there are three commonly used approaches: the income approach, the market approach and the cost approach).[345]

315. Mr Howard has determined that the income approach, and specifically a DCF valuation method, is appropriate in this case, noting that it is in fact "*the usual starting point for the valuation of an oil and gas project*" , not least as the products are commodities and easily tradeable. This is particularly the case for reserves which, by definition, have met the relevant commercial criteria (as set out in Dr Moy's analysis, described above), but Mr Howard notes that the Petroleum Resource Management System ("**PRMS**") guidelines, published by the Society of Petroleum Engineers, provide that "*equally valid cash flow-based economic evaluations can be performed on contingent and prospective resources*". As such, Mr Howard concludes that DCF can also be used in oil and gas projects which are in the exploration phase.

316. In contrast, Mr Howard considers that a market approach based on comparable transactions would not be appropriate as you would need to find a transaction that is genuinely comparable, and most oil and gas assets have many unique factors. Mr Howard sets out some of the facts that would need to be similar to be comparable, such as the nature of the resources, the reservoir rock properties, the production profiles, the export methods, the fiscal regime, etc. Mr Howard notes that he has not been able to find any such

344 Moy 1 at [208] and Section 11.

345 Howard 1 at Section 4.2.

transactions other than Discovery's own acquisition of AOG in 2014; however, this is not a comparable transaction not least because of the significant work undertaken since that acquisition which has increased the value.[346]

317. Similarly Mr Howard does not consider a cost approach to be appropriate. This is not simply a calculation of the historical costs incurred, but is rather the calculation of the 'replacement' cost of the investment. As Mr Howard notes, in the context of an oil and gas asset, this is either a variation of the market-based approach by looking at the cost of acquiring another comparable asset, or it requires finding another asset of comparable value, which in turn requires the use of a DCF model. Mr Howard also notes that historical costs "*do not indicate the potential for the project to generate future after tax free cash flow*", and refers to the Canadian Oil and Gas Evaluation Handbook which states that using such costs is not usually a valid way to determine the value of land available for exploration.[347]

318. Having determined the DCF approach to be the most appropriate valuation approach in this case, Mr Howard has conducted the decision tree analysis mentioned above in order to determine the 'best' estimate of which of the prospects identified by Mr Atkinson would be successfully drilled and subsequently developed.[348]

319. As noted above, Dr Moy has used the results of that decision tree analysis to complete his production profiles and determine the recoverable volumes from the nine successful prospects. Mr Howard has then used those recoverable volumes to carry out his DCF valuation.

320. In order to carry out his DCF valuation, Mr Howard has compiled a model to calculate the net present value of the oil and gas exploration and development

346 Howard 1 at Section 4.3.
347 Howard 1 at Section 4.4.
348 Howard 1 at Section 8.

projects, based on the recoverable volumes calculated by Dr Moy. Mr Howard has adopted a discount rate, based on a weighted average cost of capital, of 12.5%, which he has used as an input in his DCF model.[349]

321. Mr Howard has also set out the assumptions input into his DCF model, including costs, the development schedule, and the relevant Slovakian fiscal terms applicable to oil and gas extraction.[350]

322. Mr Howard has then used his DCF model to independently calculate that the FMV of the Licences, in the But For Scenario, as at 1 January 2023, is USD 2,264,948,217.[351]

323. As noted at [298(1)] above, for the purposes of the But For Scenario, it is assumed that JKX and Romgaz would have remained in the project. They each held a 25% interest in the Licences and AOG held the remaining 50%.

324. In addition, as set out at [298(2)] above, for the purposes of the But For Scenario, it is assumed that additional funding would have been made available to AOG through external investment from Akard or an alternative equivalent. As set out in Fraser 1, the terms on which that funding was to be provided were such that each of Discovery and Akard would own 50% of AOG.[352] Accordingly, Mr Howard has calculated that Discovery's share of the calculated FMV (*i.e.* 25%, being 50% of AOG's share) would be USD 566,237,054.

3. Additional sum claimed to repay Akard

325. As set out in Fraser 1, Akard did provide some funding pursuant to the arrangements agreed with Discovery.[353] Following Akard's withdrawal from

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349 Howard 1 at Section 5.
350 Howard 1 at Section 9
351 Howard 1 at Section 10, and Table 10-1.
352 Fraser 1 at [15].
353 Fraser 1 at [15].

the project as a result of the delays and opposition encountered, it was agreed that the sum of USD 1,965,198.39 would be repaid from any monies earned by Discovery from the Licences. Discovery would therefore be required to repay that amount from the sums awarded in this arbitration.

326. Ordinarily, however, that amount would have been repaid to Akard as part of its share of the profits earned by AOG. Accordingly, Discovery should not be required to pay this sum from its share of those profits. In order to put Discovery in the position it would have been had Slovakia not breached the BIT, therefore, it must receive the amount calculated by Mr Howard (USD 566,237,054, as set out above) net of the payment to Akard.

327. As a result, Discovery claims the sum of USD 1,965,198.39 in addition to the amount of USD 566,237,054 calculated by Mr Howard as representing Discovery's share of the calculated FMV.

4. Conclusion

328. Taking into account the analysis conducted in the Rockflow Expert Reports and particularly Mr Howard's independent calculations of the FMV of the Licences in the But For Scenario, and the additional sum claimed in respect of the amount due to be repaid to Akard, Discovery claims damages in the total sum of no less than **USD 568.2 million**.

B. INTEREST

329. Article 38 of the ILC Articles provides that interest is payable "*when necessary in order to ensure full reparation*".[354]

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354 International Law Commission, "*Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*", in Yearbook of the International Law Commission, 2001, Vol. II, Part Two **Exhibit CL-054**. See also *Crystallex* at [932] **Exhibit CL-026**: "[*A]n award of interest is an integral component of the full reparation principle under international law, because, in addition to losing its property and other rights, an investor loses the opportunity to invest funds or to pay debts using the money to which that investor was rightfully entitled*."

330. The Tribunal has a wide discretion to award interest, including compound interest, up to the date of the award (pre-award interest) and from the date of award up to the date of payment (post-award interest).

331. Pre-award interest has not been included in the Rockflow Expert Reports, because the FMV has been calculated on an *ex-post* basis, *i.e.* as at the date of award (or, more accurately for present purposes, as at 1 January 2023 as a proxy for the date of award, and to be updated as the arbitration progresses), with the result that no pre-award interest has accrued in that scenario. Should, however, the Tribunal consider that an *ex-ante* approach should be taken to the calculation of damages, then Discovery reserves the right to claim appropriate pre-award interest.

332. Discovery does claim post-award interest on all sums awarded from the date of award to the date of payment, at a rate to determined by the Tribunal, and Discovery reserves the right to make further submissions in this regard as may be required.

C. COSTS

333. Rules 28 and 47 of the ICSID Arbitration Rules grant the Tribunal a broad discretion to determine who should pay the costs of the proceeding and in what amount. Discovery respectfully requests that the Tribunal order Slovakia to reimburse Discovery for all of its costs and expenses related to this arbitration.

334. Discovery respectfully reserves the right to submit additional information in due course with respect to the costs and expenses incurred in relation to this arbitration, including, but not limited to: the fees and expenses of the Tribunal and of ICSID; all legal fees and other expenses incurred by Discovery (including, for example, fees and disbursements of legal counsel, experts, consultants, and fees associated with third party funding); and administrative and overhead costs, including the cost of management time.

VI. REQUEST FOR RELIEF

335. For the reasons set out above, Discovery requests the Tribunal to:

(1) **DECLARE** that it has jurisdiction over Discovery's claims;

(2) **DECLARE** that Slovakia has breached its obligations to Discovery under the BIT;

(3) **ORDER** Slovakia to compensate Discovery for the loss of its investment arising from its 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 in an amount not less than **USD 568.2 million**;

(4) **ORDER** Slovakia to pay all costs incurred by Discovery in connection with this arbitration, including fees and expenses of the Tribunal and ICSID; all legal fees and other expenses incurred by Discovery (including, for example, fees and disbursements of legal counsel, experts, consultants, and fees associated with third party funding); and administrative and overhead costs, including management time;

(5) **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; and

(6) **ORDER** such further or alternative relief as the Tribunal considers just and appropriate.

336. Discovery hereby expressly reserves its right to introduce (at a subsequent stage of this arbitration) additional claims, arguments, and evidence.

Respectfully submitted by Counsel for the Claimant

Signature Litigation LLP

Twenty Essex